

An Analysis of the Theory of Contributory Infringement

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The paper deals with contributory infringement of copyright which has recently been highlighted in various litigations involving P2P technology, one of the latest being the *MGM v Grokster* case. A comparison of this case with the Sony and Napster cases reveals a contradiction in the decisions taken by the US Supreme court. The pro-right holder decision in the Grokster case may curb innovators and tilt the balance between the conflicting interests of protection and innovation.

Keywords: Copyright, contributory infringement, peer-to-peer

Technology related to music has come a long way over the years, beginning with sheet music followed by piano rolls, phonograph records, analog tapes, and eventually compact discs.¹ However, such is the pace of technological advancement that compact discs are gradually being taken over by the peer-to-peer (P2P) network, which allows for (1) instant access to files that would be easily available through the Internet; (2) copying of files, copies of excellent quality, tough to distinguish from the original; (3) distribution at a cost that is negligible.¹

Almost a year ago, the Supreme Court of US gave its much-awaited verdict in the case of *Metro-Goldwyn-Mayer v Grokster Ltd.*² The Court held Grokster and StreamCast, the distributors of popular P2P file sharing software, liable for secondary or contributory copyright infringement. The reasoning on which the Court acted on was that 'one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties'.²

This decision remains a significant part of the intellectual property discourse because of the principle enunciated therein, that of contributory infringement liability. This concept is not novel to US legal history, but the future import of contributory infringement liability and interpretation given by the Supreme Court need to be critically analysed, especially in light of the fact that both District Court and Ninth Circuit Court of Appeal did not consider

Grokster to be liable of contributory infringement. The import of contributory infringement liability to copyright law has led to conflicting decisions for more than two decades now.

Copyright Infringement

Article 27, paragraph 2 of the Universal Declaration of Human Rights (UDHR) provides as a basic right that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.³ This primary international law can be interpreted to guarantee protection against copyright infringement.

Many countries too have relevant safeguards in place. The German constitution, for example, guarantees the right to property as a basic right. Copyright is subject to this constitutional right of property. The details of the copyright laws are incorporated in the German Copyright Act. France and Italy provide for similar rights. Moreover, the Court of Justice of the European Community has recognised copyright as being within the range of the basic right of property.

Copyright protection in the United States emanates from the Constitution itself. It is the first document that authorised the Congress to promote the progress of science and other useful arts and thereby enshrined exclusive protection to the authors and inventors with respect to their work.⁴ Pursuant to this, the US Copyright Act (the Act) was passed in the year 1976 (ref. 5) The Act only envisages punitive action in case of direct infringement.

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Contributory Infringement

There are two forms of secondary copyright infringement, namely, vicarious and contributory infringement. The concept of contributory infringement liability stems from law of torts. It is based on the principle that one who directly contributes to another's infringement should be held liable. It is a judicial tool, which was evolved to fill in the lacuna created by the legislature. The purpose of contributory copyright liability is to 'empower copyright owners to sue the root cause of numerous infringements,' rather than having to sue a 'multitude of individuals' for direct infringements.⁶

After the judgment of *Grokster*, there is a whole range of critical opinion that believes that the line taken in the case on contributory infringement goes against Article 1, Section 8, of the US Constitution. The reason appended to such a belief is that the Constitution of US guarantees that the 'creators of expressive works are given a limited monopoly not as an individual reward, but rather as an incentive for the creation of future creative works.'⁷ Therefore, what is now happening is that in the garb of copyright protection excessive rights are being conferred, which may have a negative impact on the growth of communication technologies.

Two specific standards need to be met in order to import contributory infringement liability:

Knowledge or Intent on the Part of Infringer

Unlike direct infringement,⁸ contributory infringement emphasises on knowledge or the intent of the infringer. It is necessary for the person to have 'specific' knowledge of the infringing activity. The word specific knowledge is emphasized because it is to be noted that contributory liability requires that the secondary infringer 'know or have reason to know' of direct infringement.⁹ General knowledge that infringement is likely to occur or is in fact in progress, is not sufficient.¹⁰ It is necessary to have actual and constructive knowledge.⁹ Secondly, there should be an attempt by the third party to block such infringement. If a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.¹¹ Thus, though the court would look into the evidence of defendant's actual knowledge arising from the defendant's conduct¹², the product if found to have substantial non-infringing use will not

be charged with constructive knowledge of infringement.

