MEDIA NEUTRALITY IN THE DIGITAL ERA
A STUDY OF THE PEER-TO-PEER FILE SHARING ISSUES

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Introduction

Due to the unexpectedly rapid development of technology, the issues regarding intellectual property rights have grown considerably, particularly in the field of copyright. Following the development of technology, the scope of copyright has been adjusted and expanded. The whole world emphasizes copyright protection; nevertheless, the outcry over public domain is palpable. Copyright owner’s interest and the public’s interest have been in tension since the origin of the legal concept of copyright. How can the law strike a balance between the copyright and the public domain? The fair use doctrine plays a significant role in the balance between these two competing interests.

Copyright law always keeps pace with the development of technology. In a digital world, the issues are the following: Does the attitude toward the copyright in the digital era differ from the attitude in the traditional technology world, such as print, cassette tapes, TV and radio? Is it appropriate to establish regulations for new technology based on those of prior technology? The principle of media neutrality, which was derived from Sony Corp. of Am. v. Universal City Studios, Inc. (“Sony”)¹ and developed in RIAA v. Diamond Multimedia Systems, Inc. (“Diamond”)², may solve these thorny issues.

This note starts with a brief introduction to the fair use doctrine and its role in the digital age. Then the note traces the development of the media neutrality principle from two precedents – Sony and Diamond. Thereafter, the note takes P2P (Peer-to-peer technology) file-sharing cases, including two pending cases in Taiwan – ezPeer and KURO, as examples. Based on the differences between the legal systems and practices between the U.S. and Taiwan, the note discusses the possible directions of ezPeer and KURO from the viewpoints of the prosecutors, the defendants, the courts and the public policy. At last, a media-neutrality-centered approach may address the P2P issues.


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I. The Foundation of Copyright

Copyright owners have the right to reproduce, to prepare derivative works, to distribute to the public, and to perform and display publicly. From the founding of copyright law, copying has always been at the center of copyright. It is copies, rather than originals, that concern copyright owners. Thus, copyright can be broadly described as a right of control over copying of the work. Before the invention of paper and the printing press, the price or value of a work had mainly depended on the cost of copying, rather than on the precise idea in the work. This was due to the extremely high cost of copying by hand. It had not been necessary to worry about protecting copyright because of the actual difficulties in copying.

After the printing press was invented and used as copying equipment, copyright protection arose, in general, due to business interests of publishers. With improved copying technology, such as the printing press, photocopiers, video tape recorders, computers and the Internet, copy quality has improved while the cost of copying has declined. Information technologies and communications techniques have exploded onto the market. Meanwhile, copyright laws have also been modified to adjust to the changes which technology has brought to copyright. Hence, copyright and technology have always been in tension. Although technology can easily infringe copyright, technology can also offer better protection to copyright owners than they might imagine.

Copyright protection, which only offers incentives for authors to create, is different from the protection afforded to ordinary or tangible property because of the non-exclusive and “non-rivalrous” nature of ideas. Natural scarcity does not exist in ideas. Everyone can share the other’s idea without diminishing its power. Therefore, Article I, section 8, clause 8 of the United States Constitution, the Copyright Clause, provides:

The Congress shall have the power to promote the progress of science and useful arts, by

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5 LESSIG, supra note 4, at 124-25.
7 LESSIG, supra note 4, at 124-25.
8 Id., at 127.
9 Id., at 132-33.
securing for limited times to authors and inventors the exclusive rights to their writings and
discoveries.  

The Copyright Clause explicitly empowers Congress to bargain with copyright owners on behalf of the public. This is based on the metaphor of *quid pro quo*. The drafters of the Constitution intended to motivate authors to create by offering them a limited reward, and then to have the creative works available to the public after the exclusive right had expired. In order to supply incentives for authors to produce more works, the public agrees to grant a limited-time monopoly to authors as a reward for their creativity. For their part, authors promise to allow the public to freely exploit their works after the copyright has expired. This “trade-off” demonstrates a bargain and balance between private copyright protection and the public domain.

There are two schools of copyright metaphysicians: copyright optimists and copyright pessimists. Copyright optimists insist that copyright is based on natural justice, and that the copyright’s cup, which is half-full, needs to be filled. Copyright pessimists, on the other hand, contend that owners should control copies to induce them to create, but that copyright should protect only to the extent necessary, otherwise the public is unable to express its own wishes.

In order to simultaneously encourage creation and maintain the public domain, the “copyright’s cup” ought to be half empty. That is, copyright protection is provided to the extent necessary in order to give a necessary incentive to authors. Because copyright laws not only protect copyright owners, but also, and more importantly, advance the public interest, “the progress of science and useful arts” cannot occur if the copyright’s cup is full. Some commentators emphasize the economic incentives of copyright from the view of the economic analysis of law. They focus solely on how to increase the economic incentives to create works, but do not take the public into account. The key point in resolving copyright issues, nonetheless, is to always keep the public interest in mind.

II. Fair Use and New Technology

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11 U.S. Const. art. I § 8, cl. 8.
12 JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTION INTELLECTUAL PROPERTY ON THE INTERNET 78 (2001).
13 Sony, 464 U.S. 417, 429.
14 LESSIG, supra note 4, at 133-34; LITMAN, supra note 12, at 78-79.
15 LESSIG, id., at 133.
16 LESSIG, id., at 133-34; VAIDHYANATHAN, supra note 10, at 20-21, 23, 44; LITMAN, supra note 12, at 78-79.
17 GOLDSTEIN, supra note 4, at 10-11.
18 LESSIG, supra note 4, at 129.
19 LITMAN, supra note 12, at 79-80.
The Copyright Act grants a bundle of rights to copyright owners. However, there are two exceptions to the broad copyright. First, there is the “first sale” doctrine, which holds that after the copyrighted work is sold, the original copyright owner can no longer control the distribution of this work. The other exception is the “fair use” doctrine, which exempts certain types of unauthorized usage of copyrighted works from copyright infringement liability. The protection granted to copyright owners is held with certain limitations under the public interest, one of which is fair use. Generally speaking, copyright owners can control how the public uses copyrighted works. The public, however, can access and use copyrighted works under the fair use doctrine.

Fair use, which serves as a critical defense in copyright infringement cases, is a made law. In Folsom v. Marsh, Judge Joseph Story held that in determining whether the secondary use of the copyrighted work was justified, courts must examine “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”

The fair use doctrine evolved from precedents and was then codified in Section 107 of the Copyright Act of 1976. The section provides that the fair use of a copyrighted work does not constitute an infringement of copyright. When determining whether an unauthorized use of a work is exempted from copyright infringement, courts must consider all four Folsom factors: “(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 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.”

The principle of fair use originated, because it was impossible to monitor and measure every unauthorized copying, and transaction costs of negotiation between copyright owners and users were high. Due to such inconveniences, the “implied consent” of copyright owners to

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20 Id., at 17-18.
21 LESSIG, supra note 4, at 134.
24 Id., at 348.
27 Id.
28 LESSIG, supra note 4, at 137.
29 GOLDSTEIN, supra note 4, at 201. According to Professor Harper, fair use allows the copier to avoid the transactional costs associated with fee negotiations between the copier and the copyright owner. Professor Harper
Unauthorized acts is presumed. Congress and courts permit the existence of fair use on behalf of the public interest. Moreover, fair use is also applied to the “enforced-consent” situation in which copyright owners are unwilling to allow the public to use the copyrighted works.\textsuperscript{30}

When technology improves, measuring each use of the works becomes no longer difficult. However, it does not mean that fair use is of no use.\textsuperscript{31} New technology probably influences the balance between copyright owners and the public, while fair use is critical to rebuild the scope of copyright and the public domain. Every new technological development reignites the debate as to whether the scope of copyright under the existing copyright system extends to this new technology.\textsuperscript{32} When deciding new technology cases, which the Copyright Act had never addressed before, the courts always employed the principle of fair use to resolve these thorny issues.\textsuperscript{33} The most remarkable example is the Sony Betamax case: \textit{Sony v. Universal City Studio}.\textsuperscript{34} Subsequently, \textit{RIAA v. Diamond Multimedia Systems Inc.}\textsuperscript{35} reaffirmed the principle established in \textit{Sony}.

\textbf{A. Sony v. Universal City Studio: Time-Shifting}

Video tape recorders (VTRs) were first produced in the 1950s, but they became widely used for home recording within the next two decades.\textsuperscript{36} Sony manufactured and sold its VTR product, Betamax, in 1975.\textsuperscript{37} Universal Studios and Walt Disney Productions filed suit against Sony production in 1976.\textsuperscript{38} The plaintiffs alleged that Betamax owners, who had used the Betamax to record the plaintiffs’ television programs, infringed their copyright in these programs.\textsuperscript{39} They

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\textsuperscript{30} LITMAN, \textit{supra} note 12, at 84.
\textsuperscript{31} Professor Harper suggested that in the new electronic environment, the focus of fair use should be shifted to another alternative: “a more cooperative exploration” which enables authors, publishers and users to benefit from copyrighted material. See Harper, \textit{supra} note 29.
\textsuperscript{32} LITMAN, \textit{supra} note 12, at 23.
\textsuperscript{34} 464 U.S. 417 (1984).
\textsuperscript{35} 180 F. 3d 1072 (9th Cir., 1999).
\textsuperscript{36} SAMUELS, \textit{supra} note 22, at 66.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Sony}, 464 U.S. at 420.
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further alleged that Sony, who had provided users with the infringing facilities, the VTRs, should be liable for contributory infringement.  

The United States District Court for the Central District of California held that users’ noncommercial home taping of TV programs constituted fair use. The court first found that the programs were broadcast free to the public, and that the recording conduct happened at home. Then the court found that the recorders simply increased access to programs, but did not reduce the market of the plaintiffs’ works. Even if the home taping could not be regarded as fair use, the court concluded that Sony did not share liability for users’ unauthorized taping because users had the right to do anything they liked, and Sony could not get involved.

However, the Ninth Circuit Court of Appeals reversed and held that the home taping by users was not fair use because the home taping, whose primary purpose was to record commercial programs, was not a productive use and it would diminish the market for the plaintiffs’ works. The Circuit Court then reasoned that VTRs were used to reproduce TV programs, so they were not for any substantial non-infringing use. Writ of certiorari was granted in 1982 (457 U.S. 1116).

