

JURNAL PENELITIAN HUKUM

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**WHY CURRENT AMERICAN LAW IS MORE FAVOURABLE IN BOTH SUBSTANTIVE AND
ENFORCEMENT ON SECONDARY COPYRIGHT LIABILITY?**
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MENURUT PASAL 48. AYAT (1) UNDANG-UNDANG NO 21 TAHUN 2007 DALAM
PERSPEKTIF NEGARA HUKUM KESEJAHTERAAN**
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FAKULTAS HUKUM
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DAFTAR ISI

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By:

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Abstract

Copyright holders are least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today's opinion makes clear, a copyright holder may proceed against a technology provider where a provable specific intent to infringe is present. American procedural law and practices regarding enforcement are among the best anywhere as demonstrated in the relative ease of enforcement against individuals here compared to other countries.

Keywords: *Copyright, American Law*

A. INTRODUCTION

The aim of Copyright Law is to promote the public welfare by encouraging the creation and dissemination of expressive works¹. Copyright Act grants authors the exclusive right to reproduce, distribute, perform, display and license their works. American law protects copyright monopoly privileges through the imposition of secondary infringement liability. The substantive law in *Sony/Napster/Grokster* gives equal or better defence to overseas copyright owners. The Napster's decision known as the Ninth Circuit has become the world's main decision in support of the Petitioners' clash against peer to peer file sharing technology. The Napster's result itself depends on the *Sony* principle which is of secondary liability. Essentially, the reliability between Grokster and Napster are same, except those facts are different. Present American Law on secondary copyright liability are found by foreigners is more adequate and effective in meeting their legitimate needs. It is essentially to find proper reasons why current American Law is more favourable in both substantive and enforcement? It can be answered by examining the decision of *MGM Studios Inc v Grokster Ltd* and other two preceding cases which are *Napster v Sony* and *C.B.S. Songs Ltd. V Amstrad Consumer Electronics Plc*.

B. LEGAL ISSUES

1. Legal issues and arguments in the substantive law

(a) Arguments in relation to the secondary liability

Napster has become well-known in the technology matters. In the Ninth Circuit there was no hindrance or doubt in shutting down *Napster* where is obvious that the defendant had the compulsory stage of control and the burden of the secondary liability is therefore just.² This

¹ Lee, Andrew. 2005. Copyright, *MGM Studios, Inc. v. Grokster, Ltd. & In re Aimster Litigation: A Study of Secondary Copyright Liability in the Peer-to-Peer Context*. 20(2). 487.

² Yee Fin Lim, *Cyberspace Law*, Oxford University Press, 2002, p. *A&M Records Inc v. Napster, Inc.* 239 F. 3d 1004 at 1023. 443.

consequence in the Ninth Circuit is completely steady with *Sony* and goes well further than anything entailed by international law.³ Whilst the lawful systems of numerous countries are able of dealing with the subject of secondary liability in copyright law, there is no dependable model terms of doctrine or yet effect as to how is completed. In international law, the word "authorise" is not used in any important to the IRO's brief, primarily regarding secondary infringement.⁴

Authorisation is used in American circumstance which means that an ISP is legally responsible for authorisation it ought to identify or have motive to believe that infringements are taking place and have the capability to manage the content.⁵ The word authorisation entails that yet inactive involvement in the infringing behaviour along with knowledge of the conditions giving increase to the infringement; meet the criteria as authorising the conduct.⁶ The name "authorise" is resulted by one case in America obviously states that "the enclosure of the right to authorise was intended to keep away from any queries as to the liability of contributory infringers". Individuals, who do not straight implement the copyright owner's rights, but authorise others to do so.⁷ American Law includes as direct infringement much that is considered to be "secondary" elsewhere and goes further than to contain a rich judge made common law secondary liability.⁸ Under Canadian Law the comparable right is treated as "secondary infringement". On the other hand, there is no law as to secondary liability at the European Union Level. The EU cannot discover a common domestic denominator as to the subject of secondary copyright liability in this context, either on a substantive or technical doctrinal foundation. A test of the rule of human being chief industrial country jurisdictions also designates that there is no reliable model relating to secondary liability in copyright law.⁹

The case *MGM Studios Inc v Grokster Ltd* which involves the respondent's software has chiefly used by its receivers to split copyrighted music and vide files without authorisation is at least as constructive to copyright owners as in any major jurisdictions.¹⁰

The UK law on secondary liability is stated by *Copinger and Skone James* which stating the meaning of authorisation is "the grant or purported grant, which may be expressed or implied of the right to do the act complained of whether the intention is that grantee should do the act complained of on his own account or only on account of the grantor."¹¹ An expression which has often been used as equivalent to the word "authorise" is sanction, approve or countenance" but this must be treated with caution particularly insofar as the word countenance is equivalent to the word "condone". Therefore generally an authorisation be able to only originate from someone having or purporting to have authority and an act is not authorised by someone who just facilitate or probably aids or even supports another to do that act but does not assert to have

³ Supreme Court of the US. 13-14.

