Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances

Kathryn Dailey Holt

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GROKSTER AND BEYOND: SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT DURING LIVE MUSICAL PERFORMANCES

Kathryn Dailey Holt

TABLE OF CONTENTS

I. INTRODUCTION .......................................................................................... 175

II. BACKGROUND ........................................................................................... 176
A. COPYRIGHT ACT .......................................................................................... 176
B. VICARIOUS LIABILITY .................................................................................. 178
   1. The Historical Development of Vicarious Liability ...................................... 178
   2. Elements of Vicarious Liability ................................................................. 180
      a. Right and Ability to Supervise and Control the Infringing Conduct ........... 181
      b. Direct Financial Benefit ........................................................................... 182
C. CONTRIBUTORY INFRINGEMENT .................................................................. 183
   1. The Historical Development of Contributory Infringement ......................... 183
   2. Elements of Contributory Infringement .................................................... 183
      a. Knowledge of the Direct Infringement ................................................. 184
      b. Material Contribution to the Direct Infringement ................................. 185

III. ANALYSIS ................................................................................................. 187
A. GROKSTER'S IMPACT ................................................................................. 187
   1. The Supreme Court's Holding in Grokster ................................................ 187
   2. Grokster’s Impact on Secondary Liability ............................................... 189
      a. Impact on Vicarious Liability ............................................................... 189
      b. Impact on Contributory Infringement .................................................. 191
B. RAMIFICATIONS FOR INFRINGEMENT DURING LIVE PERFORMANCES .... 193
   1. Vicarious Liability .................................................................................... 193
   2. Contributory Liability .............................................................................. 194

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173
C. AN AGE-OLD SOLUTION ................................................. 196
   1. Music Licensing Agreements ................................. 196
   2. The Lounge Act Agreement ................................... 198

IV. CONCLUSION ............................................................... 199
GROKSTER AND BEYOND

I. INTRODUCTION

It is a Friday night and you are meeting your friends at a bar to relax and celebrate the beginning of the weekend. You arrive at your destination and notice that a local band is performing tonight. "Great," you think to yourself, "I love live music." You order a drink and the band starts to play a familiar song, something you have heard on the radio dozens of times. This is a common scene, one that does not seem to involve any illegal activity. However, by performing that one song, the band has engaged in copyright infringement and they are not the only ones responsible. On July 13, 2010, the United States District Court for the Central District of Illinois addressed just such a situation, ruling that the owners and operators of Goodfellas Pub & Pizza (Goodfellas) were vicariously liable for thirteen counts of copyright infringement.1

Goodfellas is a restaurant located in Pekin, Illinois that often hires local bands to perform.2 On three separate occasions, Broadcast Music, Inc. (BMI), dispatched investigators to Goodfellas to determine specifically what music was being played.3 During the course of their investigation, BMI discovered the bands hired by Goodfellas were playing copyrighted works without authorization, including such popular songs as "Billie Jean,"4 "I Want You to Want Me,"5 and "I Wanna Dance With Somebody Who Loves Me."6 On May 11, 2009, BMI filed suit for copyright infringement, seeking a permanent injunction against Goodfellas in addition to statutory damages and costs and attorney's fees.7

The court's decision is the result of the steady progression of the law regarding copyright infringement, representing dozens of decisions spanning nearly one hundred years. The purpose of this Note is to discuss the progression of vicarious liability and contributory copyright infringement and their impact on a frequently neglected but quintessential aspect of music: the live performance. Specifically, this Note will examine the Grokster line of case law and assess its effect on more basic forms of musical copyright infringement. While on the surface MGM Studios, Inc. v. Grokster8 appears to be primarily applicable to new and expanding technologies, the court's holding concerning the two principal doctrines of secondary liability—vicarious liability and

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2 Id. at 932.
3 Id. at 933.
4 Id. at 932.
5 Id.
6 Id. at 933.
7 Id. at 933.
contributory infringement—has definite ramifications for copyright infringement during live performances. Part II will examine the historical development of the doctrines of vicarious liability and contributory liability with respect to copyright infringement. Part III will examine Grokster and the impact it had upon the development of the two primary doctrines of secondary liability in the post-Grokster world of copyright infringement. Part III will also examine the relevancy of the post-Grokster rules to the potential liability of the owners and operators of small music venues by applying the rules to the factual situation set forth in Broadcast Music, Inc. v. CDZ, Inc. Finally, Part III will examine the methods of prevention available to the owners and operators of small music venues in order to demonstrate the most effective means of escaping liability.

II. BACKGROUND

A. COPYRIGHT ACT

The United States’ Copyright Act, which establishes rights for authors and creators, is codified at 17 U.S.C. §§ 101, 122. The United States has had a copyright statute on record for much of our nation’s history, with the first such statute appearing in 1790. The 1790 Act protected against the copying of certain printed materials without permission. Congress extended protection to non-dramatic public performances in 1831; however, the statute still permitted dramatic public performances without requiring authorization. The Act was again amended in 1897, this time to include dramatic public performances and musical performances, which were not included within the scope of the amendment. Musical works were finally brought within the purview of the Act in 1909 when Congress replaced the Act with the 1909 Copyright Act. The 1909 Act required a plaintiff to prove three elements to sustain a claim for copyright infringement: (1) the infringer must have performed the copyrighted work, (2) in public, and (3) for profit. The

11 Raines, supra note 10, at 174; Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).
12 Copyright Act of 1831, ch. 16, 4 Stat. 436 (1831).
13 Id.
14 Copyright Act of 1897, ch. 4, 29 Stat. 481 (1897).
15 Id.
17 Id.
Copyright Act of 1976, which took effect on January 1, 1978, replaced the Copyright Act of 1909 and it, along with numerous amendments, represents the current codification of American copyright law.

Section 106 of the Copyright Act sets forth the exclusive rights for which the Act provides protection. Specifically, the Act gives the copyright holder the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." Performing a work publicly is further defined as performing the copyrighted work "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ."

