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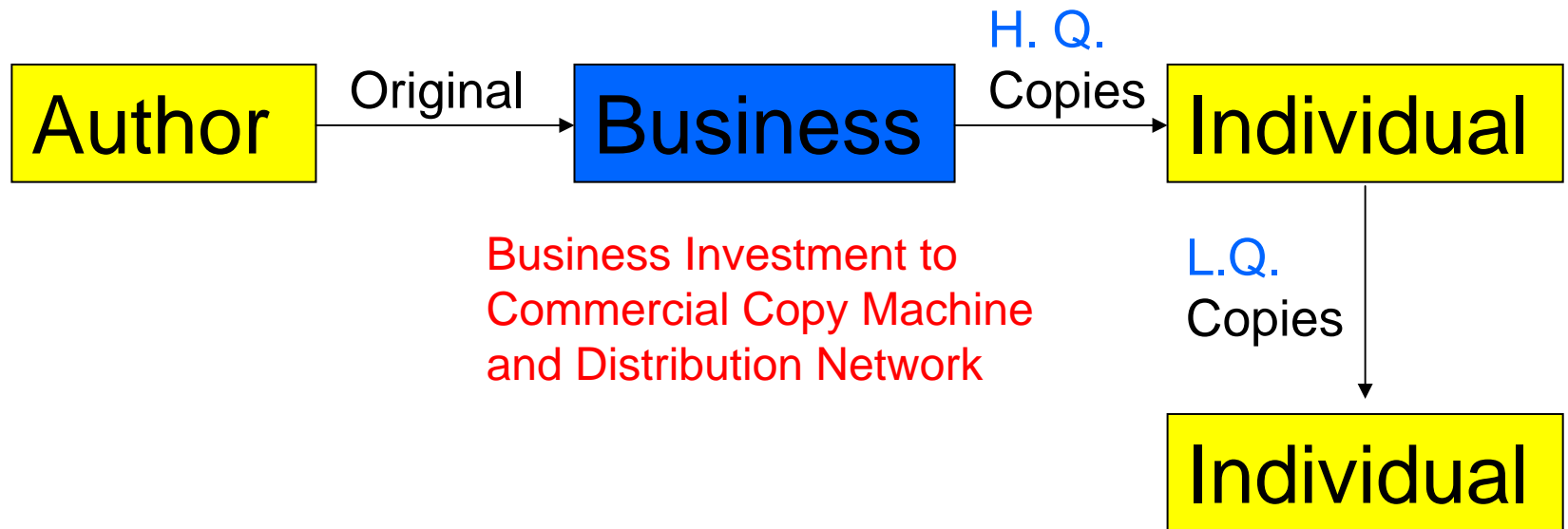
# Enforcement of Copyright in Digital and Networking Era

