No. 04-480

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

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BRIEF OF *AMICUS CURIAE* THE PROGRESS & FREEDOM FOUNDATION IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Progress & Freedom Foundation (PFF) is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] Its principal mission is to study the digital revolution and its impact on public policy.

[1] The parties to this proceeding have filed with the Clerk of Court blanket consents to all *amicus curiae* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other then the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

PFF's interest in this case stems from the work of an internal project called the Center for the Study of Digital Property (CSDP), which is dedicated to developing and advancing market-based, property-rights-oriented approaches to issues of digital content. In furtherance of the mission, CSDP maintains a website entitled *IPcentral.info*,[2] which contains links to a variety of materials on intellectual property issues, including written materials, a weblog, and other sites with related interests. Staff members prepare or commission analyses of important intellectual property issues, including, in 2004, a work on "Liability of P2P File-Sharing Systems for Copyright Infringement By Their Users."[3] Staff members also appear before congressional committees and interact regularly with journalists, academicians, industry representatives, and government officials.

"Digital property" is a broad category, encompassing not only music but movies, software, many varieties of word-based material, games, photographs, knitting patterns, architectural drawings, and even 3-D representations of physical objects. The increasing importance of digital property is forcing much serious re-thinking about the nature and operation of property rights and markets, and considerable institutional innovation. Because music is in the vanguard of the changes, it has become the focus of attention, but the decisions made with respect to music will reverberate throughout the economy and society.

[2] The website may be found at http://www.IPcentral.info.

[3] William F. Adkinson, Jr., "Liability of P2P File-Sharing Systems for Copyright Infringement By Their Users," The Progress & Freedom Foundation, *Progress on Point* No. 11.7 (March 2004) (http://www.pff.org/publications/ip/pop11.7p2psystems.pdf).

In consequence, the instant case, and the related *Aimster* decision,[4] involve core PFF interests in promoting effective property rights and markets in digital content.

SUMMARY OF ARGUMENT

Consumers have two strong interests: (1) Avoiding inhibitions on technological progress; and (2) Fostering the production of content by providing incentives to creators.

These are complementary, not conflicting, because each is necessary to the other. Technological devices are useless without content, and content is pointless without means of delivery. But they must be reconciled, because each, taken to the limit of its logic, can do serious harm to the other.

The Ninth Circuit focused totally on the need to avoid any inhibition on technology, and in so doing it lost sight of the equally important consumer interest in promoting content.

Consumers face a collective action problem of the type known as Prisoner's Dilemma, the name applied to situations in which the immediate incentives operating on each individual work to undermine the interests of the whole group. In the context of music, each consumer is better off if he or she has total access to unauthorized file-sharing while every other consumer pays for the music. But if everyone responds to this calculus of personal interest, the whole system collapses and everyone loses.

A crucial function of legal rules is to avoid such results. But the Ninth Circuit failed to recognize that no group of consumers, interested in solving its Prisoner's Dilemma problem and maximizing its long-term enjoyment of music, would select a legal regime that allows the untrammeled operation of Grokster and similar programs. Such a regime

[4] *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

would quickly distribute the existing stock of music, but would provide no incentives for future production, and would destroy any hope for the creation of legitimate Internet distribution systems that can provide continuing incentives to the creative community.

Also, the Ninth Circuit was mistaken in its application of the "capable of substantial non-infringing uses" language from *Sony*. No one 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. These can and should be the subject of judicial inquiry, and condemned when they create business models that can fairly be classified as deliberately dependent on infringement.

Finally, this Court has been urged to defer to Congress. This is bad advice, because it assumes that *Sony* was rightly applied below. Also, the present situation needs cautious, common law approaches, not sweeping efforts to solve poorly-understood problems at one hack. Congress will benefit greatly if this Court gives it some breathing space.

ARGUMENT

I. Nature of Consumers' Interest

The dispute here cannot be characterized as a contest of "content providers vs. tech companies," or "producers vs. consumers." It is not a zero-sum game, in which gains by one interest are the reciprocal of losses by the other.

Instead, the case requires reconciliation of two complementary interests of consumers, each of which has been recognized in decisions of this Court.