An individual who violates this right is subject to suit for copyright infringement. In order to sustain a prima facie claim for copyright infringement, the plaintiff must prove: (1) the infringer performed a copyrighted work in public without the permission of the copyright holder, and (2) the defendant does not fall within any of the exemptions included within the statute itself. The Act includes several exceptions which relieve the infringer from liability and are codified at 17 U.S.C. § 110. These exceptions include the use of copyrighted works for educational purposes, the use of certain copyrighted works for religious worship, and the use of copyrighted works whereby the infringer does not directly or indirectly profit from the use. Notably, small businesses are also given an exemption.

In order to qualify for the exemption, a small business must "(1) be a small commercial establishment; (2) not make a 'direct charge' to hear the music; (3) employ a 'single receiving apparatus of a kind that . . . ."

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19 ROBERT A. GORMAN, COPYRIGHT LAW 3 (2d ed. 2006).
22 Id. § 101.
23 Id. § 501.
24 Id. § 501(a); Peggy H. Luh, Pay or Don't Play: Background Music and the Small Business Exemption of Copyright Law, 16 LOY. L.A. ENT. L.J. 711, 713 (1996); see also Mob Music Publ'g v. Zanzibar on the Waterfront, ILC, 698 F. Supp. 2d 197, 202 (D.D.C. 2010) (requiring plaintiff prove "(1) originality and authorship of the compositions involved; (2) compliance with formalities required to secure a copyright; (3) plaintiff's ownership of the copyright; and (4) defendant's public performance of the compositions."); Broadcast Music, Inc. v. CDZ, Inc., 724 F. Supp. 2d 930, 934 (C.D. Ill. 2010) ("A plaintiff claiming copyright infringement must establish two elements: 1) ownership of a valid copyright, and 2) copying of constituent elements of the work that are original.").
26 Id. § 110(1), (3)-(4).
commonly used in private homes;’ and finally, (4) ‘the performances must not be further transmitted to the public.’ 28 Furthermore, a copyright infringement action must be filed no more than three years after the accrual of the claim.29

B. VICARIOUS LIABILITY

While the Copyright Act does not explicitly extend liability to secondary infringers, the House Report indicates the legislators intended the Act to extend to individuals other than the primary infringer:

A well established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers…. The Committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right.30

The House of Representatives opined that to be held secondarily liable for infringement, the defendant had to “actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance.”31

1. The Historical Development of Vicarious Liability. In 1927, the Eastern District of Tennessee recognized the applicability of secondary liability to copyright infringement law suits through the doctrine of respondeat superior.32 There, the court held the owners and operators of a movie theatre in Lenoir City, Tennessee liable for copyright infringement resulting from their employee playing a borrowed player piano roll during a showing of a motion picture.33 The court rejected the defendants’ contention that they could not be held liable for copyright infringement because they did not intend for any infringement to occur, stating that “the lack of intention does not affect the fact of liability. The

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33 Id. at 413.
result, and not the intention, determines the question of infringement." The court further held that the employer is liable for any wrongful acts committed by his employee in the course of his employment and that such was applicable despite an order from the employer to the employee to the contrary. In Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., the Seventh Circuit held that the owners and operators of a dance hall were still subject to liability for copyright infringement even though the primary infringer, an orchestra, was an independent contractor. The court reasoned Dreamland Ball Room should be held liable because the orchestra in question performed the copyrighted works for the profit of Dreamland Ball Room, thus meeting the standard for copyright infringement.

In 1963, the Second Circuit announced its opinion in Shapiro, Bernstein & Co. v. H.L. Green Co. In that case, H.L. Green Co. entered into a licensing agreement with Jalen Amusement Company to operate the phonograph record department in twenty-three of H.L. Green's stores. The licensing agreement in question provided H.L. Green with ten to twelve percent of the profits accrued from record sales. In addition, H.L. Green retained the power to fire employees for misconduct. Given these facts, the court held H.L. Green liable for copyright infringement stemming from Jalen's production of bootleg records. Green certainly satisfied one prong of the test for vicarious liability by profiting from the sale of the bootleg records. Additionally, the court found that he satisfied the second prong of its test for vicarious liability. Specifically, H.L. Green was liable because he possessed a supervisory right over Jalen:

[w]hen the right and ability to supervise coalesce[d] with an obvious and direct financial interest in the exploitation of copyrighted materials — even in the absence of actual knowledge that the copyright monopoly [was] being impaired — the

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34 Id. at 414.
35 Id.
36 Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929).
37 Id.
38 Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963).
39 Id. at 306.
40 Id.
41 Id.
42 Id. at 308.
43 Id. at 307.
44 Id.
purposes of copyright law [would] be best effectuated by the imposition of liability upon the beneficiary of that exploitation.45

Because Green had the power to supervise and control Jalen’s conduct, he was in the best position to prevent Jalen from infringing upon copyrights by making the various bootleg records.46

In 1971, the Second Circuit took the ruling in Shapiro a step further. The American Society of Composers, Authors, and Publishers (ASCAP) sued Columbia Artists Management, Inc. (CAMI) for copyright infringement when artists managed by CAMI performed copyrighted works belonging to Gershwin Publishing Company during a community concert.47 The court held that the rule regarding the right and ability to supervise and control the primary infringers’ performance had been satisfied despite an inability to exercise direct control over the primary infringers.48 As the court stated, “even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”49

2. Elements of Vicarious Liability. Vicarious liability for copyright infringement has two requirements: (1) the defendant must possess the right and ability to supervise the infringement, and (2) the defendant must gain financially from the infringement.50 Of course, it should be noted that one cannot be held vicariously liable for copyright infringement without an act of direct infringement.51 Furthermore, the two prongs of the test should be analyzed together, using the “totality of the relationship” approach.52 In employing this approach, a court should look at all aspects of the relationship