The U.S. Supreme Court held that Sony’s conduct did not constitute contributory infringement because the Betamax was capable of significant non-infringing uses. The majority reasoned that the staple article of the commerce doctrine in the Patent Act (35 U.S.C. §271(c)) could be applied to copyright cases. The Court first recognized that the Copyright Act had never “accorded the copyright owner complete control over all possible uses of his work.” As to authorized time-shifting, the Court found that many producers of television programs had no objection to the practice of time-shifting for private home use. With regard to unauthorized time-shifting, the Court then reasoned that private home taping done to shift the time when the programs were viewed was a noncommercial and non-for-profit use, and that the plaintiffs had not proven actual present harm or potential future harm by such use. Therefore, there were

40 Id. at 419.  
42 Id., at 442, 450.  
43 Id., at 452, 456.  
44 Id., at 461.  
45 Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 972 (9th Cir. Cal. 1981).  
46 Id., at 975.  
48 Id., at 442.  
49 Id.  
50 Id., at 443-47.  
51 Id., at 447-56.
substantial non-infringing uses for the Betamax, and Sony could not be held liable for contributory infringement committed by some users as a result of selling them such equipment.\(^{52}\)

### B. RIAA v. Diamond Multimedia Systems: Space-Shifting

The plaintiff, RIAA, sought a preliminary injunction to enjoin the defendant, Diamond Multimedia Systems Inc., from producing and selling the Rio portable music players by which users could download MP3 files from computers and listen to them anywhere.\(^{53}\) RIAA alleged that the Rio did not use a Serial Copyright Management System (SCMS), and thus it was not qualified as a device under the Audio Home Recording Act of 1992, 17 U.S.C §1001 et seq.\(^{54}\)

The Ninth Circuit Court cited the *Sony* case and found that the copies made by the Rio were only the files, which users “space-shift[ed]” from their computers to portable music players.\(^{55}\) Hence, the court concluded that such copying constituted a noncommercial personal use.\(^{56}\) As a result, in *Diamond*, the Circuit Court developed the idea of “space-shifting” based on the “time-shifting” concept in *Sony*.

### III. The Concept of Media Neutrality

The statement of Marshall McLuhan and Quentin Fiore, “the medium is the message,” stands for the proposition that the effects imposed by the means or manner of communication are greater than those conveyed by the message itself.\(^{57}\) Because a medium transmits a message to recipients, the effects that the message creates depend not only on the content of the message, but also on how many recipients the medium can reach. The more recipients the medium can reach, the more influential the message. Messages conveyed by conventional media, such as handwriting, can access only a limited number of recipients, while new technology such as print, telephone, television, the computer, and the Internet, can transmit the message to more recipients in seconds. Due to the profound influence that a message has on the recipients, a medium enhanced with new

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\(^{52}\) Id., at 456.

\(^{53}\) RIAA v. Diamond Multimedia Systems, 180 F. 3d 1072, 1073 (9th Cir., 1999).

\(^{54}\) Id., at 1073, 75.

\(^{55}\) Id., at 1079.

\(^{56}\) Id.

\(^{57}\) MARSHALL McLUHAN AND QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 8(Jerome Agel Coordinator, Bantam Books) (1967) (published in 2001 by Gingko Press). See also Gray and & DeVries, supra note 33. Some scholars disagree with Marshall McLuhan’s statement about the relationship between media and messages, contending that the medium and the message are totally distinct and that “everything we create purposefully is an expression in some medium.” See DAVID R. KOEPSELL, THE ONTOLOGY OF CYBERSPACE 1 (2003).
technology has more power than ever imagined.

Media neutrality means that a copyright owner enjoys the same protection in any form where his work is fixed. The subject matter of media neutrality is material objects, like books, periodicals, disks and tapes, as well as electric storage media, such as audiotapes, videotapes, computer disks (CDs), and digital versatile disks (DVDs). In other words, the terms “medium”, “forms” or “manner” embrace not only “physical storage media” but also “systems of communication or entertainment (the broadcast media)” or “modes of expression.” Moreover, technology adopted in media plays an important role in conveying messages. In a digital world, the progress of computer science technology has advanced the usage of media. Under this interpretation, media neutrality can be broadly read as “technology neutrality.”

This concept of media neutrality as technology neutrality arose from White-Smith Pub. Co. v. Apollo Co. The plaintiff, White-Smith Pub. Co., claimed that piano rolls, which the defendant, Apollo Co., had published in the form of sheet music, infringed the plaintiff’s music copyright. The U.S. Supreme Court held that the defendant was not liable because piano rolls were just parts of a machine, duly operated by a skilled operator to make musical tones. The Court found that the musical sounds combined to form an auditory reproduction, which did not come under copyright protection because the Copyright Act, however, protected only visual reproductions.

White-Smith demonstrates the reluctance of courts to expand copyright protection to new technology. The holding pushed Congress to accept the concept of media neutrality by creating the compulsory license system for recordings of music works in 1909 and modifying the definition of “work” in Section 102(a) of the Copyright Act of 1976. Section 102(a) of the Copyright Act of 1976 provides:

Copyright protection subsists, in accordance with this title, in original works of authorship

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59 Id., at 5.
60 Id., at 5-6.
61 Id., at 6.
62 209 U.S. 1 (1908).
63 Id., at 8-9.
64 Id., at 18.
65 Id., at 17-18.
66 Tussey, supra note 58, at 1. See also Sony v. Universal City Studio, 464 U.S. 417, at 431 (The Supreme Court indicated that the protection of copyright is expanded only under explicit intent of the Congress.)
67 Tussey, supra note 58, at 1, n7.
fixed in any tangible medium of expression, ‘now known or later developed’, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The language of Section 101 and 102(a) of the Copyright Act of 1976 explicitly requires the element of fixation—copyright protection stands either in existing or in future media. This is so regardless of how works are perceived or communicated, whether directly or indirectly, through machines or devices. In order to solve the challenges resulting from future technology, Congress broadly embraces “any conceivable present and future uses of copyrighted works.” Thus, media neutrality as expressed in the Copyright Act of 1976 totally overruled White-Smith. The House Report indicated that this was the intent of Congress:

Under the bill it makes no difference what the form, manner, or medium of fixation may be . . . whether embodied in a physical object in written, printed . . ., magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device “now known or later developed.”

Under media neutrality, the subject matter of copyright includes works fixed on both existing media and future media. The broad protection encourages authors to create more works and thus advance the progress of science and useful arts. Such an incentive matches the ultimate goal of the Copyright Act. Media neutrality not only makes the Copyright Act stay neutral, rather than favoring any specific technology, but it also directs courts to interpret the Copyright Act as new technology develops. Thus, the purpose of media neutrality is to shape a more flexible copyright law to fit new technology without repeatedly revising the copyright law in the future. The above explanation of media neutrality represents the view of copyright owners. The next section will discuss other points of view of the media neutrality principle.

IV. The Dilemma between Copyright Law and New Technology

Basically, copyright laws were first premised on print media, and then expanded to

69 Tussey, supra note 58, at 2-3.
71 Id., at 2-6.
photocopiers, broadcast, tapes, films, video taps, and digital media.\textsuperscript{73} Of course, there are many debates about whether new legislation should be enacted specifically for digital media.\textsuperscript{74} It is, however, too early to draw such a conclusion without further observing how the Internet develops. Under the principle of media neutrality, the existing copyright protection system should still be sufficient to fix the problems arising from digital media.

In *Twentieth Century Music Corp. v. Aiken*, Justice Stewart held that the ultimate aim of the incentive in the copyright law is to “stimulate artistic creativity for the general public good” and that the Copyright Act must be interpreted under the basic purpose to solve literal ambiguity rendered by technology changes.\textsuperscript{75} However, the exclusive rights of authors would undermine the creativity of the public because the public is barred from using the copyrighted works, which might stimulate the spark of creativity.\textsuperscript{76} Furthermore, new technology for reproducing and disseminating copyrighted works greatly challenges the Copyright Act.\textsuperscript{77} It is necessary to figure out a resolution to deal with the difficulties resulted from the exclusive nature of copyright and the development of new technology.

In the beginning, material on the Internet was made available to the public free of charge. Many authors made their original works accessible, and plenty of net users shared information on the Internet. As a result, the Internet became a mass medium because of the World Wide Web.\textsuperscript{78} The Internet and digital media enhance freedom of expression and access to information.\textsuperscript{79} The nature of the Internet is one that is open and available to the public. From the history of development of player piano rolls, phonograph records, jukeboxes, video tape recorders, photocopiers, and cable television, when copyright laws have made exemptions for new technology, the related industries have flourished\textsuperscript{80} because these new technology have created another new market for copyrighted works. As the Internet has become a mass medium, the media neutrality principle should apply to the issues on the Internet as well.

The *Sony* opinion, which is related to time-shifting and the staple article of commerce doctrine, is a landmark decision of the fair use theory. The *Sony* court firmly struck down copyright owners

\textsuperscript{73} *Id.*, at 31. Keller, *supra* note 72, at 31.
\textsuperscript{74} Some contend that recent technology differs from the conventional media so that copyright laws cannot handle it any more. Others insist that copyright laws always deal with new technology well. See Keller, *id.*, at 35.
\textsuperscript{75} 422 U.S. 151, 156 (1975).
\textsuperscript{76} Harper, *supra* note 29.
\textsuperscript{77} Tussey, *supra* note 58, at 14.
\textsuperscript{78} LITMAN, *supra* note 12, at 103-04.
\textsuperscript{79} Tussey, *supra* note 58, at 12.
\textsuperscript{80} LITMAN, *supra* note 12, at 106-07.
who had kept trying to extend the monopoly right to new technology. The concept of space-shifting in *Diamond* achieved the same purpose. The narrow interpretation of copyright to accommodate new technology both in *Sony* and in *Diamond* is consistent with media neutrality. Further, any new technology used as a personal tool to copy or disseminate should be shielded under the media neutrality doctrine. Likewise, under media neutrality, the characteristics of the Internet—speedy and costless transmission of information all over the world—will permit more and more materials that inspire potential authors to create more original works.

Some commentators describe the *Sony* case (analog video recording) as the first war between Hollywood (the entertainment industry) and the Silicon Valley (the technology industry). The second one, they contended, is the MPEG3 audio recording. The media neutrality principle not only determines the scope of copyright, but also applies to the range of the public domain for the public and media or technology providers. In other words, the law and the courts can strike a balance between copyright owners and the public with media neutrality. The following section will discuss the current topic of P2P file-sharing and try to solve the dilemma between the Copyright Act and new technology.

V. The Argument of P2P File-Sharing

A. The Basic Conception of P2P

Traditionally, Internet content is provided by the “client-server” model in which a central system, “the server,” takes requests from a user, “the client,” who asks for access to the information or data, and then the server transmits the required content to the user. *RIAA v. MP3.com* is the leading case about this model.

Recently, the conventional “client-server” model has been replaced by peer-to-peer technology

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82 The *Diamond* case mainly dealt with the new usage of new technology, the Rio portable players.
84 Litman, *supra* note 12, at 108.
86 Id.
(a.k.a “P2P”), which initiates the direct connection among individual personal computers. On one hand, P2P is extremely popular all over the world because of its features of convenience, flexibility, and high quality with low-cost. On the other hand, P2P is severely challenging the core of the Copyright Act. Music and film industries, in particular, are trying to fight P2P technology through enforcement of copyright laws.\(^8\)

There are two types of P2P: the modified P2P system and the pure P2P mode. The modified P2P system still contains a central system, such as Napster, ezPeer and KURO.\(^9\) The ending of Napster has contributed to the development and popularization of second-generation P2P systems—the pure P2P mode,\(^9\) which operates totally without an intervening server. The first well-known system of the pure P2P mode is Gnutella. In addition, FastTrack, developed by a Dutch company, is the most sophisticated system and currently used by the most rapidly growing new services: Grokster (based in Nevis, West Indies), Music City Networks (offering the widely hailed “Morpheus” software), KaZaA, eDonkey and Grouper (allowing file-sharing within a small group of people).\(^9\)

**B. The Client-Server Model**

In *RIAA v. MP3.com*, the defendant, MP3.com, launched its “My.MP3.com” service having purchased tens of thousands of popular CDs in which the plaintiffs held the copyrights.\(^9\) The defendant, without authorization, copied the plaintiffs’ CD recordings onto its computer servers so as to be able to replay the recordings for its subscribers.\(^9\) The service was provided as the “Beam-it Service”\(^9\) and the “Instant Listening Service.”\(^9\) MP3.com subscribers were then able to access, via the Internet, from a computer anywhere in the world, copies of the plaintiffs' recordings made by the defendant.\(^9\)

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\(^8\) The following cases indicate how the industries fought with the new technology.

