INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is but one part of a much larger, sustained campaign to suppress innovation that copyright owners cannot control. In recent years, copyright owners have sued the makers of software (*Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001); *DVD Copy Control Ass'n v. Bunner*, 113 Cal. Rptr. 2d 338 (Ct. App. 2001), *rev'd granted*, 117 Cal. Rptr. 2d 167 (2002)), the makers of devices that play music (*RIAA v. Diamond Multimedia Systems, Inc.* 180 F.3d 1072 (9th Cir. 1999)), Internet service providers (*Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001); *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal. 2002)), Internet search engines (*Kelly v. Arriba Soft, Corp.*, 280 F.3d 934 (9th Cir. 2002)), venture capitalists who fund Internet companies (*A&M Records, Inc. v. Napster*, 284 F.3d 1091 (9th Cir. 2002) (also naming ventures firm and individuals who invested in *Napster*)), and even the lawyers who represent those companies (*mp3.com v. Cooley, Godward, LLP*, No. 1-02-cv-806837, California County Superior Court, Santa Clara County (Universal, after successfully suing and then acquiring mp3.com, then sued mp3.com's counsel in underlying action)). The copyright owners' goal is quite simple: to prevent the development of any technology – including the Internet – that they perceive, with or without basis, as having any potential to enable infringement.

In this latest chapter in their campaign, Plaintiffs, the world's largest record labels,[1] have sued Lime Wire LLC ("LW") as well as its founder Mark Gorton, its Chief

[1] Plaintiffs are 13 record labels that fall under the umbrella of four major labels: (1) Sony labels—Arista Records LLC, BMG Music, LaFace Records LLC, and Sony BMG Music Entertainment ("Sony"); (2) Warner Music Group labels—Warner Bros. Records Inc., Atlantic Recording Corporation, and Electra Entertainment Group, Inc. ("Warner"); (3) Universal Music Group labels—UMG Recordings Inc.,

Technology Officer Greg Bildson, and its largest former shareholder (Lime Group LLC) for secondary copyright infringement.[2] Plaintiffs submit that they are bringing this action to stop "Defendants massive and daily infringement of Plaintiffs' copyrights." First Amended Complaint ("FAC") ¶1. In support of their claims, Plaintiffs allege, without basis, that Defendants, who they label "pirates," are responsible for the actions of users of LW's popular LimeWire peer-to-peer ("P2P") software ("LimeWire") which allows users to share freely and openly all sorts of digital files over the Internet. But this case is not really about stopping the underlying infringement that Plaintiffs claim they so desperately seek to stop, since forcing LW to close its doors will not stop the underlying infringement. Instead, Plaintiffs' true goals are to stifle innovations that they cannot control and punish those who dare cross the line and invest in a company that produces a product that can be used to infringe; Plaintiffs thereby preserve their historic market power.

Simply put, the suppression of innovation is detrimental to the public and the American entrepreneurial spirit. LW is not responsible for Plaintiffs' lot in life or their failing businesses. LW is not responsible for Plaintiffs' failure to protect their own content. Most importantly, LW is not liable for secondary copyright infringement

LW cannot be liable for contributory and vicarious copyright infringement based on the mere distribution of a product that, because of its inherent design, is capable of both noninfringing and infringing uses. The facts are not controverted; the parties and

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Interscope Records, and Motown Record Company, L.P. ("UMG"); and (4) EMI labels—Capital Records, Inc., Priority Records LLC, and Virgin Records America, Inc. ("EMI") (collectively, "Plaintiffs").

[2] Plaintiffs have also brought a claim of fraudulent transfer against Mark Gorton and the MJG Lime Wire Family Limited Partnership.

their experts generally agree as to how LW's software works. Based on those uncontroverted facts, LW is entitled to summary judgment for several reasons. [3]

First and foremost, LW is shielded from liability for contributory and vicarious copyright infringement by the *Sony-Betamax* doctrine which provides a safe harbor for products capable of substantial noninfringing uses. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Peer-to-peer technology like LW's has previously been determined to be capable of substantial noninfringing uses by all of the *Grokster* courts (including the Supreme Court, which did not upset the lower courts' rulings on this issue). *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913-14 (2005). As a result, LW and its software are entitled to the protections afforded by the *Sony-Betamax* doctrine.

