UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL NOS. 03-55894, 03-55901

METRO-GOLDWYN-MAYER STUDIOS INC., et al.,

Appellants,

v.

GROKSTER, LTD., et al.,

Appellees.

JERRY LEIBER, et al.

Appellants,

v.

GROKSTER, LTD., et al.

Appellees.

Appeal from the United States District Court, Central District of California
Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al.,
Case No. CV 01-08541 (PJWx) (Consolidated with *Leiber, et al. v. MusicCity.com, Inc., et al.*, Case No. CV 01-09923 SVW (PJWx)),
Honorable Stephen V. Wilson

BRIEF OF *AMICUS CURIAE* SHARMAN NETWORKS LIMITED IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Sharman Networks Limited ("Sharman") certifies the following:

Sharman has no parent companies and no publicly held company owns 10% or more of its stock.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Sharman, a company registered in Vanuatu and with management services based in Australia and Europe, is a defendant in the action below, but is not a party to this appeal. Appellants belatedly added Sharman to this action after summary judgment proceedings giving rise to this appeal were underway. Although Sharman did not participate in the summary judgment proceedings, Sharman has a direct interest in its outcome.

Like Grokster, Sharman licenses the "FastTrack" protocols that enable peer-to-peer communications over the internet. The FastTrack protocols were developed for a Netherlands company known as KaZaA BV (who Appellants also sued in this action). In addition to the FastTrack communications protocols, KaZaA BV developed a graphic user interface (containing the screens that a computer user sees when searching for, downloading, and displaying files) and installation program. Collectively, KaZaA BV called its application the "Kazaa Media Desktop" or "KMD" and made it available for downloading by computer users. KaZaA BV also developed a website that serves as a "start" page when users open the KMD application.

In January 2002, Sharman purchased selected assets from KaZaA BV, including its graphic user interface and installer applications, its website, domain name, and some server equipment. Sharman did not purchase the FastTrack protocols. Sharman understands that KaZaA BV transferred the rights to the

FastTrack protocols to a company known as Blastoise (later renamed Joltid). Accordingly, Sharman licensed the FastTrack protocols from Joltid.

Before offering a "peer to peer" application, Sharman undertook to ensure that it achieved its business objectives lawfully, fully respecting the intellectual property rights of others. After completing the asset purchase and licensing the FastTrack protocols, Sharman shut down the web site and ceased offering the KMD application. During the shutdown period, Sharman consulted with legal counsel, and cleansed the application and web site of any content that could arguably promote infringing activity. Sharman further rewrote the "Terms of Use" for the KMD application, prohibiting copyright infringement and obligating KMD users to respect the legal rights of content owners. Finally, Sharman cancelled contracts with third-parties, including advertisers, that could be perceived as promoting or encouraging infringement. When Sharman resumed operations, it offered a demonstrably different KMD and website, one that actively discouraged any past infringing behavior. Sharman also set about to integrate technology that would enable the KMD to deliver digitally protected, rights managed content, and it heavily promoted legal use of peer-to-peer technology.

Sharman did not cease in these efforts to promote legitimate uses of peer-to-peer technology. Over the past 20 months, Sharman has continued to revise and update its KMD application. Among other things, Sharman provided features that enable users to promote their own content for peer-to-peer exchange. Sharman also entered into a joint enterprise with Altnet, Inc., for distributing licensed, secure content through the KMD application. (*See* Brief of *Amicus Curiae* Altnet, Inc.). Promoting non-infringing uses of KMD did not turn users away. To the contrary, Sharman's KMD application recently became the most downloaded application ever. Despite Sharman's efforts to form a business based on legal uses of peer-to-peer technology, Sharman has been dragged into litigation half way around the world and subjected to unfounded charges—ironically from Hollywood—ranging from piracy to smut peddling.

Arguing that the District Court failed to apply the law of secondary copyright liability, Appellants ask this Court to reverse the grant of summary judgment. Yet, in granting summary judgment to Appellees, the District Court not only applied the law of this Circuit—including the *Sony* and *Napster* decisions—it applied a standard for secondary liability that is consistent with international copyright principles.

Sharman relied on those existing standards for secondary liability when it (i) decided to enter the business of distributing peer-to-peer software; (ii) revised the KMD application and its web site; and (iii) established conduct requirements for its advertisers. Sharman continues to rely on those standards in further developing its business and improving peer-to-peer technology. Those standards for secondary copyright infringement should not be extended—as Appellants advocate—in a way that makes technology providers responsible for any illegal uses of their technology simply because they "know" some users infringe, or because they generate revenue irrespective of use. To do so would place the law of secondary copyright infringement well beyond other tort concepts of secondary liability and would substitute judicial lawmaking for legislative enactments that have guided the development of United States and international copyright law for decades.

