No. 04-480

IN THE

Supreme Court of the United States

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

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* SESAC, INC. IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

Amicus SESAC, Inc. ("SESAC") is a service organization referred to as a "performing rights society," which serves both the creators and the users of nondramatic musical works (the statutory term for what are commonly referred to as songs) through licensing and royalty collection and distribution. SESAC licenses the public performance of songs on behalf of its thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States.

SESAC's concern in this matter is the growth of unauthorized public performance of songs over the Internet, which deprives its affiliates of the rightful fruits of their creative

labors. If composers, songwriters and music publishers are prohibited from effectively protecting their songs from entities that profit from facilitating copyright infringement, the creators and owners of songs will lose the economic incentive for, and the ability to make a fair living at, providing works that entertain and inform the public.

All parties have submitted to the Court written consents to the filing of *amicus* briefs in support of any party. [1]

SUMMARY OF ARGUMENT

The ability to bring civil actions against those responsibly for copyright infringement—including those secondarily liable for contributory and vicarious infringement—is of particular importance to SESAC's protection of its affiliates' rights. The Ninth Circuit's decision below requires this Court's clarification of the law concerning secondary copyright infringement liability in the digital age in light of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony-Betamax*"), whose teachings that court misapplied. Moreover, the Ninth Circuit's decision creates a clear split of authority in light of *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (Posner, J.), *cert. denied*, 124 S. Ct. 1069 (2004), which, if not reconciled, will create varying levels of protection under federal law among the circuits.

ARGUMENT

Among the exclusive rights granted to copyright owners under the Copyright Act is the right to perform nondramatic musical works publicly. *See* 17 U.S.C. § 106(4). Public performances occur by various means, from live performance at public venues to digital transmission via the Internet.

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

Leading commentators on copyright law note that the public performance right assumes its greatest importance in the context of musical works. 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §8.19[A]. It is difficult for an individual to protect this statutory right because musical works, by their very nature, are capable of being publicly performed so extensively. *Id.* The public performance of songs is so ubiquitous that individual composers and publishers generally cannot effectively oversee the licensing of their songs to large numbers of potential music users, and those music users cannot effectively obtain individual licenses for the large number of songs that they perform. *Id.*

For this reason, composers and music publishers collectively protect their public performance rights by affiliating with a performing rights society such as SESAC. The Copyright Act defines a "performing rights society" as an "entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as . . . SESAC, Inc." 17 U.S.C. § 101. The performing rights societies, including SESAC, take on the important role of protecting such rights on behalf of their affiliated composers and music publishers.

As a transferee of its composer and music publisher affiliates' rights, SESAC licenses to music users the nondramatic performing rights in those affiliates' musical works. In some instances, under SESAC's auspices, affiliated composers and music publishers are left with little choice but to bring copyright infringement actions against unlicensed music users who flaunt the law and publicly perform their musical works without obtaining authorization or paying compensation. Such actions by performing rights societies often include claims of secondary vicarious and contributory liability against parties who facilitate and profit from others' direct copyright infringement. *See, e.g., Broadcast Music, Inc. v. Larkin*, 672 F. Supp. 531 (D. Me. 1987) (vicarious liability);

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971) (vicarious and contributory liability).

This case presents a significant question of unsettled federal law: Whether Internet services such as Grokster and StreamCast, which facilitate copyright infringement on a massive and unprecedented scale, are subject to the long-standing principles of secondary liability. The Ninth Circuit ruled that Grokster and StreamCast were immune from liability for such acts of infringement by users of their services, based upon an incorrect reading of this Court's *Sony-Batamax* decision. To the extent that SESAC-represented songs are publicly performed without authorization on Grokster, StreamCast and similar Internet services, under the Ninth Circuit's decision SESAC would have no redress against them. Whether the Ninth Circuit erred in its conclusion is of great import to SESAC affiliates because it directly limits the applicability of secondary liability principles in cases of copyright infringement in the digital age.

Moreover, the Ninth Circuit's decision is at odds with the law of the Seventh Circuit. In *In re Aimster,* 334 F.3d 643 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 1069 (2004), Judge Posner affirmed a district court's conclusion that a similar peer-to-peer file-sharing service was likely to be found liable as a secondary, contributory infringer. As long as this clear split in authority exits, the federal rights of SESAC affiliates will be inconsistently protected from jurisdiction to jurisdiction. Uniform application of federal law concerning rights and remedies under the Copyright Act is of supreme importance to SESAC's affiliates. The existence or absence of rights and remedies against parties who facilitate and profit from the infringement of SESAC affiliates' copyrights should not be determined by the location of the federal court in which they are required to vindicate these rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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