

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-55894 & 03-56236

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,
Plaintiffs-Appellants,

v.

GROKSTER, LTD., *et al.*
Defendants-Appellees

No. 03-55901

JERRY LEIBER, individually d.b.a. Jerry Leiber Music, *et al.*,
Plaintiffs-Appellants,

v.

GROKSTER, LTD., *et al.*
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos. CV-01-08541-SVW & CV-01-09923-SVW
Honorable Stephen V. Wilson, United States District Court Judge

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN
CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN LIBRARY
ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, AMERICAN ASSOCIATION
OF LAW LIBRARIES, MEDICAL LIBRARY ASSOCIATION, SPECIAL LIBRARIES
ASSOCIATION, INTERNET ARCHIVE, AND PROJECT GUTENBERG IN SUPPORT OF
DEFENDANTS-APPELLEES AND 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, the following *amici curiae* certify that they do not have a parent corporation, nor do any publicly held corporations own 10% or more of their stock:

American Civil Liberties Union

American Civil Liberties Union of Northern California

American Library Association

Association of Research Libraries

American Association of Law Libraries

Medical Library Association

Special Libraries Association

Internet Archive

Project Gutenberg

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INTERESTS OF *AMICI*

The American Civil Liberties Union, the American Civil Liberties Union of Northern California, the American Library Association, the Association of Research Libraries, the American Association of Law Libraries, the Medical Library Association, the Special Library Association, the Internet Archive and Project Gutenberg submit this brief urging this Court to affirm the district court's rejection of plaintiffs' copyright infringement claims and grant of partial summary judgment to defendants. *Amici* submit this brief pursuant to the consent of all of the parties.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 400,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The protection of principles of freedom of expression as guaranteed by the First Amendment is an area of special concern to the ACLU. In this connection, the ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet. Although this case was pled as purely a copyright case, its resolution has obvious implications for the development of free speech on the Internet. The American Civil Liberties Union of Northern California ("ACLU-NC") is a

regional affiliate of the ACLU. Like the national ACLU, the ACLU-NC is frequently involved in cases raising freedom of expression on the Internet.

The American Library Association (“ALA”) is a nonprofit educational organization of approximately 65,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public’s right to a free and open information society.

The Association of Research Libraries (“ARL”) is a nonprofit association of 123 research libraries in North America. ARL’s members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

The American Association of Law Libraries (“AALL”) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and

public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The Medical Library Association (“MLA”) is a nonprofit educational organization of more than 900 institutions and 3,800 individual members in the health sciences information field committed to educating health information professionals, supporting health information research, promoting access to the world's health sciences information, and working to ensure that the best health information is available to all.

The Special Libraries Association (“SLA”) is a nonprofit, educational organization serving more than 13,000 members of the information profession, including special librarians, information managers, brokers, and consultants.

These library associations are organizations whose members engage in practices such as preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation’s youth, lending books, creating works, and facilitating better technologically-adapted schools. Because the library associations continuously face copyright issues, they support balanced copyright laws and balanced implementation of those laws. Restrictive copyright laws and court decisions adversely affect authors, artists, curators, archivists, historians, librarians,

and readers—the creators, recorders, keepers, disseminators, and users of our culture.

The Internet Archive is a 501(c)(3) public nonprofit entity that was founded to build an “Internet library” with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in a digital world, and ensuring that these collections are publicly available through the Internet. The Internet Archive also encourages others to create derivative works from this material. Currently, the Internet Archive assumes all costs associated with storing this information and with providing the bandwidth to accommodate visitor traffic. While text-based materials are relatively easy to store and distribute, the amount of audio and video material on the Internet, which are much larger files, continues to grow exponentially. Due to the tremendous volume of material in its collection and the strain placed on its bandwidth by the downloading of large audio and video files, the Internet Archive will soon find it difficult to afford web-based publishing. As a result, the Internet Archive plans to rely on peer-to-peer file-sharing technology, which allows the Archive to disperse the burdens of maintaining these voluminous materials among network users. Specifically, thanks to peer-to-peer technology, the Archive will no longer bear the sole responsibility of

maintaining sufficient bandwidth to allow visitors to download these materials. Accordingly, the ability of the Internet Archive to achieve its mission will be drastically affected by any decision that limits or threatens the viability of software enabling peer-to-peer communication.

Project Gutenberg was founded by Michael S. Hart in 1971, and is the oldest all-electronic information provider on the Internet. The aim of Project Gutenberg is to make information, books and other materials available free of charge to the public at large in a general form that the vast majority of computers, programs and people can easily read, use, quote and search. Project Gutenberg has coordinated the efforts of thousands of volunteers worldwide to enter public domain works into computers and format them as simple eBooks so that they can be used by the widest variety of computers possible. Since its inception in 1971, Project Gutenberg has made nearly 10,000 eBooks available. The vast majority of these eBooks are works in the public domain, including the works of Shakespeare and Plato, the King James Bible and the Koran. Project Gutenberg's collection also includes several hundred copyrighted works whose authors have given the Project permission to distribute. This figure includes over 5,500 MP3 files, most of which are individual chapters from eBooks with computer-generated text-to-speech audio performances. Project Gutenberg believes that any technology

that makes it easier and cheaper for individuals to redistribute eBooks over the Internet helps achieve Project Gutenberg's goal of making information freely available to the general public.

