Peer-to-Peer

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Internet Law
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Class 21

Where we are

- Part I: Public Law
- Part II: Private Law
  - Control over Computers
  - Domain Names
  - Copyright
  - Innovation
  - Case Studies

In today's class

- What is a copy?
- The law and technology of file-sharing
  - First-generation: Napster
  - Second-generation: Grokster

What is a copy?

"Copies"

"'Copies' are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or communicated, either directly or with the aid of a machine or device."

17 U.S.C. § 101

"Fixed"

"A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

17 U.S.C. § 101

MAI v. Peak

- RAM copies in computer memory are "copies" for purposes of copyright
  - Implications for initial fixation?
  - Implications for infringement?
- New digital technologies . . .
  - Make it easier to make lots of copies
  - Make more activities into infringements

Are the following “copies?”

- A live lecture?
- A movie on a DVD?
- On a computer hard drive?
- In the computer’s memory?
- On Gmail as an email attachment?
- Your memory of the movie?
- A printout of a downloaded short story?

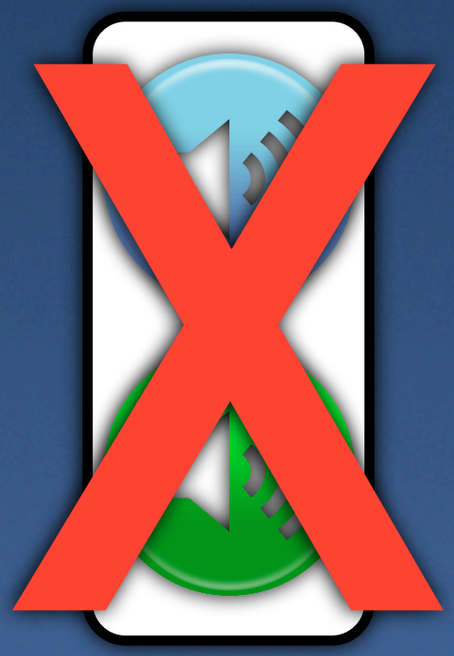
Napster

Napster

Napster


Napster
TM

Napster



Napster: fair and infringing uses

- Napster's uses:
  - Get music without paying for it
  - Try before you buy ("sampling")
  - Space-shifting
  - Authorized / public domain distribution
- Which of these uses are fair? Which are actionable?

Napster: contributory infringement

- Napster isn't a direct infringer, but . . .
- . . . it is a contributory infringer. Why?
  - It has *actual* knowledge of infringement as to those files the record companies have told it about
    - It "fail[ed] to purge such material"
  - It materially contributed to infringement
  - Game, set, and match?

