No. 04-480

IN THE
Supreme Court of the United States

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

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

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

Brief *Amici Curiae* of the Free Software Foundation and New Yorkers for Fair Use in Support of Respondents

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QUESTION PRESENTED

1. Did the Court of Appeals rightly conclude that the doctrine of contributory copyright infringement cannot be used to prohibit the Internet?

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INTEREST OF *Amici Curiae*

This brief is filed on behalf of the Free Software Foundation, a charitable corporation with its main offices in Boston, Massachusetts.[1] The Foundation believes that people should be free to study, share and improve all the software they use, as they are free to share and improve all the recipes they cook with, and that this right is an es-

[1]Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the *amici* and their counsel made any monetary contribution to its preparation and submission.

sential aspect of the system of free expression in a technological society. The Foundation has been working to achieve this goal since 1985 by directly developing and distributing, and by helping others to develop and distribute, software that is licensed on terms that permit all users to copy, modify and redistribute the works, so long as they give others the same freedoms to use, modify and redistribute in turn. The Foundation is the largest single contributor to the GNU operating system (used widely today in its GNU/Linux variant for computers from PCs to supercomputer clusters). The Foundation's GNU General Public License is the most widely used "free software" license, covering major components of the GNU operating system and tens of thousands of other computer programs used on tens of millions of computers around the world. The Foundation is strongly interested in the use and development of copyright law to encourage sharing, and to protect the rights of users and the public domain.

This brief is also filed on behalf of New Yorkers for Fair Use, a non-profit advocacy organization incorporated in New York. New Yorkers for Fair Use defends the right of private ownership of computers, and the rights of free speech and free association, especially in new forms made possible by the Internet. We defend the interests of all citizens who benefit from flexible and innovative use of digital technology, the communications infrastructure, and published information. Some members of New Yorkers for Fair Use earn their livings by writing, using, and distributing software. Should the laws be changed so that we must consider whether we will be sued for writing, using, or distributing software which facilitates indexing, presentation of indices and catalogues, and transmission of bits across the Internet, our livelihoods would be at risk.

SUMMARY OF ARGUMENT

Contrary to petitioners' self-serving announcement, this is not "one of the most important copyright cases ever to reach this Court." *Pet. for Cert.* at 1. The Court below quite properly rejected petitioners' novel and untenable claim that the doctrine of contributory copyright infringement affords a few copyright-related businesses power to define the technical structure of the Internet.

Just a few short terms ago, the movie industry was proclaiming the plenary extent of Congressional power to make the policy choices—balancing the interests of authors, publishers and users—that constitute copyright doctrine. *See* MPAA Br. Amicus Curiae in Support of Resp. in Eldred v. Ashcroft, No. 01-618, at 3. How soon they forget. This year the industry's new position is that the largest issues of copyright policy, concerning new technologies of distribution, are appropriately dealt with not by Congress, but through judicial development of secondary liability doctrine.

Contrary to a clear line of cases extending back to the decision in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), petitioners continue to argue in this Court that manufacturers and providers of new technologies of distribution are secondarily liable for infringing uses of that technology of which they are unaware and over which they have no control. Petitioners go farther, and argue that even widespread, substantial non-infringing uses of the new technology do not insulate its manufacturers from liability for others' acts. All of this is law that petitioners made up: they have no statutory bases for their claims, and are arguing here, as they argued below, that they don't need any. As though this degree of overreaching were insufficient evidence of their mettle, petitioners go on

to identify as the technical features of respondents' computer networking software that establish their entitlement to relief those features that are shared by the whole recent generation of Internet protocols, embodying the future of network design. In the teeth of this Court's clear statements extending back almost a century, without the slightest statutory justification, petitioners claimed below that they had a right to veto the technological design that organizes the majority of contemporary traffic on the global Internet. Not surprisingly, they lost, and now resume their blustering before this Court. In referring to this as a very important case, petitioners characteristically mistake self-importance for the real thing.

