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**IMPLICATIONS OF *GROKSTER* FOR ONLINE TICKET SALE
COMPANIES: WHY ONLINE TICKET RESALE SITES SHOULD BE
HELD LIABLE FOR VIOLATING STATE SCALPING LAWS**

***Hannah R. Short*¹**

The Metro-Goldwyn-Mayer Studios v. Grokster decision extended secondary liability for copyright infringement to companies who distribute software that enables its users to commit infringement. The theory of holding Internet-based companies liable for enabling users to violate laws can be applied outside the narrow context of copyright law. A host of websites allow users to scalp tickets via the Internet. Among them is StubHub.com, a particularly successful ticket resale website. Many users of StubHub.com violate state scalping laws. StubHub.com places the responsibility of compliance with scalping laws solely on its users. Attorneys general and local law enforcement agencies may find it difficult to enforce ticket sales laws against individual scalpers who use the Internet to resell tickets. Grokster may offer an approach for holding the operators of ticket resale sites secondarily liable for illegal activity of their users.

I. INTRODUCTION

Websites that encourage or facilitate ticket scalping in violation of state laws may be challenged under *Metro-Goldwyn-Mayer Studios v. Grokster* (“*Grokster*”).² In the spring of 2005, the Supreme Court in *Grokster*³ decided that companies cannot shield themselves from copyright liability for their customers’ infringing

¹ J.D. Candidate, University of North Carolina School of Law, 2007. Special thanks to Professor Laura Gasaway, Director of the Law Library and Professor of Law, University of North Carolina School of Law, for editing advice and useful background information on copyright law.

² *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, No. 04-480 (U.S. June 27, 2005).

³ *Id.*

acts with the defense that the customer, and not the company, is breaking the law. Currently, various websites offer their customers a forum for buying and selling sports and entertainment tickets from and to other online users. By doing so, many users violate their state's scalping laws. To date, companies that offer services allowing individuals to violate state scalping laws have not been subject to law enforcement actions. Similar to the companies involved in the *Grokster* decision, these companies have generally claimed they were not breaking the law—their customers were.

This Recent Development argues the United States Supreme Court's decision in *Grokster*⁴ can be used by law enforcement agencies to hold liable companies that facilitate ticket scalping in violation of state laws. First, this Recent Development summarizes *Grokster* and places it within its underpinning legal theory. Second, it provides a brief overview of state scalping laws and explains how companies that provide an online forum for buying and selling tickets also provide an online forum for users to violate state scalping laws. StubHub.com will be used as an illustration. Third, this Recent Development analogizes between the practical and economic reasons for indirect liability for copyright infringement and similar reasons for indirect liability for online ticket scalping. In both instances, it is either more efficient or more practicable to pursue the entity enabling the legal violation, rather than the individuals taking part in the violation. Finally, this Recent Development argues that state law enforcement agencies could use the *Grokster* decision to prosecute companies that facilitate online ticket scalping. Both situations involve a novel form of technology that facilitates violations of the law.

II. HOW DID GROKSTER INFRINGE COPYRIGHTS?

A. Copyright Law

The United States Constitution grants Congress the power to enact copyright law in the Copyright Clause: "Congress shall have

⁴ *Id.*

the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their . . . writings and discoveries.”⁵ Title 17 of the United States Code details the scope and subject matter of copyright protections, defines “infringement” and prescribes remedies.⁶ Copyrightable material must be original to the author.⁷ The philosophy behind granting copyrights is that the public benefits from creative works, and in order to ensure the production of creative works, individuals must be rewarded with exclusive rights in their works.⁸ Thus copyright law aims to make available to the public creative works,⁹ while rewarding the authors of such works.¹⁰

B. *Notable Exceptions*

Generally, copyright infringement occurs when original elements of a work owned by a valid copyright holder are copied without permission.¹¹ Each instance of copying without permission does not necessarily constitute infringement,¹² but instead may be deemed “fair use”¹³ or covered by another statutory exception. Section 107 of Title 17 of the United States Code sets out the doctrine of fair use: “[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an

⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶ Copyrights, 17 U.S.C. §§ 101-122, 501 (2000).

⁷ *Feist Publications, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

⁸ 1 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1-3, 3.1 (1976).

⁹ 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14 (3d ed. 2005).

¹⁰ *Id.*

¹¹ *Feist*, 499 U.S. at 360.

¹² *See, e.g., Luther R. Campbell AKA Luke Skywalker v. Acuff-Rose Music*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose . . .”).

¹³ *Campbell*, 510 U.S. at 576.

infringement of copyright.”¹⁴ There are many ways that reproduction of works can be deemed “fair use.” One example is the use of parts of copyrighted material for parody.¹⁵ Another example occurs when a teacher copies a short poem for use in classroom instruction.¹⁶ Four of the factors used to determine whether or not use is “fair” are: (1) the purpose and character of the use; (2) the nature of the use; (3) the portion of the work used; and (4) the effect of the use on the product’s market.¹⁷ In previous litigation, involving file-sharing websites, defendant websites argued that users sharing of music files via an online file-sharing program was fair use.¹⁸ The defendant companies in *Grokster*, however, did not argue that the majority of the file-sharing enabled by their software was fair use, but instead advanced an argument that many of the works users downloaded were not copyrighted. Therefore, the *Grokster* software had potential non-infringing uses.¹⁹

¹⁴ Copyrights: Subject Matter and Scope of Copyrights, 17 U.S.C. 107 (2000). The statute lists factors that are to be weighed in determining whether something is fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

¹⁵ Campbell, 510 U.S. at 582. For the limits of copyrighted works in parody, see 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 12, 12:29 (3d ed. 2005) (“A work will fall outside the scope of fair use if it is the kind of use that the proprietor itself could reasonably be expected to make of the work.”).

