
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 *AMICUS CURIAE* FULLAUDIO CORPORATION,
ROXIO, INC., BUYMUSIC, INC., MUSICREBELLION.COM, INC.,
MUSICNET, INC., GENEVA MEDIA, LLC AND ECHO, INC. IN SUPPORT
OF PLAINTIFFS-APPELLANTS URGING REVERSAL OF THE
DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT**

BARRY I. SLOTNICK
LOEB & LOEB, LLP
Attorneys for Amicus Curiae
345 Park Avenue
New York, New York 10154
Telephone: (212) 407-4000
Telecopy: (212) 407-4990

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
CORPORATE DISCLOSURE STATEMENT.....	1
IDENTITY AND INTEREST OF THE AMICUS CURIAE	2
ARGUMENT.....	3
I. DEFENDANTS MISUSE INTERNET TECHNOLOGY TO PROFIT FROM COPYRIGHT INFRINGEMENT.	3
II. <i>AMICI'S</i> EFFORTS TO DEVELOP LEGALLY A NEW INDUSTRY USING THE INTERNET ARE DAMAGED BY DEFENDANTS' INFRINGING BUSINESSES.	7
A. <i>Amici</i> Have Created Business Models That Use The Internet To Distribute Content Legally.	7
B. <i>Amici</i> Are The True Innovators, Not The Defendants.	9
C. <i>Amici's</i> Businesses Are Irreparably Damaged By Competing With Defendants' "Free" Infringing Businesses.....	12
III. COPYRIGHT LAW AND THE <i>SONY</i> DECISION SHOULD BE CORRECTLY APPLIED TO PROTECT THE MARKET FOR LEGAL ON-LINE COPYRIGHT DISTRIBUTION.	14
A. Copyright Law Already Prohibits Defendants' Conduct.....	14
B. Judgment For Defendants Is Inconsistent With The <i>Sony</i> Decision.	17
IV. CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE	23

TABLE OF AUTHORITIES

CASES

<i>A&M Records, Inc. v. Napster, Inc.</i> , 114 F. Supp. 2d 896 (N.D. Cal. 2000)	7, 9
<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	passim
<i>In re Aimster Copyright Litigation</i> , 334 F.3d 643 (7th Cir. 2003)	11, 16
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	3, 12
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 259 F. Supp. 2d 1029 (C.D. Cal. 2003)	7, 12, 15
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	passim
<i>Universal City Studios, Inc. v. Reimerdes</i> , 111 F. Supp. 2d 294 (S.D.N.Y. 2000)	18, 20

STATUTES

U.S. Const., art. I, sec. 8, cl. 8	15
17 U.S.C. § 106	17
17 U.S.C. § 512	15, 16
H.R. Rep. No. 105-551 (II) (1988)	15, 16

OTHER AUTHORITIES

Joseph Menn, <i>All the Rave: The Rise and Fall of Shawn Fanning's Napster</i> 30-31 (2003)	4
http://cyber.law.harvard.edu/icann	3

Giancarlo Varanini, *Q&A: Napster Creator Shawn Fanning*, ZDNet March 2, 2000 <<http://zdnet.com.com/2100-11-502047.html?legacy=zdn>>.5

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae*

certify the following:

FullAudio Corporation, Roxio, Inc., BuyMusic, Inc., MusicRebellion.Com, Inc., and Echo, Inc. have no parent companies and no publicly held company owns 10% or more of their stock. Geneva Media, LLC's parent company is Anderson Media Corporation and no publicly-held company owns 10% or more of its stock. MusicNet, Inc. has no parent company and 10% or more of its stock is held by the following publicly-held companies or subsidiaries of publicly-held companies: RealNetworks, Inc.; Warner Music Group, Inc., a subsidiary of AOL Time Warner, Inc.; and EMI Recorded Music Holdings, Inc., a subsidiary of EMI Group plc.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amici are on-line music service companies that offer *legal* music distribution over the Internet to consumers: FullAudio Corp. offers the MusicNow™ service (*see* <www.fullaudio.com>); Roxio, Inc. offers the *pressplay*™ service (*see* <www.pressplay.com>); MusicRebellion.Com, Inc. offers the MusicRebellion.Com™ service (*see* <www.musicrebellion.com>); MusicNet, Inc. offers the MusicNet™ service (*see* <www.musicnet.com>); BuyMusic, Inc. offers the BuyMusic.Com™ service (*see* <www.buymusic.com>); Geneva Media, LLC offers the Liquid Audio™ service (*see* <www.liquidaudio.com>); and Echo, Inc. will offer the Echo™ service (*see* <www.echo.com>). The primary difference between *amici* and Defendants is that *amici* have secured or are negotiating to secure licenses to distribute all the music they offer to their customers. Although *amici* compete with one another, they have a united interest in submitting this brief because if the District Court's opinion stands they all must operate under the impossible market condition of competing with Defendants' free, illegal services. The District Court's opinion, based on overly expansive view of the *Sony* decision and its refusal to apply existing copyright law and policy, protects illegal black markets at the expense of legitimate and innovative businesses that support and advance the market for copyrights.

