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 *AMICUS CURIAE* OF AMERICANS FOR TAX REFORM IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based "file sharing" services Grokster and StreamCast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Americans for Tax Reform ("ATR") is a coalition of individuals, taxpayer groups and businesses concerned with promoting a vibrant economy through tax policy, spending reduction, a balanced budget and restoring accountability to elected officials. In support of all of these goals, ATR seeks a government that adheres to constitutional norms and this Nation's founding principles of promoting free markets and protecting property rights. As a supporter of these ideals, ATR opposes any result in this case that would sanction the widespread theft of property that has been encouraged and facilitated by Respondents. Such a result would undermine this country's constitutionally rooted and long-established protections for copyright, because it would render a black market in copyrighted works functionally immune from suit, and thereby profoundly distort the proper functioning of legal markets in copyrighted works.

INTRODUCTION AND BACKGROUND

For generations, the concept of personal property rights and the knowledge that the law will protect personal property from theft have provided individuals with a compelling incentive to work, to create new items of commerce, and thereby to benefit themselves and society. From the beginning of our Republic, those incentives have been applied to the intangible product of American genius. As a result, authors, scholars and artists have been provided with the incentive to create and publish an ever-increasing array of materials to educate, empower and entertain. That system of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

legal protection for intellectual work product is the father of the modern electronic revolution.

Ironically, Respondents, while benefiting from the innovations sparked by intellectual property protections, have used those innovations to facilitate and profit from the destruction of property rights. This case tests whether the protections for personal property rights that have provided the foundation for our economy will continue in the modern, online environment. In previous cases, this Court has indicated that the protections historically afforded to copyright and patent holders will continue to apply to new methods of creating, storing and sharing intellectual property. The Court should reaffirm that principle here by applying the age-old principle that those who induce the violation of intellectual property rights are secondarily liable for that violation.

SUMMARY OF ARGUMENT

Our Nation's history has shown that the predictable and robust protection of personal property rights provides innumerable benefits. Protecting personal property from theft gives every person a healthy incentive to produce items or services that are valuable to society. Since the Founding, intellectual property has been among the products of personal labor that have received the protections of federal law. As a result, modern American consumers enjoy a rich and diverse selection of artistic, educational, and technical works.

The Ninth Circuit's decision undermines these time-honored protections for personal property. In focusing on the question of the technology that Respondents use to induce copyright violations, the Ninth Circuit's decision fails to recognize that facilitating and profiting from theft on the Internet is no different from facilitating and profiting from theft in any other context. It is Respondents' business model, not the technology they use to effectuate that model, that merits legal sanction.

Given these fundamental principles, and the manner in which Respondents flout them, it is no surprise that this Court's decision in *Sony* is inapplicable here, for at least three reasons. Although Respondents seek to wrap themselves in the protection of *Sony*, this reliance is misplaced. Unlike this case, *Sony* involved a claim of secondary infringement based on nothing more than the mere sale of a potentially infringing product; this case, by contrast, involves a business whose very purpose and goal is to encourage and profit from infringement. Although technology purveyors who sell a product with substantial noninfringing uses are justifiably protected by *Sony*, Respondents do not qualify for that protection because they distributed and marketed their service by touting its usefulness in the commission of copyright infringement and with the intent to profit from such infringement. Furthermore, *Sony* dealt with the circumstances under which constructive knowledge could be inferred from a defendant's conduct. But in this case, no such inferences are required—the evidence abundantly demonstrates that Respondents had active knowledge of the infringement that occurs via their software. Finally, *Sony* was a case in which the underlying conduct was blameless, as this Court concluded that most uses of the product were fair. Here, not even Respondents have made such a claim. This is a case about widespread and blatant copyright infringement, all encouraged by and to the profit of Respondents.

ARGUMENT

I. PROTECTING INTELLECTUAL PROPERTY AS FULLY AS TANGIBLE PERSONAL PROPERTY SERVES THE PUBLIC INTEREST.

A. Copyrights Are A Form Of Property That Has Been Fully Protected By Federal Law Since The Founding.

At least since passage of the 1710 Statute of Anne, Anglo-American law has recognized copyright as a property interest. 8 Ann., c. 19, § 1 (1710) (Eng.). Through that landmark Act, Parliament recognized the benefits that intellectual property rights offer: profits for authors and progress for society. Vesting a property right in authors incentivizes the cultivation and development of creative expression, just as real property rights promote the cultivation and development of land.