45 Id. (citations omitted).
46 Id. at 308.
47 Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1160 (2d Cir. 1971).
48 Id. at 1163.
49 Id. at 1162.
50 RONALD S. ROSEN, MUSIC AND COPYRIGHT 550 (2008); see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (one “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it”); Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (“[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”); MOB Music Publ’g v. Zanzibar on the Waterfront, L.L.C., 698 F. Supp. 2d 197, 206 (D.D.C. 2010) (“It is well established that an individual may be held vicariously liable for copyright infringement if he (i) has the ‘right and ability’ to supervise the infringing activity and (ii) has a ‘direct financial interest’ in such activities.”).
51 ROSEN, supra note 50, at 551; see also A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) (“Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.”).
between the direct infringer and the vicariously liable party pertinent to the
direct infringement. 53

a. Right and Ability to Supervise and Control the Infringing Conduct. The first
prong of the test for vicarious copyright infringement involves the right and
ability to supervise and control the infringing conduct. There are two
predominant views regarding this element—one requiring actual control and
the other requiring only legal control. 54 The actual control view is narrower,
requiring evidence of a continuous connection between the two parties in terms
of the infringing activity. 55 One cannot be held liable under the actual control
standard if one merely had the right to stop the infringing activity, "[t]hus, an
actual-control standard does not extend liability to a defendant who could not
take meaningful steps to prevent infringement."
56 Therefore, the mere
possibility of preventing infringement is not sufficient to establish actual control
absent evidence that defendants exercised any degree of control over the direct
infringers. 57 Some courts have even gone a step further, requiring that there be
evidence of a previous instance of prior control over the particular infringing
activity. 58

The costs of policing the infringing conduct also play a role in determining
whether a court will find that the defendant did in fact exercise actual control
over the infringing conduct. 59 In Artists Music, Inc. v. Reed Publishing, Inc.,
the organizers of a trade show were not held liable for unauthorized renditions of
copyrighted works because the cost of policing potential copyright infringement
would have been prohibitive. 60

The broader view is the legal control standard. 61 The legal control standard
extends liability to anyone who possessed the ability to police the infringing
conduct. 62 Thus, the first prong of the test for vicarious copyright infringement
is satisfied "[w]hether or not the defendant exerted actual control over the

53 Id.
54 Charles S. Wright, Actual Versus Legal Control: Reading Vicarious Liability for Copyright
55 Id. at 1013.
56 Id.
to be vicariously liable for copyright infringement despite satisfying the direct financial benefit
prong because of a dearth of evidence indicating defendants exercised any control).
59 Wright, supra note 54, at 1014.
60 Nos. 93 CIV. 3428 (JFK), 73163, 1994 WL 191643, at *6 (S.D.N.Y. May 17, 1994).
61 Wright, supra note 54, at 1016.
62 Id. See also Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159, 1163
(2d Cir. 1971) (holding defendant concert organizer vicariously liable for copyright infringement
because it was "in a position to police the infringing conduct of its artists").
musicians and their selections. The key factor is whether the defendant controlled or had the right and ability to control the infringing activity." 63

b. Direct Financial Benefit. The second prong of the test for vicarious copyright infringement involves the receipt of a direct financial benefit. Shapiro, the leading case on vicarious liability for copyright infringement, required “an obvious and direct financial interest.” 64 There, the court found this prong to be satisfied by H.L. Green’s collection of ten to twelve percent of Jalen’s bootleg record sales. 65

Courts have increasingly promulgated looser standards, imposing vicarious liability upon a lesser showing of financial benefit. 66 The United States House of Representatives Judiciary Committee found that the financial benefit requirement could be satisfied by either a direct or indirect benefit. 67 One such example of an indirect financial benefit is the “draw theory” developed by the Ninth Circuit in Fonovisa, Inc. v. Cherry Auction, Inc. 68 There, the court found the financial benefit prong could be satisfied by the fact that the sale of infringing works drew customers to the Cherry Auction swap meet. 69 Once the customers had been drawn into the swap meet, Cherry Auction “reap[ed] substantial financial benefits from admission fees, concession stand sales and parking fees.” 70

The “draw theory” does not require the defendant to derive a substantial portion of its income from infringing activity. 71 However, the financial benefit received has to be causally connected to the infringing material. 72 The

64 Shapiro, Bernstein & Co. v. H.L. Green, Co., 316 F.2d 304, 307 (2d Cir. 1963).
65 Id. at 308.
68 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996); 6 PATRY, supra note 52, § 21:68.
69 Fonovisa, 76 F.3d at 263.
70 Id.
71 See 6 PATRY, supra note 52, § 21:68 (citing Ellison v. Robertson, 357 F.3d 1072, 1078 (9th Cir. 2004)).
72 Id.
infringing products also must have been the chief reason why the customers came to the defendant’s location.73

C. CONTRIBUTORY INFRINGEMENT

1. The Historical Development of Contributory Infringement. In 1911, the Supreme Court set forth its ruling in what has become one of the most famous early contributory infringement cases.74 In Kalem Co. v. Harper Bros., the defendant produced an unauthorized reproduction of Ben Hur, the novel by General Lew Wallace.75 The defendant, however, was not sued for the unauthorized reproduction itself, but rather for the subsequent performances of the unauthorized reproduction.76 Justice Oliver Wendell Holmes, writing for the Court, held that the defendant had contributed to the infringement and stated that “[t]he defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story.”77

The most influential contributory infringement case to date is Gershwin Publishing Corp. v. Columbia Artists Management, Inc.78 In that case, ASCAP brought a copyright infringement action against Columbia Artists Management, Inc. for the unauthorized performances of musical pieces—including “Bess, You Is My Woman Now”—at a concert by artists managed by Columbia Artists Management, Inc.79 Although the court ultimately held Columbia Artists Management vicariously liable for copyright infringement, it famously set forth the quintessential test for contributory copyright infringement: “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”80

2. Elements of Contributory Infringement. Contributory copyright infringement has two elements: (1) the defendant must possess knowledge of the direct infringement and (2) the defendant must have materially contributed to the infringement.81 The test for contributory infringement is similar to that of

73 Id.
75 Id. at 60.
76 Id. at 55; 6 PATRY, supra note 52, § 21.45 (2010).
78 443 F.2d 1159 (2d Cir. 1971).
79 Gershwin Publ’s, 443 F.2d at 1160.
80 Id. at 1162.
81 Id.; see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct infringement.”); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001) (defining contributory copyright infringement according to the Gershwin standard); Matthew Bender & Co. v. West
vicarious copyright infringement in two ways. First, like vicarious copyright infringement, one cannot be found contributorily liable unless there is also an instance of direct infringement. Second, the two prongs of the test cannot be analyzed separately. Rather, a court must analyze the knowledge requirement in tandem with the material contribution requirement in order to fully ascertain whether a defendant has contributorily infringed upon another’s copyright.

a. Knowledge of the Direct Infringement. The first prong of the test for contributory copyright infringement requires that the defendant possess knowledge of the direct infringement. This prong can be satisfied by either constructive or actual knowledge, depending upon the requirements of the particular court. The requirement of only constructive knowledge resulted from the Supreme Court’s ruling in Sony Corp. of America v. Universal City Studios, Inc. Universal sued Sony for copyright infringement stemming from the use of one of their products—specifically a home videotape recorder. Purchasers of these home videotape recorders used the devices to record broadcasts of programs copyrighted by Universal Studios. Justice Stevens’s majority opinion stated that for liability to be imposed, Sony must have sold equipment with “constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material.” Sony was ultimately not held contributorily liable for copyright infringement because their product was capable of “substantial noninfringing uses.”