One interest is in technological innovation and progress, in not allowing new technologies to be stifled by existing business models and in not allowing copyright holders' control of content to be transformed into control over the devices through which that content is accessed. The importance of this value was emphasized in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The other equally important consumer interest recognizes that proper incentives and markets are crucial to the production of intellectual property. This value was emphasized most recently in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the Court noted that "copyright law serves public ends by providing individuals with an incentive to pursue private ones."[5] It prefaced this conclusion with the explanation:

> "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare, through the talents of authors and inventors." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science." *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), affd 60 F.2d 913 (CA2 1994). Rewarding authors for their creative labor and "promoting . . . Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals." *The Federalist*, No. 43, p. 272 (C. Rossiter ed., 1961). [Brackets, ellipses, and emphasis in *Eldred*.][6]

The consumer interests embodied by *Sony* and *Eldred* should not be called "competing values" because they do not contradict each other. Each is absolutely necessary to the full consummation of the other. Consumers are not served by the

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[5] 537 U.S. 212 note 18.

[6] 537 U.S. 212 note 18.

existence of an infinite amount of dazzling hardware if they have no content for it, nor are they served by libraries of content if they lack means to enjoy it.

So, while either value, pushed to the limit of its logic, is capable of doing serious and perhaps total damage to the other, this would (to wax a bit anthropomorphic) be a suicidal act, because either value in the course of destroying the other would destroy itself.

To aid in thinking about how these values can be reconciled, and to understand where the Ninth Circuit went wrong in *Grokster*, it is illuminating to construct a thought experiment. Imagine a group of music lovers developing a set of legal rules that will maximize their long-term enjoyment of music by promoting both the creation of content and the development of technological means by which they will receive it.

The first thing such a conclave would recognize is that untrammeled P2P, although it takes advantage of the Internet's marvelous capacity to distribute pre-existing digital content, is a devil's bargain for consumers in anything except the extreme short-run. The existence of Grokster and its ilk create serious impediments to the development of authorized, paying channels of distribution over the Internet that reward creators and nurture the production of more creative product.[7] Entrepreneurs in several industries are trying to develop such channels, but it is highly doubtful that any can succeed if the unauthorized services continue unchecked. In consequence, because unauthorized P2 distribution produces no revenue for creators, once the existing stock of creative product is ex-

[7] Note that unpaid distribution of pre-existing creations breaks faith with the creators, who produced their works in the expectation of payment. But for purposes of this thought experiment, consumers are assumed to be devoid of such moral sensibility, and focused totally on their own interests.

hausted there will much-reduced incentives for the production of more.

Advocates of P2P talk of "new business models," but no convincing specific examples of such plans have been proposed, and they remain utopian abstractions. Markets have an amazing capacity to reconstitute themselves through the development of new models, but a prime requisite for this process is that property be definable and defensible. It is precisely that definition and defense that is at issue in this case.

Consumers know perfectly well that unauthorized downloading decreases incentives for creativity, but they have a collective action problem, of the type known as Prisoner's Dilemma.[8] They know that their collective course of conduct

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[8] For readable discussions of this concept, see William Poundstone, *Prisoner's Dilemma* (1992), Robert Axelrod, *The Evolution of Cooperation* (1984), and James D. Miller, *Game Theory at Work* (2003). There is a minor dispute over nomenclature, since some purists think the name "Prisoner's Dilemma" should be applied quite narrowly. This brief follows Poundstone, Axelrod, and Miller in using the term more generally, as a shorthand for the large class of situations in which short-term incentives of each individual render it difficult for the individuals *en masse* to maximize their utility. As Axelrod says:

> Prisoner's Dilemma [is used] as the conceptual foundation for models of important social processes. Richardson's model of the arms race is based on an interaction which is essentially a Prisoner's Dilemma . . . . . Oligopolistic competition can also be modeled as a Prisoner's Dilemma . . . . The ubiquitous problems of collective action to produce a public good are analyzable as Prisoner's Dilemmas with many players . . . . Even vote trading has been modeled as a Prisoner's Dilemma . . . . In fact, many of the best-developed models of important political, social, and economic processes have Prisoner's Dilemma as their foundation. (References omitted.)

Axelrod, *supra*, at 28.