INTRODUCTION AND SUMMARY OF ARGUMENT

The defendants offer software that allows users to share copies of digital files, including copyrighted music files. Some people who use that software exchange music files that are copyrighted, including files copyrighted by plaintiffs. The defendants unquestionably know that. The defendants profit from the use of their software.

Amici share plaintiffs' view that copyright is an important, speech-enhancing doctrine. Copyright laws serve to encourage the production of all forms of speech and thus enhance society. As the MGM plaintiffs correctly suggest: "For two hundred years our copyright laws have encouraged and enabled storytellers, songwriters, recording artists, and filmmakers to create and disseminate a diverse body of expressive works that has no equal in the world. These works enrich our lives and entertain us." MGM Plaintiffs' Opening Br. at 2 ("MGM Br.").

Nevertheless, *amici* strongly support the district court's decision and urge this Court to affirm. Despite the efforts of both plaintiffs and their *amici* to argue that this case is not about the abolition of a medium of

communication, that is precisely what it is about. Plaintiffs urge interpretations of contributory and vicarious infringement that, if adopted, would make all software that utilizes peer-to-peer file exchange illegal unless the software developers agreed to redesign their products and to serve as surrogate copyright enforcers. For the reasons stated by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and for the reasons stated below, *amici* believe copyright law must be interpreted to preclude the possibility that the development of a new medium of communication could be prohibited simply because it is capable of misuse.

The parties correctly focus individually on the doctrines of contributory and vicarious infringement. In part to avoid duplication, *amici* do not. Instead, *amici* wish to emphasize two critical facts and suggest four specific errors in the legal interpretations urged by plaintiffs.

Two of the district court's factual findings are critical to *amici*'s view of this case. First, "it is undisputed that there are substantial noninfringing uses for Defendant's software...." *Metro-Goldwyn-Mayer Studios v. Grokster*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003). Second, defendants "have no ability to supervise or control the file-sharing networks, or to

restrict access to them.” *Id.* at 1045. These findings seem fully supported by the record.

Given these two facts, *amici* believe that (1) defendants cannot be held liable based on their knowledge that users are engaged in direct infringement in the absence of any showing that defendants can act upon such knowledge; (2) defendants’ liability cannot turn on an analysis of the percentage of current use that constitutes direct infringement; (3) software developers should not be required to modify their software to facilitate enforcement of copyright by plaintiffs; and (4) free speech and the public interest would be served by rules that allow new and innovative mediums of communication to develop and flourish.

The First Amendment embodies “our profound national commitment to the free exchange of ideas.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). *Amici* are believers in the free market of ideas and advocates for an educated and highly informed citizenry. Despite the blitzkrieg of public relations conducted by plaintiffs, this case is not simply about college students who believe that they should not have to pay for music when they can simply download it from the Internet. Rather, at stake in this case is the fundamental issue of whether citizens can be denied valuable technological tools for sharing information and ideas simply because some may use those

tools for improper purposes. *Amici* urge this Court to recognize that the law must not be allowed to unduly impede the noninfringing, socially and commercially valuable uses of new powerful technologies.

STATEMENT OF FACTS

A. Peer-to-Peer File-Sharing Technology Has Substantial and Valuable Noninfringing Uses.

Amici do not attempt to summarize all of the relevant facts in this complex case. *Amici* support the district court's findings and generally support the Statements of Facts contained in defendants' briefs.

The district court found that "there are substantial noninfringing uses for Defendants' software." *Grokster*, 259 F. Supp. 2d at 1035. The court identified a number of those uses: "e.g., distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare." *Id.* The court found that defendants had presented specific evidence of noninfringing uses.

"StreamCast has adduced evidence that the Morpheus program *is regularly used* to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted." *Id.* (emphasis added).

These are not the only examples of use of these programs for noninfringing purposes. Many of the *amici* here are libraries, ranging from more traditional books and mortar libraries to Internet-based libraries such as Project Gutenberg and the Internet Archive. These distinctions, however, become less precise in the digital age, as all libraries are relying to a greater degree on the Internet and other forms of electronic communication to provide access to vast amounts of digital material. Accordingly, they have a strong interest in the outcome of this case because of the potential for noninfringing use of peer-to-peer technology to share information in such areas as medicine, law, and science; to archive historical documents; and to provide electronic access to a broad range of public domain information, including government documents.

