

1-1-2007

Rhetorical criticism of absence and silence of university presidents at the Grokster Court

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RHETORICAL CRITICISM OF ABSENCE AND SILENCE
OF UNIVERSITY PRESIDENTS AT
THE GROKSTER COURT

by

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December 2007

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Dissertation Approval

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November 20, 2007

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Rhetorical Criticism of Absence and Silence of University Presidents
at the Grokster Court

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ABSTRACT

**Rhetorical Criticism of Absence and Silence of University Presidents
at the Grokster Court**

by

Lawrence Eyo Ita

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In the peer-to-peer file sharing case of *MGM v. Grokster*, university presidents and university associations did not submit any *amicus curiae* briefs.

The purpose of this study was to conduct a rhetorical criticism of this absence and silence as symbolic action. Using legal research and situational criticism, the study explores the reaction of university presidents during the earlier phases of the file sharing phenomenon as well as their absence and silence at the Supreme Court in light of the questions that litigants urged the Court to decide.

It was found that escalating peer to peer file sharing degraded university network functionality to a degree which threatened both institutional autonomy and scholarly freedom and that university presidents employed a variety of strategies to mitigate these threats.

However at the Supreme Court at which petitioners and respondents respectively urged a reversal, on the one hand, and affirmation on the other hand, of the Ninth Circuit *Grokster* ruling, university presidents

were absent and silent. The study found that this absence and silence of university presidents at the Grokster Court did not constitute a fitting response to the exigencies that faced core university values of scholarly freedom and institutional autonomy had the Court decided as urged by litigants.

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ACKNOWLEDGMENTS

I wish to extend my appreciation to my advisor and friend, Dr. Gerald Kops. You were remarkably supportive in your guidance, insights, and debates that greatly expanded my appreciation of jurisprudence and legal theory. I wish also to express my special appreciation to the Graduate College member of my committee, Dr. Donovan Conley. When I selected your Communications course to merely fulfill the cognate-course requirement of my degree, I had no idea how much my academic orientation would be influenced by your scholarly guidance in the area of rhetorical criticism; an area about which I had only vague notions, but which ultimately became an exciting passion in my deliberations and in my studies.

I wish to thank the members of my committee, Dr. Mario Martinez whose recommendations on methodology saved me from the urge to rush prematurely to accurate conclusions and Dr. Paul Meacham, who often wondered what would drive one to relive the pains and tribulations of acquiring yet another doctorate.

I thank all of my Professors of Education, Dr. Mimi Wolverton, Dr. Martha Young, Dr. Kendall Hartley, Dr. Robert Ackerman, Dr. Paul Meacham, Dr. Gerald Kops, Dr. Alice Corkill, and Dr. Eunsook Hong for their contribution in my struggle towards bridging the chasm that, in my thinking, separated the literally concrete methods from my engineering training and the fluidic provisionality that dominates the social sciences.

I remain grateful to my entire family, colleagues and friends for continued support and inspiration.

CHAPTER I

INTRODUCTION

In May 2007, the United States Supreme Court handed down its decision in the *MGM v. Grokster* copyright infringement case which petitioners in the case described as one of the most important copyright cases ever to reach the Court and one whose resolution of the question presented by petitioners would largely determine the value and significance of copyright in the digital era (*MGM v. Grokster*, 2004, Petition for certiorari).

Copyright has remained an issue of substantial public importance as well as also, an essential component in academic and research activities in higher education. As observed in “Copyright, fair use, and the challenge for universities: Promoting the progress of higher education” (Crews, 1993), Crews has explained that by virtue of both their combined teaching and research goals universities use copyrighted material in a variety of ways and also produce enormous amounts of works for which their faculty own copyright.

Copyright is entrenched in the 1st article of the Constitution along with 17 other powers that are exclusive powers of Congress. Article 1, section 8 empowers Congress ... “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

exclusive Right to their respective Writings and Discoveries.” (U.S.C. Art. 1, Sect. 8).

Following prompt action by the first Congress, the first Copyright legislation was signed into law on May 25, 1790 by President George Washington. This act for the encouragement of learning conferred exclusive rights of reproduction and distribution of maps, charts and books to authors for a limited period of 14 years subject to renewal for another term of 14 years.

Numerous amendments that followed through a period of almost two centuries successively extended the period of exclusive rights and expanded the category of works for which exclusive rights are granted. Perhaps the most significant amendment for higher education and the public in general was the Copyright Act of 1976 which codified under a Fair Use doctrine, the right of others to reproduce artistic works for the purpose of criticism, comment, news reporting, teaching, scholarship and research provided that such reproduction did not violate any one of four conditions in a fair use inquiry.

Advancement in technology made reproduction and eventually distribution of copyrighted works progressively easier and tended to shift the balance between protection of exclusive rights of copyright owners, on the one hand and access to their creative products for the public good, on the other hand. The expectation has been that Congress and

the Courts would act to modulate these shifts of balance which invariably accompanied the development of new technologies.

In 1984, eight years after codification of the copyright fair use doctrine, the Supreme Court in a landmark case in which Universal Studios sought to ban the production and sale of the Sony Video Tape Betamax recorder, held that users of the recorder were engaging in a fair use for which the copyright owner does not possess an exclusive right to such a use (*Universal Studios v. Sony Corp.*, 454 U.S. 417).

The Supreme Court decision in this case also established the principle that distribution of a product which was even merely capable of substantial noninfringing uses did not render the developer of such a product vulnerable to secondary liability charges even with constructive knowledge of infringement.

The Digital Millennium Copyright Act of 1998 dealt a blow to fair use by criminalizing circumvention of technological protective measures in order to gain access to copyrighted works for purposes covered under fair use principles. One year later in 1999, Congress passed the Digital Theft Deterrence and Copyright Damages Improvement Act which essentially increased monetary penalties for infringement.

In the same year, a college student, Shawn Fanning created Napster, an Internet tool for finding and downloading mp3 music files from connected computers. The peer to peer file sharing features of Napster greatly impacted college and university networks. From early

2000, universities reported abnormal bandwidth usage on their campus networks and soon traced this problem to increasing use of Napster.

According to McCollum (McCollum, 2000a), the initial concern of campus administrators was not copyright infringement but the shrinking availability of their network for routine administrative and academic purposes. This focus changed when record industry executives began to issue unmitigated demands backed by threats of lawsuits, urging university administrators to shut down unidentified mp3 archives on their networks.

The record industry represented by A&M Record Company filed suit in the Northern District court of California against Napster for secondarily contributing to copyright infringement. Affirmation of the lower court decision by the 9th Circuit appellate court effectively shut down the centralized Napster operation and set the stage for a new wave of peer to peer (p2p) services with new p2p network designs that were cleverly crafted to avoid vulnerability to the plaintiff's arguments that overcame Napster's legal defenses.

Notably, Grokster launched its p2p services which, unlike Napster, operated without any centralized involvement in the file sharing processes that their software enabled between users of their file swapping application. Congestion of university networks escalated with the availability of p2p systems which were now capable of swapping not only audio files, but also entire movies

The reaction of copyright owners with the birth of these new p2p systems was no different than their reaction to Napster. However, in a startling turn in the case against Grokster, the Federal Court of the Central District of California in 2003 summarily dismissed a suit brought by MGM on behalf of copyright owners in the entertainment industry to shut down the p2p Grokster operation. Even more startling, the 9th Circuit appellate court that shut down Napster in 2001, now, three years later, in 2004, affirmed the summary judgment of the California Central District court in favor of Grokster. University networks became even more vulnerable to congestion as the use of p2p file sharing systems soared to new heights.

Internally, in the Internet2 Consortium which included over 200 research universities in its membership, groups of users designed the ihub file sharing system that ran on the super-fast private network of the Internet2 consortium, the Abilene network. As reported in the media, ihub enabled users to swap full length movies in a matter of seconds.

Even as the 9th Circuit decision enabled Grokster to remain in operation, a Washington DC court decision empowered copyright owners to compel ISPs such as Verizon (RIAA v. Verizon, 2003) to release information on identified infringers. As virtually all universities provide Internet services to their faculty, staff and student dormitories, this Washington DC court ruling opened the gate to a flood of requests by

external copyright interests for information on users, mostly students, whom copyright owners intended to prosecute for copyright infringement.

The ineffectiveness of tracking down and individually prosecuting each and every copyright infringer (MGM v. Grokster: Petition for certiorari, 2004, p. 22) increased the resolve of copyright holders to pursue and destabilize providers of p2p services, such as Grokster and dozens of other p2p services that emerged on the wake of the Grokster appellate court decision.

The Supreme Court granted certiorari in 2004. At the Court, petitioners represented by MGM urged the Court to reverse the 9th Circuit affirmation of the California Central District summary judgment that absolved Grokster from secondary copyright infringement liability. Such a reversal in Grokster, which had survived lower court scrutiny on the basis of the well established “dual use” Sony principle, was considered by many, an invitation to “prior restraint” on research and researchers as well as on developers of products or systems that were capable of both infringing and non infringing uses.

Reversal or substantial review of the Sony principle, for university faculty involved in research, would amount to a prior chilling restraint in clear violation of the Association of American University Professors (AAUP) dictum that faculty research must be free from all restraint (AAUP, 1940; Dworkin, 1996; Capen, 1948). This principle is widely accepted throughout public and major private research universities as a

condition for generation and dissemination of knowledge; as well, it has enjoyed firm declaration of support at the highest level of American jurisprudence, the Supreme Court.

Views on the role of education in society have maintained significant commonalities from the early periods of the American republic to contemporary times. In comparing and contrasting the approach of Thomas Jefferson and that of John Dewey to the role of education in society, Carpenter (2001) has stated that both thinkers viewed “education as a means to promote individual growth and lifelong learning, education as a basis for political stability and personal protection, education being community based, and education being morally grounded.” (Id., p. 127).

Americans have long endorsed education as being vital to the republic. For Jefferson, education helped both the governed and the government by producing citizens able to pursue their own paths of improvement while at the same time able to responsibly exercise their rights and responsibilities particularly the ability to ward off the potentially corrupting influences of power. Ultimately "the stability of republicanism is not in the institutions of government but in the citizenry who will use those institutions to protect republican virtues such as individual liberty (Carpenter, p. 90)."

Education institutions are empowered to produce citizens equipped with knowledge, ethics, morality and intentionality in

committed and deliberate promotion and preservation of individual freedom and democratic society. The symbiotic relationship between education and society, a relationship emphasized by Thomas Jefferson and a century later by John Dewey continues to impose substantial responsibilities on educational institutions, on their faculty on their leaders and on their values (Carpenter, 2001).

At this juncture, it is relevant to consider the status of universities at the height of the p2p crisis. First, from 2000, demands of external entertainment media interests in the internal operation, management, and administration of university networks had become a regular occurrence (McCollum, 2000a; Carlson, 2001a; Carlson, 2001b) ; secondly, Universities continued to serve as major centers for research, innovation and scholarship; thirdly universities owned and operated high capacity digital networks with powerful computers and processors uniquely suited to be commanded into p2p systems operation protocols for file sharing activities; and fourthly, no indications emerged to suggest that the use of copyrighted material by university faculty would diminish.

Consequently, the urge to search for university perspectives on Grokster at the Supreme Court at which Petitioners urged the Court to essentially reverse the protective veil that the Sony 1984 decision had afforded researchers who developed dual use products capable of infringing and noninfringing uses...that urge was irresistible.

The public significance of the Grokster case is perhaps underscored by the fact that in the entire history of American jurisprudence, only two cases generated more measured public interest than Grokster.

In 2003, *Bollinger v. Grutter*, otherwise known as the University of Michigan case, 539 U.S. 306, the Supreme Court held that the narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal protection clause of Title VI. In this case, 92 parties participated through amicus curiae briefs.

In 1989, *Webster v. Reproductive Health Services*, 492 U.S. 490, the Supreme Court held that a state may not adopt one theory of when life begins to justify its regulation of abortion. In this case, 78 parties participated through amicus curiae briefs.

In *Grokster*, 545 U.S. 913, although 55 parties participated through amicus curiae briefs, it was interesting and curious that university leaders and their associations were completely absent and silent (*MGM v. Grokster*: Supreme Court Docket 04-480). To more fully understand this curious rhetorical event, a formal methodology is required.

Copyright

Congress exercised its constitutional mandate to promote the progress of science by enacting patent laws to protect inventors while to

promote useful arts, it enacted copyright laws. Constitutional intentionality of encouraging both, the “progress of science” and “useful arts” is constantly challenged by fundamental differences in the inherent characteristics of the two goals which find harmonious coincidence only at the condition that both ultimately serve the public good.

Although the Constitution provides for time limitations on exclusive rights of both authors and inventors, Congress has consistently constructed arguments that favored authors with more liberal time periods in which to exercise their exclusive rights than it has granted inventors. Congress has progressively increased the duration of copyright protection from an absolute 14 years in 1790, to, retrospectively, 70 years beyond the author’s life in 1998, patent protection has virtually stagnated at 14 years.

Since the enactment of the Copyright Act of 1790, copyright holders, through the use of injunctive relief, infringement liability, and legislative influence have sought not only to maintain, but in some cases, to expand their privileges as new technologies made copying easier. Congress amended the 1790 Act in 1831, 1870, 1909, and 1976 to modulate the effect of new technologies on the statutory privileges of copyright holders (ARL, 2006).

The courts have been called upon to resolve disputes over the interpretation and application of these legislative amendments (*White-Smith Music v. Apollo*, 1908; *Teleprompter v. Columbia*, 1974; *Sony v.*

Universal, 1984) endeavoring to maintain the balance between the exercise of exclusive rights on the part of copyright holders on the one hand, and on the other, the right of public access to creative works as well as First Amendment directives prohibiting laws that abridge the freedom of speech, or of the press (U.S. Const. amend. I).

Remarkable also are persistent attempts by copyright holders to seek expansion in the scope of statutory protection afforded them through a two pronged strategy of litigation and legislative maneuvering. While according to Association of Research Libraries (ARL), “ [for] almost three hundred years... U.S. law has been revised [by Congress] to broaden the scope of copyright, to change the term of copyright protection, and to address new technologies”, the Courts have been cautious in resisting attempts of copyright holders to expand the scope of statutory protection granted by Congress as well as to extend control over products which are not the subject of copyright laws (Grokster 2003).

Copying activities continued to expand in the public arena as well as in universities and colleges. The environment for these developments was nurtured in the mid 1980s when a new era of commerce emerged and expanded on the Internet. Advances in technology throughout the 1990s made personal computers and Internet access more affordable. The culture of malls and mall commerce lost increasing number of visits as shoppers turned to the Internet to purchase an increasing array of

goods and services. As reported by Mutz (2005), increased social trust led to greater intent to participate in, as well as to actual participation in Internet commerce. Consumer music transactions increased in volume as e-commerce expanded.

By the late 1990's, Internet users began downloading digital versions of music, movies, and books. In response to the increasing ease of copying protected works, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. (H.R. No. 2281, 1998). This act included provisions that addressed copyright infringement liability for Internet Service Providers (ISP's) to the extent that Congress believed the Committee of Conference (H.R. 2281, House of Representatives Report 105-796) appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way designed to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age" (Senate Report 105-190, p.1).

Reaction to DMCA was mixed. On behalf of entertainment industry interests, Rosen (1999) declared that the DMCA's mandate to Internet service providers (ISP's) to take down infringing material from their networks minimized harm to the artists and music copyright owners. On the side of consumer electronics manufacturers, Shapiro (1998) expressed concern over the provisions of the bill that outlawed products that circumvent undefined technological protection measures.

Case: MGM v. Grokster

Because higher education institutions owned networks with powerful computers suitable for conscription into p2p file sharing by highly skilled constituents, universities became directly or indirectly embroiled in all major cases involving peer to peer file sharing (CNN, 2001; Madigan, 2002).

The first of three major cases that relate to p2p file sharing of copyrighted music and video was A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), in which the Ninth Circuit affirmed the lower court decision to shut down the operation of the Internet file swapping services of Napster.

In 1999, the Napster architecture required a new user to login with a user name and password to download Napster's MusicShare software. The user could then add files identified by filenames into shared directories which became available whenever the computer was online. These computers were equipped to copy lists of files from their share directory to Napster's servers which organized and maintained such lists in searchable format. Napster's servers kept track of changes in sharing directories and prime directories on connected computers for searches by other computers. In case of a successful search, Napster's servers using IP addresses of the requesting computer instructed the source computer to transfer the requested file directly to the requesting computer. Though Napster operated a centralized indexing system, at no point did Napster's

servers store the actual contents of downloadable files. For Napster, this feature was sufficient to avoid being treated as a primary or direct infringer. However the centralized role of Napster's servers in indexing and exchanging linking IP information for the searching and offering computers could not escape tests for contributory and vicarious infringement liability (Napster, 2000).

The second major p2p case was *In Re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004) in which the Seventh Circuit affirmed the lower court decision to shut down the operation of the Internet file swapping services of Aimster. The Aimster architecture maintained central indexing servers but used encryption to mask file names which users created and uploaded to Aimster's central servers.

With encryption, Aimster claimed lack of knowledge of the file names which were being offered and requested. When a searching computer located a matching encrypted filename on Aimster's servers, the searching computer contacted the offering computer directly and downloaded the requested file. The pair encryption and decryption stages slowed down the Aimster service, but more importantly, failed to impress the court.

The Seventh Circuit court faulted the self serving nature of the encryption feature and used the long established principle that "eye closure", where infringement was active, cannot absolve an operator like

Aimster who had the “right and capability” to police its system. The encryption variation from the Napster architecture was not sufficient to save Aimster from closure (Aimster, 2004).

The third case is *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004) in which the Ninth Circuit affirmed the lower court decision not to shut down the Internet operation of Grokster and Stream Cast (“Morpheus”). The lower court decision laid the grounds which escalated dispute over issues involved. (*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 259 F. Supp. 2d 1029, C. D. Cal., 2003). The three appellate cases, Napster, Aimster, and Grokster relied substantially on an earlier case, *Universal City Studios v. Sony Corp. of America, Inc.* 464 U.S. 417 (1984), (“Sony-Betamax”), in which the U. S. Supreme Court reversed a Ninth Circuit decision to end the production and sale of the Sony’s Betamax recorder.

In the United States District Court, Central District of California, Metro-Goldwyn-Mayer Studios, MGM with twenty five other movie and entertainment companies as plaintiffs, filed actions against Grokster, Ltd and Stream Cast Networks, Inc as defendants for copyright infringement under 17 U.S.C. §§ 501. Plaintiffs and Defendants filed cross-motions for summary judgment with regard to contributory and vicarious infringement under the copyright law (*MGM v. Grokster*, 2003a; *MGM v. Grokster*, 2003b).

Plaintiffs contended that Defendants distributed software by means of which users of their software freely downloaded copyrighted material and that their conduct of distributing such software rendered them liable for copyright infringement. Defendants argued that they merely provided software to users over whom they had no control and thus that no liability may accrue to them under copyright law.

On April 25, 2003, the presiding judge, United States District Judge, Stephen V. Wilson issued an order and opinion granting the Grokster's and Streamcast's motions for summary judgment and denied the plaintiffs' motion (Grokster, 2003). Defendants proceeded to appeal Judge Wilson's decision at the United States Court of Appeals for the Ninth Circuit (Grokster, 2004).

A panel of three circuit judges Robert Boochever, John T. Noonan and Sidney R. Thomas heard the appeal with MGM Studios and twenty-four movie and entertainment companies as Plaintiffs-Appellants against Defendants-Appellees Grokster Ltd., and Stream Cast Networks, Inc., formerly known as Musiccity.Com, Inc. The appeal panel's decision rendered by Judge Thomas and filed on August 19, 2004, affirmed the district court decision. The Plaintiffs-Appellants proceeded to file a petition for a writ of certiorari on October 8, 2004.

The Supreme Court granted certiorari on December 10, 2004 on the 9th Circuit decision (380 F.3d 1154). Plaintiffs sought the Supreme Court's determination of the following question:

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based “file-sharing” services Grokster and Stream Cast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services. (MGM v. Grokster, 2004).

At the Supreme Court, in the merit phase, fifty five parties submitted amicus curiae briefs, nineteen supporting petitioners, twenty seven supporting respondents and nine supporting neither party. On March 29, 2005, the Court heard arguments. Appearances were Donald B. Verrilli Jr. for petitioners, Richard. G. Taranto for respondents, and Paul D. Clement, Acting Solicitor General, Department of Justice, for United States as amicus curiae. The Supreme Court’s opinion was delivered in June, 2005, in effect debunking the theory that providers of systems that facilitated copyright infringement cannot be held liable provided that such systems are capable of substantial non infringing uses. This decision also fell short of imposing any design constraints on software and system developers among whom Microsoft is a prominent player.

Grokster and Morpheus were based on a radically different architecture in which central servers played no role in discovery, storage

and indexing of file names and computer information. In less sophisticated systems, computers searched other computers for the presence of desired music files and conducted all phases of the transfer without the involvement of servers controlled by the service provider. Searching millions of computers for each request consumed enormous resources and severely slowed down computer processes.

This problem was solved by Grokster and Morpheus who designed their networks as self-organizing systems. The more powerful computers running the software, and based on instructions in the code, emerged as supernodes. These powerful computers performed the indexing function and facilitated fast searching and downloading routines. The lack of ability of Grokster and Morpheus to exercise any control over the activities of their software, although not the only factor, was non the less determinative in the Ninth Circuit decision affirming the California U.S. Court summary dismissal of the MGM lawsuit against Grokster and Streamcast (Grokster, 2004).

Institution Impact

Soon after the enactment of DMCA, in 1999, and the creation of Napster by Shawn Fanning in the same year, the number of users of the Napster p2p file sharing software increased phenomenally (Strahilevitz, 2003), and national CD sales dropped (Zentner, n.d.). The impact on universities was remarkable.

From the early 2000, colleges and universities reported abnormal bandwidth usage on their campus networks (McCollum, 2000a). Administrators soon traced this phenomenon to increasing use of Napster, an Internet tool for finding and downloading MP3 audio files online. For colleges and universities, the initial concern was, according to McCollum, not because of its potential for copyright infringement, but because when students use it en masse they can clog even high-bandwidth campus Internet connections (Id.).

As universities experienced high bandwidth utilization on their networks and traced the problem to file sharing operations, the potential of high economic losses drew the attention of artists like Metallica and Dr. Dre (Foster, 2000). Represented by the Motion Picture Association of America, MPAA and the Recording Industries Association of America, RIAA, artists claimed that p2p file sharing through the Napster Network was cutting into their earnings. The MPAA and RIAA used a dual approach of cooperation and intimidation (RIAA, 2006) to get universities, first, to exercise tighter control on networks and shut down file sharing capabilities, or alternatively, face copyright infringement law suits. Universities responded and reacted in various ways (Hennessey & Spanier, 2004). Eventually a Ninth Circuit Court decision shut down the centralized Napster Network while software developers engineered decentralized networks to accomplish essentially the same ultimate file sharing capabilities.

While universities and colleges worried about the increasing bandwidth consumption in their networks, for artists and recording companies, the primary concern was copyright infringement (McCollum, 2000; McBride, 2005). In 2000, several recording companies initiated a lawsuit against the makers of Napster for actively encouraging direct copyright infringement (*A&M Records v. Napster, Inc.* 114 F. Supp. 2d 896, N.D. Cal. 2000), while the Recording Industry of America Association (RIAA) regularly demanded that colleges shut down online archives of illegal MP3's on campus networks. (Madigan, 2002; RIAA, 2006; Terdiman, 2006).

Judge Beezer rendered opinion in the A&M case against Napster (*A&M Records, Inc. v. Napster, Inc.* 239 F. 3d 1004, 9th Cir. 2001). Essentially, this decision required the lower court to order Napster to remove from its system all offending tracks identified by copyright owners. With the exception of music company BMG, all major labels with outstanding copyright infringement suits against Napster were required to provide lists of the material that they wanted removed from the system. Exclusion of BMG followed the withdrawal of parent company Bertelsmann from the Napster lawsuit. In a joint agreement with Napster, Bertelsmann agreed to fund the development of the file-sharing company. The company would establish a membership based service that would pay royalties to artists whose works its members accessed (Smith, 2000).

As Napster was taking steps to comply with the court order to modify its system in a way that identifies copyrighted material and restrict access to these works, the company also settled the law suit with Metallica and Dr. Dre. Napster agreed to identify and block access to files that the artists did not want to share while they agreed to share some of the artists' songs through a new version of Napster which complied with the court rulings and ensured compensation to artists and publishers (CNN, 2001). The law suit with Metallica was the first p2p copyright infringement case in which universities were named as co-defendants.

In April 2003, two U.S. District Court decisions restructured the balance of power in the conflict between the music industry and music fans. In *RIAA v. Verizon* (2003), a Washington D.C. court ruled that copyright holders could compel Internet Service Providers (ISPs) to release information on users identified as direct copyright infringers, and ordered Verizon to comply with RIAA subpoena to disclose the identity of an alleged anonymous copyright infringer on the ISP's network. Universities and colleges routinely provide Internet access to members of their internal constituency, faculty, students and staff thus qualifying their organizations as ISPs.

In Los Angeles in *MGM et al v. Grokster Ltd.* 259 F. Supp. 2d 1029 (C.D. Cal. 2003), the court granted summary judgment to defendants Grokster and Streamcast, ruling that they could not be held liable for the activity of their users. The court held, based on its reading

of the landmark Sony “Betamax” case, Sony Corp. of America v. Universal City Studios, inc., 464 U.S. 417 (1984), that while some users might engage in illegal copyright infringement, other users of the file sharing services were legitimately sharing public documents or authorized media content.

Thus while the Los Angeles ruling meant that the record industry could no longer shut down p2p networks as it had done with Napster, the Washington ruling made it procedurally feasible for copyright owners to target for prosecution, direct primary infringers, many of whom were university and college students on campus networks.

The demise of Napster, and the expanding interest of music fans in accessing and sharing free Internet music was exploited by software developers who developed distributed systems which were not susceptible to the same legal vulnerabilities which ultimately destroyed Napster’s operation. Notably, Kaazar, Grokster and Stream Cast Networks designed and deployed distributed p2p network systems without any central control servers.

Alluding to copyright enforcement through targeting specialized intermediaries like Napster which ran central indexing servers, Wu, in “When code isn’t law” (p. 683) has declared that peer networks exploit that enforcement structure by “creating a distribution network that eliminates intermediaries”.

At institutions of higher education, students developed the i2Hub system which ran on an advanced university network system, Abilene. This system enabled students in the 200 colleges and universities participating in the Internet2 network to swap movies and songs at great speeds (Internet2, 2005).

Thus, the generation of p2p file sharing software that emerged after the demise of Napster raised to higher levels the concern of the motion picture industry as well as that of universities. While the Napster system shared music files, the new generation of systems typified by Grokster and i2Hub represented “the most ambitious effort to undermine an existing [copyright] legal system using computer code (Wu, Supra. at 683)”. These networks had added the capability of sharing entire movies with consequent increase in bandwidth usage and therefore posed a significant threat to university and college networks as well as to copyright interests.

The Motion Picture Association of America (MPAA) and the RIAA monitored and targeted users of the i2Hub, bringing pressure on university administrators to shut down the extraneous file-sharing use of Internet2. The MPAA also announced intention to directly sue a number of active users of the i2Hub (Gross, 2005). The inefficiencies inherent in this distributed attack on individual users stimulated the resolve of copyright owners to increase legal pressure on the relatively fewer

targeted distributors of p2p software while concurrently filing lawsuits against the most serious direct infringers.

Although copyright, and not academic freedom, was the apparent and central issue in *MGM v. Grokster*, a deeper understanding of the impact of this case on higher education requires a consideration of the broader socio-educational implications of academic freedom.

Academic freedom, unlike copyright, has no specific constitutional imperatives but has evolved out of the "... changing relationship between faculty and their disciplines, students, university administrators, communities and governmental bodies (Aby and Kuhn IV)." Aby and Kuhn state that according to Rorty (1994), the socio-political grounds of academic freedom should be strengthened over commonly held epistemological presuppositions. Wright (1949) advances a global perspective which identifies the kind of universities which spring from academic freedom as the only category of institutions in society which can grapple with the problems of a world faced with war and poverty, problems that threaten civilization, if not mankind itself. Tight (1985) has concluded that academic freedom can only be maintained and protected by force of law. (as cited in Aby and Kuhn IV, 2000, p.17).

Indeed several Court decisions have effectively established the rationale for protecting academic freedom. In *Sweezy v. New Hampshire*, 354 U.S 234 (1957), Chief Justice Warren declares the "areas of academic freedom and political expression ..." as areas in which

government should be “extremely reticent to tread.” Justice Brennan stated that “Our Nation is deeply committed to safeguarding academic freedom ...” for its “... transcendent value ... (Keyishian v. Board of Regents)”. Opinion in “The Michigan Case”, *Grutter v. Bollinger*, 539 U.S. 306 (2003) repeats the Court’s tradition of “... giving a degree of deference to a university’s academic decisions” The decision in *Urofsky v. Gilmore*, cert denied, 121 U.S. 759 (2001) noted without endorsement as a legal or Constitutional right, the AAUP report defining academic freedom as a right claimed by “ ...teacher and investigator ...” as well as the 1940 statement that established the concept of academic freedom for professors. The Urofsky opinion declared that the Supreme Court has given no latitude in considering academic freedom beyond recognition of an institutional right of self-governance in academic affairs.

Moodie in *On Justifying the different claims to academic freedom* (1996) addresses three different claims to academic freedom beyond civil liberties that the Constitution guarantees all persons. These three claims are scholarly academic freedom of the scholar’s right of unconstrained decision making, typically in the pursuit of research interests and in classroom pedagogy; institutional freedom that promotes university autonomy and shields institutions in higher education from externally imposed restraints; and lastly, academic rule that protects the privilege

of departmental groups to make decisions on academic disciplinary issues.

From 2000 when higher education institutions first experienced the choking effect of p2p file sharing practices on their networks (McCullum, 2000), up to the Supreme Court decision in the MGM v. Grokster in May 2005 (Grokster, 2005), the exploding p2p file sharing phenomenon posed multi faceted challenges on the higher education complex.

Excessive demand on bandwidth reduced network availability for academic and research endeavors for students and faculty and for routine administrative applications. Institutions, urged by external interests, devised various approaches to terminate p2p operations and avoid interruptions of their own academic and research functions. At the same time, a surge in research interest produced scholarship in network theory, design and optimization (Iamnitchi, 2004) as well as in behavioral incentives for participants in p2p networks (Ranganathan, 2004) .

Somewhat less frontally, the p2p file sharing explosion and its progression up to the Supreme Court left discursive traces in several domains. One such domain is academic freedom with widely recognized taxonomy of internal and external categories of threats.

Historically, internal threats arose from differences in the rhetorical construction of meaning by diverse internal constituencies (Guttman, 1983; Ambrose, 1990; Hamilton, 1995), internal display of

power (Gottfredson, 1996) and ambivalence (Capen, 1948) on the part of university administrators, ethics of responsibilities (Held, 1983; Gouran, 1990) and skepticism of relevance (Dworkin, 1996).

Peer to peer file sharing by internal constituents substantially degraded network availability for established academic and administrative functions. This phenomenon needs to be contextualized to determine if it posed any threat to any of Moodie's three categories of academic freedom, namely scholarly freedom, institutional autonomy and departmental rule (Moodie, 1996).

Categories of external threats arose from exercise of power of state apparatus (Urofsky, 2001) business interests (Appel, 1993) and trustees (Berquist, 1972), collaborative research accommodations and business association with government agencies (Kreiser, 1993), and industry (Altbach, 1999).

During the peer to peer file sharing phenomenon, Read (2006) has reported that universities received unsolicited directions and injunctions from external interests on how to configure and manage campus networks. These directions were frequently followed with threats of lawsuits if the recipient institution failed to comply (Id.). Again, contextualization of such action by external interests may shed light to what degree, if any, such tactics threatened institutional autonomy.

Tension between copyright protection of authors of works of art, on the one hand, and the public interest of access to these works, on the

other, has been fundamental to the ease with which higher education has pursued its own societal derived mandate to produce and disseminate knowledge and scholarship.

Colleges and universities reacted initially to excessive consumption of bandwidth by its internal constituency of students by imposing administrative ban on file swapping and also by introducing new policy statements to regulate the practice (Hennesey & Spanier, 2004). Some developed their own monitoring programs and other counter measures following coercive dialogue with media organizations (McCollum, 2000).

Little consideration was given to the effects of unusual interference in institutional governance and the implications of such interference on categories of academic freedom, nor to the long term prospects of success of the suppressive enforcements strategies against alleged p2p file sharing activity; strategies that appealed to some administrators and that they employed to seek immediate relief to network congestion and simultaneously pacify media executives. An immediate effect of the somewhat coerced collaborative environment that had been forged between media executives and university leaders was a reprieve from the threat of lawsuits (Mangan, 2002) and a halt to the degradation of college networks.

From pursuing universities in their role as ISPs and their students as primary copyright offenders, entertainment media organizations, chiefly the RIAA and MPAA focused attention on lawsuits against p2p file

sharing services. At every stage of this legal encounter, they repeatedly argued that Grokster be assigned secondary liability for not designing or re-designing their p2p file sharing software in a way that makes them incapable of use for infringement.

At the Supreme Court, of all the interests that had substantial stakes in the outcome of Grokster, higher education leaders were conspicuously absent and silent. This dissertation has focused on and analyzed the complete absence and silence of university presidents at this crucial stage of the Grokster conflict.

Petitioners essentially asked the Court to remove the protective veil which the Sony Supreme Court decision (1984) had established to shield researchers and product developers from secondary liability arising from infringing third party use, provided that their products were also capable of noninfringing uses. As several scholars pointed out in various amicus curiae briefs, acquiescence to petitioner's request would amount to an outright chill on innovation and creativity.

Universities have been major centers for research, innovation and scholarship in almost every conceivable field of human endeavor. These institutions own and operate extensive Internet networks with high capacity computers and systems; their faculty and students use and produce massive quantities of copyrighted material and from the early file-sharing Napster operation, universities have been the focus of external pressure and threat from entertainment industry executives.

Absence and silence of university leaders at the determinative moment at the Grokster Court was unusual. This symbolic action has been further probed and analyzed using methodologies of rhetorical criticism and legal research.

Research Problem

As movie and music industry executives pressured some colleges, collaborated with others, and initiated lawsuits against individual students, colleges and p2p software developers, software developers created new programs and systems designed to avoid vulnerabilities to legal attack. The public increased its consumption of art, and participation in its distribution. Meanwhile, colleges struggled with the effect of bandwidth utilization on their technology budgets and network availability for routine academic, research and administrative functions.

File sharing assumed colossal cultural dimensions in sheer volume and participation and generated conflicting perspectives of ethics and morality (Logan, 2006; Read 2006a; Vaidhyanathan, 2004, p. 2). Legislative attempts to end the conflict proved ineffective. Ideological arguments raged regarding the role of a free market in a democratic society and attempts to distort the free market structure. Philosophical questions on creativity and on the creation and distribution of knowledge, enabling software technology, art and culture raged (Carr, 2005) as executives in the entertainment industries moved with

determination and resolve in the legal arena to end the impact of p2p networks on music and copyright infringement.

P2p file sharing operations impacted higher education institutions in several conflicting ways. First, the core functions of teaching, research and institutional administration relied heavily on network availability and integrity. P2p file sharing activity threatened maintenance of these core institutional functions and if unchecked would attain disruptive dimensions and cripple the day to day operation of institutions (Carlson, 2001b).

At the same time, as reported by Read (2005), p2p file sharing remained a powerful and extensively used tool for collaboration in research activities of faculty and students. Institutions that could not shut down all p2p functionality without also disrupting the research effort of their faculty and students faced the challenge of filtering out unwanted p2p file sharing while maintaining a network in which desired p2p activity could proceed without undue impediment.

Plaintiffs demanded removal of the protective shield that the Sony decision provided for researchers, designers and developers of products and systems against secondary copyright liability on the condition that such products were capable of substantial noninfringing uses (Cohn et al. 2005).

While members from the constituency of university faculty spoke through over a dozen amicus curiae briefs in support of one side or the

other, or spoke in support of neither side, at the Supreme Court, the constituency of higher education leaders, presidents of universities and colleges responded by complete absence and silence at the Court.

This response of absence and silence by higher education leaders has invoked the need for a critical review of this performance in an attempt to examine both its reasonableness as well as its appropriateness in the rhetorical situation surrounding a Supreme Court determination of a dispute in which fundamental assumptions of higher education autonomy and scholarly freedom faced possibilities of substantial modification. The situation at the *Grokster* Court has necessitated a probe of the following questions for fitting answers.

Research Questions

1. Did *Grokster* threaten academic freedom or institutional autonomy?
2. Utilizing rhetorical criticism, what were the implications of the absence and silence of higher education leaders at the *Grokster* Court?
3. What was the impact of the United States Supreme Court decision in *Grokster* on higher education?
4. Have new issues been generated?

Definition and Explanation of Terms

Amicus curiae: Latin for "friend of the court," a party or an organization interested in an issue which files a brief or participates in

the argument in a case in which that party or organization is not one of the litigants. (law.com Law Dictionary)

Appellate court: A court having jurisdiction to hear appeals and review a trial court's procedure.

Artifact: An object of rhetorical criticism.

Bandwidth: Amount of data that can be transmitted in a fixed amount of time.

Certiorari: A writ of review issued by a higher court to a lower court.

Critical theory-1: Defined by Max Horkheimer as social theory oriented toward critiquing and changing society as a whole, in contrast to traditional theory oriented only to understanding or explaining it. (Wikipedia, http://en.wikipedia.org/wiki/Critical_theory).

Critical theory-2: "theory which can provide the analytical and ethical foundation needed to uncover the structure of underlying social practices and to reveal the possible distortion of social life embodied in them." <http://www.answers.com/topic/critical-theory>

Dialectics: A method of reasoning which aims to understand things concretely in all their movement, change and interconnection, with their opposite and contradictory sides in unity.

Differance: The notion that words and signs can never fully summon forth what they mean, but can only be defined through synonymy, through the appeal to additional words. Thus, meaning is

forever "deferred" or postponed through an endless chain of signifiers. (In Jacques Derrida's *Differance* as cited in Wikipedia:

<http://en.wikipedia.org/wiki/Differance>; Derrida quoted in Biesecker, 1989).

Ethical economy: A concept (coined in this work) that indicates how efficiently communication within a sphere works to enhance the attainment of objectives that participants in the sphere articulate.

File sharing: Access of files on a computer from other computers.

ISP: Internet service provider.

Interpellation: An involuntary recruitment into a subject position which bonds an individual to both the subject position and also to the underlying ideology.

MP3: A popular digital audio encoding format designed to greatly reduce the amount of data required to represent audio with minimal quality loss.

Network: A system linking computers.

P2P: Peer-to-peer; computers existing with equal privileges in a network.

PC: Personal computer.

Problematic: A definite theoretical structure characterized by a dialectical interplay of structuring concepts that serve to raise some questions while suppressing others. (Giroux, 1981).

Rhetorical criticism: The description, analysis, interpretation, and evaluation of persuasive uses of language. (In K. K. Campbell's Critiques of contemporary rhetoric, as cited in German, 1985, p. 87)

Rhetorical situation: A complex of persons, events, objects, and relations presenting an actual or potential exigence which can be completely or partially removed if discourse, introduced into the situation, can so constrain human decision or action as to bring about the significant modification of the exigence. (Bitzer, 1968).

Rhetor: The speaker in a rhetorical situation.

Sphere: A space of human discourse.

Summary judgment: A court order ruling that no factual issues remain to be tried and therefore a cause of action in a complaint can be decided upon certain facts without trial.

Supreme Court: The highest court in the United States, which has the ultimate power to decide constitutional questions and other appeals based on the jurisdiction granted by the Constitution, including cases based on federal statutes, between citizens of different states, and when the federal government is a party. (law.com Law Dictionary).

U.S. Courts of Appeal : The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit (U.S. Courts :

http://www.uscourts.gov/courts_of_appeals.html)

U.S. District Court: The United States district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters.