The distinction can also be embodied in the terms "constitutional interest" and "action interest"; the constitutional interest is what the individual sees as being in the best interest in the group as a whole while action is ruinous in the long term, to the creation of product and to the development of legitimate Internet distribution channels, but no single consumer can stop the tide.[9] An individual who stops participating loses access to the material while other consumers continue to obtain it. In the end, the individual's refusal to participate will have trivial impact on the availability of content in the future, so the non-participant will have sacrificed without result. Thus, while each participant knows that the current course of joint conduct is folly, each has a strong incentive to continue to take while the taking is good.

Indeed, the situation becomes a particularly egregious case of a commons problem. If a commons is going to be destroyed, then each individual has an accentuated incentive to grab as much as he or she can as quickly as possible before the destruction is complete, and the downward spiral accelerates.

Clearly, consumers' willingness as individuals to seize the opportunity offered by Grokster to loot the music commons is not an indication of what they would perceive as their real long-term interest. Consumers' true interest is in finding a mechanism for solving the Prisoner's Dilemma problem, a mechanism by which each consumer agrees to forego un-

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interest is his interest in a particular situation. See Viktor Vanberg & James M. Buchanan, "Rational Choice and Moral Order," in 10 *Analyse & Kritik* 138 (1988).

[9] A lively empirical debate exists over the impact of the unauthorized downloading services on sales of CDs. This literature is not cited here because it is profoundly uninteresting. While dual distribution channels will exist for some time, and the interaction of P2P with the sale of physical CDs will be complex and sometimes beneficial, the future of the business is in changing music into bits and sending it out over wires and wireless. The crucial issue in this case is the impact of Grokster and similar companies on the development of legitimate channels in this space, not on its impact on a declining business model.

authorized downloading in exchange for a similar commitment from others.

In this framework, the question becomes, "what legal rules will prevent business entities from exploiting the short-term incentives of the situation and will enable consumers to pursue their long-term collective interest?"

One legal regime that the consumer conclave would reject immediately is the one established by the Ninth Circuit's decision in this case, which will allow Grokster and other unauthorized file-sharing services to operate with impunity. This is not a solution—this is the problem.

More generally, the consumers would reject the Ninth Circuit's application of *Sony* to this case. In *Sony*, this Court said that the "sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, *it need merely be capable of substantial noninfringing uses*." (464 U.S. at 442) (emphasis added)

But it is difficult to see how this standard provides an answer in the instant case. The Court's preface to the crucial *Sony* language (italicized above) referred to an item of hardware, the Betamax. The plaintiffs' attack was on the core function of this hardware—the ability to record and replay television programs. Even if the Betamax were used for non-infringing purposes as well as infringing, there was no way to allow the product to exist that did not create the possibility that it would be used for infringement.

The instant case, and any case involving P2P software programs, is quite different. There is no effort to suppress the core concept of P2P as a *technology* that allows filesharing among a network of willing users. Everyone accepts that this technology is indeed legitimate and useful.

The dispute concerns the use made of P2P technology in a business setting, and the ancillary features wrapped around the core of P2P technology to make it a paying commercial enterprise. To apply the "capable of non-infringing use" to the *P2P technology* used by Grokster does not answer the question of liability, because there remains the issue whether this standard should be applied to Grokster *the business*. And the clear answer should be "no."

To expand on the *Sony* Court's analogy of the copying machine, suppose someone purchased a battery of photocopying machines and set up shop advertising: "Business opportunity: bring us someone else's book and we will make any number of copies that you can sell at half price." Under *Sony*, and quite properly, the copyright holder could not sue the maker of the copying machine—the *technology*—but no court would immunize the shop on the ground that its *business* was also capable of duplicating non-copyrighted material.

Thus, the interest of consumers in this case is not in having *Sony* overturned or even diluted, but in developing a further standard that reflects the complicated context of this case by focusing on business models. It is in consumers' interest that a business should be held secondarily liable for infringement if it encapsulates a technology within a web of practices that make the enterprise as a whole deliberately dependent on infringement.

II. Relevant Business Practices

It goes without saying that everyone concerned in this dispute—consumers, tech companies, content companies—would love to find a bright-line standard to inform everyone exactly what practices justify the classification of a business as one that is deliberately infringement-dependent.

Regrettably, no one has articulated such a standard, and it appears that the matter must undergo further resolution in the lower courts.

