Peer-to-Peer and Inducement

Copyright Law – Professor Grimmelmann
Class 22 – November 11, 2008

setting up *Sony*

- Sony sells VCRs. Some of its customers tape copyrighted programs shown on TV.
  - is Sony a direct infringer?
  - is Sony a vicarious infringer?
  - is Sony a contributory infringer, *based on the doctrine as we saw it in* Abdullah?

the policy problem

- some people use VCRs to infringem but other people use them legitimately
- if Sony pulls the VCR from the market because it's liable for infringing uses, innocent users suffer
- we need to put the non-infringing uses into the liability assessment somehow

the *Sony* "solution"

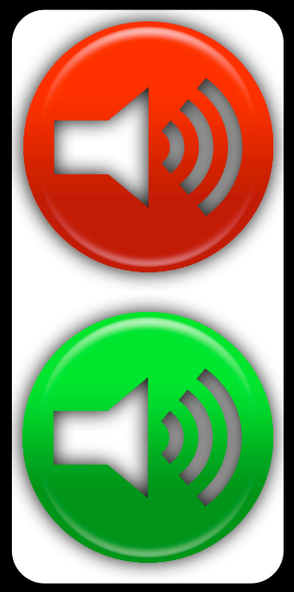
- "the sale of copying equipment . . . does not constitute contributory infringement if the product is **capable of substantial non-infringing uses**."
  - defense to contributory infringement
  - forward looking; no balancing
  - knowledge irrelevant

some problems with the solution

- this rule "works" for the VCR, but . . .
  - what if the non-infringing uses are substantial but the infringing ones are overwhelming?
  - what if a simple design tweak would have eliminated the infringing uses?
  - does it encourage lawsuits against users?

Napster
TM

Napster
TM



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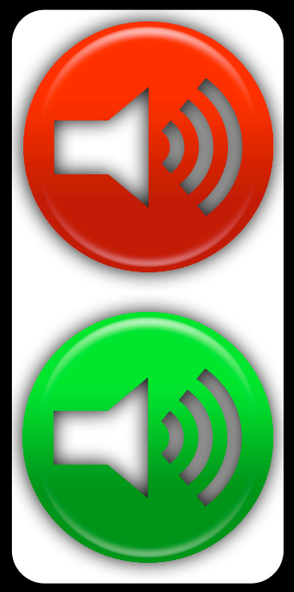

