

**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 AMICI CURIAE
INTERNATIONAL RIGHTS OWNERS**

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CORPORATE DISCLOSURE STATEMENT

[CIRCUIT RULE 26.1]

The following amici affirm that they do not have a parent corporation or any publicly held corporation that owns 10% or more of their stock:

Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique ("BIEM");

International Confederation of Societies of Authors and Composers ("CISAC");

International Confederation of Music Publishers ("ICMP/CIEM");

International Federation of the Phonographic Industry ("IFPI");

International Federation of Actors ("FIA");

International Federation of Film Producers Associations ("FIAPF");

International Federation of Musicians ("FIM");

International Publishers Association ("IPA"); and

International Video Federation ("IVF").

STATEMENT OF AMICI IDENTITY AND INTEREST

Pursuant to Fed. R. App. P. 29(a), *amici* state that all parties have consented to the filing of this brief.

The parties joining this *amicus curiae* brief are trade associations and professional organizations based outside the United States, representing hundreds of thousands of owners of copyrights and related rights all over the world. Specifically, *amici* represent record companies, producers and distributors; musical and literary publishers; composers and authors of a variety of protected works; rights societies; film producers; musical, theatrical and audiovisual performers, and video publishers, in more than 100 countries outside the United States.

BIEM, founded in 1929 and headquartered at Neuilly-sur-Seine, France, is the international organization representing 41 mechanical rights societies in 38 countries, which societies license the reproduction of songs including musical, literary and dramatic works. One of BIEM's principal missions is to negotiate compensation for its members, the licensors of copyrighted works, for the uses of their works by others.

CISAC, founded in 1926 and headquartered at Neuilly-sur-Seine, France, is a non-governmental, non-profit organization with a membership of 209 authors' societies in 109 countries, which societies represent more

than 2 million creators of musical, dramatic, and literary works, as well as works involving the visual and graphic arts. One of CISAC's principal objectives is to watch over, safeguard and contribute to the legal interests of creators, both in the international sphere and in national legislation.

ICMP/CIEM, domiciled at Lausanne, Switzerland, is the umbrella non-profit organization which globally represents, through its 30 members – national, regional and international music publishers' trade associations in Europe, Northern and Latin America, Australasia and Africa – most of music publishing throughout the world. Taking action against unauthorized Internet usage of copyrighted music is one of the priorities for ICMP/CIEM within its mission of promoting the value of songs and of the people who create, and who help to create, music.

IFPI, founded in 1933 and having its registered office in Zurich, Switzerland, is a non-profit trade association representing the international recording industry. IFPI's approximately 1500 record company members, who are located in 76 countries, own copyrights and related rights in sound recordings. IFPI's activities focus on combating traditional hard goods and on-line piracy, promoting legislation that protects the rights of intellectual property owners, and encouraging healthy trade, and electronic commerce, in recorded music.

FIA, founded in 1952, is an international non-governmental organization registered in the United Kingdom. FIA currently represents the interests of 95 performers' unions, guilds and associations in 75 countries around the world, from North and Latin America, to Europe, Africa and Australasia. FIA is a recognized non-governmental organization at UNESCO, the International Labour Organization (ILO), the World Intellectual Property Organization (WIPO), the International Theatre Institute (ITI) and the Council of Europe. FIA's affiliates represent hundreds of thousands of professional actors, singers, dancers, choreographers, broadcast professionals and other artists on a wide range of issues relating to the social and professional protection of performers, including their intellectual property rights.

FIAPF, founded in 1933 and based in Paris, France, is made up of 30 national producers' organizations in 27 countries. FIAPF's mission is to defend and promote the economic and legal interests of film and audiovisual producers on a global basis. FIAPF participates in copyright and neighboring rights' protection activities, anti-piracy efforts, the promotion and maintenance of audiovisual technology standards, and incentive policies for film production/distribution.

FIM, founded in 1948 and based in Paris, France, represents musicians worldwide and has approximately 70 member unions located in all regions of the world. Since its inception, FIM has played an important role in the international development and protection of performers' rights. It was one of the driving forces in the adoption of the 1961 Rome Convention, among the first international treaties to recognize performers' intellectual property rights, and has been active in the creation of numerous collecting rights societies, which manage performers' rights.

