

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 METRO-GOLDWYN-MAYER STUDIOS, INC., :

4 ET AL., :

5 Petitioners, :

6 v. : No. 04-480

7 GROKSTER, LTD, ET AL. :

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P R O C E E D I N G S

[10:13 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in number 04-480, MGM Studios versus Grokster,
Limited.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

ON BEHALF OF PETITIONERS

MR. VERRILLI: Mr. Chief Justice, and may it
please the Court:

Copyright infringement is the only commercially
significant use of the Grokster and StreamCast services,
and that is no accident. Respondents deliberately set out
to capture a clientele of known infringers to stock their
services with infringing content, they intentionally and
directly promote the infringing use of the service, they
support infringing use of the service, and they directly
--

JUSTICE STEVENS: May I just interrupt for the
one -- you said "the only significant use." There's a
footnote in the red brief that says the figure is some 2.6
billion legitimate uses.

MR. VERRILLI: Yes. Yes, Your Honor. I --

JUSTICE STEVENS: Is that correct, or incorrect?

MR. VERRILLI: Well, I think it's an absolutely

1 incorrect assertion of reality, and perhaps I could delve
2 into it and explain why.

3 The evidence in this case, which was presented
4 at summary judgment, showed that 90 percent of the
5 material on the services was either definitely or very
6 likely to be infringing.

7 JUSTICE STEVENS: Now, was there a finding of 90
8 percent?

9 MR. VERRILLI: Well, this was submitted on
10 summary judgment, Your Honor, and we lost summary
11 judgment, so the evidence has got to be construed in the
12 light most favorable to us. And the Ninth Circuit decided
13 the case on the assumption, we'd submit, of 90 percent.

14 But with respect to that 10 percent, what
15 happened, and we submit is completely wrong, is that the
16 Ninth Circuit drew the inference, because it wasn't shown
17 by our expert study, which, by the way, is the only
18 empirical analysis in the case, to be infringing, that the
19 Court could assume that it was noninfringing and then
20 extrapolate from that to a number along the lines of the
21 number that Your Honor suggested. And I think that that's
22 completely illegitimate analysis, factually, and, besides,
23 that number is big only because the overall activity is so
24 big. The scale of the whole thing is mind-boggling. If
25 there are that many noninfringing uses --

1 JUSTICE STEVENS: It goes to the --

2 MR. VERRILLI: -- imagine how many infringing --

3 JUSTICE STEVENS: -- accuracy of your statement
4 that there is no other significant legitimate use.

5 MR. VERRILLI: I don't think there -- I think
6 it's quite accurate on the summary-judgment record, and
7 certainly drawing the inferences in our favor, as we must
8 here on summary -- on this summary-judgment record, that
9 there is commercially significant noninfringing use.

10 JUSTICE GINSBURG: But there could be. There
11 could be, both with respect to material in the public
12 domain and with respect to people who authorize the
13 transmission.

14 MR. VERRILLI: I don't think, in the context of
15 this record in this case and the business model of these
16 Defendants, Grokster and StreamCast, that that is true,
17 Justice Ginsburg. I don't think that's right. I think
18 what Grokster and StreamCast are arguing is that this
19 Court's decision in Sony stands for the proposition that
20 their massive actual infringement is -- gets a free pass,
21 a perpetual free pass, so long as they can speculate that
22 there are noninfringing uses out there, such as public-
23 domain uses and authorized uses. We don't think that that
24 -- that Sony stands for any such proposition.

25 We also want to point out that that doesn't help

1 them -- that proposition doesn't help them with respect to
2 one very significant part of this case, and that's the
3 fact that they intentionally built a network of infringing
4 users, and they actively encouraged and assisted
5 infringement.

6 Now, even if there are commercially significant
7 noninfringing uses, and we submit there most definitely
8 aren't under Sony, but even if there are, that's no
9 defense to a contributory infringement claim based on
10 intentional building up of an infringing business and
11 active encouragement and assistance of infringement, and
12 it can't be; because, otherwise, then the fact that they
13 had commercially significant noninfringing uses, again,
14 would be just a free pass to actively promote infringing
15 uses; not merely to support them, but to promote them.
16 And so --

17 JUSTICE SOUTER: BUT, your argument, I take it,
18 would be the same if the proportions were reversed. Your
19 argument with respect to -- your current argument with
20 respect to infringing use would be the same if only 10
21 percent -- if it were assumed that only 10 percent of the
22 use were illegitimate and infringing. Is that correct?

23 MR. VERRILLI: The active-encouragement aspect
24 of our argument would be the same, certainly.

25 JUSTICE SOUTER: That's right.

1 MR. VERRILLI: They don't get a -- they don't
2 get a free pass to encourage any infringement.

3 JUSTICE O'CONNOR: Is that the same as active
4 inducement --

5 MR. VERRILLI: Yes. I think there's --

6 JUSTICE O'CONNOR: -- as that term --

7 MR. VERRILLI: -- there's a lot of --

8 JUSTICE O'CONNOR: -- is used?

9 MR. VERRILLI: Yes, Justice O'Connor, there's a
10 lot of lingo floating around in this case -- inducement,
11 active encouragement, assistance.

12 JUSTICE O'CONNOR: If we should think that the
13 Respondents are not liable for the type of contributory
14 infringement dealt with in Sony, could this Court reach
15 the question of active inducement on this record?

16 MR. VERRILLI: Yes, very definitely. I think --
17 I think the Court, of course, should find that there's
18 contributory liability under the Sony theory --

19 JUSTICE O'CONNOR: I know you do, but --

20 MR. VERRILLI: -- but with respect to --

21 JUSTICE O'CONNOR: -- I just said --

22 MR. VERRILLI: -- that theory --

23 JUSTICE O'CONNOR: -- could you --

24 MR. VERRILLI: Yes.

25 JUSTICE O'CONNOR: -- assume, for a moment, that

1 we didn't; could we, nonetheless, address the active
2 inducement --

3 MR. VERRILLI: Yes, Justice O'Connor, and let me
4 explain why. The District Court in this case issued a
5 partial final judgment, under rule 54(b), granting the
6 Respondent's summary-judgment motions. Now, we argued for
7 contributory liability on two theories in the District
8 Court and in the Ninth Circuit. We argued that there was a
9 lack of commercially significant noninfringing use under
10 Sony, and we've argued the inducement or active-
11 encouragement theory. We argued that both theories entitle
12 us to relief against the current operations of the service,
13 to entitle us to damages, and entitle us to injunctive
14 relief to eliminate the harmful ongoing infringing
15 consequences of this intentionally built-up infringement
16 machine.

17 The District Court granted summary judgment
18 against us and gave a clean bill of health, gave
19 absolution, essentially, to the current versions of the
20 services. The only thing that was left to us, as the
21 Ninth Circuit and the District Court -- and the District
22 Court, both, understood the law, is that we can go back
23 and try to show that, with respect to specific past acts
24 of infringement, if we can show that they occurred at a
25 time when we had given them notice that they were about to

1 occur, and that we had the power to -- and they had the
2 power to stop them at the moment we gave them the notice,
3 that we can get damages for those specific things, and
4 those specific things only. That's all that's left in
5 this case. And I think it's quite clear, from the Rule
6 54(b) certification order of the District Court that it
7 was only damages with the past services and the past acts
8 --

9 JUSTICE KENNEDY: It's not clear -- it's not
10 clear to me from your brief, focusing on the contributory
11 aspect of it, not -- and not the inducement part of it --
12 it's not clear to me from your brief what your test is.
13 What do we tell the trier of fact, that if there is a
14 substantial part of the use which is noninfringement, if
15 there's any part?