\(^9\) EzPeer and KURO are P2P websites that are operating in Taiwan. The related lawsuits will be discussed as below.

\(^9\) Fisher and & Yang, supra note 87.

\(^9\) Id. See also (Author?) Software Company to Offer Friends-only File Sharing, Oct. 4, 2004, at <http://online.wsj.com/article/0,SB109684679650734905,00.html> (last visited on Oct. 12, 2004).


\(^9\) Id.

\(^9\) Id.

\(^9\) A subscriber to MP3.com must prove that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-Rom drive for a few seconds. See MP3.com, id., at 350.

\(^9\) A subscriber to MP3.com must purchase the CD from one of defendant’s cooperating online retailers. See id., at 350.

\(^9\) Id., at 350.
The defendant argued that such copying is protected under the affirmative defense of “fair use.” The court, however, held that such an argument was indefensible. First, the court reasoned that the defendant’s purpose was unquestionably commercial and its services simply repackaged the recordings to facilitate their transmission through another medium. Such a service added no new aesthetics, insights or understandings to the copyrighted music works, so it did not constitute a “transformative space shift.” Then, the court recognized that the plaintiffs’ recordings were creative. The defendant totally copied and replayed the plaintiffs’ works, and the defendant’s activities would reduce the plaintiffs’ entry to the derivative market. Therefore, the court concluded that there was no fair use and the defendant was liable for copyright infringement.

To sum up, the server in a “client-server” model takes charge of all transmission of required information from the server to the end user. Such an operation was the main reason why the operator of a “client-server” website was held liable. Moreover, simply transmitting information from one medium to another one can hardly be considered transformative. Thus, the owner of a “client-server” model is unlikely to successfully invoke the fair use privilege in order to avoid infringement liability. This example is completely consistent with the media neutrality principle.

C. The Modified P2P System

1. A&M Records v. Napster

Napster was the designer and operator of a system that permitted PC users to transmit and retain copyrighted sound recordings employing digital technology. Through a process known as P2P file sharing, Napster maintained a “search index” of a collective directory, and allowed each user to create a “user library directory,” which was stored on individual computer hard drives. Users could access the user library directory to search for music files stored on other users' computers, and transfer the desired copies from one computer to another via the Internet.

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98 Id.
99 Id., at 352.
100 Id., at 351.
101 Id.
102 Id.
103 Id., at 352.
104 Id., at 352.
105 Id., at 352.
106 Id., at 1011.
107 Id., at 1012.
108 Id., at 1012.
The plaintiff, RIAA, brought copyright infringement actions against Napster, alleging that Napster users directly infringed the plaintiff’s copyright, and that Napster should be liable under the theories of contributory and vicarious infringement.\(^{109}\) After evaluating the four factors set forth in Section 107 of the Copyright Act, the U.S. Court of Appeals for the Ninth Circuit rejected Napster’s defense that its users engaged in fair use of the copyrighted material.\(^{110}\) As to the argument that Napster just provided samples of music, the court found that even though what Napster users downloaded was a full, free and permanent copy, Napster adversely impacted the plaintiff’s audio CD and digital download markets. Thus, sampling did not meet the requirements of fair use.\(^{111}\)

With regard to space-shifting, the court held that the model of shifting in *Sony* and *Diamond* was different from that in Napster because the music files, which were listed on the Napster system, are available to other Naspter users, not just to the single user himself. Therefore, there was no fair use of space-shifting.\(^{112}\) Next, the court upheld the district court’s conclusion that Napster may be secondarily liable for direct copyright infringement under two doctrines: contributory infringement and vicarious infringement.\(^{113}\) As to the contributory copyright infringement claim, the court concluded that Napster knowingly encouraged and assisted its users to infringe the record companies’ copyrights and that Napster materially contributed to infringing activities.\(^{114}\) As to the vicarious copyright infringement claim, the court concluded that Napster had a direct financial interest in its users’ infringing activities and that Napster retained the ability to police its system for infringing activities.\(^{115}\)

The court concluded, however, that the scope of the district court’s preliminary injunction was overbroad and remanded the case to the district court for modification of the injunction as follows: Napster may be held liable for contributory copyright infringement only to the extent that Napster knew of specific infringing files with copyrighted musical compositions or sound recordings; knew or should have known that the files were available on the Napster system; and failed to act to prevent the distribution of the copyrighted material.\(^{116}\) Napster may further be held liable for vicarious copyright infringement when it failed to affirmatively use its ability to patrol its system

\(^{109}\) *Id.*, at 1013.
\(^{110}\) *Id.*, at 1014-17
\(^{111}\) *Id.*, at 1018-19.
\(^{112}\) *Id.*, at 1019.
\(^{113}\) *Id.*, at 1020, 1024.
\(^{114}\) *Id.*, at 1019-22.
\(^{115}\) *Id.*, at 1022-24.
\(^{116}\) *Id.*, at 1019-22.
and preclude access to potentially infringing files listed in its search index.\textsuperscript{117}

\textbf{2. In Re Aimster}\textsuperscript{118}

The plaintiff, RIAA, sued the defendant, John Deep, for contributory and vicarious infringement, alleging that the defendant operated a website to offer “Aimster,” later renamed as “Madster,” for his subscribers to swap digital copies of the plaintiff’s popular music songs.\textsuperscript{119} The district court granted motion for a preliminary injunction and the defendant appealed.\textsuperscript{120}

The Seventh Circuit Court held that it was the subscribers who made the copies of the plaintiff’s music and that the defendant just played a role as a stock exchange.\textsuperscript{121} Thus, the defendant was not a direct infringer.\textsuperscript{122} Then the court distinguished Sony from the case at bar.\textsuperscript{123} In Sony, the Betamax video recorder had been used in three manners: (1) for “time-shifting” (the owner of the Betamax wanted to watch the programs later); (2) for “library building” (users used the Betamax to retain the copies of the programs); and (3) for “commercial-skipping” (people skipped commercials while watching the programs recorded by the Betamax.)\textsuperscript{124} The first manner constituted fair use, while the other two did not.\textsuperscript{125} There were both infringing and non-infringing uses for the Betamax.\textsuperscript{126} Sony could not control the way the buyers used it.\textsuperscript{127} As a result, Sony was not liable for the buyers’ infringing activities.\textsuperscript{128}

On the other hand, the court found that the defendant took copyrighted music as an example of file-sharing in his tutorial which was an “invitation to infringement.”\textsuperscript{129} Moreover, the monthly fee of “Aimster” differed from the free nature of television programs in Sony.\textsuperscript{130} Thus, the court shifted the burden of proof from the plaintiff to the defendant and asked the defendant to prove that his service was used in a substantial non-infringing manner.\textsuperscript{131}

\begin{footnotes}
\item\textsuperscript{117} Id., at 1027-29.
\item\textsuperscript{118} 334 F.3d 643 (7th Cir. 2003).
\item\textsuperscript{119} Id., at 645.
\item\textsuperscript{120} Id.
\item\textsuperscript{121} Id., at 646-47.
\item\textsuperscript{122} Id.
\item\textsuperscript{123} Id., at 649-50.
\item\textsuperscript{124} Sony, 464 U.S. at 422-24, 447-456.
\item\textsuperscript{125} Id., at 454-55.
\item\textsuperscript{126} Id., at 456.
\item\textsuperscript{127} Id., at 438, 442.
\item\textsuperscript{128} Id., at 456.
\item\textsuperscript{129} Aimster, 334 F.3d at 651.
\item\textsuperscript{130} Id., at 652.
\item\textsuperscript{131} Id., at 651-52.
\end{footnotes}
However, the court found that the defendant not only failed to prove that the “Aimster” service had been used in a non-infringing manner, but he also tutored subscribers in how to use the service to swap music files by encryption. The safe harbor clause, 17 U.S.C. §512(i)(1)(A), did not apply to this case due to the defendant’s “ostrich-like” attitude toward the infringing use of his service without taking any further preventive measures.

In addition, the court rejected the argument that the injunction decreed by the district court violated the defendant’s freedom of speech based on Eldred et al. v. Ashcroft. In Eldred, the Supreme Court confirmed that the Copyright Act had already taken into account the First Amendment right to free speech. Consequently, the court held the defendant liable for contributory infringement.

3. EzPeer

The defendants, Global Digital Technology Co., Ltd. and its principal, Wu Yih-Dar, operated the ezPeer website and charged the members for using ezPeer software and downloading other members’ files. Members downloaded a P2P software “ezPeer” from the website and installed it in their personal computers. After installing the ezPeer software, members could execute ezPeer software to access ezPeer server.

After checking the ezPeer member’s validity, the master server recorded the information from a specific file folder into the database in the “file name directory server.” Once the content of such music folders was recorded in the database, any logged-on member could perform a keyword search to quickly find the desired MP3 music files in the specific file folder. Then members could click on the screen and select the desired files. Their selections were then transmitted through each computer’s IP node to ezPeer’s file name directory server. Thereafter, the server establishes the direct ICP/IP link between two members’ computer so as to enable the requesting

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132 Id., at 650, 651, 653.
133 Id., at 654-55.
135 Eldred, 537 U.S. at 218-221.
136 Aimster, 334 F.3d at 655-56.
137 The indictment of the Prosecutor’s Office of the Shih Lin District Court, Taiwan, Case Number: 91 Jen Tzyh No.10786, 92 Jen Tzyh No.4559 (Dec. 4, 2003).
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id.
member to download the desired files.\textsuperscript{145}

On December 4, 2003, the operator of the ezPeer website and four ezPeer members who connected to the ezPeer website and downloaded MP3 files through the ezPeer program, were indicted by the Prosecutor’s Office, Shih Lin District Court, Taiwan.\textsuperscript{146} They were accused of violating Paragraph 1 of Article 91\textsuperscript{147}, Paragraph 1 of Article 92\textsuperscript{148} and 94\textsuperscript{149} of the Copyright Act of Taiwan. As to the defendant, Global Digital Technology Company, the prosecutor recommended using Paragraph 1 of Article 101 of the Copyright Act\textsuperscript{150} to impose a fine under Article 94.1 of the Copyright Act.\textsuperscript{151}

\textbf{4. KURO}\textsuperscript{152}

The defendants, Fashion-now Co., Ltd. and its principal, So Tern Chen, operated two websites that provided the P2P software for file sharing under the title of “KURO.”\textsuperscript{153} KURO members used the software to download other members’ files. (The connecting process of KURO is quite similar to that of ezPeer, so no need to describe it in detail.\textsuperscript{154})

On December 1, 2003, the operator of the KURO website and one KURO member who connected to the KURO website and downloaded MP3 files through the KURO program, were