Libraries seek to maximize literacy, education, and entertainment through the free distribution of information. Peer-to-peer systems such as defendants' can be of massive assistance in achieving that goal. For example, Project Gutenberg makes available electronic copies of books that are either in the public domain or whose authors have given their consent. Consequently, there are currently over 9,500 books available through Project Gutenberg. Beginning in February 2002, all of the Project Gutenberg files

were available using Morpheus (the StreamCast program) for approximately six months.¹

The Internet Archive Project is an effort to archive the World Wide Web. The amount of material now available through the Internet Archive through a web-based system is enormous. Approximately 1 terabyte of data is downloaded from the Internet Archive each day. This would be the equivalent of 200,000 MP3 songs each day. Much of the Internet Archive is text-based material but both the number and percentage of audio and video files are increasing rapidly. All of these audio and video files are noninfringing.

For entities like Project Gutenberg and the Internet Archive, web-based distribution of material in such volume can become tremendously expensive and, at a certain point, cost-prohibitive. Specifically, web-based publishing requires the host to bear the bandwidth costs associated with traffic to and from its site. For that reason, the Internet Archive and Project Gutenberg strongly support the use of peer-to-peer technology, which redirects user traffic to various sites throughout the electronic community, and ultimately facilitates the broad dissemination of information.

¹ Project Gutenberg currently makes its files available for peer-to-peer sharing by using the LimeWire software.

Producers of copyrighted material also rely on peer-to-peer networks to gain wider distribution of their work. Up-and-coming artists who do not have a large record label promoting their work rely on peer-to-peer technology to create a “buzz” among listeners. *See* Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. TIMES, Sept. 22, 2003, at C1. Likewise, many authors have given Project Gutenberg permission to distribute their work in the hopes of reaching a broader audience. Even established artists use peer-to-peer technology for commercial purposes. For example, some well-known musicians encourage their fans to share recordings of live shows to spur attendance at concerts, which are their main source of income (as opposed to royalties). *See* Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at A1.

Perhaps even more interestingly, news reports have revealed that plaintiffs themselves use defendants’ programs as a kind of Neilson rating system, counting the popularity of downloads and using that information to guide their decisions about which bands to sign and which CDs to promote. *BigChampagne Is Watching You*, WIRED MAGAZINE, Issue 11.10, Oct. 2003, available at <http://www.wired.com/wired/archive/11.10/filesshare.html>

(visited Sept. 26, 2003). They also use it to target regions of the country for promotion when a band or artist is particularly popular in that region. *Id.*

In light of these facts, plaintiffs cannot dispute that this technology has numerous noninfringing uses. *See, e.g., Grokster*, 259 F. Supp. 2d at 1035 (“it is undisputed that there are substantial noninfringing uses for Defendants’ software”). Rather, they insist that the amount of infringing use somehow nullifies the importance of these numerous noninfringing uses. As a preliminary matter, it should be noted that plaintiffs cannot purport to speak on behalf of all copyright holders. Consequently, the study they cite – even if it were not flawed – could only assert that 75% of the files that can be accessed using defendants’ software are being shared without permission. More importantly, however, when these percentages are translated into hard numbers, the volume of noninfringing speech taking place over peer-to-peer networks comes into focus. A mid-September 2003 search of files on Kazaa, a similar software whose files are accessible from defendants’ software, revealed that at the time the program was accessed, there were 704 million files available. This means that over 176 million files, for which

there is no evidence of infringement, can be accessed using defendants' software.²

Furthermore, in addition to the noninfringing uses of this technology that are already known, peer-to-peer software is capable of an enormous number of additional noninfringing uses. For example, as political campaigns move on-line, it is likely that candidates will turn to peer-to-peer technology to distribute position papers and campaign videos. Cf. Ryan P. Winkler, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1868-71 (2000) (noting the Internet's advantages – *i.e.*, low cost and decentralization – for political activism). Particularly in this context, the cost savings of peer-to-peer distribution would clearly make it a superior alternative to other forms of web-based political organizing, a phenomenon which itself has only started to take hold. *See id.*

Likewise, people living under totalitarian regimes that censor “unpatriotic” or “inappropriate” websites will be able to access information from anywhere in the world by using peer-to-peer technology.³ *New*

² Even if the Court were to give credence to plaintiffs' inflated 90% figure, this would still translate into 70 million noninfringing files.

³ *See* Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, CHICAGO TRIBUNE, Oct. 14, 2002, at 4 (noting that China, Saudi

Technology May Foil PRC Attempts at Censorship Efforts, THE CHINA POST, March 12, 2003, available at 2003 WL 4136640 (noting that Internet users in mainland China are unable to access information on subjects such as Taiwan, democracy, Tibet, Falun Gong, and major news sites such as CNN and BBC); see also *Beijing Juggling Internet Expansion and Censorship*, THE CHINA POST, March 20, 2003, available at 2003 WL 4136745 (recognizing potential of peer-to-peer technology as a way “of circumventing Beijing’s prying eye”).⁴ Among the documents that have been shared on peer-to-peer networks in China are the Tiananmen Papers, which are a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests.⁵ Although peer-to-peer technology may not provide a foolproof method for avoiding government censorship, it will certainly be much more difficult for totalitarian states to stifle the flow of information on peer-to-peer networks than to block a handful of websites.

Arabia, Myanmar, Laos, Yemen and the United Arab Emirates are among the countries the engage in Internet surveillance and censorship).