16 MR. VERRILLI: Here's what I -- here's where I
17 think the test --

18 JUSTICE KENNEDY: Leaving aside the inducement.

19 MR. VERRILLI: Right. Here's what I -- here's
20 what we think the test is on the -- what we'll call the
21 Sony aspect of the case, that it's -- the question here is
22 -- Sony poses to us -- is really a touchstone kind of
23 question, not a numerical kind of question. The question
24 under Sony is whether this is a business that is
25 substantially unrelated to infringement. In other words,

1 are they building their business on supporting legitimate
2 activity, or, instead, are they building their business
3 supporting infringing activity?

4 JUSTICE KENNEDY: Well, then we just throw this
5 to the birds on the trier of fact in every case --

6 MR. VERRILLI: No, I think --

7 JUSTICE KENNEDY: Well, how do we know --

8 MR. VERRILLI: And that's where you start.
9 That's the touchstone. Now, the numbers, the relative
10 proportions of use, are relevant. In a case like Sony
11 itself, certainly, where the majority use was
12 noninfringing, that's a legitimate business; you don't
13 need to go further. In a case like this one, where,
14 taking the record at summary judgment in our favor, as it
15 must be, and the Ninth Circuit's assumption that you've
16 got 90 percent infringing use, billions and billions of
17 acts of infringing use, and minuscule actual noninfringing
18 use, it seems to us it's just --

19 JUSTICE BREYER: You're not saying -- now you're
20 using different tests. Your test is "substantial." All
21 right, on your test, are we sure, if you were the counsel
22 to Mr. Carlson, that you recommend going ahead with the
23 Xerox machine? Are you sure, if you were the counsel to
24 the creator of the VCR, that you could recommend, given
25 the use, copying movies, that we should ever have a VCR?

1 Are you sure that you could recommend to the iPod inventor
2 that he could go ahead and have an iPod, or, for that
3 matter, Gutenberg, the press? I mean, you see the
4 problem.

5 MR. VERRILLI: Yes, I think my answer to --

6 JUSTICE BREYER: What's the answer?

7 MR. VERRILLI: -- those questions are: yes, yes,
8 yes, and yes.

9 [Laughter.]

10 JUSTICE BREYER: Because in each case -- for all
11 I know, the monks had a fit when Gutenberg made his press
12 --

13 [Laughter.]

14 JUSTICE BREYER: -- but the problem, of course,
15 is that it could well be, in each of those instances, that
16 there will be vast numbers of infringing uses that are
17 foreseeable.

18 MR. VERRILLI: I disagree with that, Your Honor.
19 Certainly not -- I don't think there's any empirical
20 evidence to suggest, with respect to any of the things
21 that Your Honor just identified -- and let me pick out the
22 iPod as one, because it's the most current example, I
23 guess. From the moment that device was introduced, it was
24 obvious that there were very significant lawful commercial
25 uses for it. And let me clarify something I think is

1 unclear from the amicus briefs. The record companies, my
2 clients, have said, for some time now, and it's been on
3 their Website for some time now, that it's perfectly
4 lawful to take a CD that you've purchased, upload it onto
5 your computer, put it onto your iPod. There is a very,
6 very significant lawful commercial use for that device,
7 going forward.

8 And, remember, I -- what our test -- our test is
9 not "substantial." Our test is that it's a -- it's a --
10 when it's a vast-majority use, like here, it's a clear
11 case of contribution --

12 JUSTICE SCALIA: How do you -- how do you know,
13 going in, Mr. Verrilli? I mean, I'm about to start the
14 business. How much time do you give me to bring up the
15 lawful use to the level where it will outweigh the
16 unlawful use? I have to know, going in.

17 MR. VERRILLI: Well, I --

18 JUSTICE SCALIA: And it's one thing to sit back
19 and, you know, calculate with this ongoing business, it's
20 90 percent/10 percent. But I'm a new inventor, and I'm --
21 you know --

22 MR. VERRILLI: I think the weight --

23 JUSTICE SCALIA: -- I'm going to get sued right
24 away. I know I'm going to get sued right away, before I
25 have a chance to build up a business.

1 MR. VERRILLI: I don't think that's right, Your
2 Honor, and here's why. To -- it's not just the absence of
3 commercially significant noninfringing uses that
4 demonstrates contributory infringement. I mean, you have
5 to demonstrate that you're making a material contribution,
6 with knowledge that you're doing so. The inventor, at the
7 outset, is not in that position. They're not making a
8 contribution with knowledge that they're doing so. Do
9 they have absolute certainty? No, they don't have
10 absolute certainty.

11 JUSTICE KENNEDY: Well, I don't quite understand
12 the -- I take it, inventors are profit-motive-driven, and
13 if they know that something they're working on is going to
14 have copyright experience, you -- have got copyright
15 problems, you can't just say, "Oh, well, the inventor's
16 going to invent anyway."

17 MR. VERRILLI: Well, I -- but the problem --

18 JUSTICE KENNEDY: Or did I misunderstand your --

19 MR. VERRILLI: No, I -- I think that you have --
20 to show contribution, you should have -- you have to be
21 making a material contribution, with knowledge that you're
22 doing so. And so --

23 JUSTICE SCALIA: But the inventor of Xerox does
24 that. I mean, he puts out the machine. He knows some --
25 he knows a lot of people are going to use it to Xerox

1 books.

2 MR. VERRILLI: I don't think that's right,
3 Justice Scalia. I don't think there's anywhere close to a
4 showing -- I don't think there could be anywhere close to
5 a showing that you've got the vast majority of use from --
6 for infringement from the time that the device comes out.
7 I just don't think that's --

8 JUSTICE SOUTER: Well, let's go --

9 MR. VERRILLI: -- realistic.

10 JUSTICE SOUTER: -- let's go from Xerox back to
11 your iPod. How is that clear in the iPod case? I may not
12 understand what people are doing out there, but it's
13 certainly not clear to me. I know perfectly well I could
14 go out and buy a CD and put it on my iPod, but I also know
15 perfectly well that if I can get the music on the iPod
16 without buying the CD, that's what I'm going to do. And I
17 think it's reasonable to suppose that everybody else would
18 guess that. So why, in the iPod, do you not have this
19 Damoclean sword?

20 MR. VERRILLI: Well, because I don't actually
21 think that there is evidence that you've got overwhelming
22 infringing use. I just think that's -- it's not a -- it's
23 not a --

24 JUSTICE SOUTER: Well, there's never evidence at
25 the time the guy is sitting in the garage figuring out

1 whether to invent the iPod or not. I mean, that's --

2 MR. VERRILLI: I think when you get to the --

3 JUSTICE SOUTER: -- the concern.

4 MR. VERRILLI: -- I think when you have vast-

5 majority infringing use, they should be on the hook. Now,

6 I don't think --

7 JUSTICE SOUTER: Okay, but you're --

8 MR. VERRILLI: -- you have that problem --

9 JUSTICE SOUTER: No, but you're --

10 MR. VERRILLI: -- with the iPod, and --

11 JUSTICE SOUTER: -- you're not answering --

12 you're not answering the question. The question is, How

13 do we know in advance, on your test, anything that would

14 give the inventor, or, more exactly, the developer, the

15 confidence to go ahead? As was said a minute ago, he

16 knows he's going to be sued immediately. There isn't a

17 product performance out there, as there is in this case.

