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 OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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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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INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. Its

[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the timely filing of all *amicus curiae* briefs in this matter and copies of their letters of consent have been lodged with the Clerk of the Court.

general mission includes defending the Constitution against encroachment by judge-made law, a key issue underlying this case. EFELDF also has a longstanding interest in defending First Amendment rights of association and political speech at risk in this action. In particular, EFELDF is concerned that the judicial interference with the free transfer of information over the internet[2] infringes on constitutional rights of speech and association essential to our freedoms.

Amicus has a direct and vital interest in the issues presented to this Court and respectfully submits these arguments.

SUMMARY OF ARGUMENT

Petitioners, numerous *amici* and even two U.S. Senators implore this Court to create new law to impede a new technology. Their request is misplaced. Congress is far better suited to assess a technological development and weigh the competing interests of developers and users. Moreover, the Constitution confers this power exclusively on Congress through the Copyright Clause. If the case for contributory or secondary liability were as compelling as petitioners and their powerful allies insist here, Congress would have acted years ago for their benefit. But the reality is far different from that painted in their scores of briefs. "Peer-to-peer" technology, which enables internet users to access and copy files located on computers of other users, is central to the electronic economy and to political discourse. The internet plays a growing role in society, and peer-to-peer technology is an integral part of the associations citizens forge on the internet. This Court should refrain from legislating where Congress has not, and peer-to-peer technology should remain free to develop further.

[2] The term "internet" is, like "television" and "telephone", a non-trademarked generic name for a pervasive new technology, and thus we follow the growing trend against capitalizing it.

Though young in historical terms, the internet has already become an influential political medium fully protected by the First Amendment. It has sparked the impeachment of a U.S. President, fueled the extraordinary candidacy of a little-known Vermont governor for president, defined the Swift Boats Veterans issue in the recent presidential election, facilitated the circulation of censored political information in communist countries, and altered the information landscape for traditional media of newspapers and television. Peer-to-peer technology brings tens of millions of users to associate with each other on the internet, and enables them to exchange information, some of which is undoubtedly protected free speech. In many ways, peer-to-peer technology is the printing press of the internet in distributing massive amounts of information quickly and cheaply to the world, and First Amendment rights are at stake.

The action sought by petitioners here is akin to enjoining Johann Gutenberg because of some unauthorized reproductions of the Bible. Unauthorized use of a technology – be it a printing press, an automobile, a firearm, or the internet – has never justified interference with lawful uses. Such a rash action would be particularly unwise when the technology is still in its infancy, as peer-to-peer software is. Citation of alleged copyright infringement by some users of the printing press is not justification for shutting down all presses, and certainly not before their powerful legitimate uses became fully apparent.

For good reason this Court has been reluctant to create and impose contributory or secondary liability for copyright infringement. This Court should decline the invitation presented here to foray into contributory liability in connection with a new, still-developing technology that facilitates the exchange of information. The quickly changing technology will be different before the ink is dry on the opinion in this case, and it will be years before this Court has the opportunity to refine its holding here. Legislating from the bench is unjustified in general, and is particularly ill-suited to new technologies that facilitate constitutionally protected speech and association.

ARGUMENT

I. THIS COURT SHOULD NOT PROHIBIT A NEW TECHNOLOGY THAT FACILITATES FIRST AMENDMENT USES, WHEN CONGRESS ITSELF HAS DECLINED TO BAN IT.

Peer-to-peer file-sharing software, still relatively new, is widely popular and has substantial non-infringing and First Amendment uses. It facilitates the anonymous transfer of documents of political and associative significance. While petitioners deplore an alleged loss of revenue when users exchange copyrighted songs, petitioners implicitly concede (as they must) that there are some lawful uses of the technology. These lawful activities, great in number even if low in percentage, include fully protected speech and associative activity. Congress has refrained from banning this technology, and this Court should not award relief to petitioners that Congress itself has declined to provide.

This Court should reject this challenge to its prescient decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Writing for the Court, Justice Stevens turned away an effort by the movie studios to impede the sale of video cassette recorders. Justice Stevens emphasized that:

> One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted

> a flat prohibition against the sale of machines that make such copying possible.

