

SLINGING TELEVISION: A NEW BATTLEGROUND FOR TECHNOLOGY AND CONTENT HOLDERS?

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I. INTRODUCTION

Copyright law is a forum with a long history of conflicts between technological innovations and creative rights.¹ The need for copyright law originated with the development of the printing press, yet the balance between copyright and technology has been reviewed and shifted repeatedly thereafter.² From mechanical music machines to modern computers networks, technology has pushed development of copyright law both through legislation and courtroom trials.³ In 1908, the reproduction of mechanically read piano rolls challenged the Supreme Court to interpret the application of copyright to new machines, particularly new machines that did not require human cognition.⁴ The Court deferred to Congressional power over copyright, and identified that a lack of statutory guidance to indicate copies for technological use meant no copyright violation.⁵ This finding tilted copyright law in favor of technology and innovation, although Congress quickly changed the law to increase creative protection.⁶ More recently, the Supreme Court has twice addressed cases focusing on the boundary between protection and innovation.⁷ In 1984, the Supreme Court settled a battle that began over the VCR focusing on the right to record television broadcasts.⁸ Unlike the music rolls challenged in 1905, the VCR itself did not come with the accused infringing material.⁹ Instead, the VCR enabled individuals to make infringing recordings.¹⁰ As an initial step, which expanded protec-

¹ See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 358–61 (1989) (discussing the interactions between legislation, court decisions, and industry over the past century).

² See Association of Research Libraries, *Copyright Timeline: A History of Copyright in the United States*, <http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml> (last visited April 13, 2007).

³ *Id.*

⁴ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 8–10 (1908).

⁵ *Id.* at 17–18.

⁶ See Copyright Act of 1909 § 1(e), 17 U.S.C. § 1(e) (1976) (extending copyright to mechanical reproductions).

⁷ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (addressing peer-to-peer computer networks and distribution of music); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (addressing the VCR and recording of television broadcasts).

⁸ See *Sony*, 464 U.S. 417.

⁹ *Id.* at 419–20.

¹⁰ *Id.*

tion for creators, copyright law was acknowledged to include contributory or vicarious infringement, whereby someone could be liable for another's copyright violation by enabling or contributing to the violation.¹¹ Despite this expansion of copyright law, the VCR was not held liable under any theory of copyright violation as it was protected by an individual's right to fair use.¹² Two decades later, file-sharing networks proliferated across the internet, and copyright protected music was freely copied and distributed without any author's consent.¹³ Again reaching the Supreme Court, the protections against contributory infringement that had protected Sony were not applied in the face of actual inducement of copyright violations.¹⁴ Inducing activities were strict violations of copyright, such that fair use analysis did not apply, and authors' rights were protected in the face of some technological applications.¹⁵ Today, another technological advance is threatening creative rights.¹⁶ The Slingbox broadcasts television, cable, or satellite video coming into the house across the Internet to be viewed anywhere.¹⁷ Creative right holders again feel threatened, while Slingbox creators claim that there is no copyright violation and, further, that any violation would be protected under fair use as "place-shifting."¹⁸ Section II analyzes the Slingbox and place-shifting video. Section III analyzes potential copyright violations of place-shifting and finds that the Slingbox implementation creates copyright violations of reproduction and preparation of derivative works. Section IV analyzes the Slingbox in light of *Grokster* and finds no inducement.

¹¹ *Id.* at 434–35.

¹² *Id.* at 442.

¹³ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹⁴ *Id.* at 931, n.9.

¹⁵ *Id.* at 935.

¹⁶ See Andrew Wallenstein, *Slingbox Could Spark New Lawsuits*, HOLLYWOOD REPORTER (July 6, 2005), available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000973572 (discussing place-shifting technology embodied in the Slingbox and the possibility of legal action against it).

¹⁷ Sling Media, Products, <http://us.slingmedia.com/page/products.html> (last visited April 13, 2007).

¹⁸ Compare Nate Anderson, *Sling Strikes Out With Major League Baseball*, ARS TECHNICA (June 7, 2006), available at <http://arstechnica.com/news.ars/post/20060607-7010.html> (identifying Major League Baseball as one content holder objecting to the Slingbox and likely to bring suit), with *Digital Content and Enabling Technology: Satisfying the 21st Century Consumer: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. 19 (2006) [hereinafter *Hearing*] (statement of Blake Krikorian, CEO, Sling Media) (declaring "the Slingbox does not make a copy" during a hearing on fair use of digital content).

Section V analyzes the fair use of place-shifting and finds no copyright liability under *Sony*.

II. THE SLINGBOX DEVICE

Sling Media, founded by two San Francisco Giants fans, introduced the Slingbox in 2005.¹⁹ The Slingbox is a device which connects both to the video input of a television and to an internet connection.²⁰ The Slingbox transmits video across the internet, allowing a Slingbox owner to view home television remotely on any internet-connected device.²¹ The video input can come in different forms: analog broadcast from an antenna, analog or digital cable, satellite video feeds, or video from playback devices such as a DVD player or digital video recorder.²² The internet connection can be of any type, but the Slingbox is particularly designed to work with broadband such as cable or DSL typically used by the home consumer.²³ While the Slingbox does not have wireless support, it does have an ethernet-over-power-lines option to extend home networks to the television.²⁴ The Slingbox will auto-configure most home routers to provide remote access across the internet.²⁵ The Slingbox registers a unique identifier for remote lookup, enabling internet access.²⁶ In addition to the device, Slingbox software must be installed on any viewing system.²⁷ The software automatically detects any Slingbox device on a local network, or users can

¹⁹ See Sling Media, About Sling Media, <http://www.slingmedia.com/go/about> (last visited April 13, 2007); Ken Belson, Take Your Cable Channels With You on the Road, N.Y. TIMES, Dec. 21, 2005.

²⁰ Belson, *supra* note 19.

²¹ *Hearing, supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

²² See About Sling Media, *supra* note 19; Sling Media, Slingbox AV Overview, <http://us.slingmedia.com/go/slingbox-av> (last visited Feb. 26, 2008); Sling Media, Slingbox PRO Overview, <http://us.slingmedia.com/go/slingbox-pro> (last visited Feb. 26, 2008) (listing all the various options and support for the Slingbox device).