ARGUMENT

I. This Court Should Reject Petitioners' Overreaching Claim to Control the Design of the Internet through Secondary Copyright Liability

A. PETITIONERS ARE ACTUALLY CLAIMING POWER TO DEFINE THE TECHNICAL DESIGN OF THE INTERNET

At the heart of Petitioners' argument is an arrogant and unreasonable claim—even if made to the legislature empowered to determine such a general issue of social policy—that the Internet must be designed for the convenience of their business model, and to the extent that its design reflects other concerns, the Internet should be illegal. In petitioners' own words, "Grokster's and StreamCast's services are designed so that users can easily and anonymously connect with like-minded [users]," which "breed[s] a culture of contempt for intellectual property, and for the rights of others generally, in cyberspace." Pet. Br. at 4, 13. Specifically, petitioners claim that respondents' technological choices involve decentralized indexing, *id*. at 9, lack of access controls (in contrast to a supposed "common practice" for internet services), *id*. at 10, absence of binding license agreements, *id*. at 11, and failure to implement centralized filtering, *ibid*, and that these technical choices in network architecture are demonstrative of respondents' complicity in "erod[ing] ... the very foundations of copyright law in the digital age." *Id*. at 14.

Petitioners' view of what constitutes the foundation of copyright law in the digital age is as notable for its carefully-assumed air of technical naivete as for the audacity with which it identifies their financial interest with the purpose of the entire legal regime. The combination of technical features which, as petitioners know full well,

distinguishes most current innovations in the employment of computer networks throughout all facets of social life, is, according to petitioners, an aspect of the supposed "inducement" to direct infringement that petitioners claim distinguishes this case from *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984). Pet. Br. at 27–29. Petitioners' whole theory comes to this: When the ability to "separate" infringing from non-infringing communications is within the realm of technological possibility, even if only through one possible network design, a centralized server-client architecture, that route must be chosen. Failure to adopt that technical architecture by software designers creating network protocols and applications establishes secondary liability for later acts of infringement of which the technical designers were unaware and over which they had no control. *Id*. at 32–33. Petitioners contend that their preferred model of computer networking technology is the *only* possibility that properly "strike[s] a balance between a copyright holder's legitimate demand for effective ... protection" and "the rights of others freely to engage in substantially unrelated areas of commerce." *Id*. at 17, (quoting *Sony*, 464 U.S., at 442). They claim that, without the slightest legislative authorization, federal courts should proceed to fasten this restrictive view of acceptable technical design upon the global Internet, regardless of the myriad and commercially-significant uses of non-hierarchical peer-to-peer technology, as though this Court's decision in *Sony* had provided no guidance to the contrary.

To be sure, petitioners attempt to obscure the extent to which they would recast and expand this Court's established approach to secondary copyright liability, by focusing on what they claim is respondents' "specific intent of inducing infringement." Pet. Br. at 26. But this is merely obfuscatory. Petitioners proclaim that "creation and oper-

ation of the services constitutes material contribution under settled law, and standing alone justifies liability" once their theory of *Sony*, rejected by the Court below, is conceded. *Id*. at 25. But "creation and operation of the services," despite petitioners' pretense of technological ignorance, means "participating in the peer-to-peer redesign of the Internet." Petitioners are claiming that the direction of contemporary technology is in itself "material contribution to copyright infringement."

B. The Internet is Developing in a Direction Contrary to Petitioners' View of their Business Interests

The digital network currently transforming society is a technology conceived out of a single, specific need: to share data among independently-operating computers. Early work on the architecture for what would eventually become the Internet envisioned a decentralized, densely interconnected network of machines exchanging data with each other as peers, thereby creating a system that would recover gracefully from the failure of individual machines and would efficiently use the resources of the entire machine ecology: bandwidth, CPU cycles, and storage space. *See* Nelson Minar and Marc Hedlund, *A Network of Peers: Peer-to-Peer Models Throughout the History of the Internet*, *in* Peer to Peer: Harnessing the Benefits of a Disruptive Technology 3-15 (Andy Oram ed., 2001). As the Internet began to see widespread use, the architecture took an unexpected turn away from its initial design in response to the technical and economic realities of its institutional users. Storage space and network bandwidth were too expensive for casual employment. Specific, limited applications, embodying a "client-server" model emerged wherein expensive machines with large disks were outfit-

ted with fast network connections in order to serve data to multiple end-user desktop machines, each of which featured limited storage and was connected to the network by a slow connection. Thus, relatively few institutions came to be the gatekeepers of data distribution on the Internet by way of their fast, expensive data servers pumping data onto the network.

