

IN THE
Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,
Petitioners,

v.

GROKSTER, LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL,
NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE,
PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC., AMERICAN SOCIETY
OF MEDIA PHOTOGRAPHERS, INC., ASSOCIATION OF AMERICAN
PUBLISHERS, INC., ASSOCIATION OF AMERICAN UNIVERSITY PRESSES,
PRODUCERS GUILD OF AMERICA, INC., GRAPHIC ARTISTS GUILD,
ENTERTAINMENT SOFTWARE ASSOCIATION, THE AUTHORS GUILD, INC.,
AND THE INDEPENDENT FILM & TELEVISION ALLIANCE
IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE¹

Amici are twelve separate organizations that represent thousands of members whose livelihoods or businesses depend upon effective copyright protection. Those members include individuals and corporate entities involved in creating and making available to the American public a wide variety of copyrighted works – motion pictures, television programming, sports programming, literary works, interactive video games and photographic art. *Amici's* members are subject to the same Internet piracy that plagues the motion picture and music industry Petitioners and that the Ninth Circuit, in its decision below, effectively permits to continue. *Amici's* primary purpose in submitting this brief is to draw the Court's attention to the practical implications of the decision below and to suggest an alternative approach for resolving the issues raised by Respondents' facilitation of that piracy.

Amici Office of the Commissioner of Baseball, National Basketball Association, and National Football League represent clubs engaged in professional sports. The professional sports clubs and leagues are responsible for the production of, and own the copyrights in, various audio and video products that they seek to market to the public, over the Internet and otherwise. Increasingly, however, these products are distributed illegally, and free of charge, over Internet file-sharing services, thereby

1. Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court. No person or entity, other than *Amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief. No counsel for a party in this matter authored this brief in whole or in part. Counsel for *Amici* represent certain of the Petitioners and the Recording Industry Association of America in matters other than this case, and they represent certain of the *Amici* in matters in addition to this case.

impairing *Amici's* ability to engage in an important segment of their business.

Amicus the Producers Guild of America, Inc. represents motion picture, television and new media producers. The members of *Amicus* the Independent Film & Television Alliance distribute internationally (and often produce and finance) the motion pictures and television programming that are created outside of the seven major United States studios, including such recent films as the *Lord of the Rings* trilogy, *Chicago*, *Cold Mountain*, *Lost in Translation*, *Monster*, *The Passion of the Christ*, *Shakespeare in Love*, *Whale Rider* and *Traffic*. The income that the members of these *Amici* receive is tied directly to sales of DVDs and other video products – the very sales that are displaced by illegal file-sharing.

Amici the Association of American Publishers, Inc., the Association of American University Presses, and The Authors Guild, Inc. represent the creators and distributors of various types of literary works. *Amicus* the Graphic Artists Guild represents, among others, illustrators and cartoonists whose creative efforts appear in such works and other media. Illegal file-sharing has adversely impacted the efforts of these *Amici* to create a legitimate and robust electronic book market.

Amicus Entertainment Software Association represents companies that, among other things, publish and sell interactive entertainment software (including video and computer games). Infringing distribution of entertainment software, through peer-to-peer networks and otherwise, costs legitimate software vendors billions of dollars in lost sales, robbing game developers and the game industry of revenue that could be used to underwrite the creation and marketing of an even wider array of game titles.

Amici the Professional Photographers of America, Inc. and the American Society of Media Photographers, Inc. represent the copyright interests of photographers working in a wide range of media and industries. Illegal file-sharing poses particularly significant risks for publication photographers and other small copyright owners whose livelihoods depend to a substantial degree upon commercial exploitation of their creative works.

SUMMARY OF ARGUMENT

The fundamental issue raised by this case is whether copyright protection will have any practical meaning in a digital environment — where Internet “file-sharing” services (without compensating or obtaining the consent of copyright owners) permit the virtually effortless and anonymous worldwide distribution of perfect copies of copyrighted works.

1. There is no dispute that such unauthorized file-sharing constitutes copyright infringement, which is committed on a daily basis by millions of people “who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (Posner, J.), *cert. denied*, 504 U.S. 1107 (2004) (“*Aimster*”). Nor is there any dispute that “peer-to-peer” file-sharing services, such as those offered by Respondents, are used overwhelmingly for purposes of copyright infringement. These services profit handsomely from, and would have no commercial business but for, that infringement. And they take affirmative steps to ensure that such infringement continues. Nevertheless, in the decision below, the Ninth Circuit Court of Appeals held that peer-to-peer services, by simply switching from a centralized index of files to a decentralized index of files (a process invisible and meaningless to an Internet user), can avoid secondary liability for facilitating hundreds of millions

of acts of online copyright infringement. *See Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *aff'g Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003) (“*Grokster*”).

2. Over twenty years ago, in a very different factual context, the Court formulated principles to determine whether a manufacturer of a product that facilitates copyright infringement is secondarily liable for that infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony-Betamax*”). The Court did so by striking a careful “balance between a copyright holder’s legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.* at 442. The Ninth Circuit decision below upsets that balance and seriously erodes the value of copyright protection in a digital world.