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Copyright Act of Taiwan, art. 91, para. 1 provides: “A person who infringes on the economic rights of another person by means of reproducing the work with intent to profit shall be punished by imprisonment for not more than five years, detention, or in addition thereto a fine of not less than two hundred thousand and not more than two million New Taiwan Dollars.” Intellectual Property Office, Ministry of Economic Affairs, R.O.C. (providing a translation of the Copyright Act of Taiwan) (The following translated provisions of the Copyright Act of Taiwan are supplied by the Intellectual Property Office, Ministry of Economic Affairs, R.O.C., available at <http://www.tipo.gov.tw/eng/laws/e1-4-1an.asp> (last visited on Dec. 19, 2004.).)\textsuperscript{147}
\item Copyright Act of Taiwan, art. 92, para. 1 provides: “A person who, with intent to profit, infringes on the economic rights of another person by means of public recitation, public broadcast, public presentation, public performance, public transmission, public display, adaptation, compilation, or leasing, shall be punished by imprisonment for not more than three years, detention, or in addition thereto a fine of not more than seven hundred and fifty thousand New Taiwan Dollars.” Id.
\item Copyright Act of Taiwan, art. 94 provides: “A person who commits a crime specified in paragraph 1 or 2 of Article 91, Article 91bis, Article 92, or Article 93 as a vocation shall be imprisoned for not less than one year and not more than seven years, and in addition thereto, may be fined not less than three hundred thousand and not more than three million New Taiwan Dollars.” Id.
\item Copyright Act of Taiwan, art. 101, para.1 provides: “Where the representative of a juristic person, or the agent, employee, or other servant of a juristic or natural person commits any of the offenses specified in Articles 91 through 96bis in the performance of its duties, in addition to punishing the infringer in accordance with the aforesaid articles, such juristic or natural person shall also be fined in accordance with said articles.” Id.
\item The Indictment, supra note 137.
\item The Indictment of the Prosecutor’s Office of the Taipei District Court, Taiwan, Case Number: 92 Jen Tzyh No.16389/21865 (Dec. 1, 2003).
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
indicted by the Prosecutor’s Office, Taipei District Court, Taiwan. They have been accused of violating Paragraph 1 of Articles 91, Paragraph 1 of 92 and 94 of the Copyright Act of Taiwan. As to Defendant Fashion-now Co., Ltd., the prosecutor recommends using Paragraph 1 of Article 101 of the Copyright Law to impose a fine under Paragraph 1 of Article 94 of the Copyright Act.

Summary

In the Napster, Aimster, ezPeer and KURO website servers, there is a file-index directory that can direct users to link with each other. That is the reason why the courts in Napster and Aimster as well as the public prosecutors in ezPeer and KURO all considered the operators of these websites to be liable. Technologically, they are all featured as modified P2P models.

D. The Pure P2P Mode

1. KaZaA

KaZaA, owned by Sharman Networks Ltd. (“Sharman,”) used P2P technology, “FastTrack,” by which users connected to each other directly, without a need for a central point of management. What the user needed to do was to install KaZaA, which would then connect the user to other users and search for the desired file. The user could then download this file directly from the other user’s computer.

The plaintiff, Buma/Stemra, who protected the interests of the music industry, sued KaZaA for distributing the software that allowed users to make copies of copyrighted works without permission. The plaintiff demanded that KaZaA distribution be stopped and that its owner

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155 Id.
156 See supra note 147 to 150.
157 Supra note 152.
158 Napster, 239 F.3d at 1011-12. Aimster, 334 F.3d at 646. ezPeer, supra note 137. KURO, supra note 152.
160 Id.
161 Id.
(Sharman) pay royalties for the files transferred on the KaZaA network. The plaintiff also wanted the KaZaA’s code to be modified in order to filter out copyrighted materials.

On November 29, 2001, the District Court in Amsterdam held that KaZaA was liable for copyright infringement and that KaZaA should take necessary measures to stop its users from infringing the plaintiff’s copyright and remove its site from the web. On March 28, 2002, however, the appellate court in Amsterdam dismissed the plaintiff’s claim and concluded that KaZaA was not liable for users’ copyright infringement, because KaZaA’s software had substantive legitimate uses, such as trading jokes and personal photographs. On December 19, 2003, the Supreme Court of the Netherlands ruled that P2P software, such as KaZaA, was legal and upheld the appellate-court decision in Amsterdam.

A parallel case against Sharman is pending in the lower court in Los Angeles. Sharman initially argued that the U.S. court had no jurisdiction because Sharman had no assets in the U.S., and KaZaA spanned worldwide. Recently, Sharman filed a countersuit, accusing that the plaintiff violated antitrust laws by stopping Sharman and its partner from distributing authorized copies of music and movies via KaZaA. The antitrust claim was dismissed on September 2003, while the motion to dismiss the copyright claim was dismissed on January 16, 2004.

2. **Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.**

The defendants, Grokster, Ltd., StreamCast Networks, Inc. (formerly known as MusicCity Networks, Inc.), and KaZaA BV (formerly known as Consumer Empowerment BV), distributed software that enabled users to exchange digital media via a peer-to-peer transfer network.

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165 Chander, *supra* note 162; Heim-Smith, *supra* note 162.
166 Chander, *supra* note 162; Heim-Smith, *supra* note 162.
168 Chander, *supra* note 162; Heim-Smith, *supra* note 162.
169 Chander, *supra* note 162; Heim-Smith, *supra* note 162.
170 Chander, *supra* note 162; Heim-Smith, *supra* note 162.
172 As to the motion to dismiss the copyright claim, see Metro-Goldwyn-Mayer Studios v. Grokster Ltd., et al., No. CV-01-08541-SVW, C.D. Calif. (2004).
174 *Id.*, at 1031-32.
Each defendant distributed free software, which users could download free of charge. All three platforms were initially powered by FastTrack networking technology, but StreamCast later employed the “open” (i.e., not proprietary) Gnutella technology. As a result, users of these software platforms were essentially connected to the same peer-to-peer network and were able to exchange files.

The plaintiffs, organizations in the motion picture and music recording industries, alleged that the defendants were liable for copyright infringement committed by users of the defendants’ software. The defendants argued, however, that they merely provided software to users and that they were unable to control the use of their software.

The U.S. District Court for the Central District of California ruled on April 25, 2003, that the defendants had no liability for the infringing behaviors of their users. The court found that there was no dispute about the fact that the defendants’ software, Morpheus, was capable of both infringing and substantial non-infringing uses. The court then reasoned that Grokster did not operate a centralized file-sharing network like that seen in Napster, because Grokster no longer operated such a supernode, and that StreamCast’s Gnutella was a “true” peer-to-peer network, even more decentralized than FastTrack. Subsequently, the court found that StreamCast did not operate any of these directories. Next, the court recognized that the defendants distributed and supported the software, the users of which could and did choose to employ it for both lawful and unlawful ends. The court finally concluded that there was no evidence supporting any active and substantial contribution to the infringement, and thus the defendants were not liable for contributory infringement. With regard to vicarious infringement, since there was no evidence proving that the defendants were able to police users’ infringing activities, the court concluded that the defendants had absolutely no control over the software. Therefore, the court held that there was no vicarious liability in this case.

175 Id., at 1032.
176 Id.
177 Id., at 1032.
178 Id., at 1031.
179 Id., at 1046.
180 Id., at 1035.
181 Id., at 1039-40.
182 Id., at 1042.
183 Id., at 1043.
184 Id., at 1043.
185 Id., at 1045.
186 Id., at 1045.
187 Id., at 1043-46
The plaintiffs appealed. On August 19, 2004, as to the present activities of the defendants, the Court of Appeals for the Ninth Circuit affirmed the partial summary judgment of the district court.\textsuperscript{188} As to the previous versions of the software, the Circuit Court remanded the case for further procedure.\textsuperscript{189} The court reasoned that the software had substantive non-infringing uses and that the plaintiffs did not prove the defendants had constructive knowledge of the infringement committed by software users.\textsuperscript{190} Thus, the defendants were not liable for contributory infringement.\textsuperscript{191} With respect to vicarious infringement, because the defendants had no right and ability to supervise the users’ infringing activities, the court held that there was no vicarious infringement liability.\textsuperscript{192}

**Summary**

The free and open nature of P2P matches the primary goal of the Internet exactly. KaZaA did not incur any legal liabilities for copyright infringement because of the independent way it operated without main servers and its substantive legal uses, so were Gnutella and FastTrack in *Grokster*.\textsuperscript{193} Basically, these cases were all based on the concept of “substantive non-infringing uses” in *Sony*. In addition to swapping MP3 files, P2P can be utilized for many kinds of substantive uses, such as photographs, movies, books, texts, videos, software and so on.\textsuperscript{194} Other than music and film industries, many industries, such as software industry, considerably concern the courts’ attitude toward P2P technology. That is the reason why the legal issues in the above cases are drawing great attention nowadays.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{188} Metro-Goldwyn-Mayer Studio v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004).
\item \textsuperscript{189} Id., at 1167.
\item \textsuperscript{190} Id., at 1161-63.
\item \textsuperscript{191} Id., at 1164.
\item \textsuperscript{192} Id., at 1166.
\item \textsuperscript{193} 380 F. 3d. at 1160.
\item \textsuperscript{194} Vaidhyanathan, *supra* note 10, at 181. See also Fisher and Yang, *supra* note 87.
\end{itemize}
\end{footnotesize}
E. Analysis Under Media Neutrality

The above sections introduced the doctrine of fair use and media neutrality, as well as the cases related to P2P file-sharing. The debates about P2P file-sharing result from the “decentralized and user-driven” characteristics of P2P, which influence the controls over copy and distribution of copyrighted works. The further issue is whether the media neutrality principle can provide a better solution to the P2P file-sharing disputes.

1. Theoretical Analysis

Copyright strikes a balance between the competing interests of copyright owners and the public. In reality, every copyright decision is directed not only by the statute but also by a specific policy. What is the policy implied in the above decisions? The following session summarizes the key factors in Sony, Diamond, Napster, Aimster, and Grokster.

Sony

1. Type of product manufactured or service provided
   Sony manufactured and sold video tape recorders (VTRs), Betamax, which were used for home recording.
2. Contributory infringement
   (1) Actus reus element
      As to authorized time-shifting, the Supreme Court found that many producers of television programs did not object to the practice of time-shifting for private home use. With regard to unauthorized time-shifting, the Court reasoned that private home taping for time-shifting was noncommercial and nonprofit and the plaintiffs had not proved that they incurred actual present harm or potential future harm by such use. Therefore, there were substantial non-infringing uses in the Betamax.
      (2) Mens rea element (There is no discussion about this part. “No discussion”)
3. Vicarious infringement
   (1) Actus reus element (No discussion)

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196 Samuels, supra note 22, at 66.
197 The actus reus element of contributory infringement is causation, inducement, or material involvement in a second party's infringement. See Miles, supra note 195, at 22.
198 464 U.S. at 443-47.
199 Id., at 447-55.
200 Id., at 456.
201 The mens rea element of contributory infringement is knowledge. See id., at 22.
(2) Mens rea element\textsuperscript{203} (No discussion)

4. The ruling

The majority held that Sony had not constituted to the infringement committed by some users.\textsuperscript{204}

Diamond

1. Type of product manufactured or service provided

Diamond Multimedia Systems Inc. produced and sold the Rio portable music players by which users could download MP3 files from computers and listen to them anywhere.\textsuperscript{205}

2. Contributory infringement

   (1) Actus reus element

   The Ninth Circuit Court found that the copies made by the Rio were only the files, which users “space-shifted” from their computers to portable music players.\textsuperscript{206} Hence, the court concluded that such copying was noncommercial personal use.\textsuperscript{207}

   (2) Mens rea element (No discussion)

3. Vicarious infringement

   (1) Actus reus element (No discussion)
   (2) Mens rea element (No discussion)

4. The ruling

   The court developed the same idea of “space-shifting” based on the “time-shifting” concept in Sony and thus held that Diamond Multimedia Systems Inc was not liable for the infringement of the Rio users.\textsuperscript{208}

Napster

1. Type of product manufactured or service provided

Napster was the designer and operator of a system that permitted PC users to transmit and retain copyrighted sound recordings employing digital technology.\textsuperscript{209} Through a process known as P2P file sharing, Napster maintained a “search index” of a collective directory, and

\textsuperscript{202} The \textit{actus reus} element of vicarious infringement is a direct financial interest in the second party’s infringing conduct. \textit{See id.,} at 23.