Early judges and commentators joined in adapting a Lockean view of property, which would later become the keystone of our Declaration of Independence, to the field of copyright. See, *e.g.*, Proceeding, *Donaldson* v. *Beckett*, 1 Eng. Rep. 837 (H.L. 1774) (Lord Chief Baron Smythe), *available at* http://www.copyrighthistory.com/donaldson.html ("property did exist previous to publication, and that publication could not alter it; for that publication neither made it a sale, a gift, a forfeiture, nor an abandonment, which were the only ways that a person could part with his property"); William Enfield, *Observations on Literary Property* 21 (1774) ("Labour gives a man a natural right of property in that which he produces[.] [L]iterary compositions are the effect of labour; authors have therefore a natural right of property in their works."), *quoted in* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 Cornell L. Rev. 1278, 1296 & n.94 (2003); see generally Garon, *supra*. Several states, even before the adoption of the Constitution, had also equated the need to protect the fruits of intellectual labor with the need to protect the fruits of manual labor. *E.g.*, 1783 N.H. Laws 305 (noting that government encourages human progress by providing the "legal security of the fruits of [human] study and industry [and that] no property [is] more peculiarly a man's own than that which is produced by the labor of his mind"), *quoted in* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L. J. 517, 529 n.79 (1990) (and citing other similar state statutes from the period).[2]

In light of this already solid foundation that existed for intellectual property by 1787, it is unsurprising that the Framers embraced intellectual property as essential to the Nation's future. U.S. Const. art. I, § 8, cl. 8. James Madison wrote of the Copyright Clause, "The utility of this power will scarcely be questioned." *The Federalist No. 43*. There were apparently few who doubted that, as Madison recognized, the "public good fully coincides . . . with the [intellectual property] claims of individuals." *Id.* One prominent commentator has observed that "the men who wrote the Constitution regarded the system of private property *per se* as in the public interest. In according property status to copyright, they merely extended a recognition of this public interest . . . ." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.03[A], at 1-90 (2004) (footnote omitted).[3]

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[2] By the time the Framers gathered for the Constitutional Convention, twelve of the thirteen original colonies had adopted some form of intellectual property regime. Lyman Ray Patterson, *Copyright in Historical Perspective* 194 (1968).

[3] The modern mind has no difficulty equating intellectual with tangible personal property. 1 Nimmer & Nimmer, *supra*, § 1.03[A], at 1-90 ("[t]he fruits of an author's labor seem to be no less deserving of the privileges and status of 'property' than are the more tangible creative efforts of other laborers"); Richard A. Posner, *Economic Analysis of Law* 38 (4th ed. 1992) ("the economist experiences no sense of discontinuity in moving from physical to intellectual property").

The Framers recognized that the law generally protects real and personal property in order to protect the progress society has already made, but that the specific protections of intellectual property promote future progress. The Founders of our young Nation were keenly aware of the need to achieve a level of economic advancement that would put the Nation on par with its European forebearers. Accordingly, the Framers understood that protecting intellectual property would help ensure that the newly united States would not lag in developing a marketplace of ideas behind their European rivals. Put simply, copyright incentivizes private individuals to create works that benefit the public as a whole.

This Court has recognized that copyright protection serves the public by securing rewards to the efforts of individuals. "[C]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge." *American Geophysical Union* v. *Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *quoted in Eldred* v. *Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

The public benefits derived from the protection of individual rights in copyright have led the Nation consistently to expand the availability of intellectual property rights. See*, e.g.*, Copyright Act of 1909, ch. 320, 35 Stat. 1075; Sound Recording Amendment Act of 1971, Pub. L. No. 92-140, 85 Stat. 391; *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (attributing public availability of Founding Fathers' papers to copyright protection); *Burrows-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53 (1884) (extending copyright to photographs); *Goldstein* v. *California*, 412 U.S. 546, 561 (1973) (further extending copyright to "any physical rendering of the fruits of creative intellectual or aesthetic labor"). Today, intellectual property rights are equally important on the international stage. One commentator has noted that "[c]ountries with innovative local industries almost invariably have laws to foster innovation by regulating the copying of inventions, identifying symbols, and creative expressions." Lawrence R. Hefter & Robert D. Litowitz, *What is Intellectual Property?*, http://usinfo.state.gov/products/pubs/intelprp/homepage.htm (Nov. 1999). Moreover, the United States is a party to several international accords protecting intellectual property rights. See, *e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *Legal Instruments—Results of the Uruguay Round*, vol. 31, 33 I.L.M. 81 (1994); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

