No. 04-480

In The

SUPREME COURT OF THE UNITED STATES

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,

Petitioners,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, SCREEN ACTORS GUILD, INC., AND WRITERS GUILD OF AMERICA, WEST AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Interest of the Amici Curiae[1]

The *amici curiae* are five labor organizations comprised of the musicians, vocalists, writers, actors and directors who create and perform in American sound recordings and films. The American Federation of Musicians of the United States and Canada (AFM) has 100,000 professional musician members and the American Federation of Television and Radio Artists (AFTRA) has approximately 80,000 professional vocalist, radio/television performer and newsperson members. AFM and AFTRA members include tens of thousands of musicians and vocalists who make sound recordings both as "featured" or "royalty" artists and as "session" musicians and vocalists. The Directors Guild of America (DGA) has over 12,000 members who are motion picture and television film directors, assistant directors and unit production managers. The Screen Actors Guild, Inc. (SAG) has over 120,000 members including both "principal" and "background" actors in motion picture and television films. The Writers Guild of America west (WGAwest or WGA) represents 8,500 theatrical film, broadcast and television writers.

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[1] The parties have consented to the filing of this brief. No part of this brief was written by counsel for a party. No one other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Grokster and StreamCast operate – for a profit – internet services through which millions of users copy and distribute copyrighted sound recordings and films without the copyright holders' authorization and without making any payments. The question in this case is whether Grokster and StreamCast, the Respondents in this Court, are liable as contributory infringers, or under the copyright law vicarious liability standard, for these massive infringements.

Grokster/StreamCast would have it that the parties with an interest – and a financial stake – in the answer to that question are the "technology industry" on one side and the "entertainment industry" on the other. That is misleading in the extreme.

The harmful effects of the infringements on the Grokster/StreamCast services are not absorbed by some abstract "entertainment industry." To the contrary, that harm directly affects the AFM, AFTRA, DGA, SAG and WGA artists who create those sound recordings and films. To appreciate why requires some understanding of what these artists contribute to the collaborative processes that result in sound recordings and films and how they are compensated for their work.

The Creative Process

Across and within all genres, each sound recording is a unique artistic expression informed by the contributions of the musicians and vocalists who

collaborate to create the recorded performance. Royalty and session artists alike combine their talents – and the ability to express their deepest emotions – to record a performance that transcends its parts and becomes a singular work of art. The concrete examples, from John Coltrane's legendary jazz expression of spirituality, "A Love Supreme," to Patsy Cline's extraordinary country-western hit, "Crazy," could be multiplied endlessly. What the recording companies that finance and then sell the resulting CDs and music files are providing the public – and what the public wants – is the performers' musical creation.

The same is equally true for films, each artistic aspect of which depends upon the unique visions of its collaborators that fuse to create a singular work. Screen writers labor in solitude to translate inspiration into an effective script. Directors take the writers' words and transform them into moving pictures on the screen that convey their cinematic vision. And actors by their ability to capture and project their characters' mental and psychological states communicate with audiences in a way that makes the viewer feel the film's story. Films are the product of technical know-how, experience and coordinated teamwork. But from "E.T." to "The Godfather," it is the creators' art that moves the audience.

How Performers Are Compensated

AFM, AFTRA, DGA, SAG and WGA creative artists follow a hard, financially uncertain and precarious calling. A few "stars" do fabulously well. Tens of thousands of artists with great talent and commitment never make a go of it. The great majority who succeed struggle financially and earn no more than a modest living. In this regard, they are heavily dependent on financial arrangements that produce sporadic and varied income streams tied to the sale or licensing of their creative works.

