



# CopyrightX Lecture 11: Supplements to Copyright

## Selected Illustrations

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The following images appear in the background of the 11th lecture in the CopyrightX lecture series. A recording of the lecture itself is available at <http://ipxcourses.org/lectures/>. Removed from their original context, the images will not make much sense. The function of this collection of images is to enable persons who have already watched the lecture to review the material it contains.

The terms on which these materials may be used or modified are available at <http://ipxcourses.org>.



# Kraakman, “Gatekeepers” (1986)

“Successful gatekeeping is likely to require

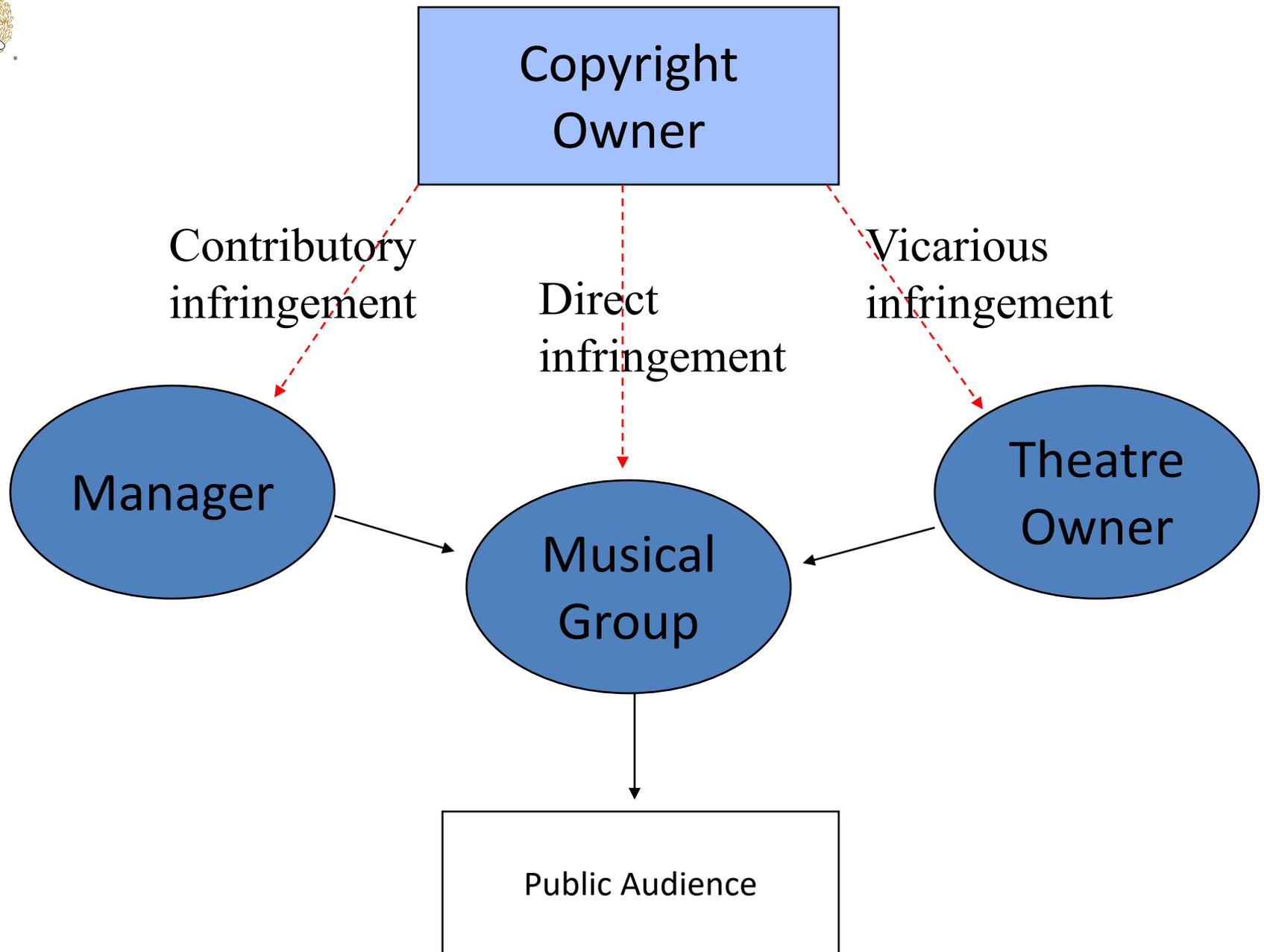
- 1) serious misconduct that practicable penalties cannot deter;
- 2) missing or inadequate private gatekeeping incentives;
- 3) gatekeepers who can and will prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers; and
- 4) gatekeepers whom legal rules can induce to detect misconduct at reasonable cost.”