The Seventh Circuit has partially rejected the Supreme Court’s holding in Sony and instead has extended liability for willful blindness, which is essentially a form of constructive knowledge. In the case of In re Aimster Copyright Litigation, the holders of certain copyrighted musical works sued Aimster, an internet service that allowed individuals to “swap” said copyrighted works. Aimster argued that it could not be found contributorily liable because the site’s encryption feature prevented Aimster from knowing which songs were being

Publ’g Co., 158 F.3d 693, 706 (2d Cir. 1998) (finding contributory liability where either “(i) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the infringement” exists).

6 PATRY, supra note 52, § 21:46.
8 Id. § 21:47.
84 Id.
88 Id. at 420.
89 Id. at 439.
90 Id. at 456.
91 6 PATRY, supra note 52, § 21:47.
92 In re Aimster Copyright Litigation, 334 F.3d 643, 644 (7th Cir. 2003).
copied by their users. Judge Posner, writing for the majority, rejected Aimster's willful blindness argument and held that "[o]ur point is only that a service provider that would otherwise be a contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used."94

Other courts have found liability premised upon actual knowledge of specific acts of copyright infringement.95 For example, in *A&M Records, Inc. v. Napster, Inc.*, the plaintiff record company sued Napster for the "reproduction and distribution of copyrighted works" by the company's users.96 The Ninth Circuit declined to hold Napster liable for contributory copyright infringement merely because its product was not capable of substantial non-infringing uses unlike the VCR in *Sony*.97 Rather, the court stated that "absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material."98 Ultimately, despite failing to impose liability, the court found that Napster met the requisite knowledge requirement because it had actual knowledge of specific instances of infringement and had the ability to block the providers of the infringing articles.99

**b. Material Contribution to the Direct Infringement.** The second prong of the test for contributory copyright infringement requires that the defendant materially contributed to the direct act of infringement. In determining whether the defendant is liable for contributory infringement, a court will look at the role played by the defendant in the infringing activity.100 In *Livnat v. Lavi*, a case concerning liability for the publication of a photographer's nude photographs, the district court aptly described the material contribution requirement of the test, stating that "[i]n order for liability to be imposed, the alleged contributory infringer must make more than a 'mere quantitative contribution' to the primary infringement. . . . Participation in the infringement must be substantial."101

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93 Id. at 650.
94 Id. at 650–51.
97 Id. at 1021.
98 Id.
99 Id. at 1021–22.
100 6 PATRY, supra note 52, § 21:48.
There are two ways to satisfy the material contribution prong. First, material contribution can be achieved through active causation, also known as inducement. In *Jalbert v. Grautski*, the court found that this prong of the contributory infringement test required active rather than passive involvement, holding that “mere knowledge, even knowledge based on willful blindness, is not sufficient to show contributory infringement. Proof of contributory infringement also requires proof that a person induced, caused or materially contributed to the infringing conduct of another.” Specifically, the court found a printing company not to be contributorily liable for copyright infringement where one of its employees had taken a few copies of a print and distributed them to other individuals. The owner of the print shop was found not to have actively contributed to the directly infringing activity.

The second way of satisfying the material contribution requirement is through providing the means of infringement, often referred to as the “site and facilities” standard. The most well-known example of this method is found in *Fonovisa*. As discussed above, the court in *Fonovisa* found that Cherry Auction had materially contributed to the direct infringement by one of its vendors through the “provision of space, utilities, parking, advertising, plumbing, and customers.” Cherry Auction argued that its involvement in the direct infringement was passive at best. The court rejected this argument, instead stating that “Cherry Auction actively str[ove] to provide the environment and the market for the counterfeit recording sales to thrive. Its participation in the sales cannot be termed ‘passive,’ as Cherry Auction would prefer.”

Another example of this interpretation of the material contribution prong is found in *Columbia Pictures Industries, Inc. v. Aveco, Inc.* Plaintiff film producers distributed copies of their motion pictures on videotapes. Defendant Aveco owned and operated an establishment which rented such videotapes for viewing in either one of its private rooms or the individual’s home. Plaintiff

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102 6 PATRY, supra note 52, § 21:48.
103 Id.
105 Id. at 63–67.
106 Id. at 72.
107 6 PATRY, supra note 52, § 21:48.
108 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).
109 Id.
110 Id.
111 Id.
112 Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986).
113 Id. at 61.
114 Id.
producers sued Aveco for copyright infringement, alleging that Aveco had authorized the public performances of their films. The court found Aveco contributorily liable for copyright infringement, basing its finding on the fact that “Aveco encourages the public to make use of its facilities for the purpose of viewing such tapes and makes available its rooms and equipment to customers who bring cassettes with them.”

III. ANALYSIS

A. GROKSTER’S IMPACT

1. The Supreme Court’s Holding in Grokster. In 2005, the Supreme Court rendered a decision that would seriously impact secondary liability for copyright infringement. On June 27, the Court issued its opinion in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. Metro-Goldwyn-Mayer (MGM), in addition to other copyright holders, sued defendants Grokster and StreamCast for secondary copyright infringement, claiming that “they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act.”

Grokster and StreamCast provided free computer software that enabled users to share computer files through peer-to-peer networks. The software allowed users to download files directly from the computers of other users. Specifically, a user’s request went to a “supernode computer,” which indexed the available files. Once the requested file had been located, its location was given to the requester and he or she had the option to directly download the file from the computer possessing it. If the requesting user chose to download the file, it was copied and placed in a shared folder on the individual’s computer. Other users of the software were then able to download the file from the original requesting user as well.

