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

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The undersigned Amici are law professors at universities around the country who take seriously this Court's admonition that "[t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (*quoting* U.S. Const. art. I, § 8, cl. 8).

INTRODUCTION

It is troubling, and perhaps more than troubling, that this case comes before the Court on a theory of direct infringement developed initially in secondary infringement cases, such as this one, where the alleged direct infringers were neither parties nor otherwise represented at all.[2] It is one thing to use theories of secondary liability to broaden the net of liability when the initial, direct infringement is clear. It is quite another when secondary liability becomes the driving force for resolving difficult

[1] No party to this case or their counsel participated in the drafting of this brief. Both parties have consented to the filing of this brief, and their letters of consent have been filed with the Court. Institutional affiliations of individual amici are listed in Appendix I for identification purposes only. Tulane University School of Law contributed to the printing costs of this brief.

[2] *See*, *e.g.*, *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001). *But see In re* Charter Comms., Inc., 393 F.3d 771, 2005 U.S. App. LEXIS at *6 (8th Cir. 2005) ("This Circuit has never determined whether music downloaded from P2P systems violates the copyright owner's rights or is a fair use. The RIAA, to our knowledge, has never prevailed in any infringement actions brought against individual downloaders.").

questions of direct infringement. The very essence of our judicial system requires that a party have an opportunity to be heard. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). Yet, P2P file sharers are being branded copyright infringers *en masse* without any such opportunity.[3]

In this case, the defendants and their attorneys have chosen not to contest whether the private copying of copyrighted works through a P2P network is a fair or infringing use more generally.[4] Instead, as a matter of litigation strategy, the defendants have chosen to focus on two plainly lawful uses of their programs, authorized distribution and distribution of public domain works, with the hope that such uses will prove sufficient to bring their

[3] Although the direct infringers were not parties in either the *Aimster* or *Napster* litigation, both the Seventh and Ninth Circuits, respectively, casually branded all of them as copyright infringers. *See* In *re* Aimster Copyright Litig., 334 F.3d at 645 ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright."); A&M Records, Inc. v. Napster, Inc., 239 F.3d at 1014 ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.").

[4] *See* MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1160 (9th Cir. 2003) ("The Copy-right Owners assert, without serious contest by the Software Distributors, that the vast majority of the files are exchanged illegally in violation of copyright law. . . . The question of direct copyright infringement is not at issue in this case."), *cert. granted*, 125 S. Ct. 686 (2004).

programs within the "capable of substantial noninfringing use" safe harbor that this Court established in *Sony Corp. v. Universal City Studios, Inc.*[5] Petitioners have seized on this apparent concession to argue for reversal: If all unauthorized P2P file sharing constitutes copyright infringement, and if the ability to obtain copyrighted music for free and without the authorization of the copyright owner is P2P's principal draw, then, Petitioners contend, defendants should be held liable. As a result, this case comes before the Court on the assumption that all unauthorized private copying constitutes copyright infringement. If the Court's opinion in this case seems to accept that assumption, then however the Court rules, the right of private copying, which has existed (as a matter of legal realism) for years, may well be lost not through a fair and vigorously contested adversary process, but through silence.[6]

Although an amicus brief is a poor substitute for actual participation and representation in the judicial process, the undersigned Amici would respectfully suggest to the Court that the question whether some or all unauthorized P2P file sharing constitutes copyright infringement is a

[5] 464 U.S. 417, 442 (1984) ("Accordingly, 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.").

[6] Consider that in *Sony Corp.*, the Court was very careful to state that it was addressing only the fair use status of time-shifting and was not addressing the fair use status of other types of home taping, such as archiving. *See Sony Corp.*, 464 U.S. at 442. Nevertheless, Chief Judge Posner of the Seventh Circuit took the Court's silence with respect to these other types of home taping as condemnation. *See In re* Aimster Copyright Litig., 334 F.3d at 647-48.

close and difficult one. As this Court recognized in *Sony Corp. v. Universal City Studios, Inc.,* "[e]ven unauthorized uses of a copyrighted work are not necessarily infringing." 464 U.S. 417, 447 (1984). Whether we evaluate the P2P direct infringement issue in terms of the right of reproduction, distribution, or public performance, Congress has expressly made each of the copyright owners' rights "subject to" the fair use doctrine. 17 U.S.C. § 106 ("Subject to sections 107 through 121, the owner of copyright under this title has the exclusive right to. . . ."). Applying the equitable rule of reason approach to fair use that this Court established for private copying in *Sony Corp.*,[7] the undersigned Amici would respectfully suggest that much of the unauthorized sharing of copyrighted works through P2P networks constitute a fair and hence noninfringing use. As a result, defendants' P2P programs are being widely used for noninfringing purposes and the decision of the Ninth Circuit should therefore be affirmed.