That decision leaves the copyright community with an untenable Hobson’s choice for responding to the literally millions of daily acts of infringement that the peer-to-peer services make possible – either flood the federal courts with numerous “John Doe” lawsuits against individual infringers (as some copyright owners have already been forced to do) or permit that infringement to go unchallenged and allow the value of their works to bleed away. But the very reason that the courts developed the secondary copyright liability doctrine was to avoid imposing such a burden on copyright owners and the federal judicial system and to ensure protection of rights guaranteed by the Constitution and the Copyright Act. Engaging in costly and burdensome litigation against a multitude of individual infringers is simply not a viable option for *Amici*. Consequently, the decision below, if allowed to stand, will deprive numerous copyright owners of an effective means to prevent and to remedy countless acts of copyright infringement.

The decision below also has the perverse effect of discouraging peer-to-peer services from acting responsibly by taking steps that could reduce or even eliminate online copyright infringement, while rewarding those services with copyright immunity when they refuse or fail to take such actions. The decision provides peer-to-peer services with a detailed blueprint for devising a system that evades all liability and equitable relief for facilitating copyright infringement on an unprecedented scale. There are several steps peer-to-peer services can reasonably take (and should take) that would significantly minimize the scope of online copyright infringement and that would *not* interfere with the comparatively *de minimis* amount of lawful file-sharing they may make possible. They can take these steps because (unlike the Betamax manufacturer) they maintain an ongoing relationship with the direct infringers, and they have the inherent ability to separate infringing and noninfringing uses. The Ninth Circuit, however, improperly deemed such steps to be “irrelevant.”

3. The Seventh Circuit Court of Appeals has taken a different, and more responsible, approach than the Ninth Circuit to resolving the issues surrounding online copyright infringement. In *Aimster*, the Seventh Circuit affirmed the district court’s determination that the peer-to-peer services in that case are secondarily liable for the infringement they facilitate. In doing so, the Seventh Circuit concluded:

Even when there are noninfringing uses of an Internet file-sharing service, moreover, if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.

334 F.2d at 653; *see also id.* at 648 (requiring a showing that the “detection and prevention of the infringing uses would be highly burdensome”).

The above approach is consistent with the Court's decision in *Sony-Betamax* and the patent law "staple article of commerce" doctrine that the Court adapted to copyright law in *Sony-Betamax*. Most importantly, the Seventh Circuit approach is faithful to the balance that the Court struck in *Sony-Betamax*, and it addresses the matter that *Amici* believe should be of principal concern here. It provides peer-to-peer services with an incentive (rather than a disincentive) to take reasonable steps that eliminate or at least minimize the amount of online copyright infringement – and thereby reduces the need for copyright owners to initiate (and for the courts to deal with) burdensome litigation against numerous individual infringers.

4. As the Court noted in *Sony-Betamax*, "the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." 464 U.S. at 435. *See also Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 667 (1944) (Frankfurter, J., dissenting) (noting that "the doctrine of contributory infringement is an expression both of law and morals"). In its decision below, the Ninth Circuit has adopted an approach that, as the Register of Copyright has suggested, "fails to see the forest for the trees"² and thus loses sight of the principles of justice and moral responsibility underlying *Sony-Betamax* and the doctrine of secondary copyright liability. On the other hand, the Seventh Circuit in *Aimster* has adopted a sound and balanced approach that both makes sense and effectuates these underlying policies. *Amici* strongly urge the Court to reverse the decision below and

2. *The Intentional Inducement of Copyright Infringements Act of 2004: Hearing on S. 2560 Before the Senate Comm. on the Judiciary*, 108th Cong. 13 (2004) (statement of the Hon. Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (hereinafter "Register's Statement") (available at <http://www.copyright.gov/docs/regstat072204.html>) (referring to the district court decision in this case).

to adopt the Seventh Circuit approach in dealing with the secondary copyright liability of peer-to-peer file-sharing services.

Amici do not believe the courts should discourage technological innovations that provide legitimate public benefits, including innovations that facilitate the lawful sharing of information over the Internet. Nothing in the Seventh Circuit approach would have such a discouraging effect. In contrast, by immunizing enterprises like those of Respondents from secondary copyright liability – enterprises that the record amply demonstrates were designed and operated with the knowledge that they would be employed overwhelmingly to facilitate copyright infringement – the Ninth Circuit did nothing to promote technology. Indeed, as discussed below, one of the unfortunate aspects of the Ninth Circuit’s decision would be its elimination of incentives for genuine technological creativity.

ARGUMENT

I. THE DECISION BELOW, IF ALLOWED TO STAND, WILL BURDEN THE JUDICIAL SYSTEM WITH MULTIPLE INDIVIDUAL INFRINGEMENT ACTIONS AND WILL DEPRIVE COPYRIGHT OWNERS OF A MEANINGFUL REMEDY FOR MILLIONS OF ACTS OF COPYRIGHT INFRINGEMENT

1. The Ninth Circuit’s decision below provides copyright owners with only one, highly unsatisfactory option for seeking redress for the hundreds of millions of acts of copyright infringement that are facilitated by Respondents’ services – lawsuits against a multitude of individual infringers. That is the course of action that the recording and motion picture industries have pursued since the district court in this case first absolved Respondents from secondary liability. During the past year,

record companies have filed copyright infringement actions against more than 7,700 individual infringers.³ Had each individual been sued separately, as some courts have required (*see infra* page 9), the number of cases generated by that litigation alone would equal the total number of all other copyright, trademark and patent lawsuits in the federal court system for the year ending September 30, 2003.⁴ The motion picture industry also has sued hundreds of individual infringers.⁵ The experience derived from such litigation highlights the serious problems with the decision below – both from the copyright owners’ perspective and from the perspective of judicial administration.