# Applied to Copyright

Penalties should be imposed on third parties in hopes of suppressing infringing behavior by others only if:

- 1) otherwise, the incidence of copyright infringement would be unacceptably high, because direct infringers cannot be controlled by socially acceptable sanctions;
- 2) the third parties, left to their own devices, would not intervene to curb infringement – and indeed, might foster it;
- 3) the third parties we might target are in a position to effectively suppress infringement – in other words, the direct infringers cannot circumvent them; and
- 4) the social and economic costs of penalizing the third parties are not unacceptably high.





# Secondary Liability in Copyright

- Contributory Infringement requires
  - Direct infringement
  - Knowledge (actual or constructive) by the defendant
  - Material contribution
- Vicarious Infringement requires
  - Direct infringement
  - Financial interest in the infringement
  - Right and ability to supervise the direct infringer



# Secondary Liability in Copyright

- Contributory Infringement requires

- Direct infringement
- Knowledge (actual or constructive) by the defendant
- Material contribution

*Fonovisa (1996)*

Providing site and facilities is sufficient

- Vicarious Infringement requires

- Direct infringement
- Financial interest in the infringement
- Right and ability to supervise the direct infringer

Sufficient that infringement makes venue more attractive



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COSNU  
Defense





# Secondary Liability in Copyright

- Contributory Infringement

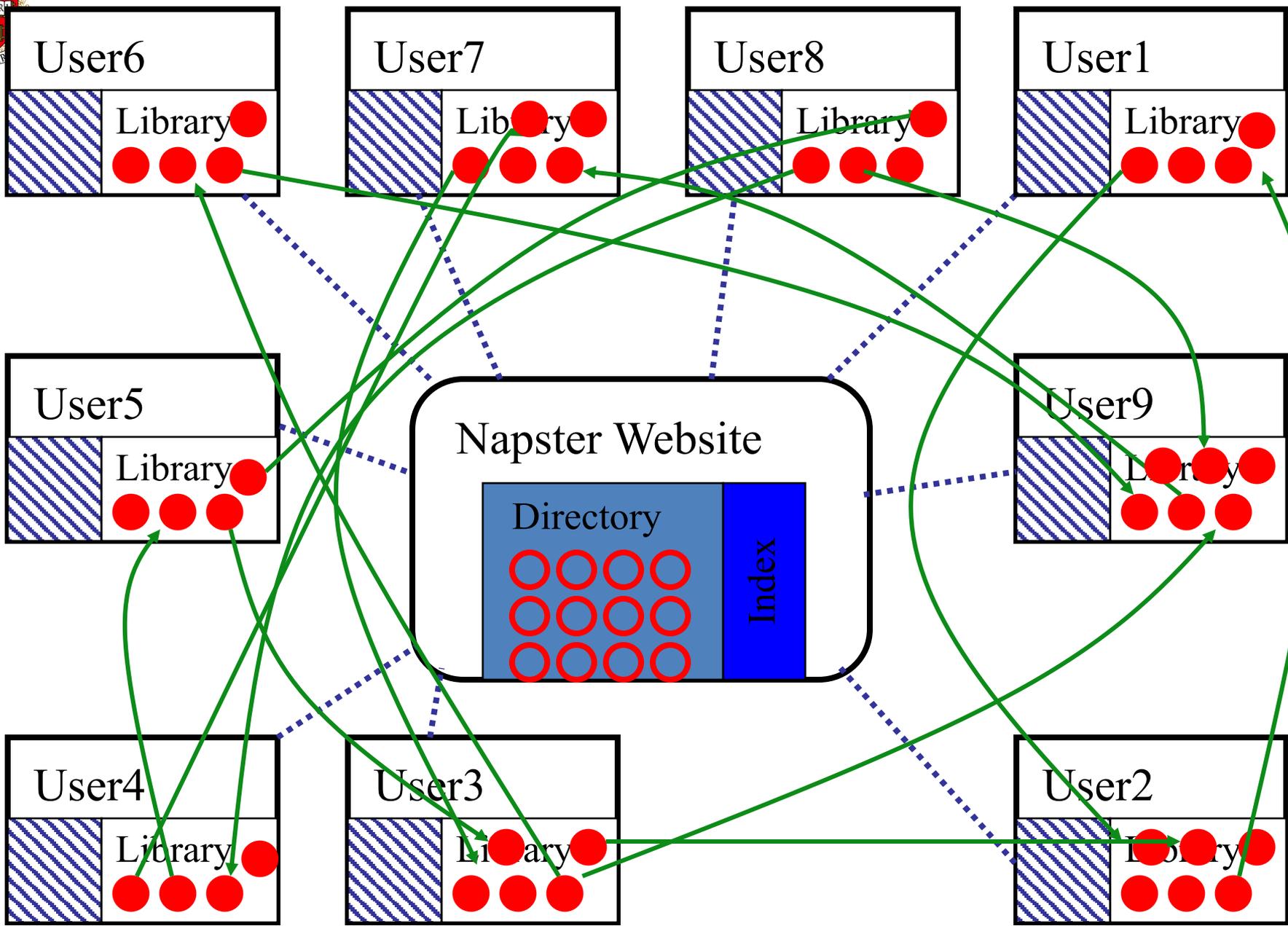
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COSNU  
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- Vicarious Infringement requires