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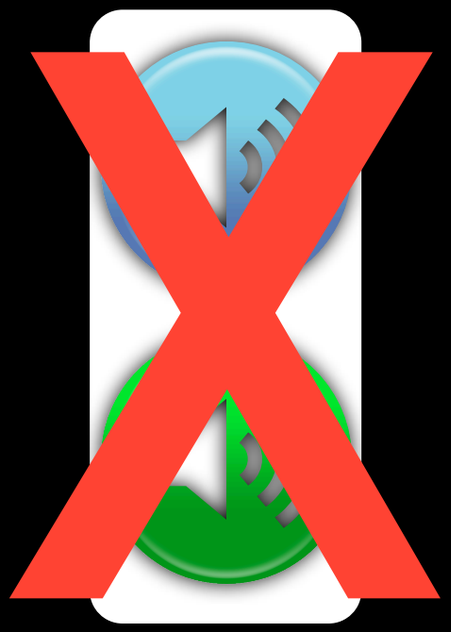
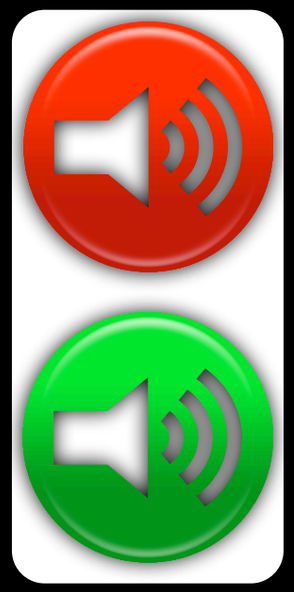
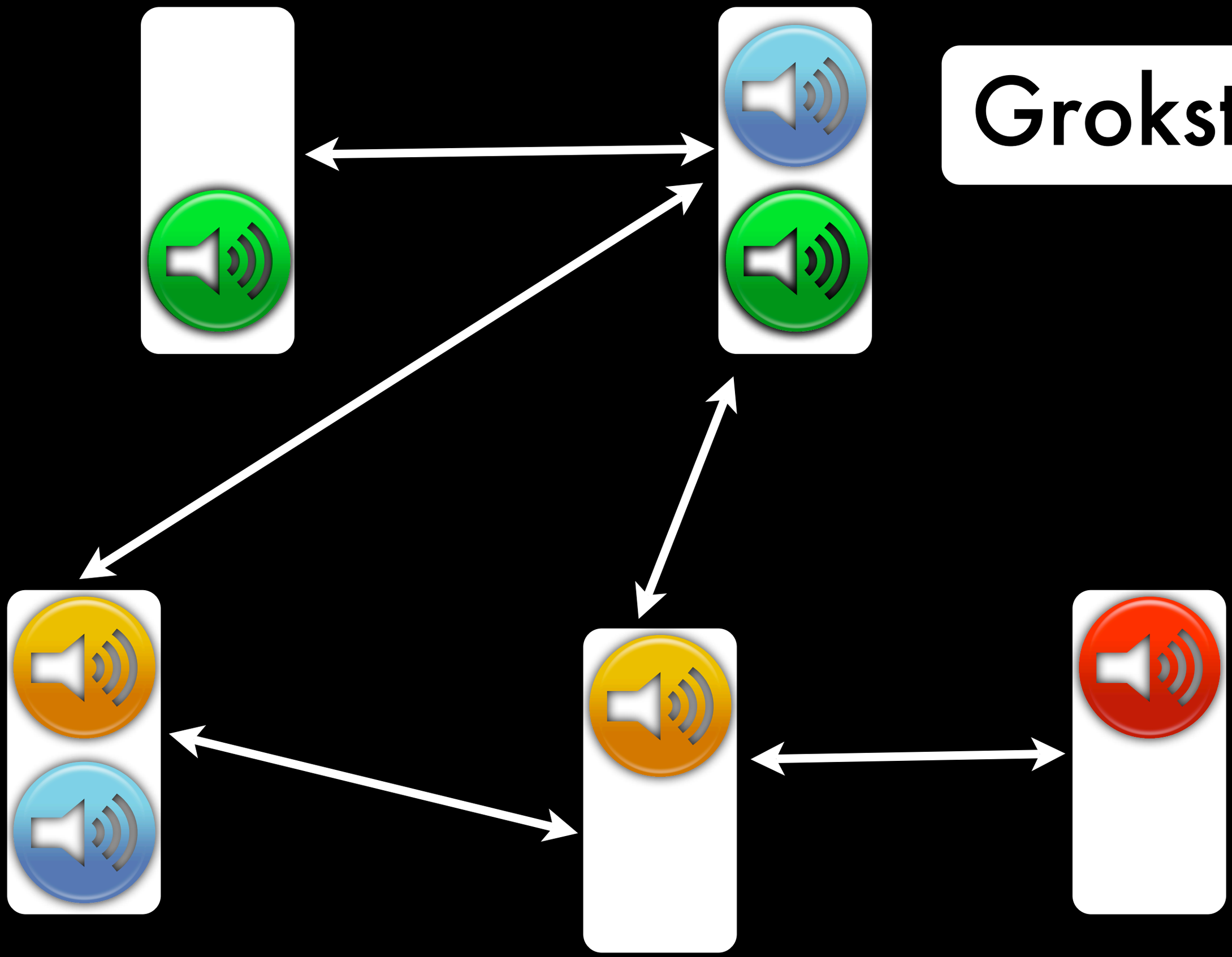
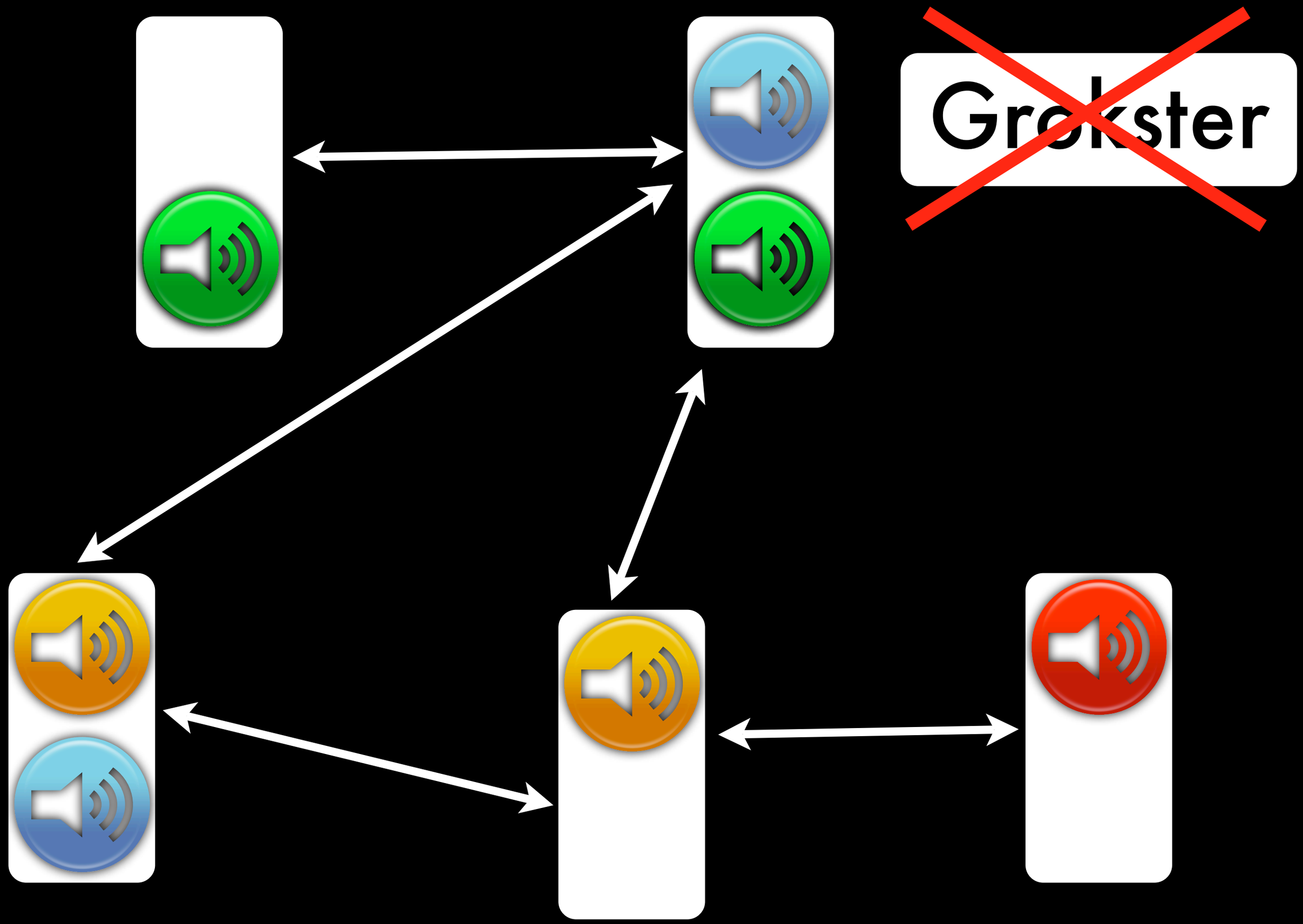




