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 ROXIO, INC., MUSICNET, INC., CODE 7 ENTERTAINMENT, INC., CINEMANOW, INC., SEA BLUE MEDIA, LLC DBA CDIGIX, AND MOVIELINK, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici are online content service companies that offer *legal* music or film distribution over the Internet to consumers: Roxio, Inc. offers the Napster® service (*see* <www.napster.com>); MusicNet, Inc. offers the MusicNet™ service (*see* <www.musicnet.com>); Code 7 Entertainment, Inc. offers the Movieflix.com service (*see*<www.movieflix.com>); CinemaNow, Inc. offers the CinemaNow service (*see* <www.cinemanow.com >); Sea Blue Media, LLC DBA Cdigix offers the Cflix and Ctrax services (*see* <www.cdigix.com>); and Movielink, LLC offers the Movielink service (*see*<www.movielink.com >).[1] The primary difference between *amici* and Respondents is that *amici* have secured licenses to distribute the music or films they offer to their customers and Respondents have not. Although *amici* compete with one another, they have a united interest in submitting this brief because if the Ninth Circuit's opinion stands they all must continue to operate under the impossible market condition of competing with Respondents' illegal black market services.

The Ninth Circuit's opinion protecting these black markets is based on an incorrect application of the *Sony* decision. *Amici* respectfully request this Court to redress the misapplication of its decision in order to provide certainty to the emerging market of legal online distribution of copyright-protected works, just as the *Sony* Court protected the then-emerging, and now-culturally significant, home video/DVD market. This brief is being filed with the consent of all parties.

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1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Two decades ago this Court established a standard for the coexistence of artistic creativity and technological innovation that promoted a mutually beneficial relationship. The decision in *Sony Corp. of America v. Universal City Studios*, *Inc.*, 464 U.S. 417 (1984) proved effective in the now quaint era of "VTRs", home taping and time-shifting. However, a new era of viral distribution of copyrighted works has caused the courts, the artistic and technology communities, and the public to re-define *Sony* in their own images and, we submit, in ways unimagined by this Court.

It is vitally important for this Court to grant the petition for certiorari now in order to re-establish the balance needed to protect copyright and nurture new industry and technological innovation for the public good. This balance has been destroyed by the Ninth Circuit and threatens the existence of a nascent industry which seeks to provide consumers with new options for the acquisition of music and film without violating the law. Any delay will permit more confusion in the market place, the boardroom and the courtroom, and specifically will be fatal to *amici*'s attempt to create a lawful industry.

The undercurrent of Respondents' arguments is that rather than challenge technology, Petitioners should embrace it and accept the ultimate benefits as the *Sony* respondents did. But the benefits of a fair return for copyright owners and the "public good," the linchpin of *Sony*, are rendered meaningless by the facilitators of free downloads. The Respondents make a mockery of the balance that was required by this Court and that went unrecognized by the Ninth Circuit in failing to see the fundamental distinctions between the conduct at issue in *Sony* and the challenged conduct here.

As this Court recognized, "the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Sony*, 464 U.S. at 432. The public good is not served by encouraging the public to engage in unlimited and unlicensed file sharing, which has been recognized by all courts as infringing conduct. It is served by making music and film available for legitimate online distribution. It is *amici* who seek to establish legitimate businesses that will find a balance between copyright owners' exclusive rights and that public good.

ARGUMENT

I. *Amici's* Efforts To Develop Legally A New Industry Using The Internet Are Damaged By Respondents' Infringing Businesses.

A. *Amici* Have Created Business Models That Use The Internet To Distribute Content Legally.

Amici's business models and infrastructure demonstrate how Internet distribution of music and film can be as vital and effective as video and DVD distribution became in the wake of the *Sony* decision without infringing copyrights. Each service provides software that users download to their computer free of charge from either the company's own web site or a co-branded, third-party web site. The web sites, along with the downloaded software, enable users to search for and either stream[2] and/or download selected music or films depending on the particular service and its licensing agreements with the copyright owners. Some *amici* offer users access to the service's entire catalog of content for a low monthly subscription fee. This subscription fee enables users to stream digital content through their computer for real-time listening or viewing, and in some cases, to "conditionally download" the content, which means users can keep downloaded content on the hard drive of their computers as long as they are subscribers, but cannot burn them to a CD. For a per-work fee, some subscription services allow users to download an individual work to keep permanently and burn on to a CD or transfer to a portable MP3 device. Other *amici* have no subscription offering at all, but allow their customers to download content for a per-work fee (generally under $1.00 for music and under $5.00 for films). Some services have restrictions related to the length of time the customer may use the file after purchase, while others have no restrictions at all.

These legitimate services offer catalogs comprising thousands of songs or films licensed from the major record companies, music publishers, independent record companies, major movie studios and independent film studios with new content licensed and added every day. These services use digital rights management and other technologies to track the purchased content and use that information to calculate royalty payments for all copyright owners. They offer many other features such as customer service and the ability to filter pornographic material.