- Direct infringement
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# *Napster* holdings

- Use of the Napster system to “sample” songs is not a fair use
- Because Napster is capable of a substantial noninfringing use, the operators of the system lack the “constructive knowledge” of infringing uses necessary to support contributory liability
- Because the Napster operators can ascertain whether a particular recording is being copied illegitimately, they have timely “actual knowledge” of specific acts of infringement necessary to support contributory liability
- For the same reason, the Napster operators have the “supervisory control” necessary to support vicarious infringement



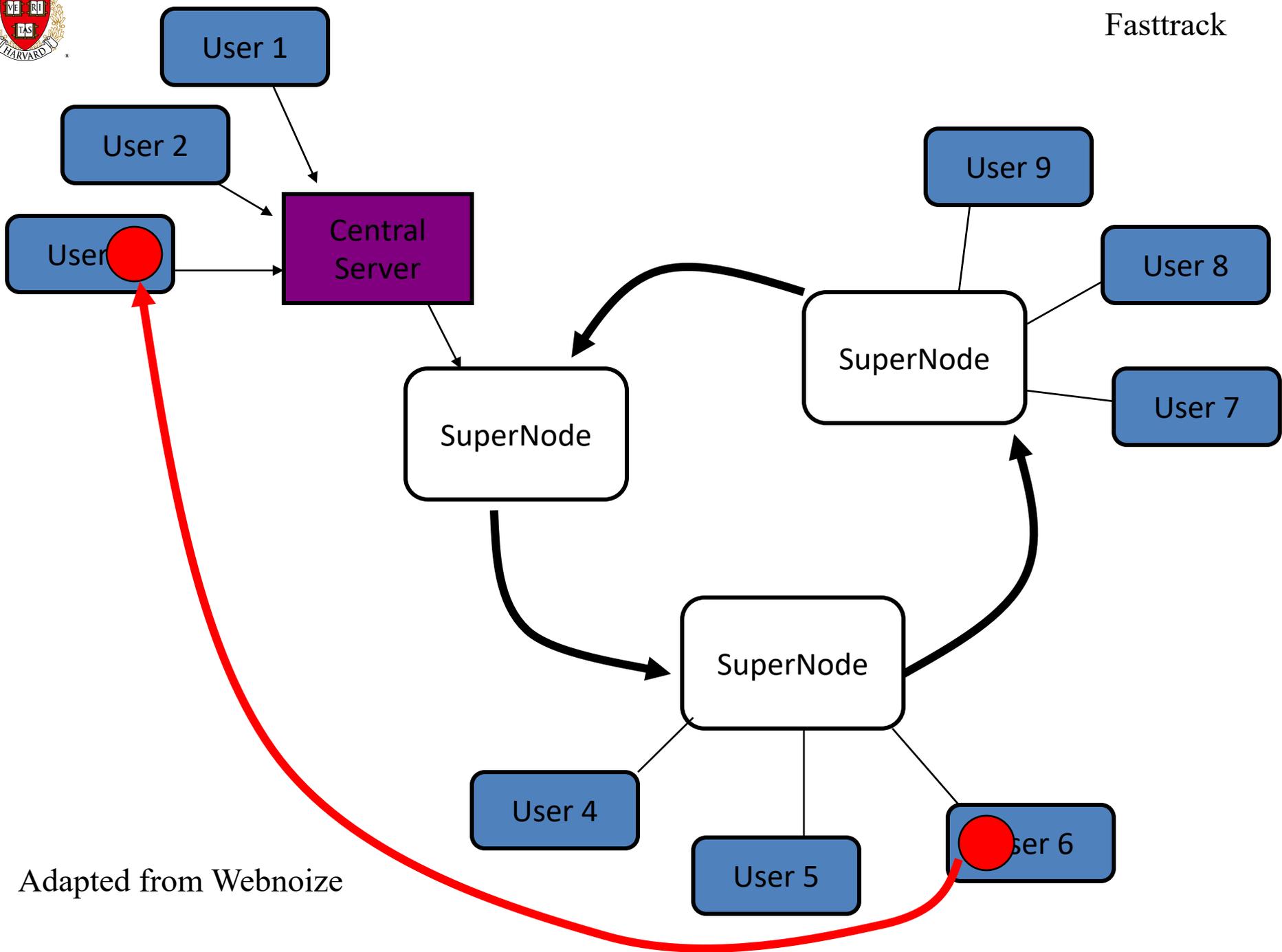
# Secondary Liability in Copyright

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- *Aimster*: CI because:
  - Ds failed to establish any legitimate uses of the systems: COSNU defense inapplicable
  - “Willful blindness” constitutes knowledge
  - Ds actively encouraged infringement
- *Aimster*: VI uncertain because:
  - “Willful blindness” may not be sufficient to treat Ds as a principal



# *Aimster* deviates from *Sony*

- To trigger the COSNU defense, a defendant must demonstrate that its product has substantial noninfringing uses, not merely that it is capable of substantial noninfringing uses
- Even if the defendant makes such a showing, if the infringing uses are substantial, the defendant must also show that it would have been “disproportionately costly” to design its product so as to eliminate or reduce the infringing uses



Adapted from Webnoize



# *Grokster* decision

## (1) Leave *Sony* doctrine intact

- Breyer concurrence sings the praises of *Sony* and interprets it generously
- Ginsburg concurrence interprets it more narrowly
- Souter’s majority opinion formally avoids the question of whether *Sony* should be modified (p. 17), but is structured so as to preserve its “safe harbor” (p. 22, n. 12)



# *Grokster* decision

## (2) Modified “inducement” theory

- “[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”



# What evidence can be used to show “inducement”? “Purposeful, culpable expression and conduct”

## Pertinent

- Advertising illegal uses
- Targeting customers known to engage in illegal uses
- Failure to adopt infringement-reducing technologies
  - Insufficient on its own – n. 12
- “commercial sense” of the enterprise depends on illegal uses
  - Insufficient on its own – p. 23