SUMMARY OF ARGUMENT

This is not the first time that copyright owners have come to this Court requesting assistance in controlling some new technology that the copyright owners believed threatened their very existence. In the 1980s, it was the Betamax and the home taping of television broadcasts; today, it is P2P file sharing and musical works. But the "sky is falling" rhetoric remains the same. Twenty-one

[7] 464 U.S. at 448, 454 (prefacing its fair use finding by saying "[w]hen these factors are all weighed in the 'equitable rule of reason' balance").

years ago, the Court rejected the copyright owners' pleas.[8] Limiting itself to a particular kind of private copying, time-shifting, the Court applied a rule of reason, equitable balancing approach under the fair use doctrine and found that time-shifting created a clear public benefit by increasing access to televised works without any clear reduction in the revenues available to copyright owners. *Sony Corp.*, 464 U.S. at 454. The *Sony* Court therefore held that the copyright owners had failed to prove[9] that time-shifting was unfair. *Id.* As a result, the Betamax was capable of substantial noninfringing use, and Sony could not therefore be held liable for vicarious or contributory infringement. Despite losing the *Sony* case, the dire warnings of copyright owners never came to pass – the sky never fell.

Amici would urge the Court to follow a similar path today with respect to P2P. To be sure, there are differences between P2P and the videotaping of television programs, but the differences are primarily of scale. While P2P may decrease copyright owners' revenues somewhat more than home videotaping, P2P also generates a far more substantial – even radical – expansion in access to existing works. Moreover, for most P2P uses, there is simply no plausible argument that unauthorized P2P file sharing substitutes for paid access. If the individual could not have obtained unauthorized access through a P2P service, then the

[8] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[9] Consistent with the historical practice, the *Sony* Court placed the burden of proof on the plaintiffs, the copyright owners, to establish that the use at issue was unfair. *See Sony Corp.*, 464 U.S. at 451 ("In this case, respondents failed to carry their burden with regard to home time-shifting."); *id.* at 456 ("[R]espondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works.").

individual would not have obtained access at all. Just like time-shifting, most P2P file sharing ensures broader access to existing work without imposing any revenue loss on copyright owners. As a result, P2P file-sharing services are capable, and indeed, are widely being used for fair and hence noninfringing purposes. The Court should therefore affirm the Ninth Circuit's decision.

ARGUMENT

Given the large number of files at issue, there is a tendency to lose sight of the fact that this case concerns individuals, typically in the privacy of their own homes, in each instance, making a single unauthorized copy of a copyrighted work for their own personal use. While the number of copies may add up, they are still being made one copy at a time. Because copyright law and copyright owners have long focused on commercial copying by would-be competitors, rather than private copying by individual consumers, the question whether private copying constitutes copyright infringement has arisen only recently. Since the question has arisen, some countries have resolved the issue by specific statutory provisions that exempt personal or private use copying from copyright liability.[10]

[10] *See*, *e.g.*, Federal Law on Copyright in Works of Literature and Art and on Related Rights, art. 42(1) (1998) (Austria) ("Any person may make single copies of a work for personal use."); Copyright and Neighbouring Rights Act, art. 25 (Mar. 22, 2000) (Bulgaria) ("The copying of already published works shall be made without the consent of the author and without compensation only if it is done for personal use. This shall not be valid for computer software and architectural

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designs."); An Act to Amend the Copyright Act, § 80(1) (Apr. 25, 1997) (Canada) ("Subject to subsection (2), the act of reproducing all or any substantial part of [a musical work, a performance, or a sound recording] onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright. . . ."); Copyright Act of 7/2000, Sec. 30(2) (Jul. 4, 2000) (Czech Republic) ("Copyright shall therefore not be infringed by whoever *a)* for his own personal use makes a recording, reproduction or imitation of a work; a reproduction or imitation of a work of fine arts must be clearly labeled as such. . . ."); Act on Copyright, art. 12 (1995) (Denmark) ("Anyone is entitled to make, for private purposes, single copies of works which have been made public."); Copyright Act art. 12 (Apr. 25, 1997) (Finland) ("Any person may make single copies of a disseminated work for his private use. Such copies may not be used for other purposes."); Law on the Intellectual Property Code art. L. 122-5 (Jan. 3, 1995) (France) ("Once a work has been disclosed, the author may not prohibit: . . . (2) copies or reproductions reserved strictly for the private use of the copier and not intended for collective use. . . . "); Law on Copyright and Neighboring Rights, art. 53(1) (Jul. 16, 1998) (Germany) ("It shall be permissible to make single copies of a work for private use. A person authorized to make such copies may also cause such copies to be made by another person; however, this shall apply to the transfer of works to video or audio recording mediums and to the reproduction of works of fine art only if no payment is received therefor."); Copyright, Related Rights and Cultural Matters art. 18(1) (Aug. 2, 1996) (Greece) ("Without prejudice to the provisions laid down in the following paragraphs, it shall be permissible for a person to make a reproduction of a lawfully published work for his own private use, without the consent of the author and without payment."); Copyright Act, § 52(1)(a)(i) (Dec. 30, 1999) (India) ("The following acts shall not constitute an infringement of copyright, namely: (a) a fair dealing with a literary, dramatic, musical or artistic work, not being a computer programme, for the purposes of: (i) private use, including research"); Copyright Act, 1912, art. 16b (Oct. 27, 1972) (Netherlands) ("It shall not be deemed to be an infringement of the copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies for the sole purpose of the personal practice, study or use of the person who makes the copies or orders the copies to be made exclusively for himself."); Act Relating to Copyright in Literary, Scientific, and Artistic Works, art. 12 (June 2, 1995) (Norway) ("Provided this is not done for purposes of gain, single copies of a work that has been issued may be made for private use."); Copyright Law, art. 48 (Apr. 23, 1996) (Peru) ("It shall be lawful

