Summaries of Amicus Briefs in *MGM v. Grokster*

United States of America

- Brief on behalf of the United States, filed by the Solicitor General
- The decision of the Ninth Circuit should be reversed and the case remanded to the district court. The Ninth Circuit's decision is inconsistent with *Sony-Betamax*'s command that copyright law demands "effective -- not merely symbolic -- protection."
- To analyze whether a product has "commercially significant noninfringing uses," a court must look to determine whether the defendant's business is so tied up with infringement that it is not genuinely engaged in an unrelated area of commerce.
- This test requires a court to look at the relative significance of infringing vs. noninfringing use. In close cases, the court should also look to how the product was marketed, the efficiency of the product for noninfringing uses, and the steps the seller has taken to eliminate or discourage noninfringing uses.
- Although there are legitimate peer-to-peer applications, "there is every reason to suspect that respondents' networks, having been built initially around the draw of illegally downloaded copyrighted material, are likely to remain centered around that activity."
- Liability may also be appropriate where the defendant induced or encouraged infringement. The court of appeals failed to consider this possibility and the record demonstrates a substantial question on this issue.

State Attorneys General

- Brief for the Attorneys General of 39 states and one territory
- Unlawful file-sharing on P2P networks is harmful in many ways, by victimizing artists, costing people jobs, and consuming Internet bandwidth. In addition to causing these harms, P2P networks "have become havens for other crime," including identity theft and child pornography, as well as giving children access to pornography. But "the most insidious consequence of respondents' business model may be the way it fosters networks of illegality."
- The rules of secondary liability in copyright law are similar to the rules of criminal and tort law in every other context: 1) one who aids and abets a violation of law is also liable, and one cannot escape responsibility by blinding oneself to violations of the law; 2) one who designs a product and profits from its unlawful use is liable where the person can take steps to stop the unlawful conduct.
- Peer-to-peer technology can be used lawfully, but peer-to-peer companies must take steps to stop the unlawful conduct occurring on their networks. They cannot ignore it, profit from it, and be above the law.

Senators Hatch and Leahy

- Brief filed on behalf of former Chair and Ranking Member of the Senate Judiciary Committee
- Grokster and StreamCast misconstrue the roles of Congress and the Judiciary. Courts have always developed the law of secondary liability and Congress has ratified that authority. Thus, Grokster and StreamCast's argument that the Court should leave these issues to Congress is simply wrong.

- Respondents "have misstated both the nature and import of the recent Senate legislative effort" on the so-called Induce Act.
- Congress considered the Induce Act because the Ninth Circuit had "bypassed" the traditional common law principles of secondary liability, which have always been well-established. Such consideration does not mean that the Court lacks authority or should refrain from deciding the issues in this case.

Office of the Commissioner of Baseball, National Basketball Association, National Football League, American Society of Media Photographers, Professional Photographers of America, Association of American Publishers, Association of American University Presses, Producers Guild of America, Graphic Artists Guild, Entertainment Software Association, Authors Guild of America, Independent Film & Television Alliance

- On behalf of organizations representing significant copyrighted owners, including major sports leagues, software distributors, publishers, artists, and authors.
- There will be no meaningful protection for copyright owners in the digital age if the Ninth Circuit is not reversed.
- Copyright owners cannot possibly sue all individual infringers and they do not have to: contributory and vicarious liability exist to allow copyright owners to stop enterprises enabling and profiting from such infringement.
- The Ninth Circuit's decision creates perverse incentives for companies to encourage infringement, but strip themselves of the means to stop it. This is exactly what counsel for EFF has advocated in his public advice to peer-to-peer services, but it is not the law.
- The Seventh Circuit in the *Aimster* case applied the correct test for liability because that test properly balances the interests of copyright owners and others engaged in legitimate noninfringing commerce

Brief of ASCAP et al.