⁴ One of the peer-to-peer system currently being used in China is called the “Six/Four System,” which refers to the date of the Tiananmen Square massacre on June 4, 1989. See Jim Rapoza, *Six/Four: The Internet Under Cover*, EWEEK FROM ZDWIRE, March 6, 2003, available at 2003 WL 5734694.

⁵ See Lee, *supra* note 3.

Predictions about the manner in which a new medium of communication will develop are notoriously unreliable. Therefore, plaintiffs' emphasis on how people are currently using this software is misplaced. Plaintiffs here initially predicted that videocassette recorders would destroy their business. Yet, as we now know, not only did companies like plaintiffs not suffer, instead they actually experienced a financial windfall due to the development of this new market. For similar reasons, *amici* believe that peer-to-peer software, if permitted to develop naturally, will increasingly be used for the distribution of additional noninfringing material. As more people become aware of resources like the Internet Archive and Project Gutenberg, and become aware of the potential of peer-to-peer systems to permit evasion of state censorship schemes, the noninfringing traffic on these user networks will undoubtedly continue to grow. Consequently, *amici* urge this Court not to close off prematurely the development of a new technology that already has demonstrated such significant noninfringing uses.

B. Defendants Do Not Have the Ability to Prevent Copyright Infringement by Users of Their Software.

The second key fact in this case is that, unlike Napster, defendants do not have the ability to prevent users from exchanging infringing material. After reviewing the record on summary judgment, the district court ruled on

the basis of undisputed facts that defendants “have no ability to supervise or control the file-sharing networks, or to restrict access to them.” *Grokster*, 259 F. Supp. 2d at 1045; *see also id.* (“there is no admissible evidence before the Court indicating that Defendants have the ability to supervise and control the infringing conduct”).

Plaintiffs contend that, theoretically, peer-to-peer software could (1) screen each file that is being shared, determine if that file is an infringing one, and block it from being copied by users; or (2) identify users who have engaged in direct infringement, or rely on plaintiffs’ identification of infringing users, and then block those users from using the defendants’ software.

With regard to this first option, the district court found that defendants could not screen and block files. For example, the district court found that “[w]hen users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster.” *Grokster*, 259 F. Supp. 2d at 1040. StreamCast also plays no role in the identification or transfer of files. *Id.* at 1041. The court thus found that, unlike Napster, which had the ability to “police those exchanges” because of the indexing of files on its

central server and its user registration requirements, defendants did not have that power. *Id.* at 1044-45.

As for the second option, the district court also found that defendants could not block users from using their software. Grokster does not currently use registration or any other method to control access. *Id.* at 1040 n.7.

StreamCast does not even control the initial access of a user, because users from other peer-to-peer systems using the gnutella network can access files available through StreamCast. *Id.* at 1041. Thus, while Napster had the ability “to exclude particular users from it,” the court found that “[s]uch is not the case here.” *Id.* at 1045.

Plaintiffs do not seriously dispute these propositions. For example, although the MGM plaintiffs assert that “Grokster has the ability to block or filter infringing files from its network,” MGM Br. at 18, a careful reading reveals that what MGM means by that statement is that defendants could modify their software to accomplish that goal. *See id.* at 61 (“Defendants clearly have the ability to include in their software (and to require present users to upgrade to such modified software) the means to filter infringing works”). Likewise, the Leiber plaintiffs do not contend that defendants can now prevent infringement, but rather focus on defendants’ alleged “refus[al] to implement technologies that would have permitted it to identify specific

infringing conduct on its service.” Leiber Plaintiffs’ Opening Br. at 17 (“Leiber Br.”). *See also Grokster*, 259 F. Supp. 2d at 1045 (“Plaintiffs contend, however, that the software itself *could be altered* to prevent users from sharing copyrighted files.”) (emphasis added). Similarly, when talking about blocking users, the MGM plaintiffs carefully say that “Defendants’ Terms of Service have provided” for such blocking. *See* MGM Br. at 57. Although it is correct that the terms of service had some discussion of user blocking in the past, the current version indisputably does not.⁶

Plaintiffs cite to the filtering mechanisms in defendants’ software as proof that defendants have the ability to prevent infringement. Although defendants’ software does include a filtering mechanism, only the *user* can enable the filter and determine what kinds of files will be screened. *See Grokster*, 259 F. Supp. 2d at 1045 (referring to “optional screens”). A user who wants to avoid potentially pornographic files can include key words in the filter to block files likely to include such material. Similarly, a user who fears downloading a virus can screen out all .exe files, which is the most common form of virus files. But the current technology does not have any

⁶ Plaintiffs cite the defendants’ prior terms of service agreement as proof of their ability to block users, *see* MGM Br. at 57, but conveniently ignore the fact that, even in this old agreement, defendants stated that they would limit access “to the extent technologically possible.” JER6632. Even then, they could not block users effectively.

method by which defendants could override the wishes of the user and block particular files.⁷

The district court specifically found that user blocking was not possible, and plaintiffs have no new evidence or other legal basis for challenging that finding. Nevertheless, plaintiffs and their *amici* continue to insinuate that defendants “could” in fact exercise control but have chosen not to. *See, e.g.*, MGM Br. at 62. Plaintiffs argue that defendants could (in the past) block access to infringing users because they previously (but no longer) required users to register their IP addresses. *Id.* at 62-63; *see also id.* at 56-58. Plaintiffs also argue that defendants could (in the future) prevent copyright infringement if they simply redesigned their technology to incorporate fingerprinting technology or mandatory filters. *Id.* at 58. Plaintiffs do not and cannot, however, argue that the version of the peer-to-peer technology at issue in this case gave defendants the capacity to block infringing users or remove infringing files. The district court’s findings were not clearly erroneous.

