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

BRIEF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC., ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, CHURCH MUSIC PUBLISHERS ASSOCIATION, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND SONGWRITERS GUILD OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MISCELLANEOUS

The American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Association of Independent Music Publishers, Church Music Publishers Association, Nashville Songwriters Association International, and Songwriters Guild of America submit this *amicus* brief in support of the Petition for a Writ of Certiorari.[1]

INTEREST OF *AMICI CURIAE*

Together, *amici curiae* represent hundreds of thousands of songwriters and music publishers who create, own, promote, disseminate, and license rights in virtually all copyrighted musical works.[2] We speak for a community that has a compelling interest in ending the massive infringement of musical works on Respondents' peer-to-peer ("P2P") networks. We have a long history of licensing and enforcing legal rights in musical works, possess vast practical experience utilizing the doctrines of contributory and vicarious liability that are at issue in this case, and have a great stake in seeing that these doctrines remain robust.

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that they authored this brief and that no person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to filing this brief, and letters reflecting their consent have been filed with the Clerk.

2. The Copyright Act separately protects musical works (which comprise music and lyrics created and owned by *amici*'s writers and publishers) and sound recordings (created and owned by recording artists and record companies). The Copyright Act does not define "musical works," but does define "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101.

The *American Society of Composers, Authors and Publishers* ("ASCAP") and *Broadcast Music, Inc.* ("BMI") are performing rights licensing organizations ("PROs").[3] Together, the PROs' members and affiliates comprise almost all American songwriters, composers, and music publishers; through affiliation agreements with similar foreign entities, the PROs represent in the United States virtually all of the world's writers and publishers of music. The PROs license nondramatic public performing rights in copyrighted musical works to users, including online music services, and enforce those rights against infringement. *See Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

The *Association of Independent Music Publishers* is a nationwide group of approximately 400 music publishers, representing tens of thousands of musical works, whose primary focus is to educate and inform its members and others about the most current industry trends and practices, by providing a forum to discuss the issues and problems confronting the music publishing industry.

The *Church Music Publishers Association*, founded in 1926, represents forty-six member publishers, including those of almost every major church denomination, the publishing companies or affiliates of every major contemporary Christian record label, the church music divisions of several major secular publishing houses, several independent music publishers, and music publishers who are involved primarily in educational markets.

The *Nashville Songwriters Association International* ("NSAI") is a trade organization dedicated to serving

3. PROs are sometimes termed "performing rights societies," a defined term in the Copyright Act. 17 U.S.C. § 101.

songwriters of all genres of music. NSAI operates workshops in over 100 cities throughout the United States and in three other countries, to help aspiring songwriters further their craft and understanding of the music business, and operates educational retreats for songwriters.

The *Songwriters Guild of America*, with approximately 5,000 songwriter members, has served the creative and business needs of developing and professional songwriters for more than 70 years. The Guild offers yet-to-be-published writers education, critiques, pitch opportunities, competitions, performance nights and other chances to hone and share their craft, and offers professional writers assistance with publishing, royalty audits and collection, catalog administration, and legislative advocacy and protection.

SUMMARY OF ARGUMENT

Amici's songwriters and music publishers are suffering serious economic harm from the massive copyright infringement occurring on Respondents' online services. This infringement has, to a great extent, displaced the legitimate marketplace for musical works, diverted royalty streams, and reduced incentives to create and further disseminate musical works. More generally *amici*'s writers and publishers depend on the courts properly to interpret the doctrines of contributory and vicarious liability which are at issue in this case. By immunizing services like Grokster and StreamCast from liability, the Ninth Circuit's erroneous ruling substantially undermines these doctrines and the sound public policy on which they rest, and, consequently, impairs the ability of songwriters and music publishers to enforce their rights effectively. The Court should grant *certiorari* to correct that error and vindicate the property rights Congress has granted to creators and other copyright owners.

ARGUMENT

I. The Massive Infringements Facilitated by Grokster and StreamCast Seriously Harm *Amici*'s Songwriters and Music Publishers

The massive unauthorized use and infringement of musical works occurring on Respondents' online services harm *amici*'s writers and publishers in several ways:

- Writers and publishers earn a "mechanical royalty," set by statute, for each phonorecord (*e.g.*, tape, record, or CD) of a sound recording sold embodying a copyrighted musical work. 17 U.S.C. § 115. Downloads from services like Grokster and StreamCast replace legitimate sales of phonorecords and consequently reduce mechanical royalties.