18 So, on your substantiality theory, why isn't it a foregone

19 conclusion in the iPod that the iPod loser -- or developer

20 is going to lose his shirt?

21 MR. VERRILLI: Well, first of all, I don't -- I

22 think it's just counterfactual to think that there is

23 going to be overwhelming infringing use of the iPod in the

24 way that there indisputably is here. Second, to the

25 extent you get the closer cases, it is our position, as I

1 gather it is the position of the United States, that you
2 look at -- to see what kind of business model the
3 Defendant is operating under. Is it a -- is it -- are
4 they marketing it for legitimate purposes? Are they
5 taking reasonable steps to prevent infringement? If they
6 are, then they -- then they're not liable. Third --

7 JUSTICE SCALIA: That's your second argument, I
8 think. I thought you were going to just stick with the --
9 with the first one. I mean, that's an inducement
10 argument.

11 JUSTICE SOUTER: Yes, that's inducement.

12 MR. VERRILLI: No, I don't think it is an
13 inducement argument, because it doesn't go all the way to
14 requiring us to show, as we can show here, that they've
15 got intent. But I do think that the issue is, you know,
16 really -- in the real world, you know, it isn't the case
17 that these guys have gotten immediately sued. That's just
18 not right. And the -- and the reality is that what
19 happens is what happens here. There's perfectly valid
20 uses --

21 JUSTICE KENNEDY: But it is the case under the
22 test you're submitting to us.

23 MR. VERRILLI: No, I don't think that's right,
24 Justice Kennedy. If there's vast-majority infringing use,
25 and you continue to operate your business with the

1 knowledge that there's vast-majority infringing use, then
2 you've got liability. Now, of course, we do have all the
3 additional inducement facts here, but we've also got those
4 facts. And in the real world --

5 JUSTICE O'CONNOR: Well, are you dealing with
6 active inducement as just a theoretical add-on, or is that
7 a satisfactory way to resolve this case?

8 MR. VERRILLI: I think that it is a -- I think
9 --

10 JUSTICE O'CONNOR: I don't understand --

11 MR. VERRILLI: Neither, is the answer.

12 JUSTICE O'CONNOR: -- your pitch.

13 MR. VERRILLI: Neither, is the answer. It is a
14 basis for resolving this case, but not to the exclusion of
15 getting the law right on Sony.

16 JUSTICE GINSBURG: But you couldn't get summary
17 judgment. Your reply brief said, "This case is so clear
18 that we should get summary judgment." If inducement is
19 the theory -- you have just said, you have to show intent
20 --

21 MR. VERRILLI: Yes.

22 JUSTICE GINSBURG: -- so you could not --

23 MR. VERRILLI: We --

24 JUSTICE GINSBURG: -- you'd have to go to trial.

25 MR. VERRILLI: We agree with that. We think, in

1 a situation where the vast majority of the use is
2 infringing and there isn't any evidence of a legitimate
3 business plan, on the Sony part of the case we would be
4 entitled to summary judgment. We agree with you, Your
5 Honor, that with respect to --

6 JUSTICE GINSBURG: Sony itself had a trial --

7 MR. VERRILLI: That's right.

8 JUSTICE GINSBURG: -- a full trial.

9 MR. VERRILLI: It came after the trial, that's
10 right. But the -- a key point I think I want to make here
11 is that this is not about this technology. What happens
12 in the real world is that inventors come up with
13 technology. Some people use it for lawful purposes and
14 valid purposes, as some people use this technology for;
15 some people abuse the technology to run business that --
16 businesses that are devoted to expropriating the value of
17 copyrights. That's exactly what's going on in this case.

18 If I could reserve the balance of my time, Mr.
19 Chief Justice.

20 CHIEF JUSTICE REHNQUIST: Very well, Mr.
21 Verrilli.

22 Mr. Clement, we'll hear from you.

23 ORAL ARGUMENT OF PAUL D. CLEMENT

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING PETITIONERS

1 MR. CLEMENT: Mr. Chief Justice, and may it
2 please the Court:

3 The decision below allows companies, like
4 Respondents, to build a business model out of copyright
5 infringement without fear of secondary liability. As long
6 as they avoid obtaining actual knowledge that a particular
7 customer is about to infringe a particular copyright, they
8 are free to operate a system that involves massive
9 copyright infringement with full knowledge that the draw
10 of the entire system for customers and advertisers alike
11 is the unlawful copying. No matter much how much of that
12 system --

13 JUSTICE O'CONNOR: Well, what do you think Sony
14 allowed? It talked about -- if it's, what, capable of
15 substantial noninfringing use, it's okay?

16 MR. CLEMENT: That's right, Justice O'Connor.
17 And then I think the Court explained and elaborated that
18 the test is whether or not there are commercially
19 significant noninfringing uses. And I would say what the
20 Ninth Circuit did in this case is basically adopt the test
21 of mere theoretical capability for noninfringing use, plus
22 maybe some anecdotal evidence.

23 JUSTICE KENNEDY: And what -- and your test is
24 whether there's a substantial use that's lawful?

25 MR. CLEMENT: Well, I think the way we would try

1 to articulate it is that if the way that the business
2 model of the particular Defendant is set up is that they
3 are not involved in a business substantially unrelated
4 from copyright infringement, that there should be
5 liability in that situation. And I think in an extreme
6 case like this, where over 90 percent of the business --
7 and I think Mr. Verrilli correctly describes that it's not
8 a minimum of 90 percent; it's over 90 percent -- because
9 the only evidence on the other side is anecdotal evidence
10 that there are such things as public-domain works.

11 CHIEF JUSTICE REHNQUIST: Mr. Clement, where did
12 the 90 percent figure come from? I know we have to accept
13 it because it's summary judgment, but where did it come
14 from?

15 MR. CLEMENT: It came from a study by
16 Petitioners' experts of the actual operation of the
17 system. And what they did is, they identified about 75
18 percent of the works as clearly infringing works, another
19 15 percent of the works were identified as very likely
20 infringing works, then there were 10 percent they just
21 couldn't tell anything about.

22 JUSTICE BREYER: I thought it was just limited
23 to music.

24 MR. CLEMENT: Well, I think the -- it's not --
25 the system is not limited to music.

1 JUSTICE BREYER: I know, but I thought the study
2 was about music.

3 MR. CLEMENT: I'm not sure about that, but --

4 JUSTICE BREYER: Well, I thought -- I mean, you
5 know, we've had 90 briefs in this, and some briefs tear it
6 apart, and others support it, but we also have briefs from
7 the ACLU saying you could put whole libraries within this
8 system.