²³ See SLING MEDIA, SLINGBOX USER GUIDE 21 (2005), available at <http://support.slingmedia.com/get/KB-005105.pdf> (identifying needing “a high-speed Internet connection using a cable or DSL modem” for remote viewing).

²⁴ See Sling Media, Slingbox Accessories, <http://www.slingmedia.com/go/accessories> (last visited Feb. 26, 2008).

²⁵ See SLINGBOX USER GUIDE, *supra* note 23, at 41 (identifying auto-configuration of routers with UPnP support).

²⁶ See Matt Whitlock, *How To Find Your Slingbox Remotely* (Oct. 20, 2005), available at <http://www.slingcommunity.com/article/10098/>.

²⁷ Sling Media, SlingPlayer for Slingbox AV, <http://www.slingmedia.com/go/slingbox-av-slingplayer> (last visited Feb. 26, 2008) [hereinafter SlingPlayer].

manually configure the software to look up a specific Slingbox by its unique identifier.²⁸ Any viewing system can then connect to the Slingbox, either locally or remotely over the internet, although the Slingbox device will only respond to one remote view at a time.²⁹ The viewing software provides a video window and virtual remote control.³⁰ Configuration options include video buffer settings, video and audio smoothness and quality adjustments, and connection settings.³¹ When connected, the Slingbox software displays whichever video channel the user selects.³² In this manner the Slingbox “place-shifts” an individual’s home television across the internet to wherever the individual happens to be.³³ It only shifts what can be displayed on the home television; no recording or playback options are provided in the remote software.³⁴ Access is available on computers and mobile devices, including cell-phones, Palm devices, and other PDAs.³⁵ If an individual has internet access and video capability on a device, the Slingbox can “place-shift” home television to that device.³⁶

III. POTENTIAL COPYRIGHT VIOLATIONS

Liability under the copyright statute requires a violation of one of six exclusive rights.³⁷

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

²⁸ SlingPlayer for Windows, Frequently Asked Questions: Sling Community, <http://www.slingcommunity.com/article/27109/> (last visited Feb. 26, 2008).

²⁹ *Id.*

³⁰ SlingPlayer, *supra* note 27.

³¹ See SLINGBOX USER GUIDE, *supra* note 23, at 67–83.

³² *Id.* at 53.

³³ *Hearing, supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

³⁴ Sling Media, Frequently Asked Questions, <http://www.slingmedia.com/go/faq> (last visited Feb. 26, 2008).

³⁵ SlingPlayer, *supra* note 27.

³⁶ *Hearing, supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

³⁷ 17 U.S.C. § 501 (2006).

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatics, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.³⁸

The sale or distribution of the Slingbox does not infringe these rights, therefore Sling Media could only be found liable under a secondary liability theory.³⁹ If use of the Slingbox creates a copyright violation, then secondary liability could apply to Sling Media.⁴⁰

A. *Reproduction*

A copyright holder has “exclusive rights . . . to reproduce the copyrighted work in copies.”⁴¹ Sling Media CEO Blake Krikorian claims that the Slingbox does not copy.⁴² This claim directly refers to the Copyright Act requirement of “fixation.”⁴³ A copy is fixed when it “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴⁴ The Slingbox streams video to the remote viewing computer, but never allows it to be permanently stored on that computer.⁴⁵ With use of the Slingbox there are two devices capable of displaying the video, the television and the remote computer, while without the Slingbox there would only be one. By not allowing the remote computer to store the video for longer than necessary to display the video stream, Sling Media has attempted to avoid infringing the right of reproduction.⁴⁶ The computer, how-

³⁸ 17 U.S.C. § 106 (2006).

³⁹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

⁴⁰ *Id.*

⁴¹ 17 U.S.C. § 106(1).

⁴² *Hearing, supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

⁴³ 17 U.S.C. § 101 (2006).

⁴⁴ *Id.*

⁴⁵ *Hearing, supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

⁴⁶ *Id.*

ever, stores the video stream long enough to communicate it by display, so violation may hinge on a question of just how long is “transitory duration.”⁴⁷

1. Is Loading into Computer Memory a Copyright Violation?

Connecting a cable feed to a second television, or turning on a second television to receive a broadcast, would create a second video display but not a second copy.⁴⁸ Digitization to a computer interpretable format, however, may create such a copy.⁴⁹ In 1993, the Ninth Circuit grappled with the problem of copies in computer memory in *MAI Systems Corp. v. Peak Computer, Inc.*⁵⁰ Peak maintained and repaired customers’ computer systems that ran MAI copyright-protected operating system software.⁵¹ While the customers were licensed to use the MAI software, including the creation of any copies necessary in its operation, Peak was not.⁵² MAI claimed that by turning on the system, Peak created a reproduction in computer memory, or RAM, of the MAI software.⁵³ Without authorization from MAI, this was a violation of the exclusive right of reproduction.⁵⁴ Peak argued that RAM was not fixed, as RAM contents would be deleted when owners turned off their computers, making it transitory.⁵⁵ The Ninth Circuit, however, held that the RAM copy was “sufficiently permanent or stable . . . to be perceived, reproduced, or otherwise communicated” because Peak could view the system log and diagnose the problem.⁵⁶ Therefore, loading copyright material into computer memory can violate the exclusive right of reproduction.⁵⁷

⁴⁷ See 17 U.S.C. § 101 (2006) (no definition of “transitory duration”); SLINGBOX USER GUIDE, *supra* note 22, at 68 (showing configuration options for setting video buffer length).

⁴⁸ 17 U.S.C. § 110(5) (2006) explicitly allows receiving and displaying “public reception of the transmission” on “receiving apparatus of a kind commonly used in private homes.”

⁴⁹ Neither § 110 nor 17 U.S.C. § 101 define “receiving apparatus of a kind commonly used in private homes,” but mobile computing devices, which do not publicly receive the transmission, do not fit the § 110 exemption.

⁵⁰ 991 F.2d 511 (9th Cir. 1993) (dealing with copies of computer programs).