Methodology

Legal Research

Legal research will be relied upon to establish the issues at Grokster and the role of questions which litigants presented for resolution at the Grokster Court in creating an exigency. Also legal research will be used to uncover salient jurisprudential principles that bear on the questions presented by petitioners and respondents in briefs and also by Supreme Court Justices in oral arguments as well as by amici through amicus curiae briefs.

The role of legal research is crucial to this dissertation in that the phenomenological absence and silence of university presidents need to be clearly established before rhetorical criticism can be attempted on this phenomenon. Fortunately, this is a relatively uncomplicated task.

Rhetorical Criticism

In the search for a methodology that would yield the clearest understanding of this curious absence and silence, consideration has been given to possibilities offered by various methodologies in the area of rhetorical criticism which has been described as a qualitative research

method that is designed for the systematic investigation of symbolic acts and artifacts for the purpose of understanding rhetorical processes.

One major obstacle was that virtually all categories of methodologies of rhetorical criticism conveyed a privileged status on artifacts that exhibit a physical or metaphysical identity such as text, speech, fantasy, ideology, and generally situations with effects that are capable of commanding dramatic attention. For example, Traditional Rhetorical Criticism developed in 1925 through the work of Herbert Wichelns, worked quite well with oratorical artifacts such as State of the Union addresses, Sermon on the Mount, Daniel Webster's defense in the 1819 Supreme Court Dartmouth case and other oratorical works for which this methodology was designed.

Traditional rhetorical criticism being squarely incompatible with speechless performances of absence and silence merits no further consideration. Other methodologies such as Fantasy Theme Analysis or Ideographic Criticism developed much later still tended to treat absence and silence as mere incidental devices in contexts dominated by the more privileged artifacts of speech and text.

Two methodologies, namely Situational Criticism and Generative Criticism, offer possibilities for the study of the curious absence and silence which was the rhetorical response of university presidents in the situation that existed in the Grokster Court. Although generative criticism starts with the encounter of a curious artifact (Foss, 2004), the

methodology relies on extensive coding of the artifact, a procedure not readily applied to absence and silence in which limitations imposed by a lack of concrete features that are amenable to a coding process would render coding impractical or at best speculative.

Situational criticism is based on the seminal work of Lloyd Bitzer (Bitzer, 1968) and a number of other works (Vatz, 1973; Consigny, 1974; Jamieson, 1975; Biesecker, 1989; Edbauer, 2005) on “Rhetorical Situation”, the bedrock of situational criticism. A central concept in Bitzer’s rhetorical situation is that exigencies within the rhetorical situation invite a fitting response (Bitzer, 2000, p. 66) which may come forth as speech or fail to come forth in the case of absence and silence or speech that is not fitting.

Laura Beth Carroll’s doctoral dissertation, *The Rhetoric of Silence: Understanding Absence as Presence*. (Carroll, 2002) has specifically employed Bitzer’s rhetorical situation to study absence. Several other works (Kurzon, 1995; Thiesmeyer, 2003; Glenn, 2004) have also highlighted absence and silence, sometimes in grave and horrific situations such as the holocaust (Lang, 1996; Jones, 1999). The value of expanding this class of works in rhetorical criticism in which absence and silence feature with innate salience, undiminished by the hierarchically privileged status frequently accorded presence and speech makes situational criticism, based on Bitzer’s rhetorical situation, particularly attractive.

Accordingly, the absence and silence of university leaders in Grokster has been analyzed through the methodology of situational criticism based on the works of Bitzer (1968) and others on rhetorical situation. The choice of situational criticism is informed by a five question inquiry proposed by German regarding the isolation and examination of the rhetorical artifact in “Finding a methodology for rhetorical criticism” (German, 1985). As Kuypers (2005, p. 18) has indicated, “Because a rhetorical artifact is a multidimensional, complex and nuanced event, there is no one best way of viewing it”. As such, the purpose of this examination is to find “... a special union of methodology and artifact to yield the best understanding of both.”(German, Id. at p. 87).

This dissertation seeks to describe, analyze, interpret and evaluate the deliberate or unintentional absence and silence by higher education leaders, at the Supreme Court phase of Grokster, at which petitioners for certiorari sought to persuade the Court to reverse the 9th Circuit decision that upheld a lower California court decision to dismiss the plaintiff’s case against defendants Grokster and StreamCast on charges of secondary copyright liability for the alleged file sharing activities of users of Internet p2p file sharing services provided by the defendants/respondents (Grokster, 2005).

Limitations

The unavoidable operation of the conscious and subconscious bias of the critic is a major limitation in the generalizability of the conclusions that rhetorical criticism produces. Although a critic is encouraged to be objective all the time, Kuypers (2005 at p. 30) has cautioned that “Indeed, excessive objectivity is a failure that occurs with unfortunate frequency in criticism.” Hopefully, scrutiny by others will help to minimize the operation of bias. In many ways, the conclusions of the critic is always provisional and leaves much room for exploration of other perspectives which may be more or less as valid as the perspectives on which the critic has anchored his or her conclusions.

Meanings are susceptible to the operation of *differance* in a general philosophic sense which means they can theoretically never be construed as absolute realities; rather they evolve through revelations of emergent traces of discourse.

As in all inquiries, assumptions do influence the direction of the critic’s perspectives. The assumption is made in the entire work that education is not just another grand narrative, but that both society and persons who seek education do benefit. Belfield has summarized the results of several studies with the conclusion that personal rates of return to investment in higher education is “higher than the yield on other economic activities” even without incorporating “the stream of social or consumption benefits from education” (Belfield, 2000, p. 29).

Belfield has also presented results of estimates of even larger percentages of “aggregate” societal economic growth due to education (Id. at p. 193).

Sustenance of higher education and its institutions has ontology far broader than that dictated by purely economic considerations. The range of narratives from Reading’s notion of symbiotic connections between early universities and national culture (Readings, 1996) to Altbach’s prescription of constructive reform (Altbach, 2001); from Jeffersonian role of education in protecting democracy through citizenship capable of “ward[ing] off the potentially corrupting influence of power (Carpenter, 2001)” to Dewey’s education’s role in “supporting democracy (Dewey, 1984)”; these views and narratives propel the assumption that universities constitute an enterprise that society needs and that leaders of universities have moral responsibilities to uphold critical values that have served and are likely to continue serving the enterprise directly and by extension, the society in which the higher education enterprise lives.

Nothing is compromised by the assumption that higher education institutions represented by public universities and large private research universities have an enduring epistemological responsibility and relevance to society, even though this assumption becomes problematic in the cosmopolitan public sphere where more educated nations can take advantage of less educated ones.

Significance of the Study

Grokster directly presented significant challenges in the areas of law, culture and technology. This study shows that, perhaps less obviously, this case carried implications for higher education institutions. At the final onslaught, at the Supreme Court, Petitioners urged the Court to essentially lift the protection which, by Sony (1984), allowed researchers to develop systems which were immune from secondary liability actions provided that the products based on these systems were capable of substantial noninfringing uses.

As argued by university professors in law, culture, and technology, such a determination would have a chilling effect on research activity, particularly at research universities which as noted by Crews in (Crews, 1993, at p. 10) "... are distinguished by their paramount commitment to original research ..."

Although ultimately, the Supreme Court opinion (545 U.S. 913, 2005) did not shake the principles which supported the Sony decision, it is noteworthy that leaders in higher education administration were completely absent and silent at the Court during the entire period in which the Court processed inputs and conducted its deliberations.

The political and ethical implications of this absence and silence need to be explored for the public who support higher education and for students of higher education culture, ethics and politics. Through the analysis of absence and silence as the rhetorical response of higher

education leaders at the Supreme Court phase of *Grokster*, a deeper appreciation could be gained of ways in which speech of university presidents may be constrained.

Readings has highlighted the symbiotic connection between early universities and national culture and has pointed to a shift in the role of the University due to “the decline of the national cultural mission that has up to now provided its *raison d’être* ...” (Readings, 1996, p. 3). Although Readings has suggested that “the University is a ruined institution (Id. at p. 169)” that “is losing its need to make transcendental claims for its function ... (Id at p. 168)” the scholar has warned against “abandonment of [real] social responsibility”, namely, “ethical probity” which “is simply not commensurate with the grand narrative of nationalism that up to now underpinned accounts of the social action of University research and teaching (Id at p. 192).”

Study so far has failed to uncover any calls for wholesale abandonment of the University, but rather prescriptions on how to “dwell in those ruins” (Readings, p. 169) or on the criticality of “constructive reform” (Altbach, 2001, p. 290).

Perspectives represented by the ideas of Readings and those of Altbach increase the significance of this investigation which directly probes the behavior of leaders of universities particularly the response of university presidents at the Supreme Court phase of *Grokster*. Whether the University’s need is to rise from “the ruins” (Readings), undergo

“constructive reform” (Altbach), or undergo some other form of transformation, the issue of ethical probity for its leadership is critical. The rhetorical analysis of the symbolic action of absence and silence of university leaders at Grokster offers another perspective that could bridge the divergent perspectives represented by Readings and Altbach.

Summary

In this chapter, “Introduction”, a brief account of copyright has been presented including its significance in the higher education enterprise. This has been followed by a summary of succeeding stages in the copyright-based case of MGM v. Grokster up to the Supreme Court at which the absence and silence of higher education leaders was glaring. The demands of petitioners at the Court were poised to reverse or substantially modify the import of the Sony principle.

The impact of Grokster through copyright implications and the impact on university function have been highlighted under the section on Institutional Impact resulting in identification of a curious rhetorical event, that is the absence and silence of higher education leaders at the Supreme Court in Grokster where petitioners’ demands had the potential of affecting universities through questions that petitioners urged Supreme Court Justices to decide. This scenario has been described briefly under the section titled Research Problem. Four interrelated Research Questions have been stated as a means of analyzing this research problem.

Due to the extensive use of terminology and language from the special disciplines of legal research and rhetorical criticism, a section on Definition and Explanation of Terms has been included.

Methodologies in rhetorical criticism and legal research are important tools and provide the framework for this investigation. German (1985) has provided a strategy for matching rhetorical artifacts with an appropriate methodology from the discipline of rhetorical criticism. Under the section on Methodology, portions of German's strategy have been summarized and the methodology of situational criticism has been selected to provide the unique combination of rhetorical artifact and methodology that promises to reveal new light on, and increase our understanding of the symbolic action of absence and silence.

The following section on Limitations admits the theoretically biased posture of a critic, and highlights certain exclusions, namely that of higher education from the category of grand narratives. The latter would overshadow the rhetorical symbolic action and perhaps raise different and more urgent questions. However by narrowing the sphere to the national public sphere, higher education in this restricted sphere escapes the certainty of the meta-narrative possibility. This allows the rhetorical criticism of the curious behavior of its leaders to remain a significant endeavor.

The next section, Significance of Study, has claimed that analysis of the absence and silence of higher education leaders in final phase of

Grokster would add to the understanding of the operation of forces that could compel such a response as well as contribute to the already highlighted concerns over challenges that exist in higher education leadership.

The entire chapter, Chapter I, is wrapped up in this Summary section.

In Chapter II, "Review of Literature", review covers cases as well as two congressional bills, S. 167 and H.R. 4077 that are of proximate relevance to the issues in Grokster. The cases are Sony, Napster and Aimster. This chapter also reviews literature in the areas of the rhetoric of absence and silence, academic freedom as well as in the area of public spheres in which university constituents are active participants. Some literature on decision making, judgment, ethics and morality is reviewed because of possible usefulness in the critical examination of the symbolic action of absence and silence.

Chapter III, "Methodology", discusses the methodological framework through which the symbolic action of absence and silence of university presidents in Grokster is examined. The framework includes two components, namely legal research and rhetorical criticism.

In Chapter IV, "Findings of the Study", research questions are answered following findings that emerge from application of methodology to the rhetorical situation at the Grokster Court with a focus on the symbolic action of absence and silence of university presidents.

Chapter V, "Summary, Conclusions & Recommendations", provides summary, conclusions and recommendations. Concerns over leadership in higher education are revived. Ideas for further research conclude this chapter and the substance of this dissertation.

CHAPTER II

REVIEW OF LITERATURE

Introduction

Literature relevant to this work falls into three categories. First, is the category of copyright cases and legislation that relate directly to p2p networks and cases through which principles of the doctrines of secondary copyright liability have been developed. Higher education institutions have played and continue to play central roles in the development and utilization of high speed networks as well as continuing to provide services as Internet service providers (ISPs) in a unique environment in which the only users of their networks are also constituents of the institutions themselves. The constituency of university students with access to college networks, at the height of the p2p file swapping phenomenon, played central roles in the crises which threatened to choke university networks and which alarmed copyright owners into legal responses that culminated in the Supreme Court decision in *Grokster*.

The second category of literature is from the area of rhetorical criticism that includes works on rhetorical situation, essential to the methodology of situational criticism as well as studies of absence and silence and the way in which these phenomena have been studied. Bitzer's seminal work on rhetorical situation is a logical starting point in

this review. Highlights of imperfections uncovered in subsequent works ranging from complete negation (Vatz, 1973), elaboration (Jamieson, 1975; Edbauer, 2005), alternative perspectives (Biesecker, 1983), and comprehensive rhetorical theory (Consigny, 1974) have been selected for review because of their fundamental relevance to situational criticism.

These first two categories of literature drawn from the areas of law and rhetorical criticism are of direct importance to the legal and critical methodologies. The scope of the third category of literature is informed by a theoretical dilemma in an exigency inquiry and illustrated in the following example in which a child is drowning in an isolated pool of water. In one case, the only subjects or agents present are other minor children who have no swimming skills while in another case, adult swimmers surround the pool.

One approach is to consider the child in the pool together with the surrounding environment of agents as a single space of inquiry. The alternative approach is to separate the child's immediate space from the space of other subjects in the immediate vicinity of the pool.

In this alternative approach, questions of capacity, qualifications, values, ethics and morality could be probed without any clash with Bitzer's alleged assumption of an independently and publicly established exigence. Merging the situation in the pool with surrounding subject

agents into a single space of inquiry unnecessarily problematizes Bitzer's notion of publicity of exigence.

For this reason, the third category of literature must be capable of dealing with the ecological environment which provide "a network of lived practical consciousness" within which rhetorical situation operates (Edbauer, 2005 at p. 5).

Included in this collection are studies on the role of universities in society, principles of academic freedom, a vibrant rhetorical site in which various constituencies in and out of higher education have established widely divergent discursive positions. This is also an area in which Supreme Court decisions have actively shaped the contours of rights and privileges which arise from various perspectives of academic freedom. Copyright, a constitutional issue is at the heart of the university function in society with strong relationships to academic freedom, the threat to which is a principal concern of this work.

Also included are works on concepts and constraints, both personal and external, on decision making, as well as considerations of ethics and morality in special instances such as in leadership positions of complex university environments. The intent is to expand the boundaries of spatialized and historialized ecology as broadly as it is reasonable to capture an exhaustive inclusion of elements in the "network of lived practical experiences...." (Edbbaur, 2005) in which the rhetorical situation is embedded.

Also, Farrel and Young (2004) have recommended for the methodology of situational criticism that "... the critic must take into account the totality of the situation and must consider the role played by each element". They further emphasize that although elements can be omitted later, initially, the list of elements "should be inclusive, even exhaustive" (Id. at p. 35).

Legal Setting

Pre-Grokster Precedent

Developments in technology leading to peer to peer file sharing systems are central to the underlining arguments in all the cases considered. Highlights of these developments deserve mention.

In 1969, an RFC (Request for Comments) by a member of the three-person Network Working Group, Steve Crocker of UCLA described details of a peer-to-peer architecture. In the RFC he stated one of the group's goals as the need to stimulate immediate and easy use of the network by a wide class of users and that "We must look for some method which allows us to use our most sophisticated equipment as much as possible as if we were connected directly to the remote computer" (Crocker, 1969; Wikipedia, 2005).

ARPANET, the basis of the Internet, went online in the same year as the RFC of the Network Working Group. Funded by the Federal Government, it was eventually turned over to an agency of the Department of Defense with highly restricted connections to military

sites, and a handful of universities involved in defense-related research. In the 1980's, connection extended to more institutions and companies involved in sponsored DOD research. Subsequently, DOD ended its development of ARPANET, clearing the way for the National Science Foundation, NSF, to continue funding the growth of the Internet until 1995, when NSF privatized access (Kristula, 2001).

By 1998, Microsoft had built-in peer-to-peer file-sharing capabilities into the Windows 98 platform (Stevens, 2007). According to Windows History (2007), a superset of Windows 3.1, Windows for Workgroups 3.11, added peer-to-peer workgroup and domain networking support and for the first time, Windows-based PCs were network-aware and became an integral part of the emerging client/server computing evolution (Windows History, 2007) and able to “share files, programs or your desktop, anytime, anywhere” (Microsoft, 2007). This feature of the Windows operating system enjoyed quiet and limited popularity until 1999 when a college student, Shawn Fanning, developed the Napster software that enabled users to download music files from other PCs connected to the Internet (Lewis 2005).

Fanning's revolutionary application of peer-to-peer networking awakened copyright owners to the potential economic consequences of massive copyright infringement, and precipitated concerted public campaign and legal maneuvers which shut down the Napster operation. The defunct Napster system was based on one of three broad classes of

peer-to-peer network design. Analysis of the MGM v. Grokster litigation is closely related to the peculiar characteristics of these three classes of peer-to-peer network architecture.

One end of the spectrum, typified by Napster, involves a central indexing server controlled by Napster. All search traffic depended on this centralized and dynamic repository of file names. At the other end of the spectrum, the “true” peer-to-peer system, each computer maintains shared files in its own hard drive. A searching computer must search each connected computer until it locates a desired file. Between the centralized and distributed extremes, an intermediate architecture exists. In this system, the software enables a computer, depending on the traffic demands and the computer’s own processing capabilities, to shift into operation as a “supernode”. Supernodes maintain indexes of files available for sharing and facilitate the connection between requesting and sharing computers. Grokster and Stream Cast based the development of their software on the FastTrack technology developed by Niklas Zennström and Janus Friis. Details in licensing relationships, as well as in the operation of the resulting networks substantially influenced analysis of liability for copyright infringement in Napster (2001), Aimster (2003), and Grokster (2004).

Although p2p Internet activity was not an issue in the Sony Betamax case, the significance of Sony is underscored by the claims of virtually all parties in Napster, Aimster, and Grokster that the Sony

decision supported their positions. It is therefore useful to examine the landmark Sony case.

Sony Corp. v. Universal City Studios (1984)

Statement of the case

Petitioners, Sony Corp., manufactured and sold, through third party retail establishments, a home video tape recorder, Betamax, capable of recording television programs for later viewing. Respondents, Universal Studios, owned copyrights on some of the television programs broadcast. Respondents brought action in Federal District Court alleging that VTR users violated copyright protection by recording the publicly aired programs and further that Sony was liable for that infringement because they marketed the VTR machines used to record television programs for later viewing. (*Universal Studios v. Sony Corp.*, 480 F. Supp. 429, 1979) . They sought money damages, an equitable accounting of profits, and an injunction against the manufacture and sale of Sony's VTRs.

The District Court denied all relief sought by respondents holding that noncommercial home recording of public broadcasts was a fair use of copyrighted material; also that petitioners could not be held liable as contributory infringers even if home use of VTRs was considered an infringing use. The Court of Appeals reversed, holding petitioners liable for contributory infringement and ordered the District Court to fashion appropriate relief. (659 F.2d 963, 1981). The Supreme Court granted

certiorari, (457 U.S. 1116, 1982) and reversed the 9th Circuit appellate decision. (464 U.S. 417, 1984).

Principles and issues

In the Court opinion, the Constitutional intent in U.S.C. Art.I, sect. 8. provided monopoly privileges to authors and inventors as a means towards the important public purpose, that of public access to creative products. Copyright and patent statutes make reward to the owner a secondary consideration. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. Such rewards are incentives to induce release of creative products for public access. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

The opinion used the “staple article of commerce” doctrine from patent law to conclude that Betamax was capable of substantial non infringing uses because of its capability to record programs which are authorized by certain copyright holders, as well as unauthorized recording of works of other copyright holders under the “fair use” doctrine of Copyright Law. The decision emphasized that indeed the product need merely be capable of substantial noninfringing uses (*Sony*, 442). In the latter case of *Aimster*, the 7th Circuit decision placed the burden on *Aimster* of demonstrating the probability of actual noninfringing uses of its system.

The role of Congress

The Court emphasized the Constitutional charge to Congress in balancing the scope of the purely statutory monopoly granted by copyright laws to copyright holders in their works, on the one hand, and on the other hand, the availability and use of such works by the general public. It indicated that Congress has been discharging its duties from time to time “fashioning the new rules that technology made necessary”, (Sony, 1984 under “The Court of Appeals Decision”), as the realities of new technologies introduce ambiguities in defining assumptions. The Court consistently defers to Congress when major technological innovations alter the market for copyrighted materials. “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology (Id.)”

However, in the case that Congress has not plainly marked the balance of competing interests, the Court is guided by the principle, credited to Justice Stewart in *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975), that although creative work is to be encouraged and rewarded within the limited monopolistic and durational scope of copyright holders’ privileges, the ultimate objective was the promotion of broad public availability of literature, music and the other arts.

Authorized use of staple article of commerce

In contrast to the Patent Act, the Copyright Act does not expressly render anyone liable for infringement committed by another. Secondary liability under the “doctrines of direct infringement and vicarious liability” were not involved in the Sony case. Rather, petitioners asked the Court to hold Sony liable for contributory infringement. The Court found that Sony does not supply Betamax consumers with copyrighted works, a critical difference in the Napster case. Rather, it sells a device that consumers, independently and subsequently may use to copy programs that are copyrighted, those that are not copyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. Sony’s advertisements did not also encourage infringing uses of its machine, in contrast to Aimster’s active promotion of unauthorized downloads of copyrighted music and movie files. Unlike Aimster, Sony, in its advertisements, warned that some television programs which Betamax was capable of recording may be protected by copyright. Ample evidence had been presented that some producers sanctioned the use of Betamax in time-shifting which afforded viewers the convenience of recording television programs for viewing at a later time.

Contributory liability

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective protection of

the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Since the potential use of Betamax is much broader than its use for recording unauthorized works, Sony could not be held liable under contributory infringement. Such a rule would “block the wheels of commerce” as in *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912).

The record showed that there were many producers of television programs who did not object to the “enlargement in the size of the television viewers that resulted from the practice of time-shifting for private home use”. The seller of the equipment that makes this time-shifting process possible “has had no direct involvement with any infringing activity”.

Whereas Sony had no direct involvement with any infringing use of Betamax, Napster’s involvement was central in the file swapping operations that the Napster system supported. In *Aimster’s* case, though *Aimster* avoided direct involvement in the actual exchange of files, it nonetheless played an essential role in enabling two peer computers to actually exchange files. In contrast, *Grokster* and *Stream Cast* have no role in the file swapping transactions between peer computers that run the *Grokster* or *Morpheus* software programs.

Vicarious liability

Although petitioners did not charge vicarious liability, the Court observed that if vicarious liability was to be imposed, it must rest on the

fact that Sony sold equipment with constructive knowledge of the fact that its customers may use that equipment for unauthorized recording of copyrighted material. The Court concluded that there was no precedent in the law of copyright for the imposition of vicarious liability on such a theory.

Unauthorized “fair use”

The Court observed that even unauthorized uses of a copyrighted work were not necessarily infringing. To constitute an infringement, the unlicensed use of copyrighted material must be in conflict with one of the five exclusive rights conferred by the copyright statute. These rights were subject to exemptions created in section 107 of the Copyright Act 1976 for a “fair use” of copyrighted works which does not require any authorization from the copyright owner. The determination of a fair use qualification required application of an “equitable rule of reason” in the analysis of each particular claim of infringement.

Section 107 provides four factors to be considered in a fair use analysis. These are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the potential market effect on the work. An adverse potential market effect may be presumed if the intended use of copied works was for commercial gain. However, if the copied work was for a non commercial purpose, the likelihood of harm must be demonstrated by a

preponderance of evidence that some meaningful likelihood of future harm existed.

Conclusion

The Court concluded that “The direction of Art. I is that Congress shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress”. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972). The Seventh Circuit applied the Supreme Court ruling in the *Sony-Betamax* case in *Aimster*. It is useful to discuss the principles underlining copyright infringement and how these impacted the Napster system since new capabilities in subsequent p2p file swapping systems exhibit different vulnerabilities when scrutinized under each principle. “Fair Use” was critical in Napster since this was the essence of Napster’s affirmative defense on behalf of its users. Direct infringement is pre requisite to any consideration of a secondary infringement. A successful fair use affirmative defense would have been necessarily fatal to the petitioner’s charges against Napster for contributory and vicarious liability. The Ninth Circuit decision in Napster addressed notable differences between the conduct of Napster and that of Sony in *Betamax*.

A & M Records v. Napster (2001)

Napster operated a system which enabled a potential user to first access Napster’s Internet website, register, download, and install the free

Napster MusicShare software on his or her computer after creating a user name and password as part of the registration process. A registered user who wants to share files is required to create a directory on the computer, load files intended for sharing and uses capabilities in MusicShare to verify and upload to Napster's servers, the names of well formatted MP3 files. The record did not show that creation of this file share directory was required. The names of files in the user's share directory were uploaded and organized under user names within a global "collective directory" of all files available for transfer. Within the collective directory on Napster's servers, the names of files on computers which were online at the moment were available for instant access by other computers running the Napster software.

Software on Napster servers maintain and update a search index which an individual user can search by artists or song titles. Napster servers handle the search requests and match these with data from their collective directory returning and return a list of all the matching file names to the computer which initiated the search. To effect an actual transfer from one computer to a requesting computer, Napster servers extract the IP addresses of both computers, use the IP address of the computer with the song files to inform that computer of the IP address of the requesting computer. Subsequently, both computers, using each others IP address, transfer the requested files. The file transfer initiates an infringement inquiry. Two conditions are required to establish a prima

facie case of direct infringement. Firstly, the plaintiff must demonstrate ownership of the subject material which in this case, is the contents of a specific music media file. Secondly plaintiff must demonstrate that the alleged infringers violated at least one exclusive right of the copyright holder under 17 U.S.C § 106.

The court established that file transfer through the Internet involves reproduction and distribution. This finding establishes the Internet based process as a valid copying mechanism for which the Copyright Act grants exclusive reproduction and distribution rights to the copyright owner, subject only to a fair use determination. In *Betamax*, copying was localized exclusively in the actions of the user. Distribution was not an issue. In *Napster*, a fair use inquiry is complicated by the fact that the acts of copying and distribution are coupled and involve two parties. A fair use analysis is based on factors enumerated in 17 U.S.C. § 107. The factors are (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work.

The first factor examines whether the resulting work adds a further purpose or different character to the original work. The court's analysis asserts that courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. This factor also

examines whether the alleged infringement is commercial or non commercial. While direct economic benefit is not required to demonstrate a commercial use, copying a work to avoid the expense of purchasing the original could potentially create an indirect economic benefit to the recipient of the copied work. In *Worldwide Church of God v. Philadelphia Church of God*, 227 F. 3d 1110 (9th Cir. 2000), the Ninth Circuit opinion observed that the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement. Also the Philadelphia Church use of "The Mystery of Ages" indirectly profited it through increased membership (*Worldwide Church v. Philadelphia Church*, 2000). The Napster court also noted that the No Electronic Theft Act, Pub. L. No. 105-147, 18 U.S.C. § 101, in its definition of financial gain includes trading infringing copies of a work for other similar works. It must be noted however that a file transfer in the Napster system, as in the subsequently developed file swapping systems of Aimster and Grokster, does not involve any reciprocal undertakings or exchanges.

The nature of use is the focus of the second factor. The court asserted that the plaintiffs' copyrighted musical compositions and sound recordings are creative in nature and therefore militate against a finding of fair use. However, how the recipient uses the work would seem to be more deterministic of fair use than the nature of the work itself which the court was apparently describing. The third factor considers the portion used. As the court observed, wholesale copying does not

necessarily preclude fair use although copying an entire work militates against a fair use finding. Here the court referred to the Betamax in Sony where the Court concluded fair use even when the protected work is copied in its entirety for time-shifting purposes (Sony, 1984, p. 449-50). If indeed the requester- recipient of a protected Internet file had a legitimate fair use for parts of a protected work, it is doubtful that limitations in the enabling technology would permit fractional copying.

The fourth and last factor examines the effect of use on the market. The court stated that if the intended use is for commercial gain, the likelihood of market harm may be presumed, but must be demonstrated in the case of a non commercial purpose. The Napster case did not clarify the threshold of harm that can be associated with a one time download of a single protected music file although it recognized that the importance of this factor would vary, not only with the amount of harm, but also with the relative strength of the other factors. Significant portions of the consideration of fair use in Napster and subsequent cases are based on an aggregation of the presumed effect of the actions of several independent alleged infringers. Direct infringement is an individual act. The validity of aggregating these individual acts in analyzing fair use factors is yet to be established. In any case, the Napster court did exactly that.

In considering present and future harm, the court relied on the opinion of plaintiffs' experts whose studies were statistical in nature as

the inferences related to the present and probabilistic as to the future impact on the market for the copyrighted works. In *Sony*, it was observed that the technology that Sony developed for the copying of music files with the Betamax machine eventually benefited copyright owners. Betamax limitation to one hour programs was overcome when another company developed the VHS which extended the one hour limit sufficiently to allow the copying of entire movies thereby generating a gigantic market for movie and musical CDs for copyright owners' works. The *Napster* court also established that lack of harm to an established market could not deprive the copyright holder of the right to develop alternative markets for their works. This concept was highlighted in *Grokster* where artists encouraged copying of their works to stimulate concert attendance sales. After *Napster* was shut down, it quickly restructured its system for the use of copyright owners in effecting controlled mass sales and distribution of their protected works.

The court also examined some established principles of fair use and concluded that time shifting use of Betamax and space shifting in *Diamond*, manufacturers of the portable MP3 player, 'Rio', served the convenience of the individual users of these devices (*RIAA v Diamond*, 1999). On the contrary, the *Napster* system enabled a user to expose to millions of potential infringers, a music file even if it had been copied for space shifting use by an original CD owner. Some lower courts had already ruled that space shifting of MP3 files through a computer disc

was not a fair use even when previous ownership is demonstrated regardless of whether the files are used exclusively by the owner or offered to others for downloading. In the absence of a fair use determination, operators of p2p file sharing systems necessarily succumb to the fundamental condition for secondary copyright liability, namely the existence of the primary direct infringer. It has long been established that there can be no contributory infringement by a defendant without direct infringement by another party. (*Religious Tech Center v. Netcom*, 1995).

Secondary liability

Contributory liability requires that the secondary infringer knows of direct infringement. The court concluded that Napster had both actual and constructive knowledge. This conclusion in the case of actual knowledge was derived in part from Napster's own internal communication. In the case of constructive knowledge, the Napster court, like Sony, would not impute the requisite level of constructive knowledge to Napster merely because peer to peer file sharing technology may be applied to infringing purposes.

The Napster court relied on the Sony opinion that selling equipment capable of both infringing and substantial non infringing uses was sufficient to relieve the seller of such equipment from being judged to possess the requisite level of constructive knowledge required for contributory liability. Actual knowledge then becomes critical to

satisfying the knowledge condition for contributory liability. The court judged Napster to have actual knowledge because copyright holders directly informed Napster of specific infringing files on its system. Napster failure to remove the names of such files contributed to infringement. The success of the Napster system depended on an architectural design that maintained searchable indexes of file names. Aimster's design attempted to overcome this feature by not maintaining any indexes on its servers. Rather its servers searched the folders of its users in an attempt to locate a specific requested file.

The second and final condition to establish contributory liability involves material contribution. The court found that Napster materially contributed to the infringing activity through its operation of an integrated service designed to facilitate the location and downloading of copyrighted music files. "The site and facilities" of Napster were involved in direct infringement as in *Fonovisa (Napster II, Sect IVB, para. 58)*. The 9th Circuit decision agreed with the lower court determination that Napster had the ability to locate infringing material listed on its search indices and the right to terminate users' access to the system and failure to exercise this right amounted to a contribution to infringement.

Vicarious liability

Vicarious liability arises in copyright law when a party with a financial interest in infringing activity and also with the right and ability to supervise that activity fails to exercise supervision to terminate

infringement. The Napster court noted that Sony's "staple article of commerce" analysis did not apply in considering Napster's liability for vicarious copyright infringement since that doctrine had application as a defense to contributory infringement and not to vicarious infringement. However, the financial benefit factor was easily established. The court found that Napster's future revenue was directly dependent upon increases in the use of its system. Increasing access of users to the Napster website and search indexes to conduct searches for copyrighted works, materially benefited Napster by creating revenue streams from Internet advertisement.

The court reasoned that Napster's website notices, and ability to block infringers' access to its services "for any reason" demonstrated the "right and ability to supervise".. Napster's own expression of rights to refuse service and terminate accounts at its own discretion confirmed its ability to supervise users' conduct. This right to police must be exercised to its fullest extent to avoid vicarious liability (Id. sect. VIII, para. 85).

The court however noted that Napster's ability to supervise could be impaired since file names are supplied by users and could be spelt incorrectly to an extent which made it difficult or sometimes impossible to determine if a file name was associated with infringing material. Napster's system did not examine file contents. For Napster to function as intended, file names must reasonably predict file contents which they represent. The court endorsed the conclusion that Napster's failure to

police the system's "premises," combined with financial benefits from the continuing availability of infringing files on its system, rendered Napster vicariously liable for copyright infringement. (Id. sect. VIII) Although all of Napster's defenses failed to avert the lower court's decision to impose a preliminary injunction, each of them has at least one significant relationship to specific circumstances in the subsequent Aimster and Grokster cases.

Napster asserted that its users were engaging in actions protected by § 1008 of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008 (Napster II, sect. VI, para. 70) and also that its liability for contributory and vicarious infringement was limited by the Digital Millennium Copyright Act, 17 U.S.C. § 512. The Audio Home Recording Act statute forbids actions alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device or an analog recording medium, or based on the non commercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings. Contrary to Napster's claim, the court excluded computers from the definition of digital audio recording devices under the assumption that their primary purpose was not to make digital audio recordings.

Napster also used the defense of copyright misuse by a copyright holder to expand the scope of the limited monopoly granted by the

Copyright Act and asserted that online distribution was not within the copyright monopoly accorded in 17 U.S.C. § 106, as exclusive rights for copyrighted works. The court stated that the format of transmission, MP3 rather than audio CD was irrelevant. Also the burden of identifying the presence of copyrighted material was placed on the copyright owner after which Napster would have the duty to disable access to the offending content.

Napster also asserted that under the First Amendment it had a right to publish a “directory” and its users’ had a right to exchange information. The court would consider the significance of the First Amendment principles if users of Napster were engaged in “fair use”. Prior restraint, contrary to the First Amendment requires a further examination. Is it admissible for the court to allow copyright owners to create a result which destroys the ability of a potential user to engage in lawful noninfringing activities sanctioned by the First Amendment? The Copyright Act provides for various sanctions against infringers. One of this is injunctive relief, 17 U.S.C § 502. The court affirmed this lower court sanction which in effect shut down the Napster operation.

In Re Aimster Copyright Litigation (2003)

In the Aimster case, cert denied, the Seventh Circuit considered several principles from the Sony “Betamax” case. John Deep, the owner of “Aimster” appealed the decision of a Northern District of Illinois court in a consolidated lawsuit filed by several owners of copyrighted popular

music to, in effect, shut down the Aimster service which facilitated the swapping of digital copies of popular music. In Aimster, as in the other related copyright cases, direct infringement by users was undisputed and factual. Though Aimster's computers do not store any music files and are not directly involved in the file downloading process, its server scouts for a connected user's computer on which a requested file is available for sharing and instructs that computer to download the requested file to the computer that initiated the search.

Statement of the case

Aimster provided proprietary software that can be downloaded free of charge from Aimster's Web site after a prospective user enters login data and information that they use to access Aimsters' services.

Computerized tutorials on the web site explained how to use the software to swap computer files. For a fee, users could join "Club Aimster", also owned by Deep. From this club, users could more easily download popular music files labeled as "top40". First time users enter a user name and password to register. Thereafter the user can designate another user as a "buddy" and can communicate directly with all buddies who are online at the same time. The mode of communication is encrypted email to which files may be attached. Encryption software may be downloaded, without charge, from the Aimster web site. Users typically place files they wish to share in a folder which is searchable by Aimster's server when another user makes a request for a particular file.

If a requested file is available in the shareable folder, the Aimster server instructs the computer on which the shareable folder exists to download the file to the requesting computer. Both computers run the Aimster software which facilitates these transactions.

Contributory liability

Judge Posner of the Seventh Circuit enumerates three possible uses of the recording machine Betamax in the Sony case. The first is time-shifting, the second, “library building”, the third was skipping commercials, in effect producing a “derivative work”. Judge Posner concludes that the Sony copying machine was used for both infringing and non infringing purposes. The Sony Court construed time shifting as “fair use” since the Court believed that this use was not hurting the copyright owner. Rather, it enlarged the audience for their programs. Posner asserts that the other two uses of the Betamax machine, library building and avoiding commercials are infringing uses. Mere constructive knowledge of infringement is insufficient to establish contributory liability. Also, lack of constructive knowledge of infringing activity does not necessarily insulate a person from contributory liability. Posner considers Deep’s claim that he lacked constructive knowledge of the contents of files being swapped as “willful blindness”. Deep cannot escape liability by the use of encryption to mask the identity of files shared by users of Aimster. “Our point is 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”.

The Aimster opinion asserts that the Sony Court did not absolve Sony from contributory liability merely because Betamax had substantial non infringing uses. The opinion suggested that other factors considered in Sony are revealed by the notice the Court gave to the fact that Sony’s advertisement did not promote infringing uses; the observation that Betamax was used “principally” for time shifting; and the statement that the opposing party, Universal Studios, owned only a small percentage of copyrighted television programming while it was unclear how many more copyright owners objected to home taping. They see no conflict with Sony in imposing contributory liability on a product or service which though capable of non infringing uses is, in reality, used only for infringement. Unlike Sony’s advertisement, Aimster actively promoted infringement through its web based tutorials and through Club Aimster whose membership provided download access to the forty most popular music hits. However, these apparent roles which involve Aimster in significant aspects of file swapping “does not exclude the possibility of substantial non infringing uses of the Aimster system.” The court considered the evidence highlighting Aimster’s role sufficient, “especially in a preliminary injunction proceeding, which is summary in character”, to shift the burden to Aimster, of demonstrating that the service has non infringing uses.

While several non infringing uses remain as possibilities, the “question is how probable they are.” Posner’s opinion asserts that “it is not enough...that a product or service be physically capable ... of a non infringing use”. The court observes that Aimster has failed to produce any evidence of non infringing uses “let alone evidence concerning the frequency of such uses”. The Aimster court apparently attaches importance to demonstration of the probability of using the service for non infringing purposes and possibly more weight to the frequency of such uses. The encryption used by Aimster with the expectation of avoiding a finding of constructive knowledge, which might be used to assign contributory liability, also made it impossible for Aimster to observe non infringing uses of its system, which might have enabled it to avoid summary judgment.

The court attached so much importance to the failure of Aimster to produce evidence of non infringing uses, that it considered irrelevant, further inquiry into the possible effects on the market for copyrighted works of the defendant. This insistence by the Seventh Court that the defendant produces evidence of non infringing uses as a condition for avoiding a contributory liability finding is one of the major differences between the 7th and 9th Circuits reading of Sony.

Judge Posner also addressed issues related to the Digital Millennium Copyright Act (DMCA) with the conclusion that although Aimster fits the definition of an Internet service provider (ISP), its actions

precluded it from seeking refuge in any of the “safe harbors” that the DMCA provides for service providers. One such refuge is that the service provider, to avoid contributory liability, must “do what it can be reasonably asked to do” to prevent the use of its services by “repeat infringers.” On the contrary, Aimster “invited them to do so, showed them how to do so with ease using its system and by teaching its users how to encrypt their unlawful distribution of copyrighted materials, disabled itself from doing anything to prevent infringement”. Thus the Seventh Circuit affirmed the lower court decision to shut down the operation of the Aimster service.