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In the United States, although there is no similar specific exemption, for more than two hundred years, no copyright owner successfully asserted an infringement claim against an individual who without authorization copied a work for his or her own personal or private use.[11] This despite copyright owners' repeated complaints over the last forty years that private copying was costing them billions in lost sales.[12] Whatever excuses copyright owners

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to make copies for exclusively personal use of works, performances or productions published as sound or audiovisual recordings."); Consolidated Text of the Law on Intellectual Property art. 31(1) (Mar. 6, 1998) (Spain) ("Works already disclosed may be reproduced without authorization from the author and without prejudice, where applicable, to the provisions of Article 34 of this Law in the following cases: . . . 2º for the private use of the copier, without prejudice to the provisions of Articles 25 and 99(a) of this Law, provided that the copy is not put to either collective or profit-making use;"); Act on Copyright in Literary and Artistic Works, art. 12 (Dec. 7, 1995) (Sweden) ("Anyone is entitled to make, for private purposes, single copies of works which have been made public."); *see also* BMG Canada, Inc. v. Doe, 2004 F.C. 488, 2004 Fed. Ct. Trial LEXIS 321, at *18-19 (Fed. Ct. Canada 2004) ("Thus, downloading a song for personal use does not amount to infringement.").

[11] Having persuaded the Seventh and Ninth Circuits that P2P users should be branded copyright infringers *in abstentia* in the *Aimster* and *Napster* litigation, copyright owners have begun applying the direct infringement rulings of these secondary liability cases to individual P2P users. *See* BMG Music v. Gonzalez, 2005 U.S. Dist. LEXIS 910 (N.D. Ill. 2005) (granting summary judgment against individual P2P user and awarding $22,500 in statutory damages against user for downloading thirty music files).

[12] *See*, *e.g.*, U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, at 101 (April 1986) (citing testimony of Alan Greenspan presented on behalf of the RIAA that the recording industry lost more than $1.4 billion in revenue in 1982 as a result of home taping); U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422, at 170-71

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may have offered for their longstanding failure to police what they now claim as their rights, the fact remains that copying privately, for one's own use, as opposed to commercially, became an accepted and widespread practice well before the advent of P2P file sharing.[13] In its 1989 report, *Copyright and Home Copying*, for example, the Office of Technology Assessment estimated that: "Americans tape-recorded individual musical pieces over 1 billion times a year."[14] While as much as one-fifth of this taping may have substituted for authorized purchases,[15] the OTA nevertheless found "an underlying set of social norms that were supportive of home taping of music."[16] "There seemed to be agreement among the public that a person who purchased a recording had the right to make copies for his own, or a friend's use. The public did, however, draw the line at using home taping for profit, i.e., making copies to sell."[17]

(October 1989) (citing similar testimony estimating losses of $1.5 billion in 1984 for the recording industry as a result of home taping).

[13] *See* OTA, Copyright and Home Copying, *supra* note 12, at 7, 12 ("In general, the public – both tapers and nontapers – believe that it is acceptable to copy a prerecorded for one's own use or to give to a friend. The only copying that was considered universally unacceptable – by tapers and nontapers – was copying a tape in order to sell it."); *see also id.* at 139-65.

[14] OTA, Copyright and Home Copying, *supra* note 12, at 3; *see also id.* at 11.

[15] *See id.* at 158.

[16] *Id.* at 164.

[17] *Id.* ("This survey finding paralleled qualitative results from focused group discussions in which tapers and nontapers agreed that taping 'to save money' was acceptable, but taping 'to make money' was wrong.").

Although it did not include a specific private or personal use exemption in the Copyright Act of 1976, Congress has generally acted consistently with this well-established social norm. For example, when Congress extended copyright protection to sound recordings in 1971, the House Committee report expressly stated Congress's intent to allow home taping to continue.[18] Similarly, when this Court in *Sony Corp.* recognized time shifting as a fair use, Congress refused to overrule the decision. And when digital taping technology became available, Congress formally exempted the practice of privately copying music from copyright infringement in the Audio Home Recording Act of 1992 ("AHRA").[19] This provision exempted private copying of music in both analog and digital formats[20] and

[18] "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." H. R. Rep. No. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. Code Cong. & Admin. News 1566, 1572.

[19] Pub. L. No. 563, § 2, 102d Cong., 2d Sess. (1992), *codified at*, 17 U.S.C. § 1008 (2004) ("No action may be brought under this title alleging infringement of copyright . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.").