⁵¹ *Id.* at 513.

⁵² *Id.* at 513–14.

⁵³ *Id.* at 515–16.

⁵⁴ *Id.* at 517–18.

⁵⁵ *Id.* at 518.

⁵⁶ *Id.*

⁵⁷ *Id.*

Congress, in apparent response to *MAI*, amended the Copyright Act to exempt copies made in computer memory for repair or servicing of that computer.⁵⁸ It further recognized that copies moving across the internet could also violate existing copyright law and added an exemption protecting service providers from liability under the copyright act for reproducing copies in normal operation.⁵⁹ Although the service provider is protected, there is no protection for the end user, leaving internet browsing open to the possibility of being classified as an act of copyright violation.⁶⁰

2. Is Browsing a Copyright Violation?

Two courts have directly addressed the question of whether the mere act of internet browsing can be a copyright violation, and both concluded that browsing can be a violation. In 1997, the Northern District of Illinois addressed this question from the perspective of the system sending out files to internet browsers.⁶¹ Pointing out that copies “need not be potentially perceptible with the naked eye,” the court explained that copies are created either just before or during transmission to internet viewers.⁶² Even though the copies exist very briefly on the creating system, they are still stable enough to reach the end user and to be “perceived.”⁶³ Therefore, the transmission to an internet viewer created a fixed copy in violation of the exclusive right of reproduction.⁶⁴ When the District of Utah addressed the issue of copies in web browsing in 1999, the sending computer was exempt under the service provider exception in the Copyright Act.⁶⁵ Rather than addressing creation of a copy from the transmitting computer, the court addressed creation of a copy in the browsing system.⁶⁶ Explaining that copying, but not mere viewing, would be a copyright violation, the court identified that a copy created in RAM was necessary to view the mate-

⁵⁸ Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 302, 112 Stat. 2860, 2887 (1998) (codified as amended at 17 U.S.C. § 117 (2006)).

⁵⁹ DMCA § 202 (codified as amended at 17 U.S.C. § 512 (2006)).

⁶⁰ See DMCA § 202 (the copyright limitations only address application to service providers).

⁶¹ See *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.* 983 F. Supp. 1167 (N.D. Ill. 1997).

⁶² *Id.* at 1177.

⁶³ *Id.* at 1178.

⁶⁴ *Id.*

⁶⁵ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (decided after enactment of the DMCA).

⁶⁶ *Id.* at 1294.

rial.⁶⁷ That RAM copy, although temporary, violated the exclusive right of reproduction.⁶⁸ Therefore, merely the act of browsing the internet can be a copyright violation.⁶⁹

Counter-arguments have been raised that viewing and copying should be considered separate acts and that both acts should not be applicable to web browsing.⁷⁰ Treating browsing only as a display, not as a reproduction, may avoid such issues.⁷¹ Those commentarial positions, however, only identify problems with the actual law, and the congressional task force that addressed the issue in 1995 came to the same conclusion as the courts in *Marobie* and *Intellectual Reserve*, finding that copyright law treats the mere viewing of a document on a remote dumb terminal as both a reproduction and a display:

Under current technology, when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or buffer of the user's computer, no screen display would be possible.⁷²

3. Does the Slingbox Create Reproductions?

If merely browsing an image implicates reproduction, viewing a video (which is the same as viewing many images plus audio) seems to also logically implicate reproduction. However, there are differences. Viewing an image in a web browser creates an image that remains displayed on the viewing system until the user leaves the page, closes the browser, or shuts off the system. Viewing a video only displays each image of the video for a fraction of a second—

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Gretchen McCord Hoffman, Note, *Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing*, 9 TEX. INTELL. PROP. L.J. 97 (Fall 2000) (identifying and illustrating problems with the legal position that web browsing can be an infringing activity).

⁷¹ See Joseph V. Myers, Note, *Speaking Frankly About Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper*, 49 VAND. L. REV. 439, 455–62 (March 1996).

⁷² INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, 66, 72 n. 226 (September, 1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf> (also noting about "digital 'browsing'" that the law itself clearly . . . defines such acts as implicating the display *and* reproduction rights").

long enough, in conjunction with each, to display the video, but no longer.⁷³ The Slingbox does not allow the user to save or replay the video content,⁷⁴ which means each frame displays to the end viewer only for as long as needed to incorporate that frame into the video playback. Yet, that brief showing is still long enough to perceive or communicate the video to the viewer. Additionally, the video is buffered,⁷⁵ or stored in memory on the computer long enough to smooth out any glitches or problems caused by network congestion, transmission errors, or other internet-created problems.⁷⁶ The video, therefore, is in computer memory long enough that it could be copied (even though a copy option is not given to the end user), and is retained long enough to communicate the video to the end user. Digital video buffered in computer RAM is copied just like operating system software is copied to RAM when used. And while the end user does not have a save option, a separate computer program could make an additional copy of the video buffer and permanently store the video.⁷⁷ A judge might hold that the brief time the video is stored is not “sufficiently permanent,” or that video playback should only be treated as performance, and not reproduction, but, under current case law, mere playing of video through the Slingbox requires a digital reproduction. Therefore, Slingbox users who view copyrighted programs violate the exclusive right of reproduction.

B. Producing Derivative Works

Even should a court rule that Slingbox use does not create a copy, the video produced from a Slingbox may violate copyright law as a derivative work. A copyright holder has “exclusive right . . . to prepare derivative works based upon the copyrighted work.”⁷⁸ The Copyright Act defines a derivative work as a work “based upon one or more preexisting works . . . in which a work may be

⁷³ MSN Encarta, History of Motion Pictures, <http://encarta.msn.com/encnet/RefPages/RefArticle.aspx?refid=761567568> (last visited Feb. 26, 2008).

⁷⁴ *Hearing*, *supra* note 18, at 19 (statement of Blake Krikorian, CEO, Sling Media).

⁷⁵ SLINGBOX USER GUIDE, *supra* note 22, at 68.

⁷⁶ See Tim Chambers, What Video Buffering Means to You, <http://tbc.livejournal.com/22603.html> (Feb. 26, 2008).

