No. 04-___

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

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BRIEF OF *AMICI CURIAE* INTERNATIONAL RIGHTS OWNERS SUPPORTING PETITION FOR A WRIT OF CERTIORARI

Hank L. Goldsmith
Christopher Wolf*
Proskauer Rose LLP
1233 20th Street, N.W.
Suite 800
Washington, DC 20036
(202) 416-6800

Allen N. Dixon
General Counsel
International Federation Of
The Phonographic Industry
54 Regent Street
London
W1B 5RE
United Kingdom
011 44 207 8787903

**Counsel of Record*

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INTEREST OF THE *AMICI*

All parties have consented to the filing of this *amicus* brief.[1]

The parties joining this *amicus* brief, listed below (the "International Rights Owners") are trade associations and professional organizations based outside the United States, representing hundreds of thousands of owners of copyrights and related rights all over the world. Specifically, *amici* represent record companies, producers and distributors; musical and literary publishers; composers and authors of a variety of protected works; rights societies; film producers and video publishers, in more than 100 countries outside the United States.

Amici hope to address more directly than the parties the potentially devastating impact of the decision below, *Metro-Goldwyn-Mayer Studios, Inc.*, 269 F. Supp. 2d 1213 (C.D. Cal., 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), on the international intellectual property landscape, and its equally harmful potential disruptive effect on the harmonization of intellectual property law and the development and maintenance of uniform protection of intellectual property rights in the international arena. These matters dictate immediate review.

Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique ("BIEM"),

[1] No counsel for any party authored this brief in whole or part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission hereof.

founded in 1929 and headquartered at Neuilly-sur-Seine, France, is the international organization representing 44 mechanical rights societies in 42 countries, which societies license the reproduction of songs including musical, literary and dramatic works. One of BIEM's principal missions is to negotiate compensation for its members, the licensors of copyrighted works, for the uses of their works by others.

The International Confederation of Societies of Authors and Composers ("CISAC"), founded in 1926 and headquartered at Neuilly-sur-Seine, France, is a non-governmental, non-profit organization with a membership of 207 authors' societies in 109 countries, which societies represent more than 2 million creators of musical, dramatic, and literary works, as well as works involving the visual and graphic arts. One of CISAC's principal objectives is to watch over, safeguard and contribute to the legal interests of creators, both in the international sphere and in national legislation.

The International Confederation of Music Publishers ("ICMP/CIEM"), established as an association under Swiss law in Lausanne, Switzerland, is the umbrella non-profit trade organization which globally represents, through its 32 members – national, regional and international music publishers' trade associations in Europe, Northern and Latin America, Australasia and Africa – most of music publishing throughout the world. Taking action against unauthorized Internet usage of copyrighted music is one of the priorities for ICMP/CIEM within its mission of promoting the value of songs and of the people who create, and who help to create, music. ICMP/CIEM has observer status at the Geneva-based WIPO.

The International Federation of the Phonographic Industry ("IFPI"), founded in 1933 and having its registered office in Zurich, Switzerland, is a non-profit trade association representing the international recording industry.

IFPI's approximately 1,450 record company members, located in 75 countries, own copyrights and related rights in sound recordings. IFPI's activities focus on combating traditional hard goods and on-line piracy, promoting legislation that protects the rights of intellectual property owners, and encouraging healthy trade and electronic commerce in recorded music.

The International Federation of Film Producers Associations ("FIAPF"), founded in 1933 and based in Paris, France, is made up of 30 national producers' organizations in 27 countries. FIAPF's mission is to defend and promote the economic and legal interests of film and audiovisual producers on a global basis. FIAPF participates in copyright and neighboring rights' protection activities, anti-piracy efforts, the promotion and maintenance of audiovisual technology standards, and incentive policies for film production/distribution.

The International Publishers Association ("IPA"), based in Geneva, Switzerland, established as an association under Swiss law in 1896, represents the worldwide book and journal publishing industry (print and electronic) through its 78 national and specialized member associations in 66 countries. One of IPA's main objectives is to promote a chain of strong and enforceable copyright laws around the world, including for electronic publishing. IPA enjoys observer status at the United Nations and its agencies, such as the Geneva-based WIPO and Paris-based UNESCO, and participates in developments at the Geneva-based WTO.