⁴ *Ibid*

⁵ *Ibid*

⁶ Bryan Mercurio. 2002. Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty. *E-Law*. 9 :15.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *MGM Studios Inc v Grokster, Ltd*. June 27 2015.

¹¹ *Ibid*

an authority which he can grant to give good reason for the doing of the act.”¹² In UK case mainly *CBS v Amstrad*, the House of Lord refused to discover liability primarily on the basis of the lack of control on the part of defendant over the actions of its customers. Whitford also refused to come across liability for authorisation stating that the good approach in agreement with all the United Kingdom cases is that there is no authorisation where as in the *CBS v Amstrad* the defendant is in no position to control the conduct of the person supposed to have been authorised. Thus, the element of “control” is crucial in the UK as it is in *Grokster*, *Napster* and *Sony*.¹³

(b) Arguments in relation to Contributory Liability

Contributory liability is the mainly possible method in which courts will persist to find Internet Service Provider’s (ISP) legally responsible for subscriber infringement. Contributory liability wants the ISP to include actual knowledge or strong evidence of or materially contribute to; the infringing conduct of another.¹⁴ For contributory negligence to connect, courts have assumed that the ISP must have considerably participated in the infringement, as a result merely selling a service or good that will be used to infringe is inadequate for contributory negligence. Courts disagree on when an ISP have to eradicate material or face liability, sometimes resulting in cases where ISPs allow actual infringement.¹⁵ For example, Netcom seizes that ISPs are not liable for contributory negligence if the subscriber has no reasonable claim of non-infringement and the ISP “substantially” contributes in the infringement.¹⁶ Netcom also knows that where hard to confirm infringement, the operator would have a protection adjacent to contributory infringement. Other courts yet embrace ISPs liable if they not pass to act once they obtain information sufficient to cause a reasonable person to examine. This implies that ISPs will turn out to be jeopardy unwilling and unnecessarily take away non-infringing material. The American Courts in dissimilar jurisdictions differed in their appraisal of accountability and responsibility, creating a condition where one ISP could be sued in numerous jurisdictions and be liable in some jurisdictions and held to be totally blameless in others. The remark to this situation is this can not be beared.¹⁷

The anxiety between the challenging standards of following creativeness through copyright defence and promoting technological novelty by restraining infringement liability is the subject of Sony case.¹⁸ In spite of offsetting reflections, the argument for imposing indirect liability is powerful, given the number of infringing downloads that occur in daily using respondents’ software.¹⁹ When a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device’s distributor for secondary liability

¹² See Per Whitford in *CBS v Ames Records and Tapes Ltd* (1982) Ch. 91 at 106, approved in *Amstrad Consumer Electronics Plc v British Phonographic Industry Ltd.* (1986) F. S. R. 159 at 211, C. A. and in *CBS Songs v Amstrad Plc.* (1988) A. C. 1013 at 1055, H.L.

¹³ Bryan Mercurio. *Op. Cit.* 5-6.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

on a theory of contributory or vicarious infringement. One infringes contributory by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it. Although “the Copyright Act does not expressly render anyone liable for another’s infringement”, these secondary liability doctrines emerged from common law principles and are well established in the law. The claim came up from *Sony* which stated that secondary liability for infringement can arise from the very distribution of a commercial product. Copyright holders sued Sony, the manufacturer of video cassette recorders claiming that it was contributorily liable for the infringement that occurred when VCR owners tapped copyrighted programs. The evidence showed that the VCR’s principal use was “time-shifting”, for instance, taping a program for later viewing at a more convenient time, which the Court found to be a fair, noninfringing use. Moreover, there was no evidence that Sony had desired to bring about tapping in violation of copyright or taken active steps to increase its profit from unlawful taping. On those facts, the only conceivable basis for liability was on a theory of contributory infringement through distribution of a product. Because the VCR was “capable of commercially significant noninfringing uses”, the Court held that Sony was not liable. This theory reflected patent law’s traditional staple article of commerce doctrine that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. The doctrine absolves the equivocal conduct selling an item which lawful and unlawful uses and limits liability to instances of more acute fault. The Ninth Circuit misread *Sony* to mean that when a product is capable of substantial lawful use, the producer cannot be held contributorily liable for third parties’ infringing use of it, even when an actual purpose to cause infringing use is shown, unless the distributors had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that information. *Sony* did not displace other secondary liability theories.²⁰