March 2, 2005

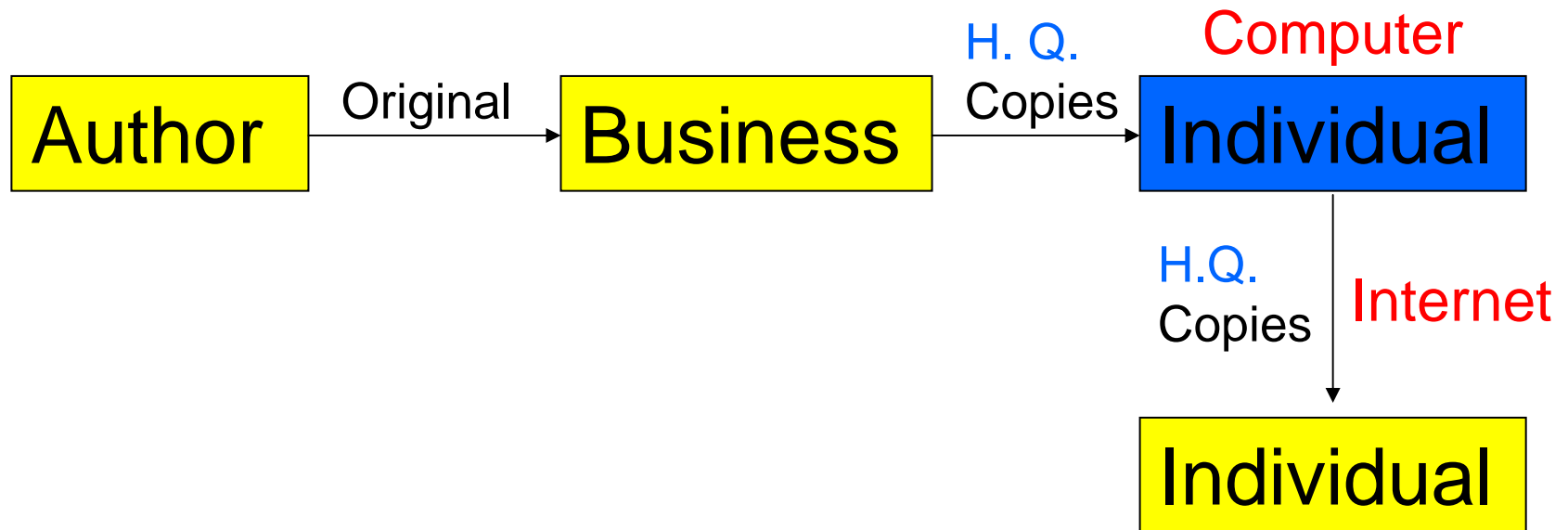
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# Main Players in Analog Era



# Main Players in Digital Network Era



# Impact of Digital Network Technology

## ■ Analog Technology

Huge Cost for Reproduction and Distribution

(1) **Business** Entities as Main Players using Copyright

(2) Copyright Infringement as **Business** Profiting

Maximize Creating Works as **Investment** in Market

## ■ Digital Technology

No Cost for Reproduction and Distribution

(1) Private Individual as Main Players using Copyright

(2) Copyright Infringement as **Private** Entertainment

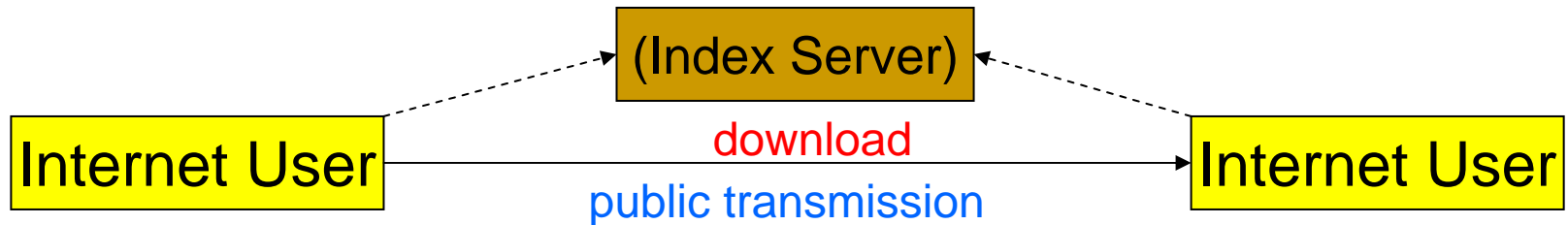
Market Failure: Creating Works only as **Pleasure**  
if no effective enforcement of copyright

# Forms of Private Infringement

- Posting illegal Copies on Website



- File-Sharing of illegal Copies



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# Forms of File-Sharing

*MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004)

- **Napster-Type**
  - a centralized indexing system, maintaining a list of available files on one or more centralized servers
- **Gnutella-Type**
  - a completely decentralized indexing system, in which each computer maintains a list of files available on that computer only
- **KaZaa-Type**
  - a "supernode" system, in which a selected number of computers act as indexing servers

# Posting on BBS: Infringement of the Right of Reproduction

- When is the Right of Reproduction infringed?
  - Copy is made on Server when uploading



- Who Infringes the Right of Reproduction?
  - Not Provider but User

*Playboy Enterprises Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)

vs.