There are, however, some lists of practices developed by various sources that courts should consider in refining the rules on this issue.

One interesting list comes from an article written as a primer on how P2P software providers can avoid liability.[10] The author's advice is that a P2P company has a binary choice: "Total control or total anarchy." It should either completely control the users of its product, and prevent infringing conduct, or it should eschew any control whatsoever.

The techniques for eschewing control are:

> Make no copies of copyrighted material on the provider's own servers;
>
> Sell stand-alone software rather than on-going services;
>
> Create a platform that can be use for non-infringing uses and promote them;
>
> Do not promote infringing uses;
>
> Disaggregate functions: "search, bootstrapping, namespace management, security, dynamic file redistribution, to take a few examples" should be performed by different entities;
>
> Don't make money from the infringing activities of your users;
>
> Give up End User Licensing Agreements; these contain terms that can be used to establish "control";
>
> Do not provide direct consumer support, especially when help requests concern copyrighted material;

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[10] Fred von Lohmann, *IAAL: What Peer-to-Peer Developers Need to Know about Copyright Law*, Electronic Frontier Foundation, v. 4 (Sept. 2004) (at http://www.eff.org/IP/P2P/p2p_copyright_wp_v4.pdf).

> Make the software “open source” (*i.e.*, release it under a license that allows anyone to modify it and/or redistribute it without payment to the developer).

If these factors were applied as tests for secondary liability, much of the problem would disappear. It would become difficult indeed for a P2P service to make money under these terms, and impossible if the open source injunction were followed, so such businesses would die.

Another interesting list of important practices focuses on the default settings built into a program by the distributor. A brief by the Berkman Center for Internet & Society at Harvard Law School argued that it would be unfair to hold the user of a P2P software program liable for infringement, noting:[11]

> “With [program], it is easy to begin file sharing, but much more difficult to turn it off,” because “by default, [program] starts itself immediately when the user turns on his computer. The program runs in the background, pre-set with the file-sharing feature tuned ‘on’ and configured to allow an unlimited number of uploads at a time. Many users may not be aware that the program is running continually in this fashion.”
>
> “Unless the user changes these default settings, [program] will begin to run every time the user turns on his computer.”
>
> “When a user downloads a file from another [program] user, by default that copy is stored in the publicly shared folder, which means it becomes immediately available for copying by others . . . . [program] defaults to creating a shortcut to open this folder on the user’s desktop.”

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[11] *Brief of Amicus Curiae Berkman Center for Internet & Society at Harvard Law School, Capitol Records, Inc., v. Alaujan*, No. 1:03-CV-11661-NG (D. Mass.), pp. 8-10 (May 24, 2004) (http://cyber.law.harvard.edu/home/uploads/352/amicusbrief.pdf).

> Also by default, if the user wants to "discontinue file sharing, he must either select the 'Disconnect' option under the file menu, or shut down [program] entirely. Unlike most computer applications, clicking on the 'x' button on the top right corner" does not achieve a shutdown. "This action merely hides the [program] . . . while [it] continues to run . . . in the background."

> "Disabling the default file-sharing features in [program] is a complicated process [and] available resources that detail how to disable file sharing are often inconsistent or provide incomplete instructions."

Register of Copyrights Marybeth Peters, in testimony before the Senate Committee on the Judiciary, added to this list of questionable software features:[12]

> "Some programs affirmatively encourage people to distribute as many files as possible, knowing that most people will share infringing files. For example, [program] implements what it calls "Participation Levels", which increase a user's download performance based on the amount uploaded from that user. In other words, the more attractive the files you are sharing with others, the easier it will be for you to download copies from others. Indeed, [program] suggests that the user 'share large and interesting files.' This feature encourages users to make available popular copyrighted works, which will likely be the most frequently downloaded by others." (Footnote omitted)

Register Peters pointed to other possible indicia that a program has crossed the line from purveyor of a product or service into deliberate infringement-dependency. For exam-

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[12] *Protecting Innovation and Art While Preventing Piracy: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong., 2d Sess. (July 22, 2004) (statement of the Honorable Marybeth Peters, Register of Copyrights, p. 17) (http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=307).

ple, it is relevant that a distributor does not require consumers to pay for its software program, relying instead on acquiring an audience that it can then sell to advertisers. Audiences do not come unless content is available, and if the business has no plans to either provide or pay for any, then it is not unfair to conclude that it is counting on using content created by others. Obviously, there is nothing wrong with an advertising model—it underpins businesses ranging from television broadcasting to Internet search engines—but it is a factor. When a business relies on an advertising model while making no provision to develop or pay for content, it knows the content must come from somewhere.