Id. at 456. Justice Stevens concluded, "[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written." *Id.* at 456.

As recently as the end of the last session, Congress considered legislative approaches to peer-to-peer technology. The Washington Post described the efforts and outcome as follows:

> In the final few weeks before the 2004 election, lobbyists for high-tech, entertainment and civil liberties interests were crammed into an icy room in the Dirksen Senate office building, trying to hammer out a bill that would have put Internet song-swapping networks like Kazaa and eDonkey out of business. . . . Talks eventually collapsed . . . .

David McGuire, "Uncertain Landscape Ahead for Copyright Protection; Specter to Lead Key Panel as Industry Ally Hatch Steps Down," Washingtonpost.com (Dec. 16, 2004). Moreover, "two other anti-piracy measures supported by Hatch -- one which would have allowed the Justice Department to slap downloaders with financial penalties, and another which would have made it easier to jail file swappers -- failed to pass at the end of the 2004 session." *Id.* This Court should not serve as a second chance for the lobbyists.

The principle of deferring to Congress, central to the *Sony* ruling, applies with even greater force to peer-to-peer technology due to its facilitation of First Amendment activities. As Justice Kennedy wrote for this Court in another case implicating First Amendment concerns, "[i]t is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989) and *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)) Congress considered but refrained from imposing secondary liability on peer-to-peer technology, and First Amendment considerations compel an interpretation of the copyright laws to avoid prohibiting this technology.

It is undeniable that peer-to-peer technology brings people together on the internet and promotes substantial non-infringing speech that would not otherwise occur. It matters not what percentage of the overall use of the technology is non-infringing. Constitutional rights are not diminished based on potential for lawlessness. The right to be free from searches and seizures without a warrant is not lost based on concealment of contraband by some or even most citizens. Our First Amendment freedoms are not hostage to those who engage in infringing activity, as law-abiding citizens are not to be punished for misconduct of others. *Cf. In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (It is a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

The recent candidacy of Howard Dean illustrated just how important and powerful the internet is. His campaign was the first to develop event planning that harnessed peer-to-peer software. As one reporter explained before the 2004 election:

> "Peer-to-peer is truly a new thing." What peer-to-peer refers to is any system where computer users can connect directly to each other without going through a middleman. When music sharing network Napster was driven out of business, software writers created a decentralized variant known as P2P in order to share music directly with each other, rather than going through a music site. But there are many other uses. For instance, people use P2P to connect with each other to create groups and plan

> meetings, rather than relying on a central campaign to plan it for them.

Alexandra Samuel, "Internet plays wild card into U.S. politics," The Toronto Star, D1 (Oct, 18, 2004).

In bypassing a middleman or gatekeeper, peer-to-peer software facilitates the exchange of information among users on the internet. That information includes political discourse and expressions of dissent in the United States and, to an even greater extent, under totalitarian regimes. Peer-to-peer transfers enable frequent communication with less risk of interference by governmental authorities. This software is a valuable tool for combating government suppression, particularly in totalitarian countries. The potential political influence of anonymous speech using peer-to-peer technology was recently illustrated by the dissemination of 240,000 names of communist-era spies, agents and informers in Poland, thoroughly discrediting the regime. Jan Cienski, "Poles nervous as their secret past becomes public: The online release of a list of suspected communist-era agents and informers has the nation gripped," Financial Times, p. 2 (Feb. 22, 2005). Such legitimate free speech use of anonymous speech immediately became the most popular activity on the internet in Poland. "Poland's communist-era 'spy' list more popular than sex on Internet," Agence France Presse – English (Feb. 5, 2005). This disproves the claim that peer-to-peer technology is inherently improper or unlawful.

It would be unjustified to prohibit a new technology based on current rather than potential activities. What matters, from a constitutional perspective, is what the technology holds for the future. As electronic transfers can be easily tracked and censored, but peer-to-peer exchanges cannot, this technology has undeniably valuable First Amendment uses. Anonymous speech has a vaulted place in our heritage of free speech and the press dating back to our earliest days as a nation. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360-67 (1995) (Thomas, J., concurring) (tracing the central role that anonymous speech played in colonies in the 1700s and afterwards).

