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* THE PROGRESS & FREEDOM FOUNDATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Progress & Freedom Foundation (PFF) is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] The foundation's principal mission is to study the impact of the digital revolution and its implications for public policy.

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[1] The parties to this proceeding have filed with the Clerk of Court blanket consents to all *amicus curiae* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other then the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

PFF's interest in this case stems from the work of an internal project called the Center for the Study of Digital Property (CSDP), which is dedicated to developing and advancing market-based, property-rights-oriented approaches to issues of digital content. In furtherance of the mission, CSDP maintains a website entitled *IPcentral.Info*,[2] which contains links to a variety of materials on intellectual property issues, including written materials, a weblog, and links to other sites with related interests. Staff members prepare or commission analyses of important intellectual property issues, including, earlier this year, a work on "Liability of P2P File-Sharing Systems for Copyright Infringement By Their Users."[3] Staff members also appear before congressional committees and interact regularly with journalists, academicians, industry representatives, and government officials.

Music is, obviously, one of the most important forms of digital content. Much of the re-thinking and institutional innovation about property rights that is necessitated by the rise of computers and the Internet must take place within the context of music. The problem of secondary liability for infringements of copyrights via downloading over the Internet is both vexing and important, and this case, and the related *Aimster* decision,[4] cut to the core of PFF's interest in promoting effective markets in digital content.

SUMMARY OF ARGUMENT

Consumers have two strong interests: (1) Avoiding inhibitions on technological progress; and (2) Fostering the production of content by providing incentives to creators.

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[2] The website may be found at http://www.IPcentral.Info.

[3] William F. Adkinson, Jr., "Liability of P2P File-Sharing Systems for Copyright Infringement By Their Users," The Progress & Freedom Foundation, *Progress on Point* No. 11.7 (March 2004).

[4] In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

These are complementary, not conflicting, because each is necessary to the other. Technological devices are useless without content, and content is pointless without means of delivery. But they must be reconciled, because, each taken to the limit of its logic, can do serious harm to the other.

The Ninth Circuit focused totally on the need to avoid any inhibition on technology, and in so doing it lost sight of the other, equally important consumer interest in promoting content. It failed to recognize that no group of consumers, interested in maximizing its long-term enjoyment of music, would select a legal regime that allows the untrammeled operation of Grokster and similar programs. Such a regime would quickly distribute the existing stock of music, but would provide no incentives for future production, and would destroy any hope for the creation of legitimate Internet distribution systems that can provide continuing incentives to the creative community.

Consumers face a problem of the type known as Prisoner's Dilemma. Each consumer is better off if he or she has total access to unauthorized file-sharing while every other consumer pays for the music. But when everyone tries to free ride on everyone else, the whole system collapses.

It is the job of the courts and Congress to create a legal regime that embodies the true consumer interest, which is to solve the Prisoner's Dilemma problem. Each consumer needs to forego efforts to free ride in exchange for all other consumers also agreeing to forebear.

Achieving such a regime requires an inquiry into the types of inhibitions that can and must be placed on file-sharing services, without undue burdens on technology. The Seventh Circuit in *Aimster* recognized the need to reconcile both sets of consumer interests. The Ninth Circuit, in this case, did not.

ARGUMENT

At this stage of the proceedings, the inquiry is limited to whether the case deserves consideration by the Supreme Court. For matters arising through the federal court system, Rule 10 of the Court sets forth three alternative tests: Is there a conflict in the circuits on an important matter? Has the court of appeals decided an important legal question that should be settled by the Supreme Court? Has the court of appeals decided an important legal question in a manner that conflicts with decisions of the Supreme Court?

The Ninth Circuit decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), meets all three of these tests, which makes the argument in favor of granting *certiorari* overwhelming.

The facts of the dispute are set out in the *Petition for Certiorari* filed by 38 companies and individuals which, collectively, account for a huge proportion of the creative content generated each year, and need not be repeated here. Nor need the arguments concerning the importance of the case to content producers be reiterated. Instead, this brief concentrates on the reasons that *consumers* of content should support the request for review.

The dispute in this case embodies a collision between two important consumer values, each of which has been recognized in decisions of this Court.

One value is in technological innovation and progress, in not allowing new technologies to be stifled by existing business models and in not allowing copyright holders' control of content to be transformed into control over the devices through which that content is accessed. The importance of this value is emphasized in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), a case that has been the focus of intensive analysis in the course of this litigation.

The other consumer value, equally important, is the recognition that proper incentives and markets are crucial to the production of intellectual property. This was emphasized most recently in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the Court noted that "copyright law serves public ends by providing individuals with an incentive to pursue private ones."[5] It prefaced this conclusion by saying:

> As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare, through the talents of authors and inventors." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science." *American Geophysical Union v. Texaco Inc*., 802 F. Supp. 1, 27 (SDNY 1992), *affd* 60 F.2d 913 (CA2 1994). Rewarding authors for their creative labor and "promoting . . . Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals." *The Federalist*, No. 43, p. 272 (C. Rossiter ed., 1961). [Brackets, ellipses, and emphasis in *Eldred*.] [6]

The consumer interests embodied by *Sony* and *Eldred* should not be called "competing values" because they do not contradict each other. Actually, each is absolutely necessary to the full consummation of the other. Consumers are not served by the existence of an infinite amount of dazzling hardware if they have no content for it, nor are they served by libraries of content if they lack means to enjoy it.

