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 FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

MARVIN A. MILLER
JENNIFER W. SPRENGEL
MATTHEW E. VAN TINE
MILLER FAUCHER AND CAFFERTY LLP
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
(312) 782-4880

KEVIN P. RODDY*
WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Woodbridge, NJ 07095
(732) 636-8000

**Counsel of Record*

Counsel for Amicus Curiae National Association of Shareholder and Consumer Attorneys (NASCAT)

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INTEREST OF *AMICUS CURIAE*

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization founded in 1989. The member law firms frequently represent consumers and investors in federal and state court lawsuits brought under antitrust, consumer protection, unfair trade practices, securities and intellectual property laws. NASCAT and its members are devoted to representing victims of corporate abuse and fraudulent schemes in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to the courts. Over the last fifteen years, NASCAT has filed a number of *amicus curiae* briefs in this Court including, most recently, the securities fraud loss causation case, *Dura Pharmaceuticals, Inc. v. Broudo*, No. 03-932 (argued Jan. 12, 2005).[1]

INTRODUCTION

NASCAT believes that the instant case represents a serious attempt to limit the rights of consumers, and to expand the power of the corporate conglomerates that control the distribution of music compact disks (CDs), motion pictures, and television shows. The expansion of the copyright laws which Petitioners seek will not only shore up those conglomerates' control of the entertainment

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[1] Pursuant to Supreme Court Rule 37.6, counsel for NASCAT state that they authored this brief in whole and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of *amicus* briefs, and blanket consent letters have been filed with the Clerk.

industry, but will also expand their monopoly over content into market power over the technology used to deliver that content. In effect, the entertainment providers seek the power for each provider to have a veto over what technology is available in the marketplace. Such a governmental grant of power to any individual or corporate entity is odious on its face, and becomes even more detrimental when it is given to conglomerates such as Sony that already have considerable market power in the consumer electronics market.

ARGUMENT

Petitioners ask this Court to rewrite the scope and purpose of the federal copyright laws. The expansion sought by Petitioners would give the holder of a copyright over an artistic, literary, or scholarly work the ability to veto the technology which third parties distribute in the marketplace if that technology can be used to infringe on their copyright. Petitioners' proposed rule should be rejected because it conflicts with the copyright laws and raises serious antitrust concerns.

I. THIS COURT HAS HISTORICALLY RESISTED THE EXPANSION OF COPYRIGHT PROTECTION BECAUSE THE CONSTITUTION PROVIDES FOR ONLY A LIMITED PROTECTION MEANT TO BALANCE THE REWARDING OF INNOVATION WITH ENCOURAGING THE GROWTH OF KNOWLEDGE

The U.S. Constitution provides:

> "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by

> securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

U.S. CONST. Art. I, § 8.

The Framers of the Constitution did not choose to grant perpetual protection to works; rather, they provided for a scheme of protection limited both as to time and scope. Thus, the federal copyright law enacted by Congress balances an incentive granted to authors in the form of a monopoly to encourage their efforts, with an expiration of that monopoly so that the work becomes part of the public domain, and the public is given unrestricted access to it. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (hereinafter "*Betamax*"). The copyright statute is primarily concerned with fostering innovation, and only secondarily concerned with rewarding the author. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

Over the years, this Court has upheld the Constitutional intent by resisting attempts to expand the monopoly and squelch innovation. In *Betamax*, this Court refused to grant the plaintiff studios the ability to restrict or collect royalties on the use of video tape recorders (VTRs), the term used in the opinion to describe Sony's Betamax videocassette recorder, despite evidence that the Betamax was being used to tape copyrighted television programs and movies without the copyright holder's permission.

While Petitioners contend that this Court ruled for Sony in *Betamax* primarily because the Court endorsed using a VTR for "time-shifting" – that is, recording programs which come on television at inconvenient times so that they may be watched a single time when it is more convenient – *Betamax* was not so limited. Rather, this Court found that so long as the VTR had at least one substantial non-infringing use, Sony could not be held liable for contributory infringement:

> 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.***
>
> * * *
>
> 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 non-infringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial timeshifting in the home.

464 U.S. at 441 (emphasis added).

Later in its opinion, this Court again emphasized that a single noninfringing use would suffice when it noted that decisions under similar patent law principles

> deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use."

Betamax, 464 U.S. at 441 (quoting *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980)).