The past decade has seen tremendous changes in the economics and technology of personal computing and networking. High-bandwidth network connections are now within the budget of individuals for their personal use, and storage space has become cheap enough that users rarely have to budget it at all. Accordingly, network dynamics have begun once again to reflect the initial design of the Internet: each connected machine now has the surplus resources to store and serve large amounts of data to peer machines on the network, and the mediating presence of a high-bandwidth server is no longer necessary. These direct peer-to-peer data exchanges make efficient use of all the resources available on the network, mobilizing unused bandwidth and storage space on millions of desktop machines to facilitate applications on the scale of the entire Internet. *See* Press Release, O'Reilly Media, P2P Research Report Strips the Hype from Peer-to-Peer (Nov. 7, 2001), *available at* http://www.oreilly.com/www/oreilly/press/p2presearch.html (Nov. 7, 2001); *see also* Clay Shirky, *What's P2P and What's Not*, *available at* http://www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html (Nov. 24, 2000). Peer-to-peer data management "has potential benefits in bandwidth sharing (e.g. distributed content streaming), load balancing, fail-over redundancy, collaborative content creation and maintenance, and more." KELLY TRUELOVE ET AL., 2001 P2P NETWORKING OVERVIEW: THE EMERGENT P2P PLATFORM OF PRESENCE, IDENTITY, AND EDGE RE-

SOURCES (2001). And these benefits have not gone unnoticed by the technical and academic communities. Computer scientists at MIT and Berkeley developing a next-generation computer network that may supplant the current Internet have recognized the strengths of peer-to-peer data networks; their National Science Foundation-funded project, IRIS, employs a peer-to-peer framework to ensure security, reliability, and efficiency.[2] The digital technology industry has also realized the benefits of peer-to-peer file sharing as a means of efficiently distributing and storing large amounts of data: Both Microsoft and IBM have extensive technology projects focused on this area.[3]

According to petitioners, however, the entire process of replacing "centralized filtering" and "controlled access" with "decentralized indexing" and peer-to-peer sharing is nothing more or less than "material assistance to infringement." Yet these aspects of respondents' services reflect the new realities of the Net as a whole. The World Wide Web is largely a domain of uncontrolled access and decentralized indexing. Respondent Grokster's use of the free software gnutella protocol is but one implementation among many of the new technical possibilities opened up by the maturation of the Internet.

Petitioners' argument, quite properly rejected by the Court of Appeals, would actually apply to the majority of the Net as it exists today. Peer-to-peer systems have begun

[2] *See* David Cohen, *New P2P network funded by US government*, NEW SCIENTIST, Oct. 1, 2002, *available at* http://www.newscientist.com/article.ns?id=dn2861; *see also* Press Release, Massachusetts Institute of Technology, MIT has share in project for a more secure Internet (Sep. 25, 2002), *available at* http://web.mit.edu/newsoffice/2002/connect.html; *IRIS: Infrastructure for Resilient Internet Systems*, *at* http://iris.lcs.mit.edu/.

[3] *See* Marc Rapport, *Microsoft, IBM Develop P2P Technology*, PEER-TOPEERCENTRAL.COM, Feb. 12, 2001, *available at* http://www.imakenews.com/p2pcentral/e_article000015110.cfm.

to supplant the traditional client-server model in terms of actual volume of traffic over the Internet. CacheLogic, a firm that develops tools for network traffic analysis for Internet service providers, and CAIDA, a cooperative group that develops Internet traffic metrics, both recently published studies attributing 60% to 70% of all Internet traffic to peer-to-peer data exchange, with the popular application Bit Torrent accounting for 53% of all peer-to-peer traffic.[4] Bit Torrent is a peer-to-peer application designed to speed up and decentralize the distribution of large data files. It works by breaking the file into small pieces, then exploiting the upload capacity of each individual user to serve pieces of the file to other users while the original user is downloading the rest of the file from elsewhere. The list of users serving and downloading a given file is "tracked" on a website, where new users can go to begin the download/file-serving process in collaboration with the other participants.

This "bucket-brigade" communal approach to distribution does more than achieve efficient use of network technical resources. As well as being used for a good deal of infringing activity sharing, among other things, copyrighted movies and television programs produced by petitioners, Bit Torrent has found widespread use by numerous groups seeking to distribute large files on the Internet for commercial and non-commercial non-infringing purposes. The free software community has embraced Bit Torrent as an efficient method of distributing software installation CD images for non-proprietary operating systems

[4] *See* Press Release, CacheLogic Announces New Internet Analysis Platform, Provides Exclusive Data on Worldwide P2P Usage (July 15, 2004), *available at* http://www.cachelogic.com/news/pr040715.php; *see also* Thomas Karagiannis et al., *Is P2P dying or just hiding?*, December 2004, *available at* http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf (presented at Globecom 2004).