Where proof goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses and demonstrates statements or actions directed to promoting infringement, *Sony*’s clip piece of writing rule will not preclude liability.²¹ At common law a copyright or patent defendant who “not only expected but invoked infringing use by advertisement” is liable for infringement.²² The rule on inducement of infringement as developed in the early cases is no different today. Evidence of active steps taken to encourage direct infringement such as advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe, and overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use. A rule that premises liability on purposeful, culpable expression and conduct does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.²³

(c) Arguments in relation to Direct Liability

Two needs must be satisfied in order to present a case for direct liability. First, the plaintiff ought to demonstrate ownership of the allegedly infringing material. Second, the plaintiff must

²⁰ *Ibid.*

²¹ Supreme Court of the US. 18-19.

²² Supreme Court of the US. 18-19.

²³ *Ibid.*

reveal that the alleged infringers dishonoured an exclusive right granted to the copyright holder.²⁴ A little number of courts has held that the act of providing Internet service attaches liability to an ISP for copyright infringement. These apparently harsh decisions are because of the fact that in response to subscriber requests, ISPs reproduce and distribute copyrighted material, as every download causes the ISP's computer to copy the material and forward it to the subscriber.²⁵ A case in 1993 had used this theory to determine liability.²⁶ It was held that when another party posted Playboy photos onto the defendant's BBS, notwithstanding the fact that the defendant was unaware of the infringing material. However, several cases have discredited this theory due to the extreme and unreasonable liability it creates.²⁷ It was stated "although copyright is a strict liability statute, there should be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."²⁸ The court continued, "Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for functioning of the Internet." The case of *Sony Corp v Universal City Studios* was held that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third party action is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.²⁹ The direction of the internet has expanded since the Playboy decision and courts are well aware of the stifling effect direct liability would cause for the industry. Therefore, it is extremely unlikely another court will hold an ISP directly liable for simply providing the service to infringing subscribers.

2. Legal issues and Arguments in Australian law

(a) Two leading cases – *Telstra v APRA* and *APRA v OzEmail*

The case law and clearness of ISP liability for subscriber copyright infringements is less developed in Australia than in the United States. The pilot case, *Telstra v Australasian Performing Rights Ass'n (APRA)*, occurred when Telstra played music in which APRA owns copyright to persons on hold on the telephone.³⁰ The majority of the High Court held Telstra infringed APRA's right to reason the works to be conveyed to the subscribers by a dispersal service.³¹ While this case does not engage ISPs, it is leading authority on the diffusion right. Subsequent to this case, APRA based its claim against ISPs on this right. The three to two majority stated there were three basics of s 31(1)(a)(v) which must be satisfied to establish a diffusion right violation.³² First, there must be a diffusion service. Section 26(1) provides diffusion involves "the transmission of the

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Playboy Enterprises, Inc. v Frena*

²⁷ *Religious Technology Center v Netcom*

²⁸ Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty. 9. No. 4, E-Law. 2002. 4.

²⁹ *MGM Studios v. Grokster*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

work or other subject matter in the course of a service of distributing broadcast or other matter...over wires, or other paths provided by a material substance.”³³ The majority held that the unnecessary music transferred over telephone lines constituted such a service. Second, the work must be transmitted to the subscribers of the service. In Telstra, the music is being transmitted to the people who phoned Telstra, not the company that subscribes to the music on hold service (Telstra).³⁴ However, since the music “service” is incidental to their purpose of business, s 26(5) deems to the subscribers to the telephone service to be subscribers to the diffusion service. Therefore, the music was transmitted to the premises of the deemed subscribers of the music service. Third, the alleged infringer must have caused the transmission of allegedly infringing material. Section 26(2) provides the person operating the service is deemed to be the person causing work to be transmitted. In addition, s26 (4) states, the “person who undertakes to provide the service to subscribers in agreements with them “is taken to be the” person operating the service.”³⁵ Since the majority deemed the callers to have an agreement with Telstra by which Telstra provides the music on hold service, Telstra is the “person operating the service” and “caused” the transmission. Therefore, Telstra was liable for the playing of music on hold, even though it exercised no control in determining the content of the music played.³⁶