2. Streaming is designed to be ephemeral: the user listens to the music or views the film as it is being streamed through the Internet to the user's computer, but the computer does not retain a copy for future playback. *See A&M Records*, *Inc. v. Napster*, *Inc.*, 114 F. Supp. 2d 896, 909 (N.D. Cal. 2000).

The legitimate on-line services also offer quality control measures that ensure that each file is recorded and delivered to the consumer in a high quality digital file. *Amici'*s quality control measures also ensure that each file is accurately labeled with identifying information related to the content so users can easily find what they are looking for through a variety of search and browse methods and can be confident that they will get what they expect.

B. *Amici* Are The True Innovators, Not The Respondents.

Although *amici*'s services appear seamless from the consumer point of view, it requires an enormous amount of time, effort and creativity to develop and sustain these businesses. *Amici* have spent several years and tens of millions of dollars to develop their business models and infrastructure and negotiate licenses for music and film distribution. They continually refine their software and services. The end result is services that offer high quality products and a high quality experience to the consumer. *Amici* have created an unique way of distributing artistic content over the Internet that offers the consumer control over the experience and respects the rights of copyright owners at the same time. This is innovation that deserves protection.

Ironically, Respondents' theme to the courts below was that they are misunderstood inventors and promoters of creativity persecuted by Petitioners' attempt to stifle technology and Internet distribution. Nothing could be further from the truth. Petitioners do not want to prevent the use of file-sharing technology; they want to prevent people from using the technology illegally. Respondents have simply taken the easy way out. They profit from blatant and knowing infringement of copyrights by refusing to secure rights to the works distributed on their network, and by enabling and encouraging their users to engage in unlawful trading activities on the black markets they created. Moreover, their refusal to implement quality control measures (in a misguided effort to fabricate a lack of "knowledge" and "control" and thus attempt to avoid liability) results in a scattershot experience for the user, who receives digital files that are subject to whatever digital methodology was used to record them, and no assurances that the file has been labeled correctly, contains the complete metadata, the complete work, or even anything remotely resembling the file sought by the user. Most importantly, copyright holders are not compensated for any of these uses. Respondents' distribution disregards both the integrity of the works and the artists who created them.

The time and effort it took to develop *amici*'s businesses versus Respondents' businesses can be analogized to the difference between establishing a large retail operation versus setting up a card table at a street corner and selling counterfeit goods. Developing and implementing a legal, for-profit business using new technology is truly innovative — providing a black market for people to steal music and films is not. Respondents' real "contribution to society" and "innovation" is fostering a climate in which stealing is considered acceptable. Teenagers and adults who would not shoplift from a brick-and-mortar store steal millions of dollars worth of music and film online because Respondents' very existence (and Respondents' advertising) tells them that this conduct is "okay." *See In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003). The refusal of the Ninth Circuit to deliver an alternative message reinforces and legitimizes this message.

C. *Amici's* Businesses Are Irreparably Damaged By Competing With Respondents' "Free" Infringing Businesses.

Amici have invested substantially in licensed, legitimate online services in reliance on the *Sony*[3] decision from this Court, and other decisions like the *Sony* decision from the courts below.[4] Those decisions led *amici* to believe that the courts would continue to prohibit services like those of Respondents and protect copyrights from online infringement, thereby providing a legitimate space to meet the obvious demand. The lower courts' decisions in this case have turned this expectation on its head without justification.

Despite the fact that *amici*'s services offer higher quality files and features than Respondents' services, *amici* do considerably less volume than Respondents for one simple reason. Respondents offer their stolen content for free, a price impossible to beat for legitimate businesses which acquire the rights to sell their product and support systems to track, account and pay for those rights. Both *amici*'s and Respondents' success depend on the volume of users. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 259 F. Supp. 2d 1029, 1043-44 (C.D. Cal. 2003) ("[A] significant

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3. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

4. *See, e.g., A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001) (enjoining online file sharing service under theories of contributory and vicarious copyright infringement); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (operators of swap meet may be held liable for contributory and vicarious copyright infringement for sales of counterfeit recordings by independent vendors).

proportion of Defendants' advertising revenue depends upon [their users'] infringement [*i.e.* use]."). But few, if any, of *amici* are currently profitable and are unlikely to be profitable until a legitimate market develops. In addition to the impossibility of competing with a free service, *amici* are also harmed by, *inter alia*:

• the immediate availability of current music and films that are not subject to any kind of licensing restriction.

• venture capital funds' disincentive to invest in this industry due to the illegal networks' corruption of the market.

• the disincentive for widespread support of digital rights management and other features in the portable device industry due to the amount of unprotected content available to their consumers.

The Ninth Circuit previously recognized that the former Napster[5] "rais[ed] barriers to plaintiffs' entry into the market for the digital downloading of music . . . Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads." *A&M Records*, *Inc. v. Napster*, *Inc.* 239 F.3d 1004, 1016-17 (9th Cir. 2001) (hereinafter *Napster*). Respondents, self-styled as the former Napster's heir, have the same effect on the market today. A legitimate market needs to develop within a timeline that will allow *amici* to survive. The courts are the only expedient means to protect this market.