Session musicians and vocalists – who work in recording sessions under the AFM and AFTRA industry-wide agreements on an on-called basis – earn scale wages, pension contributions, "re-use" fees if the recording is used in another medium, and, for vocalists, health coverage if they qualify by reaching annual earnings minimums. In addition, session musicians receive deferred income from the Sound Recording Special Payments Fund, which is funded by signatory companies in accordance with a formula tied to sales, and session vocalists receive "contingent scale" payments when recordings reach certain sales plateaus. Musicians who record film scores share in the receipts from the exploitation of their films in secondary markets like DVD sales via payments from the Film Musicians Secondary Markets Fund.

On the intermittent occasions when they are making a record, royalty artists are entitled to the union-negotiated payments just described. But they are heavily

dependent on income from selling and licensing their recordings to earn a living, to meet the eligibility requirements for health coverage, and in particular to pay for the costs of their recording projects.

Recording musicians and vocalists also receive income from the performance of their recordings on the digital music services that make authorized, non-infringing use of copyrighted recordings on the internet. Webcasts that are "non-interactive" pay compulsory license fees, of which featured performers receive 45% and nonfeatured performers receive 5% as mandated by the Copyright Act. "Interactive" digital music services – such as internet subscription services that stream particular recordings "on-demand" – must negotiate licenses with copyright owners. The resulting license income is shared with royalty artists pursuant to their royalty contracts, and with session performers pursuant to union agreements.

As in music, employment for motion picture and television film creators is intermittent and sporadic and requires marketing oneself for specific, short term projects. Screenwriters, directors and actors who do so most successfully still may work at best only one year out of two. Industry-wide agreements negotiated by DGA, SAG, AFTRA and WGA establish minimum payments for every sort of script, role and directorial project, and enable creators to earn pensions and health coverage (if they meet annual earnings minimums). A critical feature of the union

contracts, and an essential component of writers', actors' and directors' incomes, are residual payments that pay creators a portion of the income generated by the continued exploitation of their films in foreign distributions, pay or cable TV, and sale or rental of videocassettes and DVDs after the completion of the film's original run. Creators depend on residual payments from the use of their past projects to carry them through the periods when they are not working. Even when they are working, residual payments are a critical component of their incomes and their ability to meet annual earnings requirements to qualify for health coverage.

How Performers are Harmed by Unauthorized Distribution of Sound Recordings and Films

Unauthorized free copying and distribution of copyrighted sound recordings and films on the internet directly harm the creative artists represented by the *amici curiae*.

First and foremost, every infringing download of a sound recording or film denies creators payment for their work to which they are entitled as a matter of copyright law and contract, and which they can ill afford to lose. And because their work is an expression of their being, such theft hurts in a way beyond the financial – through their performances, artists offer up their very essences to the consumer, and the consumer refuses to offer anything in return.

Secondly, each infringing free download is most likely a substitute for a purchase. Every lost sale represents a lost royalty payment for the royalty artist,

and/or a lost Special Payments Fund or Secondary Markets Fund contribution which decreases musicians' income, and/or a lessened potential for a vocalist to achieve a contingent scale payment, and/or a lost residual payment for a writer, actor or director. In addition, because entitlement to AFTRA, DGA, SAG and WGA health coverage depends upon reaching minimum annual earnings (including earnings in the form of royalties or residuals), lost sales can lead not only to lower pensions but also to the loss of health insurance for vocalists, writers, actors, directors and their families.

So far as we are aware, there is no scientific certainty as to the precise quantitative effect of infringing free downloading. But there is no question that as this illegal practice has increased exponentially, CD sales in the U.S. have dropped precipitously, and that musicians and vocalists already have felt the pain of lost royalties, lowered Special Payments Fund payments, and fewer contingent scale payments. For example, the Sound Recording Special Payments Fund collections from signatory recording companies, based on sales, for fiscal year 2003 totaled $14,852,222 – a 30% decrease from the 2002 collections of $21,183,689. This decrease is extremely painful financially since Special Payments Fund payments form a substantial portion of musicians' earnings.