like GNU/Linux and for other free software applications that are licensed on terms that permit free copying, modification and redistribution.[5] BitTorrent provides a means for these groups, which are often funded out of the pockets of unpaid individual users and developers, to spread the costs of distributing the files among the community, to match demand with supply via BitTorrent's automatic matching of popularity with availability, and to prevent the possibility of a single server crash making a given resource unavailable.[6]

Various coalitions of independent filmmakers have, for similar reasons, adopted Bit Torrent as a tool for distributing their non-copyrighted or freely-licensed content.[7] In many cases, the films and footage would not otherwise have been available to the public due to the high costs of hosting a video content server.[8] Similarly, many independent journalists have taken to posting their video feeds and political documentary footage on Bit Torrent sites like Torrentocracy, which host various political documents of public interest that might not otherwise find a viable channel of distribution.[9] Educators have also made use of Bit

[5] *See The Linux Mirror Project at* http://www.tlm-project.org/; *see also Open Bits at* http://www.open-bits.org/.

[6] *See* Andy Dornan, *BitTorrent Jibes With Caching*, NETWORK MAGAZINE, February 1, 2005, *available at* http://www.networkmagazine.com/shared/article/showArticle.jhtml?articleId=57701944.

[7] *See My5Minutes at* http://www.my5minutes.com/; *see also Waxy at* http://www.waxy.org/bt/.

[8] Being an oligopoly, petitioners are understandably shy about indicating in their presentation to this Court that the technology they are seeking to eliminate as contributing to infringement lowers the most important barrier to entry faced by their competitors.

[9] *See* Press Release, Matt Haughey, Creative Commons Applauds the Release of Political Film Footage on Peer-to-Peer (Sep. 15, 2004), *available at* http://creativecommons.org/press-releases/entry/4401; *see also Outraged Moderates: Government Document Archive at* http://www.outragedmoderates.org/GovernmentDocumentLibrary.html

Torrent to share multimedia language-learning resources with each other.[10]

C. THE COPYRIGHT ACT AND ASSOCIATED DOCTRINES OF SECONDARY LIABILITY DO NOT EMPOWER ONE SMALL INDUSTRY TO BALANCE FOR EVERYONE ELSE THE SOCIAL INTERESTS AFFECTED BY WIDESPREAD CHANGES IN DISTRIBUTION TECHNOLOGY

Petitioners advocate a reinterpretation of this Court's established secondary copyright infringement doctrine that would allow copyright holders to reach and restrain the implementation of core technologies of copying and distribution under the guise of protecting their statutory rights. As the Court is well aware, "a finding of contributory infringement [here is] the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee." *Sony*, 464 U.S., at 441. Applied as petitioners would have it applied, contributory infringement doctrine would work an unprecedented and unwarranted extension of their monopolies.

The exclusive rights granted to authors under 17 U.S.C. § 106 are severely limited by both statute and the Constitution. As this Court has repeatedly observed, the "limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest. ... But the ultimate aim [of copyright] is ... the general

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(2004); *Chomsky Torrents at* http://www.chomskytorrents.org/ (non-copyright-protected video and audio of Noam Chomsky's lectures and interviews); *Torrentocracy at* http://torrentocracy.com/torrents/; *Blog Torrent at* http://www.blogtorrent.com/; *Independent Media Center at* http://www.indymedia.org.

[10] *See* Robert Godwin-Jones, *Emerging technologies: messaging, gaming, peer-to-peer sharing: language learning strategies & tools for the millennial generation*, LANGUAGE, LEARNING & TECHNOLOGY, January 1, 2005.

public good." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (quoting *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975)). This Court has consistently held that copyright holders do not have unlimited power to control all or even most uses and distributions of their works. Extension of control beyond the limits set by the distinction between expressions and ideas, and the principle of fair use, is constitutionally prohibited, as this Court has repeatedly taught. *See Eldred* v. *Ashcroft*, 537 U.S. 186, 190 (2003); *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340, 349–50 (1991).

Where the Constitution sets no limit on the scope of the monopoly to be granted, it empowers Congress to make the basic policy decisions that the grant of a statutory monopoly inherently involves. This Court has rightly, throughout the history of the Republic, preserved the common law's tradition of skepticism about statutory monopolies, and has wisely engaged in strict construction of the legislature's grant. So with respect to technologies of redistribution, for example, this Court has unfailingly held that copyright owners' ability to dictate how specific copies of works are distributed is stringently curtailed by the first sale doctrine. As Justice Day noted nearly one hundred years ago, "[t]o add to the right of exclusive sale the authority to control all future retail sales ... would give a right not included in the terms of the [copyright] statute." *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 351 (1908).