Other important business practices were discussed by the Seventh Circuit in *Aimster*, where the defendant offered a software tutorial that used only copyrighted music files as examples of how to use the service, and offered for a monthly fee a "Club Aimster" option that listed the 40 most popular songs on the service—all of which were "invariably under copyright." The court also mentioned the lack of any showing that eliminating or reducing substantially the infringing uses would have been disproportionately costly.[13]

One can think of yet other business practices that should bear on the issue of secondary liability:

> Does the business simply transfer a program or does it maintain a continuing relationship with its users? For example, is the software purveyor pinged whenever the user opens the program so the purveyor can send advertising? If the purveyor does send advertising, does the program keep track of what material the user is downloading so that advertising can be targeted to individual interests? (It would be highly relevant if those

[13] *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

> interests, and the resultant ads, centered on downloads of copyrighted material.)
>
> If a program keeps in contact with its users, then it could keep track of the files they download, and could develop highly accurate information on whether the program is used regularly for infringement. It could send notices to the infringers, or at least to the egregious ones. And, were it serious about preventing infringement, it could inform the plaintiffs of egregious cases.
>
> Is the software program, either in an initial version or through upgrades, designed to facilitate a user's circumvention of digital rights management? For example, does it circumvent the Federal Communications Commission's broadcast flag rule,[14] or crack other coding? Does the purveyor provide dynamic help, upgrading its program to counter improvements in rights management programs?

The lower courts, starting with the Ninth Circuit in this case, should be asked to examine these factors and determine which ones are determinative, or even relevant, and which are not. As noted earlier, the lack of any bright line standard is regrettable, but, on the other hand, if the principle is clear -- the need to impose liability not on technologies but on those businesses that deliberately structure themselves to be dependent on infringement, then it should be possible to quickly develop guiding principles sufficiently precise to give fair notice to the participants in the market.

An additional point should be made. The various factors listed above are focused on software programs, and even more precisely on businesses that are selling P2P programs. It could well be that an inquiry into possible liability by a piece of hardware, or even by a different type of software, would require a different inquiry. At this point, it is ex-

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[14] Federal Communications Commission, "Final Rule: Digital Content Broadcast Protection," 68 *Fed. Reg*. 67599 (Dec. 3, 2003).

ceedingly unclear whether a single general rule, of the type the Ninth Circuit attempted to distill from *Sony*, is possible.

III. Congressional Action

Before the Ninth Circuit and during the *certiorari* phase of this case, the argument was made that the decision of the trial court should be affirmed because Congress is better suited than courts to make the adjustments needed in copyright law.

This is bad advice.

To begin with, it is a truism. *Of course*, Congress can rejigger copyright law if it wishes, but it can do so whichever way the Court decides in this case. The issue is what default rule applies pending any congressional action.

The argument for judicial passivity also rests on the assumption that the trial court and the Ninth Circuit properly applied *Sony*. For the reasons stated earlier, this is not so. Further, if this Court does not act then all the involved industries will be subject to competing and contradictory standards, as articulated in *Grokster* and *Aimster*, which will present them with great difficulties.

Finally, another fundamental premise of the defer-to-Congress argument is dubious, at best. The present situation is a jungle of uncertainty. Anyone who thinks Congress can clearly see the way through it has serious reality-testing problems. Quite the reverse; the situation cries out for a common law approach, one that does not attempt to do too much too quickly, and that avoids *hubris*.

This Court will be of maximum help Congress if it elaborates further the law of secondary liability as it applies in this new digital environment, focusing on the Grokster situation and on deliberate dependency upon infringement.

Such action will give Congress a breathing space, and the luxury of choosing its own time to act rather than being forced into a premature response to a confused and developing situation.

CONCLUSION

The ruling below should be reversed and the case remanded for further appropriate proceedings.

Respectfully submitted,

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