9 MR. CLEMENT: Well --

10 JUSTICE BREYER: The question I wanted to ask
11 you is, given that concern, that there are, conceptually
12 anyway, really excellent uses of this thing, does
13 deliberate -- what is the word?

14 MR. CLEMENT: Actual inducement?

15 JUSTICE BREYER: Yes. Because what you are
16 worried about, it seemed to me that the actual inducement
17 would take care of. And if you sent it back and said,
18 "Let's have a trial on actual inducement." If this really
19 is the extreme case you're talking about, why wouldn't the
20 Petitioners here be bound to win that trial?

21 MR. CLEMENT: Well, based on our review of the
22 record -- and we haven't been able to see the entire
23 record -- I agree with you, the Petitioners ought to be
24 able to win this case on an active-inducement ground, and
25 that's a narrow way to decide the case. I do think,

1 though, this Court might have to say something about the
2 Sony issue before it reached that issue. And if it did
3 feel compelled to do that, I think it would be a mistake
4 to sanction the Ninth Circuit's reading of Sony, because,
5 you're right, there's a theoretical possibility that
6 public-domain works can be exchanged on this system, but
7 it's also true that this system doesn't have much of a
8 comparative advantage for trading in public-domain works.

9 JUSTICE O'CONNOR: Well, you got interrupted a
10 bit. Tell us, in the simplest way you can, what test you
11 think Sony stands for and how the Ninth got it wrong, if
12 you believe it.

13 MR. CLEMENT: Justice O'Connor, it stands for --
14 the test is whether or not there are commercially
15 significant noninfringing uses. The Ninth Circuit got it
16 wrong because it thought that test was satisfied by a
17 combination of two things: being able to point out that
18 there were such things as public-domain works or
19 authorized sharing of the Wilco album, for example, and
20 anecdotal evidence that you could actually do that.

21 Now, if that were the right reading of Sony,
22 with respect, I would suggest that footnote 23 of this
23 Court's Sony decision would have been the sum total of the
24 Court's analysis, because in that footnote the Court
25 observed that there were broadcasts of public-domain

1 works.

2 JUSTICE KENNEDY: Suppose the owner of the
3 instrumentality, the program, thinks that there's going to
4 be a vast area of lawful use, and he knows that there's
5 going to be some abuse at the -- in the short term, but he
6 does everything he can to discourage that. He says, "This
7 is a two -- P2P is going to revolutionize the way we talk
8 to each other, there's things in the public domain.
9 Please don't use this for copyright." But he knows that
10 there's going to be some infringement, let's say that
11 it'll be 50 percent of the use, in the short term. Can he
12 use the program?

13 MR. CLEMENT: If it's 50 percent infringement in
14 the short run? We think, absolutely, yes.

15 JUSTICE KENNEDY: Yes, that he can --

16 MR. CLEMENT: He can --

17 JUSTICE KENNEDY: -- use the program.

18 MR. CLEMENT: -- use the program. I mean, as we
19 suggest, if you're at a 50-50 -- I mean, if you're
20 anywhere below 50 percent, we think that there should be
21 no liability under the Sony standard. If you're above
22 that level and there's sufficient evidence that you're
23 really targeting infringing uses, then I think maybe there
24 would be liability. But in the hypothetical you suggest,
25 there would clearly not be liability in that situation.

1 What we would like to suggest, though, is there
2 ought to be enough room for -- under the Sony test, before
3 you reach actual inducement, to capture somebody where
4 they've clearly set out, as a business model, to deal with
5 the infringing uses. And the only thing they point to are
6 the theoretical possibility, anecdotal evidence, that it
7 could be used for public-domain works.

8 JUSTICE GINSBURG: If there's more, they could
9 bring it out at trial, could they not? The difference
10 between your position and Mr. Verrilli, I take it, is that
11 you think there should be not summary judgment for the
12 Petitioners, but a trial.

13 MR. CLEMENT: I think that's a fair point,
14 Justice Ginsburg. We're operating in something of a
15 disadvantage, because we haven't seen the entirety of the
16 record. Based on the record that I've seen, I think
17 there's a close case, unless perhaps once this Court
18 clarifies the legal standard, Respondents put on
19 additional evidence. I think this is a close case, where
20 you actually could grant summary judgment in favor of the
21 Petitioners. But certainly we have no objection to having
22 a trial on the Sony issue in this case. What we object to
23 is the Ninth Circuit rule, which, in every case, is going
24 to obviate the need for a trial, based on a showing that
25 there are such things as public-domain works.

1 JUSTICE SCALIA: The inducement -- the
2 inducement point doesn't get you very far. Presumably a
3 successor to Grokster, or whatever this outfit is called,
4 could simply come in and not induce anybody but say, you
5 know, "We're setting up the same system," know very well
6 what people are going to use it for, but not induce them.
7 And that would presumably be okay.

8 MR. CLEMENT: I think that's potentially right
9 --

10 JUSTICE SCALIA: Which is why you need --

11 MR. CLEMENT: -- Justice Scalia --

12 JUSTICE SCALIA: -- the Sony --

13 MR. CLEMENT: -- and that's why I think it's
14 important to preserve a role for the Sony test. And,
15 again, this Court, in Sony, could have adopted a simple
16 theoretical-capability test, but this Court, instead,
17 adopted a test that required there to be shown some
18 commercially significant use for the -- noninfringing use.
19 And even in the patent context, where I think the test is,
20 and should be, more demanding, even in that context, cases
21 like Fromberg, which we cite at page 19 of our brief, show
22 that there is an analysis to make sure that the suggested
23 theoretical noninfringing use is, in fact, a practical use
24 of the item.

25 JUSTICE SCALIA: Will you give a company ten

1 years to establish that?

2 MR. CLEMENT: Well, I don't think --

3 JUSTICE SCALIA: I mean, what I worry about is
4 the suit that just comes right out of the box, as soon as
5 the company starts up. Will you give the company a couple
6 of years to show that it's developing a commercial use?

7 MR. CLEMENT: Well, Justice Scalia, we have
8 concerns about that, as well. I don't know that we would
9 give them ten years of, sort of, free space to do as --
10 facilitate as much copyright infringement as possible. I
11 think what we would say is that when you're -- when a suit
12 targets a nascent technology at the very beginning, there
13 ought to be a lot of leeway, not just for observed
14 noninfringing uses, but for the capacity of noninfringing
15 uses.

16 I don't think, in fairness, that's what you have
17 before you in this case, because this is a case where the
18 peer-to-peer technology was out there, it was employed in
19 a particular way, with a centralized server, in a way that
20 was actually -- had a lot of users involved in it, and
21 they were users of the old Napster system, that had a
22 distinct character. They were using that system for
23 infringing copyrighted musical works. And then these
24 individuals come along and seek to capitalize on that
25 market. That is their business plan from day one. And

1 it's not some newfangled idea. The only newfangled idea
2 here is that if you give something of value away for free
3 by ignoring the copyright laws, you're likely to draw
4 consumers to your site, and you're likely to attract
5 advertisers. But that cannot be the kind of innovation
6 that we want to further through a development of secondary
7 liability into the copyright laws.

8 JUSTICE SOUTER: Mr. Clement, in one way this
9 presents an easy case for answering Justice Scalia's
10 question, but what about a case in which there isn't the
11 Napster example to start with? Should there be some kind
12 of a flexible rightness doctrine in response to suits, as
13 Justice Scalia put it, against the inventor or developer
14 right out of the box?