The International Video Federation ("IVF"), is a non-profit international association established in 1988 under Belgian law, with the aim of providing national video associations with international representation of their members' interests as publishers and distributors of pre-recorded video cassettes and DVDs. Based in Brussels, Belgium, the IVF represents thousands of video publishers in

numerous international fora, including the European Communities, WIPO, WTO and the United Nations institutions. Like the other *amici*, IVF has a strong interest in protecting the worldwide rights of its members, and supports the promotion and fostering of consistent and effective international enforcement of copyright.

SUMMARY OF ARGUMENT

From the perspective of *amici*, this case is primarily about ensuring that the United States does not falter in its responsibilities under various international agreements and norms, by permitting a safe haven for entities to set up businesses deliberately designed to enable copyright infringement on a massive scale. That is a perspective we hope the Court will find informative.

As the Ninth Circuit acknowledged, its decision below is inconsistent with the Seventh Circuit's decision in *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 1069 (2004). In part because of this fact (and in part because of the holding of the decision below itself), there will be immediate widespread uncertainty as to whether the United States is meeting its obligations under international copyright agreements to which the United States is a party, and under which the United States has an obligation not only to recognize the intellectual property rights that are violated by unauthorized uses of copyrighted works on the Internet, but also to provide rights owners -- particularly foreign rights owners such as *amici* -- adequate and effective means of enforcing such rights.

This is particularly true in the context of what the Ninth Circuit called today's "quicksilver technological environment" (380 F.3d at 1167), which has given rise to one of the most virulent species of infringements ever – those carried out globally, using peer-to-peer networks designed to facilitate instantaneous, worldwide infringement of intellectual property rights on a previously unimaginable scale.[2]

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[2] The Ninth Circuit noted that defendants did not "seriously contest" that of the millions of files copied and distributed through their services, "the vast majority are exchanged illegally in violation of copyright law." 380 F.3d at 1160. The District Court similarly found that it was "undisputed" that defendants'

Failure to deal with the legal challenges imposed by this environment, or failure to apply consistent rules within the United States judicial system, threatens to place the United States in breach of its international obligations and responsibilities. The situation is exacerbated by the fact that, as noted, there is no clear message emanating from the United States Courts, given the present *Aimster/Grokster* conflict. An immediate review by this Court is necessary.

Another concern is the potential spill-over effect that the Ninth Circuit's decision could have for enforcement of copyright and related rights outside the United States, especially against the unauthorized distribution, use and reproduction of material emanating from the United States. Rights owners have always faced the problem of pursuing counterfeit or infringing copies, produced in countries with lax copyright enforcement practices, that cross borders and infiltrate markets in other countries. If United States law is now perceived to allow businesses like defendants' to function without restraint, or is perceived as inconsistent and unreliable, this spill-over problem will be global, massive and instant.

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software and networks were being used to carry out direct infringements of copyright (which of course includes internationally guaranteed exclusive rights). 259 F. Supp. 2d at 1034; 1037.

ARGUMENT

I. The Decision Below Creates Uncertainty As To Whether The United States Is Meeting Its Obligations Under International Agreements That Require Recognition Of Substantive Rights And Effective Means Of Enforcing Those Rights.

International rights owners such as *amicis'* members are protected in the United States by a number of international agreements concerning the protection of intellectual property (all of which are reproduced in the appendices to Professor Nimmer's treatise). The main agreements of relevance here include:

- the Berne Convention for the Protection of Literary and Artistic Works (protecting "authors" and their representatives and assignees in all fields),[3]

- the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (protecting a range of rights owners on substantive and enforcement issues),[4]

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[3] July 24, 1971, U.S. Senate Treaty Doc. 99-27, KAV 2245, 1 B.D.I.E.L. 715, 17 U.S.C. § 104; *also reprinted at* http://www.wipo.int/clea/docs/en/wo/wo001en.htm (the "Berne Convention").

[4] Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197, *reprinted at* http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (the "TRIPs Agreement").