Evolving Interpretations of Copyright Law Interests

In the United States, copyright laws derive from Article I, Section 8, Clause 8 of the U.S. Constitution, “the Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. Congress exercised its constitutional mandate to promote the progress of science by enacting patent laws to protect inventors while to promote useful arts, it enacted copyright laws.

While Congress has progressively increased the duration of copyright protection from an absolute 14 years in 1790, to, retrospectively, 70 years beyond the author’s life in 1998. Remarkable also are the persistent attempts by copyright holders to seek expansion in the scope of statutory protection afforded them through a two pronged

strategy of litigation and legislative maneuvering. While according to ARL, “for almost three hundred years... U.S. law has been revised [by Congress] to broaden the scope of copyright, to change the term of copyright protection, and to address new technologies”; the Courts have been cautious in resisting attempts of copyright holders to expand, not only the scope of statutory protection granted by Congress, but to extend control over products which are not the subject of copyright laws (Sony, 1984, sect. I).

The first Congress implemented the copyright provision of the U.S. Constitution in 1790 through “An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies”. ARL, 2005. “Exclusive rights” included the right to print, re-print, or publish their works for a period of 14 years with an option to renew for the same duration. The Act embodied the two pronged constitutional intent of providing incentives to encourage artists and writers to create artistic works while it ensured that “science and the useful arts” are advanced through wide public access to these artistic creations which, upon the expiration of a limited period of monopoly, pass into the public domain. A revision in 1831 doubled the term of protection to 28 years, with an option to extend by an additional 14 year period. Successive revisions in 1909 extended the additional period to 28 years thereby providing protection for 56 years and then to the life of the author plus 50 years and in the case of works

for hire, 75 years beyond the life of the author. Current protected term of 70 years beyond the author's life came into effect in 1998. (Notable dates in United States Copyright, 2005; Timeline, 2005)

Throughout the Grokster case, attorneys representing defendants Grokster and Stream Cast, like the lower State of California courts have insisted that the plaintiffs' demands amount to a plea for judicial expansion of the statutory scope that successive amendments of the Copyright Act have already established for protected works and that such action is reserved for Congress. (Sony, sect. II).

Congress made major revisions of the U.S. Copyright Act in 1909 to include "all works of authorship". Lawmakers expressed the concern that "it has been a serious and difficult task to combine the protection of the composer with the protection of the public". For this congressional session, the challenge was "securing to the composer an adequate return ... and at the same time prevent the formation of oppressive monopolies". *Id.*, HR 2222. Another major revision in 1976 codified "fair use" for purposes of criticism, comment, news reporting, teaching, scholarship and research. This represented a bold attempt to serve the common good especially as the same revision also extended the duration of protection beyond that which ordinary mortals could lay in wait. Education received generous concessions in the House report accompanying the 1976 act.

The Digital Millennium Copyright Act of 1998 dealt a debilitating blow to "fair use" by criminalizing "unauthorized access to a work by

circumventing a technological protection measure” to frustrate copying, except by libraries and state agencies, for any purpose, including purposes which had been established under the fair use doctrine. A year later, in the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Congress significantly raised the minimum statutory damages for infringements from \$500 to \$750. The maximum for willful infringement increased from \$100,000 to \$150,000. As a strategy to deter casual infringers, copyright owners have sued over 8000 “major infringers”, many of whom are students at university networks (Niccolai, 2006).

Congressional Bills S.167 and H.R. 4077

Another attempt by Congress to fulfill its constitutional role of balancing reward to creators of art and preservation of public good is embodied in two Bills H.R.4077 and S.167.

The House of Representatives bill H.R.4077 sponsored by Rep. Lamar Smith of Texas, with seven cosponsors, titled “Piracy Deterrence and Education Act of 2004” sought “To enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, and for other purposes.” In H.R. 4077, law makers frontally tackled the peer-to-peer phenomenon stating that over 2 billion digital-media files were transferred among up millions of users who simply believed that they will not be caught or prosecuted for their conduct. (H.R. 4077, Sec. 2 . 3,4). Congress was concerned over the

security and privacy threats of “software that could allow an independent company to take over portions of users’ computers and Internet connections and has the capacity to keep track of users’ online habits” were addressed in (Sec. 2.5. Id.) in apparent reference to “supernodes” in the Grokster “Gnutella” system. The act provided for the Department of Justice to urge ISPs to warn identified infringers of the penalties for [p2p] copyright infringement and train Computer Hacking and Intellectual Property (CHIP) agents to investigate and enforce “intellectual property crimes”.

The bill prescribed penalties for persons who record movies in “a motion picture exhibition facility” but made no reference to fair uses by users of home media recording equipment. In Sec. 9, development and legal use of peer to peer technology was commended and encouraged while decrying economic and criminal consequences of massive illegal activity that includes “the distribution of child pornography, viruses, and confidential personal information, and copyright infringement.” Sec. 10 targets p2p file sharing users who exceed a distribution threshold with a minimum penalty of \$10,000 per infringement. The threshold is comparable to that used by RIAA in selecting users that it targets for legal prosecution.

The bill implies a clear distinction between users who simply download files which are offered by others and users who make available to others to download, substantial number of files. Procedures are

detailed for ISPs to participate voluntarily in transmitting warning notices to offenders which government CHIP agents have identified. Virtually all institutions of higher education provide Internet and network access to their faculty, staff and students and therefore, under H.R. 4077, have the same responsibilities as other ISPs to control unauthorized file sharing activity on their networks.

Senate bill S.167 sponsored by Sen. Orin Hatch of Utah and four cosponsors and introduced under the title “A bill to provide for the protection of intellectual property rights, and for other purposes” has been enacted into Public Law No: 109-9 as the “Family Entertainment and Copyright Act of 2005” or “Artists’ Rights and Theft Prevention Act of 2005”. Also cited as the ‘ART Act’, this enactment prescribes penalties for distribution of works ‘being prepared for commercial distribution’ but not yet released as well as commercially available works such as ‘a computer program ... sound recording ... and motion picture’

The Grokster Lower Court Decisions

MGM v. Grokster (S.D. Cal. 2003), aff’d. (9th Cir. 2004)

Plaintiffs brought actions against Grokster, Ltd and Stream Cast, Networks, Inc. (“Defendants”) under 17 U.S.C §§ 501 for secondary copyright infringement based on uncontested direct infringement of users of their software. Defendants filed cross-motions for summary judgment arguing that they have no control of users of their software.

Details of architecture and licensing relationships are critical in the analysis.

Software distributed by Grokster, Stream Cast and Kazaa BV, were initially based on the FastTrack networking technology developed by Niklas Zennström and Janus Friis, owners of Kazaa BV. (Wu, *supra*. p. 734; Grokster, 2003, sect. IIA) FastTrack was licensed to the three organizations; however, Stream Cast now employs the non proprietary Gnutella technology in its software, Morpheus. Grokster's software is based on the FastTrack technology, under license from Sharman who acquired ownership of Kazaa. Users of both software packages ultimately connect to other users and download copyrighted media files and by their actions, raising genuine questions of contributory and vicarious liability for Grokster and Stream Cast who supply the software.

Contributory infringement

The two factors which determine liability for contributory infringement are knowledge of the direct infringing conduct and material contribution in the infringement process. The standard for the knowledge condition, established in *Sony Corp. v. Universal Studios*, 464 U.S. 417, if the product is capable of substantial noninfringing uses, is actual knowledge of specific instances of infringing uses at a time during which infringement is in progress. Constructive knowledge is not sufficient to impose contributory infringement, nor is actual knowledge, if the

knowledge arrives when the alleged contributory infringer can do nothing to stop the infringing conduct.

In *Religious Tech v. Netcom* (N.D. Cal. 1995), alleged infringing messages resided on servers controlled by Netcom at times when plaintiffs asserted, Netcom could have deleted them and suspended users accounts to make distribution of the messages impossible. Netcom is the classic landlord – tenant case where knowledge of infringement acquired after the tenant is in control of the leased premises is insufficient to establish contributory infringement.

Material contribution

Fonovisa v. Cherry Auction (9th Cir. 1996) gave guidance on the extent of involvement required to establish material contribution. Fonovisa provided “the site and facilities” which included non only rental space, like the landlord, but also utilities, parking and advertisement to lure buyers of counterfeit goods from his swap meet tenants. Napster’s provision of a central site essential to users searches for locations with downloadable files, satisfied the site and facilities standard to establish liability (*Napster* 239 F.3d at 1022). *Grokster* and *Stream Cast*, unlike *Napster*, do not maintain central sites under their control that are essential to the successful use of their software by users to download files from other users.

Grokster’s system is based on the FastTrack technology which dynamically establishes supernodes within the network of connected

computers. The Grokster system is configured with a list of “root supernodes” which direct users to active supernodes. Grokster does not have the ability to alter the proprietary software licensed from Sharman. Grokster has since disabled the root supernodes feature ensuring that users connect to other users without any support from Grokster. Without the supernode feature, and any control of the source code, Grokster was not contributing to infringement. Stream Cast, unlike Grokster, designed its software “Morpheus” on the open source Gnutella technology in which there is no hierarchical structure of nodes and supernodes that characterized the Grokster network. But while Stream Cast could alter the open source software, it probably does not need to since as it is, Morpheus users find and download files completely independently of Stream Cast.

In spite of plaintiff’s assertion that defendants’ systems enabled and provided an infrastructure for infringement, the court found that neither defendant provided the site and facilities to support direct infringers who searched for, and established connections and downloaded files completely independently of Grokster and Stream Cast and concluded that these companies are no different from companies that sell home video recorders or copy machines.

Vicarious liability

The two elements required for vicarious liability are financial benefit or interest in and the ability to supervise the infringing conduct.

Financial benefit can be direct as in *Napster*, 239 F. 3d at 1023 or indirect in *Fonovisa*, 76 F.3d at 263. Collection of advertising revenues that accrued from the draw of customers to the defendants' website and the fact that most, but not all, users accessed these websites to download software for infringing uses, indicated that a financial benefit flowed to the defendants. The second condition, "the right and ability to supervise" then becomes the determining factor in a vicarious liability finding. *Napster*, with its centralized file indexing and user registration requirement, had not only the ability but also the obligation to exercise its right to police to the fullest extent. In *Aimster*, the 7th Circuit also concluded that *Aimster* had the ability to terminate users and control access to its centrally controlled system.

Grokster and *Stream Cast* have no control over users of their software and could not be construed to have any exercisable ability to police the network that users of their software establish for infringing and possibly noninfringing activity. The court once again deferred to Congress for guidance in containing the insistence of plaintiffs who would expand the protections afforded them by Copyright laws. "When major technological innovations alter the market for copyrighted materials, Congress has the constitutional authority and the institutional ability to accommodate fully the raised permutations of competing interests".

MGM v. Grokster (9th Cir. 2004)

The Ninth Circuit court added two salient points to the lower court ruling in *Grokster*. First it highlighted its disagreement with the 7th Circuit reading of *Sony*. The 7th Circuit in *Re Aimster Copyright Litigation*, 334 F.3d 643 apparently introduced a novel probability condition on noninfringing uses whereas for the 9th Circuit, a system used for infringement, only needs to have the capability of noninfringing uses to raise the knowledge standard for secondary liability from constructive to factual and timely knowledge in regard to specific infringing content.

The court also raised a question as to the nature and extent of continuing involvement with the infringing user that would precipitate secondary liability. They note that Stream Cast maintained an XML file from which user software periodically retrieves parameters such as the addresses of websites where lists of active users are maintained. Also, the owner of FastTrack, (Sharman and not Grokster) maintained root nodes containing lists of currently active supernodes. For the 9th Circuit, these and occasional communication with users, “are too incidental” to any direct copyright infringement to constitute material contribution.

The insistence by plaintiffs that defendants can alter their systems to prevent infringement assumes that defendants have already been found liable for infringement after which like in *Napster*, they would have the obligation of policing their system to the fullest extent. *Napster* was

forced to implement filtering software on its own centrally controlled system where it had the right and ability to police and which was essential to the success of infringing file swapping activity . However since Grokster and Stream Cast had not been found guilty of secondary infringement, they had no duty to modify their systems. The 9th Circuit observed that in the rapidly changing technological environment, with initially adverse economic effects to copyright owners, market forces “often provide equilibrium in balancing interests”.

Grokster at The Supreme Court

MGM v. Grokster: Petition for a Writ of Certiorari (2004)

Petitioners presented the following question to the Supreme Court:

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based “file-sharing” services Grokster and Stream Cast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services.

(MGM v. Grokster, October 8, 2004).

Arguing their question, petitioners state the rationale for urgent review to resolve the conflict between the 9th and 7th Circuits and to clarify the standards for secondary liability applicable to Internet-based services that facilitate copyright infringement. According to petitioners,

the 9th Circuit believed that Sony-Betamax imposed limitations on the factors that establish contributory liability if the infringing product is merely capable of substantial or commercially viable noninfringing uses even when infringement is the principal use. Knowledge, one of the necessary factors, in the above circumstances must occur at a timely moment when infringement is in progress and the defendant can act to curtail the infringing conduct. The court deemed the notices that copyright owners provide to Grokster and Stream Cast irrelevant since the alleged infringing conduct occurs when defendants had no means of stopping the alleged infringement.

The 9th Circuit also assumed that the defendants have no legal duty to alter the design of their system to avoid infringement, even if they could, because the system as designed was capable of non-infringing uses and prior liability had not been established. Napster's order to redesign followed a finding of liability after which Napster had a legal duty to redesign its system to eliminate the possibility of infringement. Petitioners state that the 7th Circuit, when applying Sony in Aimster, considered the prevailing conditions under which infringement occurs "in determining how best to accommodate both the interests of copyright holders in preventing infringement and the public's access to the noninfringing uses of the service" The Aimster court was concerned about relative proportions of infringing and noninfringing uses as well as the defendant's ability to implement measures which interdict infringing

users while leaving the capability for noninfringing uses intact. While the 7th Circuit did not allow Aimster the luxury of curtailing its ability “to police its operation” by using encryption to mask the names and media titles in lists maintained on its servers, the 9th Circuit would not hold Grokster and Stream Cast liable even when they acknowledged that defenders may have redesigned their system to “tie their own hands” with the expectation of avoiding a finding of vicarious liability.

Petitioners argued that lack of Supreme Court intervention, would cause several undesirable consequences; leave copyright owners with only the impractical and “manifestly inadequate option” of bringing individual suits against each direct infringer; stifle development of innovative noninfringing systems such as Apple’s iTunes; and subject copyright owners to economic ruin, contrary to Constitutional and legislative intent. Out of millions of alleged infringing users of media file sharing systems, copyright owners have brought suits against approximately 8000 identified as “the most conspicuous infringers”. Petitioners allege that inaction poses a grave threat to the foundations of the copyright law’s incentive for promoting the progress of science and the arts.

MGM v. Grokster (2004): Brief for Respondent Grokster in opposition

Respondents presented the following question:

Whether the district court and Ninth Circuit correctly concluded that Congress, rather than the courts, should decide whether

and how to expand the scope of the statutory copyright monopoly to reach new technologies that have substantial noninfringing uses (*MGM v. Grokster*, November 8, 2004).

Respondents urged the Court to deny certiorari on the grounds that the task of finding the proper accommodation between new technologies such as p2p file sharing and copyright is reserved for Congress and that no urgency justified Supreme Court intervention in a task that the Constitution has committed to Congress. They point out numerous instances since *Sony* that Congress has exercised this constitutional right (p. 5).

Further the lower courts correctly rejected petitioners' effort to overturn the *Sony* precedent embodied in the "substantial noninfringing use" test. The p2p technology has substantial noninfringing uses and the prospect of "massive and unpredictable" liability for innovators would "cast a pall over the nation's technology sector (p. 2)."

MGM v. Grokster (2004): Reply Brief of petitioners

In their reply (filed November 22, 2004) to respondents' brief against certiorari, petitioners charged that *Grokster* and *StreamCast* set out to capture infringing users of the defunct *Napster* and have disabled mechanisms that could limit infringement thereby maximizing financial harm against copyright holders.

They assert that urgent review was needed to settle the question of whether a defendant that created and operated a worldwide network for

distributing infringing works could escape liability merely by disabling or avoiding available mechanisms that block infringement (p. 5). They urged that the petition for writ of certiorari should be granted (p. 10).

On December 10, 2004, The Court granted petition for certiorari and set for argument on March 29, 2005. Before argument, petitioners presented two briefs followed by brief presented by respondents and two reply briefs. Highlights of these briefs follow.

MGM v. Grokster (2005): Brief of Motion Picture Studio et al.

In their “Brief for Motion Picture Studio and Recording Company Petitioners, (MGM v. Grokster, January 24, 2005)”, petitioners presented the following question:

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based “file-sharing” services Grokster and Stream Cast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services. (MGM v. Grokster, January 24, 2005).

Petitioners asserted that respondents Grokster and StreamCast operated services that contributed to copyright infringement on a “mind-boggling scale” enabling their users to commit millions of acts of

infringement each day; respondents exploit this massive infringement for profit while petitioners suffer extreme harms as a consequence (Id., p. 1).

Grokster and StreamCast took steps to create “plausible deniability” by disabling log in, disengaging themselves from Napster type central control (p. 9) and foisting the task of indexing on conscripted high performance computers of users (p. 10).

Respondents’ services “inflict massive and irreparable harm” by facilitating production of infinite number of perfect copies (p. 12), and breeding a culture of contempt for intellectual property ... in cyberspace (p. 13).

Respondents are liable as contributory infringers because they have “knowledge of the infringing activity”, and they induce, cause, or materially contribute to that infringing activity in “myriad ways” (p. 17); liable under vicarious liability principles through direct advertising profits and cannot claim the protection of Sony because they intentionally facilitated and actively encouraged and assisted infringement (p. 27).

They urged the Court to reverse the Ninth Circuit judgment (p. 50).

MGM v. Grokster (2005): Brief of Songwriter and Music Publisher

In their “Brief for Songwriter and Music Publisher Petitioners (MGM v. Grokster, January 24, 2005)” petitioners presented the following question:

Whether secondary copyright liability extends to companies whose Internet-based “file sharing” services facilitate copyright infringement and exploit it through advertising, when such liability provides the only practical remedy for widespread infringements of copyrights, will not thwart legitimate uses of file-sharing technology, and will spur demand for legitimate online distribution of music [MGM v. Grokster, January 24, 2005].

Petitioners representing over 27,000 songwriters and music publishers assert that songwriters, most of whom are struggling in a “difficult economic scenario” suffer the added impact of staggering Internet distribution of copyrighted music. Grokster and StreamCast intentionally exploit copyright infringement and have removed protective features from their services to exploit loopholes in the Ninth Circuit Napster opinion (p. 16).

They warn that imposing liability “is the only effective way to enforce ... [copyright] p. 14.” ; and urge reversal of the judgment of the Ninth Circuit Court of Appeals.

MGM v. Grokster (2005): Brief for Respondents

Respondents presented (March 1, 2005)the following question:

Whether the court of appeals correctly ruled, on the only issue before it, that respondents’ distribution of the current versions of their file-sharing software does not render respondents secondarily liable for every direct infringement of petitioners’

copyrights committed by users of the software (MGM v. Grokster, November 8, 2004).

Software distribution by the respondents satisfies the requirement in Sony, that the product or service be capable of noninfringing uses. Not only are the services of Grokster and Stream Cast capable of noninfringing uses, respondents have provided ample evidence of such uses. In Sony, the Court rejected the attempt to impose copyright liability on Betamax and thereby extend control of copyright holders over “an article of commerce that is not the subject of copyright protection”. 464 U.S. at 441. Such extension of statutory copyright privilege is reserved for Congress, not courts, and congress has from time to time, made adjustments when new technological developments would clearly upset the balance between entitlements of copyright owners and the rights of the public to use products of these developments in noninfringing ways. Id at 430, n11,12.

Respondents present counter arguments to several issues raised in petitioners’ brief to assign secondary copyright liability to Grokster and Stream Cast; a proportionality inquiry as to the predominance of infringing compared to noninfringing uses; supposed aggravating consequences of a profit motive in distribution by Grokster and Stream Cast of file-sharing software; and the proposal that failure to redesign their services to police infringing uses is tantamount to “turning a blind eye” towards conduct of direct infringers. They point out that these

objections are flawed under Sony. The predominance theory is foreign to Sony which merely required that a product be capable of noninfringing uses. Regarding redesign, the Sony Court reached its decision based on the product, Betamax, as designed, despite the fact that possible modifications to Sony's Betamax recorder were "repeatedly called to the Court's attention". Quoting from the U.S. Br. 19-20, "Vicarious liability does not apply just because a change in an existing product could give defendant control over direct infringements".

Respondents urged that the Court adhere to stare decisis and reject expansion of secondary liability without specific direction of Congress adding that Sony stated a "clear rule of law, not a case-specific result limited to the circumstances presented". The effects of changing circumstances are best left for Congress which has the capability of conducting "wide-ranging inquiry, assessment, and experimentation...as in the 1998 Digital Millennium Copyright Act ... and ... [as] Congressional consideration of their current arguments is actively under way". Respondents Brief at sect. IIID (Grokster, 2005).

MGM v. Grokster (2005): Reply of Motion Picture Studio et al.

In "Reply brief for Motion Picture Studio and Recording Company Petitioners (March 18, 2005)" petitioners state that Grokster and StreamCast cannot escape the reality that copyright infringement is the entire basis of their business and cannot escape liability by claiming hypothetical noninfringing uses for their services, even if actual uses are

overwhelmingly infringing (p. 1). Unlike Sony whose relationship with Betamax users was limited to a one-time sale, respondents are actively involved in the maintenance and expansion of their networks (p. 7).

In their reply, petitioners draw significant distinction between patent law from which the Sony Court constructed its “noninfringing uses” test. Petitioners point out that in the patent context, a product or device used in contributory infringement typically affects only one patent, whereas a copying product or service can be used to infringe all copyrights in the relevant medium (p. 9). Consequently, higher proportions of noninfringing uses should be required to consider immunization of a service capable of both infringing and noninfringing uses from secondary liability.

MGM v. Grokster (2005): Reply of Songwriter et al.

In “Reply brief for Songwriter and Music Publisher Petitioners (March 18, 2005)” petitioners charge that Grokster and StreamCast are not innocent innovators and therefore have no genuine claim to concerns about broader policy ramifications of a decision in the case. Professed concerns about innovation and deference to Congress would be more credible except that respondents’ own conduct was clearly tied to infringement (p. 1).

Petitioners undo two principal policy arguments made by Grokster and StreamCast namely, that holding them liable would “condemn” the use and development of p2p technology for legitimate purposes and that

Congress and not courts should decide the issue of secondary liability presented to the Court..

They charge respondents as p2p abusers who lure users by distributing free content and profiting from advertisements and point out that, by contrast, legitimate services such as iMesh use p2p technology to distribute music online while ensuring that content owners are paid appropriately. A decision against respondents would benefit developers of legitimate p2p music distribution systems and would not “condemn” p2p technology or chill innovation (p. 9).

Petitioners argued that the Court should decide the case rather than waiting for belated congressional action due to the immediate, substantial and ongoing harm caused by illegitimate distribution of tens of millions of perfect digital copies of copyrighted works (p. 10). They lament the inefficacy of measures available to copyright owners to target and prosecute millions of direct infringers and underscore the need for urgent relief (p. 12).

Petitioners conclude that it is the intention of Congress, as demonstrated by its rejection of requests to articulate precise boundaries of secondary liability in the DMCA statute that the courts should continue to evaluate secondary liability for those providing services on the Internet (p. 15). Petitioners urged the Court to reverse the Ninth Circuit setting the stage for oral arguments and subsequent judgment

MGM v. Grokster (2005): Oral Arguments

Interest peaked as the date for oral arguments approached. (Squeo, 2005a; Squeo, 2005b; Zeller, 2005). At the oral arguments, Donald Verrilli, and Richard Taranto appeared on behalf of petitioners and respondents respectively. Acting Solicitor General , Paul Clement represented the U.S. Department of Justice as amicus curiae, supporting the petitioners. Verrilli's opening charge that the "only commercially significant use of Grokster and Stream Cast services" was copyright infringement was questioned by Justice Stevens, drawing attention to "some 2.6 billion legitimate uses" in a foot note in [petitioners] brief. Justice Stevens inquired if any proportion of noninfringing uses would affect Verilli's continuing criticism of respondents claim of substantial noninfringing uses of their systems as merely a device to a "a perpetual free pass" to continue distribution of their copyright infringing software.

On Verilli's contributory theory which incorporated a substantiality test component, Justices Kennedy, Breyer, Scalia, and Souter wondered how such a "Damoclean sword" approach, "going in", would have affected the development of several products such as the VCR and the iPod. Following Verilli, Clement focused on the "active inducement" theory for contributory liability but could not defend its efficacy in the hypothetical case, raised by Justice Scalia, that successors of Grokster announce the very same system but avoid any appearances of active inducement. Scalia. Clement agreed that for new products, something in the line of

Justice Souter's suggestion of a "flexible rightness doctrine" could form a basis for responding to suits.

Taranto attempted to separate respondents past "active inducements" from the current operation which is inducement free, although Justice Souter conjectured that past inducement could have fueled the current financial success of the file sharing systems. In addition (Id. at p. 30), Justice Ginsburg opined that statements in the Sony opinion to the effect that a product merely be "capable of substantial noninfringing use" could not be described as a "clear rule" in disregard of the rest of the document, parts of which acknowledged that authorized or fair noninfringing time-shifting was the predominant use of Sony. Despite the survival of industry in light of the Sony [mere capability for significant noninfringing] rule, Justice Breyer wondered why a different substantiality rule would not have served equally well. In response to the impropriety of using "unlawfully expropriated property" as startup capital, Taranto suggested that resolution of the dilemma should be left for Congress. Oral arguments concluded with Verilli stressing the point that the "staple article of commerce" doctrine required striking "a real balance that provides effective protection of copyright, as well as protecting unrelated lines of commerce" and that instead of balance, respondents are using selected portions of the Sony opinion to seek immunity (Id. at p. 52). As indicated by Greenhouse (2005), the Grokster case which pitched "old-fashioned entertainment and new-

fangled technology found the justices surprisingly responsive”. Such responsiveness may support the theory that argument does in fact influence the calculation, and ultimately the propensity of Justices towards fundamental fairness.

As Cardozo has observed (*supra.* at p. 30), “The directive force of a principle may be exerted along the line of logical progression ...” *Grokster* stretched principles from the *Sony* case, upon which litigants on both sides drew strength to argue their positions. Many other concepts and issues in *Sony* may not have served the direct thrust of litigants’ arguments, but this is not to say that others would gain no grounds in pointing to those concepts and issues from the landmark *Sony* decision that would serve interests beyond those of the litigants of record.

MGM v Grokster (2005): Amicus Curiae Briefs

A total of 55 amicus curiae briefs were submitted to the *Grokster* Court. 19 supporting petitioners, 27 supporting respondents and 9 supporting neither party. Fourteen briefs were submitted by professors in their private capacities as scholars and educators, 3 supporting petitioners, 10 supporting respondents, and 1 supporting neither party. No briefs were submitted by Institutions, University and College Presidents or Higher Education Associations.

Amici urging reversal argued the 9th Circuit decision would upset the balance between private incentive and public benefit (Gibson, 2005), result in economic inefficiency and prohibitive costs of action against

direct infringers (Strauss et al., 2005). Gibson et al. enumerate negative effects of the lower court decision to include “negatively affect existing technologies, undermine the copyright system, destroy the economic viability of legitimate file-sharing services, and retard future innovation in both the technological and authorial communities”. Menell et al. (2005) question the appropriateness of incorporating the statutory patent law defense for dual-use technology into copyright law with the argument that an infringing “staple article of commerce” would affect only a limited number of patents whereas the distribution of dual-use technologies would threaten entire industries and expose the copyright system to “grave risks”. The amici point out that the Audio Home Recording Act of 1992 bans audio recording devices that do not incorporate technology to block second-generation digital copies.

Professor Hollaar’s brief in support of neither party favored retention of the Sony “capable of substantial noninfringing uses” standard and simultaneously recognizing secondary contributory liability based on two theories, namely direct contribution and inducement, the severity of which will be determined by in a trial. (Hollaar, 2005). Hollaar asked the Supreme Court to vacate the decision of the 9th Circuit appellate court which affirmed a summary judgment of the lower California court and remand for further proceedings for a determination of secondary liability based on the inducement theory.

Scholars in support of respondents suggested affirmance of the appellate court judgment on several grounds that include adequacy of the “capable of substantial noninfringing uses” standard of Sony (Abelson, 2005; Fisher III, 2005; Lunney, 2005; Mulligan, 2005), exclusive purview of Congress over issues involving balancing of interests that are skewed by new technology (Lessig, 2005; Pulgram, 2005), First Amendment protection of speech (Lee, 2005), lack of “clear” statutory authority to create common law in an area “... where Congress has enacted detailed statutes ...”. (Pollack, 2005), petitioner’s flawed claims of economic loss ascribed to p2p activity (Oberholzer-Gee, 2005), fair use principles (Lunney, 2005), and the need to avoid generation of another layer of doubt, anxiety, and misunderstanding among educators (Liebman, 2005).

They argue that reversal could be interpreted as an injunction to redesign networks with filtering at the network level. Such networks are less useful and less efficient and remain vulnerable to defeat. Petitioners seek a remedy that will “hobble advances in technology”(Abelson, 2005). P2p networks, that remain unburdened by design restrictions that petitioners demand, are essential in maintaining classes of constitutionally protected speech typified by creators who use these networks to freely distribute their works. (Lessig, 2005). Oberhozer-Gee et al (2005) argue that in the “first and only detailed study of which files individuals actually downloaded via file sharing networks”, there is no

support for petitioner's contention that reduction in sales was caused by p2p activity. Lunney (2005) warned that the assumption that all unauthorized private copying was not fair use was problematic since the Sony Court was addressing only the fair use status of time-shifting and not that of "other types of home taping", allowing Chief Judge Posner of the 7th Circuit to assume by the Court's silence that "other types of home taping" were condemned. Liebman (2005) stated that within the educational context, introducing "another level of doubt, anxiety, and misunderstanding ..." would chill development of creative uses of p2p "within the academy". Anxiety already exists with the limits of "fair use" in classroom production.

MGM v. Grokster (2005): Supreme Court Decision, 545 U. S. 913

The Court opinion, delivered by Justice Souter, accepted the theory that it was impractical to enforce rights in protected works effectively against all direct infringers leaving an attack against the distributor of the copying device as the only practical alternative. Contributory infringement involves intentional inducement or encouragement of direct infringement (*Gershwin Pub. Corp v. Columbia Artist Management*, 443 F. 2d 1159). Vicarious infringement involves profiting from direct infringement while declining to exercise a right to stop or limit it, (*Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304). Both forms of secondary liability, contributory and vicarious, are well established principles of common law.

The Court considered and dismissed the allegation of contributory liability in Sony based on the opinion that the principal use of the VCR was for “time shifting” which the Court found to be noninfringing and for which a fair use determination was appropriate. There was also no evidence that Sony intended to promote infringing use of its VCR, even though it possessed constructive knowledge of the likelihood that some would use it for infringement. Under these circumstances, the Sony Court held that the VCR was “capable of commercially significant noninfringing uses” and that its manufacturer could not be faulted “solely” for distributing the product.

With evidence beyond a product’s characteristics and constructive knowledge of infringement, Sony’s staple-article rule will not preclude liability. The Court decided that distribution of a device with the object of promoting its use to infringe copyright, as shown by “clear expression or other affirmative steps to foster infringement” is liable for third party acts of infringement. The Court was satisfied that petitioners showed sufficient evidence from statements and actions of respondents indicating “a patently illegal objective”. Hence the Court vacated the judgment of the 9th Circuit Court of Appeals and remanded the case for “further proceedings consistent with this opinion”.

Positions taken in Sony, in re Aimster and in Grokster were affected by assumptions that litigants as well as subsequent courts made on issues on which various courts remained silent. “Nothing in Sony

requires courts to ignore evidence of intent ... and the case was never meant to foreclose rules of fault-based liability derived from common law". This indicates that silence and absence are certainly not inconsequential.

Rhetorical Setting

Considerable literature exists on the rhetoric of silence and absence. Following is a review of literature on rhetorical situation followed by a review of literature focused on the examination of absence and silence in various situations. Although the focus is ultimately on situations that are rhetorical, a few works on absence and silence in non rhetorical situations have been included for completeness.

Rhetorical Situation

Bitzer has stated that rhetorical situation focuses on the interaction of rhetors, audience, and exigencies that create opportunities for rhetorical responses (Bitzer, 1968; Bitzer, 2000). Bitzer's formally defines a rhetorical situation as:

a complex of persons, events, objects and relations presenting an actual or potential exigence which can be completely or partially removed if discourse introduced into the situation, can so constrain human decision or action so as to bring about significant modification of the exigence. (Id. at p. 63).

Bitzer's seminal work contains important concepts. Rhetoric is a mode of altering reality by creating discourse which changes reality and

a particular discourse comes into existence because of some specific condition or situation which invites response (Id. at p. 62).

To say that rhetoric is situational means that the rhetorical discourse comes into existence as a response to situation. However many rhetorical situations “mature and decay” without giving birth to a rhetorical utterance which theoretically is required to alter reality in the situation and influence the inclination of an audience.

Bitzer has examined the constituents of rhetorical situation namely, exigence, audience, and constraints. Because an exigence must be capable of being modified or removed through discourse to count as rhetorical, not all exigencies are rhetorical. Examples of exigencies such as death, winter, and some natural disasters are not rhetorical since they cannot be modified by any means and even less so through discourse (Id. at p. 63).

Another important concept is that in any rhetorical situation, there will be at least one controlling exigence which “functions as the organizing principle”, although the exigence may or may not be perceived by the rhetor or other persons in the situation (Id. at p. 64). Also the exigence may appear to be strong or weak depending upon the “clarity of their [author’s] perception and the degree of their [author’s] interest in it.” Furthermore, the exigence may be real or unreal depending on the facts of the case and may be important or trivial, familiar or totally new and unique.

Right after exigence, the second constituent of rhetorical situation is audience. An audience in rhetorical situation is not necessarily the same as a body of mere listeners. A rhetorical audience consists only of those persons who are capable of being influenced by discourse and of being mediators of the change which the discourse functions to produce.

The third constituent of rhetorical situation is a set of constraints made up of “persons, events, objects, and relations which are parts of the situation” because they have power to constrain decision and action needed to modify the exigence. Bitzer provides a list, by no means exhaustive, of standard sources of constraint that include beliefs, attitudes, documents, facts, traditions, images, interests, and motives. Further, Bitzer has elaborated on the rationale of grouping constraints into two main classes, those originated or managed by the rhetor and other constraints in the situation which “may be operative”. This is “to separate those constraints that are proper from those that are improper.”

Although rhetorical situation invites response, this is not just any response, but a fitting one if it is not to amount to poetry or declamation “without rhetorical significance.” Even though the rhetor may or may not read the prescription accurately, every situation prescribes the contours of its fitting response whose existence can be readily certified by a critical examination of the “objective, publicly observable and historic” circumstances of the situation.

Bitzer explains salient differences in structurally simple and complex situations. A situation such as the usual courtroom consisting of well screened jury, knowledgeable counsels and prepared judges, is highly structured and complex. Situations may become weakened by causes such as the involvement of numerous or incompatible exigencies in a single situation, a scattered rhetorical audience, uneducated regarding its duties and powers and many other possible factors which may weaken the structure of situations.

Another important characteristic of rhetorical situations is that they come into existence, then either mature or decay or mature and persist, maybe indefinitely (Id. at p. 67).

Finally, Bitzer suggests that rhetoric as a discipline, and analogous to scientific inquiry, is philosophically justified insofar as it provides “principles, concepts and procedures by which we effect valuable changes in reality (Id. at p. 68).” This quality distinguishes rhetoric from the mere craft of persuasion which “although it is a legitimate object of scientific investigation, lacks philosophical warrant as a practical discipline.” A number of studies have raised important questions ranging from the validity of rhetorical situation as constructed by Bitzer (Vatz, 1973) to potential conflicts that may be avoided by a reconsideration of the basis of Bitzer’s fundamental assumptions (Biesecker, 1989). Other studies have served to make Bitzer’s framework more extensible (Consigny, 1974; Jamieson, 1975; Edbauer, 2005).

According to Vatz, Bitzer has assumed that “There is an intrinsic nature in events from which rhetoric inexorably follows, or should follow.” Vatz stated a contrary position that “No situation can have a nature independent of the perception of its interpreter or independent of the rhetoric with which he chooses to characterize it.” Relationship between situations and rhetoric is dependent upon the “initial depiction of the situation (Vatz, 1973 at p. 157).” Such depictions are initiated through rhetoric by rhetors who “choose or do not choose to make salient [:] situations, facts, events, etc. (Id. at p. 160); choices that have crucial ethical implications (Id. at p. 158).

Vatz’s critique would place rhetoric at the top of a disciplinary hierarchy on the premise of a rhetorical basis for all meaning, without which “rhetorical study becomes parasitic to philosophy ... or whatever discipline can inform us as to what the [real] situation is.” Vatz’s perspective has not specifically ruled out the role of philosophy through legal research rather than rhetoric, of validly establishing more or less invariant properties of situations from which rhetoric may be applied in the art of salience creation.

The major oppositional perspectives of Bitzer and Vatz on rhetorical situation in which orders of rhetors, audience, constraints, situations, exigencies and symbolic action inter relate to define, generate, exude, attenuate or extinguish exigencies are both phenomenological. However in Bitzer’s view, rhetorical situation merely discloses clearly

constituted and intrinsically present exigences that invite a fitting rhetorical response; whereas for Vatz, situational exigencies are fabricated at will through pure rhetorical arbitration. Biesecker's dialectical resolution of the impasse is noteworthy.

One of Biesecker's outstanding contributions to rhetorical theory is the treatment of rhetorical situation on a fundamentally elemental level; analysis capable of dissolving the impasse precipitated by existential presuppositions endemic in virtually all expositions of rhetorical theory. In *Rethinking rhetorical situation from within the thematic of differance* (Biesecker, 1989), Biesecker has applied Derrida's deconstruction and the elemental concepts of differance and articulation in the reproduction of materiality and discursivity in a radically productive way.

Differance was coined by Derrida to explain how signifiers are trapped in an infinite precessional quest for veritable signification. Any transcendental claims for an elemental signifier is instantly dismissed by the realization that a more fundamental element is already ubiquitously in effect, separating every element from that which it is not, while simultaneously and unheirarchically dividing the present element in itself (Id. at p. 16).

The result, quoting Derrida is that:

Nothing, neither among the elements nor within the system is anywhere ever simply present or absent. There are only, everywhere, differences and traces of traces ... no element can

function as a sign without referring to another element which itself is not simply present ... Only to the extent that we are able to differ, as in spatial distinction or relation to another, and to defer, as in temporalizing or delay, are we able to produce anything (Id. at p. 117).

By deconstructing the hierarchy between situation and rhetors as respectively assumed in Bitzer's framework and in Vatz's critique, "questions of origin" are replaced by questions of process that "frees rhetorical theorists and critics from reading rhetorical discourses ... as either the determined outcome of an objectively identifiable and discrete situation or an interpreting and intending subject" Neither the text's immediate rhetorical situation nor its author can be taken as simple origin or generative agent since both are underwritten by a series of historically produced displacements (Id. at p. 121) through the operation of differance.

Articulation is a somewhat intuitive concept that plays a critical role in the historicity of dynamic identity production. Articulation is about connectivity and is capable of operating on simple as well as in complex systems capable of constraining as well as liberating functionality in multiple dimensions. Microsoft Encarta College Dictionary (2001) defines articulation in speech, communication and in jointing as follows; speech, the pronouncing of words, or manner in which they are produced; communication, the coherent expression of

thoughts, ideas, or feelings; and jointing, the connection of different parts of something by joints, or the way the parts fit together.