Third, infringing free distribution of sound recordings on the internet competes with distribution of sound recordings on the internet by lawful services

that pay distribution and performance royalties to performers. Why pay a monthly fee to an online subscription service that will provide you with on-demand streams of the sound recordings you choose, if you can download those sound recordings for free? Why pay even a mere $0.99 or $0.79 for a legal permanent download of a sound recording if you can get that download illegally for nothing? Musicians and vocalists have a vital stake in the development of the lawful internet market for sound recordings, but that market is unfairly forced to compete with free – and illegal – internet distributions. As compression technologies improve and high-speed broadband becomes ubiquitous, legitimate new internet movie services like MovieLink will be similarly threatened by competition from illegal and free distribution on the internet.

Finally, musicians and vocalists have already suffered from contraction in the industry caused by lost sales revenues, as labels reduce their artist rosters and thus decrease recording opportunities for royalty and session artists alike. Artists may not always agree with their recording companies, but they rightly fear the demise of the companies that employ them and distribute their work. Rhetoric about new "entertainment business models" provides little comfort to artists as long as the technology industries foster the twin misconceptions that there is no need and no reason to pay for sound recordings, and that no one is hurt by their

theft. Again, as it becomes easier to download films, film creators will face the same threats.

In sum, there is no fat in the incomes of most sound recording and film creators. While it is true that they create for love and out of passion, it is also true that they must be able to earn a living – unreduced by unlawful "sharing" that shares nothing with them – or they will be unable to continue to devote themselves to music and film, and to satisfy the public's desire for their art.

SUMMARY OF ARGUMENT

Under the copyright law vicarious liability standard, Grokster and StreamCast are liable for the direct infringer conduct (*viz* the unauthorized copying and distributing of copyrighted works) that takes place in the course of Grokster's/Stream Cast's business operations.

Grokster and StreamCast operate businesses that are actively engaged in the "exploitation of copyright materials" Shapiro, Bernstein & Co. v. H.C. Groom Co., 316 F.2d 304, 307 (2nd Cir. 1963), and are thus subject to copyright law vicarious liability for direct infringer conduct committed in the course of those business operations.

Grokster/StreamCast have the most "obvious and direct financial interest," *Green*, 316 F.2d at 307, in the infringing exploitation of copyrighted works that takes place in the course of its business operations.

Third, Grokster/StreamCast have the "right and ability to supervise," *Green*, 316 F.2d at 307 in the sense of "the power to police carefully the conduct" of the person who is the direct infringer, *id.* at 308.

It is therefore just and proper to hold Grokster/StreamCast vicariously liable for the direct infringer conduct at issue here.

ARGUMENT

Under the copyright law vicarious liability standard, Grokster and StreamCast are liable for the direct infringer conduct (*viz* the unauthorized copying and distributing of copyrighted works) that takes place in the course of Grokster's/Stream Cast's business operations. The Ninth Circuit's contrary conclusion rests on a misunderstanding of, and misapplication of, that standard.

1. *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963) sets out the classic statement of the copyright law standard. *See*, e.g. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984) (citing and quoting *Green* with approval). *Green* proceeds by drawing the rule on the "pattern of business relationships which would render one person liable for the infringing conduct of another" from the "open-ended terminology" of the relevant Copyright Act provisions; "the elements that have given rise to the doctrine of *respondeat superior*;" and the "principle which can be extracted" for the "legion" of cases "which hold [a] dance hall proprietor liable for the infringement of

copyright resulting from the performance of a musical composition by [an independent contractor] band or orchestra whose activities provide the proprietor with a source of customers and enhanced income." *Id.* at 307. And, *Green* distills those materials by formulating the governing standard in the following terms:

> When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials – even in the absence of actual knowledge that the copyright monopoly is being impaired … – the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation. [316 F.2d at 307 (citation omitted).]

