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.”

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

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. The Krikorians made themselves rich


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 cubicled 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

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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).


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

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. 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. The United States Supreme Court’s unanimous 2005 decision in *MGM Studios, Inc. v. Grokster, Ltd.*, 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. Meanwhile, proponents of Slingbox defend it on...
“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”).


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
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.\(^26\)

\(^{23}\) 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.

\(^{25}\) 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:

Established in *Grokster* and suggest necessary clarifications and revisions.\(^{23}\)
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. 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. 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. 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. Thus, “copyright owners” include persons or entities holding legal title to any portion of the bundle of rights. 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.


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][a][B].


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

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 $50 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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{41}

Today, many copyright infringement actions involve vicarious or contributory infringement, in addition to the more intuitive, statutorily-defined direct infringement.\textsuperscript{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.\textsuperscript{43} Unlike tort-based
vicarious liability, however, there is no independent contractor exemption in copyright law. Thus, copyright laws hold proprietors civilly liable for the direct infringement by their independent contractors, as well as their employees. 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. 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.

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

3-12 Nimmer on Copyright, supra note 29, at § 12.04[A][2].

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).

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).

6. 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).

7. See 3-12 Nimmer on Copyright, supra note 29, at § 12.04[A][3][a] (implying supervision element not necessary for contributory copyright infringement).

8. 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.

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. The Second Circuit refined this concept in the 1971 case Gershwin Publishing Corp. v. Columbia Artists Management, Inc., requiring two elements—knowledge of infringement and material contribution—in order to find contributory infringement by a non-direct infringer. 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. Further, courts may allow would-be contributorily infringing technologists to avoid liability when the technology in question performs “substantial noninfringing uses.”

Historically, ostensibly contributory infringers have defended themselves from liability by utilizing the doctrine of fair use. 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. 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. Some fair uses are solely the product of judicial decisions, while Congress has explicitly codified others in federal statutes.

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).


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.\textsuperscript{64}

The defendants claimed that the Betamax’s ability to time-shift constituted fair use despite the device’s obvious capacity for infringement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{67}

The plaintiffs, for multiple reasons, disagreed that time-shifting constituted fair use.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. \textit{Id.}

\textsuperscript{64} See \textit{Sony}, 659 F.2d at 964 (enumerating plaintiffs’ requested remedies).


\textsuperscript{66} \textit{Id.} at 468 (mentioning sport, religious, educational, and other testimony for defendants); see also \textit{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. \textit{Id.}

\textsuperscript{67} \textit{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. \textit{Id.}

\textsuperscript{68} \textit{Sony}, 480 F. Supp. at 466 (detailing plaintiff’s time-shifting objections).

\textsuperscript{69} \textit{Id.} at 440, 452 (describing advertisers’ role in structure of broadcast industry and their opposition to Betamax). \textit{See generally} Ethan O. Notkin, Note, \textit{Television Remixed: The Controversy Over Commercial-Skipping}, 16 FORDHAM INT’L. L. REV. 1 (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. \textit{Id.} at 937-38. \textit{But see} In re \textit{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).

\textsuperscript{70} \textit{Sony}, 480 F. Supp. at 466-68 (contending copyright holder revenues would decrease).
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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


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 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.
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. Today, legal scholars and contributory infringement defendants recount this epilogue to Sony in order to demonstrate their position favoring the significant noninfringing use defense. 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.

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. In A&M Records v. Napster, the Ninth Circuit rejected a music file-sharing company’s significant noninfringing use defense, holding Napster liable for contributory infringement. 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. In doing so, the court noted that Napster operated with “actual knowledge” of its customers’ infringement.

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78. Id. at 43 (alleging $9.52 billion theater receipts and $24.42 billion home video receipts in 2002).
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).
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In *In re Aimster Copyright Litigation*, the Seventh Circuit also held file-sharing companies liable for contributory infringement but for slightly different reasons. 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. In contrast, Judge Beezer of the Ninth Circuit required actual knowledge of infringement before imputing contributory liability to the *Napster* defendants.