The Framers' vision of a nation driven forward based, in part, on the fruits of intellectual labor has been realized perhaps beyond their capacity to imagine. The importance of copyright law to the U.S. and global economies can hardly be overstated. In 2002, core copyright industries[4] accounted for $626.6 billion, or 6% of the total U.S. gross domestic product. Eric H. Smith, *Foreword* to Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report*, Int'l Intellectual Prop. Alliance, (2004), *available at* http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf. These industries employ 4% of U.S. workers. Between 1997 and 2001, the industries grew at 3.19% per year, more than double the employment rate increase for the rest of the economy. In 2002, copyright industries accounted for $89.26 billion in foreign sales and exports. *Id*. All of this, of course, does not even begin to include the value to our economy and to our standard of living that is contributed by the protection of patent rights. In sharp contrast to the economy as a whole, there is an intellectual property trade *surplus*, *i.e.*, the U.S. exports much more valuable intellectual property than it

[4] This group includes industries whose primary purpose is to produce or distribute copyright materials, *e.g.*, newspapers, book publishing, recording, music, motion pictures, television broadcasting, and software.

imports. Honorable Richard Posner, *The Economic Structure of Intellectual Property Law*, Address at the American Enterprise Institute (Nov. 19, 2002), *available at* http://www.techlawjournal.com/intelpro/20021119.asp.

B. Intellectual Property Rights Require Vigilant Protection In The Digital Age.

For as long as our law has recognized the immense benefits of intellectual property rights, there have been free riders and thieves who violate the law. The Statute of Anne explicitly stated that "persons[] have of late frequently taken the Liberty of Printing . . . Books, and other Writings, without the Consent of the Authors . . . to their very great Detriment, and too often to the Ruin of them and their Families." 8 Ann., c. 19, § 1 (1710) (Eng.).

Nearly three centuries later, the threats to our intellectual property system posed by piracy take technologically advanced forms. But the new dressing in which we find modern piracy does not change its nature. Theft is theft. Intentionally enabling and profiting from the theft of others harms us all. The proper functioning of our free enterprise system requires effective recourse for property holders when their rights are invaded. Respondents are enabling and profiting from massive theft. The law must respond.

The technologically advanced nature of the theft that leads to Respondents' profits only enhances its impact. No longer does intellectual property piracy depend upon costly machines and time-consuming copying processes. Low cost computers and the Internet make piracy fast and easy. The impact is staggering. The music, motion picture, and video game industries all report enormous losses on account of piracy: 111,000 jobs in the software industry, $4 billion in music sales, $3 billion in film sales, and $3 billion more in lost video game sales. Garon, *supra*, at 1280.

Happily, the law is general enough and adaptable enough to meet the needs of our technologically advanced society and protect our intellectual property system from the massive theft taking place at the behest of Respondents. As Petitioners and other *amici* have demonstrated, and thus it does not require an extended discussion here, standard rules of secondary liability in copyright law apply to Respondents and warrant imposing liability against them.[5] This is not surprising. The Internet, though technologically foreboding, is no less amenable to the application of the sound general rules of law that have served our Nation and its economy well for centuries. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 208 ("Develop a sound law of intellectual property, then apply it to computer networks."). Through three centuries, an effective legal framework has fostered unimaginable innovations in technology, communications, art, literature, film and music. No competent body has yet determined that there is anything unique to the digital age that would justify an abandonment of the same system that has brought such profound gifts to society. When the Framers empowered Congress to "secur[e] . . . to Authors and Inventors the *exclusive* Right to their respective Writing and Discoveries," they surely meant "exclusive" without any unexpressed exception for new methods of copying and distribution. Const. art. 1, § 8, cl. 8 (emphasis added). The teaching of *New York Times Co.* v. *Tasini* confirms precisely this point: the Court found "no basis . . . to shrink authorial rights" simply because copyrighted works had moved into the digital world. 533 U.S. 483, 506 (2001). Thus, this Court ensured that the rights of authors would remain fully protected even as their creative expression migrates into cyberspace. There is no reason to think that *now* is the time to start developing an "Internet" exception to the laws that protect property rights.