ARGUMENT

I. INTRODUCTION

We are at the end of judge-created common law of contributory and vicarious copyright infringement. If new and expanded legal liability is to be created of the type urged by Appellants, Congress and the Executive branches of government must do it, not the Judiciary.

In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), this Court correctly applied the limits of secondary copyright infringement set by the United States Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1986), to a centralized file sharing system. This case involves decentralized peer-to-peer file sharing applications built upon the existing infrastructure of the internet. Because the existing law of secondary copyright infringement does not extend to impose liability on the providers of this peer-to-peer software, Appellants advocate new rules that would hold providers of technology secondarily liable for direct infringement whenever they "know" that some users will infringe copyrights with the technology, or whenever they "profit" from the technology independent of any infringing conduct. As expressed in the *Sony* decision, courts impose secondary liability doctrines only under manifestly just circumstances. Extending these doctrines to Defendants in the present case—where they neither authorize the infringement, nor have the ability to stop any infringement at the time it occurs—would be manifestly unjust and would extend secondary copyright infringement liability beyond those circumstances that this Court or the United States Supreme Court has recognized as the appropriate bounds for the imposition of such liability.

The new "rules of law" urged by the Appellants, if adopted, would (i) outlaw a technology in its infancy that already has substantial non-infringing uses; (ii) retard the development of new technologies; (iii) chill and destroy a global means of exchange and free expression, (iv) promote the interests of copyright holders over the interests of technology developers and technology users; and (v) disturb international conventions involving copyright law and thereby affect relations among foreign nations. The Judiciary is not equipped and, indeed, it is not constitutionally entrusted with the task of weighing all these competing concerns. If new law is to be made—and make no mistake, Appellants seek this Court to legislate new, previously non-existent rules of law—Congress and the Executive should do it, not this Court.

II. THE COMMON LAW OF SECONDARY COPYRIGHT INFRINGEMENT LIABILITY HAS WELL DEFINED BOUNDARIES THAT SHOULD NOT BE EXTENDED EXCEPT BY LEGISLATIVE ENACTMENT

In granting partial summary judgment, the Court below correctly applied the settled, well-defined boundaries of secondary copyright infringement. Where the existing boundaries of copyright law cannot resolve the competing interests of copyright holders, technology developers, and technology users, legislative solutions always have been reached. Here, in the context of the global internet and decentralized peer-to-peer technology, a legislative solution, not judicial law making, is both available and constitutionally required.

A. The Boundaries of Secondary Copyright Infringement Are Well Defined

The United States Copyright Act makes direct infringers liable for copyright infringement. 17 U.S.C. § 501. Although the Copyright Act does not impose liability for infringement on anyone other than direct infringers, courts have extended liability by applying contributory and vicarious concepts under "circumstances in which it is just to hold one individual accountable for the actions of another." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1986). But the limits of judicially-imposed contributory and vicarious liability have been narrowly and precisely articulated in law, lest fair notice of wrongful conduct not be given.

Since the Supreme Court's *Sony* decision, contributory liability for copyright infringement has been recognized under two circumstances. First, persons other than direct infringers can be held liable for infringing activities when an "ongoing relationship" exists "between the direct infringer and the contributory infringer at the time the infringing conduct occurred." *Sony*, 464 U.S. at 437. According to the *Sony* Court, imposing secondary liability is "manifestly just" where the contributory infringer is "in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner." *Id.* As examples of "ongoing relationship" situations where a person other than the infringer not only authorized the direct infringement but could have stopped it, the *Sony* Court cited the so-called "dance hall cases" as well as cases involving performance managers and advertisers of infringing works.[1] *Id.* at n. 18. In these situations, persons not engaged in infringing activities are said to materially contribute with "actual knowledge" of the infringement. In other words, a person can be justly held responsible when he or she culpably participates in known instances of direct infringement.