⁷ Even though defendants have no obligation to install filtering software, it is unclear whether they would even be able to develop a program that *only* blocked infringing files. For example, any compulsory filter that screened out MP3 files would block noninfringing MP3 files as well as infringing ones.

ARGUMENT

I. Contributory Infringement Liability Must Depend Not Only on Actual Knowledge But Also on the Ability to Act Upon Such Knowledge.

Contributory infringement represents a judicially crafted extension of the traditional rule of copyright liability. *See Sony*, 464 U.S. at 434-35. Accordingly, courts should exercise caution when determining how wide the net of contributory liability should be cast. *Id.* at 431 (“The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme.”). The elements of contributory infringement require that (1) an entity “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another,” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)), and (2) the participation be substantial. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (citing *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616, 625 (N.D. Cal. 1993), *aff’d*, 35 F.3d 1435 (9th Cir. 1994)).

In rejecting plaintiffs’ contributory infringement claim, the district court emphasized that, whereas Napster had “perfect knowledge and

complete control over the infringing activity of its users,” *Grokster*, 259 F. Supp. 2d at 1041, defendants in this case had no ability to exercise such control. The court phrased the “critical question” as “whether Grokster and StreamCast do anything, aside from distributing software, to actively facilitate – or whether they could do anything to stop – their users’ infringing activity.” *Id.* at 1039.

Plaintiffs attempt to portray the lower court opinion as hinging on the question of *when* defendants knew of their users’ infringing activity. MGM Br. at 32-38; Leiber Br. at 6. Plaintiffs focus on this issue in an attempt to blur the more fundamental question presented below – *i.e.*, control. The question of timing only becomes relevant if defendants have the ability to do something about the infringement once they received timely notice.

Although “control” is not expressly included as an element of the contributory infringement test (as opposed to vicarious liability, which explicitly incorporates the element of “control,” *see discussion infra*), the cases make clear that contributory infringement implicitly presumes that a defendant could actually do something to prevent future infringement by the third party.⁸ In both *Napster* and *Netcom*, the court not only examined when

⁸ In this sense, “control” has a somewhat different meaning in the context of contributory, as opposed to vicarious, liability. Whereas “control” under vicarious liability emanates from the doctrine of *respondeat superior*, and

(and whether) the defendants had notice of the infringing activity, but also focused on the fact that the defendants could have acted upon that information to stop future infringements. In *Napster*, the district court found, and this Court particularly emphasized, that the defendant had the ability to remove the infringing files from its index and to prevent access by known infringers in the future. 239 F.3d at 1022 (“The record supports the district court’s finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, *that it could block access* to the system by suppliers of the infringing material, and *that it failed to remove the material.*”) (additional emphases added). Likewise, in *Netcom*, the court noted that the bulletin board administrator had the ability to prevent distribution of an infringing message or to delete it from the bulletin board after it had been posted. 907 F. Supp. at 1375 (noting that Netcom “does not completely relinquish control over how its system is used, unlike a landlord”).

primarily focuses on whether a party can direct or prevent the actions of another party, “control” in the context of contributory infringement refers to the ability of a party to take action within areas under its “control” that will inhibit the ability of others to infringe. Therefore, whether called “ability to act in a meaningful way” or “ability to exercise control,” the material contribution prong of the contributory liability analysis ensures that a party will only be held liable if it actually has the ability and authority to do something that will prevent infringement by another.

Defendants, on the other hand, currently have no ability to exercise control. Defendants cannot prevent individuals from downloading its software, which is now widely available on the Internet, and have no ability to block users who are violating others' copyright. Nevertheless, plaintiffs would have this Court impose liability on companies such as defendants, which create products with potentially infringing uses, on the grounds that they *could have* designed their product to allow greater control, but did not.

Such an interpretation of contributory infringement would have devastating practical consequences. Although the current standard properly requires consideration as a threshold matter of whether a party can exercise control given the existing design of the product, plaintiffs propose a standard that would hold manufacturers of products with perfectly legitimate uses liable unless they build into those products specific tools for monitoring users or preventing infringement. The Supreme Court expressly rejected this proposal in *Sony*, and refused to require Sony to modify its Betamax machine, such as by removing the tuner, including a blocking function, or eliminating its ability to record. *See Sony*, 464 U.S. at 494 (Blackmun, J., dissenting) (criticizing majority for not requiring such modifications). Likewise, this Court found Napster liable only after determining that (1) Napster had actual knowledge of infringing activity and (2) the actual

technology involved in the case (not some hypothetical program that Napster could have designed) allowed it to take meaningful action that could in fact prevent future copyright violations by its users. *See Napster*, 239 F.3d at 1022.