- On behalf of associations of composers, authors, publishers, and songwriters.
- Liability is appropriate against secondary infringers who "are often the parties who benefit the most from, and are in the best position to end, the illegal acts."
- As a practical matter, it is difficult to obtain relief from the direct infringers. And as a theoretical matter, the one who benefits from the direct infringement ought to share the costs of that infringement.
- "Unlike most other property, copyrights cannot be protected by fences or locks, and their owners must rely solely on the protection afforded by the courts."
- The costs of enforcement against individual direct infringers are staggering, especially for small, independent songwriters and publishers, and especially when the infringements occur online. Only the largest copyright owners have the resources to protect their copyrights against this rampant online infringement.
- When enforcement is available only against the direct infringers, who are often minors, enforcement against them fosters negative publicity and disrespect for copyright law.

Brief of National Academy of Recording Arts & Sciences, Inc., fifty-four recording artists, et al.

- On behalf of NARAS, which sponsors the GRAMMY Awards, the Recording Artists' Coalition, the Country Music Association, Inc., the Gospel Music Association, the Hip-

Hop Summit Action Network, the Jazz Alliance International, Inc., the Rhythm & Blues Foundation, and SESAC, Inc., and fifty-four recording artists.

- "[C]ountless members of the Academy and other *amici* organizations have lost their jobs with record companies, or seen their contracts not renewed, because of the dramatic downturn in the music business due to such infringement."
- The Ninth Circuit's decision immunizes parties from secondary liability so long as their product is capable of *any* hypothetical, insignificant noninfringing use. It never considered whether those uses were "substantial" or commercially significant.
- The Respondents here engaged in conduct that constituted knowing inducement to infringe.
- The Ninth Circuit's standard encourages P2Ps to design their software so that they avoid knowledge of the ongoing infringement, and cannot know of specific acts of infringement until it is too late. "[T]here is simply no technological, economic, or practical reason why Grokster could not have implemented" filtering.
- "It is hardly a secret that record companies have fired thousands of employees and have significantly cut back on investment and expansion plans, largely due to the downturn in record sales resulting from illegal downloading via the internet."

<u>Digimarc, Audible Magic, and GraceNote</u>

- Brief filed on behalf of companies that provide technologies to identify and filter out copyrighted works
- There are many commercially available technologies that could be used to block dissemination of infringing works on peer-to-peer services.
- Digital fingerprinting, provided by Audible Magic and GraceNote, makes it possible to identify a file containing a digital sound recording by its acoustical properties, and thus to prevent its dissemination.
- Digital watermarking allows content providers to embed special codes in files so that they can be tracked. This has been highly successful in addressing physical theft, but also can be used to prevent unauthorized reproduction and dissemination of copyrighted works online.
- Any of these technologies could be implemented today in a decentralized peer-to-peer network to limit the amount of copyright infringement occurring, while ensuring that non-infringing uses, as well as legitimate commercial downloads of copyrighted music, may flourish.

<u>iMesh</u>

- Brief from oldest surviving peer-to-peer company that is preparing to implement a peer-to-peer network that will filter copyrighted content.
- iMesh is in the process of integrating digital fingerprinting technology into its peer-to-peer network, which would allow it to sell legitimate downloads of copyrighted works, prevent infringement on its network, and allow free dissemination of public domain works.
- Such technology can be implemented -- even without access to the underlying source code -- in the Gnutella and Fast Track peer-to-peer networks, or any decentralized peer-to-peer network.
- Innovation such as legitimate peer-to-peer will prove to be a "Sisyphean task" if

copyrighted works are still available, for free, on peer-to-peer networks that are not held accountable. "No matter how much companies like iMesh invest in marketing, innovative technology, and branding, the boulder will likely roll back down to the bottom of the hill."

Brief of the Business Software Alliance

- On behalf of the Business Software Alliance, an alliance of software and hardware technology companies
- Secondary liability can be applied in ways that do not threaten innovation. A defendant need not have *actual* knowledge of infringing activity, as constructive knowledge is sufficient.
- Technology vendors that engage in "direct involvement" with infringing uses should be liable.
- The case should be reversed and remanded to examine whether Grokster and StreamCast had the requisite "direct involvement" with infringement in this case.