In *Sony*, the Supreme Court recognized that "actual knowledge" contributory

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[1] *See Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F.2d 1213 (1st Cir. 1977); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo. 1977); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2nd Cir. 1963); *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2nd Cir. 1971); and *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (SDNY 1966).

infringement "plainly" could not be applied to hold Sony—the manufacturer of the Betamax video recorder—secondarily liable. Sony had neither the requisite "direct involvement with the allegedly infringing activity [nor] direct contact with purchasers of Betamax who recorded copyrighted works off-the-air." *Id.* at 438. Because "actual knowledge" contributory infringement did not apply, the *Sony* Court examined whether liability could exist under the second form of contributory infringement: material contribution with "constructive knowledge" of infringement. *Id.* at 439. But the Supreme Court recognized an important exception to the "constructive knowledge" contributory infringement doctrine—one that made the doctrine inapplicable to Sony's manufacture and sale of the Betamax. Borrowing from patent law concepts, the *Sony* Court held that liability based on constructive knowledge could not lie where the product contributing to the infringement was "capable of substantial noninfringing uses." *Id.* at 442.

For vicarious copyright infringement, courts have consistently applied a two-pronged test: (1) "a right and ability to supervise the infringing activity," and (2) "a direct financial benefit in the [infringing] activities." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996). Tort concepts of vicarious liability are premised on one of two theories: either an employer's common law *respondeat superior* liability over employees or agents, or a landlord's common law premises liability. *See Shapiro, Bernstein & Co.*, 316 F.2d at 307-08; *Adobe Sys. v. Canus Prods.*, 173 F. Supp. 2d 1044, 1053 (C.D. Cal. 2001). For example.

applying the premises liability notion of vicarious liability, the Ninth Circuit found a swap meet owner vicariously liable for a vendor's sale of counterfeit recordings. *Fonovisa*, 76 F.3d at 262-63. Likewise, the *Napster* Court implicitly analogized the central index and server functionality of Napster's service to a "premises" owner in finding Napster vicariously liable for its user's direct infringement. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-22 (9th Cir. 2001).

But vicarious liability has never been extended or applied to a vendor-customer relationship, particularly where new technologies are involved. As this Court has recognized, the Supreme Court never considered that Sony could be vicariously liable for acts of direct infringement by Betamax customers. *See Napster*, 239 F. 3d at 1022-23 ("[W]hen the *Sony* Court used the term 'vicarious liability,' it did so broadly and outside of a technical analysis of the doctrine of vicarious copyright infringement."). Holding vendors vicariously liable for the torts of their customers would undoubtedly open wide the floodgates of litigation. After all, vendors must "profit" from sales to stay in business and vendors almost always could design products in a way that allowed for some control over potential economic impacts to third-parties. Certainly makers of VCRs and photocopiers would come under renewed attack if they could now be held vicariously liable for their customer's infringement.

B. The Well-Defined Boundaries of Secondary Copyright Infringement Were Correctly Applied By the Court Below

The reach of secondary liability principles for copyright infringement found their limit with the Napster system. Napster's "hybrid" system featured not only software for peer-to-peer communications, but centralized servers that performed the necessary indexing and search functionality. *Napster*, 239 F.3d at 1011-12. These centralized functions placed Napster "in a position to control the use of copyrighted works," *Sony*, 464 U.S. at 437, thus giving rise to "actual knowledge" contributory liability. *Napster*, 239 F.3d at 1022. It also provided premises beyond a mere vendor/customer relationship for imposition of vicarious liability. *Id.* at 1022-23. In contrast, judicial contributory and vicarious infringement doctrines could not reach Sony's sale of Betamax recorders, even if the recorders allowed for copyright infringement on an equal scale.

Providers of truly decentralized peer-to-peer software applications, such as Appellees, cannot be held secondarily liable each time a user of their application downloads a copyrighted file without permission from the content owner. To hold otherwise would push the doctrines of contributory and vicarious copyright liability well beyond the limits set in *Sony* and *Napster*. It would also be manifestly unjust.

First, liability under the "actual knowledge" test for contributory infringement, as in *Sony*, "plainly" does not apply. *Sony*, 464 U.S. at 437-38. Contrary to Appellants' arguments, knowledge that some users will infringe copyrights with peer-to-peer applications is not enough to impose secondary liability because providers of peer-to-peer software applications lack the necessary "ongoing relationship" with software users at the time any infringing conduct occurs. Although the applications connect to a web-based "start page" when opened on a personal computer, the web page indisputably gives no ability to direct or monitor the peer-to-peer search function. Indeed, the web page has nothing to do with the search functionality of the applications. Even shutting down the servers would have virtually no effect on the search and download capabilities of the application. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1040 (C.D. Cal. 2003). Just as Sony lacked the requisite relationship with Betamax purchasers, providers of peer-to-peer software are neither in a "position to control the use of copyrighted works by others" nor do they "authorize the use without the permission from the copyright owner." *Sony*, 464 U.S. at 437.