[20] *See* 17 U.S.C. § 1008 (2004) ("No action may be brought under this title alleging infringement of copyright . . . based on the noncommercial use by a consumer of [a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium] for making digital musical recordings or analog

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reflected Congress's general intent to establish the legality of privately copying music both finally and completely.[21]

Yet, in the last four years, virtually overnight, millions of Americans found themselves branded criminals and threatened with outrageous penalties and personal bankruptcy for conduct that has been widespread and accepted for almost fifty years. This radical change in the law came not from Congress or our elective representatives, nor from judicial proceedings in which these citizens had the right and opportunity to be heard. Rather, this change came from judicial proceedings strategically orchestrated

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musical recordings."). Lower courts have held that this exemption does not cover P2P file sharing on the grounds that a computer is not a digital audio recording device. *See*, *e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024-25 (9th Cir. 2001). Yet, if we treat the P2P file sharing software itself as the relevant device, then it would seem to satisfy the definition of a "digital audio recording device." 17 U.S.C. § 1001(3) (2004).

[21] See, *e.g.*, Audio Home Recording Act of 1992, 102d Cong., 2d Sess. (Sept. 22, 1992), 138 Cong. Rec. H 9029, 9033 (Statement of Rep. Moorehead) ("Mr. Speaker, H.R. 3204 would make it clear that noncommercial taping of music by consumers is not a violation of copyright law. The debate over home taping of records goes back to 1970 when Congress first extended copyright protection for records but this legislation will end the 22-year-old debate and make it clear that home taping does not constitute copyright infringement."); *id.* (Statement of Rep. Hughes) ("H.R. 3204 removes the legal cloud over home copying of prerecorded music in the most proconsumer way possible: It gives consumers a complete exemption for noncommercial home copying of both digital and analog music, even though the royalty obligations under the bill apply only to digitally formatted music. No longer will consumers be branded copyright pirates for making a tape for their car or for their children."); *id.* at 9035 (Statement of Rep. Collins) ("There are three basic provisions of the legislation. First, [the AHRA] guarantees consumers the legal right to make analog or digital copies of musical recordings for noncommercial use."); *id.* at 9036 (Statement of Rep. Fish) ("The bill makes clear that the home taping of music is not a violation of copyright law.").

by copyright owners to exclude the relatively sympathetic P2P users in order to focus judicial ire on the relatively unsympathetic P2P service provider.[22] Given the defendants actually before them in *Napster* and *Aimster*, the key issue there, as here, was the question of secondary liability; the casual overturning of the longstanding legality of private copying was little more than an afterthought.

This Court in *Sony Corp.* recognized, but did not decide, the question whether Congress intended to exclude private copying from the reach of copyright entirely. *See Sony Corp.*, 464 U.S. at 430 n.11. Instead, the Court assumed *arguendo* that unauthorized private copying could constitute copyright infringement and resolved the legal status of time shifting through application of the fair use doctrine. But in resolving the fair use issue, this Court placed a heavy thumb on the scale in favor of private copying, presuming that such use was fair and requiring the copyright owners to prove the unfairness of the specific use at issue.[23] Applying *Sony*'s approach establishes that P2P file sharing is predominantly fair.

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[22] In the ongoing litigation against digital video recorders, copyright owners unsuccessfully sought to preclude a group of the alleged direct infringers from using a declaratory judgment proceeding to join the proceeding. *See* Newmark v. Turner Broadcasting Network, 226 F. Supp. 2d 1215, 1220 (C.D. Cal. 2002) ("The Entertainment Defendants contend that they did not even know about the *Newmark* Plaintiffs until they filed this action, and that they did not name any individual Doe defendants in the *RePlayTV* action and point out that they make these allegations [of direct infringement] only because these allegations are necessary to state a claim against RePlayTV for contributory and vicarious copyright infringement.").

[23] *Sony Corp.*, 464 U.S. at 448 ("If the Betamax were used to make copies for a commercial or profit-making purpose, such use would

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I. Unauthorized P2P File Sharing Constitutes a Fair Use

A. Fair use entails a balancing of the competing public interests at stake.

Judicially developed in the nineteenth century, the fair use doctrine incorporates flexibility into copyright's seemingly absolute rights. Even where conduct would otherwise appear to transgress the literal terms of one of the copyright holder's exclusive rights, section 107 provides that "the fair use of a copyrighted work . . . is not an infringement." 17 U.S.C. § 107 (2004). By expressly incorporating fair use directly into each of the copyright owner's exclusive rights in section 106, Congress made plain that copyright owners do not have the right to prohibit all unauthorized reproductions, derivative works, public performances, or public displays, but only those that the copyright owner has proven[24] are unfair. See *Sony Corp.*, 464 U.S. at 433, 447.

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presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.").