This Court should not be diverted by the red herring of “timing.” Rather, this Court should focus on the proper standard for contributory infringement: a party may not be held liable for contributory infringement unless the party has (1) actual knowledge of infringement and (2) the ability to act upon this knowledge to prevent future violations.

II. Defendants’ Liability Cannot Turn on an Analysis of the Percentage of Current Use That Constitutes Direct Infringement.

Plaintiffs place tremendous emphasis on their assertion that a very large percentage of the files currently being shared by users of defendants’ software are infringing. Indeed, much of the thrust of plaintiffs’ briefs is based on an argument that the amount of infringement is so great that defendants just must be liable. *See, e.g.*, MGM Br. at 41. However, the percentage of current uses that are infringing is largely irrelevant as a matter of law. It fails to recognize that noninfringing uses need not be the majority but need only be substantial. It also fails to recognize the Supreme Court’s holding that the future possibility of noninfringing uses is sufficient for defendants here to prevail. Not only is plaintiffs’ emphasis on the

percentage of infringing uses wrong as a matter of law, it would lead to results that would harm free speech and the development of new technology.

In *Sony*, the Supreme Court explained that the pivotal question was whether the Betamax machine was “capable of commercially significant noninfringing uses.” *Sony*, 464 U.S. at 442. The Court found that it “need not give precise content to the question of how much use is commercially significant.” *Id.* In fact, the Court rested its decision on the fact that the technology was capable of *one* potential use that was noninfringing: time-shifting.⁹ *Id.* (“one potential use of the Betamax plainly satisfies this standard, however it is understood: private, non-commercial time-shifting in the home”).¹⁰ Accordingly, as the Betamax was “capable of substantial noninfringing uses,” the Court ruled that Sony’s sale of the product did not constitute contributory infringement. *Id.* at 456. This Court has likewise emphasized that the critical question is not the current uses but whether the software can be used in the future for noninfringing purposes.¹¹ *Napster* at 1021.

⁹ Time-shifting is the practice of recording programs for viewing at a time other than the time of broadcast. *See Sony*, 464 U.S. at 421.

¹⁰ The Court also acknowledged that the Betamax could be used for authorized recording, another noninfringing use. *See id.* at 443-47.

¹¹ The Seventh Circuit’s dicta in *In re Aimster Copyright Litigation* suggesting that courts must balance the respective magnitude of current infringing versus noninfringing uses, 334 F.3d 643, 650 (7th Cir. 2003),

The district court found that there were currently “substantial noninfringing uses.” *Grokster*, 259 F. Supp. 2d at 1035. Indeed, the district court found that this fact was “undisputed.” *Id.* The district court cited the evidence in support of that finding. *Amici* have cited additional examples above. For example, all of the books on Project Gutenberg, which include many of the greatest works of English literature, can be accessed using defendants’ software. The district court’s conclusion was not clearly erroneous.

The district court also properly noted that there are likely to be additional substantial noninfringing uses. *Id.* at 1036. *Amici* have discussed other probable future noninfringing uses above. As noted, those noninfringing uses are likely to increase both in volume and in percentage as users become more familiar with this technology. Thus, the district court’s finding that there will be future additional substantial noninfringing uses was also not clearly erroneous.

Considering the millions of files that are currently being shared over the Internet, *see supra* at 12, the noninfringing speech taking place on peer-to-peer networks cannot be dismissed lightly. Contributory infringement liability does not become automatic simply because the percentage of

clearly contradicts both the Supreme Court’s analysis in *Sony* and this Court’s decision in *Napster*.

infringing use seems “too high.”¹² Regardless of whether a product is used as a means of infringement 90% of the time, 75% of the time, or 40% of the time, the court must focus its attention on the value of the noninfringing uses of the product. If the Supreme Court had adopted the approach advanced by plaintiffs in this case, not only would the Sony Betamax have been banned, but video cassette recorders, or CD burners, or DVD recorders could still be banned today so long as a plaintiff showed that these mechanisms are now used for infringing purposes by whatever the magic percentage is determined to be. No developer of a technology that has infringing uses would ever truly be safe from liability. Xerox could be held contributorily liable if a certain percent of its copiers were being used to violate copyright law. E-mail could be banned if copyright holders could show that X percentage of e-mails are infringing. Microsoft Word could be banned if copyright holders could show that it is being used X percentage of the time to plagiarize. This is most certainly an outcome that the Supreme Court sought to avoid.