Amici respectfully request this Court to reverse the grant of partial summary judgment to the Defendants-Appellees (hereinafter referred to as “Defendants”) on Plaintiff-Appellants’ (hereinafter referred to as “Plaintiffs”) claims of contributory and vicarious copyright infringement and enter judgment in favor of Plaintiffs on those claims. This brief is being filed with the consent of all parties.

ARGUMENT

I. DEFENDANTS MISUSE INTERNET TECHNOLOGY TO PROFIT FROM COPYRIGHT INFRINGEMENT.

Internet search, file-transfer, and distributed-computing technology that provide the core of the distribution systems that Defendants have bought or licensed have lawfully been employed for years, and in some cases decades.¹ To say, as Defendants have suggested, that Plaintiffs are “against” peer-to-peer technology is no more accurate than to say that the plaintiff in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), was “against” swap meets. Swap meets were not the problem in *Fonovisa* – the problem was an operator that intentionally, and for a financial benefit, permitted its swap meet to become a haven for counterfeiters.

¹ See <<http://cyber.law.harvard.edu/icann/pressingissues2000/briefingbook/dnshistory.html>>

Similarly here, there is no “bad” technology that requires copyright owners helplessly to tolerate massive copyright infringement. There is only misuse of neutral technology by companies, like Defendants, that make money by giving away other peoples’ copyrighted works in order to attract an audience to view advertisements. They make no money by distributing free software — the software is not what attracts users, and in turn, advertisers.

Digital audio and video files can be distributed over the Internet by file transfer. A copy, often in “MP3” format if an audio file, is made and transmitted from one computer to another. Once received, the copy is stored on the receiving user’s computer, where the MP3 file can be played back at any time, and also copied onto other devices, burned to a compact disc, or distributed via the Internet to other users. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 10011-12 (9th Cir. 2001) (“*Napster*”). Prior to the appearance of Napster, such MP3 files were typically found on Web sites, hosted on commercial-grade computers known as Web “servers.” Bands and record companies wishing to make songs available would permit downloading of the songs from their Web servers. *See Joseph Menn, All the Rave: The Rise and Fall of Shawn Fanning’s Napster* 30-31 (2003).

In the late 1990s many “pirate” Web sites sprang up offering unauthorized copies of popular music. But because these sites were housed at

easily identifiable locations, it was relatively easy for copyright owners to locate them and shut them down. Noting the popularity of these pirate web sites, its nineteen-year-old creator developed the original Napster service.² Napster was called a “peer-to-peer” or “p2p” service for two principal reasons: first, unlike the case in the central server Web site model, the files made available on Napster were stored on users’ own computers, or “peers,” scattered over the network. Second, files selected for copying by a user were transferred from user computer to user computer, or “peer-to-peer,” without ever passing through Napster’s central servers.

Peer-to-peer technology is lawfully used in many computer applications and by many companies. With regard specifically to peer-to-peer transfer of media files, examples of legitimate enterprises abound. Kontiki provides software that permits companies to conserve system resources by distributing files from peer computers rather than from central servers.³ Similarly, Jive Networks provides services to distribute digital media via computer “peers” or “nodes” rather than central servers.⁴ And the Furthur Network is a peer-to-peer network for finding and copying music files, where files re distributed from user to

² See Giancarlo Varanini, *Q&A: Napster Creator Shawn Fanning*, ZDNet March 2, 2000 <<http://zdnet.com.com/2100-11-502047.html?legacy=zdn>>.