[24] In *Sony Corp.*, this Court placed the burden of proof on copyright owners to prove that a use was unfair in the context of private copying. *Sony Corp.*, 464 U.S. at 433-34 ("Anyone ... who makes a fair use of the work is not an infringer of the copyright with respect to such use. . . . To prevail, they [Universal and Disney] have the burden of proving that users of the Betamax have infringed their copyrights. . . . "); *id*. at 451 ("In this case, respondents failed to carry their burden with respect to home time-shifting."). In placing the burden on the copyright owners, the *Sony* Court was following the historical practice. *See*, *e.g.*, Simms v. Stanton, 75 F. 6, 13-14 (C.C.N.D. Cal. 1896). In *Harper & Row Pubs., Inc. v. Nation Enters.*, this Court also placed the burden of proof on the copyright owners to prove a use unfair. 471 U.S. 539, 561 (1985) (referring to fair use as an "affirmative defense" but shifting burden of

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Because of the nature of the printing technology available at the time, the initial development of the fair use doctrine focused on the rights of a copyright owner against a later author or publisher whose work built in some way on the earlier work.[25] In this context, courts

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proof on fair use to alleged infringer only after "a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue"). In *Campbell v. Acuff-Rose Music, Inc.*, counsel for the defendants, whether acting for some strategic reason or out of simple ignorance, conceded at oral argument that his clients bore the burden of proof on fair use. Transcript of Oral Argument, Campbell v. Acuff-Rose Music, Inc., 1993 U.S. TRANS. LEXIS 113, at *17 (Nov. 9, 1993) (Bruce S. Rogow, counsel for defendants) ("When the plaintiff files a lawsuit, all the plaintiff need show is ownership of the copyright and copying, and then the burden shifts to the defendant to raise the fair use affirmative defense."). And in its opinion, the Court recited defense counsel's concession. *See Campbell*, 510 U.S. 569, 590 & n.20 (1994). Unfortunately, the *Campbell* Court recited the concession as if it were holding, which given counsel's concession it could not be, and some lower courts have mistakenly followed *Campbell*'s dicta, rather than *Sony Corp.*'s holding. Counsel's mistake in *Campbell* was to confuse a casual use of the phrase "affirmative defense" with a formal use of the phrase. In casual speech, it is often easier to talk about proving something, such as fair use or independent creation, than to speak of "traversing" or disproving an element of plaintiff's case. But such casual use of the phrase "affirmative defense" does not control the formal, legal issue as to which party bears the burden of proof. Given the historical placement of the burden of proof on the copyright owner, and the fact that most of the relevant evidence on the fourth fair use factor will be exclusively in the hands of the copyright owner, it makes more sense to place the burden of proof on the copyright owner to prove a use unfair. Such an allocation of the burden of proof also ensures that, as in *Sony Corp.*, where a use generates some public benefit, but its effect on the market value of a work is unclear, the use may continue.

[25] *See*, *e.g.*, Simms v. Stanton, 75 F. 6, 10-11 (C.C.N.D. Cal. 1896) (applying fair use doctrine in a case involving alleged infringement of plaintiff's physiognomy text by defendant's subsequent text on the same subject); Lawrence v. Dana, 15 F. Cas. 26, 60-61 (C.C. Mass. 1869) (No. 8,136) (applying fair use doctrine in a case involving alleged

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crafted the four fair use factors, now codified in section 107, to balance the public's interest in the two works: Given the later work's purpose and how much it took from the earlier work, measured in the light of the nature of the works at issue, should the later work be considered a new work or simply a competitive substitute for the earlier work.[26] Because the four fair use factors were developed specifically to address transformative or productive uses, they continue to work reasonably well today in balancing the public's competing interests for such uses. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-94 (1994) (applying the four nineteenth century factors to resolve fair use in context of transformative use).

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infringement of an earlier work when defendants later published an updated edition); Greene v. Bishop, 10 F. Cas. 1128, 1134 (C.C. Mass. 1858) (No. 5,763) (applying fair use doctrine in a case involving alleged infringement of plaintiff's book on grammar by defendant's subsequent book on same subject); Emerson v. Davies, 8 F. Cas. 615, 625 (C.C. Mass. 1845) (No. 4,436) (applying fair use doctrine in a case involving alleged infringement of plaintiff's book on introductory arithmetic by defendant's book on same subject); Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (No. 4,901) (applying fair use doctrine in a case involving alleged infringement of plaintiff's twelve-volume work, entitled the Writings of President Washington, by defendant's subsequent two-volume work, entitled The Life of Washington).

[26] *See also* Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U.L. REV. 975, 997-98 (2002) ("In this particular context, the value added by the second author's work and the extent to which similarities will necessarily arise or borrowings necessarily occur given the shared subject matter, must be balanced against the need to ensure the original author a reasonable opportunity to earn a fair return on her creative investment. Out of the attempt to do so, courts developed the four fair use factors that Justice Story summarized in *Folsom v. Marsh*: 'In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.' ") (internal citations omitted).