Stormer (2004) has fleshed out considerable scope for articulation which makes it useful to visit several excerpts from this work before returning to the role of articulation in Biesecker's rethinking of rhetorical situation. Stormer (2004) has used *taxis*, the Greek term for textual articulation that describes the linkage of elements within a text to create certain effects in the audience in a project of "... retheorization of the historiography of rhetoric as it is relevant to understanding the emergence of different rhetorics."

Stormer in applying articulation to orders of material and discursive elements has explained that "articulation is transformational and emergent, creating new possibilities through the mutual interaction of elements ..." and that "articulation modifies through a mutual capture of powers among elements ..." in a network of elements in which no single element has complete control over the interaction (Id. at p. 264).

Returning to Biesecker, the scholar's conclusion is that deconstruction enables a reading "of the rhetorical situation as an event structured not by the logic of influence but by a logic of articulation ..." Since the subject or audience, as constituted by the play of *différance*, is shifting and unstable, the rhetorical event may be seen as an incident that produces and reproduces the identities of subjects and constructs and reconstructs linkages between them enabling elements in a

rhetorical situation to affect each other. Deconstruction enables the opening of a space “wherein it becomes possible ... to discern the considerable heterogeneity of the social sphere and the formidable role that rhetoric plays in articulating this heterogeneity (Id. at p. 126).”

Deconstruction of rhetorical situation and its constituent elements, rhetors, audience, and constraints, enables a rethinking of rhetoric as articulation and opens rhetorical situation and embedded symbolic appearances to endless radical possibility and critique. Works by other scholars continue to expand the boundaries of Bitzer’s rhetorical situation.

Regarding constraints, one of Bitzer’s constituent elements of rhetorical situation, Jamieson (1975) has further extended Bitzer’s horizons. Bitzer has stated that a rhetorical work may obtain its character from the circumstances of the [proximate] historical context, to which Jamieson has added, through an analysis of constraints in certain genres, namely, the papal encyclical, the early state of the union addresses and their congressional replies, that past historical contexts rather than proximate ecology may indeed prove more determinative in constraining forms of ensuing discourse.

Jamieson has illustrated the similarity of contemporary papal encyclicals and historical apostolic epistles as evidence of “genre calcification” and to essential correspondence in rhetorical function of

pope, in contemporary times, and apostles in more ancient history (Id. at p. 407).

In a different example, faced with “an unprecedented rhetorical situation”, namely, that of responding to the new Constitutional enjoiner to report to Congress on the state of the union, Washington, president of the new democratic republic, delivered a speech rooted in form in the monarch’s speech from the throne. Response by Congress to this first attempt at the state of the union address was equally mimetic in form and substance to the response of parliament to the monarch’s speech from the throne; an obvious contradiction in a republican constitution in which executive and legislative arms of government are equal. Hardly fortuitously, subsequent Congresses quickly readdressed the tone and format of congressional responses to presidential state of union addresses.

To include cases in which response is controlled by an inappropriate antecedent genre, Jamieson has concluded that:

perception of the proper response to an unprecedented rhetorical situation grows not merely from the situation but also from antecedent rhetorical forms ...Antecedent genres are capable of imposing powerful constraints. Furthermore, the manacles of an inappropriate genre may be broken with varying degrees of difficulty (Jamieson, 1975).

Edbauer (2005) has further expanded the scope of possibilities afforded by the “elemental framework” consisting of temporally and spatially constituted elements of rhetors, audience and constraint, by relocating each individual element within a wider ecological context of historical fluxes in which they progress. Edbauer has stated that “the exigence is more like a complex of various audience - speaker perceptions and institutional or material constraints (Id. at p. 8).”

Similar to Biesecker’s use of Derridian deconstruction and *différance*, (Biesecker, 1989), Edbauer’s ecologically conditioned notion of exigence informs a dialectical reconciliation of Bitzer’s suggestion that rhetors discover exigencies that already exist and Vatz’s assertion that exigencies are created for audiences through the work of rhetors (Edbauer at p. 6). By shifting the focus from rhetorical situation to “rhetorical ecology”, Edbauer has proposed “a revised strategy for theorizing public rhetorics and rhetoric’s publicness as a circulating ecology of effects, enactments, and events (Id. at p. 9)”

Perhaps the closest approach to the emergence of “a coherent theory of rhetoric” may be read in the work of Consigny (1974) in which the author seeks to unify the apparently diametrically contentious perspectives of Bitzer and Vatz. As observed by Consigny (Id. at p. 176) for Bitzer the situation controls the response of the author; for Vatz the rhetor is free to create a situation at will (Id.).

Consigny has indicated that rhetors face an indeterminate existential situation in which the best must be made of “facticities” encountered through the use of strategies for “shaping the indeterminacies, thereby formulating concrete problems which can be potentially solved (Id. at p. 177)” Further, Consigny has argued that the rhetorical situation is an indeterminate context marked by troublesome disorder which the rhetor must structure so as to disclose and formulate problems.

Hence, according to Consigny:

Bitzer errs in construing the situation as determinate and predetermining a fitting response. [From another perspective, the rhetorical situation is not one created solely through the imagination and discourse of the rhetors.] It [rhetorical situation] involves particularities of persons, actions, and agencies in a certain place and time ... hence Vatz errs in construing [rhetors] as completely free to create ... exigences at will and select ... subject matter[s] in a manner of pure arbitration (Id. at p. 178).

Rhetors thrown into a rhetorical situation must transform the indeterminacies into a determinate and coherent structure; and “in this activity, he is constrained by the recalcitrant particularities of the situation which bear on his disclosure and resolution of the issue (Id.)” with the conclusion that rhetors who fail to take these constraints into

account may never get in touch with events or the audience and may “rightly be dismissed as ineffective and irrelevant.”

According to Consigny, the rhetorical act is one in which rhetors become engaged in a novel and indeterminate situation and are able to disclose and manage exigences therein (Id. at p. 179). Rhetors require a capacity which permits receptivity and responsiveness to particularities of novel contexts. Consigny has argued that “the art of rhetoric” is both a heuristic art, allowing the rhetor to discover real issues in indeterminate situations and also a managerial art, providing the rhetor with means for controlling real situations and bringing them to a successful resolution or closure (Id. at p.180).

Consigny’s art of rhetoric requires two conditions, namely, integrity and receptivity, to provide rhetors an effective means of engagement in particular situations. Integrity demands that rhetoric as an art provide the rhetor with a “universal” capacity such that the rhetor can discover and manage issues in all kinds of indeterminate and particular situations as these change dynamically, without “his action being predetermined.” Rather than being forced to respond in a fitting manner “... as Bitzer claims, the rhetor will have a repertoire of options and the freedom to select ways of making sense anew in each case, disclosing the problems and finding means of attaining their solutions (Id. at p. 181)”

Contrary to Vatz’s view, the rhetor cannot be “merely a universal artist with complete freedom to create problems arbitrarily.” Rather than

create problems at will with complete disregard to situational parameters, the rhetor must remain receptive to particularities of the individual situation in a way that facilitates discovery of relevant issues, if the rhetorical act is to be heuristic or managerial (Id.).

Consigny has asserted that the art of “Topics” meets the two conditions of integrity and receptivity and that mastery of this art permits the rhetor to enter into and function in a wide variety of indeterminate fields irrespective of subject matter. Referring to views expressed by legendary persons in the field of rhetoric; Aristotle, Cicero and Vico, Consigny has argued that “topic” is construed as an “essential instrument for discovery or invention.” It is also the “realm” or field marked by the “particularities of persons, acts, and agencies” in which the rhetor thinks, acts, discloses and establishes meaningful relationships. Consigny has concluded that “the topic” functions both as instrument with which the rhetor thinks and the situation in and about which he thinks (Id. at p. 182).”

To function as a central device of a rhetoric which meets the two conditions of integrity and receptivity, the topic must maintain a dynamic interplay between instrument and realm. Consigny has noted that topics are universal, formal devices that may be applied in a variety of novel situations. The author’s choice of topic is not predetermined by the material or the context, rather the rhetor is “engaged in an interplay

of devices and material which direct the indeterminate situation to resolution (Id. at p. 184).”

A competent rhetor is able to select the most fruitful topic from among a wide repertoire of topics at his command for the exploration, selection, arrangement and effective management of the heteronomous matter in any given situation, with an engagement in a novel situation and “thereby find and shape issues without predetermining what he will find (Id.)”.

Rhetoric of Absence and Silence

The rhetorically expansive categories of symbolic action and language embrace all permutations of presence, absence, speech and silence with ontologies and effects in psychological, social, cultural, legal and purely rhetorical and artistic arenas and which may be mapped from non rigid moral and ethical reference positions into a spectrum of laudableness and desirableness on one side of the spectrum, undesirableness and disdain on the other side.

In assimilating the instantaneous, dynamic, proximate or ecological characteristics (Edbauer, 2005) of rhetorical situation for oneself or framing these for others (Vats, 1973), articulated exchanges map traces of signification on elements of rhetorical situation including elements of audience and rhetors. “Fittingness” (Bitzer, 2000) results from exchanges with a high probability of attenuating, extinguishing or

otherwise affecting or controlling the exigencies in the rhetorical situation.

Subject intentionality factor into the exchanges that contribute to the composition and flow of ensuing discourse which makes the consideration of ethics, morality, competence and dispositions of rhetors important, whether rhetors are engaged in legitimate exercises to grapple with complexities of situational indeterminacies (Consigny, 1974) or possibly engaged in arbitration of deliberate creation as suggested by Vatz.

Works on situations in which ethics and morality relate to categories of absence and silence as well as to how judgment is exercised in decision making would be useful in evaluating the resulting performance and effects of certain subject elements in a rhetorical situation. All these considerations need to be filtered and funneled into the assessment of “fittingness”.

Jones (1999) has presented in “Theory of moral responsibility” a basis for analyzing problematic situations which involve moral and ethical judgments, such as arose in the holocaust. This theory is sufficiently general and may be applied in a broad scope to situations of far less horrific circumstances such as in cases of the absent parent (Mathys, 1996). Jones’s theory has three major components.

The first is the concept of “liability to judgmental blame”, the elements of which are constructive knowledge of a wrongful act which a

person, from “morally bad motives”, voluntarily and intentionally executes (Id. p.16). The second component of Jones’s theory is “virtue ethics” which recognizes relatively stable personal character traits in a virtuous and vicious matrix, with a note that “sometimes people act out of character” The third component are “justified moral excuses” which are patently exculpatory. Examples of these are ignorance or the lack of relevant knowledge, mistakes, and coercion.

Other features of Jones’s theory include imposition and or acceptance of “informal moral sanctions” such as withdrawal of approval, social ostracism, and “formal legal sanctions” such as criminal punishment. Another feature is “self-deception”, a psychologically attractive alternative to the pains and distress of feelings of guilt, shame, and remorse which, depending on circumstances may be considered desirable or undesirable. An analysis of conduct involves considerations of several responsibilities: moral responsibility, or “liability to moral sanctions”, role responsibility, or “duties of office”, expressed or implicit, capacity responsibility or “possession of powers of agency” (Id. p. 26).

Perhaps the most innocuous use of absence and silence may be found in the arts, where “structured absence” is used as a deliberate literary device to involve the spectator or reader in the process of meaning construction and co-authorship. Walsh (1998) states that the perception that something that could or should be present is not there becomes vaguely threatening, requiring some sort of resolution or

closure. This “disquieting multivalence” makes “rational analysis infinitely more complex and difficult” and possibly more engaging (Id. p. 170). Walsh states that “through a wide variety of structured absences, readers are made to feel what words cannot touch and to experience sympathetically what our logical and discursive abilities cannot approach”. Walsh describes the use of structured absences as “negative techniques” “... a heuristic process of unnamings, whereby the scaffolding of words and sentences is seemingly dismantled in favor of some less material but immensely more powerful form of awareness ”.

In Hollywood’s *White House, Alkana*, (2003) in reference to the films *Mr. Smith goes to Washington*, *The Candidate*, and *Bulworth*, states that, “his [The American President’s] lack of presence in these films allows the American leader to remain above the corruption, the pettiness, and the partisanship of American party politics while, consequently, symbolizing continuity and strength in face of the challenges to the political system raised by the films”. In the arts, constructing absences is the artistic and dramatic challenge.

In real life, circumstances create absences out of physically present persons through the category of Bystanders who, by their inaction or an unacceptable level of reaction, frustrate an expectation to make an “acceptable statement”. Grayling (2003) describes bystanders as people on the sidelines, unaffected by major events of war, terrorism, global capitalism and technological change (Id. p. 152) and adds that

“Even inaction is action ... there is a choice about one’s manner of involvement ...” Voluntarily or otherwise one can become witness, victim, fighter for peace, or “as the kind who does physical battle, which is justified when it opposes greater evils ...”, or as helper of the victims (Jones, 1999; Grayling, 2003). The only certainty is that there will always be victims and a good probability that in one way or another, every one will indeed be one.

Staub (2003) reports that “the perpetrators of many school shootings have been described as victims of bullies, with others passively witnessing their suffering (p.489).” Staub places bystanders in two classes. Type I or internal bystanders, according to Staub, witness the mistreatment of members of a group of their own society but remain passive. Type II bystanders remain passive in the face of societal issues and chose to attend to tasks they consider urgent and ignore the distraction of impulses to take action toward fulfilling long-term group goals.

Carroll (2002) has examined silence as a rhetorical tool that “reinforces or works to undermine power structures” and cites examples of elected rhetorical silences that “are chosen for specific discursive and rhetorical purposes (Id. at 4).” A taxonomy limited to these classes of elective silences names them as “affirmation, consent, acknowledgement, negation, and refusal”. Silences that affirm and acknowledge, “without

critique”, are collaborative silences, while silences that “consciously negate and refuse” are resistant silences.

Carroll discusses two models of interpretation. According to Carroll, Kurzon (1998) ignores contexts and postulates that society constructs answers that are negative to the silent rhetor’s position as is the case in many legal systems. Lang’s model, in Heidegger’s *Silence*, establishes the ambiguous nature of silence and confronts the problem of interpretation (Lang, 1996).

Actually, the methods of interpretation of silence developed by Kurzon and Lang are not mutually inconsistent. Kurzon (Id. at p. 4) declared that “The central problem of silence in discourse is to discover the meaning”, and has presented a “basic model” of interpretation (Id. at p. 45). In this model, the intentional silence leads to “modal interpretations” and as Kurzon has indicated (at p. 50), “Contextualization of the silence is the best aid in interpreting it and answering the ultimate question [meaning]”.

Chbib (2004) points to the effect of “moment of silence” at Ground Zero, televised worldwide, “unites a seemingly subjugated disembodied community of nations against the globalism defined by the Bush administration” as an example of another perspective of “how contemporary democracies appropriate illusion and phantasmagoria ... “... to essentially interpellate popular sympathies while pushing a political agenda. Also, moments of silence are skillfully used by television

to mask political bias as they evoke empathies of viewers (Id., p. 69) and in memorial events in popular culture such as funerals.

Contemporary views of silence have successfully deconstructed this rhetorical object to allow for a wider range of interpretations of silence as passive concealment (Gardner, 2001), a form of communication that challenges the logo centric tendency that privileges assertion and speech over silence (Farrell, 1999), a force in Judicial Opinions (Conway 1996): “A study of persuasion based on voices – whether those voices have been quoted, contrived, or silenced -- seems especially suited to Supreme Court majority opinions, where intensely politicized issues often have their final official hearings”.

The effects of absence as a result of politically motivated exclusion abound in several areas. In *An American Dilemma: The Negro problem and modern democracy*, Myrdal (1944) found that “the only important difference between Negroes and whites is that practically all the economic, social and political power is held by whites”.

Absence is not always caused by power imposed exclusion. Various strategies and tactics in politics use absence to gain political grounds such as legislative absences precipitated by “walk outs” and boycotts (CBS News, 2007); economic influence on political issues as in the Johnson & Yeager (2006) article reporting that “... to underscore their importance to the [U.S.] economy and to protest against legislation that would target illegal migrants, hundreds of thousands of immigrants

staged coordinated walk-outs that hit several businesses”. This is an example of a deliberately and precisely calculated and executed absence. The purposes, meanings, and effects of the absence of university presidents and higher education institutional associations in Grokster may not be as clearly delineated as in the “walk out”. Nevertheless, the implications for values such as academic freedom and implications on the role of universities in the national public sphere cannot be ignored.

Academic Freedom and Copyright

Unlike copyright, the intensely fertile rhetorical site of academic freedom is devoid of an explicit constitutional basis. Standler (2000) argues that academic freedom cases fall under government suppression of political speech by professors as in *Pickering v. Board of Education*, 391 U.S. 563 (1968), or government’s interference with freedom of association as in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) and that such cases relate to First Amendment rights which the Constitution guarantees without preference to all citizens. Although Tight (1985) has concluded that academic freedom can only be maintained and protected by force of law (as cited in Aby and Kuhn IV, 2000, p.17), discursive engagement has certainly maintained academic freedom as one of the most vibrant rhetorical sites in societies’ institutions of higher education.

Although is clear that the First Amendment protection of free speech that the Constitution guarantees all citizens extends,

undiminished, to scholars, the original motivation for the First Amendment was to foment democracy. Publicly, citizens can criticize leaders in powerful positions and hopefully limit abuse of power and rationalize the conduct of public policy.

However, production of truth and knowledge in all dimensions do not necessarily materialize most efficiently from the type of freedom of expression that the Constitution protects. The ethics of public policy, dictated by the need for efficient processing of a broad range of issues in the national public sphere demands a search for more efficient conditions for the production of all truth forms and knowledge categories. Indeed ethical economy of the national public sphere coincides with the protection of national sovereignty against subsuming and subversive experiences.

The special privilege of academic freedom and the invention of spheres in which this freedom can function, is a necessary condition for the pursuit of this economy. Throughout Grokster, significant disruptions of functionality and intrusion by external interests into internal governance of universities raise substantial questions of the effects of such events on academic freedom as well as their potential impact on the role of institutions of higher education in the broader sphere of national ethics.

Being itself a culturally established category of constitutionally protected free speech, it is not surprising that academic freedom

continues to generate endless traces and bifurcations of meaning and contention among the chief constituents of universities, namely, faculty, administration, and students. Kaplan in "Regulating the intellectuals", states that academic freedom is "not an abstraction" and must be placed within a system of higher education that serves definite social, cultural and political functions. (Kaplan and Schrecker, 1983, p. 15). What these functions are or should be, in Kaplan's view, determine the actual meaning of academic freedom and its value to the university and to society. Gewirth (1990, p. 21) argues that the existence of a [universal] human right to education necessitates criteria for intellectual excellence. These criteria provide the justification for and limits of academic freedom.

Although few scholars question that universities have a legitimate function in society, a question that would cause leaders such as Jefferson and Dewey to turn in their resting places, the nature and scope of functions are differently construed as are the threats to universities and academic freedom. Thomson (1983) has stated that society needs institutions for the advancement of knowledge, provision of higher education for students, and the training of specialists in the various professions and that such institutions "require free search for truth and its free exposition". For Sykes (1988), universities have virtually abandoned the teaching function to assistants. Sykes in Profscam (1988)

calls for abolishment of tenure to “free the vast untapped energies of the academy ... locked in the petrified grip of a tenured professoriate.”

Altbach (2001, p. 290) has suggested that American universities require “a critical eye for constructive reform ... if [American] higher education is to continue to thrive”. A wide array of described threats and challenges include enumerated “new variants of intolerance and ideological orthodoxy ... ” (Dickman, 1993, p. vii), degree of university leadership commitment to academic values operating to diminish academic freedom and consequently discourage beneficial research, “given the external political and corporate forces that influence (or control) the university’s administration”(Fischer, 1994), tendency to sacrifice professional merit for political ambition or personal security and a weakening of respect for intellectual objectivity by “attractions of power and political ideology” (Chapman, 1983, p. 22).

Aby and Kuhn IV’s (2000) comprehensive guide indicates that academic freedom is a vibrant rhetorical site at which politics, ideology, economics and culture intersect. A major part of the complexity at this site arises from the presence of a multiplicity of issues which generate rigid discursive positions. As a special privilege beyond First Amendment rights (Standler, 2000), scholars have defined three categories of academic freedom which have gained enormous validity from Supreme Court opinions (Grutter v. Bollinger; Sweezy v. New Hampshire; Keyishian v. Board of Regents) and from teacher organizations such as

the American Association of University Professors (AAUP, 1940).

Scholarly freedom allows scholars enormous opportunities to pursue research with few constraints; institutional autonomy allows universities and colleges to essentially govern themselves without external interference, while academic rule conveys decision-making rights to groups such as academic departments (Moodie, 1996).

The three categories, particularly scholarly freedom, generate radically divergent discursive positions among scholars inside and outside the academy (Buckley, 1986; Sykes, 1988; Altbach, 2001). The doctrine that academic freedom is absolutely essential for the search for knowledge and for universities to function is countered with the caution that other values merit consideration and that academic freedom attaches responsibilities which cannot be ignored. Questions about the need for academic freedom and its attachment to tenure threaten both privileges as do many other highly contested categories of concerns that arise from internal and external relationships.

Externally, government interference (Winks, 1983, p. 190), “[inevitable clash] of scientific freedom and national security“, (Schwab , 1990 p.29), business interests, and apparent reversals in legal opinion impact scholarly freedom, academic autonomy (Urofsky, 2000), and in varying degrees, institutional autonomy. Internally, research misconduct, faculty squabbles, ideological biases in academic department standards (Gottfredson, 1996) and weak support by

administrators (Capen, 1948) often result in dissipative conflicts and frustration to faculty.

To highlight the rhetorical and political nature of academic freedom, demands for accuracy in academics by watch-dog groups are decried unconditionally by the AAUP (On Accuracy in academia and Academic Freedom, 1985) bolstering the criticism that the AAUP is more committed to the protection of faculty employment privileges and less concerned about academic freedom, symbolically “placing security of appointment and other related matters ... on the first part in it’s agenda”. (Shils, 1993 p.13).

Another perspective seeks to emphasize nationalistic values in the socio political relevance of the university in supporting democracy (Dewey, 1984), maintaining critical vigilance on key social issues (Wallerstein, 1971), and supporting strategic national defense research (Reagan, 1983). Epistemological perspectives explore academic freedom as a condition for the emergence of knowledge and truth (Trinity College 1904; AAUP 1940; Dworkin 1996; Capen 1948).

Societies have learned that the privilege of unique knowledge has remained critical to the advancement of their civilization and to the expansion of their culture. The terms of dialogue and diplomacy in peaceful times as well as military superiority and dominance in times of conflict are heavily dependent on the degree of control over specialized knowledge and information. Falk (2003 p. 19) has highlighted the

relationship that exists between higher education and war. “The exponential growth of the destructive power of war weapons coincided with the exponential growth of codified knowledge and the unprecedented growth of every type of educational and research institution”. According to Falk, this relationship developed new forms of knowledge based in military research and enabled “large academic funding increases justified by appeals to military, social and economic Cold War preparedness” (Id. p. 19).

Though unintended, some of these new forms of knowledge pass to antagonistic forces as evidenced in McBride’s recall of Murdock’s statement that the military establishments design their weapons systems to defeat their own artifacts and to fit their own pre-conceived strategic and tactical conceptions (McBride, 1989, p. 84). Even if this were unavoidable, time still operates to increase the advantages of superior knowledge and technology in times of conflict. Hughes (1999) has made reference to decisive roles of “Infowar” in conflicts in Iraq, peace negotiations on Bosnia and the Chiapas conflict. Throughout history, dominance over certain categories of knowledge has played decisive roles in the outcome of notable conflicts (Palmer 1997).

Establishing a framework in which these categories of knowledge can emerge was critical in the development and legitimacy of higher education in society. The culture of higher learning has been nurtured to provide the freedom of inquiry and dialectics that are believed to promote

the creation, critique and evolution of knowledge at least within the restricted military or the open public spheres in which such knowledge is desired.

The Constitution identified two broad categories of knowledge, the sciences and the useful arts and higher education has maintained a central position in the pursuit and evolution of both categories of knowledge. Although other constituencies such as inventors, artists, and business interests, outside of institutions of higher education, contribute routinely towards the development of useful products of scientific research, society has gradually deferred the right and freedom to act in leadership of educational matters and issues to institutions of higher education. The 1947 Report of the President's Commission on Higher Education charged that the birth of the atomic age "has deepened and broadened the responsibilities of higher education ..." in preparation for social and economic changes that were certain to follow the new age (Report of the President's Commission on Higher education in Lester F. Goodchild and Harold S. Wechsler, Eds. *The History of Higher Education*, 2nd Ed. 1997).

Universities have acquired substantial privileges of autonomy and self governance to legitimize their status in the wider society. Societies have recognized that creation of knowledge and research are complex diachronic endeavors and that although the results of present efforts may not be immediate, the environment of free inquiry that produced

historically what is usefully applied in contemporary times, is likely to continue its operation in ways that increase benefits to society.

Consequently even though the Constitution did not create academic freedom nor universities but only protective rights for inventors and creators of arts, society by popular acquiescence and political involvement, helped to legitimize the protection of academic freedom for higher education institutions. The Courts have reinforced the concepts of academic freedom through several decisions and institutionalized society's assumptions that this freedom is essential to the continued production of useful knowledge (*Keyishian v. Board of Regents*, 385 U.S. 589, 1967; *Grutter v. Bollinger*, 539 U.S. 306, 2003).

The Constitution, desirous of promoting the wide availability of products of invention and works of arts, mandated that Congress provides incentives to inventors and artists to encourage production of these works. For the products of science and arts to be available to society, society, through the Congress, grants exclusive rights to those who create these products.

The products of the arts, preserved on media, have remained a useful source of material that higher education institutions rely upon to further their ancillary mission of providing education to members of the society who seek knowledge through education. Providing education has grown to become a necessary part of the basic public mandate which had been primarily the production and dissemination of new knowledge and

scholarship. Students of today become agents of application of learned knowledge in the production of newer scholarship and in the economic development and enhancement of culture.

This has created reliance on making copies of various works for classroom use. Waves in technological development expanded the boundaries of the practice of reproducing copyrighted material for use in the traditional classroom. Instructors copy portions of textbooks and research papers, librarians copy research papers for the benefit of other researchers directly from their collections or through interlibrary loans, instructors tape television programs for reproduction in their classes.

Many of these activities are interpreted as expansive and intrusive on the constitutional rights of persons who created these works. The public benefits of the availability of these works and the incentive to create more works necessarily alarm copyright owners who at least want to protect their copyright privileges if not outright expand them through conscious and organized legal pursuits.

Sustenance of the culture of higher education relies on two basic foundations, namely public trust and judicial support. Through legislative and executive reflections of the public will, higher education is supported as a matter of public policy with the expectation that they operate to increase public welfare. Empowerment through judicial decisions has stabilized the environment in which higher education

institutions can operate and sustain the public trust as generators of knowledge and scholarship that ultimately benefit the public interest.

Judicial activity has supported theories of academic freedom both of the institution and of their faculty with the clear view that the university remains the cradle from which by all of its integrated activities and individualized entities, the public good is served. This unique position of higher education, not being of constitutional creation, cannot be taken for granted in the inevitable presence of threats from both external and internal sources.

Actors in the higher education enterprise must remain aware of factors which may contribute to the erosion of public trust keeping in mind that it is this public trust which constructed and continues to sustain the privileged environment. Privileged autonomy has witnessed increasing challenges from rising and more complex expectations of accountability as elaborated by Berdahl and McConnell (1999). Maybe not as well recognized, a significant obstacle to the fulfillment of the mission of higher education is the existence of adverse interests which control many of the principal tools that higher education relies upon.

Typified by copyright protection, these interests derive their strength from the Constitution. While higher education culture seeks to use copies of works of arts, traditional and contemporary, in the furtherance of their institutional mission, they have to navigate successfully in the arena of assertive copyright owners who rely on the

same political and judicial institutions, the legislature and the Courts, to protect their more fundamental and constitutionally protected positions.

Constituencies in the higher education enterprise need to act with shared resolve and understanding that progressive failure to protect the tools that facilitate their epistemic directions could hamper their operations, diminish public trust, and ultimately lead to considerable modification of its contemporary systems. The dilemma is complicated by differences in the perspectives of internal constituents of institutions themselves; faculty, students, trustees, and administrators (Crews, 1993 at p. 14) as well as the power configuration of the external environment in which these institutions exist.

The three functions of higher education institutions are teaching, research and service. All three require extensive use of historical as well as contemporary works of arts in the form of original writings, computer programs and works fixed in digital and other media, works whose authors have direct private interests which conflict with the mission of higher education and are protected by the Constitution. If by its failure to effectively bracket the inclination of copyright owners to expand the scope of statutory protection, higher education proportionally and perhaps unintentionally reduces its capabilities to sustain its expected public mission, this inaction could steadily erode the rationale for public support and alter the future evolution of higher education in unpredictable ways.

Society has the right to expect that as the higher education enterprise grapples with their day to day operations, they remain vigilant against threats that limit hard won privileges of institutional autonomy and scholarly freedom. Lapses in vigilance could accumulate to erode public trust. Crews in *Copyright, Fair Use, and the Challenge for Universities* (1993, p. 116), alludes to the conformist tendencies of universities; concerned about litigation universities have gravitated towards acceptance of the Association of American Publishers (AAP) limiting “Classroom Guidelines” and avoided the more liberal American Library Association (ALA) model policy on photocopying, a significant activity in many academic and research functions in higher education.

From findings in the study by Crews it is apparent that university leaders generally had failed to fully exploit the advantages that “fair use” was created to provide towards the expansion of research and scholarship. Towards the last years of the twentieth century and the early years of the twenty first, as technology expanded the capabilities and ease of the copying process, universities once again faced threats of copyright lawsuits, this time, from members of the Recording Industry for American Artists (RIAA) and the Motion Pictures Association of America (MPAA).

Constraints

Constraints, one of the categories in Bitzer’s rhetorical situation (Bitzer, 2000, p. 63) may be imposed by proximate and historical factors

in the ecological network within which rhetorical situation is embedded (Edbauer, 2005). These may relate to environmental, political, psychological or personal factors that act as constraints and affect a rhetor's response to exigencies (Janis, 1992; Foucault, 1972). Constraints, effectively handled, increase the likelihood that a fitting response results; ineffectively handled, the resulting response becomes less fitting and in extreme cases, may fail to materialize in any discursively notable form.

Decision making

At various times as the Grokster litigation progressed towards the Supreme Court, university presidents were faced with decision making tasks and leadership challenges. A brief discussion of leadership and decision making theories should be useful in sorting out the applicability of portions of these theories in the understanding of presidential roles in Grokster. These theories recognize three categories of constraints to the use of "high quality decision procedures". These are cognitive, affiliative and egocentric constraints (Janis, 1992). Janis presents a comprehensive array of pathways all of which start with some awareness or perception of threat or opportunity. Integrated with research in three areas of inquiry, namely, effective leadership practices, organizational norms and structure, and personality characteristics of leaders, probabilities of avoidable errors are ranked (p. 30).

Pettigrew (1973) highlights the role of power and support generation as determinants in a decision process in a study which identified known internal and politically relevant details such as the composition and status of staff, organizational structure and the objects for which decisions were required. Early phases of the file sharing crisis in universities bear similarities to Pettigrew's political model. The ways in which leaders understand and perceive the meaning of leadership could help to illuminate the role of university leaders in several phases of Grokster and the file sharing crisis.

In Bensimon, Newman and Birnbaum (Supra., p. 215), the authors restated Birnbaum's findings that when asked to explain what leadership meant to them, most of the presidents participating in an extensive study of institutional leadership defined leadership as a one-way process, with the leader's function depicted as getting others to follow or accept their directives. A small minority saw leadership as facilitating the emergence of leadership latent within the organization. Infrequently definitions included elements of conceptual orientations from trait, contingency, and symbolic theories.

While transactional theories seek to understand interactions between leaders and followers, transformational theories (as Bensimon, Newman and Birnbaum quoted from Kauffman, p. 217), stress the need for leaders dedicated enough to the purpose of higher education that they will expend themselves, if necessary, for that purpose. Consensus is

that high quality decisions produce rewards that accrue to decision makers and their organizations. On the other hand, poor quality decisions may not only fail to produce rewards but could actually invite or result in moral or legal sanctions. Valid critique of legitimacy is perhaps one of the milder forms of sanctions against leadership associated with poor decision making scenarios.

Legitimacy of leadership is affected by the degree of congruence of the actions of the leader with strong rhetorical currents that run in the organization. According to Edmundson (1998), contradicting or failure to reverence firmly entrenched conventional moral views can be suicidal to legitimacy. Drawing from concepts in Mill's "On Liberty", Edmundson has named as behaviors that are fit objects of moral reprobation, retribution and punishment, unfair or ungenerous use of advantages over others and selfish abstinence from defending them from injury (p. 135).

Dill (2000) suggested that since humans need and seek meaning, an important part of academic administration involves the creation and maintenance of academic beliefs (p. 106). Participation or non participation of a leader in a situation may ultimately rest on the functioning of the completely personal sphere in which the subject, emotions and decision making systems co-exist.

According to Arduini (1992) the most emotion-loaded elements are those centered on the self and the own good in a broad sense and that

these influence the subject as additional weights to the weight of other rational elements and also operate as factors causing transformation of the reference framework in which reasoning and behavior are developed and organized. Arduini argues that emotions could interfere with a smooth progression in eidetic operations as well as restructure the subject's reference framework in a way that affects the level of importance of factors that compete to dominate the individual decision making process. (p. 128).

Public spheres

While the individual may be unique the public sphere is characterized by communicative interchanges among multiply constituted groups of persons. Although presumed to operate without preexisting influence of power, the public sphere has witnessed numerous transformations in communicative resources that continuously reshape its form. Hyland, Gomez and Greensides (2003, p. 386) recounted the description of the early public sphere by Habermas as a sphere of public authority in which private persons, on account of their status and position in society could not participate.

Eventually, as Habermas has argued in his landmark work "The Structural Transformation of the Public Sphere" (Habermas, 1962), public areas typified by coffee houses developed and preserved a kind of social intercourse in which ideally, the relevance of hierarchical social status became less determinant of the process through which ideas on

issues of public concern emerged. Assumptions in cultural products of philosophy, literature and art became problematic in principle and subject to public discursive examination and interpretation. Stable groups of discussants remained part of the larger open public and sometimes actively sought to disseminate their views and ideological perspectives to the wider public. Theoretically, public opinion emerged from public debate and grew in stature as legitimate basis for ethics and morality.

Other works indicate that the public as envisioned by Habermas is subject to certain distortive influences. King (1995) has pointed to the argument that the distinction between public and private hides the fundamental dependency of the capitalist market on the structure of relations in the intimate sphere of the conjugal family in which forms of gender biases are ingrained and projected into public discourse.

Further the influence of the media gives the press enormous ability to shape the contours of a public sphere by influencing what information ultimately becomes available and the parameters of discourse (King, p. 196). These concerns would limit the abstract universality that Habermas assumed would allow individuals to achieve parity in their subjectivities and ensure that critical public debate was based on common shared principles and in accord with universal rules without regard to all preexisting social and political rank.

While accepting that “something like Habermas’s idea of the public sphere is indispensable to critical social theory and democratic political practice”, Fraser (1992) has problematized the Habermas “public sphere” and argued that a multiplicity of publics operates to better bracket the tendency of dominant groups to “delegitimize some interests, views, and topics and to valorize others (Id. at p. 131)”. Fraser has referred to “weak publics”, “strong publics”, “institutional public spheres” , “internal public sphere”, “subaltern counterpublics” in arguing for “a widening of discursive contestation” in stratified society.

University students and scholars have played significant roles at promoting critical discourses across public spheres that incorporate networks of other institutions. At times, these discourses have influenced public policy in dramatic and definitive ways as in terminating United States involvement in the Vietnam War. Ideally, for such publics to function effectively, communication must be free of community-wide biases and free from serious interruptions.

Bohman and Lutz-Bachmann (1997) added that the cosmopolitan public organized in world civil society must understand itself as maintaining this openness and inclusiveness in communication. Such openness, they maintain, allowed new publics to emerge with new themes and issues for the public agenda and fresh challenges to current understandings.

Bohman and Lutz-Bachmann asserted that beyond criticism of existing law and authority citizens in a world public sphere must be able to debate, discuss and deliberate in such a way as to produce public agreements and consensus consistent with the integrity of various political communities and cultures. Changing priorities and concerns spawn new publics. They argued that political institutions that do not remain responsive to new, increasingly pluralistic and cosmopolitan publics risk losing legitimacy and that the source of many extraordinary periods of democratic lawmaking was characterized by the reassertion of popular sovereignty against the resistance of rigid forms of institutionalization and entrenched relations of power (Id., p. 192).

Bohman and Lutz-Bachmann concluded that the force of the opinions of world citizens, like the opinions of republican citizens in the state, would be primarily responsible for limiting military power and ensuring world peace. Such far reaching effects require the formation of internationally connected publics with common global themes and issues such as world peace and environmental integrity. Across universities nationally and internationally students and faculty are active in publics with cosmopolitan and global intents. University administrators must factor these activities into the leadership challenges that they address, or, as implied by Edmunson (p. 135), ignore them at the risk of moral reprobation.

The area of public discourse appears to be grappling with a variety of conceptual issues as suggested in Warner's statement that that "publics have become an essential fact of the social landscape, yet it would tax our understanding to say exactly what they are (Warner, 2002. at p. 413)", and in Frazer's critique of Habermas's conceptualization of the early bourgeois public sphere and its subsequent transformation (Habermas, 1989; Frazer, 1992). The extensive role of universities in promoting, shaping and in the understanding of discourse in virtually all spheres of society adds to the complexity of challenges that face leaders of these institutions.

Summary

In this chapter, literature review has been conducted under two categories, namely, legal settings and rhetorical settings. The first component of the legal setting consists of the pre-Grokster p2p file sharing cases, Napster, In Re Aimster, the landmark Sony litigation, as well as a discussion of evolving interpretations of copyright interests and early congressional bills on p2p file sharing. The second and third components cover the lower court decisions in Grokster and the Supreme Court phase of the Grokster litigation respectively.

Under the rhetorical setting, Bitzer's rhetorical situation is reviewed along with modifications that add robustness to Bitzer's basic concepts. Also, works on absence and silence are reviewed to illustrate the treatment of these phenomena as discursive symbolic action in a

variety of environments. Next the rhetorically fertile academic freedom site and its connection to copyright has been explored.

Finally works on certain elements of the ecology have been included in the review. These may be viewed as Bitzer's category of constraints in rhetorical situation. Such constraints have varied ontology and are capable of affecting the fittingness of a rhetorical response in rhetorical situation where exigencies exist.

CHAPTER III

METHODOLOGY

Legal Research

Cohen and Olson (1996) have warned that legal sources differ in their relative authority (p. 3) and have identified three categories of legal literature required for thorough research. These are primary sources, finding tools and secondary materials.

Primary sources are found in constitutions, in decisions of appellate courts, in statutes passed by legislatures, in executive decrees, and in regulations and rulings of administrative agencies. A major category of primary sources is judicial decisions. In common law jurisdictions, such as in the United States, law is expressed in an evolving body of doctrine based on cases. Established rules are tested and adapted for novel situations.

Another category for primary sources comprises statutes passed by legislatures. Cohen and Olsen have stated that the ruling principles in some subject areas are determined wholly by case law while other areas are governed partly by case law and partly by statute. The third important primary source is administrative law, contained in the regulations and decisions of government agencies.

Due to the multiplicity of cases and statutes generated and the concurrent need for stability, the researcher needs to consider the most

recent legal sources as well as the doctrine of stare decisis which ensures the relevance of a wide range of chronological enactments, decisions and rulings.

Finding tools facilitate discovery of existing decisions and statutes by subject or topic. In print format, digests reprint headnotes summarizing points of law from court decisions classified by subject and citators list later sources that have relied upon or mentioned a particular precedent; annotations and legal encyclopedias provide narrative explanations of case law. WESTLAW and LEXIS are powerful and comprehensive computer-based systems for legal research.

Secondary materials such as treatises discuss and analyze legal doctrine. According to Cohen and Olsen, much of the most influential legal writing is found in the academic journals or law reviews. The authors also distinguish between “authoritative treatises by great academic scholars”, and “superficial tracts by hack writers”. Relevant secondary sources are also available through law library catalogs and legal periodical indexes.