115 Id. at 61–62.
116 Id. at 62 n.3. See also H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674 (expressing that a “person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance”).
118 Id. at 920–21.
119 Id. at 919–20.
120 Id. at 921–22.
121 Id.
122 Id.
123 Id. at 921.
124 Id.
MGM provided the Court with empirical evidence indicating that close to 90% of the downloadable files on the system in question were copyrighted works. Furthermore, Grokster and StreamCast conceded that they were aware that many users used their software to download infringing works. Justice Souter, writing for the majority, summarized the factual basis, stating that "the record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement."

In prior proceedings the district court found direct copyright infringement on behalf of the individuals who downloaded files using the two companies' software. However, the court granted summary judgment in favor of Grokster and StreamCast on the issue of contributory infringement by third-party users because it found that they did not materially contribute, through either active or substantial involvement, to the act of direct infringement.

The Ninth Circuit affirmed the district court's ruling because MGM had not satisfied either prong of the contributory infringement analysis. The court required actual knowledge of specific infringing acts for the imposition of liability where the product in question was also capable of substantial non-infringing uses. The court further found the material contribution element to be lacking because defendants' contributions were only incidental to the direct activity and therefore could not constitute a substantial contribution.

The Supreme Court granted certiorari. In delivering its decision, the Court adopted the rule of inducement from patent law. The rule of inducement places liability upon "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, [making that person] liable for the resulting acts of infringement by third parties." The Court further stated that this rule required the secondary infringer to engage in purposeful

125 Id. at 922.
126 Id. at 923.
127 Id. at 923-24.
129 Id. at 1043.
131 Id. at 1162.
132 Id.
134 Id. at 936 n.11.
135 Id. at 936-37.
and blameworthy conduct. Grokster and StreamCast intentionally injected themselves into a market whose participants were infamous for engaging in copyright infringement, yet they purposely failed to develop mechanisms for preventing infringing conduct. In addition, the Court found that the high volume of advertisements directly correlated to acts of direct infringement, indicating an intent to promote such uses by both Grokster and StreamCast.

The rule of inducement also requires a showing of actual infringement by the users of the software. The Court declared the record to be teeming with evidence of innumerable instances of copyright infringement by Grokster's and StreamCast's users. This, coupled with the finding of intentional conduct by both Grokster and StreamCast, was sufficient for MGM to withstand a motion for summary judgment.

In so holding, the majority rejected the Ninth Circuit's application of the Supreme Court's holding in Sony Corp. of America v. Universal Studios, Inc. Unlike Sony's production of the VCR, the actions of both Grokster and StreamCast went beyond merely distributing a product capable of infringing uses. Rather, both companies intentionally encouraged and profited from the direct infringement of their users. In the end, "[i]f liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objection was."


a. Impact on Vicarious Liability. While the Supreme Court premised its decision in Grokster upon contributory liability, the decision still has ramifications on vicarious liability. Notably, the Supreme Court cited the vicarious liability test for copyright infringement promulgated by the Second Circuit in Shapiro, Bernstein & Co. v. H.L. Green Co. This test sets forth a standard for the financial benefit requirement that requires a more direct
connection than that previously demanded by the Ninth Circuit. As a result, many lower courts could interpret the Supreme Court's dicta in *Grokster* as an affirmative endorsement of the Second Circuit's test for vicarious liability and thereby insist upon a more substantial showing of a direct financial benefit as opposed to the more attenuated prerequisite called for by the Ninth Circuit. The subsequent application of the stricter standard can readily be seen in *Broadcast Music, Inc. v. CDZ, Inc.*, where the District Court for the Central District of Illinois applied the test set forth by the Supreme Court in *Grokster*. The widespread adoption of the stricter standard could result in the possible decline of copyright infringement claims predicated upon the theory of vicarious liability, especially in those instances where the plaintiffs have evidence of an intent to cause the infringement on behalf of a third party.

The philosophical underpinnings of the Supreme Court's decision could also impact the application of vicarious copyright infringement. In *Grokster*, the Court indicated that the imposition of liability upon both Grokster and StreamCast was appropriate because of "the impossibility of enforcing rights in the copyrighted works against the millions of direct infringers who used Grokster." Under this principle, the doctrine of vicarious liability for copyright infringement is a form of risk allocation. The owners and operators of performance venues are generally in a far better position to incur the financial penalties resulting from copyright infringement. The copyright holder's chance for receiving adequate retribution is thus maximized by holding the employer or venue owner vicariously liable for the direct infringement.

Importantly, the Supreme Court's decision in *Grokster* may have called into question the continued existence of vicarious liability within the world of copyright infringement. Vicarious liability had historically been widely employed because plaintiffs were not required to prove knowledge on behalf of

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148 Coats et al., *supra* note 146, at 245.
149 Id.
151 Coats et al., *supra* note 146, at 245.
152 Bartholomew, *supra* note 95, at 461.
153 Id.
154 6 *PATRY*, *supra* note 52, § 21.62.
156 Id. at 398.
the secondary infringer. Following *Grokster*, some lower courts combined the doctrines of vicarious liability and contributory infringement into one single doctrine of secondary liability. This is particularly worrisome because it is now possible to impose contributory liability upon a showing of intent to induce or cause infringement absent knowledge of specific acts of infringement. It is therefore becoming increasingly unnecessary for plaintiffs to plead vicarious liability for copyright infringement when the freshly broadened theory of contributory infringement can fully address the alleged infringement scenario.

### b. Impact on Contributory Infringement

The most far-reaching and important implications of the *Grokster* decision have been on the doctrine of contributory liability. Unfortunately, the decision has left the field just as muddled and confusing as before, if not more so. Since the 2005 decision, some courts have read the knowledge requirement as requiring a showing of reasonable knowledge. A few courts have taken the expanded notion of the knowledge requirement even further, stating that mere notice is sufficient to satisfy the scienter requirement. The District Court for the District of Columbia is one such court. In *Newborn v. Yahoo!, Inc.*, the court held that the knowledge prong of the analysis could be satisfied by demonstrating that the defendant had been notified of specific infringing acts and either failed to take steps to stop the infringing conduct or engaged in willful blindness concerning the possible infringement. Other jurisdictions have continued to apply the Ninth Circuit standard requiring knowledge of specific acts of infringement. These jurisdictional variations in the scienter requirement demonstrate that fault is becoming the primary inquiry in the legal analysis of third-party copyright infringement, just as the Supreme Court intended.