DiMA, Net Coalition, Center for Democracy and Technology, Information Technology Ass'n

- Brief from associations representing Internet and IT companies and civil liberties group
- The Ninth Circuit applied the wrong standard, and the case should be remanded to the district court to determine whether Grokster and Streamcast encouraged infringement in violation of the copyright laws.
- The *Sony-Betamax* standard must be interpreted to balance the interests of copyright owners and technology companies, but should broadly protect sellers of products so long as "there exists a reasonable possibility that there will be substantial current or future use of a technology for noninfringing activities."
- The Seventh Circuit decision in *Aimster* was incorrect and, if it was the law, would harm innovation.

Brief of Defenders of Property Rights

- On behalf of Defenders of Property Rights, a non-profit legal foundation interested in ensuring that intellectual property rights remain meaningful and protected in the digital age.
- "Under the Ninth Circuit's reasoning, an individual who markets and sells burglary tools, and counsels customers on how to use the tools to break into homes, would not be liable on the theory that some customers might use the tools to break into their *own* houses if they misplace their keys—or the houses of their friends who give them permission."
- In order to encourage creative arts, copyright must preserve the financial incentives of writers, authors, and composers.
- Since the 1600s, courts have recognizes that those who join together to commit torts can be held liable for aiding and abetting.
- Because Respondents assisted, encouraged and benefited from the tortious conduct, they are morally culpable and should be deemed liable for the resulting harm. Unlike the defendants in *Sony-Betamax*, these defendants did not merely sell a product, but have taken affirmative steps to assist and encourage infringement; this is secondary liability *regardless* of whether there are commercially significant noninfringing uses. Moreover,

every copying device is “capable” of noninfringing uses, so the Ninth Circuit’s standard would render copyright owners helpless.
- The Court should balance the interests at stake, to permit legitimate technologies to flourish while still respecting property rights.

Kids First Coalition, Christian Coalition of America, Concerned Women for America, Enough is Enough, Morality in Media, National Center for Missing and Exploited Children, Fraternal Order of Police, National Law Center for Children and Families, We Care America
- Brief on behalf of family and law enforcement groups.
- “Like any non-sentient, non-judgmental technology, peer-to-peer technology can be used for illegal pernicious activities.” In response to the Napster case, peer-to-peer companies had a choice: act responsibly and stop infringement on their networks or disable means to stop unlawful conduct and pretend to be blind to it, while still profiting from it. Grokster and StreamCast chose the latter. As a result, P2P networks are havens for copyright infringement, identity thieves, and pedophiles
- Grokster and StreamCast’s engineering is not innovation, but a conscious choice to attempt to skirt the law. The Ninth Circuit’s decision in wrong because it immunizes companies for making such choices, rather than giving them incentives to ensure that the law is not broken.
- The decision below “encourages the proliferation of irresponsible networks that facilitate the unfettered dissemination of illegal materials.”
- Under traditional principles of tort, criminal, and copyright law, Grokster and StreamCast are responsible for their actions, including their attempts to blind themselves to what occurs on their services.

Law Professors, Economics Professors, Treatise Writers
- Brief filed on behalf of 15 academics in law and economics
- The Ninth Circuit’s decision was wrong both because it failed to look at the respondents’ intent and because it applied the wrong standard as to whether services that are overwhelmingly used for copyright infringement can claim to be immune because a few people use them lawfully.
- The Ninth Circuit’s decision mixes up contributory infringement and vicarious infringement and creates the wrong incentives for technologists to design technology to thwart copyright protection, rather than technology that protects (or does no harm) to copyrights.
- The courts, which have always been the primary arbiter of secondary liability -- not Congress -- should decide this issue.

Kenneth Arrow, Ian Ayres, Gary Becker, Wiliam Landes, Steven Levitt, Douglas Lichtman, Kevin Murphy, Randal Picker, Andrew Rosenfeld, and Steven Shavell
- Brief on behalf of professors and economists, including two Nobel Laureates in economics
- Clearly defined property rights are essential for competitive markets. This applies to copyright as well as anything else.
- Indirect (or secondary) liability is most commonly appropriate in circumstances 1) where it is difficult or impossible to sue the direct infringer; 2) where the party to be held indirectly

liable has the ability to deter the infringement; and/or 3) where the party to be held indirectly liable facilitates the infringement in some way. All three factors are present here.
- The fact that a product might be capable of some non-infringing use is not a basis for refusing to impose indirect liability. A rule, such as the Ninth Circuit's, "gives manufacturers no incentive to deter infringement even when deterrence can be accomplished at low cost and without any significant interference with non-infringing uses."
- A better rule is that of the DMCA, which gives service providers incentives -- through safe harbors -- to act responsibly and assist copyright owners.
- The fact that some public domain material is available on peer-to-peer networks does not mean that there are substantial non-infringing uses -- public domain material is available elsewhere. When evaluating non-infringing uses, one must look at whether there are other alternatives for the non-infringing uses and alternatives for stopping the infringement.