¹⁶ 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 12, 12:42 (3d ed. 2005).

¹⁷ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015–16 (9th Cir. 2001).

¹⁸ *Id.* at 1015–19.

¹⁹ Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., No. 04–480, slip op. at 4–5 (U.S. June 27, 2005).

A copyright is a type of property that can be bought, sold, and licensed.²⁰ The copyright owners who sued Grokster and StreamCast (hereinafter collectively referred to as “Grokster”), included recording companies, musicians, music publishers, and movie studios.²¹ In the *Grokster* decision, the Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”²²

Grokster involved Grokster, Ltd.,²³ whose software allowed users to share electronic files, including music files, by communicating directly with other users.²⁴ The resulting peer-to-peer (“P2P”) network²⁵ was similar to a bulletin board that is used to exchange information. The information was not stored at a central hub, but rather consisted of files stored in users’ personal computers, just as an item for sale on a bulletin board is not stored on the bulletin board, but is in the possession of the party posting a bulletin board advertisement. By making their file libraries available to Grokster, users could make known to other users which electronic files they had available and other users could search for the files they wanted. If one user had a file that another user wished to obtain, the software provided by Grokster allowed them to share that file.²⁶ It is estimated that one million songs per day were downloaded illegally, and artists and studios were not

²⁰ GOLDSTEIN, *supra* note 9, at 4 (3d ed. 2005).

²¹ Metro-Goldwyn-Mayer Studios v. Grokster, Inc., No. 04-480, slip op. at 2. (U.S. June 27, 2005).

²² *Id.*

²³ Grokster Ltd. is a privately held software company registered in the West Indies. They primarily distribute peer-to-peer “P2P” software based on the FastTrack system. See <http://en.wikipedia.org/wiki/Grokster>. StreamCast utilizes Morpheus, a file-sharing client also based on FastTrack system. See <http://en.wikipedia.org/wiki/Morpheus> (follow the hyperlink that begins “Morpheus is a file sharing computer software client operated by the company StreamCast”) (last visited Oct. 30, 2005).

²⁴ Grokster, No. 04-480, slip op. at 1 (U.S. June 27, 2005).

²⁵ *Id.* The term “peer-to-peer” refers to the fact that users communicate directly with each other; there is no central server that information must pass through.

²⁶ *Id.*

being compensated appropriately.²⁷ Once a song is downloaded, it can be uploaded onto an iPod or similar device or burned onto a compact disc ("CD") almost immediately.²⁸ In effect, this online bulletin board offered a substantial amount of free stolen goods.

When copyright holders sued Grokster and StreamCast, they successfully argued that what the companies were doing was analogous to copying keys; it is not illegal to copy keys, but when one copies keys so that other people can break into houses, it becomes aiding and abetting a theft.²⁹ Further, copyright holders claimed that Grokster and StreamCast "abus[ed] the technology."³⁰ This idea of abuse is critical for an analysis of when the law should properly place obstacles in the path of technological innovation. In the *Grokster* decision, the Court repeatedly took notice of the need to balance the interests of users of copyrighted works in taking advantage of technological innovation and the rights of copyright holders,³¹ ultimately siding with the copyright holders.³²

C. *Vicarious Liability and Inducement to Infringe*

The Court noted that Grokster did not play a merely passive role in encouraging copyright infringement.³³ Instead, they used marketing techniques and software that was compatible with software used by Napster,³⁴ a company which had been enjoined from distributing copyrighted materials to its users.³⁵ In *A&M*

²⁷ *Morning Edition: Supreme Court Hears Copyright, File-Sharing Case*, (National Public Radio broadcast Mar. 29, 2005) (transcript on file with the North Carolina Journal of Law & Technology).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Brief for Motion Picture Studio and Recording Company Petitioners at 2, *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.* No. 04-480 (U.S. June 27, 2005).

³¹ *Metro-Goldwyn-Mayer Studios v. Grokster, Inc.*, No. 04-480, slip op. at 10. (U.S. June 27, 2005).

³² *Id.* at 21.

³³ *Id.* at 20.

³⁴ *Id.*

³⁵ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

Records, Inc. v. Napster, Inc.,³⁶ the Ninth Circuit determined that a file sharing company, Napster, Inc. (“Napster”) allowed users to illegally download sound recordings using Napster’s digital technology.³⁷ Napster’s software, MusicShare, enabled users to access, and then to download and transfer music files from other users computers.³⁸ In *Grokster*, the plaintiff copyright holders, in essence, accused Grokster and StreamCast of seeking to get around the *Napster* ruling, by providing an alternative technology that functionally served the same purpose as Napster.³⁹

Vicarious infringement occurs when a defendant interacts with the infringer and has some control over the infringer’s actions as well as a financial stake in the infringing activity.⁴⁰ Contributory infringement occurs when a defendant has knowledge of another party’s infringing activity and “induces, causes, or materially

³⁶ 239 F.3d 1004 (9th Cir. 2001).

³⁷ *Id.* at 1011.

³⁸ *Id.*

³⁹ See *Grokster*, No. 04-480, slip op. at 6 (U.S. June 27, 2005). StreamCast deliberately targeted Napster’s customers:

StreamCast gave away a software program of a kind known as OpenNap, designed to as compatible with the Napster program and open to Napster users for downloading files form other Napster and OpenNap users’ computers [T]he OpenNap program was engineered “to leverage Napster’s 50 million user base”. . . . An internal e-mail from a company executive stated: “We have put this network in place so that when Napster pulls the plug on the free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative.

Id.

Grokster similarly targeted Napster’s former customers in order to draw them to their site:

Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Website so that computer users using Web search engines to look for “Napster” or “free filesharing” would be directed to the Grokster Website, where they could download the Grokster software.

Id. at 7.