⁷⁷ See Appian Technologies, At-Large Recorder, <http://applian.com/at-large-recorder/index.php?AID=10426747&PID=559287&SID=sling> (last visited Feb. 26, 2008) (an add-on product that enabled recording Slingbox video).

⁷⁸ 17 U.S.C. § 106(2) (2006).

recast, transformed, or adapted.”⁷⁹ The definition also adds that a work “which, as a whole, represent[s] an original work of authorship, is a ‘derivate work’.”⁸⁰

1. Is Translation to a Different Medium a Derivative Work?

In 1951, the Second Circuit addressed the question of recreating a work in a new medium.⁸¹ At issue was the availability of copyright protection for mezzotint reproductions of paintings in the public domain.⁸² The mezzotint reproductions were translations or versions of the originals that contained “distinguishable variations.”⁸³ The court stated that any such variation, even those caused by “bad eyesight” or “shock caused by a clap of thunder,” could be sufficient to create copyright protection in the new work.⁸⁴ As long as the variation is enough to identify the new work from the original, the new work is a copyrightable derivative work.⁸⁵

In 1999, the Southern District of New York further addressed “distinguishable variation.”⁸⁶ *Bridgeman Art Library* focused on whether overhead slide reproductions of paintings in the public domain were copyrightable.⁸⁷ Although photographs are subject to copyright, photographs of original works generally lack originality.⁸⁸ A change of medium alone, absent some other factors that introduce something original, is not sufficient to create a distinguishable variation.⁸⁹ A slavish copy or sweat of the brow reproduction, which does not introduce original elements, will not be subject to copyright protection.⁹⁰ If a work meets the distinguishable variation criterion, it will be a copyrightable derivative work, but neither *Alfred Bell* nor *Bridgeman Art Library* address whether a translation in medium might be considered a derivative work for copyright infringement, even if not a copyrightable derivative work.

⁷⁹ 17 U.S.C. § 101 (2006).

⁸⁰ *Id.*

⁸¹ See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

⁸² *Id.* at 104.

⁸³ *Id.* at 105.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *Bridgeman Art Library, Ltd. v. Corel Corp.* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

⁸⁷ *Id.*

⁸⁸ *Id.* at 195–96.

⁸⁹ *Id.* at 196.

⁹⁰ *Id.* at 197.

2. Will Translation Create an Infringing Derivative Work?

Two cases involving the Albuquerque A.R.T. Company address necessary levels of transformation in infringing derivative works.⁹¹ The Ninth Circuit first addressed this in 1988.⁹² *Mirage Editions* challenged tiles sold by the Albuquerque A.R.T. Company as derivative works in violation of copyright.⁹³ A.R.T. had mounted individual pages from *Mirage's* art books on tiles and sold the tiles.⁹⁴ A.R.T. defended with a claim that use of the original work without any reproduction could not be considered a separate, derivative work.⁹⁵ Although the Ninth Circuit agreed that no reproduction had occurred, it focused on the definition, stating that a derivative work may consist of “any other form in which a work may be recast, transformed or adapted.”⁹⁶ Explaining that this language encompasses more than mere reproduction, the Ninth Circuit held that mounting pages of a book on a tile was either a recasting or transformation of the original and violated the exclusive right of preparing derivative works.⁹⁷ Nine years later, the Seventh Circuit expressly disagreed with the Ninth Circuit, stating: “we . . . decline to follow . . . *Mirage Editions*.”⁹⁸ *Lee v. A.R.T.*, however, differed in a significant way from *Mirage Editions* – rather than removing pages of a book to create a tile piece, A.R.T. mounted note cards in their original form on tiles.⁹⁹ The Seventh Circuit first explained that this action was expressly allowed under the first-sale doctrine as codified in 17 U.S.C. § 109(a).¹⁰⁰ Because a lawful owner may sell or dispose of his copy and A.R.T.’s tiles contained the entire original note card, the Seventh Circuit found no rationale to exclude A.R.T.’s sales from § 109(a) protection.¹⁰¹ This view differed from the Ninth Circuit’s view, which stated that the first-sale doctrine granted a right to

⁹¹ See *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988).

⁹² See *Mirage Editions*, 856 F.2d 1341.

⁹³ *Id.* at 1342–43.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1343.

⁹⁶ *Id.* (quoting 17 USC § 101).

⁹⁷ *Id.* at 1344.

⁹⁸ *Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997).

⁹⁹ *Id.* at 580.

¹⁰⁰ *Id.* at 581.

¹⁰¹ *Id.*

transfer the exact copy, but not to consume that copy in derivative works.¹⁰² Perhaps because of this difference, the Seventh Circuit went beyond a finding based on first sale and also concluded that mounting cards on tiles was not preparation of a derivative work.¹⁰³ Because A.R.T.'s mounted cards had failed to receive copyright registration, the Seventh Circuit first reviewed whether a derivative work could exist even if that work lacked the originality needed for copyright protection.¹⁰⁴ Identifying a split in authorities over the requirement of originality, the Seventh Circuit concluded that A.R.T.'s tiles failed to meet any standard of derivative work.¹⁰⁵ Failure of originality required Lee to prove that the tiles "recast, transformed, or adapted" the original work.¹⁰⁶ While "transformation" was closest, affixing a card to a tile did not transform the card in any way—it merely permanently framed it on a tile.¹⁰⁷ Should the court have held otherwise, it indicated that changing a frame around a piece of art, such as is regularly done in museums, would also constitute preparing a derivative work, and that would be a "jarring" extension of copyright law.¹⁰⁸

Despite the stated disagreement between circuits, a distinguishing line appears between alteration of the original work and reuse in an unaltered state. Yet, both cases dealt with physical works that differ from electronic copies.

3. Need a Derivative Work be Fixed?

In 1983, *Midway Manufacturing Co. v. Artic International, Inc.*¹⁰⁹ applied derivative work creation to electronic products. Midway claimed that speeding up a video game after a circuit board modification created a derivative work.¹¹⁰ The Seventh Circuit held that although a sped-up sound recording is probably not a derivative work, a sped-up video game is.¹¹¹

The court reasoned that there would be no market for the accelerated recording, and therefore no need for copyright protection, but that there was a

¹⁰² *Mirage Editions*, 856 F.2d at 1344.