The notion that private property is somehow enhanced by destroying new technologies and interfering with legitimate constitutional rights on the internet has been implicitly rejected by Congress, and should be dismissed here by this Court. In the United States there is no natural right to copyright, which is entirely statutory. Congress has not established a copyright power that can crush peer-to-peer systems. Petitioners and those sympathetic to them should lobby Congress if they seek a copyright power to suppress peer-to-peer technology. As of now, no such power exists.

Peer-to-peer software does not infringe on copyright, and facilitates activity protected by the First Amendment. Petitioners have failed to show a compelling interest or statutory basis for destroying this technology.

II. THIS COURT SHOULD REJECT THE SEVENTH CIRCUIT STANDARD OF *AIMSTER*, WHICH CONSTITUTED AN OVERLY BROAD RESTRAINT ON FREEDOM OF SPEECH AND ASSOCIATION.

This Court should reject the Seventh Circuit standard promulgated in *Aimster*, which was an overly broad restraint on freedom of speech and association. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). In *Aimster*, the Seventh Circuit affirmed an astoundingly broad injunction mandating that "Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster . . . ." 334 F.3d at 645 (Preliminary Injunction Order at ¶2). Its injunction then shifted the burden to defendants to "prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service." *Id.* The Seventh Circuit even held, without any precedent or logical justification, that the defendants had waived any rights to object to this broad injunction by failing to agree to a narrower alternative. *Id.* at 656.

Such prior restraint on speech is untenable. "Any prior restraint on expression comes ... with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The *Aimster* injunction is an example of a "prior restraint[] on speech and publication [that is] the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This Court has emphasized that "it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "[A]ll ideas having even the slightest redeeming social importance," such as those concerning "the advancement of truth, science, morality, and arts" enjoy the full protection of the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957) (quoting 1 Journals of the Continental Congress 108 (1774)). *See also United States v. O'Brien*, 391 U.S. 367 (1968).

Even if there were a compelling interest to restrict the rights of peer-to-peer systems, such restraints must be narrowly tailored to such interest. *See California Democratic Primary v. Jones*, 530 U.S. 567, 582 (2000) ("'Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest.'") (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Professor Rubenfeld laments that "[c]opyright law blithely ignores at least three basic principles of free speech jurisprudence that elsewhere go without saying," including the "First Amendment principle … against prior restraints." Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality,* 112 YALE L.J. 1, 5-6, (2002). "In some parts of the world, you can go to jail for reciting a poem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America." *Id.* at 3 (footnote omitted).

The threat posed to free speech by copyright is undeniable. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 3-4 (2001). In the past, courts have typically found protection of First Amendment values in the limitations imposed by copyright doctrine, often citing a 1970 law review article by Melville Nimmer for this proposition. *Id.* at 4. However, copyright owners have rapaciously sought and procured increasingly expansive protections. "This expansion raises serious questions about copyright's continued fit with its incentive-for-original-expression rationale. It has also imposed an increasingly onerous burden on speech." *Id.*

Justice Breyer observed the need to begin applying the First Amendment to the insatiable demands of copyright owners:

> The "monopoly privileges" that the Copyright Clause confers "are neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *cf.*, *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). This Court has made clear that the Clause's limitations are judicially enforceable. *E.g.*, *Trade-Mark Cases*, 100 U.S. 82, 93-94, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879). And, in assessing this statute for that purpose, . . . take into account that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related.

Eldred v. Ashcroft, 537 U.S. 186, 243-44 (2003) (Breyer, J., dissenting).

The Solicitor General, as *amicus*, misplaces the interest of the United States as being in the "meaningful and effective protection of intellectual property, which represents a significant portion of the Nation's economy and exports." Govt. Br. at 1. Quite the contrary, a greater interest of the United States is in the First Amendment rights that inflated copyrights impede. This Court has emphasized that "[t]he *sole* interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932) (emphasis added). Reward to the copyright owners is "a secondary consideration." *Eldred,* 537 U.S. at 227 n.4 (Stevens, J. dissenting).