- These services also hurt legitimate online services, where sales of downloads generate their own form of mechanical royalties (termed "digital phonorecord deliveries"). 17 U.S.C. § 115(d). They almost certainly have also deterred many other legitimate entrepreneurs who might otherwise have entered the market. And they have undermined the legitimate services' ability to price their product because they are forced to compete with free, albeit illegal, services.

- Illegal downloading further displaces the market for traditional music outlets (such as radio) and legitimate online music services which pay performance fees to PROs.

- P2P networks like Grokster and StreamCast can also stream musical performances—if they have no copyright liability and require no licenses, writers and publishers lose these performance royalties as well.

- Online infringements of motion pictures and television shows on Respondents' services also harm writers and publishers of music. Ordinarily, motion picture and television producers pay "synchronization" licensing fees for the right to record the music onto the soundtrack of films and TV shows. These fees are often based on sales of home videos and DVDs. All such revenues are diminished when unauthorized downloading of an audiovisual work occurs on a service like Grokster or StreamCast.

- Unauthorized transmission of audiovisual works containing music also deprives writers and publishers of performance royalties for these transmissions.

- Sales of videogames similarly generate synchronization fees for their use of musical works, but not when illegally downloaded games replace legitimate sales.

- Sales of sheet music generate income for writers and publishers, but are reduced when sheet music is available to millions of online users for free.

Thus, *amici*'s songwriters and music publishers have lost substantial income as a result of the pervasive infringement occurring on P2P services, losses which reverberate throughout the musical works community. Examples abound—to name a few: Mechanical royalties, one of the largest income sources, have dropped significantly, as the

number of music units shipped to retail outlets has dropped nearly a quarter since 1999 and has not been replaced by legitimate online uses.[4] Nashville is a center of country music, but half of Nashville's music publisher staff songwriters have lost their jobs since P2P services began.[5] Country writers have had to change they way they work, sometimes being driven out of professional songwriting to make ends meet.[6] Senator Frist of Tennessee recently lamented the state of Nashville's music industry:

> When I return home to Nashville and drive down Music Row, my heart sinks as I see the "For Sale" and "For Rent" signs everywhere. The once vibrant music community is being decimated by online piracy. No one is spared. It's hitting artists, writers, record companies, performing rights organizations, and publishers.

150 Cong. Rec. S7178-01 (daily ed. June 22, 2004).

4. Recording Industry Association of America, 2003 Yearend Statistics, *at* http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf.

5. Associated Press, *Federal Government Takes Aim at Music Piracy* (Aug. 16, 2004), *at* http://www.wsmv.com/Global/story.asp?S=2182055&nav=1TcTPvcm.

6. *See id.*; Brooks Boliek, *Working Folks Lobby Congress* (Oct. 22, 2003), *at* http://www.hollywoodreporter.com/thr/music/feature_display.jsp?vnu_content_id=2007232; Jennifer Potash, *Experts Explore Ups, Downs of Downloading* (June 1, 2004), *at* http://www.pacpub.com/site/news.cfm?newsid=11831777&BRD=1091&PAG=461&dept_id=346950&rfi=8; Chris Lewis, *Songwriters Make Play to Curb Illegal Downloads* (Aug. 17, 2004), Nashville City Paper, *at* http://www.nashvillecitypaper.com/index.cfm?section=10&screen-news&news_id=35060.

As we next explain, the erroneous legal basis for the decision below will exacerbate the serious economic harm to America's songwriters and music publishers. The Court should grant the Petition to provide an opportunity to remedy that legal error and consequent economic harm.

II. Proper Interpretation of the Contributory and Vicarious Liability Doctrines Is Crucial for *Amici*'s Songwriters and Music Publishers

The Court should grant the Petition so it can rectify the Ninth Circuit's erroneous interpretation of contributory and vicarious liability—two doctrines that songwriters and music publishers depend on to enforce their statutory rights.

A. Secondary Liability Is Indispensable for the Enforcement of Copyrights in Musical Compositions as a Matter of Both Copyright Policy and Practical Justice

Creators and copyright owners need a practical and just way to enforce their rights. However, rightholders have no realistic remedy if only direct infringers are liable, while those who facilitate, encourage, or induce infringement are immune from liability.