³ See <<http://www.jive.com>>.

user but files are limited to recording of live performances distributed with the consent of the copyright holders.⁵

The former Napster and its imitators have used peer-to-peer technology to unlawfully facilitate copyright infringement. Napster enabled the distribution of unauthorized copies of sound recordings through services including: software that matched search requests for artists and/or song titles against indices of available files; log-in servers that functioned as a gateway to the network; and forums and chat rooms where users helped one another find and copy unauthorized copies of sound recordings. *See* 114 Supp. 2d 896, 905-07. As the former Napster faced legal troubles, imitators introduced similar infringing systems, including Napster-like clones that functioned in the same way. The most popular successors have been those that operate on the "FastTrack network." Defendant Grokster has operated continuously on FastTrack since June 2001. Defendant StreamCast operated on it from April 2001 to February 2002. Also popular has been "Gnutella," a network used jointly by numerous file-copying companies, such as LimeWire and BearShare, and used by StreamCast in March 2002.

(continued from previous page)

⁴ *See* <<http://www.bluefalcon.com>>.

⁵ *See* <<http://www.furthurnet.com>>.

Like the former Napster, Defendants' FastTrack- and Gnutella-based systems permit users to search for music and movie files on other users' computers and to copy those files in peer-to-peer fashion. Defendants' FastTrack and Gnutella systems also make money by delivering advertising that appears inside the windows of the file-copying software application. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1039 (C.D. Cal. 2003) ("*Grokster*"). Like the former Napster, for the most of their first year Defendants operated log-in servers that acted as gateways to the network. *Id.* at 1040 n.7. Like the former Napster, infringing content does not pass through Defendants' servers as it transfers from user to user. *See A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 907 (N.D. Cal. 2000). In sum, there are no true "differences" between the former Napster and Defendants, and therefore the legal consequences should be the same as well.

II. *AMICI'S EFFORTS TO DEVELOP LEGALLY A NEW INDUSTRY USING THE INTERNET ARE DAMAGED BY DEFENDANTS' 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 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 software enables users to search for and either stream or download selected music 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 music for a low monthly subscription fee. This subscription fee enables users to stream⁶ music through their computer for real-time listening, and in some cases, to "conditionally download" music, which means users can keep downloaded music files on the hard drive of their computers as long as they are subscribers, but cannot burn them to a CD or transfer them to a portable MP3 device. For an extra, nominal per-song fee, some subscription services allow users to download an individual song 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 songs for a low, per-song fee (generally under \$1.00) with no restriction on the file's use after purchase. Once users select the music they want to listen to or download, either *amici*'s own servers or servers outsourced from third parties send the music selected to the user.

⁶ Streaming is designed to be ephemeral: the user listens to the music 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).

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

The legitimate music services also offer quality control measures that ensure that each track is recorded and delivered to the consumer in a high quality digital audio file. *Amici's* quality control measures also ensure that each file is accurately labeled with the artist name, album name and full song title 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 Defendants.

Although *amici's* services appear seamless from the consumer point of view, it requires an enormous amount of time, effort and creativity to develop these businesses. *Amici* have spent several years and millions of dollars to develop their business models and infrastructure and negotiate licenses for music distribution. They continually refine their software and services. The end result is a service that offers a high quality product and a high quality experience to the

consumer. *Amici* have created an unique way of distributing music 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, Defendants' theme is that they are misunderstood inventors and promoters of creativity persecuted by Plaintiffs' attempt to stifle technology and Internet distribution.⁷ Nothing could be further from the truth. Plaintiffs do not want to prevent the use of this technology; they want to prevent people from using the technology illegally. Defendants 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. 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 song,

⁷ See, e.g., MEM. OF P. & A. OF DEFS. MUSICCITY.COM, INC. (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC. IN SUPP. OF PARTIAL SUMM. J. REGARDING VICARIOUS INFRINGEMENT, at pp. 1, 8; MEM. OF P. & A. OF DEFS. MUSICCITY.COM, INC. (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC. IN SUPP. OF PARTIAL SUMM. J. REGARDING CONTRIBUTORY INFRINGEMENT, at p. 1; GROKSTER'S LTD.'S REPLY MEM. IN SUPP. OF MOT. FOR SUMM. J., at pp. 4-5.

or even anything remotely resembling the file sought by the user. Defendants' distribution disregards both the integrity of the work and the artist who created it.

The time and effort it took to develop *amici*'s businesses versus Defendants' 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. Defendants' 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 on-line because Defendants' very existence (and Defendants' advertising) tells them that it's "okay." *See In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003). The refusal of the District Court to deliver an alternative message reinforces and legitimizes this conduct. Judgment for Plaintiffs will protect true innovators like *amici* who have made a legitimate use of technology to create a new industry and a new way to distribute "creative expression."