Material Contribution

The other primary requirement is that the third party should have materially contributed to the primary infringement. The court looks into whether the defendant provided an integral service to the infringer thus, facilitating the infringement¹³ or the defendant was just a 'passive conduit'¹⁴ for the infringing activity.

Judicial Precedents in the US

*Gershwin Publishing Corp v Columbia Artists Management Inc*¹⁵

The first case where the concept was articulately expressed was the *Gershwin* case.¹⁵ The US Court of Appeals for the Second Circuit examined whether a concert promoter should be held liable, when musicians performing at the promoter's concerts played copyright-protected works, thereby infringing on the copyright owners' exclusive rights of public performance. The Court ascertained liability under the theories of vicarious and contributory infringement liability. The Court of Appeals affirmed the decision given by the District Court. It held that, the fact that Columbia Artists Management Inc. (CAMI) knew that copyrighted works were being performed at the Port Washington concert and that neither the local association nor the performing artists could secure a copyright licence, was sufficient to hold CAMI responsible for contributory infringement. Merely because Columbia Artists Management Inc. (CAMI) had no formal power to control either the local association or the artists for whom it served as agent did not imply absence of intent. It is clear that the local association depended upon CAMI for direction in matters such as this; moreover, the fact that CAMI was in a position to police the infringing conduct of its artists, and it derived substantial financial benefit from the actions of the primary infringers, points towards the fact it was responsible vicariously as well.

*Sony Corporation of America v Universal City Studios Inc*¹⁶

Sony had come out with its new Betamax video tape recorders (VTRs), which was different from the video cassette player because it had the function of recording television programmes. Universal City Studios Inc and Walt Disney Production held copyright over various motion pictures and audiovisual works.¹⁷ The home consumer of the VTR

was apparently responsible for an infringing act, in using the VTR to record copyrighted television broadcasts.¹⁸ The respondents brought an action against petitioners in Federal District Court, alleging that VTR consumers had recorded some of respondents' copyrighted works that had been exhibited on commercially sponsored television and thereby infringed respondents' copyrights, and further those petitioners were liable for such copyright infringement because of their marketing of the VTR's.¹⁶ The case in the district court was dismissed primarily based on fair use principle.¹⁹ However, the Ninth Circuit reversed the decision held the plaintiff to be liable for contributory infringement.²⁰

On appeal, the Supreme Court in turn reversed the Ninth Circuit Decision denying all counts of contributory infringement against Sony, namely, the requirement of constructive knowledge and position of control. The Court relied on traditional patent laws' staple article of commerce doctrine²¹ that states that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. The Court thus held that if a product is capable of other non-infringing and 'substantially lawful' uses, the producer could not be held liable. The staple article of commerce limits liability to instances of more acute fault than the mere understanding that one's products will be misused. Consequently, the Betamax VTR was held to have substantial non-infringing use and Sony was not liable of contributory infringement. The Court also looked into the time-shifting doctrine that occurs when a television viewer records a particular programme to view it later. The Court stated that, 'Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but it is well below 10 per cent.'²² The Court was of the opinion that holding Sony liable for authorized time shifting would have a negative effect on the production and distribution of VCRs, those copyright holders who authorized time shifting would be frustrated in their attempts to reach more viewers by doing so.²³ Regarding unauthorised time shifting, the Court held that, 'even unauthorised uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.'²⁴ Thus, it was held that the Betamax VTR had both substantial

infringing and non-infringing use, hence, Sony could not be held liable for contributory infringement.

*A&M Records Inc v Napster Inc*²⁵

One of the most controversial cases to have surfaced in the judicial history of US is the one between the Recording Industry of America (RIAA) and Napster. In July 1999, the plaintiff's, namely, record companies and music publishers brought a copyright infringement action against Napster, a P2P network company that was engaged in facilitating the upload and download of MP3 files by its users. The plaintiff alleged that Napster was liable for contributory infringement along with other allegations of vicarious infringement. Napster provided the users with the MusicShare software that enabled the users for uploading and downloading songs from the P2P network. It is pertinent to note that Napster provided technical support for the indexing and searching of MP3 files.²⁶ The free software provided by Napster 'MusicShare' enabled the users to (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users, (2) search for MP3 music files stored on other users' computers, and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet.²⁷ There was further evidence of Napster's active involvement with the users as it provided technical support for the indexing and searching of MP3 files, as well as for its other functions, including a chat room, where users could meet to discuss music, and a directory where participating artists could provide information about their music.²⁷ On being sued by the copyright owners in the Northern District of California on counts of contributory and vicarious infringement, Napster contented that the Sony doctrine shielded it from secondary liability because its software and network were capable of substantial non-infringing uses.²⁸ The District Court granted preliminary injunction in favour of the plaintiff. However, thereafter a startling fact that came out was that about 87 per cent of the material available on Napster was copyrighted and that the plaintiffs held the copyrights on about 70 per cent of this material, which clearly established the direct infringement prong.²⁹