The doctrines of contributory infringement and vicarious liability recognize the reality that those who induce, contribute to, or can control infringement—rather than those who directly infringe—are often in the best position to end the illegal action. Indeed, justice and common sense require that those who derive the ultimate benefit from infringement of copyrighted music should be liable, even if they do not commit the direct infringement. The live performance of

music in bars and clubs provides an example: If performances in a club are unauthorized, the musicians in the band are directly liable for the infringement. But it would make no sense either as a matter of copyright policy or practical justice to seek redress against them. As a matter of policy, the band may be likened to the bartender the club employs. Just as the club owner pays the bartender for dispensing drinks to patrons, so too the musicians are paid to "dispense" (*i.e.*, perform) music for patrons. The bartender is not expected to pay the cost of the liquor he dispenses—that responsibility is the club owner's, for the ultimate benefit is his. Neither should the musicians be expected to pay the cost of the music to be performed, as, here too, it is the club owner who derives the ultimate benefit from their services. Further, as a matter of practical justice, it is often impossible to identify the musicians for purposes of an infringement claim, nor do the musicians have the resources to pay the damages awarded in the inevitable judgment. The club owner, however, can be located and does have those resources. As a matter of copyright policy and practicality, then, the entity that ultimately benefits from the use of the copyrighted property should be the party that shares responsibility and liability for unauthorized use.

B. The Doctrines of Secondary Liability Were Established for Just Such Infringements as Are Here Presented

In response to demands of both copyright policy and practical justice, songwriters and music publishers or their representatives brought the cases that established the doctrines of vicarious liability and contributory infringement in copyright law. In *Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, several music publishers sued the owner of department

stores in which an independent concessionaire sold pirated recordings. The Second Circuit found the department stores' owner vicariously liable for the infringement conducted within its stores by the concessionaire. Applying the agency rule of *respondeat superior*, the court found that when a defendant has "the right and ability to supervise" the infringing conduct and receives "an obvious and direct financial interest in the exploitation of copyrighted materials," then he or she is liable for the infringement even if not the direct infringer. *Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

In *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, a PRO, on behalf of its music publisher members, brought an action against a company that promoted unlicensed concerts, although local community concert associations directly sponsored the performances. The Second Circuit held the promoter, although not the direct infringer, liable for contributory infringement as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. . . ." *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

Since prevailing in *Shapiro, Bernstein & Co.* and *Gershwin Publ'g*, songwriters and music publishers, and their representatives, have invoked both doctrines many times to enforce their rights against secondary infringers.[7] But the Ninth

7. *See, e.g.*, *Casella* v. *Morris*, 820 F.2d 362, 365-66 (11th Cir. 1987) (shareholder who sold restaurant franchise rights held contributorily liable for inducing a franchisee's infringement); *Broad. Music, Inc.* v. *Blueberry Hill Family Rests.*, 899 F. Supp. 474, 480-81 (D. Nev. 1995) (owner of restaurants containing jukeboxes that

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Circuit's ruling dangerously undermines the doctrines of secondary liability that we helped establish. Our community could face serious repercussions as a result:

First, the ruling substantially limits the ability of songwriters and music publishers to seek relief from infringement over P2P services. Copyright infringement is a tort, for which all who participate are jointly and severally liable. It is a fundamental principle of tort law that the injured party may select the joint tortfeasor he or she wishes to sue.[8]

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played music held vicariously liable); *Broad. Music, Inc.* v. *Hartmarx Corp.*, No. 88 C 2856, 1988 WL 128691, at *2-3 (N.D. Ill. Nov. 17, 1988) (holding company held vicariously liable for infringing performances by its subsidiaries); *Barnaby Music Corp.* v. *Catoctin Broad. Corp. of N.Y.*, No. CIV-86-868E, 1988 WL 84169, at *2-3 (W.D.N.Y. Aug. 10, 1988) (owner and manager of infringing radio station held vicariously liable); *Blendingwell Music, Inc.* v. *Moor-Law, Inc.*, 612 F. Supp. 474, 481-82 (D. Del. 1985) (owner and manager held contributorily and vicariously liable for infringements by bar-restaurant); *Boz Scaggs Music* v. *KND Corp.*, 491 F. Supp. 908, 913-14 (D. Conn. 1980) (general manager of infringing radio station held vicariously liable).