⁴⁰ GOLDSTEIN, *supra* note 16, at 8:2.

contributes” to it.⁴¹ Inducement to infringe requires a finding that the inducing party communicates a message, such as an advertisement, encouraging the target audience to engage in infringement.⁴²

Since Napster allowed rampant copyright infringement by its users and took no affirmative steps to curb it while profiting from the illegal downloads,⁴³ the Ninth Circuit found Napster to be a vicarious infringer.⁴⁴ Similarly, plaintiff copyright holders in *Grokster* argued that Grokster was guilty of contributory infringement.⁴⁵ In contrast, the Ninth Circuit ruled in favor of Grokster and StreamCast,⁴⁶ relying on the decision in *Sony Corp.*

⁴¹ GOLDSTEIN, *supra* note 16, at 8:2 (quoting Gershwin Publ’g. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

⁴² See *Grokster*, No. 04-480, slip op. at 20 (U.S. June 27, 2005).

The only apparent question about treating MGM’s evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM’s part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. *Id.*

⁴³ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023-24 (9th Cir. 2001).

⁴⁴ See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001) (defining a contributory infringer as “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”) (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The Court further concluded that “Napster, by its conduct, knowingly encourages and assists the infringement of plaintiffs’ copyrights.” Contributory liability requires that the secondary infringer “know or have reason to know” of direct infringement. The district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music. The district court also concluded that the law does not require knowledge of “specific acts of infringement” and rejected Napster’s contention that because the company cannot distinguish infringing from non-infringing files, it does not “know” of the direct infringement. 114 F. Supp. 2d at 917.

⁴⁵ Brief of Petitioner-Appellant at 23, No. 04-480 (U.S. June 27, 2005).

⁴⁶ *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, *Metro-Goldwyn-Mayer Studios v. Grokster*, No. 04-480 (U.S. June 27, 2005).

of *America v. Universal City Studios, Inc.*⁴⁷ (“Sony”) by interpreting its holding to mean that if there were a substantial non-infringing use for a technology, the designer could not be held liable.⁴⁸ On appeal, the Supreme Court determined that the Ninth Circuit misinterpreted *Sony*,⁴⁹ and that *Sony* in fact stood for the proposition that secondary liability must be based on something more than “design or distribution” of a product that is capable of an infringing use.⁵⁰ The Court found that Grokster and StreamCast did much more than design a product that was capable of infringing use; it in fact encouraged infringement.⁵¹

However, the Court in *Grokster* declined to determine whether Grokster and StreamCast were guilty of vicarious infringement, because it found that they were liable on a theory of inducement to infringe.⁵² Thus, by enabling users to reproduce and distribute copyrighted works illegally,⁵³ Grokster and StreamCast were legally liable for copyright infringement. The Court’s ruling was broad enough to encompass secondary liability for both vicarious liability or as inducement to infringe: “We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁵⁴ This powerful notion concerning of secondary liability for online companies is likely to have serious

⁴⁷ 464 U.S. 417 (1984).

⁴⁸ *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 380 F.3d at 1160.

⁴⁹ *Metro-Goldwyn-Mayer Studios v. Grokster, Inc.*, No. 04-480, slip op. at 16. (U.S. June 27, 2005).

⁵⁰ *Id.*

⁵¹ *See id.* at 1-9 (U.S. June 27, 2005).

⁵² *Id.* at 14, note 9 (U.S. June 27, 2005) (“Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM’s vicarious liability theory.”). *See generally id.* at 13-20 (describing legal basis for claims of vicarious liability).

⁵³ *See* 17 U.S.C. §§ 101-102 (2000 & Supp. IV 2004) (describing the nature of works covers by Copyright protection), 17 U.S.C. § 115 (2000 & Supp. IV 2004) (defining the protections for artists and copyright holders of sound recordings, which includes digital recording).

⁵⁴ *Grokster*, No. 04-480, slip op. at 1.

implications in various areas of cyberspace,⁵⁵ by introducing a legal theory that may be applicable in other areas of law touched by Internet technology.

The fact that StreamCast and Grokster profited by encouraging users to break the law was argued by petitioner copyright holders⁵⁶ and noticed by the Court,⁵⁷ which found “the business models employed by Grokster confirm that their principle object was use of their software to download copyrighted works.”⁵⁸ In other words, the more users Grokster generated, the more advertising revenue they could earn. In short, Grokster needed as many users as possible to make money, and because they did not charge a user fee, they encouraged illegal use, because illegal use is precisely what drew the most traffic.⁵⁹

II. HOW ARE ONLINE TICKET RESELLERS BREAKING THE LAW?

By taking a percentage of the ticket sale price,⁶⁰ or by earning revenue by generating enough Internet traffic to attract

⁵⁵ See, e.g., Terrance Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305 (describing how novel technology can create novel problems for law enforcement, and in particular, jurisdictional issues).

⁵⁶ See, e.g., Brief of Petitioner-Appellant at 2, *Metro-Goldwyn-Mayer v. Grokster*, No. 04-480 at 11 (U.S. June 27, 2005) (“The profit-driving concept behind respondents’ services—the transactional *quid pro quo*—is that file-swappers implicitly, and necessarily by reason of the software’s design, agree to receive advertising in return for “free” access to music and other copyrighted content.”).

⁵⁷ *Metro -Goldwyn-Mayer Studios*, No. 04-480, slip op. at 1 (U.S. June 27, 2005).

⁵⁸ *Id.*

⁵⁹ *Id.* (“While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that into dollars.”).

⁶⁰ See <http://stubhub.com/about-us>. (describing StubHub.com’s profit structure from online ticket resales) (last visited Nov. 7, 2005) (on file with the North Carolina Journal of Law & Technology).

advertisers,⁶¹ online ticket companies have little incentive to abide by state scalping laws. For example, these resale sites earn their revenue by taking a percentage of the ticket sale price, and revenue is increased through advertising design to maximize Internet traffic. Indeed, they have a direct incentive to encourage as much traffic as possible, or the highest ticket prices possible, or both.