IPA, based in Geneva, Switzerland, established as an association under Swiss law in 1896, represents the worldwide book and journal publishing industry (print and electronic) through its 76 national and specialized member associations in 66 countries. One of IPA's main objectives is to promote a chain of strong and enforceable copyright laws around the world, including for electronic publishing. IPA enjoys observer status at the United Nations and its agencies, such as the Geneva-based WIPO and Paris-based UNESCO, and participates in developments at the Geneva-based WTO.

IVF is a non-profit international association established in 1988 under Belgian law, with the aim of providing national video associations with international representation of their members' interests as publishers and

distributors of pre-recorded video cassettes and DVDs. Based in Brussels, Belgium, the IVF represents thousands of video publishers in numerous international fora, including the European Communities, WIPO, WTO and United Nations institutions. Like the other *amici*, IVF has a strong interest in protecting the worldwide rights of its members, and supports the promotion and fostering of consistent and effective international enforcement of copyright.

SUMMARY OF ARGUMENT

The decision below is inconsistent with international copyright agreements to which the United States is a party. Under these agreements, the United States has an obligation not only to recognize the intellectual property rights that are violated by unauthorized uses of copyrighted works on the Internet, but also to provide rights owners—particularly foreign rights owners such as *amici*—*adequate and effective means of enforcing such rights*. The decision below raises two major concerns for international rights owners as to the enforceability of their rights.

The first concern is whether they will be able to enforce their rights effectively and protect them from being infringed, on a massive and unprecedented scale, in the United States, if the decision below is not reversed. Far from promoting effective enforcement of copyright, the decision below immunizes parties that are responsible for the infringement of copyrighted works on a massive scale, and effectively holds that in the face of such copyright infringement, copyright owners have no effective recourse whatsoever against such parties. The District Court's decision thus severely limits the practical ability of right owners such as *amici* to enforce their rights effectively against one of the most virulent species of online infringements – those carried out using peer-to-peer networks designed to

facilitate infringement – and thereby threatens to place the United States in breach of its international obligations and responsibilities.

The second concern is the potential spill-over effect that this decision could have for enforcement of copyright and related rights outside the United States, especially against the unauthorized distribution, use and reproduction of material emanating from the United States. Rights owners have always faced the problem of pursuing counterfeit or infringing copies, produced in countries with lax copyright enforcement practices, that cross borders and infiltrate markets in other countries. If United States law now allows services like Morpheus and Grokster to function without restraint, this spill-over problem will be global, massive and instant—given that hundreds of millions of users can get access via the Internet to unauthorized copies of materials emanating from any country where rights cannot be, or are not being, effectively enforced.

I. DENYING INTERNATIONAL RIGHTS OWNERS EFFECTIVE MEANS OF ENFORCING THEIR RIGHTS AGAINST MASSIVE INFRINGEMENTS ON PEER-TO-PEER SERVICES CONTRAVENES INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY

A. International Agreements Require Recognition Of Substantive Rights, And Effective Means Of Enforcing Those Rights.

International rights owners such as *amicis*' members are protected in the United States by a number of international agreements concerning the protection of intellectual property (all of which are reproduced in the appendices to Professor Nimmer's treatise). The main agreements of relevance here include:

- the Berne Convention for the Protection of Literary and Artistic Works (protecting "authors" and their representatives and assignees in all fields),¹
- the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (protecting a range of rights owners on substantive and enforcement issues),²

¹ July 24, 1971, U.S. Senate Treaty Doc. 99-27, KAV 2245, 1 B.D.I.E.L. 715, 17 U.S.C. § 104; also reprinted at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm> (the "Berne Convention").

- the WIPO “Internet Treaties” (protecting authors, producers and performers on Internet and other matters),³
- the Universal Copyright Convention (protecting authors in parallel with the Berne Convention),⁴ and
- the Geneva Phonograms Convention (protecting producers against unauthorized reproduction of their phonograms).⁵

A host of other international legal obligations of the United States require similar or related protections.⁶

² Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197, *reprinted at* http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (the “TRIPs Agreement”).

³ WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, at 1, 36 I.L.M. 65 (Geneva, 1997), *reprinted at* <http://www.wipo.int/treaties/documents/english/word/s-wct.doc> [hereinafter cited as “WCT”]; WIPO Performances and Phonograms Treaty, S. Treaty Doc. No. 105-17, at 18, 36 I.L.M. 76 (Geneva, 1997), *reprinted at* <http://www.wipo.int/treaties/documents/english/word/s-wppt.doc> (“WPPT”).

⁴ (Paris text, 1971), July 24, 1971, 25 U.S.T. 1341, T.I.A.S. 7868, 1 B.D.I.E.L. 813, *reprinted at* http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml (“UCC”).

⁵ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. 7808, 888 U.N.T.S. 67, *reprinted at* <http://www.wipo.int/clea/docs/en/wo/wo023en.htm>.

The foregoing international agreements guarantee non-U.S. owners of rights in intellectual property substantive rights, which have been enacted into law.⁷ These include rights to authorize or prohibit reproduction,⁸ distribution,⁹ Internet transmission¹⁰ of and other substantial uses of their works and other protected material. The international agreements allow for exceptions or limitations to these rights, but only in certain special cases that do not conflict with the normal exploitation of the material, and that do not unreasonably prejudice the legitimate interests of the rights holders.¹¹

⁶ See generally P. Geller, 1 Int'l Copyright Law & Practice, ¶¶ 3[3](b) (outlining United States treaty ratifications and implementation in the international copyright area).

⁷ See 17 U.S.C. § 104(b) (foreign author may claim U.S. copyright if domiciliary or national of Berne Convention, or other treaty nation, or if the work was first published in the U.S. or a Berne, UCC or other treaty nation), cited in *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 484 (9th Cir. 1994).

⁸ Berne Convention, art. 9; TRIPs Agreement, art. 9, 14; WCT, art. 1(4) (incorporating Berne requirements); WPPT, arts. 7, 11; UCC, art. IV *bis*(1); Geneva Phonograms Convention, art. 2.

⁹ Berne Convention, art. 14(1) (distribution of cinematographic works); TRIPs Agreement, arts. 11, 14(4) (rental of computer programs, cinematographic works, phonograms); WCT, arts. 6-7; WPPT, arts. 8-9, 12-13; UCC, arts. V, VI; Geneva Phonograms Convention, art. 2.

¹⁰ These rights, while encompassed under more general provisions of earlier treaties, are embodied explicitly in the WIPO Internet Treaties. WCT, art. 8; WPPT, arts. 10, 14.

¹¹ Berne Convention, art. 9(2) (three-step test); TRIPs Agreement, art. 13 (same); WCT, art. 10 (same); WPPT, art. 16 (same); UCC, art. IV *bis* (exceptions that do not conflict with the spirit and provisions of Convention); Geneva Phonograms Convention, art. 6 (same kinds of

The District Court here explicitly found that it was “undisputed” that defendants’ software and networks were being used to carry out direct infringements of some of these internationally guaranteed exclusive rights. 259 F. Supp. 2d at 1034 (individuals are engaged in direct infringement); *id.* at 1037 (“many if not most individuals” are committing infringement).

The TRIPs Agreement, which provides “the highest expression to date of binding intellectual property law in the international arena” (*United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999) (citation omitted)), for the first time also imposes far reaching requirements in the enforcement of intellectual property rights.¹²

Article 41(1) of the TRIPs Agreement requires in broad strokes that:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to *permit effective action* against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies *to prevent infringements* and remedies

limitations permitted with respect to literary and artistic works). *See generally* 17 U.S.C. § 107 (fair-use exception); World Trade Organization, Report of the Panel, *United States – Section 110(5) of the U.S. Copyright Act*, Case No. 00-2284, (WT/DS160/R, 15 June 2000) (interpreting three-step test of Berne Convention art. 9(2) and TRIPs).

¹² “TRIPs stands unique among international copyright compacts in the sophistication of its enforcement mechanisms [G]iven that TRIPs contains enforcement provisions far more efficacious than those extant under Berne, it can be anticipated that TRIPs will set the international standard for enforcement.” 4 Nimmer on Copyright § 18.06[B][2], at 18-67.

which constitute a deterrent to further infringements. (emphasis supplied)¹³

The United States consistently has taken the position in its negotiations with WTO partners that “effectiveness” of a party’s enforcement and remedies in this context means enforcement and remedies that “work in practice.”