Flexibility is also evident in the variation between the courts’ analyses of the material contribution prong. Some courts have imposed liability for

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158 Id.
159 Bartholomew, supra note 95, at 461.
160 Hirning, supra note 157, at 19.
161 Id.
162 Bartholomew, supra note 95, at 455.
163 Id. at 455–56.
164 6 PATRY, supra note 52, ¶ 21:47, n.23.
166 Bartholomew, supra note 95, at 455.
168 Bartholomew, supra note 95, at 457.
indirectly facilitating the infringing acts. For example, the Ninth Circuit has found material contribution in cases where the defendant could have "take[n] simple measures to prevent further damage' to copyrighted works, yet continue[d] to provide access to infringing works." In Perfect 10, Inc. v. Amazon, Inc., Perfect 10, a company that markets, copyrights, and sells pictures of naked models, operated a website containing these images which required a subscription for access. While Google's image search feature did not include the images requiring a subscription, it did include those copies of the images that individuals uploaded to the internet without authorization from Perfect 10. Perfect 10 sued Google, alleging, among other claims, contributory infringement. The Ninth Circuit remanded the case to the district court for a determination of whether Google materially contributed to the directly infringing conduct by providing access to infringing images because it was not clear from the record whether Google could have taken steps to feasibly prevent the infringing conduct.

Furthermore, Amazon.com set forth three factors that justified the imposition of liability for contributory infringement, especially when the material contribution prong is satisfied by demonstrating that the defendant could have taken reasonable steps to prevent the infringement. The three factors are: (1) the difficulty or cost of taking a precaution against infringement; (2) the effectiveness of the precaution -- i.e. the amount of infringement the precaution prevents; and (3) the amount of non-infringing behavior simultaneously supported by the defendant.

The first factor prevents defendants from having to enact measures that are unduly burdensome to them in order to escape liability. In other words, if the measures necessary to impede infringement are excessively expensive or unrealistic, the defendant will not be punished for his inability to take such steps. The second factor is fairly straightforward: the more effective the precaution at preventing copyright infringement, the more favored it will be within the judicial system. The third factor is more complex. Essentially, the likelihood that the defendant is culpable is proportional to the infringing nature of the conduct to which he
The greater the likelihood that the defendant is contributing to the activity because of the activity's non-infringing uses, the greater the justification for his support of the infringing activity.\textsuperscript{179}

Other factual situations have led courts to base a finding of liability upon a more direct connection regarding the material contribution.\textsuperscript{180} In \textit{Perfect 10, Inc. v. Visa International Service Ass'n}, the Ninth Circuit demanded a stronger showing of material contribution for the imposition of liability than it previously articulated in \textit{Amazon}.\textsuperscript{181} In the \textit{Visa} case, Perfect 10 sued Visa for processing credit card transactions to websites that directly infringed upon their copyrights.\textsuperscript{182} The court found that “[t]he credit card companies cannot be said to [have] materially contribute[d] to the infringement in this case because they [had] no direct connection to that infringement.”\textsuperscript{183} The court based its finding on the fact that Visa did not contribute to the reproduction, alteration, display, or distribution of the infringing material; rather, they merely provided a mechanism that allowed the direct infringers to profit.\textsuperscript{184} It should be noted that this formulation of the material contribution requirement is not inconsistent with that set forth by the same circuit in \textit{Perfect 10 Inc., v. Amazon, Inc.}\textsuperscript{185} In that case, Google clearly displayed infringing material, thus materially contributing to the direct infringement. However, the difference between the cases seems to be that the situation faced by Visa demanded a more substantial showing of material contribution than that set forth in \textit{Amazon}.

B. RAMIFICATIONS FOR INFRINGEMENT DURING LIVE PERFORMANCES

At first blush, it may seem that \textit{Grokster} has little applicability outside the context of copyright infringement stemming from the use of technological innovations such as the internet. While it is true that some of the rules handed down in the post-\textit{Grokster} era are limited to technological advancements, some of the rules could have an impact upon the more traditional areas of copyright infringement, such as live musical performances.

1. \textit{Vicarious Liability}. The \textit{Grokster} decision could be interpreted as prohibiting the imposition of vicarious liability even where the defendant has

\begin{itemize}
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{180} See Bartholomew, supra note 95, at 458 (arguing courts denied contributory copyright liability because the contract between the defendant and the direct infringer was too indirect).
  \item \textsuperscript{181} Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007).
  \item \textsuperscript{182} \textit{Id.} at 792.
  \item \textsuperscript{183} \textit{Id.} at 796.
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{Id.} at 801.
\end{itemize}
satisfied the direct control prong of the vicarious liability test. Thus, if the owner or operator "takes reasonable precaution against the probability of harm to the plaintiff," he will not be found liable for secondary copyright infringement. The owner or operator of a music venue can evade liability if he exercises control but ultimately fails to prevent the侵权conduct.

Applying this concept to the fact pattern set forth in Broadcast Music, Inc. v. CDZ, Inc., the owners and operators of Goodfellas could evade liability if they are able to demonstrate that they took "reasonable steps" to prevent the local musical artists from engaging in copyright infringement, even if they were not successful and the artists still performed copyrighted material.

On the other hand, the aforementioned philosophical underpinnings of the Grokster decision could militate in favor of the imposition of vicarious liability in many situations involving the live performance of music. The theory of risk allocation is particularly attractive in contexts such as Broadcast Music, Inc. v. CDZ, Inc. It is far easier and more cost-effective for the copyright holder to sue the owner or operator of the music venue rather than each individual performer for the violation of a copyright. Furthermore, given the nomadic nature of many musicians and performers, it would be difficult for victims of infringement to locate those performers directly responsible for violating their copyrights in order to serve them with process. In light of this economic viewpoint, the owners and operators of the music venues are in the best position to address the harms resulting from copyright infringement, whether or not they intended such infringement to occur. The interests of those affected by copyright infringement are thus more adequately served by placing the blame on individuals who are arguably responsible and also financially prepared to deal with the aftermath.