This dissertation focuses on the curious rhetorical behavior of absence and silence of higher education leaders in *MGM v. Grokster* at the Supreme Court phase of this notable copyright-based case. Consequently, it is useful to briefly describe the structure of the United States Federal Court system through which the litigation progressed;

from U.S. District Court, through U.S. Court of Appeals and finally U.S. Supreme Court.

The Internet site (<http://www.uscourts.gov/>) has presented the following account of the U.S. Federal Court system. The United States district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Three territories of the United States, the Virgin Islands, Guam, and the Northern Mariana Islands have district courts that hear federal cases, including bankruptcy cases.

The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies.

The United States Supreme Court consists of the Chief Justice of the United States and eight associate justices. At its discretion, and within certain guidelines established by Congress, the Supreme Court each year hears a limited number of the cases it is asked to decide. Those cases may begin in the federal or state courts, and they usually involve important questions about the Constitution or federal law.

Internet searches in FindLaw.com, WESTLAW and Electronic Frontier Foundation (EFF) and THOMAS Library of Congress system and The Chronicle of Higher Education produced instant references for the Grokster case as well as the preceding relevant cases, Napster, Aimster, and Sony. Published decisions in these cases have provided links to significant cases involving both secondary and primary copyright liability and dating back beyond the previous century. The Grokster Docket at the Supreme Court (Docket for 04-480) website provided details of documents and briefs filed at the Court. EFF provided details and links to briefs filed by all parties, including amici curiae briefs. I expect that the above tools as well as general and law library aids and databases available at most university libraries and collaborated material obtained from Internet searches will provide adequate and accurate material for this work.

The first task using legal research was to establish the case that provides the site for rhetorical criticism. The case is the Grokster litigation at the United States Supreme Court: METRO-GOLDWYN-MAYER STUDIOS INC. V. GROKSTER, LTD. (04-480) 545 U.S. 913 (2005), 380 F.3d 1154, vacated and remanded. The components of this case are certiorari, briefs, oral arguments and the Supreme Court decision. Briefs discussed in this project are Petition for certiorari submitted by Petitioners MGM et al., Brief of Respondents submitted by Grokster et al. and briefs submitted by amici. Although 55 amici briefs

were submitted, representing the 3rd most significant case in United States contemporary history as measured by number of briefs submitted by amici with declared interests, only the briefs submitted by universities, their associations or their constituent faculty were considered of interest to this project. This follows the assumption that these briefs, totaling 14 in number represent perspectives of higher education in Grokster.

A crucial finding for this project is that the 14 briefs referred to above were submitted by university professors in their individual capacities as scholars. Each declared interest did not extend beyond individual roles as scholars. Direct reference to the case docket, Supreme Court Docket 04-480 (MGM v. Grokster Ltd., Supreme Court Docket 04-480) corroborated with a list of briefs published by the Electronic Frontier Foundation ([EFF] (2007b) confirmed the finding that from universities, all briefs were submitted by individual scholars.

No record was found that universities and university associations submitted any briefs and since the only participation permitted at the Supreme Court by interests who are not parties in the case, with the exception of the Solicitor General of the United States, permitted to submit briefs and participate in oral arguments on behalf of the United States, is through submission of amicus curiae briefs, the finding is that universities did not participate at the Grokster Court. The conclusion is

that university presidents and university associations were absent and silent at the Supreme Court in *Grokster*.

Rhetorical Criticism

German (1985) has explained that it takes a special union of methodology and artifact to yield the best understanding of both, and has recommended exploration of five questions about the artifact. This process would serve to expose the utility of various alternative perspectives and direct the critic towards choice of a perspective that most effectively illuminated the discourse over the most significant orientations of the artifact.

The first question is as follows: "Is there a prominent element or several elements in the artifact which dominate it?" The prominent elements can include the character of rhetors, the words themselves or a "... strong image in the artifact which dominates the effect of the discourse". (German, p. 88); also, the artifact may depend on the audience for its impact. German has explained that since any artifact has many facets that include the ideas, pattern, rhetor, style, context and impact, a thorough examination and understanding of all facets should be acquired before formulation of final impressions. German lists several examples that a critic might choose to examine, such as, an examination of the moral qualities of the public statements of figures like Mahatma Ghandi or Mother Hale, the arguments of atomic scientists on the nuclear energy question, motivational appeals in presidential

campaign commercials and the structure of the Gettysburg Address. Rhetorical artifacts can be examined “for their use of logic, speaker credibility, motivational appeals, ideas, structure, expression, and delivery”, (Id.). Emergence of dominant elements can narrow the range of choices for the critic’s method.

The second question: “Is the rhetoric an expression of its cultural milieu?” German states that the rhetoric may “reveal something about the we live, the way others live” or express a point of view which enriches understandings of humanity. According to German, the Olympic spirit exemplified by Mary Lou Retton and Edwin Moses reveal how we view sports; Slim Goodbody provides a model for children in a health-conscious society while the 1984 presidential campaign teaches us something about our political expectations. Each of these examples is an expression or reflection of its culture and, as such is a rhetorical manifestation of culture.

The third question: “Is there an interaction of elements in this artifact which accounts for its unique character?” German has stated that the nature of communications depends upon combinations of audience, rhetor, and message (Id.), and that “the manner in which this occurs is of unending interest to the critic, particularly because it may reveal something about the nature of communication” (Id). The “rainbow coalition” of the 1984 Democratic Convention, the “silent majority” of the Vietnam era, both feature an interaction of values, ideas, personalities

captured in a single expression. To understand the power of rhetorical slogans, the critic can analyze the interaction of elements and how each element affects the process of meaning creation. German states that “countless rhetorical artifacts function in this manner including dramatic works” such as the state play “Uncle Tom’s Cabin”, music like the hymns of John Wesley, poetry such as feminist writings of the mid-60’s and more traditional discourse. This orientation provides the critic with “salient dramas, fantasies, and myths” , as they are expressed in popular rhetoric.

The fourth question: “When compared to other artifacts, does this rhetoric reveal unique characteristics it possesses or which characterize a group of similar artifacts?”

German (Id. at p. 89) states that rhetoric may have unique characteristics which are not seen until contrasted with other rhetorical artifacts and that the striking features of categories may not be readily apparent until they are seen together. As an example, the critic may explore the rhetorical characteristics of Joan Baez’s songs by discovering their common denominators or by comparing them with the music of other songwriters. German also indicated that critics may not find comparisons which best illustrate the function of the rhetorical artifact of interest until the search outside of the realm of strictly rhetorical comparisons for other ways of illuminating the rhetoric. As an example, the organizational pattern/argumentative structure of a speaker might

resemble the repetition of the fugue in music or the campaigner seeking a party office may resemble the courting ritual (In Hermann G. Stelzner's *Humphrey and Kennedy court West Virginia*, as cited by German, *Id.* at p. 89).

The fifth question: "Does the rhetorical theory of the historical period lend understanding to the rhetorical artifact?"

German has stated (*Id.* at p. 90) that a rhetorical artifact may be examined by discovering the theory or practices which influenced the rhetorician because conventions of message or audience understanding of rhetorical conventions that shape the message differ from our own with the conclusion that "one source for appropriate methodologies exists in the rhetorical theorists of the historical period ... (*Id.*). A critic should choose the perspective which gives the reader new insight into the forces of rhetoric.

In selecting a particular method of rhetorical criticism to apply to the artifact, it is useful to remember that rhetorical systems and methodologies have developed in response to the questions asked by critics. Many tentative systems are available from which the critic may examine potential candidates for selection. German (*Id.* at p. 96) suggests that the final selection should be clear, efficient, and appropriate and should also answer the "most important question", namely "does the methodology reveal something new about the artifact" and increase our

understanding of the rhetorical artifact “since that is the purpose of rhetorical criticism”.

German has presented some categories of methodology including traditional criticism, situational criticism, three subcategories of sociological criticism, genre, or analog criticism and historically relevant theory. However “because distortions of complex systems of thought are not acceptable”, it is important to apply a methodology with the entirety of its essential tenets. The methodology of generative criticism (Foss, 2004, p. 411) offers a system which is ideal when a critic needs to analyze an artifact without following any formal method of criticism. Such may arise if standard codified methodological categories seem inadequate in any significant respects. Following are outlines of some systems of rhetorical criticism.

Traditional criticism is based on the theory that rhetoric functions as a means for discovering rational truthful appeals to audiences. Several elements dominate the rhetorical artifact and the critic focuses on logical, ethical, and motivational elements through which the rhetor operates to achieve persuasion. The focus is on internal subcategories such as speaker credibility, motivational appeals, use of language, organization and delivery.

In situational criticism, the rhetorical artifact arises from the situation or the culture and suggests the use of Bitzer’s “rhetorical situation” as a source of methodology. One approach in situational

criticism focuses on the interaction of audience, exigencies, and, contingencies in creating the opportunity for an appropriate and timely rhetorical response (Bitzer, 1968). Another approach focuses on an examination of the culture which produces external influences from a rhetorical situation. According to German (*supra.* at p. 92), differences in cultural expectations or conventions can account for mis-communication, a common occurrence in international communication.

Sociological criticism focuses on language as a response to social situations in which communication is a means of action as well as a record of thoughts, attitudes and values. (*Id.* at p. 92). German has listed four approaches to sociological criticism. These are movement studies, or agitation criticism, dramatism, reality construction, and fantasy theme analysis.

In movement or agitation criticism, critics have been interested in the language and action which accompany social movements using these to account in varied ways for the rhetoric produced to create and sustain, as well as to diminish and suppress the effects of social movements (*Id.*).

Dramatistic criticism, credited to Kenneth Burke, uses the theme of dramatic interaction to capture the essence of rhetoric through rhetorical transactions influenced by ratios of the five factors of the “pentad”, action, agent(s), agency, scene and purpose.

Reality construction focuses on rhetoric as the means that aids the creation and sustenance of the social reality necessary to form relatively enduring governments and social institutions. Language is a primary force calculated to reinforce the connection of individuals in relationships to the larger society, ultimately assuring and maintaining a stable social reality.

In Generative criticism, upon encountering a “curious artifact”, the critic generates units of analysis or an explanation schema from the artifact rather than from previously developed, formal methods of criticism (Id.). Foss provides a flexible template that considers encountering the curious artifact, coding the artifact, searching for suitable explanatory theory and creating an explanatory schema.

This dissertation has focused on the curious absence and silence of higher education leaders at the Supreme Court phase of Grokster. Most systems of rhetorical criticism are biased towards corporal identity of the rhetorical artifact; speech, texts, semiotic objects - occurrences in which silence, absence, and space are treated as incidental clarificatory or effect devices. For example the last sentence is repeated here without the incidental devices of space and punctuation.

most systems of rhetorical criticism are biased towards corporal identity of the rhetorical artifacts speech texts semiotic objects in which silence absence and space are treated as incidental clarificatory or effect devices

Without the necessity of embarking on a process of deconstructing speech and presence in an attempt to earn silence and absence the same status among other traditional rhetorical artifacts favored in most common rhetorical systems, the process of rhetorical criticism can commence squarely with the encounter of the curious artifact.

For this project, of all major methodologies in rhetorical criticism, generative criticism and situational criticism offer the most attractive possibilities. Generative criticism (Foss, 2004) allows the critic enormous flexibility but also involves important coding processes which are difficult to perform with absence and silence which have limited availability of features that can be coded with certainty.

Situational criticism based on Bitzer's rhetorical situation deals frontally with a situation that invites a fitting response which may or may not materialize. Bitzer's seminal work draws on the usual courtroom case as an example of "situation which is complex and highly structured (Supra. p. 67)" and by acknowledging that situations are not always accompanied by fitting responses (Id. p. 60), makes room for absence and silence as legitimate objects of study in a rhetorical situation.

Bitzer's rhetorical situation has survived negating posmodernistic critique (Vatz, 1973) as well as elaborations in expansive categories and theory (Consigny, 1974; Jamieson, 1975; Biesecker, 1989; Edbauer, 2005) which perhaps fortuitously have served to intensify situational

criticism as a veritable methodology with applicability to extensible categories of symbolic acts including absence and silence.

Carroll (2002) has indeed conducted a formal study of silence using Bitzer's rhetorical situation. Many other studies and treatises of absence and silence (Jones, 1999; Kurzon, 1995; Lang, 1996) may be readily analyzed and understood through the application of concepts and principles enunciated and discussed in works on rhetorical situation, particularly Bitzer's "Rhetorical Situation".

German (supra at p. 91) has stated that "... methodologies have developed in response to questions asked by critics ...", and discusses methodologies that "... cover a broad range of potential critical perspectives." These include traditional criticism which "assumes that rhetoric functions as a means for discovering rational, truthful appeals to audiences."; situational criticism "focuses on the interaction of audience, exigencies, and contingencies in creating the opportunity for a rhetorical response which is appropriate to the situation"; sociological criticism "focuses on language as a response to social situations in which communication is a means of action as well as a record of thoughts, attitudes and values."; genre or analog criticism "attempts to identify types of rhetoric through the common characteristics or functions of the members of that group". State of union messages and press conferences are examples of genres each with its unique characteristics. Historically relevant theory focuses on the dominant rhetorical ideas which

influenced the rhetor when they “spoke” and extracts broader meanings in the context of that immediate influence.

Situational Criticism

From these major perspectives, this dissertation has applied the methodology of situational criticism to the Supreme Court phase of *Grokster* with a focus on the absence and silence of university presidents.

Farrell and Young in *The Art of Rhetorical Criticism*, J. A. Kuypers, Ed. (2004) have repeated Bitzer’s definition of “the rhetorical situation” as:

a complex of persons, events, objects and relations presenting an actual or potential exigence which can be completely or partially removed if discourse introduced into the situation can so constrain human decision or action as to bring about the significant modification of the exigence (Id.).

Further, “in any rhetorical situation there will be at least one controlling exigence which functions as the organizing principle; it specifies the audience to be addressed and the change to be effected (Farrell & Young, 2004).”

In Bitzer’s view, according to Farrell and Young, the situation in which rhetoric is called forth encompasses all of the elements that influenced the moment including the events, the individuals involved, the circumstances, and the relationships among these factors (Id. at p. 35).

The critic must take into account the totality of the situation and must consider the role played by each element.

Formally, Farrell and Young prescribed four major steps in situational criticism. The first is the generation of a list consisting of each of the elements that constitute the particular situation. Initially this list should be inclusive, even exhaustive; elements can be omitted later if the analysis demonstrates their role to be negligible. The second task is to analyze each element, in terms of the role each played; the third task is to determine the dominant element or exigence that will govern the response and the fourth task is to analyze the response to determine if the exigence is modified and if the response is “fitting”.

Farrell and Young admit that the four steps described do not constitute an exhaustive list of steps in situational criticism and that situational analysis is seldom used as a stand alone tool to evaluate a rhetorical artifact. More typically, according to the authors, situational criticism enriches other analytical methods by providing a deeper understanding of context in all its dimensions (Id. at p. 35). It may also be analogized that other analytical methods may be referenced and used to enrich situational criticism. Farrell and Young conclude that only by understanding the full context of a rhetorical event can the critic comprehend and evaluate the artifact itself.

The first step in Farrell and Young’s four step process is to generate a list of elements in the particular rhetorical situation. This was

accomplished by applying the five questions suggested by German to the Supreme Court phase of Grokster. Additionally to aim towards the production of an exhaustive list as recommended by Farrell and Young, concepts in the works of Bitzer and other scholars will be applied to hopefully discover other elements to further expand the list of elements.

The next step in the four step process, namely analyzing each element in terms of the role each played, will also rely on the earlier referenced works on rhetorical situation by Vatz (1973), Consigny (1974), Jamieson (1975), Biesecker (1989) and Edbauer (2005). This step is expected to situate the absence and silence of university presidents at the Grokster Court along with other elements whose salience will be thoroughly examined in the third step, namely, determination of the dominant element or exigence that will [should] govern the response. The fourth step in Farrell and Young's scheme is an analysis of the response to determine if the exigence is modified and if the response is fitting.

Four research questions have been probed and answered; these are: Did Grokster influence scholarly freedom or institutional autonomy? Utilizing rhetorical criticism, what were the implications of the absence and silence of higher education leaders at the Grokster Court? What was the impact of the United States Supreme Court decision in Grokster on higher education? Have new issues been generated?

Summary

In this chapter methodology was discussed in two parts; legal research was applied to the Grokster litigation to identify rhetors and audiences in the rhetorical situation at the Supreme Court. Also important discursively influential artifacts of text and speech were identified. Absence and silence of university presidents and university associations were established through legal research.

CHAPTER IV

FINDINGS OF THE STUDY

Application of Methodology in Grokster

The situation of interest is the Supreme Court phase of the Grokster legislation construed in broad terms with elements that relate to discourse and discursivity in the situation. Formally, Farrell and Young have prescribed four major steps in situational criticism. The first is the generation of a list consisting of each of the elements that constitute the particular situation. "Initially this list should be inclusive, even exhaustive; elements can be omitted later if the analysis demonstrates their role to be negligible." The second task is to analyze each element, in terms of the role each played; the third task is to determine the dominant element or exigence that will govern the response and the fourth task is to analyze the response to determine if the exigence is modified and if the response is "fitting" (*supra*).

List of elements have been generated from three sources namely answers to German's Five Questions, Bitzer's constituents comprising exigence, audience and constraints as well as other elements that the critic can provisionally appended and ultimately justify. Obvious examples are elements from the category of author and also legal briefs. A tentative list of rhetors at the Grokster Court emerged through legal research; representing copyright owners in the entertainment industry,

MGM et al. as Petitioners; representing peer to peer service providers, Grokster et al. as Respondents. At oral arguments (MGM v. Grokster (2005a), appearances before the full house of Supreme Court Justices were: Donald B. Verrilli, Jr., Esq., on behalf of the Petitioners; Paul D. Clement, Esq., Acting Solicitor General, Department of Justice, for United States, as amicus curiae, supporting the Petitioners and Richard G. Taranto, Esq., on behalf of the Respondents. This list will be expanded after examination of German's questions on matching methodology and "artifact."

German's Five Questions

German's five questions are used to ferret out as many tangible elements as possible in the situation. This will be supplemented by adding additional elements from the critic's perspective to produce the exhaustive list that Farrell and Young's methodology recommend. Because of the complexity of Grokster, an ecological expansion of situation will be applied to include elements of historical relevance such as the legal progression of p2p secondary liability jurisprudence from Napster (2000) through Aimster (2003) and Grokster (2004).

This legal history was thoroughly intertwined with universities which typically operated powerful processing technologies and embedded within unique university culture which governed how the use of these technologies were managed and regulated. Thus university values and leadership will prove to be important elements in this project.

Starting with German, the first question is as follows: “Is there a prominent element or several elements in the artifact which dominate it?”

Although several prominent elements will be uncovered in the analysis, the question presented by Petitioners at the Court and the complete absence and silence of higher education administration are prominent elements. Quoting Norton, “That which is omitted, absent and silent is as important as that which is committed, present, and conspicuous” (Norton, 2004).

Rhetors from universities included professors in their individual roles as scholars and intellectuals (Foster, 2005; Pollack, 2005; Lessig; 2005; Abelson, 2005). Their statements shed considerable light on issues of university and scholarly autonomy and serve to justify the problematization of the absence and silence that characterized the performance of university presidents at Grokster.

The second question: “Is the rhetoric an expression of its cultural milieu?”

Through an analysis of the rhetoric of absence and silence in this case, a deeper appreciation could be gained of ways in which external interests and power can operate to constrain speech in certain constituencies and interpellate rhetors into roles that are patently problematic. In higher education culture, scholars have expressed concern over the extent to which research sponsored by external

interests can affect tenure and all meanings of academic freedom at universities (Thomson, 1983).

The third question: “Is there an interaction of elements in this artifact which accounts for its unique character?”

The rhetorical situation in this case is characterized by multiple interactions of the textual briefs of rhetors with distinct flavors in law (Pollack), culture (Lessig) and technology (Abelson et al.), several of which related to some aspect of institutional and scholarly autonomy and ultimately the role of higher education in society and demonstrated that legitimate university perspectives existed. These performances of presence and speech give a uniquely curious character to the absence and silence of presidents of universities. Other interactions were oppositional perspectives expressed by litigants and the United States Department of Justice at oral arguments and interaction of media executives of AIAA and MPAA with university presidents while *Grokster* was progressing towards a Supreme Court showdown.

The fourth question: “When compared to other artifacts, does this rhetoric reveal unique characteristics it possesses or which characterize a group of similar artifacts?”

The absence and silence of higher education administration in *Grokster* possess unique characteristics compared with other categories of absences and silences such as those that result from external

suppression of speech or silences used as resistance by persons and groups in positions of lesser power (Carroll, 2002).

The fifth question: “Does the rhetorical theory of the historical period lend understanding to the rhetorical artifact.”

The historical period is contemporary and as such current ideas in critical theory, psychoanalytic process manifested through desire, communication in different spheres and ethics will be drawn upon to illuminate the implications of absence and silence of university leaders at the Grokster Court.

It is now time to apply Farrell and Young’s four step prescription for situational criticism. The first is the generation of a list consisting of each of the elements that constitute the particular situation; the second task is to analyze each element, in terms of the role each played; the third task is to determine the dominant element or exigence that will govern the response and the fourth task is to analyze the response to determine if the exigence is modified and if the response is “fitting”.

List of Elements

Several rhetors appeared at the Grokster Court. Petitioners and respondents had similar goals. Each sought to prevail over the other at the conclusion of certiorari. This project identifies other categories of rhetors at the Supreme Court. These are university professors in their individual roles as scholars, university presidents in their roles as administrative leaders of their institutions and as leaders in higher

education whose symbolic action gained salience in the form of absence and silence and, Supreme Court Justices who used speech and text to arrive at the final disposition of the case. Professors spoke through amicus curiae briefs from backgrounds of law, technology, and culture. Supreme Court Justices spoke individually at the oral arguments on petition for certiorari and as a democratic body through textual rendering of their decision. Presidents of universities and colleges displayed absence and silence at the Supreme Court phase of Grokster.

Actual and potential exigencies always exist in a court of law, particularly at the Supreme Court from where contending parties can launch no further appeals. Universities and colleges, though not a party in the case potentially faced exigencies by virtue of the question that litigants placed before the Court. These exigencies, tentatively assumed in the areas of institutional autonomy and scholarly freedom, will be evaluated for their significance in this project.

Practitioners in popular culture also faced potential threats to creativity of cultural artifacts as well as economic restrictions on the distribution of music. These exigencies will also be evaluated for their significance in this project. Copyright holders who were not litigants faced the possibility of gross loss of royalty income and rent if the Court were to affirm the 9th Circuit taking a cue from the hysteria that followed the appellate court affirmation of the California District summary dismissal in favor of Grokster.

Audience in the Grokster situation extended far beyond the Supreme Court Justices for whom deciding a case, as discussed by Cardozo, is a complex interaction of both conscious and subconscious processes (Cardozo, 1949). The public and private sectors which, together, provide the major portion of financial support for colleges and universities take cognizance of positions taken by scholars of these institutions no less than of decisions that come down from the Supreme Court. The continuing evolution of the public view of the role of universities in society is not immune to what members of key constituencies in these institutions say, do, and think.

What is not said or what is not done may be as important as what is said and done. As Norton discusses at (Norton, p. 89) “That which is omitted, absent, and silent is as important as that which is committed, present and conspicuous.” As the public consciously or subconsciously moulds its opinions of the higher education complex, the speech, actions and other behavior of university presidents may not go unnoticed.

By the sheer number of interested amici as measured by a count of briefs filed, over the subject matter of availability and distribution of popular music, a national activity which accounts for a large proportion of commerce, it is fair to argue that American society at large and possibly western society was listening attentively for the outcome of Grokster. Every listener in Grokster had a different personal or

professional exigence that the Supreme Court decision could dispel, aggravate or in some way affect.

All subject and configurational positions at Grokster were products of historical and rhetorical processes, some, such as copyright, from the very birth of the Constitution through several amendments and Supreme Court cases all of which directed efforts towards carrying out the constitutional intent of balancing interests of copyright holders through levels of compensation that maintained productive incentive to ensure public availability of creative works of art.

For universities, the nature and responsibilities of the societal pact as well as conceptualization of privileges of academic freedom have developed over a period of over a century even predating the foundation of AAUP by luminaries such as John Dewey. Academic freedom, perhaps, the most active and long enduring rhetorical site outside of Congress and popular politics, finds public education and its institutions and values close to the center.

The above elements arising from the immediate Grokster Court gain salience from the questions presented for Supreme Court Justices to decide. In Statement of the Case, Petitioners stated that “This is one of the most important of copyright cases ever to reach this Court. Resolution of the question presented here will largely determine the value, indeed the very significance of copyright in the digital era (MGM v.

Grokster, 2005a). Petitioners, MGM and 36 of the largest entertainment companies in the world presented the following question:

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based “file-sharing” services Grokster and Stream Cast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services (MGM v. Grokster, 2005a).

Respondents Grokster and StreamCast presented a different question:

Whether the court of appeals correctly ruled, on the only issue before it, that respondents’ distribution of the current versions of their file-sharing software does not render respondents secondarily liable for every direct infringement of petitioners’ copyrights committed by users of the software (MGM v. Grokster, 2005b).

To this somewhat comprehensive list of elements, an important element in this project was represented by media association executives from the Recording Industries Association of America (RIAA), and the Motion Picture Association of America (MPAA). Like university presidents, neither the executives nor their associations were litigants at any stage of

Grokster. Also, like university presidents, neither they nor their associations RIAA and MPAA submitted amicus curiae briefs.

The crucial difference is that the major companies who in fact make up the membership of these two powerful media organizations were non other than the Petitioners at Grokster whereas for 39 listed university associations (NTLF, 2007) and over 200 presidents of research universities (Internet2, 2005), there was not a single voice at Grokster. The most prominent association for university faculty, the American Association of University Professors (AAUP) also did not present an amicus curiae brief at Grokster; however 14 briefs filed by their members; professors in their individual scholarly capacities covered issues of relevance to university faculty and higher education from the three major discursive positions. They filed 3 briefs in support of Petitioners, 10 briefs in support of Respondents and 1 brief in support of neither party.

Analysis of Elements

From Farrell and Young's suggested approach to situational criticism, the second step is to analyze each element in terms of the role each played, however the large number of elements interacted in several different dimensions. Farrell and Young' have stated that "As with any critical effort, it is the rhetorical artifact that will determine how the critical narrative develops." (Farrell & Young, 2004 at p. 35).

Also they have indicated that "... more typically, it [situational analysis] enriches other analytical methods by providing a deeper understanding of context in all its dimensions (Id.)." To conduct an analysis that reveals the role played by the most significant elements in the complex situation, a dimensional approach will be applied to supplement individual element analysis.

The Supreme Court phase of *Grokster* is a product of both direct and indirect cultural factors. Direct factors are constituted by the legal encounter at the Court between Petitioners, MGM et al. and Respondents *Grokster* and *SteamCast* over principles of secondary liability in copyright law. Participants, petitioners, respondents, and amici were actively present and vocal using established Court processes in the form of briefs and oral presentations, all of which are at a minimum, processes that Supreme Court Justices take judicial notice of and most probably processes to which they attach some weight. These direct factors deal with legal issues from concretized doctrines and codes of copyright law.

Indirect factors are less concrete but nevertheless contain issues of considerable significance to higher education in particular and to society in general. The vibrant rhetorical site of academic freedom experienced yet another set of traces of signification as did the role of higher education in a society with expressed and latent expectations in public

ethics as well as expressed and latent expectations of leaders such as presidents of institutions of higher education.

Universities have been involved with the development and use of network technology since Steve Crocker of UCLA first described basic peer to peer architecture (Crocker, 1969). Soon after Shawn Fanning created the file swapping service Napster in 1999, universities began to feel the impact of music file sharing on their networks (McCollum, 2000a). According to McCollum Napster file swapping activity at universities escalated rapidly leading to excessive consumption of available bandwidth and rapidly increasing cost for network access.

Several copyright owners through the RIAA regularly demanded that colleges shut down online archives of illegal MP3s on their campuses (RIAA, 2006) while others filed lawsuits against universities (Carlson, 2000b; Read, 2004). Read reported that RIAA lawsuit targeted over 75 network users in 21 universities. Massive file sharing created a panic in institutions where the practice was rampant as administrators sought various means to deal with the crisis on their campuses (Hennessy, 2004). The showdown at the Supreme Court marked the culmination of the legal fight between Petitioners and Respondents.

Legal dimensions

The Supreme Court phase of Grokster was a determined and final effort by copyright owners to reverse the 9th Circuit decision which upheld a lower court's summary dismissal of the Petitioner's complaint

against the file sharing services of Grokster and SteamCast (545 U.S. 913, 2005). Petitioners and respondents relied on varying interpretations of the Sony “Betamax” decision.

While respondents keyed in on the principle derived from patent law that providers of products capable of substantial non infringing uses cannot be held liable for secondary infringement (Sony, 442), petitioners insisted on a calculus which gave weight to relative proportions of infringing and noninfringing uses. Petitioners essentially asked The Court to reverse the Ninth Circuit decision that “immunized” Grokster and Stream Cast from copyright liability in spite of “millions of daily acts of copyright infringement that occur on their services” and that constitute over 90 percent of the total use of the services (Grokster, 545 U.S. 913).

During the period of the Grokster lawsuit, over 200 universities were involved in the high speed Internet2 network research project developed to promote collaboration and innovation “that has a fundamental impact on the future of the Internet”. (Internet2, 2005). Chilling innovation in a project as vast as Internet2 was a concern of several university professors through their amicus curiae briefs. Also several lawsuits targeted users of the student-developed i2hub file swapping system that operated over the Internet2 Consortium Abilene network, a network capable of supporting “lightening speed” file transfer processes (Read, 2005).

Grokster had succeeded in producing a file sharing system that avoided the legal vulnerabilities of Napster and Aimster to two established principles of secondary liability, contributory and vicarious liability. To be liable through contributory principles, the secondary infringer must not only have knowledge of the direct infringing conduct, but must make material contribution in the infringing process. Constructive knowledge was deemed insufficient as was actual knowledge gained at a time when the alleged contributory infringer can do nothing to stop the infringing conduct (Grokster, 2004, p. 13a).

Requirements for vicarious liability are financial benefit or interest and the ability to supervise the infringing conduct. Direct financial benefit was demonstrated in Napster, 239 F. 3d at 1023. Napster also required logins which empowered it to control access and therefore supervise file downloading activities. All major universities and colleges provide Internet access to students, faculty and staff in offices, classrooms, computer laboratories and many provide access from home based computers.

In Urofsky (121 U.S. 759), professors sought to remove chilling limitations on what content may be accessed using computers provided in university faculty offices. Although this constraint was purely legal, it underscores the significance of ability to exercise control over university network access. According to Hennesey and Spanier (2004) access

control was indeed one of the methods that universities used to limit p2p file transfer activity.

Some of the indirect influences that operated during *Grokster* in fact operate in all cases before the Supreme Court. The process by which Supreme Court Justices arrive at decisions as discussed in Cardozo (1949) is a complex interaction of both conscious and subconscious processes, beginning with the search for a legal precedent. Cardozo at p. 31, discusses four methods in judicial decision making, the method of philosophy or “the rule of analogy”, the method of evolution along the line of historical development, the method of tradition along the line of customs of the community and the method of sociology along the lines of justice, morals and social welfare.

Cardozo declined to expressly rank the four methods, but declared that “Homage is due to it [rule of analogy] over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a better right (Id. at p. 31).” Cardozo’s thesis rests on the presumption that Justices desire only to do the “right thing” and take approaches which enable them to actualize that desire. This view is consistent with concepts of ethics in the public sphere.

Kearney and Merrill (2000) discuss three pragmatic theoretical models of judicial decision making and their implications for amicus briefs. These are the legal model, the attitudinal model and the interest group model. The legal model suggests that Justices rely on their

understanding of the requirements of relevant authorities which include the text, structure and history of applicable constitutional and statutory provisions, precedents of the Court, and arguments about the policy consequences of different outcomes (p. 776).

In the attitudinal model Justices decide cases in accordance with their political and ideological predispositions which remain relatively fixed throughout their career while in the interest group model, justices seek to resolve cases in accordance with the desires of the organized groups that have an interest in the controversy. (p. 783).

Kearney and Merrill from a controlled statistical study of Supreme Court decisions reported that “institutional litigants” such as the ACLU, the AFL-CIO, and the States enjoy above-average success with amicus curiae briefs. Also, amicus filers supporting respondents enjoy more success than do filers supporting petitioners. They conclude that amicus briefs clearly do matter in many contexts and that the Court is almost certainly influenced by additional information supplementing that provided by litigants (p. 830).

Non litigants filed fifty five amicus curiae briefs in *Grokster*. Justices, who separately and collectively constitute perhaps the most important elements at the *Grokster* Court, by Kearney and Merrill’s study are to some extent susceptible to the influence of both the text as well that of authors of amicus briefs.

With changes in technology and operational procedures, Grokster presented major legal challenges over its immediate predecessor Napster. Napster's reliance on a central indexing server under the control of Napster was no longer relevant in Grokster which relied on peer computers that directly searched other computers and requested files to be downloaded without any assistance or intervention of Grokster machines. Whereas the Ninth Circuit closed down Napster, the same circuit completely absolved Grokster from charges of contributory and vicarious liability. Cardozo's "method of philosophy" (p. 30) could not rely on any analogy between Grokster and Napster beyond the observation that both systems were used for file swapping by primary infringers.

Other methods of assistance to judicial decision making include consideration along lines of historical development. Evolution from the Sony case (Sony, 1984) through Napster to Grokster provides some progression in the calculus of proportions of infringing and noninfringing uses. "Fair Use" had been accepted as sufficient defense in Sony where it was noted that an overwhelming proportion of use was to record programs which had been offered for free viewing; viewers used Betamax for "time shifting".

In Napster, fair use had been rejected in a lower court (Napster II, 2001, para. 21). Also availability of resources recorded could not be completely free as they were in Sony since these resources were offered by sources, other users of the file swapping services, without any rights

to copyrighted material. Also the proportion of infringing uses was substantially greater than in Sony.

Regardless of the methods by which a Justice arrives at a decision, litigants may increase the weight of their argument by addressing all the factors, philosophic, historical, traditional, and sociological, all of which may influence the inclination of a Justice in a binary situation where petitioners and respondents demand diametrically opposing outcomes. Following this line of thought, the realization that Justices take notice of amicus curiae submissions marks this legal artifact as a possible source of influence beyond arguments of direct litigants. Even though Justices become rhetors in cases before the Court, they are also audiences as the voice of other rhetors filter in through amicus curiae briefs.

Rhetoricity of briefs

The situation at the Supreme Court phase of Grokster was a complex web of cultural, legal and rhetorical factors. The immediate contest was a legal showdown between Petitioners represented by MGM and Respondents represented by Grokster and SteamCast. Questions are repeated here for convenience. Petitioners had asked the Court for an affirmative answer to the question:

Whether the Ninth Circuit erred in concluding contrary to long established principles of secondary liability in copyright law, that the Internet file sharing services of Grokster and SteamCast should be immunized from copyright liability for the millions of

daily acts of copyright infringement that occur on their services and that constitute at least 90 percent of the total use of the services. (545 U.S. 913, 2005, Petition for a writ of certiorari)

Respondents also asked the Court for an affirmative answer, but to a different question:

Whether the court of appeals correctly ruled on the only issue before it, that respondents' distribution of the current versions of their file sharing software does not render respondents secondarily liable for every direct infringement of petitioners' copyrights committed by users of the software. (Id. Brief for Respondents).

With these textual artifacts, petitioners and respondents established their positions as major rhetors in the situation at Grokster. Lawyers on both sides also presented oral arguments in dialogic formats in which Supreme Court Justices interjected questions and comments at strategic points during the oral exercise of both petitioners and respondents (MGM v. Grokster, 2005a).

A more detailed rhetorical analysis of the way that the contending parties framed their questions before the Court reveals the use of subtle persuasive approaches. On the one hand, petitioners' goal was to reverse the Ninth Circuit decision which had ruled that respondents could not be held liable on grounds of secondary liability and on the other hand respondents sought an affirmation of that decision. However, both

parties framed their questions, even before presenting any arguments, in ways that appealed to different judgmental inclinations.

Petitioners highlighted the Ninth Circuit by name, parenthetically contrasting its decision with that of the Seventh Circuit which is a body of equal status and whose decision in the *Re Aimster* case had been in effect affirmed by a refusal of the Supreme Court to grant certiorari while respondents used the generic “court of appeals”. A particular instance from the class of appellate courts could be singled out for notoriety, while a court of appeals retains its institutional status as a clearing house for fundamental principles.

Petitioners highlighted the preponderance of noninfringing uses of the file sharing services, appealing to the methods of history which, as Cardozo (1991, p. 51) has explained, can limit the tendency of a principle to “expand itself to the limit of its logic”. Whereas in *Sony*, a product with 100 per cent of infringing use could still pass the infringement test if the product is capable of substantial noninfringing use, Petitioners sought to bracket the *Sony* condition within the historical period before the growth of the Internet that enormously facilitated reproduction of copyrighted works.

Respondents avoided any notion of a proportionality calculus and subtly undermine the reasonableness of any tendency which would condemn them for “every single act of infringement”. The significance of this brief comparison of the rhetorical construction of the opening

questions posed by Petitioners and Respondents is that rhetors appeal to different orientations which according to Cardozo, add weight to the inclination of Supreme Court Justices towards a desired opinion. Other immediate rhetors use similar approaches.

Amici curiae presented a total of 55 briefs, one of the highest numbers of submissions in cases before the Supreme Court, surpassed by only two other cases, *Grutter v. Bollinger* (2003) and *Webster v. Reproductive Health Servs.* (1989). As rhetors, the class of amici featured prominently in *Grokster* using the well established textual artifact, the amicus curiae brief, to establish their presence and speech in the situation.

An amicus curiae highlights an interest, a requirement that presumes that such interests face possible and potential threats which makes the absence and silence of persons or institutions, for which some vulnerable interest may have existed, a valid question of inquiry. All direct participants at the Supreme Court, petitioners, respondents, Justices fulfill roles of rhetors as well as roles of audience.

However, the audience in *Grokster* was more expansive. Matters that escalate to the Supreme Court, with as much interest of amici, tend to command large active audiences that include substantial segments of the national public sphere and in the case of *Grokster*, public spheres that transcend national geographical and cultural boundaries. Rhetors who performed with presence and speech are easily identified. At

Grokster, two classes of rhetors were absent and silent. One was the class of alleged primary infringers who were not represented at any stage of Grokster; the other was the class of leaders of higher educational institutions and their associations.

Since 2000 up to certiorari at the Supreme Court in 2005, Universities continued to experience excessive bandwidth usage due to file sharing activities. Ruling in favor of respondents by an affirmation of the 9th Circuit on Grokster would most likely open the floodgate to sophisticated file sharing network design based on the experience following the 9th Circuit affirmation of the Northern District California court summary dismissal of the MGM suit against Grokster. Universities with powerful computers and fast networks such as the Abilene network of the Internet2 consortium would be the highly preferred target for file sharing network operation.

File sharing escalated after Napster was shut down as Grokster and others developed systems with greater technical flexibility and with reduced vulnerability to legal challenge. The modified designs passed the Sony test at the 9th Circuit. Affirmation by the Grokster Court would challenge technically sophisticated university networks, divert more activity to less protected networks and cripple even weaker university networks. This scenario would follow if the Supreme Court decided in favor of Grokster.

If Petitioners prevailed outright by an unconditional reversal of the 9th Circuit, then Grokster's operation would be grounded as would the ambitions of aspiring music swapping file sharing ventures. Developers would then have to live with a Damoclean sword as suggested by Justice Souter (MGM v. Grokster, 2005a at p. 14). Uncertainty of facing secondary liability lawsuits would impose a chilling effect on all research and development of products, networks and services that may be used by third parties to infringe copyright. Designers would be forced to seriously consider ways of modifying their products with features that would block infringing uses of their products or systems.