15 MR. CLEMENT: Well, whether you call it a
16 flexible rightness doctrine or you develop the doctrine in
17 a way that is very forgiving --

18 JUSTICE SOUTER: Congress of laches.

19 MR. CLEMENT: -- a brand-new technology.

20 JUSTICE SOUTER: Congress of laches.

21 MR. CLEMENT: Right. I mean, I think -- the way
22 I would style it is to develop a substantive standard
23 that's very forgiving of brand-new technologies and allows
24 people to point to, in those situations, capabilities for
25 future uses. I do think that --

1 JUSTICE SOUTER: How would you express the --
2 how would you express that, that substantive standard that
3 anticipates, just as you suggested we do?

4 MR. CLEMENT: Well, I was just trying to
5 articulate it, which is to say that this Court has talked
6 about the capacity for noninfringing uses. I think, with
7 a mature product like this, it's fair to point to how it's
8 actually used in the marketplace.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Clement.

11 MR. CLEMENT: Thank you.

12 CHIEF JUSTICE REHNQUIST: Mr. Taranto, we'll
13 hear from you.

14 ORAL ARGUMENT OF RICHARD G. TARANTO
15 ON BEHALF OF RESPONDENTS

16 MR. TARANTO: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 Because Respondent's software products are tools
19 of autonomous communications that have large and growing
20 legitimate uses, their distribution is protected under the
21 clear Sony rule. That rule should be adhered to by this
22 Court, because copyright does not generally step into the
23 role of product control, because doing so would cause
24 overkill. The Sony rule safeguards legitimate uses by
25 protecting the product and --

1 JUSTICE O'CONNOR: Yes, but active inducement
2 is a doctrine that's been employed to curb the intentional
3 encouragement of noninfringing uses, isn't it?

4 MR. TARANTO: Not in copyright law, it hasn't,
5 but that's not my primary point. My primary point is that
6 it is critical, it is jurisdictionally critical, to
7 separate two separate acts, distributing the product and
8 any of the past acts that the Petitioners allege
9 constituted encouragement, their synonym for "inducement,"
10 which were explicitly outside the District Court ruling
11 that was certified for interlocutory appeal.

12 Questions about past acts not inherent in the
13 distribution of our product remain in --

14 JUSTICE SCALIA: But they are inherent. They
15 are inherent. I mean, the point is that those past acts
16 are what have developed your client's current clientele.

17 MR. TARANTO: No, I don't think so, Justice
18 Scalia. The Petitioners -- this is what I think is here
19 and usable about the past acts. They claim that there is
20 an intent, as part of the current distribution of the
21 product, to profit from increased use, including
22 generically known infringing use, a point on which the
23 District Court and the Court of Appeals assumed to be the
24 case. Beyond that, the question whether there were
25 encouraging acts, any kind of promotional activity that

1 says, "We ask you to, and urge you to, use this product
2 for infringement," that is not here, because that was
3 explicitly part of the past activities, removed from the
4 District Court decision. And when the Petitioners sought
5 interlocutory appeal, they said, expressly, these were
6 "distinct and severable," in their terms -- that's a quote
7 --

8 JUSTICE SOUTER: But I don't --

9 MR. TARANTO: -- from the past.

10 JUSTICE SOUTER: -- understand how you can
11 separate the past from the present in that fashion. One,
12 I suppose, could say, "Well, I'm going to make inducing
13 remarks Monday through Thursday, and I'm going to stop,
14 Thursday night." The sales of the product on Friday are
15 still going to be sales which are the result of the
16 inducing remarks Monday through Wednesday. And you're
17 asking, in effect -- you're asking us -- to ignore Monday
18 through Thursday.

19 MR. TARANTO: No, I'm not. Let me try to be
20 clear. There is a theory, not present here, along exactly
21 those lines, which Petitioners are entitled to argue, back
22 in the District Court, without a remand, because that
23 issue remains in the District Court. It is a theory that
24 says, "You started your business with illegitimate acts,
25 your current business is a causal consequence of that." I

1 will say, there is not one bit of evidence that the
2 Petitioners introduced, in resisting summary judgment, in
3 support of that theory. It is, in fact, a highly
4 implausible theory, for reasons that the District Court
5 can explain, because users of software like this switch
6 readily. There is no plausible lock-in effect to this
7 software. People go from Kazaa to Grokster to eDonkey to
8 BitTorrent week by week. That was -- that is an available
9 theory. You would --

10 JUSTICE SOUTER: Then why was current -- why was
11 inducement, as a current theory of recovery, even the
12 subject of summary judgment? It seems to me that to make
13 it a summary judgment is implausible to a nonworldly
14 degree.

15 MR. TARANTO: I'm not entirely --

16 JUSTICE SOUTER: I mean, I thought you were
17 saying that, so far as the inducement theory of recovery
18 is concerned --

19 MR. TARANTO: Yes.

20 JUSTICE SOUTER: -- the only summary judgment
21 that was granted was with respect to current acts of
22 inducement, the way the company is acting now, not the way
23 the company was acting last year. And my question is --
24 if that is correct, then I don't see how summary judgment
25 could even intelligibly have been considered.

1 MR. TARANTO: I think -- because as the
2 Petitioners insisted when they pressed for interlocutory
3 appeal, they said these were distinct and severable,
4 because, as Justice Scalia referred to before, the
5 important question, on a going-forward basis, is whether
6 the current set of activities -- this software, given how
7 it operates, being generally distributed -- is a vendor's
8 -- the distributor of that software -- secondarily liable
9 because somebody else, tomorrow, can do exactly the same
10 thing, without the baggage of any past acts.

11 JUSTICE KENNEDY: Well, I don't want to get us
12 too far off the track on this question, but it just seems
13 to me that what you've done before bears on what you know,
14 or have reason to know, on an ongoing basis.

15 MR. TARANTO: I agree with that, Justice
16 Kennedy, but there's no dispute about that. This case was
17 decided on the assumption, which we are not contesting
18 here, that the Respondents here knew that there would be
19 widespread infringing use of a product that they were
20 putting out, and, what's more, that they intended to
21 profit from maximum use of the product, which necessarily
22 would include infringing use, which they had no ability to
23 separate from noninfringing use.

24 JUSTICE KENNEDY: Well, then why don't you tell
25 us what's wrong with the Government's test and with the

1 Petitioner's test, the substantial-use part of it?

2 MR. TARANTO: Well, I'm not entirely -- I think
3 there are several tests, and I'm not sure I followed them
4 all here. We think it is critical that the Court adhere,
5 for innovation protection, to the very clear Sony rule.

6 JUSTICE GINSBURG: That, Mr. Taranto, is
7 something I find very puzzling. There is a statement --
8 one could take it as clear -- "capable of substantial
9 noninfringing use." That would be very clear, I agree.
10 But Sony goes on for 13 more pages. If the standard were
11 all that clear, it would have stopped there. And usually
12 when you're interpreting a document, one rule is, you read
13 on, and if you read on, you find we need not give precise
14 content to the question of how much use is commercially
15 significant. That doesn't sound very clear to me. Or if
16 you then read back, as a careful reader would, then you
17 find this statement that the primary use of the Sony
18 machine for most owners was time-shifting, a use that the
19 Court found either authorized or fair, and, hence,
20 noninfringing.