¹⁰³ *Lee*, 125 F.3d at 581.

¹⁰⁴ *Id.* at 582.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 704 F.2d 1009 (7th Cir. 1983).

¹¹⁰ *Id.* at 10–11.

¹¹¹ *Id.* at 1013.

market for the sped video game.¹¹² Additionally, speeding a video game required more creative effort than speeding an audio recording.¹¹³ Despite a difficult fit into copyright law, which the court attributed to the development of the video game market after passage of the Copyright Act, the court expanded copyright law to include video game alteration as preparation of a derivative work.¹¹⁴

Nine years later the Ninth Circuit focused not on derivative works but rather on the permanent form of the work.¹¹⁵ *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* examined the operation of the Game Genie, a device that altered existing video games.¹¹⁶ The court referred to the Copyright Act's legislative history, which indicates that a derivative work "may be an infringement even though nothing is ever fixed in tangible form."¹¹⁷ The court explained that derivatives need to be fixed for protection, but not for infringement, yet still concluded that "a derivative work must incorporate a protected work in some concrete or permanent 'form.'"¹¹⁸

The Ninth Circuit traced its argument for requiring fixation to the definitions in the Copyright Act: "[a] 'derivative work' is a work," and "[a] work is 'created' when it is fixed"¹¹⁹ However, these definitions identify only the time of a work's creation and do not define 'work' itself.¹²⁰ The Ninth Circuit concluded that creation of a derivative work does not require fixation,¹²¹ but nevertheless held that infringement requires a "concrete or permanent form."¹²² The court did not identify the source of its concrete-or-permanent standard, but its analysis of the Act emphasized that derivative works may be in "[a]ny . . . form in which a work may be recast, transformed, or adapted,"¹²³ and that infringing works must "incorporate a portion of the copyrighted work in some form."¹²⁴ The court held that the Game Genie was not a derivative work be-

¹¹² *Id.*

¹¹³ *Id.* at 1014.

¹¹⁴ *Id.*

¹¹⁵ See *Lewis Galoob Toys, Inc., v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

¹¹⁶ *Id.* at 967.

¹¹⁷ H.R. Rep. No. 94-1476, at 62 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5675.

¹¹⁸ *Lewis Galoob Toys*, 964 F.2d at 967.

¹¹⁹ *Id.* at 968 (citing 17 U.S.C. § 101).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 969.

¹²³ *Id.* at 967 (quoting 17 U.S.C. § 101).

¹²⁴ *Id.* at 967 (quoting H.R. Rep. No. 94-1476, at 62 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5675).

cause it did not create a concrete or permanent work, but merely enhanced the existing video game.¹²⁵

The Ninth Circuit analogized the Game Genie to looking at a work through a kaleidoscope or through a different lens, rather than constituting a new work.¹²⁶ Unlike the device in *Midway*,¹²⁷ which required a chip replacement to operate, the Game Genie operated between the Nintendo and the video game without physically replacing any components.¹²⁸

The Ninth Circuit emphasized that technological advancements that enhance, rather than replace, existing works should not violate the Copyright Act.¹²⁹ Even though a large market existed for the Game Genie, the market itself was not proof that a work existed.¹³⁰ Because the Game Genie would not replace any games in the market, but could only be used in addition to purchase of the video games, it enhanced rather than supplanted existing works.¹³¹ As the Game Genie only enhanced the existing game output, could not produce the game on its own, and did not “duplicate or recast” any games, it was not a derivative work.¹³²

4. Does the Slingbox Create Derivative Works?

Sling Media’s advertising echoes the *Lewis Galoob* decision: “[T]he focus of Sling Media is to embrace – not replace – existing products and standards by enhancing them”¹³³ Despite this textual spin, the Slingbox appears to create derivative works under all standards. The Slingbox transforms a copyrighted broadcast television signal into digital video ready to be streamed across the internet.¹³⁴ Slingbox configuration settings transform the quality of the original video to compensate for bandwidth restrictions.¹³⁵ Just like the original-

¹²⁵ *Id.* at 968.

¹²⁶ *Id.* at 969.

¹²⁷ 704 F.2d 1009 (7th Cir. 1983).

¹²⁸ *Lewis Galoob Toys*, 964 F.2d at 969.

¹²⁹ *Id.*

¹³⁰ *Id.* at 968–69.

¹³¹ *Id.* at 969.

¹³² *Id.*

¹³³ About Sling Media, *supra* note 19.

¹³⁴ See Sling Media – Tecnology [sic] Behind Slingbox, <http://www.slingmedia.com/go/technology> (last visited March 9, 2008) (describing the transformation technology used for creating the Slingbox video).

¹³⁵ *Id.*

ity needed to speed up video games, the transformation performed by the Slingbox is the original and creative work developed by Sling Media.¹³⁶ Further, streaming video from the Slingbox to a portable device induces distortions in video resolution, smoothness, and audio that are not in the original video.¹³⁷ This is very similar to the originality added by a clap of thunder or poor eyesight. Sling Media may desire to make a “slavish copy,” but technological limitations not only prevent slavish replications but also require original alterations to provide the stream. These alterations are enough to make Slingbox video a derivative work.

Even if no transformation occurs, a Slingbox video is still a derivative work. The new video does not consume the original video; it creates a separate, additional video based on the original. The original video is still available for display on the local television. The transformation is thus not a mere re-framing, or mounting on tiles, or even ripping out of a book and then mounting on tiles. The Slingbox must replicate the video before presenting it in the new medium. Therefore, the Slingbox video is transformative under both *A.R.T.* cases.

Like the Game Genie, the Slingbox contains no copyrighted material. The Slingbox creates no useful output without input from a broadcast signal. However, the Slingbox differs from the Game Genie in a very significant manner. Even when the Game Genie is used, only one video cartridge is available to the Nintendo. The Game Genie enhances the video game, but does not create a second, co-existing game. The Slingbox does not enhance television; it creates a second viewing option. Rather than modifying one display on the local television, the Slingbox allows the local television to retain its display and creates an additional display available on the remote system (a concrete-and-permanent, secondary display). In this fashion, the Slingbox creates a derivative video by being original, transformative, and creating a separate, concrete output.