Such online ticket sales and resale sites can be lucrative.⁶² The number of people who chose to buy tickets online for concerts and other events is growing, and revenue from this practice is expected to reach \$4.7 billion by 2006.⁶³ Currently, there are a host of companies allow consumers to buy and sell tickets to sporting events and concerts online. Prominent among ticket resale websites is StubHub.com.⁶⁴ This Recent Development focuses on StubHub.com, because it stands out as a popular and successful example of the basic model for ticket re-sale outlets. In particular, StubHub.com is an example of a website devoted to ticket re-sales which, like Grokster or StreamCast, uses technology to evade laws.

StubHub.com calls itself a “marketplace”⁶⁵ and stresses that it is not a ticket broker.⁶⁶ This means that StubHub.com does not buy tickets and sell them to bidders.⁶⁷ Instead, the StubHub.com

⁶¹ It is important to note that not all of StubHub.com’s business is from ticket sales by and to individuals. They also partner with sports teams and leagues. Therefore, this Recent Development refers only to that portion of StubHub.com’s business that is focused on ticket resales. *See id.*

⁶² *But see, OpenSeats.com Ready for Playoff Ticket Rush*, NASHVILLE BUS. J., Jan. 3, 2005, <http://nashville.bizjournals.com/nashvillee/stories/2001/01/01/daily16.html> (last visited Oct. 30, 2005) (on file with the North Carolina Journal of Law & Technology).

⁶³ Cecily Fraser, *That’s the Ticket: Websites Help Consumers Buy Hard-to-Find Event Tickets*, MARKETWATCH, Sep. 7, 2001, <http://marketwatch.com>, (search keywords “that’s the ticket” and follow link to article) (last visited Sept. 25, 2005) (on file with the North Carolina Journal of Law & Technology).

⁶⁴ Other online ticket sites that operate similarly include www.buyselltix.com, www.ticketmagic.com, www.concertlivewire.com, www.openseats.com, and notably, AOL’s online ticket venue, www.aoltickets.com.

⁶⁵ <http://stubhub.com/about-us>. (last visited Nov. 7, 2005) (on file with the North Carolina Journal of Law & Technology).

⁶⁶ *Id.*

⁶⁷ *Id.*

creators, former investment bankers,⁶⁸ have tried to set up an entirely free marketplace where buyers and sellers can negotiate to arrive at a price for tickets that “reflects the true value of [the] commodity.”⁶⁹ StubHub.com allows individuals to post the availability of tickets they hold to concerts, sporting events, and theater events.⁷⁰ StubHub.com charges a 10% fee from ticket buyers, and a 15% fee from sellers.⁷¹ A legal comparison can be made between the activity of StubHub.com and the activity in Grokster. Namely, StubHub.com allows its users to violate laws by scalping tickets via their website.⁷²

Before focusing on how StubHub.com defends its business practice of allowing its users to violate the law, it is helpful to note that other online companies also break laws directly, and StubHub.com is by no means a lone actor. An example is Show Me Tickets, a Missouri ticket broker that operates the website www.showmetickets.com.⁷³ As a ticket broker, Show Me Tickets operates differently than a site that allows users to buy and sell directly from one another; rather, Show Me Tickets buys the tickets from season ticket holders or individuals, then sets their own prices and sells the tickets to online buyers.⁷⁴ As a licensed ticket broker, Show Me Tickets is upfront about charging more than face value for tickets.⁷⁵ In 2004, Missouri Attorney General, Jay Nixon sought a restraining order against Show Me Tickets for

⁶⁸ William Grimes, *That Invisible Hand Guides the Game of Ticket Hunting*, N.Y. TIMES, June 18, 2004, available at [www://stubhub.com/about-us](http://www.stubhub.com/about-us) (follow the “read more” hyperlink) (last visited Nov. 7, 2005) (on file with the North Carolina Journal of Law and Technology).

⁶⁹ *Id.*

⁷⁰ <http://stubhub.com/about-us>, *supra* note 65.

⁷¹ <http://stubhub.com/help>, (follow the “seller’s handbook” hyperlink; follow the “here” link under “What fees are associated with selling tickets?”) (last visited Nov. 7, 2005) (on file with the North Carolina Journal of Law & Technology).

⁷² Grimes, *supra* note 68.

⁷³ <http://showmetickets.com> (last visited Oct. 30, 2005) (on file with the North Carolina Journal of Law & Technology).

⁷⁴ <http://showmetickets.com/about.html> (last visited Oct. 30, 2005) (on file with the North Carolina Journal of Law & Technology).

⁷⁵ <http://showmetickets.com/faq.html> (last visited Oct. 30, 2005) (on file with the North Carolina Journal of Law & Technology).

selling St. Louis Cardinals playoff tickets for above face value, in violation of Missouri state law.⁷⁶ The relevant difference between StubHub.com and Show Me Tickets, is that as a ticket broker, Stubhub.com is not violating scalping laws directly. Rather, it has developed an online business that enables *users* to violate scalping laws. Because attorneys general may not be able to prosecute non-broker online ticket resale sites directly, as Jay Nixon did with Show Me Tickets, the *Grokster* case may offer legal theory to hold the proprietors of such websites liable for the illegal activities of their users.