\textsuperscript{203} The \textit{mens rea} element of vicarious infringement is the right and ability to supervise the infringing behavior. \textit{See id.,} at 23.

\textsuperscript{204} 464 U.S. at 456.

\textsuperscript{205} 180 F. 3d at 1073.

\textsuperscript{206} \textit{Id.}, at 1079.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.}, at 1081.

\textsuperscript{209} 239 F. 3d at 1011.
allows each user to make a “user library directory,” which was stored on individual computer hard drives. Users could access the user library directory to search for music files stored on other users’ computers, and transfer the desired copies from one computer to another via the Internet.

2. Contributory infringement

(1) Actus reus element

The Ninth Circuit Court rejected Napster's affirmative defense that its users fairly used the copyrighted material. As to the argument of sampling, the court found that even though what Napster users downloaded was a full, free and permanent copy, Napster adversely impacted audio CD and digital download markets. Thus, sampling did not meet the requirements of fair use.

With regard to the issue of space-shifting, the court held that the model of shifting in Sony and Diamond is different from that in Napster because the music files, which are listed on the Napster system, are available to other Napster users, other than the single user himself. Therefore, there was no fair use of space-shifting. In addition, the court found that Napster materially contributes to infringing activities.

(2) Mens rea element

The court concluded that Napster knowingly encouraged and assisted its users to infringe the record companies’ copyrights.

3. Vicarious infringement

(1) Actus reus element

The court found that Napster had a direct financial interest in its users’ infringing activities.

(2) Mens rea element

The court found that Napster retained the ability to police its system for infringing activities.

4. The ruling

The court held that Napster was liable for contributory copyright infringement only to the

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210 Id., at 1012.
211 Id., at 1011.
212 Id., at 1019.
213 Id., at 1018.
214 Id.
215 Id., at 1019.
216 Id.
217 Id., at 1020-22.
218 Id., at 1023.
219 Id., at 1023-24.
extent that Napster knew of specific infringing files with copyrighted musical compositions or sound recordings; knew or should have known that the files were available on the Napster system; and failed to act to prevent the distribution of the copyrighted material. Furthermore, Napster would be held liable for vicarious copyright infringement when it failed to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index.221

Aimster

1. Type of product manufactured or service provided

The defendant operated a website to offer “Aimster,” later renamed as “Madster,” which enabled his subscribers to swap digital copies.222

2. Contributory infringement

   (1) Actus reus element

   The Seventh Circuit Court held that it was the subscribers who made the copies of the plaintiffs’ music and that the defendant just played a role as a stock exchange, and thus that the defendant was not a direct infringer. However, the court found that the defendant took copyrighted music as an example of file-sharing in its tutorial. This approach constituted an “invitation to infringement.” Thus, the court shifted the burden of proof from the plaintiffs to the defendant; the defendant, however, failed to prove the fact that the Aimster service had been used for a non-infringing use.

   (2) Mens rea element

   The defendant tutored subscribers on how to use the service in order to swap music files by encryption. The court held that such conduct could not shield the defendant from the actual knowledge of illegal uses of its service.

3. Vicarious infringement

   (1) Actus reus element

   Because the defendant received monthly fees from its subscribers, the court found that its relationship to the infringing activities of users differed from Sony’s, in which television

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220 Id., at 1022.
221 Id., at 1023.
222 334 F. 3d at 645.
223 Id., at 646-47.
224 Id., at 651.
225 Id.
226 Id., at 652-53.
227 Id., at 650.
228 Id., at 650-51.
programs were free.\textsuperscript{229}

(2) \textit{Mens rea} element

The court reasoned that the defendant failed both to diminish the encryption function and to
monitor the use of its service in order to limit users’ infringing activities.\textsuperscript{230} Thus, it could not
escape vicarious infringement liability.\textsuperscript{231}

4. The ruling

The court held the defendant liable for contributory and vicarious infringement.\textsuperscript{232}

\textit{Grokster}

1. Type of product manufactured or service provided

Grokster, TreamCast, and KaZaA distributed free software that enabled users to exchange
digital media via a P2P transfer network.\textsuperscript{233} Users of these software platforms were essentially
connected to the peer-to-peer network and were able to exchange files seamlessly.\textsuperscript{234}

2. Contributory infringement

(1) \textit{Actus reus} element

The defendants’ software, Morpheus, was capable of both infringing and substantial
non-infringing uses.\textsuperscript{235} The Ninth Circuit Court found that Grokster did not operate a centralized
file-sharing network like Napster, because Grokster no longer operated a supernode, and that
StreamCast’s Gnutella was a “true” peer-to-peer network, even more decentralized than
FastTrack.\textsuperscript{236} The court concluded that there was no evidence presenting any active and
substantial contribution to the infringement.\textsuperscript{237}

(2) \textit{Mens rea} element (No discussion)

3. Vicarious infringement

(1) \textit{Actus reus} element

The court found that the defendants’ software was free of charge.\textsuperscript{238}

(2) \textit{Mens rea} element

Since there was no evidence proving that the defendants were able to police users’
infringing activities, the court concluded that the defendants had absolutely no control over the
software.\textsuperscript{239}

4. The ruling

The court held that there was no contributory or vicarious liability in this case.\textsuperscript{240}

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\textsuperscript{239} 380 F. 3d at 1165-66.

\textsuperscript{240} 380 F. 3d at 1160.
With respect to the requirements of liability, it seems clear that the courts have been following the consumer-practice-based policy. That is to say, while finding that most of the users employed the issued technology for non-infringing purposes, such as time and space shifting, the courts recognized the legitimacy of the new technology under the doctrine of fair use. Take *Sony* as an example; the majority of *Sony* discussed the capabilities of the Betamax recorders based on the surveys provided by parties.\(^{241}\) Though the majority did not expressly put the figures into the judgment, it can be reasonably implied that the great likelihood of time-shifting practice impacted the judgment.

On the other hand, if the courts found that too many users exploited the new technology as unauthorized copying tools, the courts were reluctant to immunize the providers of new technology, especially involving the Internet. Probably because of the enormous influence of the Internet, the courts dealt with the related issues cautiously. As a result, the courts in recent cases have imposed a much heavier burden on technology providers. Both *Aimster* and *Grokster* demonstrate this shift. The Seventh Circuit Court in *Aimster* held the defendant liable on the ground that the Aimster service had no substantial non-infringing uses and that all users engaged in illegal conduct.\(^{242}\) However, in *Grokster*, the Ninth Circuit Court found that the defendants’ software had other substantial non-infringing uses.\(^{243}\) Therefore, the court held that the defendants were not liable for contributory infringement.\(^{244}\) In short, these courts’ decisions depend on whether there are substantial non-infringing uses by empirical evidence of consumers’ practice.

Furthermore, the next issue is whether such trend is consistent with the Copyright Act. *Sony* is the first case in which the Supreme Court reached a judgment based on the “capabilities of machines rather than the conduct of people.”\(^{245}\) Both the *Sony* and *Diamond* decisions recognized the media neutrality principle, which is consistent with the aim of the Copyright Act. The new technologies, the Beta max video recorders and the MP3 players, have developed well because these decisions have shielded them from infringing liability. In *Sony*, the plaintiffs’ TV programs were broadcasted without charge and the home-taping activities did not affect the

\(^{241}\) 464 U.S. at 422-24. Some commentators observed that *Sony* did not take the ratio of infringing and noninfringing uses into account. See Miles, *id.*, at 41. Their observation seems to be conflict with the holding.

\(^{242}\) 334 F. 3d at 653.

\(^{243}\) 380 F. 3d at 1161.

\(^{244}\) *Id.*, at 1164.

\(^{245}\) Miles, *supra* note 195, at 23.
However, in the cases of P2P file sharing, the music works are not free of charge and the file-sharing activities have negative impacts on the potential market of the copyrighted works because the users can save the costs of buying lawful music copies by downloading the free MP3 files. The problems resulted from P2P technology, indeed, differ from those caused by the Betamax.

It is noticeable that in The Society of Composers, Authors and Music Publishers of Canada v. The Canadian Association of Internet Providers, the Supreme Court of Canada confirmed the role of an Internet intermediary as a “conduit.” The plaintiff, SOCAN, alleged that the defendants, a coalition of Canadian Internet service providers, ought to pay royalties to the plaintiff, despite the origin of the transmission of the defendants’ users. The Supreme Court of Canada held that if an Internet intermediary stayed neutral by providing “a conduit” for information, it is immunized from the copyright infringement liability under Section 2.4(1)(b) of the Copyright Act of Canada. The Court reasoned that the fact that some users might employ the content-neutral Internet technology to infringe copyright was not sufficient to accrue liability to the Internet intermediary because liability required actual knowledge of the infringing contents.

The above cases have concentrated on the secondary liability of the P2P providers, but have not dealt with the issue of whether individuals’ file-sharing behavior is immune from infringement liability under the fair use principle. Some researchers contend that individuals who share MP3 online will create and transmit additional copies and that posting MP3 files online to share with others infringes the copyright owners’ rights to perform publicly. Some argue that the Grokster court implied, in dicta, that file-sharing of copyrighted works was an infringing act and that fair use cannot extend to protect the free exchange of copyrighted works by file sharing.

Admittedly, some users exploit P2P file-sharing technology to reproduce and distribute
copyrighted works to which they have no legal right. Nevertheless, the practice of new technology should not be the center in P2P cases. On the contrary, the neutral nature of technology is the very point emphasized by the media neutrality doctrine. The free and open nature of P2P matches the primary goal of the Internet. Other than illegal infringing uses, P2P technology still enables substantial non-infringing uses, such as exchanging photographs, movies, books, texts, video, software and other digital files. The technology is employed as a tool to help people to communicate or share information with each other. Under media neutrality, the P2P technology providers should not be held liable for users’ infringing activities.

2. Practical Application in the Two Pending Cases in Taiwan

The widespread P2P file-sharing, especially swapping copyrighted music without permission, is also flourishing in Taiwan. The two cases discussed — ezPeer and KURO — are just the tip of the iceberg. The infringement liability of the copyright law and the practice of copyright lawsuits in Taiwan differ from those in the U.S. The next section focuses on whether the related cases in the U.S. could lead to some solutions to these cases in Taiwan.