As Justice Breyer further explained in *Eldred:*

> [U]nder the Constitution, copyright was designed "primarily for the benefit of the public," for "the benefit of the great body of people, in that it will stimulate writing and invention." . . . [H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)]. And were a copyright statute not "believed, in fact, to accomplish" the basic constitutional objective of advancing learning, that statute "would be beyond the power of Congress to enact. *Id.*, at 6-7. Similarly, those who wrote the House Report on legislation … said that "the constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning." H.R. Rep. No. 100-609, p.22 (1988) (internal quotation marks omitted).

Eldred, 537 U.S. at 247 (Breyer, J., dissenting).

Congress likewise observed the First Amendment concerns in view of the sweeping prohibitions in the Digital Millennium Copyright Act. The House Commerce Committee report on the DMCA warned against development of a "legal framework that would inexorably create a pay-per-use society," citing testimony that the newly created rights of the Act would dramatically diminish public access to information. H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

It is indisputable that many uses of peer-to-peer systems are valuable and non-infringing. Visitors who find and copy music and other information lacking any copyright restriction against such use would be engaging in non-infringing activity. Peer-to-peer software can be used for any files, not only music, and could even be beneficial in joint efforts to draft legal briefs. Allowing access to encrypted speech by dissidents in foreign countries is worth protecting and not in violation of respondents' copyrights. The Seventh Circuit ruling in *Aimster*, however, banned perfectly lawful activity in addition to arguably infringing activity. The injunction mandated that no copying, not even fair use copying, can occur without authorization. This draconian standard unnecessarily chilled peer-to-peer systems from facilitating lawful activity, and thereby constituted an unconstitutionally overbroad injunction.

In *Eldred*, this Court held "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 186 U.S. at 212-213. Congress has seen fit to enumerate a set of exclusive rights belonging to the copyright owner, 17 U.S.C. § 106, and has recently adjusted the temporal, 17 U.S.C. §§ 302, 304, and substantive, 17 U.S.C. § 1201, scope of these rights in accordance with the constitutional grant of authority to Congress. U.S. Const. Art. I, § 8, cl. 8. Under the Constitution, then, expansion of this set of rights is the exclusive prerogative of Congress.

While the Copyright Act grants courts authority to fashion injunctive relief appropriate to the circumstances of the case, 17 U.S.C. § 502, nowhere does the Copyright Act state that the distribution of non-infringing works or devices may be enjoined. This Court in *Sony* limited the authority of courts under the Copyright Act to fashion relief that would enjoin the distribution of devices capable of substantial non-infringing uses. *See Sony*, 464 U.S. at 442. Where, as here, non-infringing uses exist, the technology should not be enjoined. The decision below should be affirmed.

III. THIS COURT SHOULD REJECT THE EXPANSION OF A "COMMON LAW OF SECONDARY LIABILITY" FOR NEW TECHNOLOGIES AS URGED BY *AMICI* SENATORS LEAHY AND HATCH.

Two senators out of a total of 535 in all of Congress urge that this Court expand on a "common law of secondary liability" for the new technology at issue here.[3] This request by Senators Patrick Leahy and Orrin Hatch to abdicate and transfer congressional power to the courts is unprecedented. "The Court's role in declaring law is mandatory," they insist without citation to any authority. *Amici* Br. of Leahy & Hatch, 2004 U.S. Briefs (LEXIS) 480, at *7. Though this Court has declared specific laws unconstitutional, the federal judiciary does not declare law in the sense of creating it, as implied by the senators. Separation of powers is turned on its head when a few legislators urge the judiciary to invent law as a substitute for bills that failed to pass Congress as reported by David McGuire, quoted *supra* Point I.

There is, of course, no federal "common law" of copyright, which is itself a statutory creation. Nor should there be. Among the three branches of the federal government, only Congress has the power to "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, Sec. 8, cl. 8. This power is not conferred on the judiciary, and the arguments by Senators Leahy and Hatch to transfer this authority do not somehow make it constitutional. If there

[3] *See* Brief of *Amici Curiae* United States Senator Patrick Leahy and United States Senator Orrin G. Hatch in Support of Neither Party.

is to be secondary liability for copyright infringement by new technology, then that is for Congress alone to establish.