2. Contributory Liability. The impact of contributory liability on copyright infringement resulting from live musical performances is more difficult to ascertain. The vast majority of post-Grokster case law deals with infringement in the internet context; therefore, its application to the performance of live music appears tenuous. However, the principles articulated in cases following the implementation of Grokster, particularly those arising out of the Ninth Circuit, may have a wide range of applicability.

186 Yen, supra note 167, at 228-29.
187 Id.
188 Id.
189 See Litchman & Landes, supra note 155, at 398-99.
190 Id. at 399.
191 Id.
Initially, the doctrine of vicarious liability was far more attractive to plaintiffs pleading infringement by musical performers. This could be explained by the fact that vicarious liability is essentially a form of strict liability. Thus, plaintiffs who pled vicarious liability were not required to prove knowledge on the part of the defendant regarding the infringing acts. The post-

Grokster line of cases appears to have loosened the scienter requirements traditionally associated with contributory liability, making this doctrine far more appealing to plaintiffs. The expansion of the knowledge requirement to encompass notice of the specific infringing acts set forth in Newborn v. Yahoo! Inc. is arguably applicable to infringement that results from performances of live music.

The rule stated in Broadcast Music, Inc. v. CDZ, Inc., could also apply in the live performance context. In that case, BMI sent the defendants numerous letters between March 8, 2004 and April 16, 2009 informing them that they needed a license to allow performances of copyrighted material in their restaurant. BMI also sent representatives to Goodfellas on three separate occasions where they observed specific instances of infringement that they reported to defendants. This is a clear example of a defendant receiving notice of specific instances of infringing conduct. Under the rule articulated in Newborn, the owners and operators of Goodfellas would satisfy the knowledge requirement of contributory liability, despite lacking actual knowledge of specific infringing acts as originally required for liability prior to Grokster.

The newer interpretations of the material contribution requirement also provide increased opportunities for plaintiffs to successfully plead contributory infringement in this type of situation. The indirect connection found to satisfy the material contribution prong in Perfect 10, Inc. v. Amazon, Inc. is readily applicable to the live music context. To satisfy the material contribution requirement, the defendant merely has to have been in the position to take simple steps to prevent subsequent infringement but failed to do so. The owners and operators of Goodfellas, in addition to other owners and operators of small music venues, conceivably could have taken a simple step, such as looking over the artists’ set lists prior to their performances, in order to evade

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192 See Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929) (imposing liability on dance hall operators for the infringing conduct of an orchestra); Gershwin Publ’g Corp. v. Columbia Artists Mgmt., 443 F.2d 1159, 1162-63 (2d Cir. 1971) (holding a concert organizer vicariously liable for the infringement by artists performing at the concert).


194 Id. at 228.


196 Id. at 933.

liability. However, without evidence of such actions, the owners could face liability for contributory infringement under this formulation.

Furthermore, if the court accepts the factual analysis described by Yen, the contributions of defendants such as those in *Broadcast Music, Inc. v. CDZ, Inc.* could be found somewhat justifiable, especially in light of the third factor—the non-infringing nature of the defendant’s activity in comparison to its infringing nature.\(^{198}\) Under this balancing test, it could be entirely reasonable for owners and operators of music venues to provide the opportunity for copyright infringement, despite potentially knowing that it is occurring, if their primary purpose is to bring in customers for activities unrelated to the infringement, such as purchasing food and beverages.

The stricter interpretation of the material contribution prong embraced by the Ninth Circuit can also find its place within more traditional areas of copyright infringement. *Perfect 10, Inc. v. Visa International Service Ass’n* indicated that evidence of a contribution to the reproduction, alteration, display, or distribution of infringing material was necessary for a finding of material contribution. This articulation of material contribution is easily satisfied in the music venue context. One could easily argue that the owners and operators of music venues such as Goodfellas Pub contribute to the reproduction of infringing musical works by providing the performers access to a venue, sound equipment, and perhaps most importantly, an audience.

C. AN AGE-OLD SOLUTION

Obviously, it is still not clear what conduct on behalf of a live music venue constitutes secondary liability for copyright infringement. The best solution for the owners and operators of these venues is to be proactive and obtain a license for the performance of musical compositions.

1. *Music Licensing Agreements.* There are three performing rights associations: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage, Authors and Composers (SESAC).\(^{199}\) The songwriter or publisher grants the performing rights society the nonexclusive right to license the nondramatic performance of his works.\(^{200}\) A nondramatic performance is a performance of a piece of music that is not part of an identifiable plot.\(^{201}\) The performing rights society then grants licenses to entities such as radio broadcasters, television broadcasters,

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198 Yen, supra note 175, at 522.
200 Raines, supra note 10, at 181.
concert halls, hotels, night clubs, and public arenas.\textsuperscript{202} The society collects fees for these licenses and distributes the appropriate shares of these fees to the songwriters or publishers.\textsuperscript{203}

The primary form of licensing employed by the performing rights societies is the blanket license. Entities are able to pay an annual fee for the ability to play any of the compositions within the performing rights society's expansive catalogue of music.\textsuperscript{204} The fee a music venue is required to pay in exchange for this right, if music is performed in the venue on a regular basis, is usually based on several factors, including: “the seating capacity of the venue, whether there is an admission charge, the amount of the admission charge, the weekly music budget for live performances, and the number of hours per week musical entertainment is provided to a paying audience.”\textsuperscript{205} If, on the other hand, music is played at the location rarely or irregularly, then the performing rights society may collect fees from the promoter or producer.\textsuperscript{206}

The agreement to license a songwriter or publisher's musical compositions also includes a right to enforce the copyright.\textsuperscript{207} The performing rights society is given the right to litigate any infringement claims and to collect any damages resulting from such litigation.\textsuperscript{208} This explains why BMI has standing as the plaintiff in the case at issue here,\textit{Broadcast Music, Inc. v. CDZ Inc.}, rather than the individual writers of the popular songs infringed upon by the performers. In addition to the right to initiate copyright infringement litigation, the performing rights society generally also possesses the right to join in any lawsuits commenced by the songwriter or publisher and in any lawsuits commenced against the songwriter or publisher.\textsuperscript{209}