As enunciated by this Court, the *Betamax* rule was consistent with longstanding copyright law. While direct involvement in the wholesale copying of a work was sufficient to find contributory infringement in *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), the renting of a hall to an infringer is not enough for a finding of contributory infringement. In *Kalem*, this Court held that the producer of an unauthorized film version of the book *Ben Hur* was liable for contributory infringement. In *Betamax*, this Court commented on the plaintiff studios' argument that Kalem established Sony's liability:

> Respondents argue that *Kalem* stands for the proposition that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This argument rests on a gross generalization that cannot withstand scrutiny. The producer in *Kalem* did not merely provide the "means" to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. Petitioners in the instant case do not supply Betamax consumers with respondents' works; respondents do. Petitioners supply a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the

> copyright holder, and those that the copyright holder would prefer not to have copied. The Betamax can be used to make authorized or unauthorized uses of copyrighted works, but the range of its potential use is much broader than the particular infringing use of the film *Ben Hur* involved in *Kalem*. *Kalem* does not support respondents' novel theory of liability.

464 U.S. at 436-37.

In a footnote, this Court discussed the distinction between making space available to an infringer for possibly illegal activities and actually controlling those activities through employing the infringer:

> The so-called "dance hall cases," *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n*, 554 F.2d 1213 (CA1 1977) (racetrack retained infringer to supply music to paying customers); *KECA MUSIC, Inc. v. Dingus McGee's Co.*, 432 F.Supp. 72 (W.D.Mo.1977) (cocktail lounge hired musicians to supply music to paying customers); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (CA7 1929) (dance hall hired orchestra to supply music to paying customers) are often contrasted with the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity were found not to be liable for contributory infringement. *E.g., Deutsch v. Arnold*, 98 F.2d 686 (CA2 1938).

464 U.S. at 437 n.18.

In two post-*Betamax* cases, the Courts of Appeals have applied these concepts to reject challenges to the distribution of software which copyright holders claimed was predominantly used for the purpose of infringement. In one case, the Fifth Circuit found no liability for contributory infringement on the part of a software company that distributed a computer program designed to "facilitate the duplication of programs placed on copy-protected diskettes." *Vault Corporation v. Quaid Software Ltd.*, 847 F.2d 255, 258 (5th Cir. 1988). The court reached its conclusion after determining that the computer program had a substantial non-infringing use – the creation of archival copies of the copy-protected diskettes. Accordingly, the Fifth Circuit held that the "advertisement and sale" of the computer program by the defendant did not constitute contributory copyright infringement. *Id.* at 267.

Similarly, in its decision in this case, the Ninth Circuit found that so long as the software was capable of non-infringing use, the distributor could not be held liable for contributory infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004). In reaching this decision, the Ninth Circuit applied the interpretation of *Betamax* it had previously articulated in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).[2] As the Ninth Circuit stated in *Napster*:

> To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.

239 F.3d at 1021.

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[2] The Ninth Circuit found liability in *Napster* but not in this case because the Napster service operator had specific knowledge of infringing material actually residing on its system. In contrast, the services involved here did not have any infringing material residing on their systems.

The copyright laws have been carefully limited in their scope. As Article I, Section 8 of the Constitution recognizes, such limits are necessary to strike a proper balance between rewarding one innovator and encouraging the efforts of other innovators.

II. IN THIS CASE, PETITIONERS SEEK TO EXPAND COPYRIGHT INTO NEW AREAS

The relief sought by Petitioners in this case is an unprecedented expansion of the copyright law. Petitioners claim not only the right to police the use of their own works, but also the works of third parties, works that have no specific relationship to their copyrighted works other than the fact that yet another third party might choose to apply one to the other. Such a restraint on the property of third parties is unheard of in our system of law, and goes well beyond the current rights of copyright holders or the analogous rights of patentees.

In *Betamax*, this Court examined the relief sought by the studios and found that not only was it unauthorized by the copyright laws, but it went even further than what was allowed by the patent law:

> If vicarious liability is to be imposed on petitioners in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory.

464 U.S. at 439. Indeed, this Court found that the extension of the copyright monopoly sought by the plaintiff motion picture studios in that case was "extraordinary":

> It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTR's simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below indicates that respondents seek, in effect, to declare VTR's contraband.

Id. at 441 n.21.

In *Betamax*, this Court contrasted the studios' breathtaking request for judicial legislation with the provisions found in the patent law, wherein both infringement and contributory infringement are explicitly defined and were considerably more limited than the relief sought by the studios:

> The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents.

Id. at 440.

This Court went on to observe that when contributory infringement was found under the Patent Code, the infringing article was not removed from commerce because of "the public interest in access to that article of commerce." *Id.* at 441. Instead, a finding of contributory infringement

> give[s] the patentee effective control over the sale of that item. Indeed, a finding of contributory infringement is normally the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee.