This Court has frequently invalidated attempts by the entire Congress, let alone just two of its members, to transfer power to other branches of government. *See, e.g., Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). This Court should flatly reject the invitation by Senators Leahy and Hatch to expand on the invention of secondary liability for copyright infringement without statutory basis. Though these *amici* insist that "the courts have recognized vicarious liability in copyright for years," *Amici* Br. of Leahy & Hatch, 2004 U.S. Briefs 480, at *10, in fact this Court has never fully embraced this fiction and should not do so here. The references to secondary or vicarious liability for copyright infringement by this Court have been infrequent and at most dictum, usually when the holding was against the claim of infringement. *See, e.g., Sony*, 464 U.S. at 434-442; *Aldinger v. Howard*, 427 U.S. 1 (1976) (dismissing claim); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 160-64 (1975).

The *amici* Senators cite only one decision by this Court holding in favor of secondary or vicarious liability for copyright infringement. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). There this Court imposed liability on a producer of "Ben Hur" who dramatized a copyrighted book subsequently sold by others. But that decision did not require there to be secondary or vicarious liability. "By Rev. Stat., § 4952, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of Ben Hur this copyright was infringed. We are of opinion that Ben Hur was dramatized by what was done." *Id.* at 61. The infringement was a violation of the applicable statute, and this Court did not create a "federal common law."

One is hard-pressed to think of a situation in which judicial creation of a legal standard would be more ill-advised than here. Technology is swiftly changing, rendering judicial rules about it archaic almost as soon as they are established. Justice Oliver Wendell Holmes attempted to resolve a conflict between the technologies of the railroad and emergent automobile. When a driver of a truck was killed by a passing train, Justice Holmes declared that "we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts." *Baltimore & O. R. Co. v. Goodman*, 275 U.S. 66, 70 (1927). Overturning a jury verdict in favor of the truck driver, Justice Holmes declared that "he must stop and get out of his vehicle," if his view is obstructed, to satisfy his standard of conduct. *Id.* This judicially invented law for new technology lasted a mere seven years, until Justice Cardozo wrote for this unanimous Court in overturning it in *Pokora v. Wabash R. Co.*, 292 U.S. 98 (1934).

Rapidly changing technology is for Congress, not the courts, to address.

IV. THIS COURT SHOULD REJECT THE DEMAND FOR EXPANSIVE SECONDARY LIABILITY URGED BY THE *AMICI* ECONOMISTS.

This Court should reject the call by nearly a dozen *amici* economists to impose secondary liability on owners of a technology despite substantial non-infringing uses.[4] Where, as here, the applicable statute does not impose liability vicariously, economic principles do not support indirect liability either. Their brief calls on this Court to suppress observed market preferences in favor of what they call "the next-best legally permissible approach," a concept as foreign to free enterprise as it is to law. *Amici* Br. of Arrow *et al*., 2004 U.S. Briefs (LEXIS) 480, at *12. The injustice of punishing one for the wrongdoing of others, as sought by petitioners here, is as flawed economically as it is legally.

In the absence of transaction costs, an assumption particularly apt for the internet, the free market automatically allocates resources in an efficient manner. Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). Yet the *amici* economists insist that "at a minimum, possible legitimate uses of a technology should be evaluated in light of plausible alternative means by which to accomplish the same ends." *Amici* Br. of Arrow *et al.*, 2004 U.S. Briefs 480, at *12. Even worse, the *amici* economists implore this Court to engage in armchair economic speculation rather than defer to the market's efficient allocation of resources. Because the court below did not attempt a comparative analysis, the *amici* economists insist that "it therefore significantly misestimates the substantiality of any non-infringing uses." *Id.* This argument is untenable legally and economically.

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[4] *See* Brief of *Amici Curiae* Kenneth J. Arrow, Ian Ayres, Gary Becker, William M. Landes, Steven Levitt, Douglas Lichtman, Kevin Murphy, Randal Picker, Andrew Rosenfield and Steven Shavell in Favor of Petitioners.