8. *See, e.g.*, *Costello Publ'g Co.* v. *Rotelle*, 670 F.2d 1035, 1043 (D.C. Cir. 1981) ("it is well established that a suit for [copyright] infringement is analogous to other tort actions and infringers are jointly and severally liable; hence plaintiff need sue only such participants as it sees fit"); *Wylain, Inc.* v. *Kidde Consumer Durables Corp.*, 74 F.R.D. 434, 437 (D. Del. 1977) (where joint and several liability exists for infringers of copyright, patent, and trademark rights, "the plaintiff has the privilege of selecting his defendant"); *Robbins Music Corp.* v. *Alamo Music, Inc.*, 119 F. Supp. 29, 31 (S.D.N.Y. 1954). *See generally* 7 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1614, at 227 (3d ed. 2001) ("A suit for
(Cont'd)

Such an option makes sense, given the numerous evidentiary and financial burdens a copyright plaintiff bears in enforcing his or her rights in court. This Court has noted, for example, that performing rights in music are "not self-enforcing."[9] When the scope of direct infringement is vast, the burdens of bringing legal proceedings against all, or even a significant portion, of the individual direct infringers may simply be too great to stop the widespread infringement. The copyright owner would have to identify each infringer, gather the necessary evidence for each, file a myriad of lawsuits in different jurisdictions, collect damages, and enforce injunctions—all requiring inordinate time and expense, and providing uncertain results.[10] When P2P services induce tens of millions to infringe, requiring lawsuits against individual direct infringers hardly makes sense as a matter of copyright policy. This is especially true when the direct infringers are frequently minors and almost always without the resources to cure or redress the overriding problem of massive infringement. But the Ninth Circuit has ignored this reality

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[copyright] infringement may be analogized to other tort actions; all infringers are jointly and severally liable. Thus, plaintiff may choose whom to sue and is not required to join all infringers in a single action."); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.03 (2004 ed.) ("Any member of the distribution chain may be sued without the need to join any of the other infringers, and those left out of the lawsuit are not indispensable parties.").

9. *Broad. Music, Inc.*, 441 U.S. at 4.

10. As the Seventh Circuit recently put it, "the impracticability or futility of a copyright owner's suing a multitude of individual infringers" justifies liability for P2P services such as Respondents', as contributors to the infringement. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (Posner, J.).

and the policy behind it, by concluding that copyright owners can *only* sue the individual users of P2P services like Grokster and StreamCast. Faced with the impossible task of proceeding individually against millions of direct infringers, songwriters and publishers are left with few meaningful ways to enforce their property rights and protect their works.

Moreover, allowing the Ninth Circuit opinion to stand would encourage Respondents and other P2P networks to design online services that avoid legal liability, but continue to benefit from the massive infringement occurring on them. The *Shapiro, Bernstein & Co.* court itself explicitly recognized this danger if it did not hold secondary infringers liable. In finding the defendant store owner vicariously liable, the court wrote:

> Were we to hold otherwise, we might foresee the prospect—not wholly unreal—of large chain and department stores establishing "dummy" concessions and shielding their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement.

Shapiro, Bernstein & Co., 316 F.2d at 309. Yet, the Ninth Circuit has created those very incentives for P2P services. By weakening the secondary liability doctrines, the Ninth Circuit's decision will further encourage services like Grokster and StreamCast to proliferate, making infringement by individual users easier and even more widespread.

The decision will also impede the substantial efforts made by *amici* songwriters and music publishers to educate

the public about respecting rights in musical works, educational efforts necessitated in part by the intangible nature of copyrighted property. In the wake of the decision, P2P services now are seen by many, and promote themselves, as a "legal" alternative to authorized, license-fee-paying online services, confusing the public and further encouraging individual infringement.

Most troublingly, the Ninth Circuit's decision encourages public disrespect for rights in musical works and for the copyright law generally. Congress expressly approved of the doctrines of vicarious liability and contributory infringement to allow meaningful protection of musical works. When it enacted the current copyright statute, Congress explicitly considered and rejected an amendment intended to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent contractor like a band leader. Congress explained:

> A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers. . . . The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right.

H.R. Rep. No. 94-1476, at 159-60 (1976). By limiting enforcement actions only to direct infringers, the Ninth Circuit ruling overturns the Congressional policy to give meaningful effect to rights in musical works. The ruling tells the general public that they may ignore the property rights

of creators and copyright owners, for the likelihood of their being held responsible for acts of direct infringement is minuscule. As a matter of policy and law, that ruling is wrong and we look to this Court to correct it.

CONCLUSION

Amici respectfully ask that the Court grant the Petition, to remedy the harm suffered by our community and to ensure that the doctrines of vicarious liability and contributory infringement continue to protect our musical works.

Respectfully submitted,

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