- the WIPO "Internet Treaties" (protecting authors, producers and performers on Internet and other matters),[5]

- the Universal Copyright Convention (protecting authors in parallel with the Berne Convention),[6] and

- the Geneva Phonograms Convention (protecting producers against unauthorized reproduction of their phonograms).[7]

A host of other international legal obligations of the United States require similar or related protections.[8] All these international agreements guarantee non-U.S. owners of rights in intellectual property substantive rights, which have been enacted into law.[9] These include rights to authorize or

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5 WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, at 1, 36 I.L.M. 65 (Geneva, 1997), *reprinted at* http://www.wipo.int/treaties/documents/english/word/s-wct.doc (cited as "WCT" herein); WIPO Performances and Phonograms Treaty, S. Treaty Doc. No. 105-17, at 18, 36 I.L.M. 76 (Geneva, 1997), *reprinted at* http://www.wipo.int/treaties/documents/english/word/s-wppt.doc ("WPPT").

6 (Paris text, 1971), July 24, 1971, 25 U.S.T. 1341, T.I.A.S. 7868, 1 B.D.I.E.L. 813, *reprinted at* http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml ("UCC").

7 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. 7808, 888 U.N.T.S. 67, *reprinted at* http://www.wipo.int/clea/docs/en/wo/wo023en.htm.

8 *See generally* P. Geller, 1 *Int'l Copyright Law & Practice*, ¶¶ 3[3](b) (outlining United States treaty ratifications and implementation in the international copyright area).

9 *See* 17 U.S.C. § 104(b) (foreign author may claim U.S. copyright under certain circumstances), cited in *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 484 (9th Cir. 1994).

prohibit reproduction,[10] distribution,[11] Internet transmission[12] of and other substantial uses of their works and other protected material. These international agreements allow for exceptions or limitations to these rights, but only in certain special cases that do not conflict with the normal exploitation of the material, and that do not unreasonably prejudice the legitimate interests of the rights holders.[13]

The TRIPs Agreement, which provides "the highest expression to date of binding intellectual property law in the international arena" (*United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999) (citation omitted)), for the first time also imposes far reaching requirements in the enforcement of intellectual property rights.[14] Thus, Article 41(1) of the TRIPs Agreement requires:

> Members shall ensure that enforcement procedures as specified in this Part are

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10 Berne Convention, art. 9; TRIPs Agreement, art. 9, 14; WCT, art. 1(4) (incorporating Berne requirements); WPPT, arts. 7, 11; UCC, art. IV *bis*(1); Geneva Phonograms Convention, art. 2.

11 Berne Convention, art. 14(1) (distribution of cinematographic works); TRIPs Agreement, arts. 11, 14(4) (rental of computer programs, cinematographic works, phonograms); WCT, arts. 6-7; WPPT, arts. 8-9, 12-13; UCC, arts. V, VI; Geneva Phonograms Convention, art. 2.

12 These rights, encompassed under general provisions of earlier treaties, are embodied explicitly in WCT, art. 8; WPPT, arts. 10, 14.

13 Berne Convention, art. 9(2); TRIPs Agreement, art. 13; WCT, art. 10; WPPT, art. 16; UCC, art. IV; Geneva Phonograms Convention, art. 6; *See generally* 17 U.S.C. § 107; World Trade Organization, Report of the Panel, *United States – Section 110(5) of the U.S. Copyright Act*, Case No. 00-2284 (WT/DS160/R, 15 June 2000) (interpreting Berne Convention art. 9(2) and TRIPs tests).

14 "TRIPs stands unique among international copyright compacts in the sophistication of its enforcement mechanisms . . . . [G]iven that TRIPs contains enforcement provisions far more efficacious than those extant under Berne, it can be anticipated that TRIPs will set the international standard for enforcement." 4 Nimmer on Copyright § 18.06[B][2], at 18-67.

> available under their law so as to ***permit effective action*** against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies ***to prevent infringements*** and remedies ***which constitute a deterrent*** to further infringements. (emphasis supplied)[15]

The United States consistently has taken the position in its negotiations with its WTO partners that "effectiveness" of a party's enforcement and remedies in this context means enforcement and remedies that "work in practice."[16]

Judicial decisions such as the present one, moreover, form an important part of the analysis of whether a particular country is in compliance with its TRIPs obligations. Particularly relevant to a consideration of the TRIPs requirement of "effective action" to prevent and deter piracy, the WTO Appellate Body in *India -- Patent Protection for Pharmaceutical Protection and Agricultural Chemical Products* repeated the principle from a 1926 Permanent Court of International Justice case instructing that national compliance be evaluated broadly on the basis of numerous factors, including judicial decisions*:*

> From the standpoint of International Law and of the Court which is its organ,

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15 The WIPO Internet Treaties contain a similar requirement. *See, e.g.*, WCT, art. 14; WPPT, art. 23.