A. *State Scalping Laws*

Unlike Grokster and StreamCast users, who were breaking federal copyright law, some StubHub.com users break state and local scalping laws.⁷⁷ There is no national anti-scalping law,⁷⁸ but the Supreme Court has upheld the basic right of states to enact laws that regulate ticket pricing and sales.⁷⁹ While these laws vary, they basically follow several basic variations: (1) the sale of a ticket with any markup from the face-price of the ticket is

⁷⁶ *Nixon Seeks to Stop Online Broker Scalping Cardinals Playoff Tickets*, ST. LOUIS BUS. J., Sept. 30, 2004, available at <http://stlouis.bizjournals/stlouis/stories.2004/09/27/daily52.html> (last visited Oct. 30, 2005) (on file with the North Carolina Journal of Law & Technology). Ticket scalping, penalty, MO. REV. STAT. 578.395 (2004) ("Any person, firm, or corporation who resells or offers to resell any ticket for admission, or any other evidence of the right of entry, to any public sporting event for a price in excess of the price printed on the ticket is guilty of the offense of ticket scalping.").

⁷⁷ *Cf.* Daniel J. Glantz, *For Bid Scalping Online*, 23 CARDOZO ARTS & ENT. L.J. 261, 305 (2005) (arguing for a federal uniform ticket resale act that would prevent discriminatory practices and protect consumers).

⁷⁸ *See* Stephen K. Happel & Marianne M. Jennings, *Creating a Futures Market for Major Event Tickets: Problems and Prospects*, 21 CATO J. 443, 445 (2002).

⁷⁹ *See* Gold v. DiCarlo, 235 F. Supp. 817, (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965) (enforcing scalping laws when ticket scalping was done in person). *Cf.* Peter Lewis, *Ticket Scalping Cases Tossed*, SEATTLE TIMES, Jan. 31, 2004, at A1 (citing a Seattle case in which a judge overturned the conviction of one man and dismissed charges against another for ticket scalping because the judge found prosecution of traditional scalpers unfair in light of rampant online scalping).

prohibited;⁸⁰ (2) the amount that a reseller can charge is capped;⁸¹ and (3) certain restrictions are imposed on the means by which a party can resell a ticket.⁸² In addition, many of these statutes prohibit or limit the price of “service fees” that can be applied to the resale of tickets.⁸³

B. *Online Ticket Resale Outlets*

It is common knowledge that many customers of StubHub.com and similar websites are breaking state scalping laws.⁸⁴ Moreover, there is some evidence that online scalping interferes with law enforcement’s ability to curb traditional scalpers.⁸⁵ On September 23, 2005, two tickets for the Rolling Stones concert in Durham, North Carolina—a state that prohibits the sale of tickets in excess of printed prices and only allows a \$3 service fee⁸⁶—were offered

⁸⁰ See Happel & Jennings, *supra* note 78, at 445.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Several municipalities have scalping ordinances as well. See *id.*

⁸⁴ See generally Glantz, *supra* note 77 (arguing the operations of online secondary marketplaces for ticket sales and how transactions done on the sites are breaking scalping laws).

⁸⁵ See, e.g., Tom Di Nome, *Hot Tickets, Hawked Legitimately Online*, N.Y. TIMES, July 31, 2003, at G8.

⁸⁶ See N.C. GEN. STAT. § 14-344 (2005), which states:

Sale of Admission Tickets in excess of printed price:

Any person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars . . . for each ticket except that a promoter or operator of the property where the event is to be held and a ticket sales agency may agree in writing on a reasonable service fee greater than three dollars The existence of the service fee shall be made known to the publish by printing or writing the amount of the fee on the tickets which are printed for the event. Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section shall be guilty of a Class 2 misdemeanor.

for sale through StubHub.com for \$2,012 each.⁸⁷ The highest priced ticket sold directly through Ticketmaster—the standard ticket outlet—that particular day was \$350, with a \$27.50 convenience charge.⁸⁸ Thus, the tickets for sale at StubHub.com were priced far above the face value. StubHub.com claims it is doing nothing wrong, and expects its customers to comply with state laws.⁸⁹

The online auction site, eBay, illustrates that the practice of routinely ignoring scalping is not an essential component of a successful business model. eBay allows customers to buy and sell tickets online, but has strict guidelines concerning compliance with state laws to prevent consumers from bidding on a ticket at a price that would violate their state laws.⁹⁰ eBay, as compared to

⁸⁷ <http://www.stubhub.com> (search for “Rolling Stones,” then search for Wallace Wade Stadium in Durham, NC, Saturday, Oct. 8, 2005) (last visited Sept. 25, 2005) (on file with the North Carolina Journal of Law & Technology).

⁸⁸ <http://www.ticketmaster.com> (last visited Sept. 25, 2005) (on file with the North Carolina Journal of Law & Technology).

⁸⁹ E-mail from StubHub.com Customer Service to Hannah R. Short, author of this Recent Development, Staff Writer for North Carolina Journal of Law & Technology (Sept. 20, 2005, 23:24 EST) (responding to the query, “I have just signed up as a Stub Hub member. How do I know what my state law concerning prices is? If I try to sell a ticket for higher than the state allows, will you allow it? What if some law enforcement agency tried to contact you, would you give them my information?” by sending a form response that gave directions concerning selling tickets and adding, “Unfortunately, we cannot recommend pricing advice to you but we ask that you abide by your local laws in terms of pricing. Also, please note that we charge a selling fee of 15% once your tickets sell, however we do not charge you the selling fee in the case that your tickets do not sell.”). Compare OpenSeats.com/help/asp (listing states with scalping laws for customers of OpenSeats.com, an online tickets resale site, and warning customers that they are responsible for complying with state laws) (on file with the North Carolina Journal of Law & Technology).

⁹⁰ <http://pages.ebay.com/buyselltickets/faq.html> (explaining the basic operations of selling and bidding for tickets through eBay, and how eBay has ensured that its users are complying with state laws because “[i]t’s important for everyone, on and off the Internet, to respect the laws of states where they live and do business. eBay is concerned that its users could face substantial penalties for violating state laws regulating ticket reselling, and eBay wants to ensure that its site remains fun and safe for everyone.”) (last visited Oct. 13, 2005) (on file with the North Carolina Journal of Law & Technology). Another possible reason for eBay to build limits into its site is to protect itself from liability.