The other case is APRA v OzEmail. While the Telstra litigation was ongoing, APRA notified several ISPs alleging that they were infringing the diffusion right of the musical works which APRA owned. APRA demanded a \$1 license fee per subscriber and decided to litigate a test case when ISPs refused to accept liability or pay the fee.³⁷ This case would have authoritatively decided the issue of ISP liability in Australia, but was settled before trial. Under the three requirements under s31 (1)(a)(v) set out by Telstra, APRA’s case against OzEmail probably would have been successful. First, an ISP is unquestionably involved in a diffusion service, as its main purpose is to transfer material from the Internet to subscribers.³⁸ This transfer typically takes place over telephone lines. Therefore, the transfer would qualify as a “distribution” over “wires” under s 26(1). The second requirement, that works must be transmitted to the premises of subscribers is easily met. Section 26(5) is not needed to deem subscribers as users enter into a contract with the ISP to provide services to their premises. Third, the ISP has caused a transmission because they are “operating a service.” Because a contract between the ISP and user exists, s 26(4) is satisfied without the need to use s26(5) to deem an agreement.³⁹

(b) Authorisation

Section 13(2) of the Copyright Act states authorising others to do an act in relation to the copyright in a work is one of the copyright owner’s exclusive rights.⁴⁰ Without the license of the copyright of a work (s 36(1)) or Part IV subject matter (s 101(1)) amounts to a direct infringement of the copyright. In this context, to authorise an infringement means to “sanction, approve or

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Bryan Mercurio. *Op. Cit.* 14-15.

countenance" the infringement.⁴¹ In Australia, the High Court in 1976 utilised the authorisation doctrine to impose copyright liability on a university library that provided self service photocopiers to its patrons.⁴² However that decision has been criticised and is doubtful law in the UK. It has been expressly disavowed by the Supreme Court of Canada on the basis that the Australian High Court's "approach to authorisation shifts the balance in copyright works for the good of society as a whole." Thus it can be seen that regardless of the absence of treaty law on the subject of secondary liability, American substantive law as stated by the Court in *Sony*, *Napster*, and *Grokster* is already at least as favourable to rights owners and even more explicit than the law in most if not all other developed jurisdictions.⁴³

3. Equality between Foreign Rights Owners and American Counterparts

(a) Better Enforcement Mechanisms in U.S. Courts

Foreign copyright have better recourse in American Courts to effective enforcement than is available to their American counterparts, and they have access through their governments to powerful trade remedies that are not in fact available to American copyright owners.⁴⁴ Foreign interests are likely to enjoy a higher substantive level of protection in respect of obtaining relief based upon secondary liability than in other major jurisdictions. In terms of effective procedures, foreign interests actually enjoy a significant advantage over American copyright owners.⁴⁵ They do not need to register their copyrights as a prerequisite to enforcement by litigation. This is an important advantage in litigation of the nature currently underway against thousands of individuals in the USA, where it is alleged that many of them have illegally downloaded thousands of songs. The saving of time and expense required to obtain copyright registrations for hundreds or even thousands of individual songs is a very significant advantage over American copyrights owners in litigation against many individuals who clearly would each be downloading a different list of songs. The American recording industry has successfully used the current legal provisions to extract settlements from large numbers of individuals. American procedural law and practices regarding enforcement are among the best anywhere as demonstrated in the relative ease of enforcement against individuals here compared to other countries. There is a well established mechanism in place to generate substantial settlements averaging \$4,000 in these lawsuits.⁴⁶ This situation may be compared to that of America's neighbour and major trading partner, Canada, where the record industry has been unsuccessful to date in its litigation efforts against individual down loaders and file shares based upon major differences in substantive law and procedural safeguards to the privacy of individuals. Subject to reversal on appeal, the Canadian Federal Court has essentially held that downloading and even file sharing are immunised from liability by the private copying levy scheme in Canada, and that Canadian privacy law protects the identity of individuals sued to date on the basis of evidence filed. Foreign interests have full recourse on the same basis as American copyright owners to the statutory damages provisions

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

found in 17 U.S.C s 504(c), which allow a minimum recovery of \$750 for each infringing song. These are believed to be the highest statutory minimum damage provisions in the world. Important jurisdictions such as the UK do not even have any statutory minimum damage provisions. There is no requirement for statutory minimum damages in any treaty. These provisions play an important role in litigation against down loaders and are already viewed as excessive at their minimum level.