American Intellectual Property Law Association (AIPLA)
- Brief on behalf of bar association of intellectual property lawyers
- *Sony-Betamax* does not provide a defense where a defendant actively induces infringement.
- To show inducement, a plaintiff must show 1) actions which encourage or facilitate infringement; 2) notice of the infringing nature of the acts; and 3) an intent to cause acts that constitute infringement. The key aspect that was not present in *Sony-Betamax*, but may be present here, is intent.
- Where a product has no substantial non-infringing uses, one can infer that the seller intended to cause infringement. Where there are substantial non-infringing uses, one must find other evidence of intent. Such evidence may include sale of a product whose most conspicuous use is infringement combined with advertising or sale of a product to some one likely to be an infringer.
- The Ninth Circuit's opinion should be vacated and the case remanded to district court.

Professor Hollaar
- Brief on behalf of Professor of Computing at the University of Utah
- By only focusing on the noninfringing uses of peer-to-peer networks and then creating an impossible to meet standard of knowledge, the Ninth Circuit ignored a traditional basis for contributory infringement -- inducement.
- Liability for inducement exists in all other forms of intellectual property and "looks to the conduct of the party, not the capabilities of the technology."
- Liability for inducement requires a knowing and intentional act, but is otherwise broad and may consider a wide range of direct and circumstantial evidence, including whether the business depends on infringement to survive, how the product is advertised, whether features have been added to the product to conceal infringing uses, and whether the system is replacing another product that was widely known to be a haven for infringement.
- Clear rules establishing liability for inducement will not chill legitimate innovation.

International Rights Holders
- Trade associations and professional organizations outside the United States representing

record companies, producers, distributors, publishers, and artists

- The United States' compliance with its international treaty commitments will be called into question if it permits "a safe haven for entities to set up businesses deliberately designed to enable copyright infringement on a massive scale."
- The decision below "severely limits the practical ability of right owners such as *amici* to enforce their rights effectively against one of the most virulent species of online infringements . . . and thereby threatens to place the United States in breach of its international obligations and responsibilities."
- Failure of the United States to provide adequate enforcement mechanisms for copyright owners will drain the U.S.'s credibility in promote protection of copyrighted works abroad and to stop the piracy of copyrighted works in other countries with lax copyright laws.

Brief of Progress & Freedom Foundation

- On behalf of Progress & Freedom Foundation, which studies the digital revolution and its impact on public policy, with a focus on promoting effective property rights and markets in digital content.
- The current P2P explosion creates a Prisoner's Dilemma, through which individuals have incentives to distribute and copy copyrighted files. "But if everyone responds to this calculus of personal interest, the whole system collapses and everyone loses." Brief at 3.
- "No on in this case argues that P2P as a *technology* should be banned. The issue, rather, is the *business practices* which the filesharing companies are wrapping around this technology." Brief at 4.
- The Court here should seek to create legal rules that balance consumers' interest in technological innovation with their interest in fostering proper incentives to produce intellectual property. The Court should impose liability not on the technologies, but on those businesses that deliberately structure themselves to be dependent on infringement.

Brief of Video Software Dealers Association

- On behalf of Video Software Dealers Association, representing retailers and distributors in the home video industry.
- The P2P activity is not precisely "distribution," but "reproduction" under the Copyright Act. Distribution refers only to the movement of material objects; reproduction involves, as here, the reproduction from one tangible medium to another.
- The Court should consider whether the likelihood of infringement, multiplied by the burden imposed by infringement, is less than the cost of adequate precautions. When precautions could be taken that suppress the infringing activity, without shutting down the "forum" altogether or imposing on First Amendment rights, the cost of precautions is not great.