Second, liability under the "constructive knowledge" test for contributory infringement cannot apply. Well documented non-infringing uses exist for peer-to-peer applications. In fact, Sharman has built its business on those very uses, teaming with Altnet to provide thousands of licensed files for distribution, with more added each day. (*See* Brief of *Amicus Curiae* Altnet, Inc.). Under *Sony* and *Napster*, these existing non-infringing uses, to say nothing of potential, untapped non-infringing uses, bar "constructive knowledge" contributory liability.

Finally, vicarious liability cannot exist. Unlike Napster, decentralized peer-to-peer software applications have no "premises" upon which infringing activity occurs. Rather, peer-to-peer software is distributed in a pure vendor-customer setting, just as Microsoft distributes the Outlook email application and Xerox distributes photocopiers. Once a user downloads peer-to-peer software, the exchange of files with the software takes place completely independent of the application provider, and even without the provider's knowledge. All indexing, searching, and routing takes place on the internet and in individual user's computers.[2] Simply "profiting" from the peer-to-peer applications is not enough: without providing a "premises" for wrongful conduct, providers of peer-to-peer applications cannot be vicariously liable even if customers use their software products wrongfully.

Appellants and their *Amici* argue that secondary liability should be imposed on the developers and providers of peer-to-peer applications because their copyrights cannot be effectively enforced any other way in the world of peer-to-peer file distribution across the vast expanse of the internet. In essence, they claim that the extent of the infringement is so massive, and enforcing against the direct

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[2] Appellants suggest that software providers "subcontract" the indexing function to computer users, giving the false impression that Appellees provide Napster-like "premises" through contractual agreements. MGM Plaintiffs-Appellants' Opening Brief, at 14. Appellants' logic is not well thought out: aside from the fact that no such contracts exist, the peer-to-peer applications at issue have no centralized index to "subcontract."

infringers is so difficult, secondary liability must be imposed.

But their argument ignores other technologies—indeed, technologies to which doctrines of contributory and vicarious infringement have not applied—that provide similar potential for misuse. It is likely that far more copyrights have been infringed with everything from photocopiers, to VCRs, to email, to instant messenger services than have ever been infringed by users of peer-to-peer applications. Moreover, in a recent, well-publicized RIAA enforcement campaign against direct infringers, Appellants have demonstrated the ability to not only identify persons who use peer-to-peer applications for infringing purposes, but to successfully enforce their copyrights against them.

C. Competing Concerns of Copyright Holders, Technology Developers, and Technology Users Should Be and Have Been Resolved By Legislative Compromise

Copyright holders' "doom and gloom" predictions concerning new technologies, only to later profit from those very technologies, are well documented. Where new technologies have emerged, which the recording and studio industries have imagined would be devastating to their businesses, legislative compromises have been fashioned, copyright holders have adapted to the new technologies, and most frequently, the recording and studio industries have profited from the new technologies over time. *See* Niels Schaumann, *Intellectual Property In an Information Economy: Copyright Infringement and Peer-to-Peer Technology*, 28 Wm. Mitchell L. Rev. 1001, 1006 (2002).

The historical instances where the competing interests of copyright holders, technology developers, and technology users have been resolved through legislative enactment are legion, and extend well into the digital age. When Sony developed digital audio tape, content owners and manufactures reached a compromise in the form of the Audio Home Recording Act of 1992. *See* 17 U.S.C. § 1001-1010 (2000). Similarly, when distribution of digital, electronic files became possible (thus, possibly rendering the music publisher's mechanical license fees obsolete), the affected industries compromised, resulting in the Digital Performance Right in Sound Recordings Act of 1995. *See* Act of Nov. 1, 1995, Pub. L. No. 104-39, 109 Stat. 335 (1995). Finally, continued advancements in internet transmissions and home computing technology have resulted in both new weapons for content owners as well as safe harbors for certain internet-related businesses. *See* No Electronic Theft Act, Pub. L. No. 105-147, sec. 2(b), 111 Stat 2678 (1997) (codified as amended at 17 U.S.C. § 506 (2000)); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-34, sec. 103(a), 112 Stat. 2863, (codified at 17 U.S.C. § 1201 (2000)).

Here, legislative action, not judicial law making, is particularly needed because political issues of comity are implicated in the legal subject matter at issue. For example, the International Rights Owners argue that their copyrights cannot be protected unless United States courts impose the judicially-created secondary liability doctrines on the providers of peer-to-peer software. (Brief of

Amici Curiae International Rights Owners.) Ironically, these international organizations seek an expansion of the secondary liability doctrines from this Court precisely because the courts in their own nations refuse to either stifle innovation or impose secondary liability in an unjust manner. Indeed, these *Amici* can point to no international or national law that would hold a provider of peer-to-peer software responsible for the infringing conduct of software users.[3] To the contrary, these *Amici* point out that an appellate court in the Netherlands refused to impose secondary liability against the developer of the very software at issue in this case. (*Id.* at 25-26.) In other words, these *Amici* ask this United States Court to do what their respective sovereign nations have thus far refused to do.