Nevertheless, plaintiffs argue, in essence, that when a technology is used primarily for infringing purposes, the noninfringing speech that also

¹² In contrast, the Seventh Circuit found that Aimster, a product similar to defendants’ software, failed to put forth any evidence “that its service has *ever* been used for a noninfringing use, let alone evidence concerning the frequency of such uses.” 334 F.3d at 653 (emphasis added).

relies on the technology can be sacrificed as collateral damage, regardless of its value. Fortunately, the Supreme Court has already rejected a rigid “percentages test,” *Sony*, 464 U.S. at 491 (Blackmun, J., dissenting) (advocating for percentages test), and opted instead for a test that focuses on a technology’s capacity for noninfringing use. *See id.* at 442. Accordingly, when assessing the value of a technology’s noninfringing use, this Court should not only consider the value to the individuals who are actually exchanging files, but should also take into account the benefits that can accrue to the public at large as a result of the free flow of important information. For example, after the “blaster virus” spread through the Internet, paralyzing those relying on Microsoft operating systems, users of peer-to-peer technology shared files designed to repair the damage and protect other users from infection.¹³

Finally, just as the *Sony* test better preserves the value of noninfringing uses, so too is it more sensitive to the fact that certain uses of technology will ebb and flow over time. The first users of peer-to-peer technology undoubtedly comprised a very specific subgroup of

¹³ *See Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks Before the Senate Judiciary Committee*, 108th Cong. (Sept. 9, 2003) (Statement of Alan Morris), available at http://judiciary.senate.gov/testimony.cfm?id=902&wit_id=2277 (visited Sept. 24, 2003).

technologically savvy computer users. But as more people become familiar with file-sharing technology, the percentage of noninfringing use on these networks will undoubtedly increase. Just as the market for rental and sale of pre-recorded videos took time to develop after the Betamax was invented, so too will the noninfringing uses of peer-to-peer technology grow over time. Accordingly, the *Napster* Court ruled that the district court erred when it “improperly confined the use analysis to current uses, ignoring the system’s capabilities.” 239 F.3d at 1021. For all of these reasons, this Court should continue to apply the wisdom of the *Sony* and *Napster* courts.

III. Software Developers Should Not Be Required to Modify Their Products to Facilitate Enforcement of Copyright by Plaintiffs.

Plaintiffs ask this Court to hold defendants vicariously liable for the acts of those who purchased defendants’ software, and then used it to exchange copyrighted materials. Yet, a crucial element of the test for vicarious liability requires that a party have the capacity to exercise control over the primary violator and the ability to prevent the violation. *See, e.g., Napster*, 239 F.3d at 1022 (emphasizing that vicarious liability requires a showing that the defendant had the “right and ability to supervise the infringing activity”). Specifically, *Napster* made clear that lower courts must determine the limits of a party’s authority to “control[] and patrol[]”

infringement in order to determine whether vicarious liability is permissible. *Id.* at 1023.

The district court explicitly found that defendants' software gives users the ability to "communicate[] across networks that are entirely outside Defendants' control." *Grokster*, 259 F. Supp. 2d at 1045. Although *Grokster* and *Morpheus* are computer programs rather than physical hardware, this is not the relevant distinction. Rather, just as the *Sony* court found that the sale of a VCR did not create any kind of agency or control relationship between the buyer and the seller, so too should this Court recognize that the sale of a computer program does not transform the consumer and user of the program into an agent whose actions can be attributed to the program's manufacturer. *See In re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003) ("The teenagers and young adults who use Aimster's system to infringe copyright are of course not Aimster's agents.").¹⁴

The control requirement of the vicarious liability standard serves a similar function as the material contribution prong of the contributory

¹⁴ Notably, in *Aimster*, the Seventh Circuit did not affirm the district court's determination that the defendants were also vicariously liable for infringement. 334 F.3d at 654-55. While commenting that it was "less confident" that the plaintiffs would prevail on that claim, the court found that it was unnecessary to "resolve [its] doubts in order to decide the appeal." *Id.* at 654.

liability analysis. In short, a defendant may not be held liable by default; it must have the ability to prevent a third party's infringement before being held secondarily liable for that conduct. Although the Supreme Court did not clearly delineate the distinctions between vicarious and contributory liability, its decision in *Sony* makes clear that a manufacturer has no duty to alter its technological design to prevent any possible misuse by third parties, so long as substantial noninfringing uses of its technology (as originally designed) exist. *See Sony*, 464 U.S. at 494 (Blackmun, J., dissenting) (arguing in favor of forced modification).

Plaintiffs make a great deal out of the district court's statement that defendants may have specifically structured their technology so that they could not exercise control and thus avoid secondary liability for the infringing activities of users of its software. *Grokster*, 259 F. Supp. 2d at 1046. Whether or not that is true, this Court should recognize the independent virtues of decentralization in the realm of electronic communication. As other commentators have noted with regard to the Internet, decentralization means that the public "no longer needs to rely on a few centralized sources of information." Winkler, 84 MINN. L. REV. at 1869. Furthermore, a requirement of mandatory centralization or control, coupled with ever expansive secondary infringement liability, will result in

dramatically increased, and in many cases, overly zealous censorship by companies that are far more interested in avoiding liability than preserving noninfringing speech. *See* Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability and the First Amendment*, 88 GEO. L.J. 1833, 1871 (2000).