By way of example, the one formal WTO dispute in the copyright area that involved the “effectiveness” requirements of Article 41 of TRIPs is instructive.¹⁴ In that dispute, the United States requested consultations with Greece and the European Communities under the WTO dispute-settlement procedure, in May 1998. The United States claimed that Greece and the EC were in violation of, *inter alia*, Article 41 of TRIPs not only because of

¹³ The WIPO Internet Treaties also contain a similar requirement. The WCT provides as follows: “Provisions on Enforcement of Rights. (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty. (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” WCT, art. 14; WPPT, art. 23.

¹⁴ Request for Consultations by the United States, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1824 (WT/DS124/1, IP/D/13, 7 May 1998); Request for Consultations by the United States, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1813 (WT/DS125/1, IP/D/14, 7 May 1998).

statutory shortcomings but also because the remedies on the books had had no practical effect on the problem of widespread piracy.

As evidence of this, the United States cited the facts that a “significant number” of television stations in Greece regularly broadcast copyrighted United States films and television programs without authorization of the copyright owners, and that infringement occurred repeatedly and continuously despite efforts by United States rights holders to pursue their claims in Greece.¹⁵ The United States claimed that “effective remedies against copyright infringement do not appear to be provided or enforced in Greece” and that “this situation appears to be inconsistent with the obligations of Members under Articles 41 and 61 of the TRIPS Agreement.”¹⁶

The dispute ultimately ended by mutually agreed settlement, which documented both legislative and law-enforcement initiatives undertaken to remedy the piracy at issue, as well as to monitor the *actual* effectiveness of the actions taken and remedies available, that is, significantly reduced levels of television piracy in Greece.

* * *

¹⁵ See Requests for Consultations by the United States, *supra*.

¹⁶ *Id.*

Judicial decisions, such as the present one, form an important part of the analysis of whether a particular country is in compliance with its TRIPs obligations. Particularly relevant to a consideration of the TRIPs requirement of “effective action” to prevent and deter piracy, the WTO Appellate Body in *India -- Patent Protection for Pharmaceutical Protection and Agricultural Chemical Products* repeated the principle from a 1926 Permanent Court of International Justice case instructing that national compliance be evaluated broadly on the basis of numerous factors, including judicial decisions:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.¹⁷

¹⁷ *India – Patent Protection for Pharmaceuticals Protection and Agricultural Chemical Products*, No. 95-0000, (WT/DS50/ABIR, 19 Dec. 1997) ¶ 65, at 25, citing *Certain German Interests in Polish Upper Silesia*, [1926] PCIJ Rep., Series A, No. 7, at 19; see also *id.* ¶ 67, at 25-26, citing Report of the Panel, *United States—Section 337 of the Tariff Act of 1930* (BISD 36S/345, 7 Nov. 1989) (panel conducted detailed examination of United States legislation and practice, including court proceedings).

It is particularly appropriate in this case to apply the principle that judicial decisions, among other state actions, can play a key role in determining whether “in applying [its] law, [the United States] is acting in conformity with its obligations” under the TRIPs Agreement. The decision below renders unavailable to rights holders an enforcement mechanism (vicarious or contributory liability) rooted in the statutes, and which has been repeatedly articulated by the courts, the result of mapping common-law principles to that particular terrain of copyright law. Thus, to the extent that it can be demonstrated that the decision below, by its application of existing law, works to make “effective action” against online infringement “unavailable” to rights holders, including by denying expeditious preventive remedies and undermining deterrence, United States compliance with its international obligations could be called into question.

A reversal, in contrast, would not only be a proper application of domestic law, but would comport well with the U.S.’s obligations to provide effective enforcement in the copyright area. “GATT [now WTO] agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.” *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995), citing *Alexander Murray v. Schooner Charming*

Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains).