The Distinguishing Features in the Copyright System and Litigation of Taiwan

The Copyright Act of Taiwan (the “Act”) was enacted on May 12, 1928 and amended in 1944, 1949, 1964, 1985, 1990, 1992, 1993, 1988, 2001, 2003 and 2004. The Act defines a work as a creation that is fixed in an object and that falls “within a literary, scientific, artistic, or other intellectual domain.” When an author completes a work, he shall enjoy copyright protection, which includes “moral rights” and “economic rights.” The moral rights, which are inalienable, include the right to release a work publicly, the right to indication, and

254 VAIDHYANATHAN, supra note 10, at 181. See also Fisher and Yang, supra note 87.
256 Intellectual Property Office, Ministry of Economic Affairs, R.O.C., Laws & Regulations: Copyright Act, supra note 147.
257 Copyright Act of Taiwan, art 3, sec. 1(1), id.; Art. 3, sec. 1(16) provides: “‘Work’ means a creation that is within a literary, scientific, artistic, or other intellectual domain.” Art. 3, sec. 1(16) provides: “‘The original’ or ‘an original’ means the object to which a work is first fixed.” Id.
258 Copyright Act of Taiwan, art. 10 provides: “The author of a work shall enjoy copyright upon completion of the work provided, where this Act provides otherwise, such provisions shall govern.” Id.
259 Copyright Act of Taiwan, art. 3, sec 1(3) provides: “‘Copyright’ means the moral rights and economic rights subsisting in a completed work.” Id.
260 Copyright Act of Taiwan, art. 21 provides: “Moral rights belong exclusively to the author and shall not be transferred or succeeded.” Id.
261 Copyright Act of Taiwan, art. 15, sec. 1 provides: “The author of a work shall enjoy the right to publicly release the work; provided, this shall not apply to a civil servant where, pursuant to the provisions of Article 11 or 12, such person is the author while the juristic person employing such author enjoys the economic rights to the work.” Id.
262 Copyright Act of Taiwan, art. 16, sec 1 provides: “The author of a work shall have the right to indicate its name, a pseudonym, or no name on the original or copies of the work, or when the work is publicly released. The author has
the right of reputation.\textsuperscript{263} The economic rights embrace exclusive rights: to reproduce,\textsuperscript{264} to recite a work publicly,\textsuperscript{265} to broadcast a work publicly,\textsuperscript{266} to present an audiovisual work publicly,\textsuperscript{267} to perform oral and literary, musical, dramatic and choreographic works publicly,\textsuperscript{268} to transmit a work publicly,\textsuperscript{269} to display a work publicly,\textsuperscript{270} to adopt a work into derivative work; to compile a work into a compilation work,\textsuperscript{271} to distribute the original or copies of a work,\textsuperscript{272} to rent a work,\textsuperscript{273} and to import the original or copies of a work.\textsuperscript{274} Generally speaking, the duration of economic rights is from creation until 70 years after the author's death.\textsuperscript{275} “Economic rights for photographic works, audiovisual works, sound recordings, and performances endure for fifty years after the public release of the work.”\textsuperscript{276}

The subject matter of copyright encompasses: (1) oral and literary works, (2) musical works, (3) dramatic and choreographic works, (4) artistic works, (5) photographic works, (6) pictorial and graphical works, (7) audiovisual works, (8) sound recordings, (9) architectural works, and (10) computer programs.\textsuperscript{277} “The following items shall not be the subject matter of copyright: (1) the constitution, acts, regulations, or official documents; (2) translations or compilations by central or
local government agencies of works referred to in the preceding subparagraph; (3) slogans and common symbols, terms, formulas, numerical charts, forms, notebooks, or almanacs; (4) oral and literary works for news reports that are intended strictly to communicate facts; and (5) test questions and alternative test questions from all kinds of examinations held pursuant to acts or regulations.\textsuperscript{278}

Article 65, Subsection 1, of the Act provides that the fair use of a copyrighted work does not infringe the copyright owner’s economic rights.\textsuperscript{279} When determining whether an unauthorized use of a work conforms to Article 44 to 63 or constitutes fair use, courts must conduct an all-facts-and-circumstances test.\textsuperscript{280} The courts consider the following four factors in particular: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount and the portion used; and (4) the effect of the use.\textsuperscript{281}

Under the Copyright Act of Taiwan, copyright infringers are subject to civil liabilities and criminal penalties.\textsuperscript{282} Chapter VI (Remedies for Infringement of Rights) of the Copyright Act of Taiwan\textsuperscript{283} addresses remedies for infringement of rights. Chapter VII (Penal Provisions) of the Copyright Act of Taiwan\textsuperscript{284} contains penal provisions. Copyright owners can demand that infringers prevent and remove the infringement (Art. 84).\textsuperscript{285} If the copyright owners’ moral rights are infringed, copyright owners can claim damages, including a commensurate amount of compensation, and appropriate measures necessary for the restoration of their reputation (Art. 85).\textsuperscript{286} Copyright owners may request the destruction or other necessary disposition of infringing goods or articles used predominantly for the infringing acts (Art. 88bis).\textsuperscript{287} After the trial of the infringement case, copyright owners may demand that the infringer publish all or part

\textsuperscript{278} Copyright Act of Taiwan, art. 9, sec. 1. \textit{Id.}
\textsuperscript{279} Copyright Act of Taiwan, art 65, sec 1. \textit{Id.}
\textsuperscript{280} Copyright Act of Taiwan, art 65, sec 2. \textit{Id.}
\textsuperscript{281} Copyright Act of Taiwan, art 65, sec 2 provides: “In determining whether the exploitation of a work complies with the provisions of Articles 44 through 63, or other conditions of fair use, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

1. The purposes and nature of the exploitation, including whether such exploitation is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the work.
3. The amount and substantiality of the portion exploited in relation to the work as a whole.
4. Effect of the exploitation on the work's current and potential market value.” \textit{Id.}
\textsuperscript{282} Copyright Act of Taiwan, arts. 84 to 103. \textit{Id.}
\textsuperscript{283} Copyright Act of Taiwan, arts. 84 to 90quarter. \textit{Id.}
\textsuperscript{284} Copyright Act of Taiwan, arts. 91 to 103. \textit{Id.}
\textsuperscript{285} Copyright Act of Taiwan, art 84. \textit{Id.}
\textsuperscript{286} Copyright Act of Taiwan, art 85. \textit{Id.}
\textsuperscript{287} Copyright Act of Taiwan, art 88bis. \textit{Id.}
of the judgment (Art. 89).288

Infringing behaviors include several kinds of criminal conduct: (1) reproducing, distributing, publicly displaying the work; (2) possessing the work with intent to distribute; (3) infringing by means of public recitation, public broadcast, public presentation, public performance, public transmission, public display, adaptation, compilation, or leasing; (4) making a living from the criminal infringement; (5) selling copies of sound recordings outside of the territory; (6) distributing, publicly displaying or possessing infringing articles; (7) importing copies reproduced without authorization; (8) exploiting an infringing copy of a computer program for business purposes; (9) altering the program not for backup or the owner's personal use; (10) not providing a clear indication of the source of the work; (11) unlawfully removing or altering the electronic rights management information.289 The penalties are imprisonment and/or fine (Art. 91 to 103).290

There are no legal concepts of contributory and vicarious infringement in Taiwan. Paragraph 1, Article 185 of the Civil Code of Taiwan provides: “If several people have caused an injury to another person by a wrongful act committed in common, they are jointly liable for the damage.”291 The same rule applies if it cannot be discovered which of several participants has caused the damage.292 Paragraph 2, Article 185 provides: ” Instigators and accomplices are deemed to be jointdoers.”293 The elements of serving as an accomplice are the following: (1) a tort of a third party, (2) an intent to aid, and (3) providing aids to the third party.294 Broadly speaking, the concept of serving as an accomplice under Paragraph 2, Article 185 is similar to the concept of contributory infringement.

In addition, Paragraph 1, Article 188 of the Civil Code of Taiwan provides: ”The employer is jointly liable to make compensation for any damage which the employee wrongfully causes to the rights of another person in the performance of his duties. However, the employer is not liable for the damages if he has exercised reasonable care in the selection of the employee, and in the superintendence of the duties, or if the damage would have been occasioned notwithstanding the exercise of such reasonable care.”295 The elements of employee’ torts are the following: (1) a

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288 Copyright Act of Taiwan, art 89. *Id.*
289 Copyright Act of Taiwan, arts 91 to 103. *Id.*
290 Copyright Act of Taiwan, arts 91 to 103. *Id.*
291 Civil Code of Taiwan, art 185, para. 1. *JUDICIAL YUAN OF TAIWAN, Major Statutes of the Republic of China, Volume (II) 34 (June 1992).*
292 Civil Code of Taiwan, art 185, para. 2. *Id.*
293 Civil Code of Taiwan, art 185. *Id.*
294 Civil Code of Taiwan, art 185. *Id.*
295 Civil Code of Taiwan, art 188. *Id.*, at 35.
tort of an employee, (2) the employee’s performance within the scope of his or her employment, and (3) the ability to supervise the employee’s performance. Therefore, the employer’s liability for the employee’s torts under Paragraph 1, Article 188 is similar to the concept of vicarious infringement.

In Taiwan, those who infringe copyright must incur the civil and criminal liabilities. Plaintiffs in civil proceedings bear the burden of proof, including the ownership of copyright, the infringing activities of defendants, and the actual damage incurred from the infringing activities. Sometimes, the burden is too heavy for private parties to carry. Prosecutors, however, due to the authority they hold, must take full responsibility for demonstrating infringing activities of defendants. Because people in Taiwan tend not to enter into litigious proceedings, particularly criminal ones, most infringers are willing to settle with copyright owners. As far as copyright owners are concerned, criminal lawsuits are a better alternative. Due to the heavy burden of proof, copyright owners in criminal proceedings can achieve the goal of protecting copyright with less time and cost.

The Outline of the Indictments

The prosecutors detailed the features of the ezPeer and KURO operations in light of technology. According to the indictments, the operation of ezPeer and KURO is similar to that of Napster and Aimster. All of them are technically classified as “the Modified P2P System.” Nevertheless, there are two differences among these four cases. First, Napster was held liable for contributory and vicarious copyright infringement. Aimster was considered a contributory infringer. EzPeer and KURO, however, were accused of direct copyright infringement liability. Secondly, in Napster and Aimster, the plaintiffs only brought suit against P2P service providers, while in ezPeer and KURO, the accused defendants include not only the owners of the websites, but also the end users (members).