21 So I don't think you can take from what is a
22 rather long opinion, and isolate one sentence, and say,
23 "Aha, we have a clear rule."

24 MR. TARANTO: Well, that sentence, Justice
25 Ginsburg, is expressly stated to be the rule of law that

1 is being applied. And then the Court went on to apply it
2 to say, there are two things that satisfy the test. The
3 primary thing, of course, is what takes up most of those
4 13 pages, the question whether in-home time-shifting is
5 fair use, a question that was of considerable interest to
6 tens of millions of individuals throughout the United
7 States. But the Court, in fact, didn't rely only on that;
8 it said, "In addition, there was this roughly 7 to 9
9 percent use of authorized time-shifting." It wouldn't
10 have had to even talk about that if the primary use, you
11 know, was the entirety of --

12 JUSTICE SCALIA: Mr. Verrilli, I hope you won't
13 waste a lot of your time on this point. This Court is
14 certainly not going to decide this case on the basis of
15 stare decisis, you know, whatever else is true.

16 MR. TARANTO: Well, I will -- let me urge that
17 there is, in fact, considerable weight to stare decisis,
18 because there are major technological industries that have
19 relied on the rule that derives from patent law that there
20 is no, kind of, predominant-use kind of meaning to the Sony
21 rule. In the patent context from which this came, all
22 there has to be, in Professor Chisum's words, is, uses
23 that are not farfetched, illusory, uneconomical for the
24 user. And the inquiry there is, is this a product whose
25 -- where the same features that are alleged to cause the

1 infringement are also, in some nontrivial way, used for
2 noninfringement?

3 JUSTICE BREYER: What is -- what is the answer
4 to Justice Kennedy's question? I took it, whether -- for
5 the last 21 years, industry throughout America has taken
6 the standard as being approximately whether it is capable
7 of substantial -- commercially significant substantial
8 noninfringing uses.

9 MR. TARANTO: Yes.

10 JUSTICE BREYER: I -- and the country seems to
11 have survived that standard. There is innovation. There
12 are problems in the music industry, but it thrives, and so
13 forth. So there is an argument for just following it,
14 because it's what it is. But suppose it's totally open.
15 Why should that be the right test, instead of some other
16 test, like substantial use, et cetera?

17 MR. TARANTO: I -- because I --

18 JUSTICE BREYER: That, I think, was the
19 question, and I'm very interested in your answer.

20 MR. TARANTO: Right. Because I think any
21 alternative is worse. A focus on intent to profit means
22 that virtually every business which requires money and has
23 the least bit of sensible forward-looking thinking about
24 what the usage is going to be will be subject to
25 litigation, arguing about their knowing that a substantial

1 amount of the value of the product was going to be based
2 on infringement.

3 JUSTICE KENNEDY: But --

4 MR. TARANTO: Every --

5 JUSTICE KENNEDY: -- but what you have -- what
6 you want to do is to say that unlawfully expropriated
7 property can be used by the owner of the instrumentality
8 as part of the startup capital for his product.

9 MR. TARANTO: I -- well --

10 JUSTICE KENNEDY: And I -- just from an economic
11 standpoint and a legal standpoint, that sounds wrong to
12 me.

13 MR. TARANTO: Well, I'm not entirely sure about
14 that formulation. Sony clearly sold many more tapes
15 because of the illicit activity of Library. Sony
16 presumably sold more machines, maybe even priced them
17 higher, because there was a group of people who wanted the
18 machine for the illicit activity. The Apple iPod, in the
19 60 gigabit version, holds 15,000 songs. That's --

20 JUSTICE KENNEDY: So you think that --

21 MR. TARANTO: -- a thousand CDs.

22 JUSTICE KENNEDY: -- unlawfully expropriated
23 property can be a legitimate part of the startup capital.

24 MR. TARANTO: No, I -- what I think is that, as
25 a matter of general judicially formulated secondary

1 copyright liability law, there is no better policy balance
2 that the Court can strike, and that only Congress can make
3 the judgments about what the industry-wide facts are.
4 And I -- let me pause there a minute -- there are no
5 industry-wide facts in this record. Every citation in the
6 Petitioner's brief about the magnitude of harm to the
7 industry is extra-record citation. There are 26 billion
8 --

9 JUSTICE GINSBURG: Then perhaps there should be
10 a trial so it would all come out.

11 MR. TARANTO: Petitioners -- it's not just that
12 they didn't have it in their brief, they did not submit
13 any evidence in response to the summary-judgment motion
14 that said the rule of Sony should be applied here because
15 the magnitude of the injury to the recording industry or
16 in -- someday in the future, to the movie industry is X.
17 Zero evidence --

18 JUSTICE GINSBURG: Well, they weren't
19 concentrating on the damage to them, they were
20 concentrating on the facilitation of copying that was
21 provided. And you don't question that this service does
22 facilitate copying.

23 MR. TARANTO: As does the personal computer and
24 the modem and the Internet service provider and the
25 Microsoft operating system. There's -- everything in the

1 chain that makes this work is absolutely essential to
2 facilitating the copying. The question is which pieces,
3 if any, and under what standard, get singled out for a
4 judicially fashioned secondary copyright liability
5 doctrine.

6 JUSTICE GINSBURG: Well, you said -- I think you
7 were saying -- this is something for Congress to solve;
8 it's not for the Court. But the Court is now faced with
9 two apparently conflicting decisions: Aimster, in the
10 Seventh Circuit, the Ninth Circuit decision. And if
11 you're just looking at this in the abstract, you might
12 say, "Well, it's -- isn't it odd that Napster goes one way
13 in the Ninth Circuit, and this case goes another way?"

14 MR. TARANTO: Let me suggest why that's not odd
15 and why the cases are not just different, but critically
16 different. Napster rests -- never mind the exact words of
17 the opinion -- Napster involves something more than
18 distribution of a product. Napster, the company, was
19 sending out, in response to requests, "Where is this
20 filed," an answer, the information, "The file is here."
21 Every time it sent out that information, if it had been
22 told by Mr. Verrilli's client, "That file may not be
23 shared," it was, with specific knowledge to that file,
24 giving assistance. That is a classic contributory
25 infringement case based on specific knowledge of

1 infringement. And the reason --

2 JUSTICE SOUTER: Why isn't this a classic
3 willful-ignorance case?

4 MR. TARANTO: Because willful ignorance is about
5 having possession of information and refusing to look at
6 it. This -- that does not occur here. This tool of
7 autonomous communication is one in which there is no
8 mother-may-I system, no chaperone, no information provided
9 to us at the time that there is any request. When I ask
10 for a file from you, there is no information that goes
11 back to StreamCast or to Grokster --

12 JUSTICE SOUTER: Sure, but I thought willful
13 ignorance was basically a certainty of what was going on
14 without empirically verifying it, so as to, sort of,
15 maintain the guise of one's hands over one's eyes. And it
16 seems to me, if that's what it is, that's what we've got.