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[5] *See* Brief *Amici Curiae* of States and Territories in Support of Petitioner, No. 04-480 (U.S. filed Jan. 24, 2005).

II. RESPONDENTS' BUSINESS MODEL IS UNLAWFUL BECAUSE IT SEEKS TO PROFIT FROM INDUCING THE THEFT OF PERSONAL PROPERTY.

The Ninth Circuit's decision below must be rejected because it adopts the wrong focus. The Ninth Circuit treated this case as addressing the lawfulness of a particular technology, but it is Respondents' business model, and not the technology by which they effectuate that model, that is really at issue. If personal property is to be respected, Respondents' conduct must be illegal whether the technology they use is on the cutting edge of development or centuries old.

Respondents' entire business model is based upon encouraging the mass theft of copyrighted works over their peer-to-peer ("P2P") networks and profiting from the volume of theft that occurs. The record on this point is clear. Respondents designed their networks with the express goal of emulating Napster's infringement-based business model. See JA 738-739, 744-745, 749, 835, 836, 858-862, 864-865, 992-998. At that time, Napster (which was the first large-scale P2P network) was a notorious haven for copyright infringement, with millions of copyrighted works being illegally copied on a daily basis. See *A&M Records*, *Inc.* v. *Napster*, *Inc*., 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000), *aff'd in part & rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) ("as much as eighty-seven percent of the files available [for free duplication] on Napster may be copyrighted"); *Napster*, 239 F.3d at 1013-14 (noting the District Court's finding that that "'a majority of Napster users use the service to download and upload copyrighted music . . . [in] . . . direct infringement'" of the relevant copyrights) (quoting *A&M Records, Inc.* v. *Napster, Inc.*, Nos. 99-5183, 00-0074, 2000 WL 1009483, at *1 (N.D. Cal. July 26, 2000) (transcript of proceedings)). Respondents' original software operated in substantially the same manner as Napster, and Respondents even mimicked Napster's name for the original version of their service. See JA 250-251, 531, 579-586, 758-759. Significantly, when the federal courts enjoined Napster from continuing its infringement-driven business, Respondents did not show any signs of concern that perhaps their services were being used in an unintended unlawful manner. Rather, Respondents demonstrated that they intended the logical result of the actions they had taken in creating an infringement-based P2P service. In fact, Respondents vigorously marketed their services as an alternative for Napster's previous users. See, *e.g.*, Pet. App. 35a (Respondents promoted themselves as "'the next Napster'"); JA 749, 861-862 (Respondents declared that their networks would "Do Napster better"); JA 836, 858-863, (StreamCast advertised its network as "The #1 Alternative to Napster" and the "Alternative Napster Network").

The intent behind Respondents' efforts to identify themselves with Napster is clear. Like Napster, Respondents have structured their business model so that they receive increased advertising revenues as the volume of traffic on their networks increases. *See* JA 72, 258, 572, 759-760. Under Respondents' volume-based business model, Respondents profit from each instance of illegal traffic.[6] As a result, Respondents have no incentive to discourage illegal file sharing. To the contrary, Respondents have every incentive to promote the idea that copyrighted works may be duplicated on their networks for free. Respondents have acted upon that incentive. For example, at one time Respondents required users to create a unique username and

[6] Respondents and other similar P2P networks have succeeded in their efforts to foster illegal infringement of property rights. During the proceedings before the District Court in this case, more than 90% of the material available on Respondents' networks consisted of copyrighted works that were being illegally infinged. *See* JA 436-439, 476-480. More than 2.6 *billion* copyrighted songs are illegally downloaded from P2P networks each month. See Lev Grossman, *It's All Free*, Time, May 5, 2003.

password to log into their networks. By requiring each user to log into the network, Respondents were able to monitor their users and determine whether they were engaged in prohibited conduct. However, several months after this litigation began, Respondents disabled their log-in requirement and thus ceased to use it as a device for deterring illegal traffic. See JA 254, 271-272, 575-578, 623-625, 626-628, 665-667, 766. Respondents have acknowledged that one reason for this willful blindness is their desire to avoid any legal responsibility for the illegal traffic that they intend to foster and from which they derive their business income. See JA 791, 928-933 (Respondents' employees acknowledge that Respondents have the technical ability to see what files Respondents' users are copying, but noting that Respondents wish to avoid such knowledge). In addition to the desire to avoid liability for the conduct that they intend to foster, Respondents must ensure that individual copyright infringers can use their networks with relative anonymity so that they will escape detection and prosecution.