Copyright owners have faced significant and costly obstacles in pursuing individual infringers. It is, of course, difficult to identify those infringers because file-sharing services, such as those operated by Respondents, are designed to enable their users to act anonymously or pseudonymously. The difficulties have been exacerbated by judicial decisions that preclude copyright owners from taking advantage of provisions in the Digital Millennium Copyright Act that require Internet service providers to identify specific infringers in response to

3. See Tony Smith, *RIAA Sues 754 More P2Pers*, THE REGISTER (Dec. 17, 2004) (*available at* http://www.theregister.co.uk/2004/12/17/riaa_sues_754/).

4. See Administrative Office of the U.S. Courts, Table C3 - U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During 12-Month Period Ending September 30, 2003, 2003 Judicial Business (*available at* <http://www.uscourts.gov/judbus2003/appendices/c3.pdf>).

5. See Alex Veiga, *Moviemakers to Sue Internet Pirates; Studios Follow Path of Music Industry*, CHI. TRIB., Nov. 5, 2004, at 5 (*available at* 2004 WL 97456770).

requests from copyright owners.⁶ Copyright owners have thus been forced to file cumbersome “John Doe” suits and then serve subpoenas (often contested) to obtain the infringers’ identities.

The Electronic Frontier Foundation, which represents one of the Respondents in this appeal, has conjured a plethora of arguments designed to make the prosecution of these actions even more problematic for copyright owners. *See, e.g.*, http://www.eff.org/IP/P2P/Fonovisa_v_Plank/plank_answer.pdf (raising twenty-two separate defenses to a John Doe copyright infringement action). For example, these arguments have convinced some courts to rule that copyright owners may not bring one action seeking the identities of multiple “John Doe” customers of a single Internet service provider, but rather must initiate a separate action against each individual infringer.⁷ Decisions such as these have imposed considerable and unnecessary costs on both copyright owners and the judicial system – all as a result of the decisions below.

6. *See In re Charter Comms. Inc., Subpoena Enforcement Matter*, ___ F.3d ___, 2005 WL 15416 (8th Cir. 2005); *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004); 125 S. Ct. 347 (2004).

7. *See In re Cases Filed by Recording Companies*, Case Nos. A-04-CA-550 LY, A-04-CA-636 SS, A-04-CA-703 LY, A-04-CA-704 LY (W.D. Tex. Nov. 17, 2004) (prohibiting joinder and requiring that four actions be refiled as 254 separate John Doe actions); *BMG Music v. Does 1-203*, Civil Action No. 04-650, 2004 WL 442626 (E.D. Pa. Mar. 5, 2004) (prohibiting joinder and requiring 203 separate John Doe actions); *Interscope Records v. Does 1-25*, No. 6:04-CV-197-ORL-22-DAB (M.D. Fla. Apr. 27, 2004) (prohibiting joinder and requiring separate John Doe actions); *Twentieth Century Fox Film Corp. v. Does 1-12*, No. C 04-04862 (N.D. Cal. Nov. 16, 2004) (permitting discovery against Doe 1 and staying action against Does 2-12 because joinder improper), *aff’d on recon.*, (Dec. 1, 2004). Copies of these orders may be found at <http://www.eff.org/IP/P2P/?f=riaa-v-thepeople.html> and http://www.eff.org/IP/P2P/MPAA_v_ThePeople/.

2. The possibility of instituting individual copyright infringement actions against a multitude of individuals engaged in unlawful file-sharing is not a practicable option for *Amici* and their members. And, while major motion picture and record companies have filed lawsuits against thousands of individuals, they are certainly not able to litigate against all of the millions of individuals engaged in online copyright infringement. The costs and burdens of litigation against multiple John Doe infringers – as reflected in the recording and motion picture industries’ experience – are overwhelming. Particularly for many small and individual copyright owners, it is not practicable, financially or otherwise, to bring enforcement actions against users of file-sharing technology. Deprived of any practical remedy to protect their copyright interests against the onslaught of file-sharing technology, many copyright owners find their copyrights virtually useless in a digital environment and their ability to exploit and protect their work seriously endangered. As the Court has recognized, the endangerment of the *protection* of copyrighted works is tantamount to the endangerment of the *creation* of those works. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

The very purpose of the copyright secondary liability doctrine is to avoid precisely such burdensome litigation that renders impracticable the enforcement of copyright rights. As the Seventh Circuit in *Aimster* observed:

Recognizing the impracticability or futility of a copyright owner’s suing a multitude of individual infringers (“chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem”), . . . the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.