It is plainly less efficient for legitimate users of "peer-to-peer" technology to be compelled to transfer information using less-desired means. Those alternative means are available to them already, but disfavored for a variety of simple and complex reasons far beyond the purview of the judiciary. Where, as here, the technology is changing ever so swiftly, the comparative efficiencies likewise change far faster than legal opinions can address them. New litigation is not feasible to reevaluate the comparative efficiencies as market conditions quickly fluctuate.

The economists' proposal for judicial management of the free market is foolish at best, and dangerous at worst. From the vantage point of the courtroom, Justice Oliver Wendell Holmes' infamous exhortation for drivers to get out of their cars to look for oncoming trains may have seemed reasonable enough. *See Baltimore & O. R. Co. v. Goodman*, quoted *supra* Point III. But the efficiencies of the market dictated otherwise and legal chaos ensued until his view was overturned.

The judiciary cannot manage the economy in the face of technological advances and changes in preferences. The Coase Theorem established that clear and non-shifting lines of rights and liabilities are the best the law can do to maximize efficient transactions for the ongoing benefit of all. Opening the door to expansive theories of secondary liability would leave developers, distributors and manufacturers prey to undefined legal liability, and economic inefficiencies would abound. The invocation by the *amici* economists of ever-changing speculation about "plausible alternative means" promises legal ambiguities and uncertainties that are an anathema to the market.

The *amici* economists entirely overlook the substantial chilling effect that results from shifting penalties from the actual infringer to a vicarious infringer. This would impose a heavy disincentive on legitimate distribution of information over the internet, instilling fear that an alleged violation might trigger substantial litigation costs and enormous penalties. Real infringers would be left with little reason to change their behavior, as they would expect the easier target (the distributor) to bear the brunt of the penalties. Vicarious liability is easy to impose and the pockets are typically deeper than those of actual tortfeasors or infringers, but expediency in extracting judgments is not indicative of enhanced overall economic efficiency. To the contrary, the inefficiencies caused by chilling and even thwarting legitimate economic activity would likely dwarf any economic benefit.

Absent from the *amici* economists' arguments is recognition of enormous economic benefits resulting from an internet free from secondary liability. Such was the state of affairs that fueled the dot-com boom of the late 1990s, which helped erase the federal deficit, ignited prodigious stock market gains, and propelled the economy to unprecedented growth. No end was in sight until December 8, 1999, when petitioner Recording Industry Association of America (RIAA) filed its lawsuit against Napster in a precursor to this dispute. The efficiency of file trading over Napster had attracted a new generation to the internet, described as "a huge grass roots effort, comprised mostly of teenagers (many too young to vote) swapping files from their own personal websites." Rich Menta, "RIAA Sues Music Startup Napster for $20 Billion," MP3 Newswire.net (Dec. 9, 1999).[5] However, within months the specter of judicial interference with this "huge grass roots effort" chilled the internet, and the subsequent demise of Napster and its immense concentrated traffic hastened the end of the dot-com boom in 2000. Our economy is far worse off as a result: budget deficits ballooned and employment withered, while economic growth after the interference with the internet fell far below its prior levels. Reasonable ob-

[5] This article is available online at the following internet location: http://web.archive.org/web/20031209183601/www.mp3newswire.net/stories/napster.html (viewed Feb. 22, 2005)

servers may disagree about cause and effect, but these are issues for Congress rather the courts to sort out.

In the end, the "plausible alternative means" argument of the *amici* economists is best applied to their own recommendation. The "alternative means" to respondents' technology are offshore substitutes that would deprive the American economy of the benefits of investment in the internet, without providing any relief to petitioners. The market is not likely to budge from its highly efficient form of file trading as future technology circumvents any ruling in this case. In the wake of shutting down Napster, file trading continued unabated in distributive fashion without the economic benefits of a centralized marketplace. *Aimster* and similar rulings have reduced the incentive to invest in dot-com companies in the United States, without stopping infringement activity.

Chilling investment in the internet in the United States is not a desirable goal. Congressional restraint in imposing secondary liability on "peer-to-peer" technology may well reflect awareness that indirect benefits from that technology far exceed indirect costs. Judicial deference to Congress on this issue is essential.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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