On appeal, the Ninth Circuit Court also concurred with the District Court in their opinion. The Court clarified the analysis of Napster's contributory liability by setting out the two familiar elements of contributory infringement: (1) knowledge of a direct

infringement and (2) a material contribution to that infringement.³⁰ The court concluded that regarding knowledge, Napster had constructive knowledge of the infringement that was taking place and they had the requisite means to stop infringement by denying access.¹³ Regarding material contribution, the judges believed that Napster was facilitating and helping the users by maintaining indexing central servers and providing technical support to its users.³⁰ The Court stated, 'without the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.'¹³ Thus, the Court held Napster liable for contributory infringement and subsequently injunction was granted against the P2P network.

*MGM Studios Inc v Grokster Ltd*²

Grokster and Streamcast were companies that distributed free software that allowed computer users to share electronic files through P2P network. Grokster used FastTrack technology whereas StreamCast relied on Morpheus. The users of the P2P network were involved in downloading copyrighted materials through the network. The copyrighted materials included numerous cinematographic films and songs. The petitioners MGM complained that P2P software distributed by respondents, Grokster and StreamCast, were used to transfer files for which they held the copyright.³¹ The District Court gave a summary judgment holding Grokster company not liable for contributory or vicarious infringement of copyright. Later, the US Court of Appeal of the Ninth Circuit upheld the decision saying the elements regarding contributory or vicarious infringement were not satisfied in this case and that the company was not liable. The Ninth Circuit Court placed its reliance mainly on the *Sony* case.³² The Court distinguished the case at hand from that of Napster's in terms of the technology that was being used for sharing. The Ninth Circuit Court relied upon the *Betamax* defence holding that distribution of a commercial product capable of substantial non-infringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial non-infringing uses, in the Ninth Circuit's view, implied that Grokster and StreamCast were not liable, because they had no such actual knowledge owing to the decentralized architecture of their software. Elaborating upon the centralized structure,

the Court of Appeals (Ninth Circuit Court) distinguished Grokster from Napster. The software distributed by Grokster and StreamCast shared the same conceptual framework of decentralized storage and search without the use of a centralized computer server for file hosting or processing search requests³³, while Napster had a centralized indexing system.³⁴ Napster managed each search request through its server and thus, had the knowledge of the infringing materials being downloaded. All the three firms used P2P system³⁵, but the key difference in the indexing modes were distinct. In this particular case, Streamcast used the decentralized index model by using its own branded Morpheus version of the open source Gnutella code, and Grokster operated as per the supernode indexing system and used the FastTrack technology developed by others. Hence, to zero down on the copied files in the case of the technologies used by Grokster and Streamcast, was a difficult job. Accordingly, the Court of Appeals denied injunction to the plaintiffs, held Grokster, and other defendants not liable of contributory infringement.

The matter went on appeal to the Supreme Court, which overturned the decision of lower courts and held the P2P networks liable for contributory infringement. The Supreme Court claimed that they merely 'clarified' their stand on the *Sony* case and did not expressly overrule it (ironically Justice Sandra O'Connor, who was part of the majority decision in *Sony*, was also part of the seven-judge bench in the *Grokster* case). The Supreme Court shifted the burden on the lower courts for wrongly construing the decision of the *Sony* case and said that the Court of Appeals displaced the secondary liability theory. The Court in this regard stated that, 'nothing in *Sony* requires courts to ignore evidence of intent to promote infringement if such evidence exists.'³⁶ The Supreme Court relied on following four contentions to arrive onto the decision:

- (1) Non-filtration of copyrighted material - The *raison d'être* that the Court relied on to adduce the intent on part of Grokster and StreamCast to indulge in infringing usages was the absence of any constructive act to filter out the contents of infringing works.
- (2) Taking over from Napster - The Supreme Court opined that the respondents aimed to satisfy the sudden spurt in demand that had been created due to the closure of Napster.

The court stated that Grokster advertised itself as an alternative to Napster.³⁷ This according to the Court thus, proved the intent on part of Grokster to indulge in non-infringing activities.