¹³⁶ *Id.*

¹³⁷ See Matt Whitlock, *Slingbox Personal Broadcaster Editorial Review*, 8 (July 2, 2005), available at <http://www.slingcommunity.com/article/10062/Slingbox-Personal-Broadcaster-Editorial-Review/> (identifying video as fuzzy, blurry, and jerky when viewed across the Internet).

IV. INDUCING INFRINGEMENT

A. *What is the Inducement Standard?*

*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹³⁸ reached the Supreme Court with both sides addressing *Sony Corp. v. Universal City Studios*¹³⁹—Grokster claiming protection under the same reasoning as applied in *Sony*,¹⁴⁰ and MGM pushing for a review of and alteration to the *Sony* logic.¹⁴¹ *Grokster* focused on liability over file-sharing networks which contained copyright protected material.¹⁴² Grokster claimed that because the network had legitimate uses along with violating uses, Grokster should not be liable.¹⁴³ MGM claimed that due to the substantial degree of violating use, as opposed to very minor legitimate use, Grokster should be liable for contributory infringement.¹⁴⁴

The Court recognized that the case was portrayed as a battle between copyright protection and innovation and as one to determine the balance between artistic protection and technological innovation.¹⁴⁵ Yet rather than considering any balance of copyright and technology, the Court based its decision on corporate inducement of unlawful behavior—a common law theory it had not previously applied to copyright law.¹⁴⁶

The Court declined to consider *Sony*, or any other aspect balancing technological innovation with artistic protection, as it instead found Grokster liable of inducing copyright infringement.¹⁴⁷ Grokster had actual knowledge of infringement, both independently and through notice from MGM, but rather than passively receiving this knowledge, Grokster actively encouraged infringing use.¹⁴⁸ Grokster's revenue model of profits through advertising sales led Grokster to encourage every use it could—including infringing use.¹⁴⁹ While Grokster had the capability to take steps to curb infringement, the only step taken was

¹³⁸ 545 U.S. 913 (2005).

¹³⁹ 464 U.S. 417 (1984). See *infra* Section V for a discussion of *Sony*.

¹⁴⁰ See *Grokster*, 545 U.S. at 927–28.

¹⁴¹ See *id.* at 933.

¹⁴² *Id.* at 918–19.

¹⁴³ *Id.* at 933.

¹⁴⁴ *Id.* at 927.

¹⁴⁵ *Id.* at 928.

¹⁴⁶ *Id.* at 935–37.

¹⁴⁷ *Id.* at 931.

¹⁴⁸ *Id.* at 923–26.

¹⁴⁹ *Id.* at 940.

e-mailing warnings about copyright infringement.¹⁵⁰ While sale or distribution of a product capable of substantial noninfringing use cannot by itself “imput[e] intent to cause infringement,” Grokster’s behavior went far beyond distribution of a product.¹⁵¹ Grokster’s actions and statements promoted infringement.¹⁵²

Even though inducement is not part of the Copyright Act, the Supreme Court found it applicable.¹⁵³ The Court detailed liability of inducement as:

[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 taken to foster infringement, is liable for the resulting acts of infringement by third parties [M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.¹⁵⁴

Grokster demonstrated intent to foster infringement through using a name very similar to Napster, distributing a newsletter with links to articles promoting using Grokster to access copyright protected music, and providing aid in response to requests for help locating and playing copyright protected music.¹⁵⁵ Similarly, Grokster’s pursuit of Napster’s user base (which was notorious for massive infringement), its complete failure to develop filtering software to stop infringing use, and a business model that promoted infringement all evidenced the file-sharing company’s unlawful intent.¹⁵⁶ While each aspect alone would not have been enough to find Grokster liable of inducing copyright infringement, in conjunction they were sufficient.¹⁵⁷

¹⁵⁰ *Id.* at 926.

¹⁵¹ *Id.* at 933.

¹⁵² *Id.* at 938–41.

¹⁵³ *Id.* at 935–37.

¹⁵⁴ *Id.* at 936–37.

¹⁵⁵ *Id.* at 937–38.

¹⁵⁶ *Id.* at 939–940.

¹⁵⁷ *Id.* at 940.

B. Does Sling Media Induce Any Copyright Violations?

Slingbox advertising encourages remote viewing of video.¹⁵⁸ However, Sling Media has taken steps to reduce infringing use: only one portable device can view content at a time,¹⁵⁹ and the end-user license forbids public performance.¹⁶⁰ Further, the Slingbox does not provide an option for copying video to a hard drive, and when another company offered a product to add this feature Sling Media took steps to break interoperability and prevent further copying to disk.¹⁶¹ Additionally, Sling Media derives profit from sale of its device, not from operation of the device.¹⁶² Therefore, unlike *Grokster*, Sling Media does not profit from or have incentive to encourage infringing use. The steps Sling Media has taken not only discourage infringement, but demonstrate an active effort to avoid certain infringing uses. This differs directly from *Grokster's* avoidance of any filtering or methods to prevent infringement. Therefore it appears very unlikely that Sling Media would be found to induce infringement under the standards set out in *Grokster*.

V. FAIR USE

A. What are the Fair Use Standards?

Sony Corp. v. Universal City Studios, Inc. directly addressed the balance between copyright law and technological innovation, and identified that courts have historically declined to extend copyright protection that would limit technology without action from Congress.¹⁶³ *Sony* addressed whether the video tape recorder (VTR), Sony's Betamax product competitive with VCRs, infringed artists' rights and whether sale of the VTR could incur liability for copy-

¹⁵⁸ See Sling Media – Slingbox, <http://www.slingmedia.com/go/slingbox> (last visited March 9, 2008).

¹⁵⁹ Sling Community – Frequently Asked Questions, <http://www.slingmedia.com/go/faq> (last visited March 9, 2008).

¹⁶⁰ Slingbox End User License Agreement (EULA): Sling Community, <http://www.slingcommunity.com/article/10878/Slingbox-End-User-License-Agreement--EULA-/> (last visited March 9, 2008).