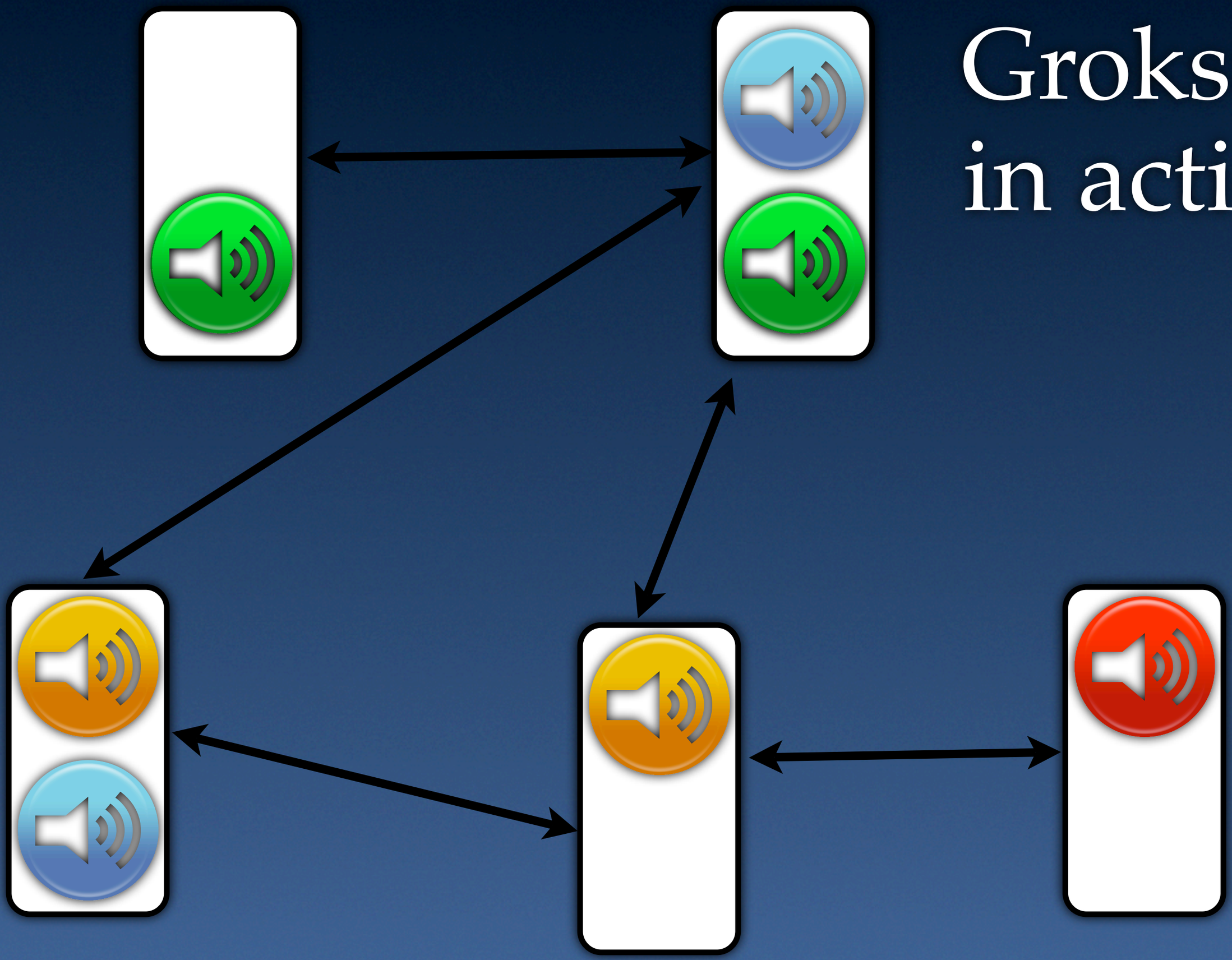
Napster: distinguishing *Sony*

- At least on a motion for a preliminary injunction, Napster might have substantial non-infringing uses
- The *Napster* court treats *Sony* as a limitation on imputed knowledge
  - Napster should have known its product would be used for infringement, but that knowledge can't be imputed to it
  - Why doesn't this help Napster?

Napster: vicarious infringement

- Napster has no revenues, but it still has a "financial interest" in the infringement!
  - Its future business models depend on building a large user-base now
- It also has the right and ability to supervise
  - Not because it could scan users' drives
  - But because it maintains the index

Grokster



Grokster in action

Second-generation p2p networks

- Gnutella network: Gnutella, LimeWire, Morpheus III, BearShare
- FastTrack network: Kazaa, Grokster, iMesh, Morpheus II
- eDonkey network: eDonkey2000, eMule
- Others include(d) Soulseek, WinMX, Blubster, Aimster, and the mysterious Earthstation 5

Grokster would win under *Napster*

- Grokster isn't a direct infringer
- Even if it has actual knowledge of specific infringing acts, it can't stop them
- Under *Sony*, knowledge can't be imputed, since the technology has significant non-infringing uses
- It has a direct financial interest, but no right and ability to prevent the infringement

So why does Grokster lose?

- Because the bad guys always lose?
- Actually, yes—Grokster designed its system to finesse the *Sony* test with the specific intent of causing infringement
- Thus, an inducement prong: "[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps . . . is liable for the resulting acts of infringement""

What *Grokster* doesn't say

- When the case went up, many people thought the issue was how to balance infringing and noninfringing uses
  - Indeed, the concurrences split 3-3 on precisely this issue
  - The inducement test resolved the case but not the deeper issue
- Still open: how substantial must a noninfringing use be to be "substantial?"

Next time

DRM and the DMCA