However, the technology that today makes routine private copying possible did not exist during the nineteenth century. A simple copy in the nineteenth century would almost necessarily have been the work of a competing printer – the paradigm case of copyright infringement.[27] As a result, a straightforward application of the nineteenth century factors to private copying would inevitably point to infringement, as the Ninth Circuit's decision in the Betamax case reflects.[28]

In reversing the Ninth Circuit's approach to the private copying fair use issue, this Court recognized that the nineteenth century fair use factors do not adequately consider the public interest in allowing private copying to continue, on the one side, and on the other, are likely to overstate the impact of the use on the copyright owner. For example, while "the nature of the copyrighted work" and "the amount and substantiality of the portion used" may prove helpful in balancing the scales for transformative uses, they are of little help in the private copying context. *See Sony Corp.*, 464 U.S. at 449.[29] Because private copying

[27] *Cf. Campbell*, 510 U.S. at 591 (explaining that "when a commercial use amounts to mere duplication of the entirety of an original, it clearly 'supersede[s] the objects,' of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur") (internal citations omitted).

[28] *See* Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963, 970, 971-72 (9th Cir. 1982) ("As the first sentence of § 107 indicates, fair use has traditionally involved what might be termed the 'productive use' of copyrighted material. . . . It is noteworthy that the statute does not list 'convenience' or 'entertainment' or 'increased access' as purposes within the general scope of fair use."), *rev'd*, 464 U.S. 417 (1984).

[29] Although this Court in *Sony Corp.* suggested that the second and third fair use factors were not important because viewers were taping programs "which he had been invited to witness in its entirety free of charge," *Sony Corp.*, 464 U.S. at 449, we should not read too much into

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commonly entails making a complete copy of popular, expressive works, these factors do not help "much in separating the fair use sheep from the infringing goats." *Campbell*, 510 U.S. at 586. Refusing to rely unduly on the four nineteenth century factors and recognizing the flexibility Congress intended fair use to incorporate,[30] this Court in *Sony Corp.* articulated a rule of reason approach that balanced directly what the public has to gain and what it has to lose from allowing private copying to continue. *See Sony Corp.*, 464 U.S. at 454-55. Under this rule of reason approach, private copying is unfair and hence infringing only if the copyright owners prove that allowing the private copying at issue would reduce incentives for the creation of additional works sufficiently to outweigh the broader access to existing works that the private copying provides. *See id.*

B. The use of secondary liability cases to resolve the question of direct infringement for P2P file sharing has distorted the fair use doctrine.

Unfortunately, the lower courts in the P2P context have not followed the approach this Court articulated in *Sony Corp.* Because the status of private copying through P2P networks has been judicially resolved solely in the context of secondary infringement cases, courts evaluating

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this statement. The Court was well aware that viewers were not invited to watch the programs at issue "free of charge," else the Court's extensive discussion of the fourth factor would have been entirely unnecessary.

[30] *See Sony Corp.*, 464 U.S. at 448 n.31; *see also Campbell*, 510 U.S. at 577-78.

the fair use status of P2P file sharing have made three key mistakes. First, rather than focus on particular instances of P2P file sharing, they have tended to resolve the fair use issue for P2P sharing as a whole. Thus, in concluding that P2P file sharing was an infringing use in *Napster*, the district court pointed to evidence purporting to show that Napster use, as a whole, reduced CD sales. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp.2d 896, 913 (N.D. Cal. 2000), *rev'd in part, aff'd in part*, 239 F.3d 1004 (9th Cir. 2001). This is inappropriate. So long as some P2P file sharing substitutes for paid or authorized access, such an approach almost necessarily leads to a conclusion that P2P, as a whole, is unfair. Yet, as this Court made clear in *Sony Corp.*, the question is not whether P2P file sharing, as a whole, is a fair or unfair use, but whether particular instances of P2P file sharing are fair or unfair.[31]

Second, even when courts try to limit their analysis to particular types of P2P file sharing, they are often unable to keep the direct and secondary infringement issues separate. Thus, the Seventh Circuit in the *Aimster* case confronted the question whether the use of P2P file sharing to "space shift"[32] constituted a fair use. Although the

[31] *See Sony Corp.*, 464 U.S. at 442 ("The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore all the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing.")

[32] As the Seventh Circuit described in *In re* Aimster Copyright Litig., space shifting involves a case where: "Someone might own a popular-music CD that he was particularly fond of, but he had not downloaded it into his computer and now he finds himself out of town

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court conceded that such use might be fair, it did not decide the issue, but instead pointed out that "the defendant's method for requiring that its customers 'prove' that they owned the CDs containing the music they wanted to download was too lax [to support space-shifting as a noninfringing use]." *In re* Aimster Copyright Litig., 334 F.3d at 653.

Third, because courts are confronting the issue solely in the secondary liability context, courts seem overwhelmed by the large number of private copies being made and unable to focus on the fair use issue in terms of individual instances of alleged infringement. In their rush to condemn what they perceive as wholesale copying, they twist the language of fair use to reach their desired conclusion and have ignored, if not overruled, this Court's fair use analysis in *Sony Corp*. For example, because the total amount of P2P file sharing is large, courts pretend that it is no longer a private or personal use activity. *See*, *e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d at 912-13. Similarly, because some P2P file sharing may substitute for authorized purchases, courts label all P2P file sharing as commercial. *See*, *e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d at 1015.[33] Moreover, where this

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but with his laptop and he wants to listen to the CD, so he uses Aimster's service to download a copy." 334 F.3d at 652.