Id.

Because a finding of contributory infringement in a patent case involves shifting the rights to control an article from the party distributing it to the patent holder claiming infringement, the Court has avoided such findings because of their extreme and anticompetitive result:

> For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." Unless a commodity "has no use except through practice of the patented method," the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention." P. Rosenberg, Patent Law Fundamentals § 17.02[2] (1982). "[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce." *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds*,

> *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

464 U.S. at 441-42 (quoting *Dawson Chem.*, 448 U.S. at 198) (parallel citations omitted).

The relief sought by Petitioners in this case would represent an extreme expansion of the rights given to copyright holders. Neither traditional notions of copyright law or even analogies to patent law support giving the owner of a copyright the power to veto the technological innovations of third parties, simply because the third party's invention could be used to manipulate the copyrighted content.

III. PETITIONERS' PROPOSED RULE RAISES ANTITRUST CONCERNS

An expansion of copyright protection giving copyright holders the ability to control the sale and distribution of unrelated services, software, and consumer electronics would be inimical to competition under any set of facts. However, with the growing integration of technology and entertainment content companies, any rule giving content companies market power over technology in the guise of protecting their copyrights is increasingly dangerous.

In this case, Petitioners demonstrate such aggregations of power over both technology and content. With its substantial acquisitions in the music and motion picture industries, Sony has effectively changed sides from the days of *Betamax*. Sony is now one of the dominant forces among the providers of copyrighted entertainment content; indeed, Sony is the ***parent*** of several of the

Petitioners.[3] Yet it still remains a dominant manufacturer and distributor of all manner of consumer electronics used to deliver that content, including televisions, CD players, stereos, computers, and radios. Nor does Sony shy away from technologies which could be used to infringe its copyrights; Sony sells computers, DVD recorders, VCRs, and audio tape decks which can be used to duplicate movies and music CDs, as well as MP3 players to play songs illegally downloaded from Kazaa.

Nor is Sony alone. Time Warner may not yet have a foothold in the hardware used in copyright infringement, but its AOL Instant Messaging software dominates the instant messaging market and is an important tool for infringers. *See In re Aimster Copyright Litigation*, 334 F.3d 643, 646 (7th Cir. 2003). At the same time, Time Warner is the parent of two of the movie studios that are Petitioners in this case.[4] Instead of focusing on hardware, Time Warner has a substantial presence in the technological services used to deliver that content: cable television (through Time Warner Cable) and the Internet (through America Online), as well as through broadcast and cable television networks.

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[3] According to the Corporate Disclosure Statement set forth in Petitioners' brief, Sony Corporation is the parent of petitioners Columbia Pictures Industries, Inc., Arista Records, LLC, The RCA Records Label, Sony BMG Music Entertainment, LaFace Records, LLC, and Zomba Recording, LLC.

[4] According to the Corporate Disclosure Statement set forth in Petitioners' brief, Time Warner Inc. is the parent of petitioners Warner Bros. Entertainment Inc. and New Line Cinema Corporation. In addition, Time Warner is the former parent of the petitioner record labels which list WMG Parent Corp. as their parent company on the disclosure statement.

It takes little imagination to see how a conglomerate such as Sony could use the rule of copyright liability it espouses in this case to enhance its market power over consumer electronics. As Sony has demonstrated by participating in this suit, it feels threatened by new technologies which it does not own, control, or dominate, such as the one involved in this case. Had copyright holders been able to veto new technology when Sony's Betamax VCR format was being challenged by the now-universal VHS format, Sony might have claimed that VHS was designed to infringe movie copyrights because the two-hour length of a standard VHS tape would hold most movies, while the original Betamax format, with its one-hour limit, was not so designed. *See Aimster*, 334 F.3d at 650.

Similarly, Time Warner, with its substantial ownership interests in cable television systems, as well as broadcast and cable television networks, has an interest in preventing the acceptance of competing means for delivering entertainment content to consumers. If a competing technology threatened Time Warner's position in the distribution of entertainment products, Time Warner might well react by trying to exercise the copyright law veto over the new technology which petitioners seek here.

These concerns are not just hypothetical. In *Feist*, exactly such a motivation existed. *Feist* involved a rural telephone monopoly which published its own phone directories which included advertising and a competing publisher of area-wide telephone directories. When the telephone company refused to license its listings to the directory company, the directory company copied them, leading the telephone company to sue for copyright infringement. As this Court noted, the district court found that the telephone company acted to unlawfully extend its monopoly over telephone service into a monopoly over yellow pages advertising when it refused to license its listings to the competing directory. 499 U.S. at 343.