- (3) Profit motive - The third assertion made by the Court with regard to inferring intent of the distributor of a product was based on the advertising and promotional model used. In the language of the Court, 'advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe.'
- (4) Practical alternative - Lastly, the gigantic scale at which the electronic file sharing was going on according to the Supreme Court, meant that the distributor was necessarily aware of the unlawful activity. Moreover, since it would be impossible in such a case to enforce effectively against all direct infringers, the only practical alternative was to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.³⁸

Thus, the US Supreme Court made a dual-limbed decision that attempted to steer a careful course between the interests of content industries and technologists.³⁹ The fact that the software was capable of substantial non-infringing uses was completely undermined by the Court. Moreover, the Court left certain questions unanswered. It failed to state in precise terms when could the *Sony* test be applied to infringement-enabling software. Thus, leaving an open question of when a product would be found with enough non-infringing uses to mitigate any user infringement.¹⁸ Also, it did not clarify what role, knowledge of unlawful activity had in imposing contributory infringement. The above arguments are illustrative of the fact that the US Supreme Court had probably not interpreted the activities of both Grokster and StreamCast correctly.

Jurisprudence in Other Countries

The jurisprudence on contributory infringement has not been deliberated upon in most of the countries. However, the fact that contributory infringement is a common law principle, as it has been derived from tort law, implies that other countries following the common law principle may also rely upon it. Other relevant caselaws from other countries are discussed below:

Canada

Even before *Gershwin* case arose in US, Canada had to confront a similar situation in 1953. In *Muzak Corporation v Composers, Authors and Publishers Association of Canada Limited*⁴⁰, Muzak had leased out sound recordings to a broadcasting corporation, which used the recordings for public performances for which it did not possess license.⁴¹ The majority of the judges of Supreme Court of Canada refused to construe liability upon Muzak as they did not believe that 'authorization' could be inferred on the part of Muzak as they did nothing constructively to allow such performance. This was in tune with the earlier Privy Council decision, which came in the case of *Vigneux v Canadian Performing Right Society Limited*.⁴² In that case, the owner of an 'electrically operated gramophone' (a jukebox) had rented the machine with its sound recordings to a restaurant where customers would start public performances by inserting coins into the machine. The Judicial Committee of the Privy Council found that the providers of the jukebox, who were receiving a flat weekly rental fee, were not actually authorizing the public performance of the musical works because '[t]hey had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not.'^{41, 42}

The case did not discuss contributory infringement liability. However, it is significant that absence of requisite knowledge or intent was a factor that greatly influenced the judges. It can be argued that had the case arisen now, judges might have relied upon the principle of contributory infringement.

United Kingdom

The Copyright, Designs and Patent Act of 1988 confers certain exclusive rights on the copyright holder like the reproduction right, the distribution right; the performance right, communicate the work to the public-the new communication right, which supersedes the old broadcasting and inclusion in a cable programme right, the adaptation right.⁴³

*CBS Songs Ltd v Amstrad Consumer Electronics Plc*⁴⁴

This case is similar to the *Sony* case discussed earlier, and happened after *Sony*. In this particular case, the House of Lords had to consider whether Amstrad had authorized a breach of the 1956 Copyright Act by selling and advertising twin-deck tape recorders, which it knew would probably be used

for illicit copying although they could also be used for other non-infringing purposes. The defendants argued that Amstrad's sale and advertising campaign amounted to authorization on its part, as it necessarily implied that Amstrad was facilitating illicit copying. However, both the Court of Appeal and the House of Lords had a different opinion. They said that authorization required express or implied grant to do the act, which was not the case here. Amstrad's advertising campaign, which drew attention to features that made illegal copying easier nevertheless did not involve a grant or purported grant of authority to copy because copyright warnings made this lack of authority clear to end users.

Lord Templeman held that neither the design of the product nor Amstrad's advertising campaign could be construed as authorizing unlawful copying, because the ultimate decision to copy was made by the user.⁴³ The ratio laid down by House of Lords in Amstrad was that, where an article is capable of facilitating infringing as well as non-infringing copying, the supplier must possess more than just generalized knowledge that illicit copying will occur before it will be held liable. Secondly, it was generally understood that the reference to an article 'specifically designed or adapted for making copies' was directed at articles such as photographic negatives, moulds, and master recordings that are designed to make copies of specific works, rather than generic copying equipment such as photocopiers or tape recorders.⁴³ The decision took a stand similar to that taken by the US Supreme Court in the *Sony* case.