StubHub.com, can serve as an example of a company that has evolved with the legal challenges that come with technological innovation. Though eBay has not always strictly enforced these laws,⁹¹ it has taken action to change user policies.

Frequently, parties using StubHub.com or similar sites, sell tickets far in excess of what the applicable state law would allow.⁹² Because law enforcement officers do not have the means to track user activity,⁹³ parties who use online ticket resale outlets are able to break state law with impunity. Though StubHub asks its customers to comply with the law of their state, it does not provide a resource for users to determine the limits imposed by their state laws or prohibit users from selling and purchasing tickets in violation of state scalping laws.⁹⁴ A consideration of its revenue source reveals that like Grokster and StreamCast, StubHub.com has a financial incentive to allow its customers to break the law and, therefore, no incentive to users help determine the law. It makes money by taking a percentage of the ticket sale price. In short, the higher the mark-up on ticket prices exchanged on their website, the more money StubHub makes.

⁹¹ See, e.g., Mark Mueller, *Net Offers Way Around State Law on Scalping*, BOSTON HERALD, Oct. 15, 1999, at 007 (reporting on police officers' frustration in trying to stop scalpers around Fenway Park before the 1999 American League Championship Series, while they have no way of stopping online scalping, including a man who paid \$12,100 for four box seats by bidding on eBay); John Manasso, *Getting Scalped*, ATLANTA J. & CONST., Oct. 16, 2000, at 2C ("EBay, which had previously said it would crack down on potentially illegal scalping, continued to host ticket auctions for the playoffs last week. In numerous cases, pairs of tickets to the games were listed at \$400 or more.").

⁹² Glantz, *supra* note 77; email from StubHub.com Customer Service, *supra* note 89.

⁹³ But see Legal Group Spites RIAA, Defends P2P, <http://www.atnewyork.com/news/article.php/2230301> (describing the Recording Industry Association of America's ("RIAA") efforts to pursue legal claims against thousands of individuals who illegally downloaded music files) (last visited Nov. 20, 2005) (on file with the North Carolina Journal of Law & Technology). If the RIAA's ability to pursue individual legal claims suggests that the technology exists for tracking individual violators, it does not deal with the differing resources between a private, for-profit industry, and public legal or law enforcement departments.

⁹⁴ Email from StubHub.com customer service, *supra* note 89.

Like Grokster and StreamCast, StubHub.com enables people to break the law via the Internet. Grokster provided software that encouraged people to break the law by making it remarkably easy to share copyrighted music. Similarly, websites such as StubHub.com foster lawbreaking by providing an online platform to facilitate illegal ticket sales. In both instances, without the technology that the companies provide, it would be far more difficult—though not impossible—for users to break the law. After all, even before the Internet, people could copy music illegally with a simple tape recorder.⁹⁵ Likewise, people have scalped tickets in person at venues for many years dating back well before the birth of the Internet.⁹⁶ However, the *scale* of illegal activity enabled by this technology may require a correspondingly greater legal remedy to address the increased illegal activity.⁹⁷

It is beyond the scope of this Recent Development to determine the actual percentage of illegal versus legal use of StubHub.com. There are certainly legitimate uses of StubHub.com that violate no laws.⁹⁸ For instance, a concertgoer who catches the flu can find a willing buyer at the last minute and regain the money she expended on ticket purchase. StubHub.com provides a legitimate service to those who purchased tickets but are unable to use them, and to those who seek tickets, but are unable to find them for purchase.⁹⁹ Another advantage of StubHub.com is its guarantee to its users that unscrupulous sellers will not defraud them.¹⁰⁰

⁹⁵ See generally Mark Plotkin, *The Times They Are A Changin'*, 1 VAND. J. ENT. L. & PRAC. 46 (1999) (giving the history of how the law of copyrights has evolved with new technology and the ways in which individuals have illegally copied sound recordings in the past half-century).

⁹⁶ Glantz, *supra* note 77, at 261-62.

⁹⁷ See Glantz, *supra* note 77, at 305. Cf. Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395 (2003).

⁹⁸ Obviously, in jurisdictions without scalping limitations, the activities of online ticket resellers pose no legal issues.

⁹⁹ See, e.g., Tom Di Nome, *Hot Tickets, Hawked Legitimately Online*, N.Y. TIMES, July 3, 2003, at G8 (touting, among other things, the way that technology can be used to safeguard against fraud and counterfeit).

¹⁰⁰ *Id.*

C. *Why Should Consumers Care about Scalping and How Can Grokster Help?*

Although much legal activity may occur on StubHub.com, the fact remains that many use the site for illegitimate, illegal ends.¹⁰¹ Scalpers who buy up many tickets for a sought-after event can pose a significant burden on consumers who do not have the means to purchase tickets at a marked-up price. Also, there is some evidence that rising ticket prices lead to falling ticket sales figures.¹⁰²

Recording artists like Neil Diamond and Bruce Springsteen limit the price of their tickets in order to make their performances available to a wider audience.¹⁰³ These artists view themselves as appealing to an audience who may not be able to afford exorbitant ticket prices. Thus, allowing scalpers to sell tickets at a higher price may be seen as an encroachment on the musician's artistic integrity. In a related argument that explains the way in which ticket prices can affect the value of an audience, and thus a performance, economists have recognized that standing in line for tickets, or being eager enough to go to the trouble to obtain them at whatever means the artists and promoters envision, serves an artistic value, because it can signify the type of person that the artists and promoters wish to attract to their concerts.¹⁰⁴ In this

¹⁰¹ *Id.*

¹⁰² See, e.g., *All Things Considered: Concert Revenue Drops for First Time in 10 Years, All Things Considered* (National Public Radio broadcast, July 7, 2005). Note that concert ticket prices have gone up for several reasons, including increases in artists' compensation.