¹⁶¹ See Natali T. Del Conte, *Slingbox Encryption Upgrade Infuriates Customers, Developer*, PC MAG., July 19, 2006, available at <http://www.pcmag.com/article2/0,1759,1991289,00.asp> (describing the steps Sling Media took which broke the save-to-disk feature added by Applian's At-Large Recorder).

¹⁶² Sling Community – Frequently Asked Questions, *supra* note 159.

¹⁶³ 464 U.S. 417, 430–31 (1984).

right violations.¹⁶⁴ The claim against Sony was one of contributing to infringement by selling the VTR device.¹⁶⁵ The Copyright Act does not include anything about contributory infringement, but it was included in the Patent Act.¹⁶⁶ Under patent law a finding of contributory infringement extends monopoly control over the infringing article; therefore under copyright law a finding of contributory infringement—which would grant monopoly control over the infringing article—should only apply if it was fairly balanced against “the rights of others freely to engage in substantially unrelated areas of commerce.”¹⁶⁷ As this balance appears in the Patent Act in the form of staple articles of commerce, the Court also adopted the staple doctrine to apply to copyright law.¹⁶⁸ “The sale of a ‘staple article or commodity of commerce suitable for substantial noninfringing use’ is not contributory infringement.”¹⁶⁹ As long as an article is capable of substantial noninfringing use it will not be liable for infringement of copyright.¹⁷⁰ The VTR had a substantial noninfringing use when applied to “non-commercial time-shifting in the home.”¹⁷¹ The Court found that home use could be authorized, and further that it was legitimate fair use.¹⁷² “[S]ports, religious, educational and other programming” was found to be a significant quantity, and therefore substantial noninfringing use.¹⁷³ Further, any relief provided in light of contributory infringement needs to be limited to only affect those infringed.¹⁷⁴ Because Sony’s VTR actually expanded the consuming audience through time-shifting, and because Sony was not directly involved in infringement, no contributory infringement could be found.¹⁷⁵

To find fair use, courts apply an “equitable rule of reason” analysis to the four statutory factors in Section 107:¹⁷⁶

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

¹⁶⁴ *Id.* at 420.

¹⁶⁵ *Id.* at 434.

¹⁶⁶ *Id.* at 440.

¹⁶⁷ *Id.* at 442.

¹⁶⁸ *Id.* at 442.

¹⁶⁹ *Id.* at 440.

¹⁷⁰ *Id.* at 442.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 444.

¹⁷⁴ *Id.* at 446.

¹⁷⁵ *Id.* at 456.

¹⁷⁶ *Id.* at 448, n.30.

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁷⁷

The Court held that under the first factor, time-shifting by VTR devices was noncommercial home use which did not weigh against finding fair use.¹⁷⁸ Because any copyrighted program was broadcast into the home, by its nature it invited the user to view it free of charge, and therefore the second factor did not weigh against fair use.¹⁷⁹ Even though the entire broadcast was time-shifted by VTR recording, the third factor did not weigh against finding fair use because the time-shifting only enabled a viewer to view what was already offered for free viewing during the live broadcast.¹⁸⁰ The fourth factor identifies copyright's purpose of providing incentive to create, and drew the most attention from the Court.¹⁸¹ Even noncommercial use which appears fair through the first three factors may be held not a fair use should it significantly reduce the copyright holder's incentive to create.¹⁸² If noncommercial use can be shown to cause actual harm or "some meaningful likelihood of future harm" then it will not be fair use.¹⁸³ Without any actual harm caused by the VTR, Universal needed to prove potential future harm from time-shifting.¹⁸⁴ All potential future harms raised by Universal were mere speculation without any factual backing.¹⁸⁵ Therefore the effect on the potential market did not preclude a finding of fair use.¹⁸⁶

One final factor the court considered in *Sony*, while outside the statutory factors, was public benefit.¹⁸⁷ While not an unlimited factor, the public interest in increased access to television broadcasts, factored with the weighing of the

¹⁷⁷ 17 U.S.C. § 107 (2006).

¹⁷⁸ *Sony*, 464 U.S. at 449.

¹⁷⁹ *Id.* at 449–50.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 450–55.

¹⁸² *Id.* at 450.

¹⁸³ *Id.* at 451

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 452.

¹⁸⁶ *Id.* at 454–55.

¹⁸⁷ *Id.* at 454.

statutory factors, made home time-shifting a fair use of copyrighted broadcasts.¹⁸⁸

B. Can A Fair Use Finding Change Over Time?

The Ninth Circuit addressed the same statutory factors for fair use in *Kelly v. Arriba Soft Corp.*¹⁸⁹ *Arriba Soft* addressed fair use of thumbnail images in a search engine.¹⁹⁰ The thumbnails were exact replicas of copyrighted images except at a much lower resolution.¹⁹¹ Despite identifying fair use as generally inappropriate for mere transmission in a different medium, the court held that fair use could be applied due to a transformative use for a different purpose than the originals.¹⁹² The thumbnail use was purely for image searching, which differed from Kelly's use of displaying and portraying the images.¹⁹³ Because this use was transformative, the purpose-and-character-of-use factor favored a finding of fair use.¹⁹⁴ The court spent most of the rest of its analysis, like the Supreme Court in *Sony*, focusing on the potential impact on the market for the copyrighted work.¹⁹⁵ The low-resolution thumbnails had little commercial value, and there was no showing that they negatively impacted any market for the high-resolution originals.¹⁹⁶ Further, thumbnails in a search engine might drive additional viewers, and therefore additional business, to Kelly's website.¹⁹⁷ Rather than having a negative impact on the market, the thumbnails might actually have a positive market impact.¹⁹⁸ With this factor strongly favoring a fair use finding, the Ninth Circuit held that thumbnail images in a search engine was fair use of the copyrighted original images.¹⁹⁹ Three years later, Perfect 10 charged Google with infringement by including thumbnail images in search

¹⁸⁸ *Id.* at 454–55.

¹⁸⁹ 336 F.3d 811, 817–22 (9th Cir. 2003).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 815.

¹⁹² *Id.* at 818–19.

¹⁹³ *Id.* at 818.