peer-to-peer: round 1

- peer-to-peer systems are clearly capable of substantial non-infringing uses, but most of them are primarily used to infringe
- Napster runs a central server through which all searches (but not files) pass
- thus, the court can duck the *Sony* issue
- Napster shuts down, but . . .


Grokster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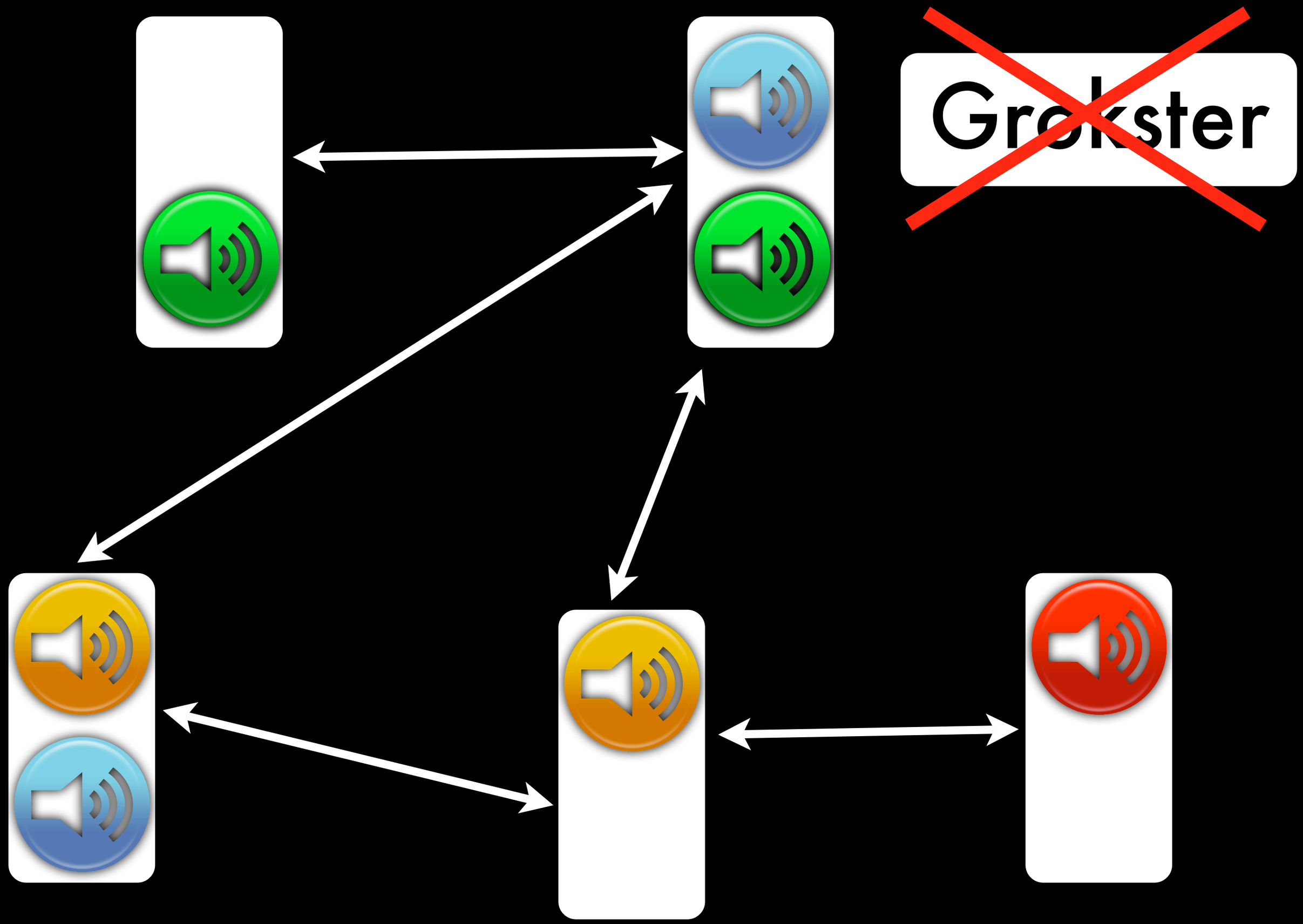
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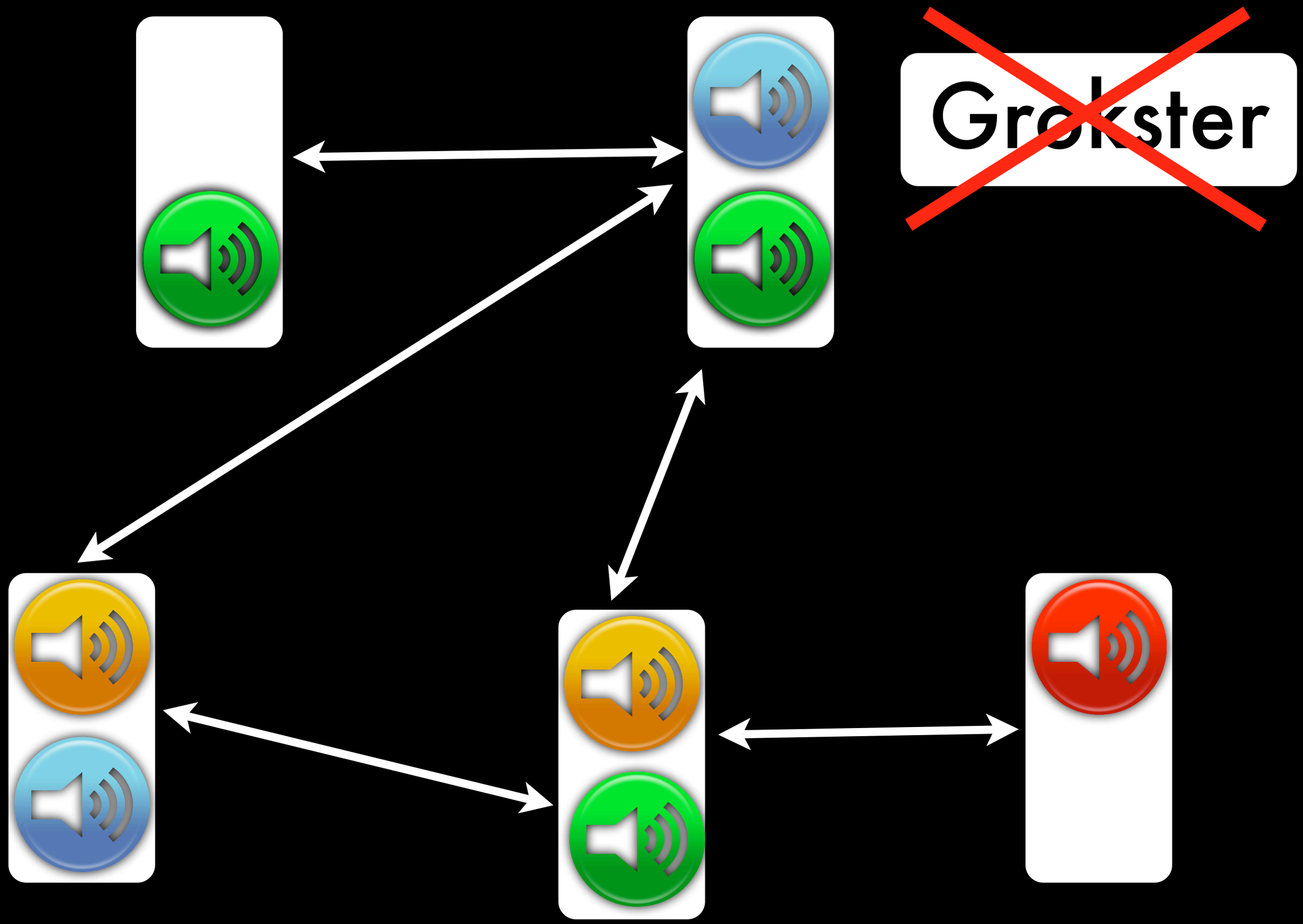
Grokster