¹⁰³ *Morning Edition: Live Concert Ticket Prices on the Rise: Fans of Baby-Boomer Acts Can Spend Hundreds Per Seat*, (National Public Radio broadcast Dec. 5, 2003). Neil Diamond, in this interview on NPR, explains that he believes many artists are persuaded by agents to charge higher prices for their tickets because otherwise scalpers will just make money off of them, "either you guys make the money or the scalper makes the money." *Id.*

¹⁰⁴ Philip A. Curry & Lutz-Alexander Busch, *Rock Concert Pricing and Anti-Scalping Laws: Selling to an Input*, (Sept. 2005), available at <http://ssrn.com/abstract=085328> (last visited Oct. 11, 2005) (proposing an economic model that values the "input" of a type of audience, e.g., loudness, that contribute to higher value of overall experience for the concert-goers, and

way, increased ticket prices can affect the “value” of an audience and the “value” of a performance, because it has the potential to keep out those who cannot afford the scalper’s prices. In *Grokster*, the Supreme Court’s rationale for holding companies liable for inducement to infringe copyright laws was in part to support artistic pursuits.¹⁰⁵ Similarly, allowing musical artists to maintain a strong voice regarding how tickets to their performances are priced also furthers these goals. Thus companies involved in ticket sales should also abide by artists’ wishes concerning ticket prices.

Aside from the rationales for anti-scalping laws,¹⁰⁶ the fact remains that states have enacted these laws and made attempts to enforce them.¹⁰⁷ Looking to the *Grokster* outcome for guidance, it is possible to advance the argument that in order to stop online ticket scalping, it will be necessary to hold StubHub.com and similar companies vicariously and contributorily liable. Professors Douglas Lichtman and William Landes have articulated why indirect liability is a necessary tool in today’s world of

also purporting that scalping tickets for above-the-face-price distorts the input value of individuals attending concert events) (on file with the North Carolina Journal of Law & Technology).

¹⁰⁵ *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, No. 04-480, slip op. at 10 (U.S. June 27, 2005).

¹⁰⁶ See generally *Happel & Jennings*, *supra* note 78 (proposing that anti-scalping laws inhibit free market activity and are not effective). But see Andrew T. Williams, *Do Anti-Ticket Scalping Laws Make a Difference?*, 15 *MANAGERIAL & DECISION ECON.* 503 (1994) (concluding that anti-scalping laws are effective in protecting consumers and keeping ticket prices lower).

¹⁰⁷ See, e.g., *State v. Leary*, 41 Conn. App. 497 (Conn. App. Ct. 1999) (affirming the judgment of defendant who was arrested for selling tickets for a price in excess of face price in violation of CONN. GEN. STAT. § 52-289, outside the New Haven Coliseum); *Diversified Group, Inc. v. Sahn*, 259 A.D.2d 47 (N.Y. App. Div. 1999) (holding that a contract to resell season ticket subscription rights was scalping, in violation of N.Y. Arts & Cult. Aff. Law § 25.01); *State v. Gabbert*, 693 N.W. 2d 475 (Minn. Ct. App. 2005) (finding that lower court erred in dismissing complaint against defendant for selling tickets outside Minnesota State Fair Grounds for \$7 when the face price was \$6, this violating MINN. STAT. § 609.805); *Roberts v. Swain*, 126 N.C. App. 712 (1997), *rev’d* for reasons irrelevant to ticket scalping, 538 S.E. 566 (N.C. 2000) (describing a civil suit that resulted from officers’ arrest of man who was believed by police to be selling basketball tickets outside of basketball arena in violation of N.C. GEN. STAT. § 105-53).

e-commerce.¹⁰⁸ They describe how the copyright law was forced to deal with flea markets in the 1970s.¹⁰⁹ At that time, flea markets were common places to buy and sell illegally copied musical recordings.¹¹⁰ Whether flea market owners were liable for the infringing acts of the vendors was a controversial matter,¹¹¹ but they were eventually found liable, because they benefited economically from the sale of copyrighted goods when they rented booths and otherwise charged the vendors.¹¹² Likewise, before *Grokster*, it was controversial to hold the technology providers liable for acts of infringement by users of their technology.¹¹³ Like the flea market owners, third parties involved in online infringement are often in a better position to stop the individual infringers.¹¹⁴ Like eBay, third parties can block illegal transactions from going forward.

There are various reasons to hold third parties liable. The first advantage to holding third parties liable is the cost savings involved.¹¹⁵ Just as it would be enormously costly to go after each individual copyright infringer who uses *Grokster* or *StreamCast*,¹¹⁶ it would be similarly difficult for law enforcement or attorneys general to pursue actions against each individual user of *StubHub.com* that violates the laws in their jurisdiction.

¹⁰⁸ Lichtman & Landes, *supra* note 97.

¹⁰⁹ Lichtman & Landes, *supra* note 97, at 396.

¹¹⁰ Lichtman & Landes, *supra* note 97, at 395.

¹¹¹ Lichtman & Landes, *supra* note 97, at 395.

¹¹² See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

¹¹³ Lichtman & Landes, *supra* note 97, at 396.

¹¹⁴ Lichtman & Landes, *supra* note 97, at 396. "Third parties" is herein used to represent any business that has an online presence or provides software or technology to users that in any way enables or aids illegal acts by the individual users.

¹¹⁵ Lichtman & Landes, *supra* note 97, at 397.

¹¹⁶ But see Tresa Baldas, *Music Piracy Defendants Start to Fight Back*, BROWARD DAILY BUS. REV., Oct. 12, 2005, at 10 ("In the last two years, the RIAA [Recording Industry Association of America] has filed 14,800 lawsuits against individuals for illegally downloading and distributing copyrighted music on the Internet. While the RIAA says that most suits settle, attorneys note that many defendants have started to fight back.").