There is no statutory language or other expression of Congressional intent anywhere in the history of United States accession to the WTO or the WIPO Internet Treaties that suggests that Congress wished to derogate from the international obligations assumed by the United States government in a way that would deprive international rights owners of effective means of enforcing their rights against the sort of infringements at issue here. Indeed, the indicia of legislative intent are directly to the contrary.¹⁸ Congress therefore should be assumed to have intended that “effective enforcement”

¹⁸ Hence, when legislation to implement the TRIPs Agreement was presented to Congress by the U.S. Administration in 1994, the Agreement was described as “establish[ing] comprehensive standards for the protection of intellectual property and the enforcement of intellectual property rights in WTO member countries,” and “ensur[ing] that critical enforcement procedures will be available in each member country to safeguard intellectual property rights.” Uruguay Round Trade Agreement, Texts Of Agreements, Implementing Bill, Statement Of Administrative Action And Required Supporting Statements, in H.R. Doc. No. 103-316, 103d Cong., 2d Sess. (1994) at 981, Uruguay Round Trade Agreements Act, at 312. While, understandably, the focus of legislative consideration was on how the TRIPs Agreement “will dramatically improve protection and enforcement of U.S. intellectual property rights abroad,” H.R. Rep. No. 103-826, 103d Cong., 2d Sess., pt. 1 (1994) (“Benefits of the Uruguay Trade Agreements”), there was nothing to indicate that this benefit was to be obtained at the cost of denying effective enforcement for domestic and international rights holders under U.S. law.

as required under international copyrights agreements would be available in the United States, including under the well-established contributory and vicarious liability doctrines.¹⁹

Amici do not argue here that any of the particular international intellectual property agreements of the United States should be given “direct effect.”²⁰ The application of the “direct effect” doctrine is a complex issue, which is not necessary to resolve with respect to any particular international agreement here.²¹

¹⁹ As plaintiffs-appellants have demonstrated in their moving briefs, the situation requiring effective enforcement here is very different from the situation presented in *Sony Corp of America v. Universal City Studios, Inc.* 464 U.S. 417, 104 S.Ct. 774 (1984). Among other things, the underlying activity at issue here is widespread, massive infringing reproductions and distributions, not substantial “fair use,” and the intermediary has an ongoing relationship with the direct infringers. See MGM Plaintiffs-Appellants’ Opening Brief at 40-43.

²⁰ See generally *Hopson v. Kreps*, 622 F.2d 1375, 1381 (9th Cir. 1980) (discussing “direct effect” and self-execution concepts).

²¹ See generally Geller, 1 Int’l Copyright Law & Practice § 3[4](a), at INT-89: “The situation in the United States is ambiguous. The United States Congress made abundantly clear its intent to leave the Berne Convention without any self-executing force. At the same time, the U.S. Senate acknowledged both the courts’ exclusive power to decide ‘the question of whether a treaty is self-executing’ and the courts’ responsibility for enforcing ‘appropriate domestic law’ to protect the rights of Berne claimants. The Congressional intent—in so many words, as the U.S. Copyright Act [17 U.S.C. § 104(c)] now states, to preclude any ‘reliance upon . . . the provisions of the Berne Convention’—cannot therefore be read to compel an ostrich-like refusal by the courts to consult any Berne text at all” (citations omitted).

Nevertheless, courts have viewed international obligations like the WTO TRIPs agreement as “persuasive authority” in interpreting questions that arise under its implementing legislation.²² Indeed, “plaintiffs are free to argue that Congress would never have intended to violate an agreement it generally intended to implement without expressly saying so.” *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1367 (Ct. Int’l Trade 2003) (reviewing WTO Agreements’ obligations in dumping area), citing *Timken v. United States*, 240 F. Supp. 2d 1228, 1238 (Ct. Int’l Trade 2003).

²² *PAM, S.p.A. v. United States*, slip. op. 2003-48, n.13 (Ct. Int’l Trade May 8, 2003).

B. The District Court Decision In Practice Strips International Rights Owners Of An Effective Means Of Enforcing Their Rights.

Amici in this case are principally concerned that the District Court's decision in practice leaves international rights holders without an effective means of enforcing their rights against what the District Court characterized as widespread infringements involving millions of individuals, promoted by services that "clearly know that many if not most of those individuals who downloaded their software subsequently use it to infringe copyrights" (259 F. Supp. 2d at 1037) and that defendants "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares" (*id.* at 1046).