Copyright holders are least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today's opinion makes clear, a copyright holder may proceed against a technology provider where a provable specific intent to infringe is present. In addition Copyright holder has always had the legal authority to bring traditional infringement suit against one who wrongfully copies.⁴⁷ Indeed, since September 2003, the Recording Industry Association of America (RIAA) has filed "thousands of suits against people for sharing copyrighted material." These suits have provided copyright holders with damages; have served as a teaching tool, making clear that much file sharing, if done without permission is unlawful; and apparently have had a real and significant deterrent effect. Further, copyright holders may develop new technological devices that will help curb unlawful infringement. Some new technology, called "digital watermarking" and "digital fingerprinting", can encode within the file information about the author and the copyright scope and date which "fingerprints" can help to expose infringers.⁴⁸

At the same time, advance in technology have discouraged unlawful copying by making *lawful* copying cheaper and easier to achieve, for instance, downloading music with the copyright holder's permission. Consequently, many consumers initially attracted to the convenience and flexibility of services like Grokster is now migrating to lawful paid services. Where they can enjoy at little cost even greater convenience and flexibility without engaging in unlawful swapping. As Sony recognised, the legislative option remains available. Court is less well suited than Congress to task of "accommodating fully the varied permutations of competing interests that are inevitably by such new technology."

(b) Free to Challenge any Alleged Inadequacy of American Law

At last, in terms of right of entry to enforcement, foreign interests contain a huge benefit that is unavailable to American interests. They are liberated to join the help of their individual governments to carry a trade challenge against the United States if they are of the belief that American law is in any way lacking according the TRIPs agreement.⁴⁹ This was effectively done by European rights holders through the sponsorship of the EU with fast and effectual results in which the American provisions of 17 U.S.C. s 110(5) were found to be non-compliant.⁵⁰ A considerable monetary payment has been enforced together with a requirement that the United States bring its law into compliance. It is to be noted that, although the United States has been

⁴⁷ Supreme Court of the US. 20-28.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

the most frequent complainant in TRIPs cases, the first copyright case to produce a panel report was in fact this very case and it went against the United States.⁵¹

The utilisation of the WTO at the request of member states to hoist stages of intellectual property should be renowned to the music country if for no other reason than the flourishing confront relating to s 110 (5) of the U.S Copyright Act.⁵² If any member state of the WTO was of the view that American law since *Sony* is defiant, they have consequently far to carry any act using the argument settlements mechanisms obtainable through the WTO.⁵³ United States law on secondary liability is not likely to be of much consequence or forthrightly even much use or even interest in most other countries, because of the tremendously characteristic environment of the development of the policy of secondary liability in this country and the very dissimilar principles abroad. In spite of all of the previous, there may be suitable rule point of view why the United States has to take a control responsibility in establishing international norms for the burden of secondary liability in copyright law.⁵⁴ However, it cannot be excessively stated that this is the single privilege of the Executive Branch. Finally, even if there were a treaty obligation with respect to secondary liability it is normally the role of Congress to implement any treaty achieved by Executive Branch.⁵⁵

C. CONCLUSION

To sum up, there are completely no needs in international law for burden of any particular principle, much less any level, of secondary liability for copyright infringement in the United States. From the point of view of a foreign copyright owner contemplating litigation in this country, both the substantive and enforcement provisions of American Law are likely to be identical or better than in the party's own country. Furthermore, it is not the position of this Court either to alter U.S copyright law or to turn out to be engaged in international relations and trade relations, which are the only liability of the Congress and the Executive Branch. Therefore, this court requires not and has to not be worried with any of the international issues raised by the IRO.

It is suggested that other countries should look up to the system of law in America regarding both substantive and enforcement on secondary copyright liability. Technology has given a massive influence on how we deal with information. It has created copyright problems. Scholars and policy makers should play vital role in order to protect the rights of copyright owners. Scholars and policy makers should ask whether the system of law has accommodated the rights of authors narrowly. The moral of users on using the information of authors should be wisely increased so that piracy and plagiarism will be avoided. It is realised that this task is not as easy as we think. Collaboration between policy makers, scholars and other institution that concerned on Copyright problems become necessary.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

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