IV. PETITIONERS' RULE WILL STIFLE INNOVATION AND INHIBIT COMMERCE

In *Betamax*, this Court was also concerned that it not fashion a rule that would inhibit commerce. The wisdom of such concerns is well-illustrated by the experience of the motion picture studios with the VCR over the past 20 years. While the movie studios saw the VCR as a threat to be stopped in *Betamax*, the sale and rental for home viewing of prerecorded videotapes of movies would ironically become a tremendous source of revenue for the studios in later years. *See Aimster*, 334 F.3d at 650. While the home viewing of prerecorded videotapes does not implicate concerns of infringement, this source of revenue was only made possible because of the public's acceptance of the VCR based upon its ability to copy programming, the use which did implicate concerns of infringement.

Moreover, it was the general acceptance of the VCR during the 1980's that hastened the later acceptance of the DVD player by the general public. Today, the sale of DVDs constitutes a windfall profit center for Hollywood movie studios, albeit one which they shroud in secrecy lest public knowledge of it would inhibit any sympathy for their anti-piracy efforts. Ross Johnson, *Video Sales Abroad Are Good News in Hollywood. Shhh*, THE NEW YORK TIMES (Jan. 31, 2005) (available at www.nytimes.com).

As Professors Landes and Lichtman have observed,

> Indirect liability has a significant drawback, however, in that legal liability – even if carefully tailored – inevitably interferes with the legitimate use of implicated tools, services, and venues. . . . This concern is particularly pronounced for new technologies, where the implications of copyright liability are often difficult to predict. One can only wonder, for example, how different the Internet would look today had it been clear from that outset that, say, Internet service providers were going to be held accountable for online copyright violations.

William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. L. & TECH. 395, 409 (2003). *See also* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1389 (2004) ("When courts shut down new technologies, the world may literally never know what it is missing.").

If Hollywood had gotten its wish in *Betamax*, the profit center formed by the sale and rental of pre-recorded videos that was made possible by the VCR would have been stillborn, and the movie studios might never have risen out of the economic doldrums about which they complained at the time of the *Betamax* case. If the copyright holders become the policemen of new technology, they will certainly harm the public good, and may well harm themselves.

V. IF COPYRIGHT PROTECTION IS TO BE EXPANDED, ONLY CONGRESS SHOULD DO IT

In *Betamax*, this Court recognized that the Constitution had given to Congress the task of defining the scope of the copyright protection. Defining this scope required not only a careful balance between the rights of the public and the rights of the author, but it also required careful calibration as technology changed. As a result, "[t]he remedies for infringement 'are only those prescribed by Congress.' *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)." *Betamax*, 464 U.S. at 431 (parallel citations omitted).

This Court stressed that it had repeatedly refused to expand the protections of the copyright laws because that is the province of the legislature. Thus, in *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968), this Court refused to find that putting a broadcast television signal on a cable television system constituted infringement of the broadcaster's or content provider's copyrights. Likewise, in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), this Court found that while player piano rolls gave individuals the ability to enjoy mechanical performances of copyrighted sheet music, Congress had not included them in the copyright laws, and, therefore, they did not infringe the sheet music upon which they were based. This Court concluded in *Betamax* that only Congress should engage in the balancing of interests required to properly apply copyright principles to new technologies:

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to

> accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

464 U.S. at 431.

The issues before this Court inherently require the resolution of competing policies. When Congress enacted the Digital Millennium Copyright Act just a few years ago, it made the circumvention of a copy protection mechanism illegal, but it expressly refused to otherwise enlarge the scope of liability for contributory infringement, or to require that consumer electronics manufacturers redesign their products so that they could not be used for infringing activities. 17 U.S.C. § 1201(c). If Congress were to now revisit this question, it would have to choose between the status quo, the draconian measure advanced by petitioners, or one of the creative schemes advocated by commentators. *See* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003). The resolution of the competing policies and proposals is best left to the legislature.

The Constitution wisely made Congress the arbiter of how the copyright laws should be applied to new technology. The courts should continue to resist expanding copyright protections without explicit legislative sanction.

CONCLUSION

For the foregoing reasons, NASCAT respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

KEVIN P. RODDY*
WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Woodbridge, NJ 07095
(732) 636-8000

Counsel of Record

MARVIN A. MILLER
JENNIFER W. SPRENGEL
MATTHEW E. VAN TINE
MILLER FAUCHER AND CAFFERTY LLP
30 North LaSalle Street, Suite 3200
Chicago, Illinois 60602
(312) 782-4880

Counsel for Amicus Curiae National Association of Shareholder and Consumer Attorneys (NASCAT)

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