If such knowing facilitators of and contributors to massive infringement cannot be stopped and ordered to act responsibly with respect to copyrighted material, what effective enforcement mechanism *is* realistically available? The District Court decision leaves few, if any, practical options. For example, even if the alternative of bringing suits against large numbers of individual infringers may be a possibility for large and well-funded rights owners, many of *amicis'* members are small or otherwise insufficiently funded for that ever to be a real option.

If unauthorized mass reproduction and distribution via the Internet cannot be stopped in the United States at the hub of such activity -- the services that knowingly promote, assist and profit from massive infringements -- it would put rights owners in the untenable position of having to chase every unauthorized copy and transmission to every one of the other countries to which they are distributed. Such a result would be unnecessary and unwarranted in this case, and would be potentially devastating to international rights owners.

Copyright law has developed secondary liability doctrine precisely to deal with such problems. As Judge Posner recently said in *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003):

Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers ("chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem," Randal C. Picker, "Copyright As Entry Policy: The Case of Digital Distribution," 47 Antitrust Bull., 423, 442 (2002)), the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aidor and abettor.

In making its judgment in this case, this Court should give careful consideration to what remedies *are* available for rights owners to enforce their rights effectively against what are probably the most widespread

infringements in history, in a world where infringement increasingly knows
no borders.²³

²³ As noted by the *Lieber* Plaintiffs (opening brief at 20-21), the District Court's finding that "substantial noninfringing uses" exist for defendants' services and software because people might use them "in countries where it is legal" (259 F. Supp. 2d at 1035) does not appear supported by the record. In any event, it cannot seriously be contended that the behavior of any "lowest common denominator" country—one that might refuse to follow international agreements requiring the global protection of intellectual property rights—should constrain those nations that seek to provide the required protections.

II. THIS DECISION WILL BE TAKEN INTO CONSIDERATION AS COURTS OUTSIDE THE U.S. GRAPPLE WITH THESE ISSUES.

The decision below will have a deleterious ripple effect on similar cases involving so-called “decentralized” peer-to-peer file transmission and copying services in other countries. Although courts in every country apply their own national laws and look to their own legal precedents and authorities, they also are informed by judicial decisions in the United States involving new Internet issues. Parties (including *amici*) do provide information on United States court judgments and raise arguments from United States court decisions as persuasive authority in other jurisdictions.

For example, United States courts dealt first with the issues surrounding so-called “centralized” peer-to-peer services in the *Napster* litigation.²⁴ Since then, cases brought and decided so far in Japan and Korea have reached the same result against similar services.²⁵ In both cases, the parties submitted information on the decisions of the District Court and this Court in *Napster*, and the reasoning of these decisions appears to have been taken into account in the foreign courts’ judgments.

²⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), affirming *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

²⁵ See A. Dixon, *Internet Copyright Litigation: Non-U.S. Developments*, BNA World E-Commerce & IP Report, June 2003, at 5, 6-7. The following case reports are taken from the referenced article.

*In Nippon Columbia Co., Ltd., et al. v. Yugen Kaisha Nippon MMO,*²⁶

defendant Japan MMO operated a peer-to-peer service used by approximately 42,000 persons, who made available about 80,000 files at any one time. Like Napster, Japan MMO created an index of files available for download, and users transmitted and copied files directly to each other. The court found, both at the preliminary injunction and “interlocutory judgment” stage, that not only were users violating plaintiffs’ exclusive right under the copyright law of “making transmittable” plaintiffs’ works and recordings, but Japan MMO itself played a role in the infringing acts. Japan MMO was enjoined from offering the service on April 9, 2002, and was found liable on the merits on January 29, 2003. Damages remain to be assessed.

*In Asia Media Inc. et al v. Yang et al.,*²⁷ members of the Recording Industry Association of Korea (RIAK) filed civil claims against the Korean “file sharing” service Soribada on February 8, 2002. On July 9, 2002, the court issued an injunction requiring the peer-to-peer service to stop letting

²⁶ 2002 (Wa) Case No. 4249 (Tokyo District Court, 29th Civil Division, interlocutory judgement 29 Jan. 2003). *See* RIAJ Press Release, *Court decided Japan MMO, a file-sharing service company, for illegality; Interlocutory judgment by the Tokyo District Court*, <http://www.riaj.com/e/news/20030129.html> (29 Jan. 2003).