[33] Congress has specifically rejected this interpretation of the noncommercial-commercial line in the AHRA. Section 1008 provides an exemption for noncommercial copying by individuals of music using either a digital or analog audio device. 17 U.S.C. § 1008 (2004). Although Congress limited the exemption to "noncommercial use," Congress clearly contemplated that such use would include uses that both were widespread and substituted for purchases of authorized copies. If the use was not widespread and did not substitute for authorized purchases, there would have been no reason for Congress to

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Court in *Sony Corp.* de-emphasized the second and third fair use factors in the private copying context, the lower courts have re-emphasized them. *See*, *e.g.*, *id.* at 1016. In many respects, the lower courts' analysis of these P2P fair use issues tracks the Ninth Circuit's analysis in the Betamax case more closely than they follow this Court's. *Compare Universal City Studios, Inc.*, 659 F.2d at 970-72 (emphasizing nonproductive nature of copying and questioning whether it can fairly be characterized as noncommercial), *with Sony Corp.*, 464 U.S. at 449-50 & n.33, 455 n.40 (rejecting attempt to characterize private copying as commercial, even if it happens repeatedly, and rejecting requirement that use be productive or transformative).

Had the fair use status of P2P file sharing arisen and been resolved through a series of cases involving the alleged direct infringers, courts might have avoided some or all of these mistakes. With the direct infringers before them, the sort of detailed factual records necessary to resolve the fair use issue on a case-by-case basis could have been developed, and courts might have been able to focus on the specific alleged infringement before them without being overwhelmed by the large number of copies others might be making. In addition, had the issue come up through a series of such direct infringement cases, courts would have had the opportunity to develop approaches and guides that could appropriately separate fair P2P sharing from unfair. Instead, the issue has arisen in the context of secondary liability, and in the place of specific cases, we get broad categories. In the place of

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enact a royalty on the sales of digital audio devices specifically to compensate for the revenue presumed lost due to digital copying. 17 U.S.C. §§ 1003-1007 (2004).

detailed evidence, we get approximations and speculation. When secondary liability is the predominant issue, it is simply not possible for the direct infringement issue to receive the attention and thoughtful analysis it deserves.

Of all the flaws associated with the court-created doctrines of secondary liability in copyright, this tendency to eliminate one of the real parties in interest from the judicial process and the resulting evisceration of the adversary process with respect to the direct infringement issue is one of the most serious. In *Sony Corp.*, this Court recognized, first, "the protection given to copyrights is wholly statutory," *Sony Corp.*, 464 U.S. at 430, and second, "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another." *Id.* at 434. Although the only logical conclusion from these two propositions is that there is no basis for asserting secondary infringement claims in copyright law,[34] Justice Stevens used these two propositions instead to justify judicial caution in drafting a secondary liability standard. *Sony Corp.*, 464 U.S. at 431-32. But perhaps caution is not enough. As this case well-illustrates, recognizing secondary liability in copyright law places the rights and interests of individuals at risk who are not parties to the proceeding, and who are represented, to the extent they

[34] That Congress has expressly provided a form of secondary liability in the DMCA, 17 U.S.C. § 1201(a)(2), (b)(1) (2004), but did not recognize such liability for copyright infringement would tend to reinforce this conclusion. *Cf.* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003) (rejecting argument for moral rights under section 43(a) by noting that "[w]hen Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin.' ").

are at all, only by a proxy – the secondary liability defendant – who may or may not decide to defend their interests.[35] As a result, critical legal issues in copyright law are being decided not through an adversary process, or even an approximation of an adversary process, but, as in this case, through default.

C. Under Sony's balancing approach, P2P file sharing that does not substitute for authorized access constitutes a fair use.

Given defendants' decision not to litigate the issue, there is little evidence in the record before the Court regarding unauthorized P2P file sharing and fair use. Nevertheless, Amici would respectfully suggest that the predominant use of P2P file sharing is fair. To get some sense for this, consider the following numbers. In their petition for certiorari, petitioners contend, citing unsworn hearsay – another consequence of this Court's secondary liability rule – that P2P file sharing: (1) amounts to 2.6 billion music files a month; and (2) is responsible for a 31 percent decline in record sales over the last three years. *See* Petition for Certiorari, at 8, MGM Studios, Inc. v. Grokster, Ltd., No. 04-480 (filed Oct. 8, 2004). On its website, the Recording Industry Association of America reports that CD album sales peaked in 2000 in the United States at 942.5 million units sold.[36] Accepting these numbers as

[35] *See* Newmark v. Turner Broadcasting Network, 226 F. Supp. 2d 1215, 1222 (C.D. Cal. 2002) (allowing declaratory judgment action by direct infringers to proceed based, in part, on grounds that interests of direct and secondary infringers are "not perfectly aligned").