In elaborating on the foregoing, *Green* emphasizes that the copyright law vicarious liability standard "cannot be deemed unduly harsh or unfair." *Id.* at 308. The person who is held vicariously liable has "the power to police carefully the conduct" of the person who is the direct infringer and the governing standard "simply encourages [the former] to do so thus placing responsibility where it can and should be effectively exercised." *Id.*

As Judge Robert E. Keeton has added in this last regard, in his thorough and scholarly opinion in *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994):

> [*Green's*] inclusion of a policy justification for vicarious liability along with its discussion of the two elements of benefit and control reflects the now common recognition in other areas of the law that vicarious liability rests, in part at least, on a policy foundation

> relating to risk allocation. Even in copyright cases, in which the touchstones of benefit and control have become the defining elements for vicarious liability, we nevertheless are considering "the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the acts of another." *Sony*, 464 U.S. at 435.

And, as Judge Keeton then explained:

> When an individual seeks to profit from an enterprise in which identifiable types of losses are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits, even if that person makes arrangements for others to perform the acts that foreseeably cause the losses. The law of vicarious liability treats the expected losses as simply another cost of doing business. The enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise. In addition, placing responsibility for the loss on the enterprise has the added benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses. [*Id.*]

It follows, Judge Keeton concluded, that:

> This background of policy justifications for vicarious liability serves to place in context the [copyright law standard's] two elements of benefit and control derived from the previous case law .... By focusing on benefit received from and control over an enterprise, a court can evaluate the defendant's ability to spread losses and police conduct within the enterprise, as well as the underlying fairness of holding the defendant liable.

> The distinctive version of vicarious liability that has developed in the context of copyright omits the requirement, common elsewhere in the law of vicarious liability, that the right and ability to control extend to the "manner and means of performance." This distinctive variation is understandable, however, and is consistent with the policy foundations, as long as the right of control extends far enough to give the person (or entity) who is to be held vicariously liable a veto over [the exploitation of copyrighted materials] at all, if authorization of the copyright holder can not be established. [*Id.* at 1326.]

2. Under the copyright law standard Grokster and StreamCast are vicariously liable for the direct infringements here.

First of all, Grokster and StreamCast operate businesses that are actively engaged in the "exploitation of copyright materials" and are thus subject to copyright law vicarious liability for direct infringer conduct committed in the course of those business operations. Grokster/StreamCast have made every effort to create the impression that they are passive third parties that have only a tenuous relationship to any business actively engaged in the "exploitation of copyright materials" and are therefore immune to vicarious liability for the direct infringer conduct at issue here under the so-called "landlord leasing" line of cases discussed in *Green*, 316 F.2d at 307. That is a false impression.

It is the Grokster/StreamCast services, and their underlying software systems, that establish a network of user computers; that set up the stores of digital files of copyrighted works available for copying and distribution; that select the

"super node"/"ultra peer" user computers to host their indices; that search for and locate digital files containing a copy of a requested, copyrighted sound recording/film on the network of user computers; and that arrange a direct link between two user computers to effectuate the copying and distribution of the copyrighted work to the requesting user for his listening/viewing (and as a resource for further copying and distribution of the work). And it is Grokster and StreamCast that actively manage their services on an ongoing basis by performing maintenance, upgrading the software, and by increasing their processing capacities.

To be sure, Grokster and StreamCast have configured their services so that various of its functions are performed through user network computers rather than Grokster/StreamCast servers. But that does not make each of those user computers a separate business that shields Grokster/StreamCast from vicarious liability for direct infringing conduct committed in the course of Grokster's/StreamCast's business operations. Each of the user computers functions through -- and under the direction and control of -- the Grokster/StreamCast software and is simply a means of carrying out the Grokster/StreamCast businesses. These users and their computers are no more separate entities that shield Grokster/StreamCast from vicarious liability than the phonograph record department concessionaire that provided no such shield in *Green*, 316 F.2d at 306, or the independent contractor

bands and orchestras that provided no such shield in the "legion" of "dance hall" cases discussed in *Green*, *id.*