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[5] 537 U.S. 212 note 18.

[6] *Ibid.*

But either value, pushed to the limit of its logic, is capable of doing serious, perhaps total, damage to the other. In consequence, they must be reconciled, a necessity recognized in both *Sony* and *Eldred*.

To aid in thinking about how such a reconciliation might be achieved, and to understand where the Ninth Circuit went wrong in *Grokster*, it is illuminating to construct a thought experiment. Imagine a group of music lovers trying to develop a set of legal rules that will maximize their long-term enjoyment of music by promoting both the creation of content and the development of technological means by which they will receive it.

It is far from clear what exact rules they would come up with, but there can be no doubt that one legal regime that would be rejected out of hand is the one established by the Ninth Circuit's decision in this case, which will allow Grokster and other unauthorized file-sharing services to operate with impunity.

While untrammeled P2P takes advantage of the Internet's marvelous capacity to distribute already-existing digital content, it is a devil's bargain for consumers. The existence of Grokster and its ilk create serious impediments to the development of authorized, paying channels of distribution over the Internet that will reward creators and thus nurture the production of more creative product. Entrepreneurs in several industries are trying to develop such channels, but it is highly doubtful that any can succeed if the unauthorized services continue unchecked. But, because unauthorized P2 distribution produces no revenue for creators, once the existing stock of creative product is exhausted there will no incentives for the production of more.[7]

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[7] Advocates of P2P talk of "new business models," but no convincing specific examples of such plans have been proposed, and they remain utopian abstractions. In no other area of national economic life have we

Consumers know this perfectly well, but they have a collective action problem, of the type known as Prisoner's Dilemma.[8] They know that their joint course of conduct is ruinous in the long term, to the creation of product and to the development of legitimate Internet distribution channels, but no one of them can stop the tide. If any individual stops participating, he or she will lose access to the material while other consumers continue. In the end, the individual's refusal to participate will have trivial impact on the availability of content in the future, so the non-participant will have sacrificed without result. Thus, while each participant knows that the current course of joint conduct is folly, each has a strong incentive to continue to take while the taking is good.

Consequently, consumers' willingness as individuals to seize the opportunity offered by Grokster is not an indication of what they would perceive as their real long-term interest, or what they would choose as a legal regime for the creation and distribution of music. Consumers' true interest is in finding a mechanism for solving the Prisoner's Dilemma problem, a mechanism by which each consumer agrees to forego unauthorized downloading in exchange for a similar commitment from others.

Such a mechanism is called a legal regime, and, to a considerable degree, the responsibility for solving the Prisoner's Dilemma problem lies with the courts. Naturally, Congress

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discovered adequate substitutes for a regime of property rights and the market, so the chances of doing so in connection with intellectual property seem remote.

[8] A readable discussion of this type of problem can be found in William Poundstone, *Prisoner's Dilemma* (1992). The distinction is sometimes embodied in the terms "constitutional interest" and "action interest"; the constitutional interest is what the individual sees as being in the best interest in the group as a whole while action interest is his interest in a particular situation. *See* Viktor Vanberg & James M. Buchanan, "Rational Choice and Moral Order," in 10 *Analyse & Kritik* 138 (1988).

has a strong role, as this Court has noted repeatedly, but intellectual property law has always had a large component of judge-made common law. Perhaps a good description is that it is a dialogue between Congress and the courts. Fair use is fundamentally a judicial creation, as are doctrines of contributory and vicarious liability. And, as a general proposition, intellectual property statutes tend to be cast in such broad terms that courts perforce engage in common-law-style doctrinal development.

The Seventh Circuit, in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004), took up this challenge of finding a way to reconcile the differing values emphasized in *Sony* and *Eldred*. It recognized that the issue is not really about an effort to suppress a technology, because no one has suggested that P2P software can or should be abolished. Rather, both *Aimster* and *Grokster* are about the *use* made of the P2P technology by an ongoing business service, and about the imperative to harmonize the two types of consumer interests.

The Seventh Circuit was willing to examine the totality of factors surrounding the ongoing provision of P2P services. It emphasized the possible importance of willful blindness. It raised the possibility that the imposition of affirmative duties to monitor and filter might be imposed on a P2P provider. It rejected the argument that, under *Sony*, "a single non-infringing use provides complete immunity from liability," and it was willing to impose some duty on the P2P service to show that its service had real non-infringing uses.[9]

At this point, one need neither agree nor disagree with the particular factors discussed in *Aimster*. One need note only that, in contrast to the Seventh Circuit, the Ninth Circuit read *Sony* mechanically and without limit, ignored the important values expressed in *Eldred*, and abdicated its duty to address

[9] 334 F.3d 651, 653.

consumers' Prisoner's Dilemma problem. By taking this approach, it undermined the true interests of the consuming public, and its decision deserves review by this Court.

CONCLUSION

On all three grounds set forth in Rule 10, *certiorari* should be granted.

Respectfully submitted,

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