## Not pertinent

- Knowledge of infringing uses
- Product support



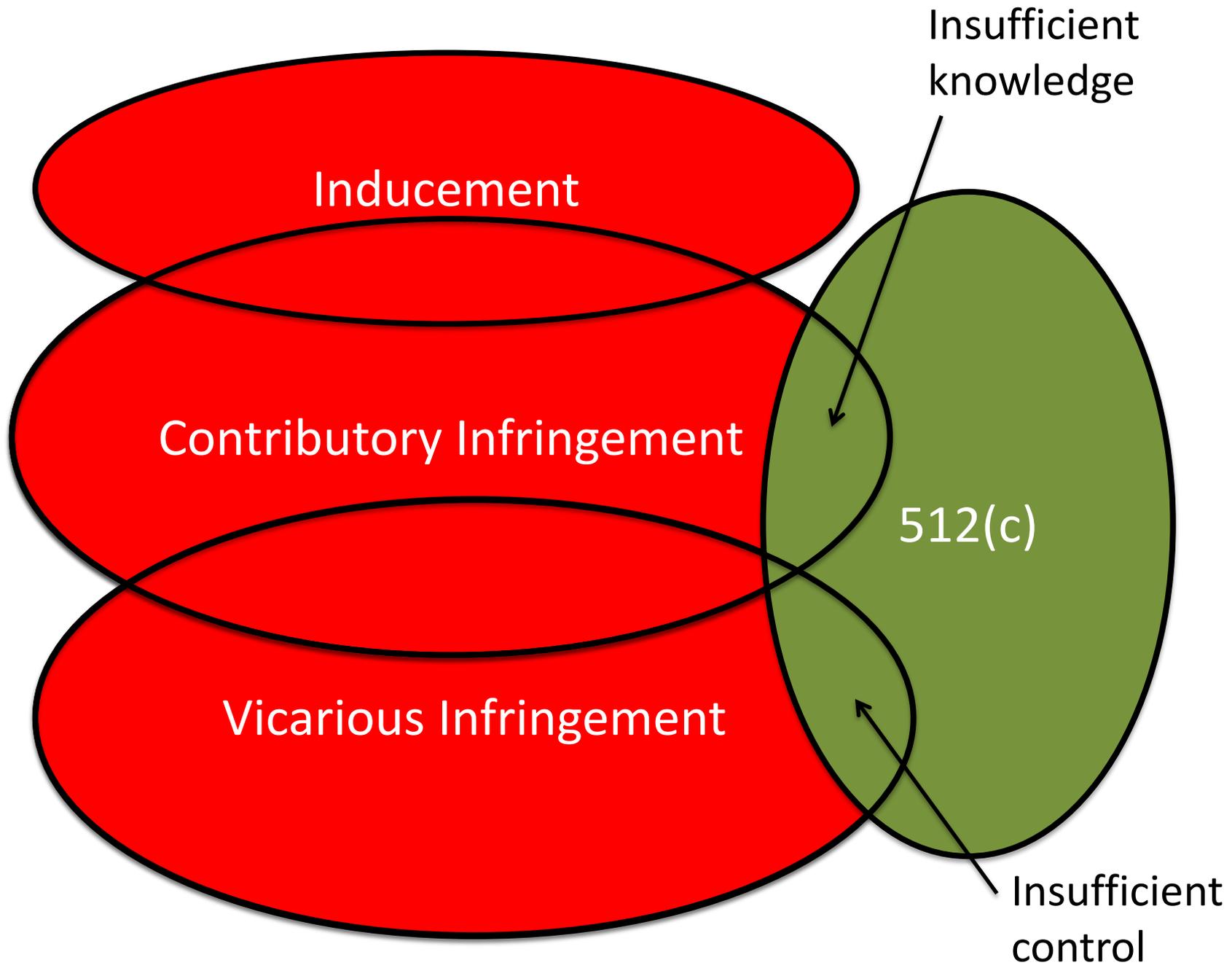
Ambiguity: liability arises when “the distributor intended and encouraged the product to be used to infringe” (p. 23, n. 13)

Subjective standard

- Internal correspondence would be relevant
- Subsequent admissions would be relevant

Objective standard

- Only affirmative acts fostering illegal activities would be relevant



Inducement

Contributory Infringement

Vicarious Infringement

Insufficient knowledge

512(c)

Insufficient control