This scenario of prior restraint on research would threaten principles of scholarly academic freedom enunciated by the AAUP (AAUP, 1940), acknowledged by opinion at the Supreme Court (Urofsky, 2001) and widely affirmed by university faculty (Aby, S.H & Kuhn IV, F. C. 2000). It is fair to expect that this aspect of scholarly freedom, being a value of fundamental importance to the knowledge generation mission of universities and within the possibility of materialization by a decision of the Court, would be defended by non reticent response of university leaders.

Dominant Element or Exigence

The third step in Farrell and Young's prescription for conducting situational criticism is to determine the dominant element or exigence in the situation.

At various periods during the p2p phenomenon, institutions witnessed various classes of exigencies which continued to dominate attention at institutions of higher education. Soon after Fanning launched Napster in 1999, universities faced immediate and urgent threat of network congestion. Peer to peer file sharing placed unprecedented demands on network bandwidth and as reported by Foster (2000), networks at many institutions were unable to handle the sudden increase in bandwidth requirements. The problem worsened as more and more users caught on to the ease of swapping popular music files.

After the demise of Napster, the new generation of file sharing services represented by Grokster and Morpheus were designed with the capability of facilitating hefty video files (Carlson, 2001) with a dramatically increased consumption of network resources. As Grokster progressed through legal channels, institutions continued to grapple with network congestion that starved and disrupted routine faculty academic and research functions as well as administrative functions that are heavily dependent on network availability.

Another category that contributed to university immediate concern were demands that copyright owners and their organizations issued to universities to take certain prescribed actions against alleged infringers and sometimes against all users including those who used peer to peer services for noninfringing purposes. Demand for information on students

escalated as copyright owners bombarded university administrators with legal notices and filed lawsuits against students, naming the colleges themselves as defendants (Carlson 2000; Carlson 2001).

While congestion and resulting diminution in network speed placed technical constraints on the use of the network for faculty research, demands of copyright interests in day to day network management and in dictating enforcement procedures against alleged infringers strained the capacity of university administration to respond to these demands and at the same time maintain routine administrative functions. Both classes of exigence persisted for many institutions up to the Supreme Court phase of *Grokster*.

At the Court, Petitioners asked the Supreme Court to reverse the Ninth Circuit decision based on the Sony principle that exempted developers of products used to infringe copyright provided that the product was capable of substantial noninfringing uses. With Sony in place, faculty researchers would not need to be concerned that products of their research may be used for copyright infringement. The possibility that the Court could overturn Sony would create an exigence for researchers who would be open to lawsuits if they developed products that were subsequently used for copyright infringement.

Alternatively researchers would need to contemplate design features that would frustrate the use of their products for infringing purposes; and even such features could be defeated through clever

“reverse engineering” leaving them still unprotected against possibility of secondary liability lawsuits.

The situation before the Grokster Court posed exigencies which were substantially addressed by university administrators using a variety of approaches. Exigencies at the Grokster Court that could substantially affect the role of universities in society arose from possible disposition of Petitioners’ question in a manner that would in any way constrain faculty research.

Fittingness of Response

The fourth and final task in Farrell and Young’s prescription for situational criticism is to analyze the response to determine if the exigence is modified and if the response is “fitting”. Significant rhetor positions and responses were: Petitioners Brief, Respondent Brief, Amici Briefs, Supreme Court Decision and symbolic action of university presidents.

Petitioners brief argued in favor of the question that Petitioners urged the Court to decide, namely to declare that Grokster was not immune from secondary liability. Grokster distributed software capable of substantial non infringing uses as acknowledged by Justice Stevens at Oral Arguments (MGM v. Grokster, 2005a at p. 3) and by stare decisis falls within the widely quoted Sony precedent (Sony, 1984) delivered by Justice Stevens “The Betamax is, therefore, capable of substantial noninfringing uses. Sony’s sale of such equipment to the general public

does not constitute contributory infringement of respondents' copyrights." (Sony, 1984 at p. 16). Reversal of the 9th Circuit would amount to abandonment of the Sony doctrine. Researchers would then be open to secondary liability lawsuits for developing products that others chose to use for copyright infringement. The response of Petitioners would aggravate and consecrate the exigency by stare decisis subject to fresh direction of Congress and consequently is not a fitting response to the exigence.

Respondents brief argued against petitioners question and for Respondents question which urged the Court to affirm the 9th Circuit. With the Sony doctrine intact, this response would remove the exigence of prior restraint on research and product development, but would revive the exigence of unbridled p2p file sharing with serious impact on all universities and colleges and particularly devastating impact on universities financially or technically unable to fortify their networks and network equipment from conscription and use in more sophisticated p2p file sharing designs. This result renders Respondents' response not a fitting response.

Amici briefs covered the space of theoretical responses omitting only the absurd response of supporting both parties. From the 14 briefs submitted by university professors in their individual capacities as scholars, 3 briefs supported Petitioners, 10 briefs supported Respondents and 1 brief supported neither party. The briefs in

supporting Petitioners or Respondents suffer the same dispositions accorded Petitioners and Respondents' briefs and are not fitting responses.

Brief of Professor Lee A. Hollaar as amicus curiae in support of neither party concluded as follows "... this Court should vacate the decision of the Ninth Circuit in this case and remand for further proceedings to determine if the defendants are secondarily liable for the inducement of the copyright infringements of their users" (Hollaar, 2005 at p. 25). Hollaar's response would retain the sanctity of the Sony doctrine and protect researchers from secondary liability lawsuits for developing products that may be used for direct copyright infringement thus removing the exigence of prior restraint. The response also had the chance of removing the exigence of unbridled p2p operation that operates to cripple university networks based on the remand instructions to the lower court. Professor Hollaar's response is therefore a fitting response.

The decision of the Supreme Court delivered by Justice Souter concluded that "There is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error. On remand, reconsideration of MGM's motion for summary judgment will be in order." Continuing, Justice Souter ordered that "The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion (MGM v. Grokster, 2005b at p. 24)." This definitive ruling left the Sony

doctrine and stare decisis unscathed thereby protecting researchers from constraints of anxiety towards possible secondary liability lawsuits. The response also had a remarkable chance of controlling reckless expansion of p2p file sharing activity which also removes the exigence of susceptibility of university networks to congestive attack from p2p file sharing users.

Drawing from an array of past cases, Justice Souter has written that "Evidence of active steps ... taken to encourage direct infringement ... such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe ... (Id at p. 18)." The conclusion is that the response occasioned by the Supreme Court decision as well as by Professor Hollaar's brief was fitting responses.

The Supreme Court, ruling from the pinnacle in the hierarchy of courts, by its decision instantly removed the exigency. The absence and silence of university presidents would have no effect in persuading Supreme Court Justices through discourse to modify their individual or collective inclinations to affirm the 9th Circuit or to abandon the Sony doctrine. This absence and silence also would have had no effect on the likelihood of expansion of p2p that could return to plague university networks had the Supreme Court Justices affirmed the 9th Circuit. Probably it had no persuasive *amicus curiae* effect on Justices who traditionally are sympathetic to arguments that promote institutional

autonomy (Grutter, 2003) or merely emanate from universities as suggested by Standler (Standler, 2000). The conclusion is that the symbolic action of absence and silence of university presidents did not constitute a fitting response. These findings inform the answers to all the research questions in the following section.

Research Questions: Answers

Analysis of the research questions helps to underscore the urgency for a more fitting rhetorical response than the response of absence and silence that presidents of institutions of higher education exhibited at certiorari in *Grokster*.

Research Question 1: Did *Grokster* influence academic freedom or institutional autonomy?

The Supreme Court phase of *Grokster* in 2004 with a 2005 decision was the culmination of the peer to peer file sharing saga which started in early 2000. Throughout this period, universities experienced worsening conditions of network congestion precipitated by the use of first Napster and quickly followed by the use of other p2p services such as *Grokster* and *Morpheus* by StreamCast (McCollum, 2000a; Carlson, 2001a; Carlson 2001b; Strahilevitz, 2003).

Escalating stress on university networks followed the trend of sophistication in p2p network design and the pattern of court decisions that shut down centralized systems such as Napster and Aimster and absolved de-centralized systems such as *Grokster* and *Morpheus* from

charges of secondary liability (Napster, 2000; Napster, 2001; Aimster, 2004; Grokster, 2004). As reported, use of external p2p file sharing services severely stressed university networks and reduced bandwidth availability for routine academic and administrative functions.

Internal Internet2 p2p file sharing systems proved even more devastating in speed although confined to the Abilene network developed for cooperative research among members of the Internet2 Consortium (Dela, 2005; Gross, 2005). Results are not available to indicate that use of the dedicated Abilene network relieved conventional university networks from bandwidth consumption. The conclusion is that Grokster, along with other p2p services, contributed substantially to the degradation of university network functionality.

Academic freedom is an intense rhetorical site with wide latitudes of discursivity among scholars in and out of the academe (Tight, 1985; Buckley, 1986; Sykes, 1988; Aby & Kuhn, 2000; Standler, 2000). Violation of scholarly freedom to teach and conduct research without undue constraints or restraints has been alleged in a wide variety of circumstances such as in Urofsky (2000) which challenged a state law prohibiting state employees, including university faculty, of using state owned computers to view “improper” sites.

In Urofsky, petitioners’ argument that the state law hampered the research and knowledge generation functions for which university faculty are engaged found sympathetic grounds with Chief Justice Wilkinson’s

remark that the State Act constituted a prior restraint because it “chills Internet research before it happens (Urofsky, 2000).”

Some universities during the p2p file sharing phenomenon rebuffed instructions from external media powers to shut down p2p operation on their networks on the basis that they [universities] were committed to the protection of academic freedom by maintaining unfettered network access (Abrams, 2000; Carlson, 2000a; Foster, 2000).

It seems fair to assert that the role of p2p file sharing in congesting university networks rendered these networks less accessible to faculty. In the mildest case, this amounts to a theoretical threat to scholarly freedom of faculty to teach and conduct research without undue constraints. Severe network congestion would amount to a practical threat for which university faculty would be forced to substantially modify details of their research and teaching schedules. Unchecked escalation of file sharing uses of Grokster and other p2p services would almost certainly disable many university and college networks and jeopardize Internet based research and instruction.

Institutional autonomy describes the right of universities to essentially manage their affairs without undue intervention of external power. Cases such as (Grutter, 2003; Urofsky, 2000) leave no doubt regarding Supreme Court affirmation of this right. As widely reported, during the p2p crisis, copyright owners, represented by the RIAA and MPAA made demands that amounted to undue intervention. These

external interests prescribed network policy (Carlson, 2000a; Carlson, 2002b; Read, 2006), demanded release of information on alleged student copyright infringers in total disregard of due process of law (RIAA v. Verizon, 2003; Abrams, 2000; Foster, 2000), demanded unprecedented access to university networks and backed these demands by threat of lawsuits to which some university leaders capitulated (Madigan, 2002; Mitrano, 2004).

Generally, university leaders expended substantial effort to counter threats to network degradation and in many cases rebuffed direct external demands while collaborating in mutually beneficial efforts through joint committees to develop approaches which institutions could then consider and, at their discretion, apply to their particular situations (ACE, 2002; Hennessy & Spanier, 2004).

At the Supreme Court, Petitioners' question posed no threat to institutional autonomy. Briefs submitted by petitioners and respondents addressed theories of secondary copyright liability derived from the Sony precedent which both parties claimed supported their positions.

The threat to scholarly freedom was embedded in the demand of petitioners to reverse the 9th Circuit decision absolving Grokster of secondary liability under any condition based on the Sony principle that the distributor of a dual use product capable of both infringing and noninfringing uses is presumptively protected from secondary liability

challenges and the possibility that the Court could accept the argument and act as urged (MGM v. Grokster, 2005b; Hollaar, 2005).

As pointed out earlier, outright reversal would mean that the Sony principle in spite of stare decisis could not be counted upon to protect researchers who develop products that are capable of copyright infringement from secondary liability even when these products had been developed for noninfringing uses. This would amount to prior restraint on research and product development since the researcher would have no protection against subsequent use of their products by third parties for direct copyright infringement (MGM v. Grokster, 2005a; MGM v. Grokster, 2005c).

Such restraint would violate the principle of unrestrained faculty research clearly enunciated by the AAUP (AAUP, 1940) and would be immutably etched in legal precedence by virtue of Supreme Court jurisprudential finality until Congress acted to modify the effect of such an outcome. The consequence of such a determination would be far more serious than the constraint on faculty research occasioned by complete network breakdown due to p2p file share excesses. Supreme Court Justices (Breyer at p. 11; Scalia at p. 12 at Oral Arguments) wondered how technology such as the Gutenberg press or iPod could have fared with the “Damoclean sword” (Souter at p. 14), under petitioners position.

In conclusion to this first research question, Grokster did grossly affect functionality of university network and operation and opened the

gate for intrusive demands by copyright owners both of which affected institutional autonomy. Grokster and p2p activity also threatened to cripple network availability for faculty teaching and research and thereby adversely affected scholarly freedom. These circumstances were managed adequately to substantially neutralize their effects on the two classes of academic freedom.

Grokster at the Supreme Court posed a graver threat to scholarly freedom by the possibility that the Court may have unconditionally reversed the 9th Circuit and consequently undermine the Sony protective veil for researchers and developers of dual use products. Alternatively, the Court may have unconditionally affirmed the 9th Circuit and opened the flood gate for unprecedented onslaught of p2p file sharing activity on university networks. This outcome would adversely impact both scholarly freedom and institutional autonomy.

Research Question 2: Utilizing rhetorical criticism, what were the implications of absence and silence of higher education administration at the Grokster Court?

From *Grutter v. Bollinger*, 539 U. S. 306, (2003), p. 20, Justice O'Connor's observation that cultivating leadership who have legitimacy in society require confidence in the openness and integrity of educational institutions places a great deal of responsibility on educational institutions themselves. It is fair to assume that presidential leadership must exude integrity and openness within the university semi public

sphere to maintain legitimacy among internal constituencies of faculty and students while not jeopardizing its credibility and status in the wider external public and semi-public spheres of tax payers, legislators and aspiring students.

As discussed earlier, most presidents with serious p2p activity on their campus networks reacted in various ways to reduce or eliminate the problem of congestion caused by these activities (Hennessey and Spanier, 2004). They recognized the impact of p2p music and video file sharing on day-to-day administrative and academic functions of their campuses and took action to remain functional.

Reaction to threats on the scholarly freedom of their faculty and threats to the institutional autonomy of their institutions varied. Reactions included rebuffing encroaching demands in their responses to legal notices (Foster, 2000; Nordin, 2000; Abrams, 2000), aligning themselves into collaborative roles (Joint Committee, 2002), outright compliance with demands (Mitrano, 2004) and independent attempts toward dialogic resolution reported by Carlson (2001) under (New Patterns, para. 3)

At the Supreme Court, every president was absent and silent. As may be derived from a study by (Kearney and Merrill, 2000, p. 831), in the entire history of the Supreme Court, only two cases attracted more interest measured in terms of amicus curiae briefs filed, than the Grokster case. These are *Grutter v. Bollinger*, 539 U. S. 306 (2003) with

92 amicus briefs over constitutionality of university admission policies (Find Law, 2007) and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) with 78 amicus briefs over constitutional aspects of abortion (Kearney and Merrill at p. 831). Several universities, as constituted institutions and academic units within institutions independently filed briefs to defend their interests in *Grutter* and *Webster*.

In *Grokster* with 55 amicus curiae briefs filed, neither universities nor academic units within universities nor did associations representing universities file any briefs. However, several scholars, in their individual and private capacities file briefs, 3 supporting petitioners, 10 supporting respondents and 1 supporting neither party. In *Regents of the Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978) over constitutionality of affirmative action, amici filed 54 briefs (Kearney and Merrill at p. 831).

Awareness by universities of the process and expected value of intervention at the Supreme Court through amicus curiae briefs should eliminate the possibility that ignorance played any part in their rhetorical response of absence and silence. In their study Kearney and Merrill (Supra. p. 830) concluded that amicus briefs clearly do matter in many contexts and this means that "...the Court is almost certainly influenced by additional information supplementing that provided by the parties to the case".

Further, they found that institutional litigants such as the Solicitor General, ACLU, the AFL-CIO, and the States enjoy above-average

success. Although the study made no mention of the success rate for universities and their associations, the deference with which the Court has treated universities in cases related to academic freedom suggests that university briefs defining a clear position in the file sharing case would receive sympathetic judicial notice.

Standler (2000, under Sec. titled Academic Abstention) has argued that “universities nearly always win in court” and has referred to a doctrine of “academic abstention” under which plaintiffs against university positions face the added barrier of judicial reluctance to intervene in the internal affairs of an educational institution (Standler, *Id.*).

Although universities were not litigants in *Grokster*, the threats to scholarly freedom of their faculty and the threats to institutional autonomy of their universities that would follow unqualified acquiescence of Supreme Court Justices to litigants’ questions created an exigence (Bitzer, p. 66) that required a rhetorical response of university presidents.

It is noteworthy that the Court’s disposition in *Grokster* followed to the letter, the argument of the brief from a university scholar who supported neither party. Hollaar, 2005, discouraged overboard interpretation of *Sony*, emphasized inducement as another category of secondary liability, and asked the Court to vacate the decision of the 9th

Circuit appellate court and remand for further proceedings based on the inducement theory.

Hollaar's conclusions and recommendation adequately addressed the chilling effect on academic and scientific research that would ensue if the fear of future liability were to limit or constrain the exercises of scholarly freedom to conduct research and search for knowledge without external imposition of preconditions.

The absence and silence of university presidents representing higher education from the defense of a cardinal pre-requisite of scholarly research is problematic. Janis has presented a matrix of different decision making pathways and the probability that a given pathway results in a "high quality" decision. All pathways start with an exigence, "a problem posed by challenging event or communication (conveying serious threat)". Assuming that the problem is not a non-routine or a relatively unimportant one, only one of Janis's pathways terminates in a high quality decision.

In this pathway, the decision maker judges correctly the importance of the challenge and expects to manage all constraints; personality deficiencies that affect responsiveness to pertinent information do not exist; and no over-riding problem solving, affiliative or egocentric constraints exist. The pathway that satisfies all of these pre conditions leads to vigilant problem solving and a low probability of avoidable errors (Janis, p. 35).

Among the 17 cognitive, affiliative, or egocentric personality deficiencies enumerated by Janis (Id.), only a few may be fairly applied to university presidents. These are a strong need for social approval, strong need for power and status, and high dependency on a cohesive group of fellow executives. Along any pathway, the presence of these and other listed deficiencies act as constraints against high quality decision making.

However, when examining the ethical and moral implications of conduct, the critic must exercise great caution and as Jones advises (p. 23), “maintain a certain level of moral modesty ...”. As such this work excludes consideration of most of the other personality deficiencies enumerated by Janis (Id.). Examples of such, from the 17 listed deficiencies are lack of conscientiousness, low self-confidence with chronic sense of low self-efficacy, negativism or hostility towards the organization and several more.

In the context of the holocaust, Jones at p. 15 notes that one who, motivated by greed, and with indifference to the harm caused to others, commits a reprehensible act, is morally blameworthy. Jones attaches concepts of motivation, intentionality, and severity of effects in a theory of moral responsibility and contrasts “retrospective responsibility” which applies to past act or omission with “role responsibility” expressed in terms of “duties of office”.

In the university setting, legitimacy and moral responsibility are implicated as in Edmundson's (p. 135), contradicting or failure to reverence firmly entrenched conventional moral views such as views of most university faculty on the basic assumptions of scholarly academic freedom. These assumptions are often affirmed in Supreme Court decisions and routinely advanced by faculty and the AAUP at least in defense of tenure, but also as a precondition for the generation and dissemination of knowledge, a widely acknowledged public good.

The exigencies of a determination in *Grokster* with a potential of chilling the free exercise of scholarly freedom established a moral responsibility on university presidents in their "role responsibility" (Jones, p. 26), to marshal a fitting response (Bitzer, p. 66), bracket another incidence of poor judgment (Janis, p. 15) and avoid judgmental blameworthiness (Jones, p. 16). The conclusion is that the absence and silence of university presidents at *Grokster* remain blameworthy.

Jones on p. 21, has established a subtle yet important distinction between the "judgment and the blame". The conclusion that the rhetorical response of absence and silence of university presidents to the exigencies at *Grokster* was blameworthy was derived without reference to intention and motives. According to Jones on p.15, "[t]he degree of blameworthiness increases with the seriousness of the wrong act and the badness of the motives". It is useful to expand the scope of factors that could aggravate or alleviate the degree of blameworthiness. These relate

to intentionality and motivation, as well as to the constraints of personal deficiencies (Janis), and constraints arising from the existence and operation of external sources of power and influence. (Foucault).

Following Janis's pathways, the presence of personal deficiencies leads to the conclusion of high probability of avoidable error. This approach is fraught with dangers of fatalism, if persons are unable to escape from the boundaries of their personal deficiencies in a Janis's pathway or are trapped within their virtues and vices under the core content of morality advanced by Jones (p. 38). No reliable methods exist for calculating values of personal deficiencies nor for measuring virtuosity and viciousness and for this reason, I propose an alternate approach in Chapter 5 that avoids the need to attempt such measurements.

The rhetorical criticism analysis supports the conclusion that absence and silence of university presidents at the Grokster Court did not constitute a fitting response to the threats that the questions of litigants posed to scholarly freedom by way of chilling prior restraint and to institutional autonomy by the likelihood of unbridled p2p file sharing expansion. The implications for role responsibility of absence and silence by university presidents, when parameters of core values of scholarly freedom and institutional autonomy were open to considerable modification by the possibilities in a binary decision of the Supreme Court at Grokster, remain problematic.

Research Question 3: What was the impact of the United States Supreme Court decision in *Grokster* on higher education?

To analyze this question fully, it is instructive to consider the acknowledged conflict between the 7th and 9th Circuit appellate disposition in *Re Aimster* and *Grokster* and how the *Grokster* Court resolved this issue. An appreciation of the inclinations of the Supreme Court in copyright cases involving peer to peer technology would aid the assessment of the impact of the *Grokster* Court decision on higher education.

Seventh and Ninth Circuit conflict

Petitioners specifically highlighted the conflict between the Seventh Circuit and the Ninth Circuit in the appellate courts' application of the landmark Supreme Court Sony "Betamax" decision (464 U.S. 417, 1984). In *Re Aimster Copyright Litigation* (334 F. 3rd 643, cert denied), the 7th appellate court upheld the lower court decision to shut down the Aimster file sharing service. Aimster provided software that users downloaded free of charge from Aimster's website and were then able to access Aimster's services. For a fee users could join "Club Aimster" also owned by the same operator and communicate directly with other users in a buddy system using the AOL Instant Messaging application to contact other users who were on line at the same time and download files of popular music whose titles had been stored on searchable folders on servers operated by Aimster. The Aimster server then instructed the

computer on which the shareable folder existed to download the file to the requesting computer.

Both the requesting computer and the sharing computer ran Aimster software which facilitated these transactions (In Re Aimster, 2003). Aimster did not store actual music files and used encryption to mask the identity of information on file titles that were available for downloading at computers running the Aimster software. Judge Posner of the 7th Circuit asserted that lack of constructive knowledge of infringing activity does not necessarily insulate a person from contributory liability but ruled that “willful blindness” self-imposed by the use of encryption to shield Aimster operators from actual knowledge of infringement by its users cannot absolve Aimster from secondary copyright liability.

The 9th Circuit appellate court had come to a similar decision in Napster where servers operated by Napster maintained and updated search indexes of titles of music files and also matched requests with information on computers that locally stored actual files of requested music titles. In both Napster and Aimster, servers owned by these companies facilitated the process of discovery of the location of downloadable music files and provided information that enabled users to directly connect to each others computers and thereafter, freely download music files.

Grokster used a different network architecture which did not involve central facilitating servers in the entire cycle of discovery and transfer of musical files. Grokster, somewhat analogously to Sony, merely supplied the enabling system. While Sony distributed a video home recorder “Betamax”, Grokster distributed a downloadable piece of software made available at their website that enabled users, independently of Grokster, to discover locations of music files which they then downloaded to their local computers.

The only apparent conflict between the 7th Circuit decision in *Aimster* and the 9th Circuit decision in *Grokster* is perhaps the trivial observation that the 7th Circuit decision shut down *Aimster* while the 9th Circuit decision failed to shut down *Grokster* by its affirmation of a lower court summary dismissal of the MGM suit to shut down *Grokster*. The failure of petition for certiorari in *Aimster* followed by success of certiorari in *Grokster* may have signaled that Justices of the Court had concerns about the wholesale validity of the 9th Circuit affirmation of the lower California court decision in favor of *Grokster*.

Wu has revealed the power and deliberate use of code in strategies to avoid copyright liability with consequent increase in the cost of enforcement (Wu, p. 711). *Grokster* and much other post-Napster systems succeeded remarkably in implementing new designs that eliminated involvement of their servers in p2p file sharing.

As affirmed by Cardozo (Supra. at p. 20), stare decisis though serving as the everyday working rule of law nevertheless leaves room for relaxation of the rule in exceptional circumstances, and if a rule continues to work injustice, it will eventually be reformulated (p. 23). The guiding principle from the Sony decision was that a distributor of a product that was merely capable of substantial noninfringing uses cannot be held liable for its subsequent use by third parties for copyright infringement. The 9th Circuit, just as the lower California court, relied absolutely on that principle of the Sony doctrine and refused to involve itself with the acknowledged shifting calculus of interests which only Congress was empowered to consider.

The loud claims of grave financial losses brought upon the music distribution industry (Starr et al., 2005), although widely disputed (Oberholzer-Gee and Strumpf, 2005b; Ben-Atar, 2005), nevertheless, gave credence to the proportionality indications in the petitioner's question and arguments before the Court. Petitioner's question drew attention to "the over 90 percent" use of respondents' systems for copyright infringement, an assertion difficult to ignore in comparison with the observation in Sony that most users copied programs that were already freely aired in their homes as a fair use "time shifting" strategy to enable them view these programs at a later time.

Also in Sony particular note was made of the fact that the corporation merely distributed its product and had no further role in

what users did with these machines. The 7th Circuit noted that Aimster was not only involved in transactions that facilitated infringement but actually encouraged them.

The conclusion is that there was no fundamental conflict between the interpretations of Sony by the Aimster and Grokster appellate courts. Both used portions of ideas and principles in the Sony decision that mirrored their peculiar circumstances and sought to ignore or minimize the relevance of portions that were more remote from factualities of their positions.

Resolution of 7th and 9th appellate court decisions

As argued here, there was no fundamental conflict in the reading of Sony by the 7th and 9th Circuits. Whereas the Ninth Circuit based its decision in Grokster on the single cardinal principle that the supplier of a product that is capable of substantial noninfringing uses should be immune from secondary liability charges, the Seventh Circuit based its decision in Aimster on a number of practical details which though supportive of the disposition of Sony were not explicitly integrated by the Sony Court as conditions necessary or required to establish the validity of the Sony cardinal pronouncement on unshakable grounds. Petitioners in their brief at certiorari pointed out several of these details.

Petitioners stated that Aimster forced courts to apply a proportionality test as well as a cost and benefit analysis to accommodate copyright holders' interest in preventing infringement while

protecting the public use of products for noninfringing uses (MGM v. Grokster, 2004, Sect. II, p. 24). They revealed that for the Ninth Circuit, only the possible existence of noninfringing uses needed to be asserted (Id. p. 25). Petitioner's brief pointed out that the Aimster Court required the provider of the service to show that re-design to eliminate and reduce infringing uses would be "disproportionately" costly (334 F. 3d at 653) while the Ninth circuit found it irrelevant to consider possible design alternatives.

A significant argument of petitioners was that the Court had established long standing principles of secondary liability that have been recognized in virtually all areas of law including copyright. (Grokster, 2004, p. 2). These principles pre-dated Sony and applied equally to post Sony situations. Petitioners asserted that these principles had been affirmed in Sony and that the Ninth Circuit had erroneously interpreted Sony as imposing limitations and higher standards for contributory infringement that were foreign to these established principles. As declared by Bainwol and Glickman, (2006), in a unanimous ruling, the Supreme Court "cut to the heart of the matter".

From the Supreme Court perspective, the question was under what circumstances the distributor of a product capable of both lawful and unlawful use "is liable for acts of copyright infringement by third parties using the product". The Court held that distribution of 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 (545 U.S. 913, 2005, p. 1).

Intentional inducement or encouragement, in no way foreign to decisions on copyright liability as indicated in *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162, 1971, had been a long standing principle prior to Sony. The Court stated that nothing in Sony required courts to ignore evidence of intent and that Sony was never meant to foreclose rules of “fault-based liability derived from the common law“. It is also the case that nothing in Sony required courts to consider such evidence.

For higher education institutions, the Supreme Court decision in *Grokster* has produced two categories of impacts. Firstly, the expected liquidation and discontinuance of affected file sharing services such as *Grokster*, *Stream Cast* and several others can be expected to remarkably reduce the pressure that p2p activity placed on university networks.

Universities started to notice excess load on their networks in the early months of 2000 (McCollum, 2000) with the operation of *Napster*. As *Napster* was moving through phases of litigation other companies had already developed systems which were poised to exploit the certain emergence of legal loopholes (Wu, p. 726). These new designs essentially eliminated the use of any centralized servers in the discovery and

transfer process through which users identified and downloaded desired music files (Id. 734).

Design compromises encouraged the design of hierarchical systems consisting of powerful computers that served as supernodes while other less powerful computers remained as regular machines, able to search the supernodes which organized and administered collections of titles of desired music files. According to Wu, Id. at p. 734, machines located on university campuses, on account of their superior processing capabilities, became prime candidates for supernodes in the hierarchical designs which succeeded Napster. This status aggravated the congestion of campus networks.

The p2p file sharing crisis forced universities to find solutions that ranged from dialog and communication within the university sphere to more deliberate responses such as termination of access, in some cases, without respect to the usual procedures that characterize dialog in the semi public sphere of higher education institutions. By 2005 when the Supreme Court decision re emphasized common law secondary liability parameters that would moderate the development and expansion of p2p file sharing applications, most colleges had in one way or another either contained the problem or at least substantially reduced its impact.

The Supreme Court decision in Grokster assured universities that the worst days of p2p file sharing were over. By clarifying the basis for secondary liability beyond the mere capability of substantial

noninfringing uses, the Court's decision has increased the burden on p2p developers who seek immunity.

The second category of impacts draws attention to behavior which may result in secondary liability. It is doubtful that universities and colleges would chose to engage in conduct that qualifies as vicarious or contributory liability. The Supreme Court decision highlighted other circumstances under which third party users of a product would attach secondary liability to the distributor of the product. For clarity, the conditions for vicarious and contributory liability are restated.

Vicarious liability involves the distributor of a product over which the distributor has the right and ability to supervise but fails to exercise that right and derives financial benefits as a result of the infringement. This is the classic dance hall case exemplified in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). The classic contrast is the land lord tenant case (*Fonovisa v. Cherry Auction*, 76 F. 3d 259, 1996), in which having rented out premises, the landlord thereafter retains no right to control infringement that the tenant commits in the premises and consequently escapes vicarious liability.

Contributory infringement applies when one with knowledge of the infringing activity materially contributes to the act of infringement as has been demonstrated in *Gershwin v. Columbia*, 443 F.2d 1159 (2d Cir. 1971). Contributory, and vicarious liability are only two of many possible circumstances in which a party can be held liable for the activities of

another party. The Supreme Court clarified in its decision in *Grokster* that:

one who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. (545 U. S. 913, 2005).

This condition formally adds another path to secondary liability theories. The existence of other possible paths should encourage universities who provide high speed access to their students, faculty and staff on college networks, to consider how close their operations may be to implicating them in secondary liability. Can a college enticement of students with promises of high speed Internet connections (Mangan, 2002) be seen as “clear expression to foster infringement”.

Many colleges and universities have developed additional policy statements to supplement their copyright and computer use policies. Others have used a variety of strategies to control p2p file sharing activities (Hennessey and Spanier, 2004). If as surmised by Bainwol and Glickman, *supra.*, and theorized by Wu (*Id.* p. 734), new systems emerge to confound old protective measures, what further measures would be expected from universities to avoid threats of distractive lawsuits.

Ultimately, as suggested by Crews (1993, p. 122) in copyright and Hennessey and Spanier (2004) in p2p file sharing, institutions will

individually need to develop policies that are consistent with their academic, ethical and strategic orientations.

Research Question 4: Have new issues been generated?

The decision of the Supreme Court in *Grokster* merely clarified the error in the wholesale application of the single cardinal statement in *Sony* to the complete exclusion of circumstances in that case from which that statement crystallized. The notion that the distributor of a product capable of both infringing and non infringing uses is immune from secondary liability provided that the product is capable of substantial non infringing uses would empower the technology connected segment of society to permanently avoid copyright rents (Wu p. 745).

Although, as Wu has pointed out, the constitutional intention of promoting public availability of works of art would not be frustrated if that were the case (*Id.* 747), the economic burden of encouraging art production through payment for copyrighted products would be shifted to, and borne by the less technologically connected in the society. Such a threat to ethical economy in the public sphere of consumers of music would become a permanent economic externality as well as a contradiction in democratic society.

Many universities have introduced novel practices in attempts to attract students (Kiernan, 2004; Mangan, 2002). Based on the principles in the *Grokster* Supreme Court decision, a fine line separates the promise of large bandwidths to increase the quality and number of

students from inducement if these students use these large bandwidths for copyright infringement. The recommendation that a university must approach the file sharing phenomenon from a holistic evaluation of its mission and its ethical orientations (Hennessey and Spanier, 2004; Mitrano, 2004) challenges universities to revisit their copyright and computer use policies.

With regard to university administration, the concerns attending leadership of higher education institutions have been highlighted through a critical analysis of their performance in *Grokster*. Particularly revealing is the performance of absence and silence in the rhetorical situation at the Supreme Court. Concerns about higher education leadership, relevance of universities in contemporary society and intermingling of academic freedom and tenure have been brought to light from several sources (Readings, 1996; Sykes, 1988; Buckley, 1986). Rather than uncovering or generating any new issues, this study has expanded the scope of significance of situations that along with others, increase the probability that these concerns will not simply fade away.

Summary

In this chapter, rhetorical analysis of the *Grokster* Court has been conducted through situational analysis in accordance with Farrell and Young's scheme (2004). Also, the four research questions have been answered based on the results of the application of legal research and situational criticism to the rhetorical situation in *Grokster*. Review of

litigation documents leads to the conclusion that Grokster, in the context of the p2p file sharing phenomenon, posed substantial threats to university networks and overburdened networks in ways that would impact academic, research and administrative functions of major universities.

University presidents reacted in various ways to contain the disruptive possibilities of p2p file sharing activity on their networks; however they submitted no briefs at the Supreme Court in the Grokster litigation.

Answers to the research questions, based on analysis of Court documents, indicated that Grokster posed a threat to scholarly freedom and institutional autonomy and that the symbolic action of absence and silence of university presidents at the Supreme Court analyzed through the framework of situational criticism demonstrated a failure to provide a fitting response to the exigencies that litigants' questions and possible reaction of Justices posed to scholarly freedom and institutional autonomy.

The implications of the Supreme Court decision in the Grokster litigation for universities were analyzed for the effect of the decision on policies that regulate p2p file sharing on university networks as well as the effect on university recruitment strategies. For the question regarding generation of new issues, it was found that Grokster added to

concerns of existing issues of university leadership in its internal and external dimensions.

CHAPTER V

SUMMARY, CONCLUSIONS & RECOMMENDATIONS

Summary and Conclusions

The rhetorical situation at the Supreme Court in *Grokster* was the culmination of several years of litigation and lower court decisions on file sharing activity that was supported by technology whose rapid evolution related to strategies that developers and providers of file sharing software and services used to avoid adverse legal determinations against them. Wu (2003, p .683) has asserted that p2p file sharing represented the most ambitious effort to undermine an existing legal system using computer code. University networks were drafted into central roles in the implementation of that effort.

Initial difficulties in pure p2p systems had been overcome in the KaZaA FastTrack engine by the introduction of a hierarchical design in which computers running the *Grokster* and *SteamCast* software became supernodes based on detected bandwidth. Wu (*Id.* p. 734) explained that students on university networks topped the list of computer users with the highest available bandwidth. Consequently, college campus computers became prominent candidates to become supernodes in the p2p hierarchy, generating file sharing activity at levels that choked college networks (McCullum, 2000), challenged college administrators

(Carlson, 2000), and brought colleges into the file sharing limelight (Mitrano, 2004, para. 2).

Immediate Threats

For university leaders, file sharing created an immediate and urgent threat. Without resolution, college networks at certain universities could not meet the day to day administrative and mission critical functions of teaching and research. Foster indicated in (Foster 2000, para. 8) that student use of Napster had been so extensive that networks at many institutions had been unable to handle the load, a scenario which became even more aggravated with the emergence of more powerful file sharing systems that facilitated swapping of hefty video files (Carlson, 2001).

Another category of immediate and urgent threats that confronted college leaders was in the legal arena as copyright owners and their organizations bombarded universities with legal notices and filed lawsuits that named college students and the colleges themselves as defendants (Carlson, 2000; Carlson, 2001). University leaders recognized and reacted to the threat of lawsuits through their legal staff (Nordin, 2000; Abrams, 2000).

Many college leaders generally recognized the problems and issues that p2p file sharing raised for their institutions; took various actions regarding legal notices, lawsuits and campus network congestion caused by file sharing activity and also reacted to threats to institutional

autonomy by rebuffing external demands to shutdown student network access (Abrams, Id, para. 1; Nordin, Id., para. 2), grant access to outside interests to monitor internal networks (Young, supra. para. 7), and install specific software on college networks (Read, 2004). Some reacted to the influence of external power through prompt compliance with intrusive demands to terminate student access (Carlson, 2001, para. 9) and, as Mitrano (2004) pointed out, disclose student identities in subpoenas not backed by a lawsuit as required by the D.C. Circuit Court of Appeals in *Verizon v. RIAA* or by forming collaborative alliances which mostly served the interests of media organizations (Joint Committee of the Higher Education and Entertainment Communities, 2002; Hennessey and Spanier, 2004).

Beyond the proximate threats of network congestion, legal notices and lawsuits, college presidents either remained unaware of, or else decided to ignore completely, fundamental issues that had far reaching implications for their institutions and all of higher education at the Supreme Court phase of *Grokster*. For four years, since *Napster*, universities had remained hot beds of file sharing activity on account of the large bandwidths that they have established in pursuit of their academic mission of teaching and research. Although many had successfully contained the immediate strain on their technology and administrative resources, the Supreme Court had been poised to rule on

issues that could potentially impact secondary liability for researchers, inventors, developers of technology protocols, and operators of networks.

Petitioners asked the Supreme Court to reverse the Ninth Circuit decision anchored on the Sony doctrine that a developer of a product that is even merely capable of substantial noninfringing uses cannot be held liable for copyright infringement based on theories of secondary liability. Over 200 institutions of higher education participated in the Internet2 consortium which had developed the Abilene network with enormous operational bandwidth that facilitate more extensive file sharing possibilities than other networks available through the Internet.

There were already several indications that the decision of the Court in *Grokster* could result in a new era of secondary liability for institutions of higher education. Young (2004, para. 8) reported that influential congressional sources apparently allied to petitioners interests had suggested that Internet2 had been “unwilling to prevent piracy on its networks” and followed with an unusual proposal that Internet2 grant access to individuals and organizations outside its membership for the express purpose of not only monitoring, but also of “enforcing” their intellectual property rights.

Mangan (2002, para. 2) quoted Zuck, president of the Association of Competitive Technology, in a forum sponsored by U.S. Representative Lamar Smith, that universities that lure students with promises of increasing bandwidth were not only vulnerable to increasing liability but

also ran the risk of compromising their legitimate education purposes. Other contributors warned that universities should be careful not to stifle the legitimate uses of peer to peer networks through overzealous restrictions (Id. para. 8). In letters urging large universities to block access to Napster, King (2000) warned colleges to take appropriate steps to avoid becoming willing participant in, and enablers of p2p copyright theft. Many of the colleges addressed took exception to the appropriateness of measures prescribed by copyright owners represented by King, one of such being a prompt ban on the entire university community on the use of Napster (McCollum, 2000). Several of the targeted colleges responded with affirmation of their commitment to academic freedom and intent to provide uncensored online services and access to its faculty, students, and staff (Abrams, *supra.*; Nordin, *supra.*).