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*. 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. The *Grokster* defendants, however, through “supernode” peer-to-peer software, had completely eliminated the need for a central server. 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. The defendants

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

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. 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. Instead, that person is merely shifting...
material that she already owns from one “space” to another. Courts in multiple jurisdictions rejected this defense. 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. Courts have not tested the placeshifting fair use defense or considered whether Sony’s time-shifting defense is analogous.

Sling Media currently markets three products, all of which allow users to access and control their televised programming from remote locations via the internet. 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. 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.

In addition to their inability to broadcast to multiple end-users, the devices lack the ability to record content. Content owners, nonetheless, fear future underground attempts to circumvent Slingbox’s inherent copy protections. 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).
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).
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Federal law currently protects the cable and satellite television industries from illegal reception of pay television signals. Federal law also explicitly outlaws the manufacture of equipment that aids in unauthorized reception of cable programming. Courts have historically assessed damages against parties who rebroadcast copyrighted material and have rejected the fair use defense in such instances. 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.

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. For example, according to the March 2006 congressional testimony


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.


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, “[D]efendant’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. Further, cable systems in each geographic market negotiate, and in effect pay for, retransmission consent agreements with various pay-television networks. Networks also pay handsome sums in order to acquire the rights to copyrighted programming, such as the rights to broadcast professional sports contests.

The media arm of Major League Baseball (MLB) has expressed public doubts about the legality of Slingbox. MLB, like the three other major professional United States sports leagues, possesses statutory protection beyond that of most content owners. 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. Sling Media, in turn, claims that it is not violating any broadcasting agreements.

123. Statement of McSlarrow, 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.


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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.biggpicturebigsound.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.
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.

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
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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,
some argue, risk extinction or expensive redesign if the flags become mandatory.\footnote{143}

III. ANALYSIS

Slingbox owners have indeed used the device for direct infringement of copyrights.\footnote{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.\footnote{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?\footnote{146} To confront this ultimate issue, this paper first asks three preliminary questions: Would Slingbox survive the \textit{Sony} and \textit{Grokster} tests?\footnote{147} If so, does Slingbox’s ability to “broadcast,” unlike a VCR (i.e., \textit{Sony}) or a peer-to-peer file-sharing network (i.e., \textit{Grokster}), warrant additional considerations beyond the scope of \textit{Sony} and \textit{Grokster}?\footnote{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?\footnote{149}

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.

\footnote{143}{Sohn, \textit{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. \textit{Id.} She alleges outlawing recordable satellite radios would slow this growth. \textit{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. \textit{Id.}}

\footnote{144}{See \textit{supra} note 117 and accompanying text (providing solicitation “Slingbox buddy” to access copyrighted content without permission of copyright owners).}

\footnote{145}{See \textit{supra} note 105 and accompanying text (announcing \textit{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. \textit{Id.}}

\footnote{146}{See \textit{supra} notes 49-52 and accompanying text (introducing secondary copyright liability of companies for their customer’s actions).}

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

\footnote{148}{See \textit{supra} notes 118-121, 124-128 and accompanying text (investigating whether Slingbox’s broadcasting capability warrants legal considerations beyond scope of \textit{Sony} and \textit{Grokster}).}

\footnote{149}{See \textit{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

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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).


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

158. See Statement of McSlarrow, 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
Such dissimilarities are, on balance, detrimental to Slingbox’s defense.\footnote{167}

Under \emph{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.\footnote{168} Sling Media’s survival of \emph{Grokster}’s first prong hinges on how broadly a court defines direct infringement.\footnote{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.\footnote{170} Sling Media, however, has not induced or encouraged its customers to sling copyrighted television programming to others.\footnote{171} In this way, Sling Media is distinguishable from the \emph{Grokster} defendants, whose entire business model was predicated on customers sharing content.\footnote{172} Further, the \emph{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.\footnote{173}