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

Amici have invested substantially in licensed, legitimate music services in reliance on the *Napster*⁸ and *Fonovisa*⁹ decisions, and other decisions like them, from this Court and others. Those decisions led *amici* to believe that the courts would continue to prohibit services like those of Defendants and protect copyrights from on-line infringement, thereby providing a legitimate space to meet the obvious demand for these services. The lower court's decision have turned these expectations on their head without justification.

Despite the fact that *amici's* services offer higher quality files and features than Defendants' services, *amici* do considerably less volume than Defendants for one simple reason. Defendants offer their stolen content for free, a price impossible to beat for legitimate businesses who acquire the rights to sell their product and support systems to track, account and pay for those rights. Both *amici's* and Defendants' success depend on the volume of users.¹⁰ *See Grokster*,

⁸ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001).

⁹ *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).

¹⁰ *See* LIEBER PLS-APPELLANTS' OPENING BR. [REDACTED PUBLIC VERSION] (hereinafter cited as "LIEBER BR."), at p. 23 & n. 65.

259 F. Supp. 2d at 1043-4 (“[A] significant 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 difficulty of competing against companies that do not respect the requirements under which the music industry licenses and releases its music. Because the illegal networks do not have to respect the term of a license, consumers do not understand that under the existing licensing models legal on-line music services currently may not offer all digital music on an unrestricted basis.

- venture capital funds’ disincentive to invest in this industry due to the illegal networks’ corruption of the market at a critical time when the legitimate services are operating at a loss.

- the portable device industry’s disincentive to implement features that would support the rules of those *amici* that offer subscription services regarding, for example, the time allotted to use the digital file caused by the amount of unprotected content available to their potential customers.

This Circuit previously recognized that the former Napster “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.” *Napster*, 239 F.3d at 1016-17. Defendants, self-styled as 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.

Companies like *amici* are attempting to repeat the success of the videotape and DVD with music distribution over the Internet but in a far more hostile environment than existed after the *Sony* decision.¹¹ Ironically, Defendants 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 Defendants 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.

III. COPYRIGHT LAW AND THE *SONY* DECISION SHOULD BE CORRECTLY APPLIED TO PROTECT THE MARKET FOR LEGAL ON-LINE COPYRIGHT DISTRIBUTION.

A. Copyright Law Already Prohibits Defendants' Conduct.

The District Court failed to understand that copyright law regulates *conduct*, not technology. It is Defendants' conduct, not their technology *per se*, from which Plaintiffs (and *amici*) seek relief. The regulation of conduct is how

¹¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Congress implements its constitutional mandate to “promote the Progress of Science and useful Arts” U.S. CONST., art. I, sec. 8, cl. 8.

Congress has historically advanced this constitutional objective by regulating the use of information - not the devices or means by which the information is delivered or used by information consumers - and by ensuring an appropriate balance between copyright owners and information users.

H.R. REP. NO. 105-551 (II), at 24 (1998) (report on the passage of the Digital Millennium Copyright Act). Consequently, Congress generally seeks to enact copyright laws that are “technologically neutral.” *Id.* In addition, the doctrines of secondary liability are judge-made, not statutory. They are not technology-specific but embody general principles of knowledge, control and participation. This is consistent with Congress’ general approach to copyright law in enacting statutes that are as technologically neutral as possible. The District Court’s refusal to apply the law because of its perception that Defendants utilize a technology not contemplated by the existing copyright laws is inapposite to Congressional intent. *See Grokster*, 259 F. Supp. 2d at 1046.

Moreover, this technology *is* contemplated by the existing law. For example, the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, is a statute designed to “establish a wide range of rules that will govern not only copyright owners in the marketplace for electronic commerce, but also consumers, manufacturers, distributors ... and on-line service providers.” H.R. REP. NO. 105-

551 (II), at 22. The DMCA shows that Congress expected copyright law and the principles of secondary liability to apply to on-line transmission of content.

Through the DMCA, Congress carved out safe harbors for certain conduct on the Internet, but *not* Defendants' conduct. See 17 U.S.C. § 512; see also *Napster*, 239 F.3d at 1025 (“[P]laintiffs raise serious questions regarding Napster’s ability to obtain shelter under § 512...”); *Aimster*, 334 F.3d at 655 (“The Act provides a series of safe harbors for Internet service providers and related entities, but none in which Aimster can moor. The Act does not abolish contributory infringement.”). Judgment for Plaintiffs will not impermissibly expand the copyright laws because the conduct at issue is already prohibited by the existing laws.