17 MR. TARANTO: No, I don't think so, I think, on
18 either account. My understanding of where in the law
19 willful ignorance has bite is when you do have the
20 information right in front of you, and you refuse to look
21 at it. And, what's more, the change of system to an
22 autonomous communication tool, where there is no
23 intermediary, which is what all of their filtering systems
24 would require, getting permission in advance, the change
25 of tool is not just some way of blinding oneself to the

1 information.

2 JUSTICE SCALIA: Yes, I think it would also
3 include disabling yourself from looking at it. And so, I
4 think it's an important part of your case, that you didn't
5 adopt this new system of decentralizing the file so that
6 it's in the computers, out there, solely in order to get
7 around Napster.

8 MR. TARANTO: Right. And I think that the
9 summary-judgment record on this is -- it, I mean, doesn't
10 leave any real room for dispute. Seeking --

11 JUSTICE BREYER: Well, wait. In respect to that
12 -- I mean, is it open? If you win on the question of the
13 standard, is it open, or would we have to remand it for
14 them to argue, in light of the history, in light of what
15 they do now, they, your client, with knowledge of
16 infringement, actively encouraged users to infringe
17 copyright using their -- using the Grokster technology,
18 and, indeed, knowingly would include willful blindness?

19 MR. TARANTO: I think --

20 JUSTICE BREYER: Because -- as I had gotten that
21 from one of these amicus briefs, you know, that's their
22 standard -- they say a willful -- of willful, deliberate
23 inducement. And that, it seems to me, important that they
24 be able to argue that. Now, can they argue it, in your
25 opinion, if we do nothing but affirm the Ninth Circuit?

1 MR. TARANTO: I think that they can certainly
2 argue, with an affirmance by this Court, that all of the
3 past acts, to use the District Court's term, constitute a
4 basis for a -- inducement liability. There would be some
5 legal questions about whether there is such a thing as
6 inducement liability, but they get to argue that. No
7 remand is required for that.

8 The record in this case establishes that one
9 reason for going to the decentralized system, without a
10 central index and a third-party intermediary, was to --
11 was a reaction to the Ninth Circuit's Napster decision
12 that said, "That's a legal problem." But it is also, I
13 think, beyond genuine dispute, for summary-judgment
14 proposes, that there were other reasons. You don't have
15 to have the servers to maintain. When StreamCast, in
16 particular, was running a Napster-like system, the so-
17 called openNap system, it had ten servers, and quickly
18 maxed out and started crashing, and immediately concluded
19 -- I think this is at page 789 or -- and 798 of the joint
20 appendix -- we would have had to start doubling, tripling,
21 quadrupling the number of services, and we didn't have --

22 JUSTICE STEVENS: Mr. Taranto --

23 MR. TARANTO: -- the money to do it.

24 JUSTICE STEVENS: -- can I ask -- I'm still a
25 little puzzled about the posture of the case.

1 MR. TARANTO: Yes.

2 JUSTICE STEVENS: Because I read the District
3 Court opinion. I think he said -- the judge said that
4 both parties agreed that there were no disputed issues of
5 fact that would preclude the entry of summary judgment in
6 either way, no disputed issues relative to whether to
7 grant relief. And I -- it's on page 24a of the cert
8 petition. And I understand you to be saying that leaving
9 everything alone, affirming would allow the case to go
10 forward with your adversaries seeking damages on an
11 active-inducement theory. Am I correct?

12 MR. TARANTO: Yes. I think -- all I read this,
13 page 24a, to say is that both sides filed for summary
14 judgment, so each one, of course, thought that there was
15 -- that it was entitled to summary judgment. Each --

16 JUSTICE STEVENS: But it says, "Both parties
17 believe there are no disputed issues of fact material to
18 Defendant's liability."

19 MR. TARANTO: I think that's just because each
20 side filed summary judgment. Each side filed extensive
21 --

22 JUSTICE STEVENS: So then your answer to my
23 question is that, yes, if we affirm, as a possibility,
24 they could continue to seek damages on an active-
25 inducement theory.

1 MR. TARANTO: Yes, absolutely. And there are --
2 there are affirmative defenses that are not even part of
3 this motion that, of course, would, by themselves,
4 preclude summary judgment in their favor.

5 JUSTICE STEVENS: And then one other --

6 JUSTICE GINSBURG: I thought --

7 JUSTICE STEVENS: -- question I had. Does the
8 record contain their proposed form of injunction that they
9 requested?

10 MR. TARANTO: I don't think it does, beyond the
11 statement at the end of their summary-judgment pleading
12 that asked for a very general injunction, "Stop the
13 Defendants from infringing." I'm not aware of anything
14 more specific.

15 Let me comment a bit on what the record says
16 about the substantial legitimate uses. This is not a
17 question of simply saying --

18 JUSTICE GINSBURG: Mr. Taranto, before you go
19 back to that, I wanted to be clear on what you were saying
20 would be left over for trial.

21 MR. TARANTO: Yes.

22 JUSTICE GINSBURG: Because, as I read your
23 briefing, it was, "Well, they can argue about some bad
24 things that Grokster was doing in the past, but this
25 decision says: henceforth, what we're doing is okay. The

1 case zeroed in on now and the future, and the only thing
2 that was left open was something that is over and gone
3 could get damages for it." But I thought that this
4 judgment gave you an okay, a green light, from now on.

5 MR. TARANTO: I -- my view that -- I mean, this
6 was not talked about in these terms. I believe it ought
7 to be open to the Petitioners, not only to prove that past
8 acts were, themselves, illegal, but that the causal
9 consequence of those past acts should somehow reach
10 forward into the current acts.

11 JUSTICE SOUTER: Then what is the point of the
12 current summary judgment?

13 MR. TARANTO: The point of the current summary
14 judgment is that there is -- the forward-looking
15 character of the activities taking place, starting in
16 September 2002 on forward, has been held, by itself, not
17 to be a basis for --

18 JUSTICE SOUTER: So you're saying the summary
19 judgment simply, in effect, says, "They're not doing
20 anything wrong now, but we have left open the question,
21 not merely of what they have done wrong in the past, but
22 whether what they did wrong in the past can carry forward
23 into the future"?

24 MR. TARANTO: As I say, it wasn't stated in
25 those terms, but, yes, I think that --

1 JUSTICE SOUTER: That's bizarre.

2 MR. TARANTO: Well, I don't think so, because --

3 [Laughter.]

4 MR. TARANTO: -- because the important question
5 is, to the Petitioners, the entire recording and movie
6 industry, Is this set of activities, which you and I,
7 tomorrow, can start engaging in, one that they can stop?
8 There are literally a handful -- on page 7 and 8 of their
9 brief --

10 JUSTICE SOUTER: So you're saying -- what it
11 really says is, "There's nothing to enjoin, but there may
12 very well be something to recover for," --

13 MR. TARANTO: Yes.

14 JUSTICE SOUTER: -- "even as to future
15 activity."

16 MR. TARANTO: Yes, exactly right. And they
17 would, of course, have had to make the very implausible
18 assertion, in a business in which there is no plausible
19 lock-in, that somehow a set of isolated events -- e-mails
20 -- a handful of e-mails out of literally, between the two
21 companies, 1700 a day, that might have said, "Why don't
22 you load some music up"? -- are somehow the causal -- the
23 cause of what is going on today.