Despite petitioners' apocalyptic rhetoric, this case follows a familiar pattern in the history of copyright: incumbent rights-holders have often objected to new technologies of distribution that force innovation on the understandably reluctant monopolist. As the Court of Appeals recognized, *see Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster Ltd.*, 380 F.3d 1154, 1158, 1166 (CA9 2004), there is no precedent in any of these cases for holding the manu-

facturer of new technology or distribution equipment secondarily liable for copyright infringement.

In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), this Court held that the manufacturer of player pianos and perforated rolls, which together played copyrighted musical compositions, did not infringe copyright. In characterizing the player piano and perforated rolls, this Court quoted approvingly from a First Circuit decision that had noted that "[the rolls] are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument." *White-Smith*, 209 U.S., at 12. In subsequently holding that such a "mechanical invention" did not fall within the ambit of copyright law, this Court was mindful that questions concerning mediation between core technologies and copyright "properly address themselves to the legislative, and not to the judicial, branch of the government." *Id*. at 18.[11]

Conversely, this Court's decision in *Buck* v. *Jewell La Salle Realty Co.*, 283 U.S. 191 (1931), upholding a claim by the American Society of Composers, Authors, and Publishers against a hotel operator for re-broadcasting copyrighted songs that it received on its radio, conspicuously did not involve any claims against the radio receiver manufacturer. Nor is it conceivable that this Court would have held the manufacturer of either the receiver or transmitting tower used in the infringing broadcasts liable in light of its decision in *White-Smith*.

More recently, this Court held in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), that a community antenna television (CATV) operator did not

[11]It is worth observing that no less an authority than John Philip Sousa concluded that failure to extend copyright to the piano player roll would eliminate the composition of music. *See* John Philip Sousa, *The Menace of Mechanical Music*, 8 APPLETON'S MAGAZINE 278 (1906), *available at* http://www27.brinkster.com/phonozoic/menace.htm.

infringe copyright by carrying signals from local television broadcasts. The Court made clear that a CATV system was no more than a technology of distribution, which, while facilitating unlicensed use of copyrighted material, was not in itself liable as a result of its contribution: "If it were," said this Court, "many people who make large contributions to television viewing might find themselves liable for copyright infringement – not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer." *Id*. at 396. Peer-to-peer networking software, such as that distributed by respondents, is to the Internet what CATV systems were to TV broadcasting in the 1960s. Petitioners, as though unmindful of everything this Court has said in relation to their past attempts at overreaching, now seek to prohibit yet another new technology because it "contributes" to activities of which they disapprove.

II. Decisions Concerning Fundamental Matters of Copyright Policy, Particularly in Relation to New Communications Technologies, Should Be Made Initially by Congress

Copyright law since Thomas Edison has been about the periodic adjustment of social practices in light of rapid technological change. Whenever technology itself has been regulated, it has always been by Congress. *See, for example*, Audio Home Recording Act of 1992 (AHRA), 17 U.S.C. § 1001 *et seq.*, 106 Stat. 4237. "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly." *Sony*, 464 U.S., at 429. Here, as in *Sony* itself, the movie industry has chosen to seek an expansion of its monopoly, not from the legislature, but in the courts.

As this Court has said, "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and institutional capability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology" *Sony*, 464 U.S., at 431. The movie industry is all for plenary Congressional power once that power has been exercised on its behalf; then, to be sure, we are in the province of "judgments [that] require balancing disparate interests and making predictions about future behavior. These factually complex, predictive determinations are precisely the sort that legislatures are most competent to make." MPAA Br. Amicus Curiae in Support of Resp. in Eldred v. Ashcroft, No. 01-618, at 3. But as Congress has not shown heretofore any enthusiasm for allowing the movie studios to reconstruct the global Internet for their own financial benefit, despite their reasonably heavy monetary investment in individual legislators, this issue no longer, from their point of view, requires complex predictive determinations or the balancing of disparate interests.[12]

CONCLUSION

The Court of Appeals properly disposed of petitioners' most recent attempt to displace legislative judgment, by

[12] An irony that seems to escape petitioners is that the non-theatrical market they claim respondents' computer software inappropriately threatens to deprive them of is the market that came into existence as a result of the videocassette recording technology they were suing to prohibit in *Sony*. Not only is Congress better than the Court at making predictive determinations in this area: it appears that it is also better than petitioners themselves.

refusing the massive expansion in their monopoly that petitioners claim they don't need to get from Congress. The decision below should be affirmed.

Respectfully submitted.

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