*Religious Technology Center v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995)

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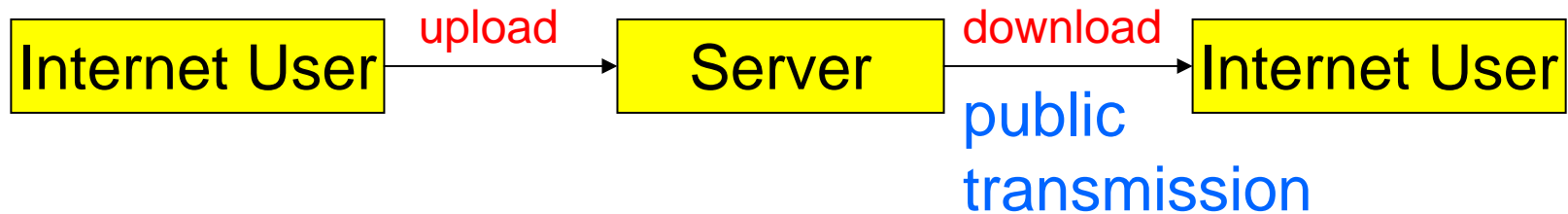
# Netcom Case

*Religious Technology Center v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995)

- “the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean Netcom has caused the copying. The court believes that Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it. Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner's liability under the rubric of contributory infringement, not direct infringement.”



# Posting on BBS: Infringement of the Right of Public Transmission



- **Right of Public Transmission** in Japanese Law:  
“The author shall have the exclusive right to transmit his work publicly” (Art. 23(1))
- **Right of Communication to the Public** in WCT:  
“author of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means...” (Art. 8)

# Who Infringes Right of Public Transmission

- Apply the Logic of Netcome case  
“the mere fact that [Provider]'s system incidentally [publicly transmits] plaintiffs' works does not mean [Provider] has caused the [public transmission]. The court believes that [Provider]'s act of designing or implementing a system that automatically and uniformly [publicly transmits] all data sent through it is not unlike that of the owner of a [transmitting] machine who lets the public [publicly transmit] copies with it.”

# Posting on BBS: Enforcement against Posting Users

- Copyright Infringement:
  - (1) Right of Reproduction
  - (2) Right of Public Transmission
- Remedies for Copyright Infringement:
  - (1) Civil Remedies: Injunction and Damages
  - (2) Criminal Sanctions: Imprisonment/Fines
- Civil Law Suits require **Infringer's ID Information**, which Provider may have
- Criminal Sanctions may be more efficient in cost/benefit, but not **Aggressive** ...

# Disclosure of Sender's ID Information under Provider Liability Limitation Law

- “Right Holder shall be entitled to demand Provider disclosure of sender information concerning infringement of the right, if  
(1) Infringement is **clear**; and  
(2) He has Legitimate Reason for Disclosure”  
High Standard
- “Provider is **not liable** for Damages which is caused by its refusal to disclosure unless it is **willful or grossly negligent**”  
No Risk on Non-Disclosure
- *Provider is **liable** for Damages which is caused by its disclosure unless it is **willful or negligent***  
High Risk on Disclosure

# Is the Right for Infringer's ID Information Effective?

- No Voluntary Disclosure
  - Lawsuit** against Provider is inevitable
- High Standard on Clear & Present Danger Test
  - Free Speech v. Copyright, but
  - Free Speech v. **Right for Judicial Proceedings**
- Suggested Disclosure System:
  - (1) No **Sham Claim** Standard
  - (2) No **Risk** of Litigation and Liability on Disclosure
  - (3) Available against Provider of **Access Services**
  - (4) Obligation to **Verify** User's ID ?

# Posting on BBS: Infringement by Provider



- **Right of Reproduction:**  
No Infringement as Reproduction is completed when Provider is given a notice of infringement
- **Right of Public Transmission:**  
May be Infringed as Transmission continues after Provider is given a notice of infringement

# Enforcement against Provider for BBS Posting Services

- **Contributory Infringement Liability:**
  - (1) Induce or Aid Direct Infringement
  - (2) Know or Have reason to Know D.I.... PLL approach
- **Vicarious Infringement Liability:**
  - (1) Receive Financial Profit from D.I.
  - (2) Have Control over D.I.
- **Direct Infringement by Illegal Omission:**
  - (1) Was able to Prevent D.I. but Did Not
  - (2) Obligated to Prevent D.I. by Reasonableness