These licensing agreements serve as insurance policies of sorts—they protect against acts of infringement by musical performers by allowing the owners and operators of live music venues to pay a relatively small annual fee for the right to have any songs they wish performed. This seems like quite an attractive solution and is perhaps the wisest choice for the owners and operators of live music venues. However, the licensing agreements' monopolistic nature has been called into question by some.\textsuperscript{210} In \textit{Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.}, Columbia Broadcasting Systems

\begin{thebibliography}{200}
\bibitem{202} M\textsc{uller, supra note 199, at 127.}
\bibitem{203} \textit{Id. at 127–28.}
\bibitem{204} \textsc{Kohn \\& Kohn, supra note 201, at 878.}
\bibitem{205} M\textsc{uller, supra note 199, at 130.}
\bibitem{206} \textit{Id.}
\bibitem{207} \textit{Id.}
\bibitem{208} \textit{Id.}
\bibitem{209} \textit{Id. at 132.}
\bibitem{210} \textit{Id. at 132–33.}
\bibitem{210} \textit{See Raines, supra note 10, at 182.}
\end{thebibliography}
(CBS) sued BMI and ASCAP, claiming that their blanket licensing scheme constituted price fixing, a violation of the Sherman Antitrust Act.211 The Court rejected CBS's claim, finding that "in the face of available alternatives including direct negotiation with individual copyright owners, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions."212 The seemingly boundless amount of power wielded by the performing rights societies in regard to granting licenses is not without its limitations. Both BMI and ASCAP signed decrees which restricted their practices.213 The "Amended Final Judgment," the decree signed by ASCAP, requires that the organization (1) give a license to anyone who wants one as long as they agree to pay a reasonable fee; (2) does "not discriminate against similarly situated users"; and (3) in the event that the individual requesting the license and ASCAP cannot come to an agreement concerning the reasonable fee, ASCAP will consent to whatever fee the District Court for the Southern District of New York deems reasonable.214 The decree signed by BMI differs from the ASCAP decree in that it does not provide a mechanism for judicial intervention when the parties cannot agree upon a reasonable fee.215 Thus, the owners and operators of live music venues are not left at the mercy of the giant performance rights organizations.

2. The Lounge Act Agreement. If the music venue is one that infrequently engages artists to perform live music or if they do not wish to go through one of the performing rights organizations, another alternative is available. A lounge act agreement is a contract between the musical artist and the venue that sets out the terms of the performance.216 A lounge act agreement contains a number of provisions, several of which are especially pertinent to the avoidance of secondary liability for copyright infringement. First, the agreement often contains a questionable material provision, which requires the performer to submit whatever he plans to perform for approval, in order to screen the material for questionable, offensive, or obscene content.217 While perhaps not its primary purpose, the provision could satisfy the reasonable step requirement set forth in Perfect 10, Inc. v. Amazon, thereby alleviating the venue of the potential imposition of contributory liability.

212 Id. at 2.
213 Raines, supra note 10, at 183.
214 Id.
215 Id. at 183–84.
216 MULLER, supra note 199, at 273.
217 Id. at 276.
Second, the music venue could insert a provision that requires the artist to only perform original material.\footnote{Id. at 279.} Under this provision, the artist would be prohibited from performing any work that is not original and belonging solely to the artist.\footnote{Id. at 279.} The artist would also agree not to “infringe on the rights of any other person or third party, including rights of publicity, privacy, and copyright.”\footnote{Id.} Any violation of this provision would constitute a breach of contract, and in the event of a copyright infringement suit initiated by one of the performing rights societies, the music venue would be able to sue the artist to recoup its losses for any liability caused by their direct infringement.\footnote{Id. at 280–81.} The music venue could also insert an indemnification provision that would render the artist rather than the venue responsible for any legal issues arising from any claims commenced against the venue resulting from breaches of the agreement by the artist.\footnote{Id. at 279.}

Finally, the lounge act agreement could contain language that expressly states that the performer is an independent contractor.\footnote{Id. at 281.} This means that the artist is not an employee of the venue and that the artist does not have any other traditional business relationship with the venue.\footnote{Id.} Thus, the venue would be generally relieved of all legal responsibilities for the artist’s actions if such an agreement were used.\footnote{Id.}

IV. CONCLUSION

The Supreme Court’s decision in *Grokster* did little to clear the muddied waters surrounding secondary liability in the world of copyright infringement. Different versions of the two concepts still abound from circuit to circuit regarding the various elements of both vicarious and contributory liability, leaving those outside of the legal community more confused than ever. Clearly, the emphasis has shifted from an imposition of strict liability to favoring fault-based liability. Application of the post-*Grokster* rules imposing fault requirements upon the owners and operators of live music venues has the potential to prevent the inequitable infliction of liability upon innocent individuals for the conduct of autonomous musical groups. However, the shift to fault-based theories of liability has also resulted in the expansion of the

\footnote{Id. at 281.}
\footnote{Id. at 281.}
\footnote{Id. at 279.}
\footnote{Id. at 279.}
\footnote{Id. at 279.}
\footnote{Id. at 279.}
\footnote{Id. at 279.}
\footnote{Id. at 279.}
knowledge requirement under contributory liability, meaning more owners and operators could now be subject to contributory liability as compared to the pre-Grokster era.

The post-Grokster decisions also indicate that the owners and operators of live music venues could be liable for a wide range of conduct, from seemingly tenuous connections to direct infringement to clear-cut instances of contribution. While the expansive spectrum of material contribution appears to shed little light on the level of conduct sufficient to preclude liability, the new rules indicate there are steps that an individual could take to evade the imposition of either vicarious or contributory infringement liability.

Ultimately, the only thing that is perfectly clear is that, because of the distinct lack of clarity that exists in this area of the law, it is wise for live music venues to be proactive and protect themselves. This can be accomplished through obtaining a license from one of the performing rights organizations or through entering into a contractual agreement with the actual performer in an attempt to allocate liability to the party actually responsible for the potential copyright infringement. Perhaps the rules promulgated in the post-Grokster era will restore an element of fairness to the imposition of liability for copyright infringement by punishing those truly responsible. Perhaps nothing will change at all. But, it is possible that the post-Grokster rules regarding secondary liability could find a niche within the more traditional areas of copyright infringement.