In a potential case against Slingbox, parties would likely disagree as to what types of customer uses constitute direct infringement.\footnote{174} For example, Sling Media might concede that “Slingbox buddy” exchanges, or parental transmissions to their children away at college, constitute direct infringement.\footnote{175} On the other hand, a vociferous plaintiff is unlikely to concede the legality of certain advertised Slingbox uses.\footnote{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,
and is thus a direct infringer.\footnote{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.\footnote{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.\footnote{179} Nevertheless, these copy protections make infringement significantly more difficult.\footnote{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.\footnote{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.\footnote{182} Inevitably, plaintiffs bringing suit against Slingbox would cite statutes and case law that overwhelmingly prohibit unauthorized retransmission of copyrighted material.\footnote{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.\footnote{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,

\begin{footnotes}
\footnote{177} Cf. supra note 69 and accompanying text (discussing argument that commercial-skipping constitutes creation of derivative work).
\footnote{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).
\footnote{179} See supra note 117 and accompanying text (illustrating examples of infringement through emergence of Slingbox buddies).
\footnote{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).
\footnote{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).
\footnote{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.
\footnote{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).
\footnote{184} See Statement of Krikorian, supra note 1 and accompanying text (noting Slingbox does not allow users to broadcast indiscriminately).
\end{footnotes}
cable and satellite signals. 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. 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. 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. In other words, if Major League Baseball wishes to confine Astros games to Houston and Giants games to San Francisco, it can do so. Nonetheless, by its inventor’s own admission, Slingbox was specifically inspired by a desire to watch Giants games outside the San Francisco area. 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.

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

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. An adverse court decision for Slingbox would dissuade other inventors and venture capitalists from bringing useful, yet potentially infringing, technologies to the marketplace. 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. In addition to deterring future innovations, a decision against Sling Media would represent a prohibition against technology that is presently innovative and useful.

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. After *Sony*, and as a direct result of the VCR, copyright owners benefited from the boom of the home video market. 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. In short, people might watch significantly more television if placeshifting becomes widespread than they would if placeshifting is prohibited.

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. 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. The availability of Slingbox might, therefore, be the clinching factor in the businessperson taking this trip. While this particular hypothetical is perhaps unremarkable, cumulative similar hypotheticals suggest an increase in economic activity as a result of the ability to placeshift.
2. Is Slinging 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{213}

Going forward, a finding that placeshifting is fair use might devalue copyrighted content by reducing the assurances that content owners could give advertisers.\textsuperscript{214} For example, content owners want to be able to promise local advertisers that they can target a particular region.\textsuperscript{215} Such promises are impossible if significant portions of the viewing audience are watching from a laptop in another time zone.\textsuperscript{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.\textsuperscript{217}

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

\textsuperscript{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).

\textsuperscript{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, DirecTV 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).

\textsuperscript{213} See Statement of McSlarrow, supra note 10, at 76 (noting cable industry’s significant investment in infrastructure).

\textsuperscript{214} See Wallenstein, supra note 7 (stating networks’ desire to promise advertisers accurate geographic demographics of viewers).

\textsuperscript{215} See Wallenstein, supra note 7 (discussing and defining “proximity control”).

\textsuperscript{216} Cf. Wallenstein, supra note 7 (speculating Slingbox could impair advertisers).

\textsuperscript{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.\footnote{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.\footnote{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.\footnote{220}

\textbf{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.\footnote{221} Only two years removed from Grokster, numerous technologies are in legal limbo as a result of its baffling holding and concurrences.\footnote{222} If Slingbox is any barometer, this ambiguity has had consequences.\footnote{223} Blake Krikorian has articulated his initial difficulty in finding venture capital investors for Sling Media due to the uncertain state of copyright laws.\footnote{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.\footnote{225} First, the duty of care that Justice Souter imposed is overly vague.\footnote{226} Ideally, the Court or Congress will better define the steps that a company like Sling Media must take...
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.

Dominic H. Rivers

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).