In other words, Respondents' business is like any business that aids and abets illegal conduct. Respondents attract business by informing those who are interested in participating in illegal conduct of the opportunity Respondents provide. At the same time, Respondents offer their users some degree of anonymity so that those who might use their service will not stay away out of fear of being caught. Finally, Respondents have devised a mechanism by which the illegal conduct they foster will redound to their financial benefit. This is *not* a case about determining the legality of file-sharing technology. This is a case about whether a person may lawfully set up a marketplace and means of exchange for trading stolen property, promote that space as a haven for illegality, and then sell advertising directed to the marketplace participants.

III. THIS COURT'S DECISION IN *SONY* HAS NO APPLICABILITY HERE.

For all of the reasons set forth above—the need for this Court to embrace robust protection of property, including copyrights; the need to guarantee such protection in the online world; and, most of all, because of the unlawful business model that Respondents have built here—this Court should reject Respondents' invitation, certain to be forthcoming, to shield their unlawful conduct on the basis of *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984). Throughout this litigation Respondents have invoked *Sony*, but that decision is distinguishable here for at least three important reasons. *First*, the claim of secondary infringement in *Sony* was premised on the defendants' bare sale of a potentially infringing product, whereas Petitioners here make the far more serious claim that Respondents deliberately encouraged copyright infringement in order to profit from it. *Second*, *Sony* addressed whether *constructive* knowledge (that defendants were contributing to infringement) could be established by the mere sale of a potentially infringing product; in this case, by contrast, there is plentiful evidence that Respondents had *actual* knowledge that that they were contributing to infringement. *Third*, this Court in *Sony* took pains to note that the bulk of the allegedly infringing conduct to which the defendants had contributed was in fact fair use; but here, no one—not even Respondents—has attempted to justify the rampant illegal conduct carried out by the users of Respondents' products on any such basis. For each of these reasons, this Court should reject categorically efforts by secondary infringers, such as Respondents, to wrap themselves in the mantle of *Sony*.

1. The allegations in *Sony* were altogether different from the allegations that Petitioners have made in this case. In *Sony*, the plaintiffs claimed that "the sale of petitioners' copying equipment to the general public" constituted contributory copyright infringement. 464 U.S. at 420. The

only conduct at issue was the fact that "Sony manufactures millions of Betamax video tape recorders ["VTRs"] and markets these devices through numerous retail establishments." *Id.* at 422. That this was the sole basis upon which liability would be imposed understandably gave the Court pause. The Court properly observed that "[w]hen a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe . . ., the public interest in access to that article of commerce is necessarily implicated." *Id.* at 440. To find infringement on the basis of those limited allegations, the Court recognized, would be "the functional equivalent of holding that the disputed article is within [a] monopoly granted to [a] patentee." *Id.* at 441; see also *id.* at 421 (expressing concern about "enlarg[ing] the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection"). That is, a finding of infringement in *Sony* would have undermined rather than enhanced the efficient operation of the intellectual property system by effectively preventing the production of useful articles in commerce. Given those concerns, the Court declined to impose secondary liability.