5. It should be noted that *amicus curiae* Roxio, Inc. purchased the assets of the former Napster that was the defendant in the cited case and turned it into a legitimate online service by securing licenses for the content distributed on its service.

Companies like *amici* are attempting to repeat the success of the videotape and DVD with digital content distribution over the Internet but in a far more hostile environment than existed after the *Sony* decision. Ironically, Respondents and their ilk use (and misuse) catch phrases (but not the spirit or principles) of *Sony* to destroy a nascent industry which could have even a greater impact on American and global culture and the widespread distribution of music, film and other forms of audiovisual creativity. If Respondents are allowed to encourage the public's disregard for copyright as property and perpetuate open and notorious black market industries, *amici* will not succeed in creating a market which could revolutionize the distribution of copyrighted works.

II. The Supreme Court Should Correct The Ninth Circuit's Misapplication Of The *Sony* Standard.

There are three fundamental distinctions between the *Sony* defendants' conduct and that of the Respondents here that render the Ninth Circuit's decision a misapplication of the *Sony* standard. *First*, the Sony VTR only provided a means for individual real time *copying*. *See Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 425 (1984). *Sony*'s limited safe harbor for articles of commerce concerned only one of the rights accorded a copyright owner, and in limited circumstances (private, non-commercial copying). *See* 17 U.S.C. § 106; *Sony*, 464 U.S. at 442. Respondents' services and their software implicate far more than non-commercial copying. They infringe one of the most important commercial statutory right of an artist — the right "to distribute copies or phonorecords of the copyrighted work to the public. . . ." 17 U.S.C. § 106(3).

Respondents' networks are means for viral, unauthorized distribution of content that allow the direct infringers to copy and distribute the work in the same transaction. This is a vastly different situation than using the VTR to laboriously record program after program (in real time) for non-commercial, individual home use. It is unlikely that the *Sony* Court would have condoned the ability to transfer the recorded program to other VTRs at the push of a button over the broadcast air waves. This scenario would have brought the *Sony* case far afield from the actual facts. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000) (describing the difference between conventional copyright infringement and "viral" distribution over the Internet as "exponential rather than linear").

Second, Respondents' services do not make a fair use of Petitioners' copyrighted works. In *Sony*, the Court recognized that time-shifting of free, over-the air programming was the predominant use of VTRs by consumers. *See Sony*, 464 U.S. at 424. The *Sony* Court premised its application of the *Sony* safe harbor on its holding that such "time shifting" was a fair use because it had no demonstrable effect upon the potential market for the copyrighted work and the artist's incentive to create. *Sony*. 464 U.S. at 442, 450.

In contrast, Respondents' activities enable the public, commercial (through advertising), unauthorized distribution of works around the world in seconds. This conduct is not remotely analogous to the *Sony* "time-shifting," and it has been demonstrated by Petitioners that this conduct irreparably harms the market for, and the value of, the artistic works distributed on those systems. *See Napster*, 239 F.3d at 1016-17 (use of Napster harmed the market by, *inter alia*, reducing CD sales and depriving copyright owners from creating alternative markets.); *Universal City Studios*, 111 F. Supp. 2d at 315 (distribution of movies over the Internet "threatens . . . to impede new, potentially lucrative initiatives for the distribution of motion pictures in digital form. . . ."). In addition, the struggle *amici* face daily to compete with Respondents' illegal, free services demonstrate that Respondents' conduct is also destroying the market for Internet distribution of copyrighted works. As this Court has held, and history has shown, the VTR was not capable of mass distribution of material, and therefore was not capable of mass destruction of the existing and emerging commercial market at issue Without fair use, the *Sony* safe harbor is inapplicable, and this Court should correct the Ninth Circuit's clear misunderstanding of that requirement.

Third, the Ninth Circuit has misconstrued this Court's application of the staple article of commerce to copyright law and has emasculated the balance required to give copyright owners "effective — not merely symbolic — protection." The protection for the manufacturers of a staple article is "to engage in substantially unrelated areas of commerce." *Sony*, 464 U.S. at 442. The distribution of copyrighted works is not an unrelated area of commerce. It is the essence of copyright ownership. Mere capacity for non-infringing use must be considered in this light and not in the theatrical abstract as urged by Respondents and accepted by the lower courts.

CONCLUSION

For all the foregoing reasons, and all the reasons set forth in Petitioners' brief and the briefs of other *amicus curiae* filed in support of Petitioners, *amici curiae* Roxio, Inc., MusicNet, Inc., Code 7 Entertainment, Inc., CinemaNow, Inc., Sea Blue Media, LLC DBA Cdigix, and Movielink, LLC, respectfully request this Court to grant the Petition for Certiorari in this case and correct the misapplication of its historic *Sony* decision by the Ninth Circuit.

Respectfully submitted,

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