Australia

In *Australasian Performing Right Association Ltd v Jain*,⁴⁵ an Australian court came to the conclusion that a tavern owner, who allowed the unlicensed performance of certain copyrighted works, was liable for authorizing the infringement of copyright. The Court held that Jain had authorized the infringing performances because it was within his power to prevent the infringements and he must have known it was likely that the performances would infringe copyright. A similar stand was adopted earlier in *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty*⁴⁶, a case whose facts were similar to those in the Canadian case of *Vigneux*. The Court, however, came to a different conclusion from that of the Privy Council on the basis that the owner of the jukebox shared in the revenue derived from the operation of the jukebox and could decide what

records could be placed in the machine. The Court held that to have the power to prevent an infringement could be regarded as a component, or even a corollary, of having the power to authorize a copyright use. This clearly highlights the fact that intent and material, which are the two fundamental criteria for construing contributory infringement, were the basis of Court's reasoning.

Netherlands

In November 2001, Buma/Stemra, a licensing body representing composers, songwriters, and music publishers in the Netherlands, filed a suit against KaZaA to prevent distribution of latter's file-sharing software (the KaZaA Media Desktop), which enabled users to search and download files from other KaZaA users. This case again saw diverse opinion from the District Court to the Court of Appeals. District Courts ruling came in favour of Buma/Strema, which was finally reversed by the Court of Appeals. Buma/Strema again appealed to the Supreme Court. However, they turned down the appeal and upheld the verdict of Court of Appeals. The Court of Appeals proceeded on the reasoning that 'the illegal acts had not been carried out by KaZaA, but by the users of KaZaA's software, and providing the means for publication or reproduction of a work is not an act of publication or reproduction *per se*.'⁴⁷ Moreover, the Court said that KaZaA application was not dependant on any intervention by KaZaA and that closing down KaZaA would not prevent the search and exchange of files-if anything it would become more difficult to trace this illegal activity, therefore, it would be unfair to impute the liability on KaZaA. This case happened prior to Grokster and after Napster. The reasoning adopted by the Court of Appeals seems to have been influenced by Napster. The fact that KaZaA did not have centralized indexing implied that they did not have specific knowledge as to what was being exchanged and copied, unlike Napster.

Conclusion

It is evident from the above discussion that contributory infringement has no fixed terrain. The decision of the Supreme Court in Grokster gives an inference about the over-arching influence of the big corporations on the regime of intellectual property rights (IPR). This judgment has created a cloud of uncertainty which could create a depreciation of innovation in the field of technology as the innovators would now have to think twice before getting

entangled in the murky details of the ever confusing regime of IPR and coming out with their products or even forwarding their idea. Moreover, the judgment has gone against what the Constitution had envisaged, since, now greater monopoly rights are being conferred. The courts should look at such a problem contextually. The fact that P2P networks are in demand is the reason why there are enterprises supplying for the same. At the end of the day, a line has to be somewhere drawn as to how much should courts interfere in cases that tend to curb technological innovation. Rather courts should take up an active role in promoting technological growth.

In India, so far there have been no cases dealing with contributory infringement. Nevertheless, the pace at which technological development is taking place, Indian judiciary too is likely to face similar cases in future. To fill up the lacunae, the judiciary will have to look at the principles of common law. This would imply reference to the US Supreme Court judgment in *Grokster*. However, abundant caution should be exercised while doing the same because this decision cuts into the heart of technological innovation. Rather the merits of the judgment delivered by the Ninth Circuit Court, where intent on part of *Grokster* was negated and the non-infringing uses permissible by the usage of P2P network provided by *Grokster* were analysed, must be carefully looked at. The judgment has to be dealt with contextually in the Indian scenario.

Moreover, taking into account the Indian IPR discourse, it is evident that no specific provision exists with regard to contributory infringement though it is contended that Section 51(a) (ii)⁴⁸ of the Copyright Act, 1957 can be referred to. Although, it primarily refers to direct copyright infringement case, yet the very fact that it says any person without a licence who permits for profit any place to be used for communication of work to the public will be held liable, can be construed to include contributory infringement cases. For contributory infringement, intent is an essential component and a person who allows the usage for communication of work for profit necessarily has the intent to commit the wrong.

As far as the *Grokster* case is concerned, the US apex Court unfortunately appears to have disregarded the fact that the copyright laws are rather archaic in nature and not updated according to changing technology. A balance has to be struck between the conflicting interests of protection and innovation.

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- 48 Section 51, Copyright Act, 1957, ‘When copyright infringed—Copyright in a work shall be deemed to be infringed—(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copy rights under this Act in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or, (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright’.