But the allegations in this case are altogether different. There has been no argument that Respondents should be subject to secondary liability merely for selling (or, more pertinent in this case, for distributing) a product. On the contrary, as set forth above, see *supra* Section II, the claim of secondary infringement is premised upon Respondents' deliberate decision to set up a business model that profits from the infringing conduct of others. Respondents materially contributed to that infringement by others by advertising, distributing, and modifying a network that would most effectively enable infringers to operate without detection. The easier and more secret the infringement by Respondents' users, the more money Respondents make. For these reasons, there is no implication in this case—as there was in *Sony*—that the imposition of liability here would mean that anyone who sells or distributes P2P software is secondarily liable and, therefore, there is no concern that holding Respondents liable would functionally extend Petitioners' copyright monopoly to cover P2P software. The distribution of articles of commerce (*i.e.*, P2P software) remains unhampered in this case, even with the imposition of secondary liability. Put simply, in *Sony* this Court was asked to expand copyright protections so broadly as to interfere with the production of perfectly lawful and socially beneficial products. Here, no such expansion is at issue.[7] Thus, whereas in *Sony* the public interest would have been adversely implicated by a finding of liability, a decision here to immunize Respondents from liability would be ruinous to the public interest because of the resulting adverse effect on the proper functioning of the legitimate marketplace.

2. *Sony* is further inapplicable here because that case addressed a different level of scienter, and different questions about proof of scienter, than what is alleged in this case. The Court in *Sony* did not address any claim of, nor did it consider any evidence of, *actual* knowledge: "If vicarious liability is to be imposed on petitioners in this case," the Court wrote, "it must rest on the fact that they have sold equipment with *constructive* knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material." 464 U.S. at 439 (emphasis added). The absence of evidence of actual knowledge was of critical importance in shaping the rule adopted by this Court, as it should have been. If the simple fact of selling a potentially infringing product could amount to constructive knowledge of

[7] This distinction is a complete answer to those who would suggest that imposing secondary liability on Respondents would threaten legitimate computing businesses such as those who manufacture computers and recordable compact disks. Where Respondents intentionally promote their services as both a mechanism and a place for illegal exchange, these businesses produce articles of commerce that are designed, marketed and used for legitimate, non-infringing purposes.

underlying infringement, and also establish the required material contribution, then both elements of contributory infringement would be established by conduct that was, in important ways, hardly, if at all, blameworthy. For this reason, the Court was unwilling to assume that the mere seller of a product that has "substantial noninfringing uses," *id.* at 442, had the requisite knowledge.

There is no claim in this case that Respondents possessed mere *constructive* knowledge that the users of their software would engage in copyright infringement. Rather, the allegation is—and the evidence put forward at summary judgment demonstrates—that Respondents were *actively* aware of and relying on such infringing conduct. They knew from the first that their businesses would attract would-be infringers, which is precisely what happened, and on a breathtaking scale. And, Respondents knew of the infringement that occurred by means of their software, not only because they actually searched the P2P networks and came across infringing conduct, but also because they were informed of infringement by rights-holders and by users. Nothing about these facts, and Respondents' choice brazenly to ignore the infringement that they knew of and profited from, bears the remotest resemblance to the knotty problems of constructive knowledge that were at issue in *Sony*. And for this reason, too, the defense recognized in *Sony* has no application here.

3. Finally, this case must be distinguished from *Sony* because the conduct allegedly facilitated by the defendants—that is to say, the alleged primary infringement—is so entirely different in the two cases. Critical to this Court's decision in *Sony* was its practical recognition that the underlying conduct was not particularly culpable, and its legal determination that much or most of that conduct was not actionable. The Court concluded that most VTR users were not engaged in copyright infringement. It pointed to findings that "the average member of the public uses a VTR principally to

record a program he cannot view as it is being televised and then to watch it once at a later time," 464 U.S. at 421; *accord id.* at 423 (surveys "showed that the primary use of the machine for most owners was 'time-shifting'"), and it held that time-shifting (whether authorized or not) is a noninfringing use, *id.* at 442-56. The fact that such noninfringing uses were not only potential, but were actually common, necessitated the Court's conclusion that secondary liability was inappropriate. See, *e.g.*, *id.* at 446 ("the business of supplying the equipment that makes [non-infringing] copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works").

Here, the underlying conduct could not be more different. Predominant legality has been replaced with overwhelming illegality. The users of Respondents' P2P networks are engaged in untold quantities of copyright infringement—*which Respondents do not even dispute*. See Pet. App. 16a ("The element[] of direct infringement . . . [is] undisputed in this case."). Respondents' software has facilitated the illegal copying of millions of copyrighted works, and there is no claim here—as there was in *Sony*—that most (or even many) of the uses of Respondents' software are non-infringing. *Sony* was a case about lawful product sellers and lawful product users; this is a case about those who deliberately encourage and then profit from rampant illegality.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submited,

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