The defendants in ezPeer and KURO argue that there are no files uploaded or downloaded in

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296 Civil Code of Taiwan, art 188. Id.
297 Copyright Act of Taiwan, arts. 84 to 90 provide the civil liabilities. Copyright Act of Taiwan, arts. 91 to 103 provide the criminal liabilities. See Intellectual Property Office, Ministry of Economic Affairs, R.O.C., Laws & Regulations: Copyright Act, supra note 147.
298 Civil Procedure Code of Taiwan, art 277.
299 Crim. Procedure Code of Taiwan, art 161.
300 Unlike the U.S., prosecutors in Taiwan must file an information including facts of and evidence for the offense and article of the law violated. Criminal Procedure Code of Taiwan, art. 264. (Article 264 of the Criminal Procedure Code of Taiwan). See JUDICIAL YUAN OF TAIWAN, supra note 291, at 487.
301 ezPeer, The Indictment, supra note 137. Kuro, The Indictment, supra note 152.
302 ezPeer, The Indictment, supra note 137. Kuro, The Indictment, supra note 152.
the web servers, and that they, just like search engines, only provide P2P software and platforms for members to exchange members’ own files. They also argue that they neither have knowledge about members’ conduct nor have the right or ability to monitor any content of members’ files. Their most critical defense is that the software can be employed legally to share various files and that their activities should be shielded under the principle of technology neutrality.\(^{303}\)

The defendants are accused of direct infringement—reproducing and publicly transmitting copyrighted works with intent to make a living from copyright infringement.\(^{304}\) Such an intent is not disputed because ezPeer and KURO charge monthly fees.\(^{305}\) In addition, those who actually engage in reproducing and transmitting copyrighted works are members of ezPeer and KURO, rather than the actual owners of the websites.\(^{306}\) However, the relationship between the owners of the websites and the accused members is not clear. From the context of the indictments, instead of accusing defendants under the theory of soliciting and abetting, the prosecutors could have directly accused them under the conspiracy theory.\(^{309}\) It is a noticeable feature in the indictments.

The Proposals to the ezPeer and KURO Cases

Even though the owners and some members of ezPeer and KURO have been indicted, some problems still remain unclear and need to be overcome. The following section outlines the problems and makes proposals from the perspectives of the prosecutors, the defendants, the court and public policy.

A. The Prosecutors’ Perspective

Unlike \textit{Aimster}, a civil suit, the defendants in \textit{ezPeer} and \textit{KURO} in the criminal procedure do not need to prove the non-infringing uses of their P2P software.\(^{310}\) Conversely, prosecutors bear the burden to prove the defendants have committed the copyright infringement.\(^{311}\) Moreover, because the prosecutors accused the defendants of direct infringement, the prosecutors must

\(^{303}\) \textit{ezPeer}, The Indictment, \textit{supra} note 137. \textit{Kuro}, The Indictment, \textit{supra} note 152.

\(^{304}\) \textit{ezPeer}, The Indictment, \textit{supra} note 137. \textit{Kuro}, The Indictment, \textit{supra} note 152.

\(^{305}\) \textit{ezPeer}, The Indictment, \textit{supra} note 137. \textit{Kuro}, The Indictment, \textit{supra} note 152.

\(^{306}\) \textit{ezPeer}, The Indictment, \textit{supra} note 137. \textit{Kuro}, The Indictment, \textit{supra} note 152.

\(^{307}\) Crim. Code of Taiwan, art. 29, para. 1 provides: “A person who incites another to commit an offense is an solicitor.” \textit{See JUDICIAL YUAN OF TAIWAN, supra} note 291, at 362.

\(^{308}\) Crim. Code of Taiwan, art. 30, para. 1 provides: “A person who aids another in the commission of a crime is an abettor notwithstanding that the person aided does not know of such assistance.” \textit{See id.}

\(^{309}\) Crim. Code of Taiwan, art. 28 provides: “Each of two or more persons acting jointly in the commission of an offense is a principal offender of the conspiracy.” \textit{See id.}

\(^{310}\) Only prosecutors carry the burden of proof. \textit{Crim. Procedure Code of Taiwan, art. 161.}

\(^{311}\) Crim. Code of Taiwan, art 161 provides: “The public prosecutor shall bear the burden of proof as to the facts of the crime charged of an accused.” \textit{See JUDICIAL YUAN OF TAIWAN, supra} note 291, at 467.
demonstrate that members of ezPeer and KURO commit infringement, and that the owners of ezPeer and KURO knowingly and willfully acquiesced in the illegal behavior of their members ("direct intent") and then jointly acted in the commission of the infringement.\(^{312}\)

The prosecutors accused the owners of ezPeer and KURO mainly based on the existence of the directory indexes or database and the necessity of ezPeer and KURO in the connection between members.\(^{313}\) However, in spite that the owners of ezPeer and KURO established directory indexes or database in the servers and that members cannot link and exchange files with each other without ezPeer and KURO, the prosecutors carry a difficult burden of proof because it is not easy to tell the exact content or uses of downloaded files merely based on the file size.

Instead of “direct intent” under Paragraph 1, Article 13 of the Criminal Code,\(^{314}\) an alternative available to the prosecutors is “indirect intent” under Paragraph 2, Article 13 of the Criminal Code.\(^{315}\) If the defendants foresaw the consequence of copyright infringement and such consequence was not contrary to their will, there existed “indirect intent.” For example, the owners of ezPeer and KURO posted an announcement on their websites telling members that members do not violate the Copyright Act if they, without the intent to profit, just upload and download a few MP3 music files.\(^{316}\) EzPeer and KURO told members that they could do so under the fair use doctrine and the recently amended Copyright Act.\(^{317}\) An announcement like this would lead to the conclusion that the owners were familiar with the related criminal responsibilities of copyright infringement and that they might have idea about what members are

\(^{312}\) Crim. Code of Taiwan, art. 28. Id., at 362.

\(^{313}\) ezPeer, The indictment, supra note 137. Kuro, The indictment, supra note 152.

\(^{314}\) Crim. Code of Taiwan, art. 13, para. 1 provides: “An act is committed intentionally if the actor knowingly and willfully causes the accomplishment of the constitute elements of an offense.” See JUDICIAL YUAN OF TAIWAN, supra note 291, at 359-60.

\(^{315}\) Crim. Code of Taiwan, art. 13, para. 2 provides: “An act is considered to have been committed intentionally if the actor foresaw that the act would accomplish the constituent elements of an offense and such accomplishment was not contrary to his will.” See id., at 360.


\(^{317}\) EzPeer, supra note 316 ; KURO, supra note 316.. Copyright Act of Taiwan, art. 91, para. 2 provides: “A person who infringes on the economic rights of another person by means of reproducing the work without the intent to profit, where the number of copies reproduced exceeds five, or where the total amount of infringement calculated by the market value of lawful copies of the work at the time of seizure exceeds thirty thousand New Taiwan Dollars, shall be punished by imprisonment for not more than three years, detention, or in lieu thereof or in addition thereto a fine of not more than seven hundred and fifty thousand New Taiwan Dollars.” However, this article was amended on Sep. 1, 2004: ” A person who infringes on the economic rights of another person by means of reproducing the work without authorization with the intent to sell or rent shall be imprisoned not less than six months and not more than five years, and in addition thereto, may be fined not less than two hundred thousand and not more than two million New Taiwan Dollars.” Copyright Act of Taiwan, art. 92, para. 2, Intellectual Property Office, Ministry of Economic Affairs, R.O.C., Laws & Regulations: Copyright Act, supra note 147.
doing with the software they provide.

Furthermore, the posted copyright announcement indicates that the owners of ezPeer and KURO were able to predict the infringing uses of their software. Nevertheless, the owners allowed and, even gave legal advices to members to exchange music files without permission, rather than tried to stop the possible infringement. Thus, the consequences of infringing copyrighted music works were not contrary the owners’ will. Moreover, the user’s instruction on the KURO website explicitly teaches users how to use KURO to search the desired music files. Such an instruction would be evidence to support the finding of indirect intent. Hence, the owners of ezPeer and KURO can be considered to have intentionally committed infringement.

B. The Defendants’ Perspective

The defendants in the criminal trials, including the owners of the ezPeer and KURO websites and the users of the ezPeer and KURO software, have the right to remain silent and bear no burden of proving their innocence. Several defenses are available to defendants as well.

Users can use the ezPeer and KURO software to upload and download music files. The liabilities of the users who uploaded music files (“uploaders”) differ from those of the users who downloaded music files (“down loaders”) due to the various content of their activities. The uploaders who uploaded music files without copyright owners’ permission infringed copyright owners’ rights to reproduce, distribute and to transmit a work publicly under the Copyright Act of Taiwan. They may invoke fair use, pursuant to which the courts must consider all circumstances as well as the four factors set forth in Article 65, Subsection 1 of the Act as set forth above.

Because they shared their music files without charge, their use of the copyrighted music works

318 EzPeer, supra note 316; KURO, supra note 316.
320 Copyright Act of Taiwan, art. 3, sec. 1(5) provides: “'Reproduce' means to reproduce directly, indirectly, permanently, or temporarily a work by means of printing, reprography, sound recording, video recording, photography, handwritten notes, or otherwise. This definition also applies to the sound recording or video recording of scripts, musical works, or works of similar nature during their performance or broadcast, and also includes the construction of an architectural structure based on architectural plans or models.” Intellectual Property Office, supra note 147.
321 Copyright Act of Taiwan, art. 3, sec 1(12) provides: “'Distribution' means, with or without compensation, to provide the original of a work, or a copy thereof, to the public for the purpose of trade or circulation.” Id.
322 Copyright Act of Taiwan, art. 3, sec 1(10) provides: “'Public transmission' means to make available or communicate to the public the content of a work through sounds or images by wire or wireless network, or through other means of communication, including enabling the public to receive the content of such work by any of the above means at a time or place individually chosen by them.” Id.
was for a non-commercial purpose. If the uploaders actually owned lawful copies of the music files, they may contend that their file-sharing activities were “reasonable and customary,” analogizing their actions to people who buy music tapes or CDs and who would like to lend the tapes or CDs to their family and friends free of charge.\textsuperscript{323} The courts, however, may hold that because the uploaders made the music files accessible to thousands of downloaders on the Internet, the magnitude of P2P file-sharing activities went far beyond the “reasonable” level. If the uploaders did not even own lawful copies of the downloaded and transmitted music, on the other hand, their non-commercial uses could hardly be deemed reasonable.

Because of their original and creative nature, musical works enjoy more copyright protection than factual works.\textsuperscript{324} The uploaders must upload the whole file for downloaders to be able to download and listen to the music. More importantly, the uploaders’ file-sharing activities would cause substantial harms to the copyright owners’ potential music market because downloaders could save the cost of buying new original music copies by downloading music files via P2P. Such activities clearly interfere with the copyright owners’ entering the MP3 market. Thus, only the first factor, the purpose of the use, will favor the uploaders, while the other three will weigh against them. The courts may determine that there was no fair use and that the uploaders infringed the copyright.

As for the downloaders, they might infringe copyright owners’ rights to reproduce and to distribute. The best defense for them is fair use on the ground of non-commercial personal use. If the downloaders owned lawful music copies, they can argue that the music files downloaded were “space-shifted” from their lawful copies to the computers in order to enjoy the music anywhere based on the \textit{Diamond} case.\textsuperscript{325} Yet, on the other hand, if the downloaders did not own any lawful copies, the courts may rule that their downloading did not constitute fair use because the second to fourth factors, that is, the nature of the copyrighted work, the amount and the portion used, and the effect of the use, weigh against the downloaders just like the they do against the uploaders, as discussed above.