Colleges had taken widely different approaches in containing or mitigating the impact of p2p file sharing activities on campus networks (Hennessey and Spanier, 2004; Kiernan, 2004). The Supreme Court decision in *Grokster* was poised to establish criteria on limits and extent of responsibilities that system operators would exercise to escape secondary copyright liability.

Respondents requested the absolute Sony standard that a system, product or service be judged solely on its capability for substantial noninfringing uses as determined in 1984 by the Sony Court (Sony,

1984, sect. III) and countenanced by the Ninth Circuit (Grokster, 2003, sect. III, A-2) over fifteen years later. Petitioners wanted substantial abandonment of the Sony standard through references to proportionality and behavioral factors (Grokster, 2004, Petition for certiorari).

Universities had a constructive interest in the decision that the Supreme Court would ultimately fashion from which they could be confident in extracting guidance as to the criteria of vigilance that they would need to exercise to simultaneously escape secondary copyright infringement liability and remain faithful to the pursuit of their academic mission. The Supreme Court phase of Grokster presented critical exigencies for all current and future inventors, researchers and operators among whom universities could not be more centrally positioned.

Exigence

As one of three components of “The Rhetorical Situation”, exigence embodies a number of important concepts discussed here in relation to the situation at the Supreme Court in Grokster. Drawing from Carroll (2002, p. 33), among numerous exigences that may be present, one controlling exigence will function as one which demands a rhetorical response capable of modifying or transforming characteristics of the exigence.

At the Court in Grokster, two exigencies existed for universities. First was the possibility of substantial modification of the Sony standard which had served as a shield that protected researchers and developers

of products and systems from a priori secondary liability provided that the products of these researches, as designed under the uncensored criteria of the researcher, were judged capable of substantial noninfringing uses even when there is constructive knowledge of their use for copyright infringement. Such an action, for which there could be no further appeal, would adversely impact scholarly academic freedom that operates in university research activities by burdening the researcher with the monumental task of anticipating possible forms of infringing uses and modifying design criteria to avoid liability (Grokster, 2002, Brief for Creative Commons, sect. II).

Drawing from Bitzer's model, Carroll (*supra.* p. 33) suggests that critics may judge responses to be excellent or poor, ethical or unethical, fitting and unfitting by matching the needs of the situation, the understanding of the situation by the rhetor and the expectations of the audience. To properly locate the discourse, the critic needs to consider the entire rhetorical situation, including audience, constraints and history. White (1992, p. 25) has stated that any communication should be understood and explored as "historical configuration".

Constraints of the rhetorical situation are factors which have the power to contain responsive action needed to modify or transform the exigence. Carroll lists beliefs, attitudes, or tradition as constraints on rhetorical silences. Discussing silences, in relation to Heidegger's complicity with the Nazi government, Carroll (p. 42) argues that

collaborative silences [in the Heidegger case] establish the guilt of the silent individual. Although silences, categorized under “resistant silence”, function as agency against power, collaborative silences generally imply a desire for alignment with institutions of power for personal gain or for self-preservation. Carroll concludes that collaborative silences often establish the guilt of the silent individual for failure to speak out against the oppression of the power institution.

Although the rhetorical situation at the Supreme Court in *Grokster* is in no way comparable to circumstances that existed in Nazi Germany (Lang, 1996; Jones, 1999), nevertheless, it is conceivable that the influence of institutions of power, as was being exhibited through the demands of petitioners, could place difficult constraints on presidents who might have contemplated a response that urged the Court to give due consideration to the burdensome effects that its opinion could impose on scholarly academic freedom and on institutional autonomy relevant to university research activity. This would bolster Foucault’s observation that the relationship between desire, power and interest are complex (Foucault, 1972, p. 207) and that the intellectual’s role has become the struggle against the forms of power that transform him [or her] into its object and instrument in the sphere of knowledge, truth, consciousness and discourse (Foucault, Id. p. 208).

By its very nature silence and absence can be ambiguous. This ambiguity requires the critic to exercise extremely caution in drawing

conclusions about the meanings of these forms of rhetorical responses to exigencies in a given rhetorical situation. Carroll (p. 50) suggests that Lang's method offers a more complete model for studying collaborative silences and in determining if a response of silence and absence has been calculated and deliberate or merely an indication of indifference or ignorance.

Lang (1996, p. 15) has dramatized the ambiguity of silence; the silence of horror can mimic the silence of consent; the silence of conspiracy or of pleasure may be as wordless as the silence of suffering. Further inquiry can serve to distinguish motivations for silence and absence. Not being a legally named party in the case, the silence and absence of university leaders in the final stages of Grokster may appear inconsequential to the casual observer. The point remains though that universities and scholars had noted the threat to academic freedom during the early stages of the p2p file sharing crisis. Foster (2001) has reported that diverse groups of law professors, computer scientists, and library groups had filed documents arguing that the ruling of a D.C. Appellate Court judge to block publication of a decryption software code violated the First Amendment and stifled scientific research.

Felten, a professor in the research team that unscrambled encryption codes of digital music emphasized the collaborative nature of science as lawyers for the universities involved in the research decided to delay publication out of concern that, following the anticipated ruling of

the appellate judge, their institution might be in violation of the digital copying act. Foster (2002) reported that Felten eventually presented his research findings at a computer security conference after industry officials backed down from their threats to prosecute, one of the strategies that Wu enumerated in an economic model that copyright interests employed to “reduce threat to their copyright rents.” (Wu, 2003, p 705). Such events had already begun to reveal ways in which unconstrained regulation could hamper research activity and scholarly academic freedom.

Responses by university lawyers of targeted institutions to demands by powerful interests in the entertainment industry clearly emphasized the commitment of the institution to academic freedom and provision of uncensored access to the Internet (Abrams, 2000; Nordin, 2000). It is fair to conclude therefore and in spite of the pronouncements of the American Council of Education, reported by Kiernan (2002) that only a fragment of university presidents have any knowledge about the [file sharing] issue, that indeed universities targeted by media industry campaigns were aware of the impact of file sharing on academic freedom and institutional autonomy.

By 2004 when plaintiffs in Grokster filed for certiorari and escalated the case to the Supreme Court most of the universities embroiled in the p2p crisis had already contained the impact of file sharing on their networks and substantially contained the threat to

scholarly research and teaching caused by network congestion (Hennessey and Spanier, 2004). In the height of p2p file sharing activity, media industry executives had succeeded in the rhetorical subjectification of targeted universities with such suggestive and implicative insinuations as “unwillingness to prevent piracy on its networks ...” (Young, 2004); luring students with promises of increasing bandwidth (Mangan, 2002); misappropriation of university-provided facility for nonacademic use (Kiernan, 2002); knowing facilitation of massive copyright infringements as willing participants in and enabler of intellectual property theft (King, 2000; Carlson, 2000). Thus media executives had already begun the relentless campaign to bracket targeted universities and their presidents into subjectified positions as accomplices in unethical and illegal practices of copyright infringement.

Given all of the p2p related experiences of universities and their astute awareness, demonstrated in contemporary history, in aggressive fights to preserve institutional autonomy through actions at the Supreme Court (*Grutter v. Bollinger*, 2003; *Regents of the Univ. of California v. Bakke*, 1978), it becomes problematic that universities responded with absence and silence at the Supreme Court in *Grokster* where scholarly freedom of researchers faced serious potential threat from the chilling effect that departure from the strict Sony doctrine would impose on innovation in products with legitimate uses. (Lessig, 2005, sect. III, p. 18; Page, Baker, Neco, Taranto and Cohn, 2005, sect. I C, p. 24).

Applying the broad binary classification of silence provided by Carroll (p. 38), resistive and collaborative, there is no evidence that silence and absence of university presidents at the Supreme Court in *Grokster* can be classed among resistive silences generally associated with tactics of the weak against power (De Certeau xix; Carroll, *supra.* at p. 40). On the contrary, the urge to class that response among “collaborative silences” is pressing. Carroll explains collaborative silences as acts of alignment with power.

Although there is ample evidence that several university presidents actively collaborated with petitioners through joint committees (Hennessey and Spanier, 2004) and to a large extent shared and echoed the discourses of the powerful media executives with whom they aligned, care must be exercised in the consideration of Carroll’s totalizing inference of the operation of motives of personal gain, self-preservation and guilt (*Supra.* p. 47).

Although these same media executives had earlier threatened targeted universities with lawsuits and actively pursued their students with formal legal action, the possibility exists that university leaders, confident of their intentions not to operate any services along the lines of services operated by *Grokster* and other file sharing services that threatened to shut down their networks, would be silently supportive of a Supreme Court determination against *Grokster*.

If the Court accepted petitioners request to rule that Grokster and similar file sharing services not be immunized from copyright infringement that occur on their services, the result most certainly would be the shutdown of Grokster, a final deterrent to the emergence of substitutes, and a welcome relief for university network administration. A response in support of Grokster would not only anger the media industry who had managed to interpellate university presidents into collaborative roles, but also would be quite contrary to the self interest of universities in their effort to preserve their network bandwidth for legitimate academic and administrative functions. However, other possible responses were available to university leaders.

While petitioners asked the Supreme Court to reverse the 9th Circuit interpretation of Sony, the possibility existed also that the Court could affirm the appellate court decision. Such an outcome would compound the threat to college operated networks and substantially frustrate Internet supported research activity throughout university campuses. Colleges would remain embroiled in an endless struggle against threats from increasingly more sophisticated and elusive p2p systems. It is reasonable to assume that university leaders were capable of fashioning a fitting rhetorical response to contain the adverse consequences of at least two possible outcomes in a Supreme Court determination in Grokster, both particularly detrimental to the operation of scholarly academic freedom.

Universities have demonstrated this skill and insistence at the Supreme Court on matters that they judged to be critical to the preservation of their institutional autonomy. Their ambivalence at protecting scholarly freedom, a privilege that generally accrue to university faculty, has been a regular source of concern within the academe of universities that expect ethical behavior from their presidents. It is possible that such positional contradictions aggravate issues of leadership that plague the ability of leaders of higher education institutions to respond to the challenges of contemporary society.

Other issues of substantial significance albeit with less prominence in the judicial arena are issues of leadership in the internal and external relationships involved in the management of academic, administrative and financial resources in all of which technology maintains an indispensable role. Zusman (1999) has surmised on p. 141 that although higher education will need greater leadership in the periods that lie ahead, the exercise of effective leadership may become more difficult especially at public universities. Regarding technology, Gumpert and Chun (1999) have concluded that technology will have far-reaching impact on higher education. Awareness by university presidents of issues generated by applications of technology is therefore a valid concern.

In *Grokster* one or more of the following three scenarios are interesting; first, the possibility that university presidents were not aware that any threat existed at the Supreme Court phase of the *Grokster*

litigation; second, university presidents were aware but judged such threat to be unimportant beyond immediate issues in their administration; third, university presidents were aware but chose to avoid confrontation with powerful external interests.

Not aware that any threat existed

The rhetorical situation in which presidents functioned during Napster and until Grokster was complex. Their institutions faced serious threats from network congestion (McCollum, 2000a; Carlson, 2001a; Carlson, 2001b), external and powerful interests flooded them with aggressive and intrusive demands (Carlson, 2000a; Young, 2004) in effect penetrating the armor of protective institutional autonomy that the Court through numerous decisions had cloaked them with (Standler, 2000; Urofsky, 2000; Grutter, 2003). Network congestion restricted bandwidth available for research and for the daily practice of scholarly freedom.

Without urgent action, the core mission of the institution within society, teaching and research could have been seriously impaired and administrative functions paralyzed. Various constituencies within the university public had different priorities. Students in dorms were allegedly engaged in activity which devoured huge proportions of bandwidth (Kiernan, 2004; Carlson, 2000; Carlson, 2001b). Major challenges of leadership confronted the decision making faculties of the president in the immediacy of the file sharing crisis.

Threats to the integrity of institutional autonomy could easily be accommodated even by presidents who the American Council on Education claimed lacked knowledge about the [file sharing] issue (Kiernan, 2000). The importance of the Supreme Court consideration of Grokster and the significance for academic freedom and creativity posed by petitioners' question before the Court may easily elude some presidents whose institutions, after all, were not parties in the Grokster litigation.

It is unlikely that a president in the class of institutions defined in this dissertation was not aware that p2p file sharing posed any threat. Presidential awareness had clearly been demonstrated by exhibition of concern (Carlson, 2000a), weighing alternative responses (Foster, 2000; Carlson, 2001c), collaborating with entertainment industry executives (Hennessy and Spanier, 2004) or handing legal notices to internal or retained legal specialists (Kiernan, 2000).

Aware but judged unimportant beyond immediate issues

As in the first scenario, university presidents demonstrated awareness of the immediate challenges that file sharing posed and responded to these in various ways (Hennessy and Spanier 2004; Kiernan, 2004). They judged as important, the internal threats to campus networks (McCollum, 2000; Carlson, 2000a) and threats of lawsuits if they failed to comply with demands of powerful entertainment industry organizations (Carlson, 2000b; Mangan, 2002).

Some universities demonstrated awareness of threats to institutional autonomy and resisted such intrusions on various grounds. Congressional committee member's suggestion to grant access to individuals and organizations outside the Internet2 consortium to police their intellectual property rights (Young, 2004) was rebuffed on behalf of university dominated membership as Young quoted Greg Wood, spokesman for Internet2 "... it was up to Internet2's members to determine whether Abilene's rules were being followed on issues such as file sharing."

Even before the Supreme Court phase of Grokster, individual scholars recognized and resisted threats to scholarly academic freedom. Foster (2001), reported briefs filed by law professors Yochai and Lessig arguing against anticircumvention provisions of the digital-copyright act on the basis of the preservation of fair use (para. 12) after a lower court judge decided to stop the publication of software code that decrypts digital data. Foster (2000) reported the rejection by 14 universities of requests by Metallica and rap artist Dr. Dre to block students' access to Napster. These responses demonstrate an astute awareness that such requests were inconsistent with university educational and research mission (Nordin, 2000), inconsistent with the university's commitment to academic freedom and to the provision of uncensored online services and access (Abrams, 2000).

In this scenario, a president was not only aware of internal threats to university networks (Carlson, 2001b) but took action of some sort to reduce or eliminate the adverse impact on bandwidth needed to fulfill the mission of the university in teaching, research and public service (McCollum, 2000; Kiernan, 2004). Many presidents recognized external threats to institutional autonomy posed by demands from powerful entertainment organizations and artists that they represented and sometimes rebuffed these intrusive advances on both legal and ideological grounds (Nordin, 2000; Abrams, 2000; Mitrano, 2004). Others sometimes sought refuge in legal technicalities and totalizing rhetoric on ethics (Carlson, 2001c; Hennessey and Spanier, 2004). Some exhibited uneasiness and a semblance of apprehension at being dragged into lawsuits over acts that lawyers representing copyright owners labeled as theft (King, 2000).

Having contained threats of direct lawsuits, a president in this scenario may not be excited by what appeared to be a remote contest between powerful entertainment industry corporations and associations as petitioners and as respondents, developers of the file sharing systems that precipitated major network and ethical crises on their campuses. Aware but chose to avoid confrontation

In this scenario a president may have been aware of internal threats to network availability as well as encroachment into the protected territory of institutional governance by external power. Faced with a

possible confrontation with the same forces of external power at the Supreme Court in a case in which their institution had not been named as a party, they simply decided not to get involved at the Court.

Recommendations

Further Research Directions

In the analysis of moral responsibility conducted in this work, the class of university presidents has been considered as a whole. Although application of a theory of ethical economy would forestall actual blame even when a finding of blameworthiness was arrived at, the class grouping is hardly fair especially when personal constraints are likely to assume important roles in determining how persons are driven to responses. Although De Certeau (1984, p. xi) describes each individual as the locus of interaction of the plurality of socially determined relationships in an apparent concern over “the historical axiom of social analysis [which] posits an elementary unit – the individual – on the basis of which groups are supposed to be formed ...”, eidetic theory allows these interactions to be processed in the internal network of human cranial structures (Arduini, 1992) and ultimately the individual may shoulder a substantial portion of responsibility for their decisions although a group is often named as author of integrated personal decisions of its membership.

In this regard, there exists definite value in following up with further research on the underlining motivations and attitudes of selected

presidents on a broad range of issues including views on scholarly academic freedom in circumstances such as obtained at various phases of Grokster up to the rhetorical absence and silence that all university and college presidents performed at the Supreme Court.

Another research direction may focus on the evolution of p2p policies at colleges and universities similar to the work done by Crews (1993) in regards to copyright policies at higher education institutions. Crews had concluded then that universities tended to be overly conservative in their copyright policies. The vast majority of institutions gravitated towards Copying Guidelines developed by and large by powerful copyright interests and distanced their organizations from the American Library Association (ALA) guidelines based on a more liberal view of copyright statutes. Crews has recommended (*Id.*, p. 122) that university leaders must be attuned to the operation of environmental pressures and consciously determine the extent that they will allow these forces to shape institutional policy and decision making. It may be noted that in this critical aspect of the academic affairs of higher education, scholars in their individual capacities, notably John Stedman and Stuart Gullickson challenged the overly restrictive Copying Guidelines and developed alternate requirements which later became the basis for the ALA model (*Id.*, p. 48).

During the p2p crisis, institutions adopted a wide variety of approaches as the file sharing phenomenon developed from Napster

(2000) to Grokster (2005). Various avenues of investigation in the social sciences and law would go a long way to illuminate the interplay of organizational politics and external power in directing the revision of computer use policies for institutional networks.

Another area of further studies arises from the voiced concerns over presidential leadership and dialog on alternative models of presidential leadership. According to Birnbaum (p. 342), calls for strengthening university and college presidency abound. Of the several models that have been discussed, no serious dialog has been floated in the public sphere of the possibilities of searching for presidential leadership from among the ranks of academic faculty for whom the defense of scholarly academic freedom has been an unfailing passion.

Due to major structural differences between the system of presidential administration and the faculty senate system and their relative susceptibilities to various power vectors, there might be hope that a serious dialog will reveal the personal and professional characteristics capable of balancing the demands of powerful constituencies and the transparent commitment to academic freedom if such freedom is judged to be an essential condition that seals the societal contract for institutions of higher education as producers and disseminators of knowledge.

What passes for personal deficiencies under Janis may be expanded to no avail. If the problem of university leadership is indeed a

structural one, any individuals, as soon as they are thrust into positions of institutional leadership and regardless of all attempts to eliminate these “personal deficiencies” become trapped in a configuration of forms of power, desire and the effects of differands of ethical economy operating in all the spheres in which university constituents participate. Any hope for fundamental restructuring of contemporary configurations in higher education leadership will find its dynamics through public dialog on all possible options.

Another area of further work is in the development of a theory of spherical ethical economy. In this work, the only requirement for ethical economy in any sphere is the assumption of efficient communication within the sphere. This means that participants within the sphere have no unusual restrictions on adding information to or extracting information, as they desire, from the streams that come into existence within the sphere. Theories of the private, public and cosmopolitan or global spheres have been extensively developed. There is only scant work on the private personal sphere as a sphere of communicating components operating with the same assumptions of ethical economy as has been applied to all other spheres. Postulating this private personal sphere in a unified theory of spheres has made the separation of moral responsibility and blameworthiness, from actual blame and moral sanctions less problematic.

The impulse to link moral blameworthiness to the necessity of some form of sanction as suggested by Edmundson (p. 128) and the burden of care that Jones (p. 22) demands from those who judge the morally questionable actions of others become irrelevant under a theory of ethical economy. As an example, finding that the absence and silence of university presidents in Grokster has indicated an indifference to the fundamental value of academic freedom in the public sphere and in the semi private university sphere does not foreclose the usefulness of further inquiry in the personal private spheres of the presidential authors of silence and performers of absence. Such an inquiry has assumed that principles of ethical economy operate with equal validity in any and in all spheres.

Alternate Conceptualization of Discursive Spheres

According to Kuypers (2004 at p. 5), "... at the start of the twenty-first century the study of rhetoric has expanded greatly, as have its definitions." Kuypers has offered the following definition: "The strategic use of communication, oral or written, to achieve specifiable goals." Foss has written "Rhetoric means the use of symbols to influence thought and action. ... Rhetoric is communication; it is simply an old term for what is now called communication..." Also "Rhetoric is not limited to written or spoken discourse... [Any] message, regardless of the form it takes or the channel of communication it uses, is rhetoric."

All concepts and definitions of rhetoric assume that rhetoric applies when one entity is able to influence a different entity through discourse. I propose a further expansion of rhetoric to include the more general case in which an entity is also able to influence itself through discourse and through any category of symbolic action. Although such influence may at first appear local, I now demonstrate that the repercussions can be global. After all, “to be, or not to be, that is the question.”

First, the well known case of the symbolic movement and action of university students at the height of opposition to the Vietnam War during which President Johnson announced that he would not seek re-election; it is difficult to imagine that the embattled president did not have quiet moments of reflection with or without aids, family and associates in which his thought processes persuaded him to relinquish a second term presidential quest, a rare occurrence in American politics.

Another well known case was the pardon of President Nixon by President Ford. Interviews granted long after President Ford left office disclosed that the first appointed American president had moments of contemplation in which he weighed the turmoil that would face the nation through a criminal trial of a former American president and persuaded himself that an unconditional pardon was the preferred alternative.

Well known narratives in the Christian religion remind the faithful of the creation of the world through soliloquy of a single and omnipotent deity; soliloquies of Jesus Christ at Gethsemane and at other solemn locations abound in Christian texts, many of which have persuaded and continue to persuade hoards of believers into passionate action. To these well known narratives may be appended an endless list of cases and categories of personal reflections, soliloquies and other categories of symbolic thought capable of immense personal, private and public impact.

Categorization of Spheres

Categories of human spheres of discourse may commence with a phenomenological unit such as an individual who can consciously communicate with and influence themselves and thus establish the category of the private personal sphere. I foresee no conflict with psychoanalytical study of this sphere at other levels of investigation. Individuals may also communicate with one or more individuals through socially sanctioned protocols and create private categories such as families. Goodnight has discussed conversation in the “personal sphere” in which “discussions sometimes has repercussions beyond the relationship (Goodnight, 1987 at p. 428)” Goodnight’s personal sphere falls under private categories. Such private categories are not pre-occupied with the enlargement of discursive space in Fraser’s public

sphere as are Fraser's "subaltern counterpublics (Fraser, 1992 at p. 123)."

Before returning to refine categories of private and public spheres, it is now useful to start from the global perspective and declare global categories which transcend national boundaries and promote common agendas and ideologies such as global warming, human rights and world peace. Using "cosmopolitan public" apparently in the global parlance, Bowman and Lutz-Bachmann have stated that "the cosmopolitan public is the broadest possible audience (Bowman & Lutz-Bachmann, 1997 at p. 183)."

The public sphere is perhaps the most widely analyzed category. Although boundaries and membership are extensible, the public sphere proposed in this work, is nominally a national space coincident with political boundaries with membership that minimally include nationals and residents of the political unit regardless of their physical domicile. There is no requirement that participants or members of the public sphere or any other sphere enjoy equality of status. On the contrary, inequalities in participant social and economic properties or in their political or ideological interests encourage the emergence of Fraser's counterpublics and result in "a widening of discursive contestation" (Supra. at p. 124). Fraser's alternate publics include "counterpublics" whose emergence become necessary because of hegemonic discursive distortions usually ascribed to dominant ideology.

For want of a more illuminating nomenclature, I have suggested the semi-public sphere which would include all of Fraser's counterpublics, weak publics "... whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making "and strong publics "in the form of self-managing institutions ... which could be arenas both of opinion formation and decision making (Fraser 1992 at p. 134)."

I designate the category of private spheres to be spheres with theoretically no interest in public sphere ideological contestations. Inclusion of groups in this category may be rhetorically challenged and defended. Examples of groups in this category are open clubs such as boy scouts, as well as exclusive clubs such as country clubs with forceful declarations of their ideological neutrality.

To summarize, the categories that will be applied in this work are the individual personal private, the private, the semi public, the national public and the global or cosmopolitan public spheres. Each and every sphere depends on communication to sustain its existence and promote its objectives. Ideally, efficiency of communication is desirable to ensure that participants have no unusual restrictions to injecting information into, or extracting information from the stream of information that is generated by participants, enters into, circulates within, or exits the sphere. Some participants may chose to use television and the Internet while others chose to use newspapers, street corner soap boxes, coffee

houses or beer parlors. There are no pretensions of equality of status or parity in any sphere or universal access to any means of communication. Indeed non-uniform accesses to certain communication resources produces, potentially, deliberate or unintended distortions to narratives that emerge, dominate or are suppressed.

Ethical Economy

Characteristics of different spheres impose different criteria for ethical economy in that sphere and internally construct functions for which a maximand may be derived. A maximand, a function of the sphere, is a set of results that represents the closest approach to satisfying the objectives of participants. Maximand is analogous “optimal mix” that results from allocative efficiency in classical microeconomic theory.

Allocative efficiency refers to a situation in which the limited resources of a country are allocated in accordance with the wishes of consumers. An allocatively efficient economy produces, in the parlance of microeconomics, an "optimal mix" of commodities. Operation of freedom of choice as well as availability of perfect information is prerequisite in the production of an optimal mix. Such a choice assumes that individuals act to maximize their individual utility functions in an environment free from “externalities” imposed by state policy or by moral influences such as collusions and deceptive promotions (Samuelson & Nordhaus, 2001).

However, individual choice cannot be relied upon to maximize all functions in a society. A theory of desirable outcomes or a theory of ethical economy is required to seek maximands in spheres. In the national public sphere, one framing of ethical economy may be in terms of the results that discourse in this sphere achieves in the area of public policy; in democratic society such framing may be monitored by tracking public opinion.

A fundamental requirement of any sphere is the lack of unusual restriction to communication within the sphere. The ubiquitous operation of power tends to frustrate these requirements. Constant vigilance is useful in reducing the effect of power on communication within the sphere and in increasing the probability of improved ethical economy. Other than in the private personal sphere which requires more elaboration, the requirements of spherical ethical economy are similar in public private spheres such as university departments or associations.

The private personal sphere requires more elaboration for at least three reasons; firstly, the inherent complexity of the human brain which has been theorized to predominantly control psychological functions such as ideas, learning, emotions, judgment, personal desires, and decision making (Arduini, 1992); secondly, all spheres are fundamentally composed of individuals who live also within their own private personal spheres and thirdly, the notion of a private personal sphere is a novel concept in rhetorical scholarship.

Nevertheless, as will be seen later the concept proves to be particularly useful in the critical analysis of the effects and products of leadership within any sphere. The requirements, functioning and effects of ethical economy in the global cosmopolitan public sphere produce different effects than ethical economy in the national public sphere or in the uniquely different private personal sphere. Although ethical economy ideally assumes unrestricted spherical communications as a requirement for achieving maximands within the sphere, spherical maximands are theoretically non-identical and are differentiated by differands which may describe substantial differences among maximands of different spheres.

Application of Ethical Economy in Grokster

The various categories of spheres, global or cosmopolitan, public, semi-public, private and personal are constituted by structures that define the boundaries of ethics in the sphere and confine participants within those boundaries. The personal sphere is unique, singular, and shared by no other person or persons. The structures and functioning of the personal sphere may produce results that violate the ethical economy of other spheres while maintaining consistency in the ethical economy of the personal sphere. A discussion of critical ethics in any sphere requires consideration of morality. Jones (1999, p. 23) has underscored the importance of holding people to account for their blameworthy actions as well as the obligation to ensure that only the blameworthy is subjected to blame.

To varying degrees, all spheres are represented in public and large private universities with activities that add complexity to the challenges that leaders must address. Although this study ultimately focuses on theories of the private personal sphere as an aid in the evaluation of actions or inactions of individuals in the scenario constructed in the rhetorical situation at the Supreme Court phase of Grokster, an understanding of concepts such as ethical economy within spheres is helped by a brief description of other spheres which exist at contemporary institutions of higher education.

According to Altbach, 1999, p.15, the contemporary university serves as home to complex systems of journals, books and databases that communicate knowledge worldwide and simultaneously as centers of political thought, political action and political action. Faculty and students at universities initiate and engage in discourses in the cosmopolitan global public spheres with issues of concern to all nations and countries on the planet and with agendas dominated by such issues as world peace, environmental integrity and human rights.

In the national public sphere faculty, students and other participants outside the immediate confines of higher educational institutions engage in discourses on issues of national culture with strong intentionality towards production of improved public policy on such wide ranging issues as national debt, social security, foreign affairs, marriage, and abortion. The semi public sphere, represented by

departments, Student Government, professional associations and unions, together, produces currents and cross currents of issues and positions that occupy presidents, deans and myriads of campus committees.

Private spheres within Student Government may focus on circumscribed positional activities which sometimes create reverberations that spill over from the desk of the chief institutional administrator into the arena of the external public sphere and all the way to the Supreme Court (Chairsell, 2001). All of these on-going activities in various spheres, in which university constituencies continuously participate, engage the attention of administrative leaders, and depending on the peculiar characteristics of issues that surge into dominating prominence, enormous administrative, technology and legal resources may need to be reallocated to deal with challenges that develop.

All stages of Grokster added to the matrix of challenges that confronted higher education leadership and the governance of their institutions and require a suitable framework to accommodate. The framework that this work constructs is that of ethical economy which can be applied generally to all spheres, global, national public, semi public, private and the unique private personal sphere constituted by all the faculties and functions that operate within the individual.

Following Janis's pathways, the presence of personal deficiencies leads to the conclusion of high probability of avoidable error. This approach is fraught with dangers of fatalism if persons are unable to escape from the operation of their personal deficiencies as in Janis's pathways (Janis, 1992) or remain trapped within their virtues and vices under the core content of morality advanced by Jones (p. 38). No reliable methods exist for calculating values of personal deficiencies nor for measuring virtuosity and viciousness. For this reason the alternate approach that I propose avoids the temptation to attempt a definition and fundamental quantification of these factors.

The principles rely on notions of ethical economy within spheres. As indicated under Chapter 4, Findings of the Study, universities actively participate in virtually all construction of spheres, the national public sphere, the cosmopolitan or global public sphere, semi-public and private spheres of national, international, local and personal significance as well as the individual private personal sphere in which all the effects and forces of ethical economy in other spheres interact.

A fundamental assumption was that if unfettered communication existed within a sphere, then the sphere tends towards a state of ethical economy in which the satisfaction of a subset of spherical aspirations cannot be increased without decreasing satisfaction of at least one of the aspirations of the sphere. This is analogous to concepts of economic efficiency in classical economics in which the operation of unfettered

communication within a market results in optimal production and distribution of goods (Samuelson & Nordhaus, 2001).

Distortions due to externalities of government fiscal intervention, obstructions in free flow of information and outright fraud work against attainment of economic efficiency. Communication in the habermasian public sphere almost ceased to be democratic as media interests struggled over control of means of communication available to participants within the sphere. The result is a commensurate departure from a state of ethical economy within the sphere. Ethical economy in a university should operate to maximize the aspirations of students for access to knowledge, faculty for continuous relevance in society, professional protection of tenure, and continuity of support for academic freedom without which it would be difficult to justify the existence of universities in society. Failure of a university president to defend the university against all threats to academic freedom diminishes ethical economy in the university and problematizes the legitimacy of presidential leadership.

As observed earlier, several universities made efforts to protect institutional autonomy from the demands of external entertainment industry interests. In prominent cases (*Grutter v. Bollinger*, 2003; *Board of Regents v. Bakke*), universities sought to maintain if not advance their institutional autonomy in lawsuits which scaled all the way up to the Supreme Court. Lack of comparable zeal in the defense of scholarly

freedom at *Grokster* indicates indifference to fundamental values of academic freedom that university faculty commonly hold. This attitude would increase blameworthiness under Jones's theory of moral responsibility.

In *Grokster*, external power operated in direct ways through demands for compliance, threats of lawsuits, and persistent rhetorical onslaught. Foucault has observed (Foucault, p. 207) that the intellectual's role has become the struggle against forms of power that in essence interpellate him or her into agency roles. University leaders, in joint committees with entertainment industry leaders, in roles categorized by Carroll as roles of "collaborative silences" (Carroll, Id. p. 42) aligned themselves with power. If their absence and silence at the Supreme Court in *Grokster* was motivated by reluctance to offend the powers with whom they had clearly aligned, that would increase the blameworthiness of their response.

However acting in a way that diminishes ethical economy in the semi public university sphere and becoming blameworthy on accounts of collaboration with external power, reluctance to offend these powers, or relative indifference to the value of academic freedom to scholars in higher education does not necessarily justify a progression to actual blame. Jones provides rationale for distinguishing between judgments of blameworthiness and actual pronouncement of blame. (Jones, p. 22). This distinction is entirely consistent with the application of ethical

economy in the private personal sphere in which a university president, like any other person, exists.

Arduini has hypothesized an eidetic event, such as an idea, as a state of "concerned nervous structures". Emotions of anger, joy, desire, and greed may act as weights that alter the significance of other elements or constitute frameworks of reference in which alternate logics of judgment operate. Such phenomena may have a fundamental reliance on an individual's cranial architecture within whose purview, traces of impulses from the ethical economy of other spheres in which the individual participates become integrated and assimilated to promote ethical economy in the personal private sphere.

Consequently, although absence and silence of a university president in Grokster may be judged as a morally blameworthy act, the critic is obliged to properly segment the sphere of relevance and the effect of the act on the ethical economy of that sphere. Though spheres may be described hierarchically, ethical economy is invariant to such descriptions. Ethical economy is as valid in one sphere as in any other sphere. Achieving a congruence of effects of ethical economy operating in different spheres would be ideal in cases of leadership where the leader acts in a way that advances and defends the aspirations of the sphere in which the leader exists and simultaneously "feels at ease" internally with the performed response and its impact on his or her personal interests and values.

In this work, the only requirement for ethical economy in any sphere is the assumption of efficient communication within the sphere. This means that participants within the sphere have no unusual restrictions on adding information to or extracting information, as they desire, from the streams that come into existence within the sphere. Theories of the private, public and cosmopolitan or global spheres have been extensively developed.

There is only scant work on the private personal sphere as a sphere of communicating components operating with the same assumptions of ethical economy as has been applied to all other spheres. This has made the separation of moral responsibility and blameworthiness, from actual blame and moral sanctions less problematic. The impulse to link moral blameworthiness to the necessity of some form of sanction as suggested by Edmundson (p. 128) and the burden of care that Jones (p. 22) demands from those who judge the morally questionable actions of others become irrelevant under a theory of ethical economy.

As an example, finding that the absence and silence of university presidents in Grokster has indicated an indifference to the fundamental value of academic freedom in the public sphere and in the semi public university sphere does not foreclose the usefulness of further inquiry in the personal private spheres of the presidential authors of silence and performers of absence. Such an inquiry would rely on the assumption

that principles of ethical economy operate with equal validity in any and in all spheres. This operates to bracket the scope of sanctions that may be validly considered from moral or ethical infractions in a different sphere or spheres.

Public Sphere and Democracy

The alternate conceptualization that I have presented makes no pretensions that public sphere discourse provides the best or for that matter any protection to democracy. The American public sphere which includes all who reside in the United States as well as all American nationals who reside anywhere in the world is open to streams of communication from all within this national public sphere. Nothing deters state and religious leaders from access to pulpits to promote ideology and dogma. Bruner (2002) has discussed the use of “limit work” to expose hegemonic and skewed characterization of national identity and uncover competing narratives.

While authoritarian regimes usually present a single or no choice at all to their citizens, most choices in American democracy are ultimately binary. The multi-dimensional flourishes of public discourse have to be funneled into unavoidable binarisms which raise valid questions on the probability that public sphere discourse in the widely idealized public sphere actually makes any difference to public policy and democratic practice. Apprehensions about the decline of public debate due to the rise in television consumerism (Zarefsky, 1998) may

also be ignoring the possibility that participation in democracy is entirely voluntary.

The operation of three equal branches of government, the Executive, Congress, Supreme Court, guided by the United States Constitution, go a long way towards sanctification and sanitization of democratic practice. With much help from the Constitution and its Amendments, unfettered freedom of the press, university scholars with tenure and resources for unrestrained research and reverberations or echoes from willing participants in the public sphere, democracy has a good chance of achieving immortality, perhaps in a form that may not be easily improved. With a powerful and omniscient military to check threats to democracy from external principalities, perhaps only extra terrestrial threats need be of concern.

Summary

In this chapter, the threats to scholarly freedom and institutional autonomy as well as the exigence at the Grokster Supreme Court are summarized. The judgmental component of situational criticism is discussed in relation to awareness of university leaders to issues generated by technology, as well as in relation to expectations of ethical and moral responsibility in the university setting.

Recommendations for further research recognize the flaw in grouping university presidents especially when ethics and moral responsibility are discussed and the need for further inquiry into factors

of personal motivation or constraints in situations such as existed at the Grokster Court. Other areas of research span from an assessment of p2p policies at universities to dialog on leadership search parameters if indeed the protection of academic freedom is a valid concern. Finally I have suggested that evaluation of moral and ethical issues involving persons with roles in any sphere would be less problematic in an alternate conceptualization of discursive spheres.

In this chapter, I have described particulars of such conceptualization that includes declaration and justification of a personal private category as well as a theory of ethical economy which operates with non-hierarchical validity in a hierarchical system of spheres. I have further applied the alternate concepts to the absence and silence of university presidents in Grokster. Finally I have offered my very personal insights on the requirements for democracy in an attempt to decouple public sphere discourse from common symbiotic presuppositions linking public discursivity and democracy in much of rhetorical scholarship. The motivation for this lies in the limited conceptualized characteristic of unfettered communication as a defining characteristic of any sphere.

REFERENCES

- AAUP (1940). 1940 Statements on academic freedom and tenure. Policy Documents & Reports. Washington, D.C. (1995).
- AAUP (1966). Statement on government of colleges and universities. *Academe*, 52(4), December 1966.
- ACE (2002). Joint Committee of the Higher Education and Entertainment Communities (2002). Universities policies and practices addressing improper peer-to-peer file sharing.
- Abelson, H. (2005). Brief of computer science professors Harold Abelson et al. suggesting affirmance of the judgment. *MGM v. Grokster* (2005).
- Abelson, T. (2005). Brief amici curiae of computer science professors Harold Abelson et al.
- About Internet2. Retrieved from the World Wide Web, May 29, 2005 at <http://www.internet2.edu/about/>
- Abrams, W. F. (2000). A letter to Mr. King from a lawyer representing Stanford University. *The Chronicle of Higher Education*. Retrieved February 2, 2007 from <http://chronicle.com/weekly/v47/i06/06a04601.htm>
- Aby, S.H & Kuhn IV, F. C. (2000). Academic freedom: A guide to the literature: Overview of academic freedom. Westport, CT: Greenwood Press.

- Alkana, L. (2003). *The absent president. Hollywood's White House*. Eds. Rollins, P.C. and O'Connor, J. E., Lexington: The University Press of Kentucky.
- Altbach, P. G. (1999). *Harsh realities. American Higher Education in the 21st Century*. Eds. Altbach, P. G., Berdahl, R. O., Gumpert, P. J. Baltimore: The Johns Hopkins University Press.
- Altbach, P. G., Gumpert, P.J. & Johnstone, D. B. (Eds.).(2001). *The American academic model in comparative perspective. In Defence of American Higher Education*. Baltimore: The John Hopkins University Press.
- Ambrose, C. M. (1990). Academic freedom in American public colleges and universities. *Review of Higher Education* 14(1), p. 5-32, Fall 1990.
- Answers.com (2006). Windows 3.1x. Retrieved on Monday, July 17, 2006 from <http://www.answers.com/topic/windows-3-1x>.
- Appel, S. (1993). Expediency was struggling with principle and expediency won: Kendrick P. Shedd's dismissal from the University of Rochester. *Journal of Educational Administration and History* 25(1), p. 41-57, January 1993.
- Arduini, A. (1992). *Principles of eidetics: Outline of a theory*. New York: Springer-Verlag.