Second, where there are lawful uses of the website, it is even more difficult to determine *which* individual users are breaking the law.¹¹⁷ For example, it would be quite complicated to track down, investigate, and file charges against each North Carolinian who uses StubHub.com, and would be almost impossible to determine who uses the site for a legal purpose and who uses it for a prohibited purpose. By contrast, the software provider may be better equipped to stop the illegal activity¹¹⁸ by better screening its customers or installing built-in protections against illegal use. In the case of StubHub.com, a minimum precaution could include a posting of information concerning the pertinent law in the user's jurisdiction. Another possibility is implementation of a screening mechanism that blocks offers that are priced above the legal limit in the state of origin of each user is another possibility.¹¹⁹ The Digital Millennium Copyright Act,¹²⁰ though insignificant in its substance¹²¹ because it concerns copyright law but does not cover MP3 technology, stands as a symbolic model for dealing with online ticket scalping. It provides legal immunity to technology manufacturers on the condition that they provide security features in their products that lower the risk of infringement.¹²²

Lichtman and Landes go a step further and propose using a negligence rule for activities that can result in infringement.¹²³ A negligence model may address copyright infringement by forcing companies with many infringing users to stop infringement, but recognizing limits for companies with too many users, such as Internet service providers.¹²⁴ Likewise, online secondary ticket sales sites could be required to act affirmatively to curb or prohibit its users violating the law. The problem with a negligence model

¹¹⁷ Lichtman & Landes, *supra* note 97, at 398.

¹¹⁸ Lichtman & Landes, *supra* note 97, at 398.

¹¹⁹ Though states and municipalities may do well to coordinate scalping laws, so as to make this option viable.

¹²⁰ Pub. L. No. 105-304, Stat. 2860 (1998). This statutory provision has been codified in various sections of Title 17 of the U.S. Code.

¹²¹ Lichtman & Landes, *supra* note 97, at 401-02.

¹²² Lichtman & Landes, *supra* note 97, at 401-02.

¹²³ Lichtman & Landes, *supra* note 97, at 405.

¹²⁴ Lichtman & Landes, *supra* note 97, at 405.

however, is that the outcome is unpredictable¹²⁵ and often applied retroactively. In other words, the courts would have to determine what is or is not negligent in each individual case. Uncertainty is not desirable, because it could result in the stalling of innovation.¹²⁶ Lichtman and Landes recognize that some limits must be placed on secondary liability so that the costs of enforcement do not outweigh the risk of prohibiting legal activity.¹²⁷

If citizens of states with anti-scalping laws are unhappy because they are unable to get tickets to concerts and sporting events priced within their reach,¹²⁸ and they believe part of the reason they cannot find affordable tickets is because online scalpers are too ready to buy tickets immediately and then sell them, then citizens can urge law enforcement authorities in their states to bring action against the companies whose online platform enables scalping, and state courts should allow the actions to proceed.

III. CONCLUSION

The Supreme Court in *Grokster* held that if companies provided software that induces individuals to violate copyright laws, those companies can be held liable for inducement to infringe, even absent the companies' direct involvement in the infringing act. Due to the difficulty of enforcing copyright laws against millions of users, the Court recognized the need for a legal remedy against the enabler of the illegal act. Likewise, states and local authorities charged with enforcing scalping laws cannot

¹²⁵ Lichtman & Landes, *supra* note 97, at 405.

¹²⁶ Lichtman & Landes, *supra* note 97, at 405.

¹²⁷ Lichtman & Landes, *supra* note 97, at 407.

¹²⁸ See, e.g., Peter French, Letter to the Editor, *Fans are Victims of Tickets Scalpers*, ROANOKE TIMES, Feb. 25, 1999, at A14 ("Scalpers take tickets away from the real fans and put them in the hands of the highest bidder. . . . On-line ticket sales are just as bad. . . . I applaud Roanoke Police Department in its effort to stop scalping. It isn't free enterprise; it's a black market."); Mark Brown, *Techno Music: Broadband Net Access Holds Immense Possibilities for Artists, Labels, Fans*, DENV. ROCKY MOUNTAIN NEWS, Aug. 20, 2000, at 6D ("Any ticket scalper worth his salt has by now signed up at every official Website available to get those early sales.").

enforce the laws against an unknown number of individuals who take advantage of Internet technology to skirt the law. When companies like StubHub.com profit directly from illegal activity, a legal remedy aimed at the companies that provide the technology should be available in order to hold them liable for breaking state scalping laws.¹²⁹ Furthermore, because online ticket sales companies receive a percentage of illegal profits, the excuse of “we are not breaking the law—our customers are” is a thin defense.¹³⁰

¹²⁹ See Dennis Kennedy, *Key Legal Concerns in E-Commerce*, 18 T.M. COOLEY L. REV. 17 (2001) (arguing that legal guidelines and norms are outpaced by the rapid pace of e-commerce growth and the novel business modes found on the Internet).

¹³⁰ In a 2005 Note entitled *For-Bid Scalping Online?*, Daniel Glantz, a Cardozo student, argued in note 126, of his paper, that cases against online ticket resale outlets should be analyzed in light of *In re: Aimster Copyright Litigation*, 334 F.3d 643 (2003), *cert. denied*, *Deep v. Recording Indus. Ass’n of Am., Inc.*, 540 U.S. 1107 (2004), in which the Seventh Circuit enjoined Aimster from operations due to infringing use. See Glantz, *supra* note 77 at n.126. The *Grokster* case, as a direct and clear statement from the Supreme Court, lends even more weight to the idea that online companies should be held responsible for their illegal uses.