²⁷ No. 2002KAHAP77 (Suwon District Court, Seongnam Branch, First Civil Dep’t, 9 July 2002).

users download the plaintiffs' recordings, to stop operating the service on the Korean Data Centre's servers, and to pay a \$170,000 guaranty.²⁸

Similarly, as courts outside the U.S. begin to look at so-called "decentralized" services like those of Streamcast's Morpheus, and Grokster, United States court decisions can and will have an important effect internationally.

Presently on appeal before the Netherlands Supreme Court is a case involving the authors' rights society Buma/Stemra and peer-to-peer operator Kazaa BV (which has defaulted in the instant case, as noted by the District Court below), on which there will be further briefing by the Netherlands Advocate General in September and a decision several months from now. The court is evaluating conflicting rulings from the Amsterdam district court and appellate court in a "summary proceedings" decision involving Kazaa.

The Amsterdam district court had found on November 29, 2001, that Kazaa violated copyright law by giving users the opportunity to download music files by means of its computer program and network without a license, and ordered Kazaa to take such measures as to render impossible any

²⁸ RIAK also filed parallel criminal proceedings, and the prosecutor indicted the two operators, in August 2001, charging them with aiding and abetting infringement. The criminal case was dismissed on May 15, 2003, on the ground that the charges did not adequately specify how Soribada aided and abetted copyright infringement. The prosecutor has appealed this dismissal to the High Court, and the appeal is pending.

communication and copying of the Buma/Stemra repertoire.²⁹ The court of appeals reversed, on the basis of a single affidavit from a witness of Kazaa (the sole piece of evidence introduced in the summary proceedings as to the functioning of the peer-to-peer system), and among other things seemed to find that so long as the Kazaa system had *any* non-infringing use, it was immune from liability.³⁰

Although that case will be decided only on the basis of a very limited evidentiary record and will have only limited precedential value, the Netherlands Supreme Court will consider issues similar to those before this Court, and *amici* fully expect that the Netherlands Advocate General will present the holding in the U.S. District Court's decision on Morpheus and

²⁹ *Kazaa v. Buma/Stemra*, No. KG 01/2264 OdC (Amsterdam Ct. of Justice, 29 Nov. 2001), *rev'd*, *Kazaa v. Buma/Stemra*, No. 1370/01 (Amsterdam Ct. of Appeal, 28 Mar. 2002), *appeal filed*, No. C 2002/186 (Netherlands Sup. Ct., 23 May 2002).

³⁰ *See id.* The court of appeals relied almost exclusively on a last-minute affidavit of a Prof. E. Huizer—presented not to the District Court but to the court of appeals under Dutch procedural rules—who argued that Kazaa lacked control over the system it had created and that its software had uses other than to infringe copyright. Due to the nature and appeal process for such ‘summary proceedings’ in the Netherlands, facts contradictory to those presented by Prof. Huizer were not considered by the Appellate Court (and indeed could still be presented in any proceedings on the merits). *See Dixon, supra* note 25, at 7. Proceedings on the merits would be considered *de novo*.

Grokster as part of the analysis that the Dutch court should consider in making its decision.

As courts like these outside the U.S. begin considering Internet issues involving the new generation of peer-to-peer services like those of Morpheus and Grokster, it is in the interest of *amici* and all affected parties that the U.S. cases in this area provide helpful analysis and clear guidance on how massive infringements on services like these can be stopped, and in particular, how key enablers and facilitators such as defendants can and should be held responsible.

This will help to promote consistent international treatment of Internet-based activities, a key goal of the evolving international treaty structure in the intellectual property field. Only after effective and consistent enforcement mechanisms are in place against infringement can the legitimate on-line use of copyrighted materials ultimately and best be developed and maintained in the international arena.

CONCLUSION

For all the foregoing reasons, *amici* respectfully submit that this Court reverse the judgment of the District Court below.

Dated: August 25, 2003

Respectfully Submitted,
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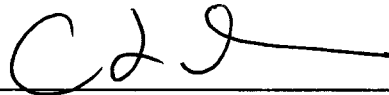
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FORM 8 CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(c) and 9th Cir. Rule 32-1 the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains fewer than 7000 words.

Dated: August 25, 2003



Hank L. Goldsmith