- Association of Research Libraries [ARL] (2006). Copyright Act of 1790.
Retrieved on June 4, 2006 from
<http://www.arl.org/info/frn/copy/timeline.html#18C>.
- afterdawn.com (2000). Metallica sues Napster. Retrieved March 4, 2007
from <http://www.afterdawn.com/news/archive/1089.cfm>
- Band, J. (2005). Supreme Court Documents. Retrieved on January 31,
2007 from http://www.eff.org/IP/P2P/MGM_v_Grokster/.
- Belfield, C. R. (2000). *Economic Principles for Education*. Cornwall, U.K.:
MPG Books Ltd.
- Ben-Atar, D. (2005). Hollywood profits v. technological progress. *The
Chronicle of Higher Education* 51 (30).
- Bensimon, E. M., Neumann, A., & Birnbaum, R. (2000). Higher
education and leadership theory. In M. C. Brown II (Ed.).
Organization & governance in higher education. (5th ed.) (p. 214 -
222) *ASHE Reader Series*. Boston: Pearson Custom Publishing.
- Berdahl, R. O. & McConnell, T. R. (1999). *Autonomy and accountability:
Who controls academe?* In Philip G. Altbach, Robert O. Berdahl and
Patricia J. Gumport (Eds.). *American Higher Education in the 21st
Century*. Eds. Altbach, P. G., Berdahl, R. O., Gumport, P. J.
Baltimore: The Johns Hopkins University Press.
- Berquist, H. E. (1972). The Edward W. Bemis controversy at the
University of Chicago. *AAUP Bulletin* 58(4), p 384-392, December
1972.

- Biesecker, B. A. (1989). Rethinking the rhetorical situation from within the thematic of différance. *Philosophy & Rhetoric*, 22(2).
- Bitzer, L. (1968). The rhetorical situation. *Philosophy & Rhetoric* 1(168).
- Bitzer, L. (2000). In Carl R. Burgehardt, (Ed.). *Readings in Rhetorical Criticism*, 2nd Ed. PN: Straton Publishing.
- Bohman, J. & Lutz-Bachmann, M. (1997). *The public spheres of the world citizen*. Cambridge: The MIT Press.
- Buckley, W. F. (1986). *God and man at Yale: The superstitions of academic freedom*. Chicago: Regnery Books.
- Burke, S. (1992). *The death and return of the author: criticism and subjectivity in Barthes, Foucault and Derrida*. Edinburgh : Edinburgh University Press, 1992.
- Capen, S. P. (1948). Reflections on freedom in education. *Philosophy and Phenomenological Research* 8(4), June 1948.
- Cardozo, B.N. (1949). *The nature of the judicial process*. Yale University Press. N.J.
- Carlson, S. (2000a). Musicians' lawyer urges top universities to block access to Napster. *The Chronicle of Higher Education*. Retrieved from the Web February 2, 2007.
- Carlson, S. (2000b). Metallica sues universities and Napster, charging that students engage in music piracy. *The Chronicle of Higher Education*. April 28, 2000, p.A50.

Carlson, S. (2000c). Scholar fears that banning online recordings could lead to banning ideas, too. Interview with Jeremy Harris Lipschultz. *The Chronicle of Higher Education*, July 28, 2000.

Carlson, S. (2001a). Napster was just the start of the bandwidth invasion: Colleges try to stay one step ahead of students who use the latest file-sharing services. *The Chronicle of Higher Education*. Retrieved February 02, from <http://chronicle.com/weekly/v47/i33/33a04301.htm>

Carlson, S. (2001b). Napster was nothing compared with this year's bandwidth problems: Colleges struggle as students download hefty video files. *The Chronicle of Higher Education*. Retrieved from the Web February 2, 2007. <http://chronicle.com/weekly/v48/i14/14a02901.htm>

Carlson, S. (2001c). New Company Besieges Colleges With Notices About Copyright Violations: Institutions weigh legal issues and inconvenience of tracking down students who share files. *The Chronicle of Higher Education*. Retrieved from the Web February 2, 2007 <http://chronicle.com/weekly/v48/i14/14a02901.htm>

Carlson, S. (2002a). Film studios want colleges to block students from downloading movies. *The Chronicle of Higher Education*. 49(7). Retrieved February 2, 2007 from <http://chronicle.com/weekly/v49/i07/07a03701.htm>

- Carlson, S (2002b). Privacy advocates warn colleges not to monitor content of file sharing. *The Chronicle of Higher Education*. 49(15). Retrieved February 5, 2007 from <http://chronicle.com/weekly/v49/i15/15a03403.htm>
- Carlson, S. (2003). Recording industry plans to accelerate complaints about illegal file sharing. *The Chronicle of Higher Education*, 49(17), January, 2003.
- Carlson, S. (2004). Duke U. will give ipod music players to all freshmen. *The Chronicle of Higher Education*, 50(47), July 20, 2004
- Carnevale, D. (2004, October 29). Fewer colleges cut Information-Technology budgets this year, survey finds. *The Chronicle of Higher Education*. 50(10). Retrieved February 5, 2007 from <http://chronicle.com/weekly/v51/i10/10a03401.htm>
- Carnegie Foundation (2005). Basic classification description. Retrieved March 5, 2007 at <http://www.carnegiefoundation.org/classifications/index.asp?key=791>
- Carpenter, J. J. (2001). The civic imperative, Thomas Jefferson and John Dewey: A content analysis of CIVITAS. Doctoral dissertation, State University of New York.
- Carr, D. (2005, April 9). Exploring the right to share, mix and burn. *New York Times*, p. 17A.

- Carroll, L. B. (2002). *The rhetoric of silence: Understanding absence as presence*. Doctoral dissertation, Texas A&M University.
- Chbib, B. (2004). *The politics of silence*. McGill University (Canada), (2004).
- Chairsell, C. (2001). Analysis of the application of First Amendment jurisprudence to university student fees policies. Doctoral dissertation, University of Nevada, Las Vegas.
- CBS News. (2007). Texas redistricting fight not over: Lower court ordered to revisit gop-drawn congressional map. CBS News February 22, 2007. Retrieved February 22, 2007 from <http://www.cbsnews.com/stories/2004/10/18/politics/main649927.shtml>
- CNNfn (2001). Music file sharing service reaches agreements with Metallica, Dr. Dre. Retrieved on July 17, 2006 from <http://money.cnn.com/2001/07/12/news/napster/>
- Cohen, M. D. & March, J. G. (2000). *Leadership in an organized anarchy*. In Ed. Christopher Brown II. *Organization & Governance in Higher Education*, (5th Ed). Boston: Pearson Custom Publishing.
- Cohn, C. A., Page, M. H., Taranto, R. G., Baker, C. S. & Neco, M. A. (2005). Brief for respondents. *MGM v. Grokster* (2005)
- Consigny, S. (1974). Rhetoric and its situations. *Philosophy & Rhetoric*, 7(3)

- Crews, K. D. (1993). Copyright, fair use, and the challenge for universities: Promoting the progress of higher education. Chicago: The University of Chicago Press.
- Crocker, S. (1969), Host Software, Network Working Group RFC.(April 7, 1969).
- Dean, K. (2003, October 03). Florida dorms lock out p2p users. Wired News Website. Retrieved June 03, 2006 from <http://www.wired.com/news/digiwood/0,1412,60613,00.html>
- Dela. (2005, November 14). Internet2-based i2Hub closed. Afterdawn.com. Retrieved on June 3, 2006, from <http://www.afterdawn.com/news/archive/7027.cfm>
- Deutsch, C. H. (2002, October 1). Suit settled over pricing of music CD's at 3 chains. *New York Times*, Late Edition – Final, p. 1C.
- Dill, D. D. (2000). The nature of administrative behavior in higher education. From Organization & governance in higher education. In M. C. Brown II (Ed.). Organization & governance in higher education. (5th ed.) (p. 92 - 110) *ASHE Reader Series*. Boston: Pearson Custom Publishing.
- Dickman, H. (Ed.).(1993). *The imperiled academy*. New Brunswick: Transaction Publishers.
- Distributed Systems Laboratory at University of Chicago (DSL) (May 2005). Retrieved from the World Wide Web, May 28, 2005 at <http://dsl.cs.uchicago.edu/dsl.htm>.

- Dworkin, R. (1996). We need a new interpretation of academic freedom. *Academe* 82(3), p. 10-15, May-June 1996.
- Easley, R. F. (2005). Ethical issues in the music industry response to innovation and piracy. *Journal of Business Ethics*, 62.
- Edbauer, J. (2005). Unframing models of public distribution: From rhetorical situation to rhetorical ecologies. *Rhetoric Society Quarterly*, 35(4).
- Edmundson, W. A. (1998). *Three anarchical fallacies. An essay on political authority*. Cambridge: The Press Syndicate of the University of Cambridge.
- Educause (2004). Members. Page last updated on May 15, 2004. Retrieved on January 31, 2007 from <http://www.educause.edu/Members/1276>.
- Electronic Frontier Foundation [EFF] (2007a). Universities should resist network monitoring demands. Retrieved February 23, 2007 from <http://www.eff.org/IP/P2P/university-monitoring.pdf>
- Electronic Frontier Foundation [EFF] (2007b). MGM v. Grokster. Retrieved February 23, 2007 from http://www.eff.org/IP/P2P/MGM_v_Grokster/
- Falk, C. (2003). *Education is war: The constitution of postindustrial learning*. Doctoral dissertation, Simon Fraser University.

- Farrell, K. & Young, M. J. (2004). *The situational perspective*. In J. A. Kuypers (Ed.), *The Art of Rhetorical Criticism* (p. 33-55). Boston: Pearson.
- Farrell, M. J. (1999). *The rhetoric of silence*. McGill University, Canada, (1999).
- Find Law (2007). *Barbara Grutter v. Lee Bollinger, et al.* Supreme Court Docket, No. 02-214. Retrieved February 16, 2007 from http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html#02-241.
- Fischer, P. M. (1994). *Fischer v. Medical College of Georgia and R. J. Reynolds Tobacco: A case study of constraints on research*. In E. Benjamin & D. R. Wagner. (Eds) *Academic freedom: An everyday concern*. San Francisco: Jossey-Bass Publishers.
- Fisher III, W. W. (2005). Brief of Internet law faculty in support of respondents. *MGM v. Grokster* (2005).
- Foss, S. K. (2004). *Rhetorical Criticism* (3d. Ed.) Long Grove, IL: Waveland Press, Inc.,
- Foster, A. L. (2000, October 6). Universities Reject Requests That They Block Students' Access to Napster. *The Chronicle of Higher Education*. Retrieved from the Web February 2, 2007. <http://chronicle.com/weekly/v47/i06/06a04601.htm>
- Foster, A. L. (2001, February 16). Scholars rally to online magazine's defense over publishing software code. *The Chronicle of Higher*

Education. Retrieved from the Web February 2, 2007.

<http://chronicle.com/weekly/v47/i23/23a04501.htm>

Foster, A. L. (2002, November 29). The making of a policy gadfly. Seeing crucial computer-science work threatened, a Princeton professor takes on Congress. *The Chronicle of Higher Education*. 49(14).

Retrieved February 02, 2007 from

<http://chronicle.com/weekly/v49/i11/11a03102.htm>

Foster, A. L. (2004). Education groups express concern over proposed copyright bill. *The Chronicle of Higher Education*, 50(48), August 2004.

Foster, A. L. (2005). Professors join the fray as Supreme Court hears arguments in file-sharing case. *The Chronicle of Higher Education*, 51(31).

Fraser, N. (1992). *Rethinking the public sphere: A contribution to the critique of actually existing democracy*. In Habermas and the Public Sphere (Craig Calhoun, Ed.). MA: MIT Press. p. 109-142.

Foucault, M. (1972). Intellectuals and power. *L'Arc* 49, p. 3-10

Gardner, J. M. (2001). What my silence conceals: Rhetoric in the Spanish sentimental novel. University of Colorado at Boulder(2001).

German, K. M. (1985). Finding a methodology for rhetorical criticism. *The National Forensic Journal*, III, Fall 1985, p. 86-101.

- Gewirth, A. (1990). *Human rights and academic freedom*. S. M. Cahn (Ed.). Morality, responsibility and the university: Studies in academic ethics. Philadelphia: Temple University Press, 1990.
- Gibson, J. (2005). Brief of amici curiae law professors, economics professors, and treatise authors in support of petitioners. *MGM v. Grokster* (2005).
- Goodchild, L. F. & Wechsler, H. S. (Eds.) (1997). *The history of higher education*, 2nd Ed., ASHE Reader Series. Needham Heights, MA: Simon & Schuster Custom Publishing.
- Goodnight, G. T. (1987). Public discourse. *Review and Criticism*, p.428.
- Gottfredson, L. S. (1996). The new challenge to academic freedom. *Journal of Social Distress and the Homeless* 5(2), p. 205-212, April 1996.
- Gouran, D. S. (1990). Academic freedom and the management of higher education: An administrative perspective. *ACA Bulletin* 73, p. 82-91, August 1990.
- Graff, G. (1995). Response to Bill Readings. *New Literary History* 26(3), p. 493.
- Gray, C. H. (1997). *Postmodern war: The new politics of conflict*. New York: Guilford Press.
- Grayling, A.C.(2003). *Life, sex and ideas: The good life without God*. Oxford: University Press, 2003.

Greenhouse, L. (2005, March 30). Lively debate as Justices address file sharing. *New York Times*, p. 1C. Retrieved March 7, 2007 from <http://www.nytimes.com/2005/03/30/technology/30bizcourt.html?pagewanted=1&ei=5090&en=9ca4962123338e19&ex=1269838800&partner=rssuserland>

Gross, G. (2005, April 13). RIAA, MPAA target file swapping on Internet2: Lawsuits will be filed against college students accused of using the high-speed network to swap music and movies. *IDG News Service*. Retrieved on June 3, 2006, from <http://www.pcworld.com/resource/article/0,aid,120425,pg,1,RSS,RSS,00.asp>.

Gross, G. (October 01, 2004). RIAA files 762 new file-trading lawsuits. *IDG News Service*. Retrieved from the World Wide Web on May 29, 2005 at http://www.infoworld.com/article/04/10/01/HNriissuits_1.html

Gumport, P. J. & Chun, M. (1999). *Technology and higher education: Opportunities and challenges for the new era*. In P. G. Altbach, R. O. Berdahl & P. J. Gumport (Eds.), *American higher education in the 21st century: Social, political, and economic challenges*. (109-148). Baltimore: The John Hopkins University Press.

Guttman, A. (1983). *Is freedom indivisible?: The relative autonomy of universities in a liberal democracy*. New York: New York University Press, 1983.

- Hamilton, N. (1995). *Zealotry and academic freedom: A legal and historical perspective*. New Brunswick, NJ: Transaction Publishers, 1995.
- Held, V. (1983). The independence of intellectuals. *Journal of Philosophy* 80(10), p. 572-582, October 1983.
- Hennessy, J. & Spanier, G. (2004, March 19,). University policies and practices addressing improper peer-to-peer file sharing. American Council on Education: Division of Government Relations and Public Affairs. Retrieved June 02, 2006, from <http://www.acenet.edu/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=8503>.
- Hollaar, L. A. (2005). Brief of Professor Lee A. Hollaar in support of neither party. *MGM v. Grokster* (2005).
- Hughes, R. L. (1999). The new face of war. *Science as Culture*, 8(1).
- Hyland, P. with Gomez, O. & Greensides, F. (Eds.) (2003). *The Enlightenment: A source book and reader*. London: Routledge Taylor & Francis Group.
- Iamnitchi, A., Ripeanu, M. & Foster, I. (March 2004). Small world file sharing communities. *Infocom 2004*, Hong Kong.
- Internet2 (2005) Member Websites - Project Sites. Retrieved from the World Wide Web on May 29, 2005 at <http://members.internet2.edu/membersites.cfm>.

- Jamieson, K. M. (1975). Antecedent Genre as Rhetorical Constraint. *Quarterly Journal of Speech*, 61.
- Janis, I. (1992). *Causes and consequences of defective policy making: A new theoretical analysis*. In F. Heller (Ed), *Decision-Making and Leadership*. Cambridge: Cambridge University Press.
- Joint Committee of the Higher Education and Entertainment Communities (2002). Universities policies and practices addressing improper peer-to-peer file sharing.
- Joachim, D. (February 18, 2004). University Gets Tough On P2P. *Security Pipeline*. Retrieved from the World Wide Web on May 29, 2005 at <http://securitypipeline.com/trends/17701191>.
- Johnson, A. E. & Yeager. H. (2006). Migrant's walk-outs hit business across US. *Financial Times Ltd*. 2006.
- Jones, D. H. (1999). *Moral responsibility in the holocaust: A study in the ethics of character*. Lanham: Rowman & Littlefield Publishers.
- Kaplan, C. & Schrecker, E. (1983). *Regulating the intellectuals: Perspectives on academic freedom in the 1980's*. New York: Praeger.
- Kearney, J.D. & Merrill, T.W. (2000). The influence of amicus curiae briefs on the Supreme Court. *University of Pennsylvania Law Review* (148).
- Kiernan, V. (2002, October 25). Higher-Education organizations urge a crackdown on illegal file-sharing. *The Chronicle of Higher Education*

- 49(9). Retrieved February 2, 2007 from
<http://chronicle.com/weekly/v49/i09/09a03702.htm>
- Kiernan, V. (2004, December 03). Outsourcing the dorm network: Hammered by file sharers and other bandwidth hogs, some colleges hire companies to handle Internet service for students. *The Chronicle of Higher Education*. 51(15). Retrieved February 2, 2007 from <http://chronicle.com/weekly/v51/i15/15a03101.htm>
- King, H. E. (2000). A letter to Harvard University from Howard E. King, representing Metallica and Dr. Dre. *The Chronicle of Higher Education*. Retrieved on February 2, 2007 from <http://chronicle.com/>
- King, G. C. (1995). Rhetorically negotiating issues, actions, and identities: A comparative study of the foundations of the public sphere. Doctoral dissertation: Pennsylvania State University.
- Kreiser, B. R. (1993). AAUP perspectives on academic freedom and United States Intelligence Agencies. *Journal of College and University Law* 19(3), p 251-257, Winter 1993.
- Kristula, D. (2001). The history of the Internet. Retrieved on Tuesday, July 18, 2006 from <http://www.davesite.com/webstation/net-history.shtml>
- Kurzon, D. (1995). The right of silence: A socio-pragmatic model of interpretation. *Journal of Pragmatics*, 23, (1995).

- Kuypers, J. A. (Ed.). (2005). *The Art of Rhetorical Criticism*. Pearson Education, Inc: Boston.
- Lang, B. (1996). *Heidegger's silence*. Ithaca: Cornell UP, 1996.
- Lee, E. (2005). Brief of professors Edward Lee, Peter Shane, and Peter Swire in support of respondents. *MGM v. Grokster* (2005).
- Lessig, L. (2004). *Free culture*. Copy @ www.lessig.org
- Lessig, L. (2005). Brief for Creative Commons in support of respondents. *MGM v. Grokster*.
- Lewis, R., 2005, Emerging Technologies, Media file sharing over networks. Retrieved from the World Wide Web on June 16, 2005 at <http://www.faculty.rsu.edu/~clayton/lewis/paper.htm>
- Liebman, R. I. (2005). Brief of media studies professors in support of respondents. *MGM v. Grokster* (2005).
- List of Institutions by Carnegie Classification, Control, and State (May 29, 2005). Retrieved from the World Wide Web on May 29, 2005 at <http://www.carnegiefoundation.org/Classification/CIHE2000/PartIfiles/partI.htm>.
- Logan, T. (2006). The social and scholarly context of online piracy. *The Chronicle of Higher Education*: Letter to the Editor, February 10, 2006.
- Lunney, Jr. J.G. (2005). Brief of law professors in support of respondents. *MGM v. Grokster* (2005).

Madigan, M. (November 14, 2002). Copyright cops target workplace, schools: Music industry renews piracy fight with correspondence and courts while colleges and companies consider their liability. *Medill News Service*. Retrieved from the World Wide Web on May 29, 2005 at <http://www.pcworld.com/news/article/0,aid,106959,00.asp>.

Mangan, K. S. (2002, October 25). Colleges could face lawsuits over software piracy. *The Chronicle of Higher Education*. 49(9) Retrieved February 2, 2007 from <http://chronicle.com/weekly/v49/i09/09a03701.htm>

Mathys, M. (1996). *The voice of shame: Absence and shame, a cross-cultural encounter*. In Eds. Lee, R. G. and Wheeler, G. San Francisco: Jossey-Bass Publishers.

McBride, S. (2004, December 13). Supreme Court to review file-sharing ruling. *The Wall Street Journal*, p. B6.

McBride, S. (2005, April 13). Film sharing on academic network is targeted. *The Wall Street Journal*, p.D2. Retrieved March 7, 2007 from http://users2.wsj.com/lmda/do/checkLogin?mg=wsj-users2&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB1111332296709604743.html%3Fmod%3Dhome_whats_news_us

McBride, W. M. (1989). *The rise and fall of a strategic technology: The American battleship from Santiago Bay to Pearl Harbor, 1898-1941*. Doctoral dissertation, John Hopkins University, Baltimore.

- McCollum , K. (2000) Indiana U. Will Test System to Prevent Computer Users From Overloading Networks. *The Chronicle of Higher Education*, April, 2000.
- McCollum, K. (2000, February 25). Students jam college networks with use of Napster to find audio files. *The Chronicle of Higher Education*.
- McCollum, K. (2000, April 7,). Indiana U. will test system to prevent computer users from overloading networks. *The Chronicle of Higher Education* 52(36). Retrieved from the Web February 2, 2007.
<http://chronicle.com/weekly/v46/i31/31a04801.htm>
- Menell, P. S. (2005). Brief of Professors Peter S. Menell et al.. in support of petitioners. *MGM v. Grokster* (2005).
- Mennecke, T. (April 13, 2005). Internet2 now an RIAA target. Retrieved from the World Wide Web, May 28, 2005 at
<http://www.slyck.com/news.php?story=745>.
- Microsoft Encarta College Dictionary (2001). New York: St. Martin's Press.
- Microsoft TechNet (2007). Windows peer-to-peer networking. Retrieved March 15, 2007 from
<http://www.microsoft.com/technet/network/p2p/default.mspx>
- Mill, J. S. (1956). *On liberty*. New York: The Liberal Arts Press, 1956.
- Mitrano, T. B. (2004, June 25). How colleges should respond to file-sharing charges. *The Chronicle of Higher Education* 50(42).

- Retrieved February 2, 2007 from
<http://chronicle.com/weekly/v50/i42/42b01601.htm>
- Moodie, G. C. (1996). On justifying the different claims to academic freedom. *Minerva* 34(2), 1996.
- Mulligan, D. K. (2005). Brief of sixty intellectual property and technology law professors and the United States Public Policy Committee of the Association for Computing Machinery in support of respondents. *MGM v. Grokster*.
- Mutz, D. C. (2005). Social trust and e-commerce: Experimental evidence for the effects of social trust on individual's economic behavior. *Public Opinion Quarterly*, 69 (3), 393-416.
- Myrdal, G. (1944). *An American dilemma: The Negro problem and modern democracy*. New York: Harper & Brothers, 1944.
- Niccolai, J. (2006). Recording industry sues another 8,000 for file sharing. IDG News Service. Retrieved February 22, 2007 from <http://www.networkworld.com/news/2006/101706-recording-industry-sues-another-8000.html>
- Norton, A. (2004). *95 thesis on politics, culture & method*. New Haven: Yale University Press.
- Notable dates in United States Copyright, U.S. Copyright Office, Circular 1a. Retrieved from the World Wide Web on June 21, 2005 at <http://www.copyright.gov/circs/circ1a.html>

Oberholzer-Gee, F. & Strumpf, K. (2005). Brief of Felix Oberholzer-Gee and Koleman Strumpf in support of respondents. *MGM v. Grokster* (2005).

Oberholzer-Gee, F., & Strumpf, K. (2005, June). The effect of file sharing on record sales: An empirical analysis. Retrieved on June 3, 2006, from http://www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf

Online (2000). Survey of students finds Napster music-sharing can hurt or help sales. *The Chronicle of Higher Education*. Retrieved February 2, 2007 from <http://chronicle.com/weekly/v46/i43/43a03902.htm>

Operation P2P (May 29, 2005). Retrieved from the World Wide Web on May 29, 2005 at http://www.personal.psu.edu/users/m/t/mth176/operationp2p/operationp2p_1d.html

Palmer, M. (1997). *Air and space power: Decisive instruments of national power*. The Research Department, Air Command and Staff College.

Peters, M. (2003). *Pornography, technology, and process: Problems and solutions on peer-to-peer networks*. Committee on the Judiciary, U.S. Senate, 108th Cong., 1st Sess. (2003).

Pettigrew, A. M. (1973). *The politics of organizational decision making*. London: Tavistock.

- Pollack, M. (2005). Amicus Brief of Malla Pollack and Other Law Professors Supporting Grokster, Ltd., et al.
- Pruitt, S. (November 07, 2002). Privacy group takes aim at p-to-p surveillance. *IDG News Service*. Retrieved from the World Wide Web on May 29, 2005 at <http://www.pcworld.com/news/article/0,aid,106781,00.asp>.
- Pulgram, L. F. et al. (2005). Brief of innovation scholars and economists in support of affirmance. *MGM v. Grokster (2005)*.
- Ranganathan, K., Ripeanu, M., Sarin, A. & Foster, I. (April 2004). To share or not to share: An analysis of incentives to contribute in collaborative file sharing environments. CCGrid'04 Conference, Chicago, IL.
- Read, B. (2004). Recording-Industry Lawsuits Pursue Song-Swappers on 21 University Networks. *The Chronicle of Higher Education*, 50(30), April 2, 2004.
- Read, B. (2005a). Recording and movie industries sue Internet2 file swappers. *The Chronicle of Higher Education*, 51(33), April 2005.
- Read, B. (2005b). Software uses file sharing for academic purposes. *The Chronicle of Higher Education*, 52(7).
- Read, B. (2006). Piracy and copyright: An ethics lesson. *The Chronicle of Higher Education*, 52(37), May 19, 2006.
- Read, B. (2006). Entertainment Industries Ask Colleges to Monitor Local Networks for Piracy. *The Chronicle of Higher Education* 52(36).

- Read, B. & Young, J. R.(2006) Virtual round table: Campus officials discuss online music services. *The Chronicle of Higher Education*, 52(32).
- Readings, B. (1996). *The University in Ruins*. Cambridge: Harvard University Press.
- Reagan, R. (1983) Address to the Nation on National Security.
- Recording Industry Association of America. (2006). Music, movie industries target theft on internal campus networks: RIAA, MPAA launch systematic program to curtail campus LAN piracy, alert 40 university presidents in 25 states of system abuse. Retrieved on June 3, 2006, from <http://www.riaa.com/news/newsletter/042706.asp>
- Rosen, H. (1999, October 28). Testimony at DMCA hearing. House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection.
- Samuelson, P. A. & Nordhaus, W. D. (2001). *Microeconomics* (7th Ed.). Boston: McGraw-Hill.
- Shapiro, G. J. (1998, June 5). *Statement of Gary J. Shapiro*. Subcommittee on Telecommunications, Trade and Consumer Protection. Retrieved on June 3, 2006 from <http://www.hrrc.org/pdf/June5-98Hearing.pdf>

- Simon, R. L. (1990). *A defence of the neutral university, Morality, Responsibility and the University: Studies in Academic Ethics*. Philadelphia: Temple University Press.
- Smith, T. (2000). BMG alliance may hinder Napster cloners. Retrieved from the World Wide Web on April 13, 2006 at http://www.theregister.co.uk/200/11/02/bmg_alliance_may_hinder_napster.
- Standler, R. B. (2000). Academic freedom in the USA. Retrieved 14 November 2006 from the World Wide Web at <http://www.rbs2.com/afree.htm>.
- Staub, E. (2003). *The psychology of good and evil*. Cambridge: University Press, 2003.
- Spanier, G. & Sherman, C. H. (2005). Thou shalt not pirate thy neighbor's songs. *The Chronicle of Higher Education*, 52(15), December 2005.
- Squeo, A. M. (2005, March 24). Supreme Court hears two key internet cases. *The Wall Street Journal*, p. B1.
- Squeo, A. M. (2005, March 30). High court enters file-sharing spat - justices must determine software providers' liability for copyright violations. *The Wall Street Journal*, p. A2.
- Stevens, P. S. (2007). The evolution of windows. Top Ten Reviews. Retrieved March 15, 2007 from <http://windows-operating-system-reviews.toptenreviews.com/the-evolution-of-windows.html>

- Strahilevitz, L. J. (2003). Charismatic code, social norms, and the emergence of cooperation on the file-swapping networks. *Virginia Law Review*, 89(3), May 2003.
- Strauss, D. A. (2005). Brief of amici curiae Kenneth J. Arrow, et al. in support of petitioners. *MGM v. Grokster* (2005).
- Sykes, C. J. (1988). *Profscam: Professors and the demise of higher education*. Washington, D. C.: Regnery Gateway.
- Terdiman, D. (2006). Studios, RIAA target student piracy. *CNET News.com*, published 2006, April 27. Retrieved on June 3, 2006, from http://news.com.com/Studios,+RIAA+target+student+piracy/2100-1025_3-6066118.html
- Thomson, J. J. (1983). Academic freedom and tenure: Corporate funding of academic research. *Academe* 69(6).
- Timeline (2005) *A history of copyright in the United States*, Association of Research Libraries, Washington, DC. Retrieved from the World Wide Web on June 20, 2005 at <http://arl.cni.org/info/frn/copy/timeline.html#18C>.
- Trinity College (1904). Trinity College Board of Trustees: Trinity College and academic liberty. *South Atlantic Quaterly* 3(1). p.62-72, January 1904.
- University of Virginia Website (n.d.) *When I go to U Va.*[Video]. Retrieved June 02, 2006, from

<http://www.itc.virginia.edu/pubs/docs/RespComp/videos/home.html>

- Vaidyanathan, S. (2004). *The anarchist in the library: How the clash between freedom and control is hacking the real world and crashing the system*. N.Y.:Basic Books.
- Vaidyanathan, S. (2001). *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity*. N.Y.:New York University Press.
- Vaidyanathan, S. (2005). Celestial jukebox: The paradox of intellectual property. *American Scholar*, 74(2), p. 131-135.
- Vatz, R. E. (1973). The myth of the rhetorical situation. *Philosophy & Rhetoric*, 6(3).
- Wallerstein, I. (1971). Academic freedom and collective expressions of opinion. *The Journal of Higher Education* 42(9). December 1971.
- Walsh, T. (1998). *The dark matter of words: Absence, unknowing, and emptiness in literature*. Carbondale and Edwardsville: Illinois University Press, (1998).
- Warthington, D. E. (1997). *Advancing scholarship in wartime: The World War I research experience and its impact on American higher education, 1900-1925*. PhD Dissertation, University of Illinois at Urbana-Champaign.

- Wikipedia (2005) *History of the Internet*. Retrieved from the World Wide Web on June 16, 2005 at http://en.wikipedia.org/wiki/History_of_the_Internet.
- Windows History (2007). *Windows desktop products history*. Published: June 30, 2002; Updated: March 7, 2006. Retrieved March 15, 2007 from <http://www.microsoft.com/technet/network/p2p/default.mspx>
- Wright, Q. (1949). The citizen's stake in academic freedom. *The Journal of Higher Education* 20(7), pp. 339-345, October 1949
- Wu, T. (2003). When code isn't law. *Virginia Law Review* 89(4), pp. 679-722
- Young, J. R. (2004, December 10). Internet2 connections: Members of Congress ask Internet2 to crack down on online piracy. *The Chronicle of Higher Education*. 51(16). Retrieved February 2, 2007 from <http://chronicle.com/weekly/v52/i36/36a03902.htm>
- Zarefsky, D. (1998). The decline of public debate. *USA Today*, March 1998.
- Zeller Jr, T. (2005, February 7). As piracy battle nears Supreme Court, the messages grow manic. *New York Times*, p.1C.
- Zentner, A. (n.d.). Measuring the effect of online music piracy on music sales. (Preliminary Version). University of Chicago. Retrieved on June 3, 2006, from <http://economics.uchicago.edu/download/musicindustryoct12.pdf>

Zusman, A. (1999). *Issues facing higher education*. In P. G. Altbach, R. O. Berdahl & P. J. Gumpert (Eds.), *American higher education in the 21st century: Social, political, and economic challenges*. (109-148). Baltimore: The John Hopkins University Press.

House and Senate Legislation

H.R. Rep. No. 2281, 105th Cong. Digital Millennium Copyright Act (1998).

H.R. 2281, 105th Cong. Digital Millennium Copyright Act (1998), H.R. Conference Report 105-796.

H.R. 2281, 105th Cong. Digital Millennium Copyright Act (1998), Senate Report 105-190.

H.R. Rep. No. 2222, 60th Cong., 2nd Sess., p. 7 (1909).

H.R. 4077,(2004). Piracy Deterrence and Education Act of 2004.

Court Cases

A & M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896 (N.D. Cal 2000). (“Napster I”).

A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (9th Cir. 2001). (“Napster II”).

Adobe Systems Inc. v. Canus Pods., Inc., 173 F. Supp. 2d 1044, 1048 (C.C. Cal 2001).

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248, 106 S. Ct 5505, 2510, 91 L. Ed. 2d 202 (1986).

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct 2548, 2553, 91 L. Ed. 2nd 265 (1986).

Columbia Pictures Industries, Inc v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986).

Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972)

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F3d 259, 264 (9th Cir. 1996)

Gershwin Pub. Corp. v. Columbia Artist Management, 443 F.2d 1159 (2d Cir. 1971).

Grutter v. Bollinger, 539 U. S. 306 (2003).

In Re Aimster Copyright Litigation, 252 F. Supp.2d 634 (N.D. Ill, 2002).

In Re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004).

Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911).

Keyishian v. Board of Regents 385 U. S. 589 (1967).

Marvullo v. Gruner & Jahr, 105 F. Supp. 2d 225,230 (S.D.N.Y 2000).

Pickering v. Board of Education, 391 U.S. 563 (1968).

Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

Religious Tech. Center v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) ("Netcom").

Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F. 2d 304.

RIAA v. Verizon (2003, January 21). Civil Action 02-MA-0323 (JDB).

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417
(1984).

Sweezy v. New Hampshire 354 U. S. 234 (1957).

Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

Teleprompter Corp v. Columbia Broadcasting System, Inc., 415 U.S. 394,
414, 94 S. Ct. 1129 (1974).

Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429
(C.D. Cal. 1979).

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) cert denied, 121 U.S.
759 (2001).

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

Wheaton v. Peters, 33 U. S. (8 Pet.) 591 (1834).

White-Smith Music Publishing Co. v. United Artists Television, Inc., 209
U.S. 1 (1908).

Grokster: Lower Court

MGM v. Grokster Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

MGM v. Grokster Ltd., 380 F.3d 1154(9th Cir. 2004).

MGM v. Grokster (C.D. Cal. 2003a). 243 F. Supp. 2d 1073. Motion to
dismiss denied.

MGM v. Grokster (C.D. Cal. 2003b) 259 F. Supp. 2d 1029. Summary
judgment granted in part to defendants,. Order filed: April 25,
2003.

MGM v. Grokster (9th Cir. 2004) 380 F.3d 1154: Opinion, Affirmed,
August 19, 2004.

Grokster: Supreme Court

MGM v. Grokster Ltd., Supreme Court Docket 04-480, retrieved June 20,
2007 at <http://www.supremecourtus.gov/docket/04-480.htm>

MGM v. Grokster, 545 U.S. 913 (2004): Petition for certiorari. Filed
October 8, 2004.

MGM v. Grokster, 545 U.S. 913 (2004): Brief of respondent Grokster et
al. in opposition. Filed November 8, 2004.

MGM v. Grokster, 545 U.S. 913 (2004): Reply of petitioners MGM, et al.
Filed November 22, 2004.

MGM v. Grokster, 545 U.S. 913 (2005): Brief of petitioners Songwriter
and Music Publisher. Filed January 24, 2005.

MGM v. Grokster, 545 U.S. 913 (2005): Brief of petitioners Motion
Picture Studio and Recording Company. Filed January 24, 2005.

MGM v. Grokster, 545 U.S. 913 (2005): Brief of respondents Grokster
and StreamCast Networks. Filed March 1, 2005.

MGM v. Grokster, 545 U.S. 913 (2005): Reply of petitioners MGM et al.
Filed March 18, 2005.

MGM v. Grokster, 545 U.S. 913 (2005): Reply of petitioner Songwriter
and Music Publisher. Filed March 18, 2005.

MGM v. Grokster Ltd., U.S. Transcripts of Oral Arguments. Alderson
Reporting Company (March 29, 2005).

MGM v. Grokster, 545 U.S. 913 (2005): Judgment. Rendered June 27, 2005.

Grokster: Selected Amicus Curiae Briefs

Abelson, T. (2005). Brief amici curiae of computer science professors
Harold Abelson et al..

Fisher III, W. W. (2005). Brief of Internet law faculty in support of
respondents. MGM v. Grokster (2005).

Gibson, J. (2005). Brief of amici curiae law professors, economics
professors, and treatise authors in support of petitioners. MGM v.
Grokster (2005).

Hollaar, L. A. (2005). Brief of Professor Lee A. Hollaar in support of
neither party. MGM v. Grokster (2005).

Lee, E. (2005). Brief of professors Edward Lee, Peter Shane, and Peter
Swire in support of respondents. MGM v. Grokster (2005).

Lessig, L. (2005). Brief for Creative Commons in support of respondents.
MGM v. Grokster.

Liebman, R. I. (2005). Brief of media studies professors in support of
respondents. MGM v. Grokster (2005).

Lunney, Jr. J.G. (2005). Brief of law professors in support of
respondents. MGM v. Grokster (2005).

Menell, P. S. (2005). Brief of Professors Peter S. Menell et al.. in support
of petitioners. MGM v. Grokster (2005).

Mulligan, D. K. (2005). Brief of sixty intellectual property and technology law professors and the United States Public Policy Committee of the Association for Computing Machinery in support of respondents. *MGM v. Grokster*.

Oberholzer-Gee, F. & Strumpf, K. (2005). Brief of Felix Oberholzer-Gee and Koleman Strumpf in support of respondents. *MGM v. Grokster* (2005).

Pollack, M. (2005). Amicus Brief of Malla Pollack and Other Law Professors Supporting *Grokster, Ltd., et al.*

Pulgram, L. F. et al. (2005). Brief of innovation scholars and economists in support of affirmance. *MGM v. Grokster* (2005).

Strauss, D. A. (2005). Brief of amici curiae Kenneth J. Arrow, et al. in support of petitioners. *MGM v. Grokster* (2005).

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Ita, L. & Sonntag, R. (1972). Influence of pressure on thermal diffusion in binary & ternary gaseous cryogenic systems. Journal of Chemical & Engineering Data. (1972)

Ita, L. (1976). Application of solar energy in gas separation. International Solar Energy Journal. (1976).

Ita, L. (1979). The Green Fountain- Blackjack. Las Vegas: Gamblers Book Club.

Ita, L. (1993). *Life's Experiences & the Sciences*. Calabar, Nigeria: Centaur Press.

Ita, L. (1988). *Save the Naira from Collapse*. Calabar, Nigeria: Centaur Press.

Ita, L. (1983). *Power Back to the Nigerian People Through Referendum*. Calabar, Nigeria: Paico Press

Ita, L. (1976). *21 Counting Methods to Beat 21*. Las Vegas: Gamblers Book Club.

Ita, L. (December 1, 2005). [Interview by Robert Kelly, Ed.] Political and legal issues surrounding 100 percent online teaching loads for full-time tenured faculty [Interview]. *Distance Education Report* (2005)

Ita, L. (December 1, 2003). [Interview by Judy Dahl, Ed.] Breaking down resistance to distance education [Interview]. *Distance Education Report*, 7(23), 2003

Dissertation Title: Rhetorical Criticism of Absence and Silence of University Presidents at the Grokster Court.

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