¹⁹⁴ *Id.* at 820.

¹⁹⁵ *Id.* at 821–22.

¹⁹⁶ *Id.* at 821.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 822.

results.²⁰⁰ Despite the similarity to *Arriba Soft*, the district court held that Google's use of thumbnails was not fair use.²⁰¹ Two significant factors caused the change in position—Google's use was found to be commercial, and the use impacted Perfect 10's market for images.²⁰² The thumbnails Google displayed could lead to click-through links to other sites which would pay Google.²⁰³ Because this was a paid, targeted service for the thumbnail, Google's use was commercial and the first statutory factor did not support fair use.²⁰⁴ In addition, Perfect 10 sold similar thumbnail size images into a cell-phone download market.²⁰⁵ Google's thumbnail images could be downloaded in place of purchased thumbnails from Perfect 10, thereby negatively impacting Perfect 10's market.²⁰⁶ Due to this negative impact, the fourth statutory factor also weighed against finding fair use.²⁰⁷ With more factors weighing against fair use, Google's thumbnail image search was not fair use of Perfect 10's images.²⁰⁸ Despite this finding, the court added that Google's search provides "enormous public benefit" and expressed concern that its ruling would "impede the advance of internet technologies."²⁰⁹ Yet the court factored neither of these issues into its balancing of the statutory factors of fair use.²¹⁰ On appeal, the Ninth Circuit reversed the finding that Google's use was not fair use.²¹¹ While it acknowledged "the importance of analyzing fair use flexibly in light of new circumstances," the lack of factual support of Google's use having any impact on the cell-phone market as well as failure to consider the public benefit of search engines were significant enough to rebalance fair use analysis in Google's favor.²¹² The reliance on facts and considerations ignored by the district court do not dissuade from the conclusion that fair use can indeed change over time.

²⁰⁰ Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 831 (C.D. Cal. 2006), *rev'd in part sub nom.* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

²⁰¹ *Id.* at 851.

²⁰² *Id.* at 846–47, 850–51.

²⁰³ *Id.* at 846–47.

²⁰⁴ *Id.* at 847.

²⁰⁵ *Id.* at 850–51.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 851.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

²¹² *Id.* at 1166–68.

C. *Is Individual Use of a Slingbox “Fair Use”?*

The Slingbox appears to share a very similar set of uses with the VCR. Public domain or authorized broadcasts are just as legitimate “slinged” through the Slingbox as recorded by a VCR. Many content holders identified in *Sony*, such as educational, religious, or local broadcasts²¹³ likely would still authorize their programs for Slingbox use. But the sports industry identified as authorizing recording in *Sony*²¹⁴ now may oppose place-shifting.²¹⁵ And *Sony* did not rest on merely the authorized recordings, but also identified that many unauthorized recordings were legitimate fair use.²¹⁶ In 1984, recordings were mostly of over-the-air broadcasts which invited free viewership.²¹⁷ Today many viewers watch paid-for cable or satellite content, rather than free over-the-air content.²¹⁸ However, the content is paid for and available to the Slingbox owner who is merely moving his viewing location. Therefore, the statutory fair use analysis under *Sony*²¹⁹ should still apply to the first three factors. The market impact factor may have changed, as there are markets now for viewing content over the internet.²²⁰ Yet the scope and actual impact on the markets may be just as speculative as the impact alleged in *Sony*.²²¹ The Slingbox only provides access to the same video that is available on a home television, and internet content providers can offer greater options.²²² Therefore, even though fair use can change

²¹³ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 444 (1984).

²¹⁴ *Id.*

²¹⁵ Anderson, *supra* note 18.

²¹⁶ *Sony*, 464 U.S. at 447.

²¹⁷ *See id.* at 449.

²¹⁸ *See* Jack Loechner, Research, *Behind the Numbers, Cable and Broadcast Television*, MEDIA MAG., Aug. 2002, available at http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=14592 (identifying a market in the United States of 85.8 million homes with cable or satellite television, and only 20 million homes connecting to over-the-air television broadcasts).

²¹⁹ *Sony*, 464 U.S. at 448–50.

²²⁰ *See* Louis Hall, *Slingbox Goes Wireless*, FORBES, Aug. 25, 2006, available at http://www.forbes.com/technology/2006/08/24/sling-media-qanda-cx_lh_0825sling.html (identifying the cell-phone market and online content as developing markets); The Official Site of Major League Baseball: Subscriptions: Subscriptions, available at http://mlb.mlb.com/mlb/subscriptions/index.jsp?c_id=mlb (last visited March 9, 2008) (offering options to purchase live baseball Internet broadcasts including mobile device access).

²²¹ *Sony*, 464 U.S. at 454.

²²² *See* The Official Site of Major League Baseball: Subscriptions: Subscriptions, available at http://mlb.mlb.com/mlb/subscriptions/index.jsp?c_id=mlb (last visited March 9, 2008) (offering access to all out-of-market broadcasts).

with the market, use of the Slingbox to place-shift video, like recording video in *Sony*,²²³ is a legitimate fair use.

VI. CONCLUSION

A copyright infringement lawsuit against Sling Media may end with a decision that the Slingbox does not create any copyright violations. Sling Media, through its marketing and public statements has a platform to argue that the Slingbox does not fix any copy and that Slingbox video should be considered an enhancing technology, not a derivative work. Alternatively, a court might decide to focus on the changed market, clarify the “commercially noninfringing uses” that the Supreme Court declined to clarify in *Grokster*,²²⁴ and hold Sling Media liable for contributory infringement. Yet either of these holdings would require an alteration of existing copyright law. Despite Sling Media’s portrayal, the Slingbox does create copies and does produce derivative works. However, Sling Media is not liable for any secondary infringement. Sling Media has taken affirmative actions to prevent infringing use, and therefore does not induce infringement. Legitimate authorized uses for place-shifting and substantial unauthorized fair use exist. Therefore, Sling Media does not incur contributory infringement. While it may be ripe for another battle between content holders and technology, use of the Slingbox, like the VCR before it, should be here to stay.

²²³ *Sony*, 464 U.S. at 455.

²²⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933–34 (2005).