Congress recognized that the Constitutional mandate to “to promote the Progress of Science and useful Arts” includes protecting the “growth of markets for works of the imagination as well as the industries that use such works.” H.R. REP. NO. 105-551 (II), at 24. *Amici* are trying to grow the market for “works of the imagination” under the existing laws. Protestations to the contrary, Defendants are not. They have established a black market for stolen works that does not provide an incentive to create (because it does not compensate creators) and therefore does not merit the protection of the copyright laws or the courts. The District Court did not need to wait for Congress to pass new laws because it

already had the law and the evidence it needed to find judgment in favor of Plaintiffs.

B. Judgment For Defendants Is Inconsistent With The *Sony* Decision.

As shown in Plaintiffs' principal appeal briefs, there are several dispositive distinctions between the *Sony* defendants' conduct and that of the Defendants here. The most fundamental distinction is that the VTR only provided a means for *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. Defendants' services and their software implicate far more than non-commercial copying, they infringe one of the most important statutory rights of an artist — the right “to distribute copies or phonorecords of the copyrighted work to the public” 17 U.S.C. § 106(3). This fundamental difference and the policy behind it renders *Sony* inapplicable to Defendants' conduct for several reasons.

First, Defendants' networks are a 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, 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 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, in *Sony*, the Court recognized time-shifting of free, over-the-air programming as the predominant use of VTRs by consumers. See *Sony*, 464 U.S. at 424. This was held to be a fair and non-infringing use. See *id.* at 456. The Supreme Court recognized that virtually all potential uses of the VTR were for private, non-commercial copying. See *id.* at 442. Compare this with the former Napster, Aimster, and Grokster networks, which enable public, commercial (through the sale of advertising) distribution of unauthorized copyrighted material throughout the world in seconds. This same difference caused the *Napster* Court to conclude that using Napster was not analogous to the permissible “time-shifting” by VTR users. See 239 F.3d at 1019.

Third, Plaintiffs in *Sony* unsuccessfully sought to make a *product* illegal. See *Sony*, 464 U.S. at 441 & n. 21. Here, Plaintiffs seek merely to impose limitations on the use of a *service* that allows users to become *de facto* (but not *de jure*) distributors of infringing copies of copyrighted material on a global basis. It

is undisputed that Defendants have created a network that searches for and downloads music and other content, and that they continue to upgrade and refine this capability in order to enable unauthorized distribution of copyrighted works. The distribution of Defendants' software, given their intent for its use in distributing unauthorized works, is sufficient to find Defendants liable here because the software is an integral, *necessary* part of the network and the additional services Defendants offer their users.¹² Without Defendants' software, the illegal networks and all their attributes (*e.g.*, the indices, the search function, user assistance) would not exist in the first place.

Amici and Defendants compete for customers who want to download music on a continuous basis, not customers who want to buy a piece of software. Defendants' software is free because the real value to Defendants is the network, the content offered on it, and the people who use it. The same is true from the *amici*'s perspective, most of which also offer their software free of charge. In contrast, the only value to Sony was the sale of the VTR itself; it received no benefit from any use (or type of use) of the VTR by consumers. *See Sony*, 464

¹² *See* MGM BR., at pp. 13-15, 17, 20-21. Defendants have tried to distinguish themselves from the Napster service because Napster had physical possession of the servers that indexed (but not transferred) the available files. The fact that Defendants' software enables Defendants to outsource the index functions

(*continue...*)

U.S. at 438 (“The only contact between Sony and the users of the [VTR] ... occurred at the moment of sale.”).

Fourth, Defendants irreparably harm the market for copyrights and their distribution. In its fair use analysis, the Supreme Court recognized that permissible, non-commercial time-shifting had no demonstrable effect upon the potential market for the copyrighted work and the artist’s incentive to create. *Sony*, 464 U.S. at 450. Defendants’ activities, and those of its users, can hardly fit into such a description. *See also 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, Inc.*, 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”). As the Supreme Court held, and history has shown, the VTR was not capable of mass distribution, and therefore mass destruction, of the existing and emerging commercial market at issue. The struggle *amici* face daily to compete with Defendants’ illegal, free (yet inferior) services demonstrate that Defendants’ conduct *is* destroying the market for Internet distribution of copyrighted works.

(continued from previous page)

to users (with or without the consent of the user) is, *amici* submit, a distinction without a difference. The end result is the same.