LimeWire allows users to search for, obtain, and disseminate a wide variety of digital content: software, video, audio, graphics, and documents. Many actual uses of the program are substantial and noninfringing; the potential uses and capabilities are vast and still unfolding. As such, LW cannot be held liable for contributory or vicarious infringement.

Yet even if the *Sony-Betamax* doctrine did not apply, LW would remain entitled to summary judgment on Plaintiffs' claims for contributory and vicarious infringement. Plaintiffs cannot establish crucial elements of those torts as a matter of law. Instead, in an effort to sway this Court to join their anti-innovation campaign, Plaintiffs attempt to

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[3] Although LW believes it is not liable for inducement infringement, LW does not seek summary judgment on this claim except to the extent that inducement like all secondary copyright infringement requires an act of direct infringement. *See infra.* § V. The other elements of inducement require a fact-intensive analysis that does not easily lend itself to summary judgment and, here, there are substantial genuine issues of material fact on those elements.

tar LW, taking every opportunity to equate LW with Napster, the pioneer in digital file-sharing, and with Aimster and Grokster, alleged successors to Napster.[4] Unlike Napster and Aimster, however, LW does not operate a file-sharing service nor does it maintain any servers that participate in the exchange of files in any way. In contrast, like Grokster,[5] LW distributes a software product that users employ to create an open, publicly-available, P2P network directly between their own computers. Unlike Napster and Aimster, LW has no involvement with LimeWire users' subsequent file-sharing activities, whether infringing or not, and lacks the power to control or stop infringing uses once the product is delivered to users, just as Xerox has no control over what its customers may do with its photocopiers.

Moreover, like Sony, at the time it delivers its product, LW has no particular knowledge whether the product will be used by a specific consumer for infringing or noninfringing uses. LW has no ability to take effective action against a particular user based on after-acquired knowledge that the user has allegedly employed the product for unlawful purposes.

For these reasons, Plaintiffs cannot establish contributory infringement's crucial element of "material contribution" to the infringing conduct and, thus, LW is entitled to summary judgment on this claim. Likewise, Plaintiffs cannot establish that LW has the

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[4] Likewise, Plaintiffs have repeatedly mischaracterized exactly what the LimeWire software application is and what it does. Plaintiffs incorrectly claim that LW's business is some vague "system/network and related services." FAC ¶1. But in reality, LW is in the business of distributing a software product. It offers no "services" that are involved in any file-sharing by LimeWire users, nor is there any LimeWire "system" or network *per se*. The only thing close to a "system" is the network of users of the LimeWire software. However, as explained *infra*, this "system" is not unique to LW users; any person running Gnutella-based software is part of that network.

[5] No court ever found the makers of the software in *Grokster* liable for secondary copyright infringement. Instead, the overwhelming evidence of intent to induce infringing uses of the Morpheus software by the StreamCast defendant led to a finding of inducement liability in that case.

"right and ability to supervise the infringing activity" of which they complain, so LW is also entitled to summary judgment on Plaintiffs' claim for vicarious liability.

FACTUAL BACKGROUND

A. *The LimeWire Software And How It Works*

The LimeWire software program is a communication tool that allows users to connect to one another independently to form a user network, commonly known as a user-to-user or "peer-to-peer" network. SoF ¶¶ 8, 40 & 41. Using the P2P networking functionality of the software, users may search for and share any kind of computer file, including text, images, audio, video, and software files, with other computer users connected to the network. SoF ¶¶ 1, 23 & 41.

Decentralization is the hallmark of Gnutella-based software products, including LimeWire. SoF ¶ 12 (detailing technical benefits that flow from network decentralization). LimeWire's searching and file-sharing functions are entirely decentralized; after downloading and installing LimeWire on their computers, users decide for themselves what information to seek out, send, and receive with the software, without any further involvement from LW or any other defendant in this case. SoF ¶ 23.

All versions of the LimeWire software have been based on a technology known as "Gnutella." Originally developed by employees of Nullsoft (an AOL-Time Warner subsidiary), Gnutella is a simple, open networking protocol intended to enable communications between computers over the Internet.[6] SoF ¶¶ 8, 9 & 10. Because Gnutella is an open protocol (*i.e.*, publicly disclosed and free for use by all), anyone can

[6] For an overview of Gnutella networking, *see* Andy Oram (ed.), PEER TO PEER (2001) at 94-122 (describing the history and functional principles behind the Gnutella networking protocol.) The relevant chapter from this text is attached as Exhibit 1 to the Declaration of Charles Baker ("Baker Decl.").