16 *See* Request for Consultations by the United States, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1824 (WT/DS124/1, IP/D/13, 7 May 1998); Request for Consultations by the United States, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1813 (WT/DS125/1, IP/D/14, 7 May 1998). Traditionally, in the international arena, the United States has sought more stringent, rather than less stringent, respect for intellectual property rights.

> municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[17]

To the extent the decision below works to make "effective action" against online infringement "unavailable" to rights holders, including by denying expeditious preventive remedies and undermining deterrence, United States compliance with its international obligations could be called into question. This is especially true where, as here, the *Aimster* and *Grokster* decisions of the United States Circuit Courts of Appeals are in conflict – a conflict directly arising from their differing readings of this Court's prior ruling in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

The Ninth Circuit recognized the conflict its decision created with *Aimster* in applying *Sony* and made only weak efforts to minimize that conflict (*see, e.g.*, Petition for Writ of Certiorari at 25-26). Thus, it is particularly appropriate in this case for this Court to review the decision below in the context of its conflict with *Aimster*, so that the United States'

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[17] *India – Patent Protection for Pharmaceuticals Protection and Agricultural Chemical Products*, No. 95-0000, (WT/DS50/ABIR, 19 Dec. 1997) ¶ 65, at 25, citing *Certain German Interests in Polish Upper Silesia*, [1926] PCIJ Rep., Series A, No. 7, at 19; *see also id.* ¶ 67, at 25-26, citing Report of the Panel, *United States—Section 337 of the Tariff Act of 1930* (BISD 36S/345, 7 Nov. 1989) (panel conducted detailed examination of United States legislation and practice, including court proceedings).

international counterparts can, in the development of their own jurisprudence and relations with the United States, assess for themselves whether "in applying [its] law, [the United States] is acting in conformity with its obligations" under the TRIPs Agreement.

In addition, review is appropriate here given the concern that the decision below can be read as expressing an implicit conclusion that in enacting the Copyright Act and other legislation, Congress *desired to depart from the international obligations set forth above.* This is a serious concern; "GATT [now WTO] agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995), citing *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains). A prompt review by this Court will settle this uncertainty and reaffirm that Congress has enacted statutes that are in fact in accord with the United States' international obligations.

II. The Decision Below Will Be Taken Into Consideration As Courts Outside The United States Grapple With These Issues.

The Ninth Circuit's decision will have a deleterious ripple effect on similar cases involving so-called "decentralized" peer-to-peer file transmission and copying services in other countries. Although courts in every country apply their own national laws and look to their own legal precedents and authorities, they also are informed by judicial decisions in the United States involving new Internet issues. Parties (including *amici*) do provide information on United States court judgments and raise arguments from United States court decisions as persuasive authority in other jurisdictions. At this point, given *Grokster's* conflict with *Aimster*, no clear message is coming from the United States courts to provide guidance to the other parties to the international agreements set forth above -- or, even worse, the wrong message is the one that will be heard.

The importance of the judicial decisions from the United States in the international arena cannot be overstated. For example, United States courts dealt first with the issues surrounding so-called "centralized" peer-to-peer services in the *Napster* litigation.[18] Since then, cases brought and decided so far in Japan and Korea have reached the same result against similar services.[19] In both cases, the parties submitted information on the decisions of the District Court and the Ninth Circuit in *Napster*, and the reasoning of these decisions appears to have been taken into account in the foreign courts' judgments.

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[18] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *affirming A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

[19] *See* A. Dixon, *Internet Copyright Litigation: Non-U.S. Developments*, BNA World E-Commerce & IP Report, June 2003, at 5, 6-7. The following case reports are taken from the referenced article.