Furthermore, as noted earlier, decentralization facilitates communication with citizens in countries whose governments actively oppose free speech as a matter of official policy. *See supra* at 12-13. Forcing software companies to incorporate methods to monitor users and choke points to control the flow of information will only make it easier for the governments in China, Saudi Arabia and other totalitarian regimes to clamp down on speech with which they disagree. Therefore, notwithstanding plaintiffs' insistence that all technology developers should be required to modify their products to maximize surveillance and control, this Court cannot ignore the fact that such a rule would come at the expense of the free speech and expression protected by our Constitution and international human rights norms.

As defendants have no ability to exercise control over users of its software and no mechanism for removing infringing files outside of its system, plaintiffs have no basis for holding them vicariously liable for the

actions of third parties. Moreover, in light of the virtues of decentralization in the electronic realm, the Court should not mandate that technology designers incorporate a particular level of surveillance and control over users of its products.

IV. Free Speech and the Public Interest Are Served by Rules That Allow New and Innovative Mediums of Communication to Develop and Flourish.

Amici certainly do not condone the violation of copyright law.

Courts, however, should not allow the interests of individual copyright holders to eviscerate the other crucial protections contained in the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enterps.*, 471 U.S. 539, 582 (1985) (observing that limitations on copyright are appropriate when necessary to “ensure consonance with our most important First Amendment values”). The First Amendment creates a strong presumption in favor of speech and against regulations that would operate as prior restraints on speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). Plaintiffs attempt to turn this presumption on its head by suggesting that the abuses committed by some of those who use file-sharing technology can justify cutting off all

other users, including those who are engaging in valuable and constitutionally protected speech.

The Supreme Court has noted that electronic communication allows “any person with a phone line . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). This is particularly true for peer-to-peer technology, which facilitates pure speech to a greater degree than virtually any other technology available today. Therefore, just as with the Internet, there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.* Accordingly, this Court must acknowledge that the noninfringing communication that takes place on these user networks is entitled to full constitutional protection.

As explained *supra*, peer-to-peer technology provides users with an easy and inexpensive way to communicate with each other. Particularly for digital libraries and other entities devoted to public education and the free flow of information, peer-to-peer technology provides the most cost-effective and in some cases the only feasible alternative for accomplishing their mission. Likewise, there are many who use this technology for valid commercial reasons, such as product promotion and distribution, and market research. Whereas web-based publishers incur significant and increasingly

prohibitive costs for bandwidth and storage, peer-to-peer systems allow the data to remain with individual members of the network, spreading out storage costs and dispersing web traffic throughout the network. In fact, in many ways, peer-to-peer technology serves the same purposes and provides the same benefits as system caching,¹⁵ a practice which Congress recognized as valuable and chose to accommodate in the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 512(b).

Plaintiffs are essentially asking this Court to shut down technology unless it conforms to specifications dictated by copyright holders. Although copyright law certainly bestows significant rights upon copyright holders and is itself an important mechanism for promoting valuable speech, plaintiffs have no right to veto new technology simply because it may enable others to violate their rights.¹⁶ Such a rule would run fundamentally counter to the interests of the public, whose well being depends on scientific advances and technological breakthroughs.

¹⁵ “System caching” is the process whereby a computer system or network automatically makes a temporary copy of material provided to it by a third party “for the purpose of making the material available to users of the system or network who . . . request access to the material from the [third party].” 17 U.S.C. § 512(b)(1).

¹⁶ Plaintiffs obviously have every right to include reasonable copy control protections on their songs and videos. In fact, some artists have already begun experimenting with such techniques. See Mike Snider, *Anti-Swap CD Hits the Racks*, USA TODAY, Sept. 23, 2003, at D6.

As the Supreme Court made clear in *Sony*, so long as a technology is capable of substantial noninfringing uses, a court may not effectively ban the technology simply because some have chosen to abuse its capabilities. See *Napster*, 239 F.3d at 1021 (“To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.”); *In re Aimster*, 334 F.3d at 649 (“The [Supreme] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying noninfringing consumers the benefit of the technology.”). Peer-to-peer technology indisputably has numerous valuable noninfringing uses. Accordingly, defendants are entitled to the protections of *Sony*, and plaintiffs’ contributory and vicarious infringement claims against them were properly rejected.

CONCLUSION

Defendants have created software that is capable of significant and valuable noninfringing uses. They also have no ability to prevent infringement by users of that software. For these simple, and yet profoundly important reasons, the decision of district court should be affirmed.

Respectfully submitted,

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PURSUANT TO CIRCUIT RULE 32-1
(REVISED FORM 8)

Case Nos. 03-55894
03-56236
03-55901

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,929 words according to the word count of the word processing system (Microsoft Word 2000) used to prepare this brief.

Christopher A. Hansen

September 26, 2003

CERTIFICATE OF SERVICE

I certify that on September 26, 2003, an original and fifteen (15) copies of the brief for *Amici Curiae* American Civil Liberties Union, *et al.*, were sent, via Federal Express, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies were sent, via United States mail, postage prepaid to:

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