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# Limitation of Provider's Liability under Provider Liability Limitation Law

- **Liability to Right Holders** for Infringement:  
No Liability if **no Negligence**
- **Liability to Users** for Deletion:  
No Liability if **no Negligence**  
or if **no Reply within 7 days**



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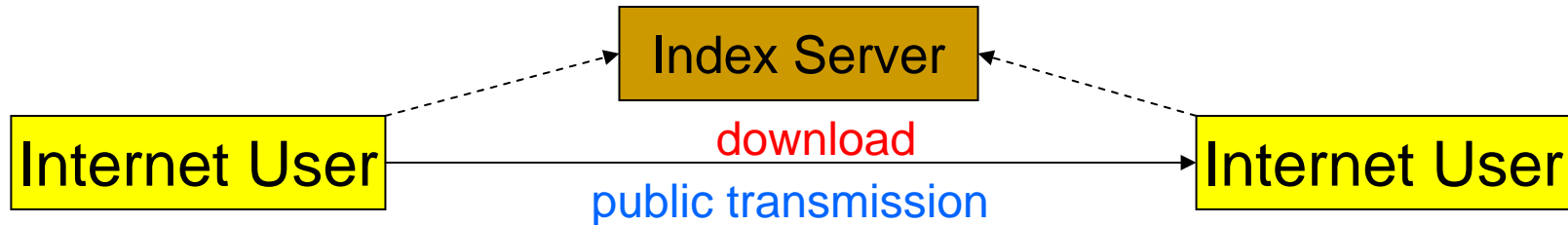
## *Shogakukan v. 2 Channel,*

Tokyo District Court judgment of March 11, 2004

- Facts: Copyright Owners sued BBS Provider for Contributory Infringement Liability
- Injunction Order: denied as against Contributory infringer
- Damages: denied as Provider has No Negligence except extraordinary case

# Napster-Type File-Sharing

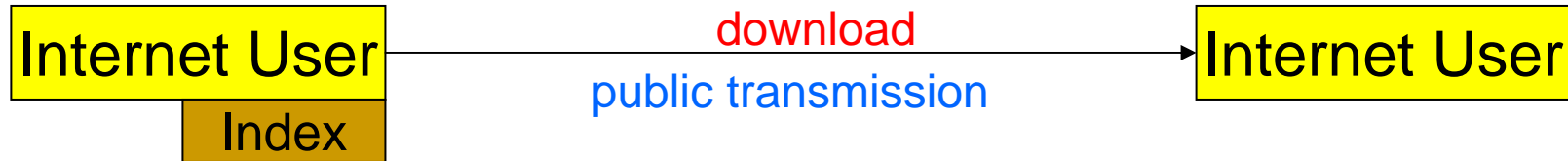
## Infringement of the Right of Public Transmission



- Enforcement against **Users**  
User's **ID Information** required
- Enforcement against **Providers**
  - (1) Contributory Infringement Liability: **Y**
  - (2) Vicarious Infringement Liability: **Y**
  - (3) Direct Infringement by Illegal Omission: **N**

# Gnutella-Type File-Sharing

## Infringement of the Right of Public Transmission



- Enforcement against **User**  
User's **ID Information** required
- Enforcement against **Provider**
  - (1) Contributory Infringement Liability: **N**
  - (2) Vicarious Infringement Liability: **N**
  - (3) Direct Infringement by Illegal Omission: **N**
- Enforcement against **Software Distributor**  
**N** if it can be lawfully used as well

# How to Improve Enforcement of Copyright in Digital & Networking Era

- System for **User's ID Information**
  - (1) **Disclosure** for Suits unless Sham Claim
  - (2) **No Risk** on Disclosure
  - (3) Available against **Access Services** Provider
  - (4) Obligation to Verify User's ID ?
- **Criminal Sanctions**
  - (5) **Showing** Prosecution of Criminal Penalties
- **Statutory Damages**
  - (6) To Compensate Minimum **Legal Costs**

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<http://www.itlaw.jp/news-e.html>

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