Second, Grokster/StreamCast have the most "obvious and direct financial interest," *Green*, 316 F.2d at 307, in the infringing exploitation of copyrighted works that takes place in the course of its business operations. Grokster's/StreamCast's sole source of revenue is to sell advertisers access to their users each time a user logs on to the system. Their advertising revenue is a function of the log-on volume; the greater the number of users who log on, the higher Grokster's/StreamCast's advertising revenue. Indeed, since almost all users who log on are attracted by the availability of copyrighted works for free, and therefore log on to engage in the infringing copying and distribution of copyrighted works, it has been undisputed and it is indeed undisputable Grokster/StreamCast reap the most "direct financial benefit, via advertising revenue," Pet. App. 16a, from the infringing uses of their services, and from multiplying those infringing uses.

Third, Grokster/StreamCast have the "right and ability to supervise," *Green*, 316 F.2d at 307 in the sense of "the power to police carefully the conduct" of the person who is the direct infringer, *id.* at 308.

The most salient point is that the operations of an internet system like the Grokster/StreamCast system are supervised and controlled through its software.

And, Grokster/StreamCast have the plain legal right, and the evidence showed the practical ability, to add filtering systems to their software which are effective in blocking the infringing copying and distribution of copyrighted works and which do not interfere with or degrade the system's ability to provide for the noninfringing copying and distribution of both copyrighted and uncopyrighted works.

On any measure that is a potent "power to police carefully the conduct" of the person who is the direct infringer. It is indeed the power to "veto" direct infringer conduct that Judge Keeton identified as the core "right of control" in assessing whether it is proper to hold the person with a financial interest in the exploitation of copyright materials vicarious liable for direct infringer conduct in the course of that person's business. Supra p _____.

To be sure, the Ninth Circuit, in a remarkable passage, came to a directly opposite conclusion:

> The district court correctly characterized the Copyright Owners' evidence of the right and ability to supervise as little more than a contention that "the software itself could be altered to prevent users from sharing copyrighted files." *Grokster I*, 259 F. Supp.2d at 1045. In arguing that this ability constitutes evidence of the right and ability to supervise, the Copyright Owners confuse the right and ability to supervise with the strong duty imposed on entities that have already been determined to be liable for vicarious copyright infringement; such entities have an obligation to exercise their policing powers to the fullest extent, which in

> Napster's case included implementation of new filtering mechanism....But the potential duty a district court may place on a vicariously liable defendant is not the same as the "ability" contemplated by the "right and ability to supervise" test. Moreover ...we agree with the district court that possibilities for upgrading software located on another person's computer are irrelevant to determining whether vicarious liability exists. [Pet. App. at 19a-20a]

This is unsound from beginning to end. The Ninth Circuit never explains why a showing that a person , who is sought to be held vicariously liable, has the practical right and ability to alter software so as to prevent direct infringer conduct is not a proper showing that he has the "power to police carefully the conduct" of the direct infringer that makes it fair and just rather than "unduly harsh or unfair" to hold that person liable. We would suggest that the reason the Ninth Circuit did not venture any such explanation is that such a showing is plainly proper and that there is no reasoned argument to the contrary.

Nor does the Ninth Circuit offer anything in support of its *ipse dixit* that a person's right and practical ability to alter his own software that he has provided to a third person to install in the latter's computer so that the latter can participate in the conduct of the first person's business is an irrelevancy. Plainly it is not. The software is the first person's software and the third person is acting for and on the first person's behalf. There is no reason to treat the third person and his computer as beyond the first person's right and ability to supervise.

CONCLUSION

The decision and judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2005, three (3) copies of the Brief of the American Federation of Musicians of the United States and Canada, American Federation of Television and Radio Artists, Directors Guild of America, Screen Actors Guild, Inc. and Writers Guild of America west as Amici Curiae were served by first-class mail, postage prepaid on all parties required to be served, to wit:

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