When established doctrines of secondary liability reach their limits over new technology, which is the situation in this case, the Supreme Court has cautioned against judicial intervention:

[3] The International Rights Holders cite a dispute between the United States and Greece involving the broadcast of copyrighted United States films and television programs. (International Brief at 13-14.) Under the circumstance described, the broadcasters directly infringed copyrights; no "remedy" involving application of secondary liability doctrines was at issue. In fact, the International Rights Owners' position that software providers should be secondarily liable here is akin to imposing secondary liability against television manufacturers in the broadcast infringement dispute with Greece.

> The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. (citations omitted). 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 raised permutations of competing interests that are inevitably implicated by such new technology. [¶] In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.

Sony, 464 U.S. at 431. Here, legislative policymakers are in a better position to broker the competing interests in a way that will simultaneously promote technical, economically-beneficial innovation and protect content owners.

III. EXTENDING SECONDARY LIABILITY DOCTRINES BEYOND *SONY* AND *NAPSTER* TO DECENTRALIZED PEER-TO-PEER SOFTWARE PROVIDERS WOULD RISK EXTRATERRITORIAL APPLICATION OF UNITED STATES COPYRIGHT LAW

It is well settled that United States copyright law does not extend to acts of direct infringement that take place outside the United States. *See Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1091 (9th Cir. 1994) (en banc); *Allarcom Pay Television Ltd. v. General Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995). For the same reason, liability for contributory or vicarious copyright infringement cannot be imposed unless an act of direct infringement occurs in the United States. *See Subafilms*, 24 F.3d at 1090-91; *Allarcom*, 69 F.3d at 387. A limited exception to this rule exists where some act in the United States that itself constitutes copyright infringement makes possible infringing conduct outside the United States. For example, liability may be imposed where an unauthorized copy of a copyrighted work is made in the United States, and subsequently shipped to a foreign country where the copy is used to produce further copies. *See Los Angeles News Service v. Reuters Television International, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Liberty Toy Co. v. Fred Silber Co.*, 1998 U.S. App. LEXIS 14866 (6th Cir. 1998).

The technology at issue in *Napster* fundamentally differs from the peer-to-peer applications at issue in this case. Napster made infringing exchanges of digital audio files possible through the use of centralized servers for indexing, searching, and routing files. Because Napster's servers were located in the United States, existing precedent allowed application of United States copyright law to find contributory or vicarious infringement without offending the notion that United States copyright law cannot be applied extraterritorially. However, with decentralized peer-to-peer software, Appellants can point to no "contributory act" or "premises" within the United States that justifies application of United States copyright law.

In this way, Napster not only defined the boundaries of the judicially-created doctrines of contributory and vicarious copyright infringement, but also tailored those boundaries to ensure that United States copyright law would not be applied extraterritorially. If, as Appellants seek, that boundary is pushed further to encompass decentralized peer-to-peer software, where acts of infringement may take place wholly outside the United States, the risk of applying United States copyright law extraterritorially increases dramatically. Specifically, if secondary liability were imposed here, it would affect not only non-infringing uses of peer-to-peer software in the United States, but all uses of the software in every other country.

With such an expansion of United States copyright law, foreign governments can be expected to respond by subjecting United States companies to similar liability. While the United States government may make the calculated decision to expand the application of copyright law in this way, this decision falls squarely with the legislative branch, which is far better equipped to weigh the policy concerns. Several laws of the United States are expressly aimed at acts wholly outside the geographic boundaries of the United States. *See e.g.*, Foreign Corrupt Practices Act, Pub. L. No. 95-213 §§ 102-104, 91 Stat. 494 (codified as 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff (1994)). The Copyright Act is not such a law, and the intent of Congress must respected unless and until Congress amends the Copyright Act as it has done on numerous occasions. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (United States law cannot be applied extraterritorially unless Congress so authorizes). Only by confining the doctrines of contributory and vicarious copyright infringement to the limit established in *Sony* and *Napster* can courts ensure that United States copyright law is not applied extraterritorially.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Sharman Networks Limited respectfully urges that the partial judgment of the District Court be affirmed.

Dated: September 26, 2003

Respectfully submitted,

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