With respect to the owners of the ezPeer and KURO websites, how ezPeer and KURO operate is definitely the key point in the pending trials. If the ezPeer and KURO websites were indeed

decentralized systems, the owners may argue that they neither have control over the swapping of users, nor own the ability to monitor or eliminate potential infringement. Due to the charge of direct infringement and the difficulty of proving the existence of direct intent, the strategy of the owners had better focus on the defenses emanating from the decentralized structure.

In addition, the user’s guide lists several types of files, which can be swapped via ezPeer, such as music, documents, pictures, images, and websites. Thus, the owners of the ezPeer website may argue that its software has other substantial non-infringing uses. Moreover, KURO has developed a new friend-finding function, by which members can make friends and chat with each other and exchange photos and diaries online. This is a strong argument for KURO because this function constitutes a substantial non-infringing use for KURO.

The tough problem exists in the announcements of the related copyright liability posted on the websites. The content of the announcements can hardly be interpreted as an ordinary copyright statement, which merely reminds users not to break copyright laws. What the defendants can argue is that they merely suggest their members upload and download under the restriction of the Copyright Act. This argument is highly unpersuasive, however, because the best defenses should focus on the decentralized feature of operation and the substantial non-infringing uses.

C. The Court’s Perspective

Some researchers think the technology-centric analysis would raise unsolved issues. The direct and secondary infringement, however, involve the judgment of the meus rea element both in civil and criminal procedures. In reality, determining an actor’s intent is always an obstacle in a trial. Demonstrating how technology works not only provides a clue in proving the direct or indirect intent of the owners of the file-sharing websites, but also relates to the application of media neutrality.

With regard to the defendants’ argument about technology neutrality, the prosecutors contended that this principle only applies to the legislative or policy-making aspect. Admittedly, when making copyright laws or policy regarding technology, lawmakers or decision-makers must be neutral. Nevertheless, the technology neutrality doctrine should not be
construed too narrowly. In determining the liability of the intermediary in copyright infringement, as long as the intermediary remains neutral, it can raise the technology or media neutrality principle as a defense.

Because the owners of ezPeer and KURO were accused of direct copyright infringement, the courts cannot expand the scope of the trial beyond the claims alleged in the complaint. The elements of the direct infringement are (1) mens rea element: direct intent; and (2) actus reus element: infringing copyright by the means of reproducing and publicly transmitting. Under the conspiracy theory, the additional element is joint action in the commission of an offence, even though the owners of ezPeer and KURO do not actually engage in the reproduction and transmission of copyrighted works. Consequently, the court may investigate whether the structure of ezPeer and KURO is server-centered or decentralized in order to determine the extent to which the owners get involved in reproducing and transmitting members’ MP3 files. If the servers of ezPeer and KURO play a significant role in the connection of members as in MP3.com, Napster or Aimster, the court should reject ezPeer’s and KURO’s arguments that they have no infringing intent.

On the other hand, if the court finds the feature of decentralization, as in Grokster and KaZaA, the court should take the principle of media neutrality into account. In other words, if ezPeer and KURO merely function as a conduit of the transmission of files, the technology remains neutral. Thus, it is unreasonable to ask the intermediary to supervise or police any transmitted content of members due to the high transaction cost. Moreover, under this scenario, P2P technology and the Internet would be developing with very lax control. Therefore, the owners of ezPeer and KURO should not bear any responsibility for the infringement of their members.

D. The Public Policy Perspective

The development of computer technology advances distribution of information and data with features of “fidelity”, “facility” and “ubiquity.” P2P technology is a useful tool for transmitting information in digital formats. With P2P technology, the public can easily access more copyrighted works than ever before, and thus ignite more creative sparks. This is precisely the

330  Crim. Code of Taiwan, art. 268 provides: “A court shall not try a crime for which prosecution has not initiated.” See JUDICIAL YUAN OF TAIWAN, supra note 291, at 488.
331  Copyright Act of Taiwan, art. 91. See Intellectual Property Office, Ministry of Economic Affairs, R.O.C., Laws & Regulations: Copyright Act, supra note 147.
332  Crim. Code of Taiwan, art. 28. See JUDICIAL YUAN OF TAIWAN, supra note 291, at 362.
333  Crim. Code of Taiwan, art. 28. See JUDICIAL YUAN OF TAIWAN, supra note 291, at 362. As to the operation of ezPeer and KURO, see ezPeer, The indictment, supra note 137. Kuro, The indictment, supra note 152.
334  GOLDSTEIN, supra note 4, at 163.
goal of media neutrality. However, many users use P2P technology as an infringing tool, by which they upload and download copyrighted music files without copyright owners’ permission. They always defend arguing that personal use is shielded under fair use. Such an argument over-simplifies the complex issue because mere non-commercial personal use is not sufficient to justify their infringing activities.

A copyrighted work generates no revenues until it is distributed on the market. Directing copyrighted works into related markets has been the principle of copyright since the Statute of Anne. If a copyrighted work cannot be distributed efficiently, the public will lose opportunities to access the copyrighted work, and future works will decrease. In order to promote authors’ intelligent ideas in physical product markets, media with advanced technology are a critical bridge between authors and the public. Without media’s involvement, authors have difficulties distributing their intelligent ideas to the public. By the same token, the public has limited access to copyrighted works. Media connect authors to the public by allowing authors to know what the public prefers and create future works based on that knowledge.

The incentive to distribute is as important as the incentive to create. The Copyright Act attempts to strike a sophisticated balance between the two. If technology providers can fully develop new forms of media or technology without copyright infringement liability, they can provide the public more advanced tools. Such balance serves the interests of the public. In the case of P2P technology, if the courts rule that the owners of P2P websites are liable, the decisions will defer the progress of new technology. In the end, the owners will shift their transaction costs to customers or users. Such negative consequences are certainly unacceptable to the public because they run afoul of the primary purpose of the copyright system—to maximize the most various and diverse expression while incurring minimal costs. Therefore, media neutrality as technology neutrality should be at the center of new technology issues.

**F. The Approach to New Technology Issues**

On the one hand, copyright owners need economic incentives to continue their creation and the public cannot just enjoy the owners’ music free of charge. On the other hand, the public, especially future authors, also needs more access to copyrighted works. In dealing with new technology issues, understanding how the technology works is critical. Some scholars contend

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335 *Id.*, at 188.
336 *Id.*, at 216.
337 *Id.*, at 211.
that the “technology-centered” method is not a good solution.\textsuperscript{338} However, because in determining secondary liability or direct copyright infringement (criminal liability), the courts have to determine whether the technology provider has knowledge of users’ infringement or intent of infringement, the operation of P2P websites is significant evidence to determine the existence of these \textit{mens rea} elements. For instance, the following aspects of the technology are important:

(1) The User Management System-- Does a user have to register or log in the system before he uses the technology?\textsuperscript{339}

(2) The Relationship between the Technology Provider and the User – Do they come into contact only at the time the service is provided?\textsuperscript{340}

(3) The Scope of Licensing – Is there any licensing agreement? Does the technology provider reserve the right to block the user who infringes copyright or to terminate the user’s account?\textsuperscript{341}

(4) The Structure of the Service Provided – Are the swapped files stored in the server?\textsuperscript{342} Does the service provider operate an index of shared files?\textsuperscript{343} Does the disconnection between the technology provider and the user interrupt any transmission?\textsuperscript{344} Can the technology provider alter the software in the user’s computer?\textsuperscript{345} Does the technology provider offer an “integrated service” including “the site and facilities”?\textsuperscript{346} Are there any substantial non-infringing uses for the technology?\textsuperscript{347}

(5) The Instruction of the Service – Does the technology provider only take music files as an example?\textsuperscript{348} Does the technology provider teach users to use encryption to avoid the judgment of the actual knowledge?\textsuperscript{349} Does the technology provider emphasize the potential infringing usage?\textsuperscript{350}

\textsuperscript{338} Tussey, \textit{supra} note 58, at 30-35.
\textsuperscript{339} \textit{Grokster}, 380 F.3d at 1165.
\textsuperscript{340} \textit{Sony}, 464 U.S. at 438.
\textsuperscript{341} \textit{Napster}, 293 F.3d at 1023-24; \textit{Grokster}, 380 F.3d at 1165.
\textsuperscript{342} \textit{Aimster}, 334 F. 3d at 647-48; \textit{Grokster}, 380 F.3d at 1163.
\textsuperscript{343} \textit{Grokster}, 380 F.3d at 1163.
\textsuperscript{344} \textit{Grokster}, 380 F.3d at 1163.
\textsuperscript{345} \textit{Grokster}, 380 F.3d at 1163-64.
\textsuperscript{346} \textit{Napster}, 239 F.3d at 1022; \textit{Grokster}, 380 F.3d at 1165.
\textsuperscript{347} \textit{Sony}, 464 US at 442.
\textsuperscript{348} \textit{Aimster}, 334 F. 3d at 651-52.
\textsuperscript{349} \textit{Aimster}, 334 F. 3d at 651.
\textsuperscript{350} \textit{Sony}, 464 U.S. at 438.
(6) The Revenue Source – Is the service free of charge? Does any revenue finance the operation of the service?\footnote{Aimster, 334 F. 3d at 652.}

With regard to the line between neutrality and technology providers’ liabilities, as long as the technology stays neutral, the technology provider who plays the role of conduit has no secondary liability for copyright infringement under the media neutrality principle. However, the technology provider who participates in the infringing activity and meets the elements of secondary liability should be held liable for users’ direct infringement. For example, if the technology provider addresses how to use the technology for a potential infringing use in advertisements or users’ guides, he should not be shielded under media neutrality.

**Conclusion**

Sometimes technology seems to be a threat to copyright, but it is likely to become a protective tool for copyright. In a digital world, the most urgent concern about copyright is the issue of what the public is entitled to under the fair use doctrine and whether new technology changes the scope of copyright. Information constitutes societal wealth and belongs to all citizens.\footnote{Litman, supra note 12, at 11.} Technology, which keeps information accessible to the public, is neutral in all circumstances, including copyright matters.\footnote{Samuels, supra note 22, at 124.} Under the media neutrality principle, there is no need to enact another statute to regulate copyright disputes regarding the Internet.

In order to enforce the Copyright Act, the infringement, undoubtedly, must be forbidden. Nevertheless, the magnitude of reproducing copyrighted works by P2P file-sharing causes us to rethink of the value and goal of copyright. The convenient and speedy characteristic of P2P file sharing technology has become a worldwide practice in the Internet. Making good use of the technology will broaden the opportunity of access to copyrighted works and innovative production. If the courts punish the operators of P2P file-sharing service, P2P file-sharing technology will decrease. Such a consequence is not only unacceptable to the public, but it also runs afoul of the ultimate purpose of the Copyright Act—to promote the progress of science and useful art. Copyright owners should cooperate with P2P file-sharing technology, rather than suppress the development of it.

How society views copyright in the digital age is more important. Just like Professor

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\text{\footnotesize{5 Chi.-Kent J. Intell. Prop. 88}}
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Lawrence Lessig said, the law over-protects copyright owners and the future focus on the Internet will be “copy-duty”—copyright owners have a duty to make their works publicly accessible.\(^{354}\) The doctrine of media neutrality behind the Copyright Act and \textit{Sony} will certainly keep copyrighted works available to the public.

\(^{354}\) \textit{LESSIG, supra} note 4, at 127.