[36] RIAA's 2003 Yearend Statistics (available at www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf).

true,[37] and assuming *arguendo* that the decline in sales is due entirely to P2P file sharing, then P2P has led to a decline in authorized access of 292 million albums per year.[38] At the same time, however, P2P file sharing has provided unauthorized access to the tune of 3.12 billion albums annually[39] – expanding access to existing works by an astounding 300 percent.[40] Even if we were to undertake the fair use balance (or resolve the secondary liability issue) with respect to P2P file sharing as a whole, *see* In re *Aimster Copyright Litig.*, 334 F.3d at 649-50, such a radical expansion in access to the most popular, existing

[37] According to the most recently available information on the RIAA's website, record sales are down only 17 percent from the first half of 1999 to the first half of 2004 in terms of units sold and down only 7.6 percent in terms of dollar value. RIAA, 2004 midYrStats.pdf (available from www.riaa.com). Moreover, a proper analysis of the revenue losses attributable to P2P would also have to consider the increased revenue that lower prices for the music itself may generate for complementary products, such as concert tickets and authorized merchandise, still within the copyright owner's exclusive control.

[38] This represents thirty-one percent of the 942.5 million album-length CDs sold in 2000 – the year in which album sales in the CD format peaked.

[39] This represents petitioners' number of 2.6 billion files per month multiplied by twelve months per year and divided by ten files per album. It is worth noting that the record industry's own pricing decisions suggest that consumers consider an album equivalent to three or four tracks that consumers want. *See* Lunney, *supra* note 26, at 1028 n.193 (citing RIAA data for the proposition that the average retail price of an album-length CD was $14.02 in 2000, while the average price for a CD single was $4.17).

[40] From 942.5 million authorized albums sold in 2000 to a total of 3.77 billion albums in 2003 (3.12 billion unauthorized and 650 million authorized).

works is clearly worth some reduction in additional works at the margins.[41]

But under *Sony Corp.*, we do not undertake the balance for P2P file sharing as a whole. Instead, we must separate P2P file sharing into sharing which substitutes for authorized access, and therefore reduces copyright owners' revenues, from sharing that does not. If we do so, then even accepting petitioners' contentions as true, it appears that P2P file sharing substituted for an authorized purchase in, at most, 292 million instances. While that is a large number in some sense, it amounts to less than ten percent of the P2P file sharing at issue. As for the remaining ninety percent, the petitioners have altogether failed to prove that this type of P2P file sharing substitutes for authorized access or is otherwise unfair.[42]

While these numbers establish that most P2P file sharing is fair, numbers alone do not tell the whole story. If the direct infringers were before the Court, we would likely find that individuals use P2P to download copyrighted

[41] For an empirical estimate of the relevant welfare gains and losses, see Rafael Rob & Joel Waldfogel, *Piracy on the High Cs: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, NBER Working Paper 10874, at 3 (Nov. 2004) (available at http://www.nber.org/papers/w10874) (finding that "[t]he reduction in deadweight loss ($45 per capita) [from downloading] is nearly double the reduction in industry revenue (from individuals in our sample).").

[42] While these are little more than back of the envelope calculations, more sophisticated econometric studies have reached a similar conclusion. *See*, *e.g.*, Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (Mar. 2004) (available at https://mail.law.tulane.edu/exchweb/bin/redir.asp?URL=http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf) (finding that P2P file sharing does not substitute for record sales).

music without authorization in a wide range of circumstances that are fair. Grandchildren who left their albums at home might use P2P to share their music with their grandparents. Others may use P2P to store their favorite music on a laptop or i-Pod, rather than rip and transfer the music themselves. Friends may use P2P to provide each other with a copy of their music, rather than rely on the old-fashioned tape exchange. Parents may use P2P to preview an album their children wish to purchase. Hearing a band or artist for the first time, an individual might satisfy their curiosity by using P2P to listen to the band or artist's music in circumstances where the individual would not otherwise have paid for access to the music.

While it might be possible to develop business models that would convert some of this P2P sharing into paid access, the petitioners' speculation that there might be some way to convert all, or even most, of these P2P users into paying customers is precisely the sort of speculation regarding future harm that this Court held was insufficient in *Sony Corp.* 464 U.S. at 451, 452-54. By any stretch of the imagination, most P2P file sharing does not substitute for the purchase of an album, nor does it substitute for paid access under any practicable licensing arrangement.[43] As with the time-shifting at issue in *Sony Corp.*, prohibiting such P2P file sharing "would merely inhibit access to ideas without any countervailing benefit." *Sony Corp.*, 464 U.S. at 450-51.

[43] Under *Sony Corp.*, to establish that the use was unfair, the copyright owner would have to show "*some* meaningful likelihood" that the consumer would otherwise have purchased or paid for access to an authorized copy of the work. 464 U.S. at 451.

The predominant use of P2P file sharing software thus appears to be fair.

CONCLUSION

P2P file sharing that does not substitute for authorized access is a fair use. Because the available information suggests that such sharing is not only a substantial, but the predominant, use of the defendants' P2P programs, this Court should affirm the decision of the Ninth Circuit.

RESPECTFULLY SUBMITTED, this 28th day of February, 2005.

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