IV. CONCLUSION.

For all the foregoing reasons, and all the reasons set forth in Plaintiffs' opening briefs and the briefs of other *amicus curiae* filed in support of Plaintiffs, *amicus curiae* FullAudio Corp., Roxio, Inc., MusicRebellion.Com, Inc., MusicNet, Inc., BuyMusic, Inc., Geneva Media, LLC, and Echo, Inc. respectfully request this Court to reverse the District Court's grant of partial summary judgment and enter judgment in favor of the Defendants.

Dated: August 25, 2003

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barry I. Slotnick", written over a horizontal line.

Barry I. Slotnick
LOEB & LOEB LLP
345 Park Avenue
New York, New York 10154
Tel: (212) 407-4000
Telecopy: (212) 407-4990

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rules 32-1 and 32-2, the foregoing Brief of *Amicus Curiae* is proportionately spaced, has a typeface of 14 points and contains 4,562 words according to the word count function of the software program used to write this brief.

Dated: August 25, 2003

LOEB & LOEB LLP

By Barry I. Slotnick
Barry I. Slotnick

AFFIDAVIT OF SERVICE

DOCKET NO. 03-55894, 03-56236

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

vs.

GROKSTER LTD., *et al.*,

-----X

No. 03-55901

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

v.

GROKSTER LTD., *et al.*

-----X

STATE OF NEW YORK)

COUNTY OF NEW YORK)
Omar Sierra
911 Walton Ave.,
Apt. 6D

I, **Bronx, N.Y. 10452** duly sworn according to law and being over the age of 18, upon my oath depose and say that:

on August 25, 2003

I served the within Brief for Amicus Curiae FullAudio Corporation, Roxio, Inc., BuyMusic, Inc., MusicRebellion.Com, Inc. MusicNet, Inc., Geneva Medica, LLC, and Echo, Inc. in Support of Plaintiffs-Appellants Urging Reversal of the District Court's Grant of Partial Summary Judgment in the above captioned matter upon:

SEE ATTACHED LIST

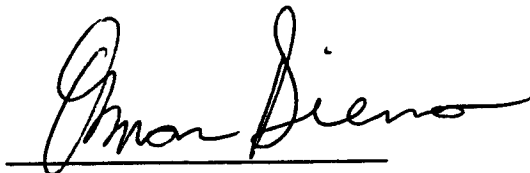
via Federal Express..

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Federal Express.

Sworn to before me on August 25, 2003



Michael DeSantis
Notary Public State of New York
No. 41-0930908
Qualified in Queens County
Commission Expires January 31, 2006



Job # 182581

MGM STUDIOS, INC., et al. v. GROKSTER, LTD., et al.

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

SERVICE LIST

Michael H. Page, Esq.
Keker & Van Nest LLP
710 Sansome Street
San Francisco, California 94111-1704
(Fax) 415-397-7188

Charles S. Baker, Esq.
Munsch Hardt Kopf & Harr, P.C.
111 Congress, Suite 2010
Austin, Texas 78701
(Fax) 512-226-7115

Cindy A. Cohn, Esq.
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(Fax) 415- 436-9993

Roderick G. Dorman, Esq.
Hennigan Bennett & Dorman LLP
601 So. Figueroa St., Suite 3300
Los Angeles, CA 90017
(Fax) (213) 694-1234

David B. Casselman, Esq.
Wasserman Comden Casselman & Pearson LLP
5567 Reseda Blvd., Suite 330
Tarzana, CA 91357-7033
(Fax) (818) 705-8147

David E. Kendall, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(Fax) (202) 434-5029

Gregory P. Goeckner, Esq.
Mark D. Litvack, Esq.
MPAA
15503 Ventura Boulevard
Encino, CA 91436-3103
(Fax) 818- 382-1797

Robert M. Schwartz, Esq.
O'Melveny & Myers LLP
1999 Avenue of the Stars, Suite 700
Los Angeles, CA 90067
Fax: (310) 246-6779

Carey R. Ramos, Esq.
Paul Weiss Rifkind Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-0064
Fax: (212) 757-3900

Kelli Sager, Esq.
Davis Wright Tremaine LLP
865 So. Figueroa St., Suite 2400
Los Angeles, CA 90017-2566
Fax: (213) 633-6899

Matthew J. Oppenheim, Esq.
Dean Garfield, Esq.
RIAA
1330 Connecticut Ave. N.W., Ste 300
Washington, D.C. 20036
Fax: (202) 775-7253