peer-to-peer: round 2

- Aimster doesn't have a central server
  - thus, the *Napster* dodge isn't available
- the court reinterprets *Sony* as having an explicit balancing test between infringing and non-infringing uses
- guess who wins?

peer-to-peer: round 3

- you can get away with *Aimster* if you're Richard Posner
- but the Ninth Circuit believes that *Sony* means Grokster et al. are immune from contributory infringement (why?)
- the Supreme Court grants certiorari, presumably to resolve this issue . . . but doesn't

Grokster

- instead, *Grokster* adds a new secondary liability test: "one who distributes a device with the **object of promoting its use to infringe copyright**, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the **resulting acts of infringement** by third parties."

thinking about inducement

- please do not ask me whether inducement liability is a kind of contributory liability
- what did StreamCast and Grokster do that indicated "unlawful intent?"
- inducement?

secondary liability summary

- vicarious: right and ability to supervise + direct financial benefit
- contributory: knowledge + material contribution (w/ *Sony* defense for devices)
- inducement: intent to infringe + resulting infringement

the road not taken

- why are we trying to derive our theory of secondary liability from *respondeat superior*?
- instead, why not judge infringing devices using *product liability* doctrines?
  - assess social benefits vs. social costs
  - look for reasonable alternative designs
- is this route better or worse than *Sony*?

Abdallah revisited

- why doesn't Abdallah get a *Sony* defense?
  - not a "staple article of commerce?"
  - not "capable of substantial uses?"
  - it's not just about the cassettes?
- do these applications make sense?
- how does Abdallah fare under *Grokster*?

Perfect 10 v. VISA

- this is our second Perfect 10 case (and in Internet Law, we read a third)
- this time, Perfect 10 is suing the VISA consortium, for processing credit-card payments to infringing web sites
- Judge Kozinski (from the Duke Nukem case) writes a fierce dissent

VISA: the law

- if VISA cuts off Flawless8.com, would it prevent any specific infringing acts? would it have a longer-term effect on infringing acts?
- is VISA's service a "material contribution?"
- does it have the "right and ability to control" infringement?
- does it "induce" infringement?

VISA: the policy

- if VISA can be liable, would that make the electric company liable, too? the computer repair guy? the local sandwich shop?
- on the other hand, isn't VISA contributing to the infringement? and doesn't VISA have the practical power to cut down the infringement? what are the costs and benefits of asking it to do so?

next time

section 512 / copyright crimes