In *Nippon Columbia Co., Ltd., et al. v. Yugen Kaisha Nippon MMO,*[20] defendant Japan MMO operated a peer-to-peer service used by approximately 42,000 persons, who collectively made available about 80,000 files at any one time. Like Napster, Japan MMO created an index of files available for download, and users transmitted and copied files directly to each other. The court found, both at the preliminary injunction and "interlocutory judgment" stage, that not only were users violating plaintiffs' exclusive right under the copyright law of "making transmittable" plaintiffs' works and recordings, but Japan MMO itself played a role in the infringing acts. Japan MMO was enjoined from offering the service on April 9, 2002, and was found liable on the merits on January 29, 2003.

In *Asia Media Inc. et al v. Yang et al.*,[21] members of the Recording Industry Association of Korea (RIAK) filed civil claims against the Korean "file sharing" service Soribada on February 8, 2002. On July 9, 2002, the court issued an injunction requiring the peer-to-peer service to stop letting users download the plaintiffs' recordings, to stop operating the service on the Korean Data Centre's servers, and to pay a $170,000 guaranty.[22]

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[20] 2002 (Wa) Case No. 4249 (Tokyo Dist. Ct., 29th Civil Division, interlocutory judgement 29 Jan. 2003). *See* RIAJ Press Release, *Court decided Japan MMO, a file-sharing service company, for illegality; Interlocutory judgment by the Tokyo District Court*, http://www.riaj.com/e/news/20030129.html (29 Jan. 2003).

[21] No. 2002KAHAP77 (Suwon Dist. Ct., Seongnam Branch, First Civil Dep't, 9 July 2002).

[22] RIAK also filed parallel criminal proceedings, and the prosecutor indicted the two operators, in August 2001, charging them with aiding and abetting infringement. The criminal case was dismissed on May 15, 2003, on the ground that the charges did not adequately specify how Soribada aided and abetted copyright infringement. The prosecutor has appealed this dismissal to the High Court, and the appeal is pending.

Pending in Taiwan at present are criminal and civil proceedings against the subscription peer-to-peer services EzPeer and Kuro, which started out as "centralized" services using Napster-based technology but which are migrating to "decentralized" and encrypted technology. To date, the Taiwan courts have issued injunctions requiring removal of 105 copyrighted recordings from both services.[23] As part of the proceedings, however, Kuro has asked the trial court to consider the Ninth Circuit's ruling in *Grokster* — perhaps predictably without any mention of the Seventh Circuit's ruling in *Aimster* — as authority for Kuro's proposition that all decentralized peer-to-peer services should be immune from liability in Taiwan.[24]

As courts like these outside the United States begin considering Internet issues involving the new generation of peer-to-peer services like Grokster, it is in the interest of *amici* and all affected parties that United States law provide helpful and consistent guidance, on how massive infringements on services like these can be stopped, and in particular, how key enablers and facilitators such as defendants can and should be held responsible.

This will help to promote consistent international treatment of Internet-based activities, a key goal of the evolving international treaty structure in the intellectual property field. Only after effective and consistent enforcement mechanisms are in place against infringement

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[23] *Rock Records (Taiwan) Co. Ltd et al. v. Fashion-Now Co., Ltd.*, 92 Tsai Chueng No. 20 (Taipei Dist. Ct., injunction issued Dec. 1, 2003); *Rock Records (Taiwan) Co., Ltd. et al. v. Global Digital Technology Co., Ltd.*, 92 Tsai Chueng No. 2082 (Shi-Lin Dist. Ct., injunction issued Dec. 11, 2003). *See also Fashion-Now Co., Ltd. et al.*, 92 Sue Tze No. 2146 (Taipei District Ct., criminal indictment issued Dec. 1, 2003); *Global Digital Technology Co., Ltd. and others*, 92 Sue Tze No. 728 (Shi-Lin Dist. Ct., criminal indictment issued Dec. 4, 2003).

[24] *Interim Application of Fashion-Now Co., Ltd*, 92 Sue Tze No. 2146 (Taipei Dist. Ct., filed Aug. 31, 2004).

can the legitimate on-line use of copyrighted materials ultimately and best be developed and maintained in the international arena.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Hank L. Goldsmith
Christopher Wolf*
Proskauer Rose LLP
1233 20th Street, N.W.
Suite 800
Washington, DC 20036
(202) 416-6800

Allen N. Dixon
General Counsel,
International Federation Of
The Phonographic Industry
54 Regent Street
London
W1B 5RE
United Kingdom
011 44 207 8787903

*Counsel of Record