24 Let me say a few words about what the record
25 says about legitimate activities. Altnet is a company --

1 this is at 1169 and -70 of the joint appendix -- they say
2 that they have distributed, on peer-to-peer systems,
3 hundreds of thousands of authorized songs, and, they say,
4 millions of pieces of -- of video games, leading to sales.
5 This is not a trivial number. JIVE, at page 67 to 68,
6 speaks about 250,000 peer-to-peer downloads of a music
7 video. The Internet archive, which is talked about in the
8 record, and if you now look at what they are on their
9 Website, now lists some several hundred musical artists
10 with 20,000 recordings which are being put out there for
11 peer-to-peer distribution. The Creative Commons is
12 licensing all kinds of things for authorized public
13 distribution. There are musical bands --

14 JUSTICE SCALIA: Because, I gather, that some
15 artists don't make money from the records, but make money
16 from the popularity that draws fans to their concerts.

17 MR. TARANTO: My understanding --

18 JUSTICE SCALIA: So they're willing to give away
19 the records for free.

20 MR. TARANTO: -- my understanding is "some" is a
21 great understatement, yes.

22 The bands talked about at 159 and 169 to '70 of
23 the joint appendix, which have authorized their live
24 concert recordings to be traded among -- on -- to be
25 traded. The GigAmerica business is in the business of

1 compiling -- this is at 323 of the joint appendix -- of
2 compiling musical recordings and other things for
3 authorized distribution. The world of music distribution
4 and video distribution and movie-trailer distribution and,
5 in small instances now, text distribution, but growing, is
6 changing and making use of this extremely innovative, low-
7 cost tool. The great innovation of this tool of
8 communication --

9 CHIEF JUSTICE REHNQUIST: Mr. Taranto?

10 MR. TARANTO: Yes.

11 CHIEF JUSTICE REHNQUIST: In your motion for
12 summary judgment, did you ask that the Plaintiff's claim
13 be dismissed?

14 MR. TARANTO: Well, we asked for judgment, in
15 our favor on their claim, that our current activities
16 constituted a basis for secondary liability. I'm not sure
17 if word "dismiss" was --

18 CHIEF JUSTICE REHNQUIST: Were there other
19 claims? You said "on their claim." Were -- did they make
20 other claims?

21 MR. TARANTO: They had a generic claim about
22 secondary copyright liability. We made the motion -- or,
23 actually, StreamCast made a motion that said, "Let's carve
24 this piece out and talk just about whether the set of
25 current activities supports secondary liability." The

1 other side eventually agreed that that was distinct and
2 severable from their claim of secondary liability as to
3 past acts and as to past versions of the software, which
4 has -- which has changed.

5 JUSTICE GINSBURG: Where does one find that?

6 CHIEF JUSTICE REHNQUIST: (Inaudible)

7 MR. TARANTO: Yes, the motion -- well, it -- the
8 simplest place, I guess, is in the June 2003 District
9 Court ruling, which is in the Joint Appendix and attached
10 to the brief in opposition, ruled on the Petitioner's
11 motion for an interlocutory appeal under 1292.

12 JUSTICE GINSBURG: But the motion itself is not
13 there to take it through the opinion of the Court?

14 MR. TARANTO: No, the motion is not -- is not in
15 the joint appendix. The -- most of the motions -- in
16 fact, both of our summary-judgment motions and their
17 summary-judgment motion, are in the joint excerpts of
18 record in the Ninth Circuit, can be found in --

19 CHIEF JUSTICE REHNQUIST: The text on --

20 MR. TARANTO: -- 30 volumes.

21 CHIEF JUSTICE REHNQUIST: -- the text, on pages
22 23a and 24a, gives the impression that the District Court
23 is disposing of the entire case.

24 MR. TARANTO: That -- it may give that
25 impression on those pages. Later, the Court explains that

1 it's ruling only on the current versions of the software.
2 And then in the June 2003 order, the Court was explicit in
3 saying, "If I haven't been clear enough, let me amend my
4 June -- my April order," which is what you were just
5 reading from, "to make explicit the limitation." And we
6 quote that in our brief.

7 The great virtue of peer-to-peer decentralized
8 software is that it doesn't require anybody to put stuff
9 onto a server and then bear the cost of bandwidth, of
10 being charged by the Internet service provider when a
11 million people suddenly want it. It automatically scales.
12 It -- the more people who want it, the more people will
13 have it, because it will be out there on a million
14 computers. That is an inherent distributional economy,
15 together with the autonomy of the user, rather than having
16 a kind of Mother-may-I system, with having to check every
17 communication through some third party to say, "Am I
18 authorized to make this communication," that are the
19 virtues of this system and that make it clearly capable of
20 growing the already large hundreds of thousands, even
21 millions, of uses that this -- that these pieces of
22 software already enable people to do.

23 One final -- final word. We're not disputing
24 that there are, in an industry-wide way, a set of
25 important policy issues here, though there's nothing in

1 the record about what self-help measures -- digital-rights
2 management, encryption, other things -- there's nothing in
3 the record what -- about that. There's nothing in the
4 record about what kinds of real industry harm is being
5 done by this. Right? This is all citations to Websites
6 in their brief. These are classic questions of predictive
7 judgment, industry-wide judgments that Congress should
8 make to decide whether there is a problem in need of
9 solution, and what solutions ought to be considered,
10 whether changing the rule would have a overriding bad
11 effect on other industries. And --

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Taranto.

14 Mr. Verrilli, you have four minutes remaining.

15 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,

16 ON BEHALF OF PETITIONERS

17 MR. VERRILLI: Thank you, Mr. Chief Justice.

18 I'd like to start by clarifying the inducement
19 issue, and then explain why inducement is not enough, and
20 then have a word, if I might, about the reality of this
21 case.

22 The reason, Justice Souter, you find it bizarre
23 is because a shell game is going on here. What the
24 Respondent's position -- excuse me -- the Respondent's
25 position here is that we can sue for specific

1 infringements that we can show were induced by these
2 specific acts, such as e-mail support. Our position on
3 inducement is that we are entitled to injunctive relief
4 against the continued operation of this gigantic
5 infringement machine, which was built by the inducement.

6 Now, I think that the Respondents have quite
7 clearly said that they're -- they don't think any
8 injunctive relief is available, going forward. But we're
9 entitled, under Section 502 of the Copyright Act, to
10 effective relief, not merely a -- relief, judgment
11 relief, that says, "Go and sin no more," but relief that
12 undoes the consequences of this inducement, of this
13 massive effort to build a gigantic engine of infringement.
14 And that is why they're just wrong about that.

15 And you certainly can't affirm the Ninth Circuit
16 and allow us to go forward with anything like that theory,
17 because the Ninth Circuit said the only thing we can sue
18 for -- the only thing we can sue for -- is a situation in
19 which we can show that we had knowledge of specific acts
20 of infringement at a time when we could stop those
21 specific acts of infringement. So there's just no way to
22 affirm and let that go forward.

23 Now, why is infringement -- why is inducement
24 not enough? It's not enough because, as Justice Scalia
25 suggested, these companies already operate in the shadows,

1 and a ruling here, which would be, I submit, a significant
2 cutback of the Sony rule, that inducement is the only
3 available ground of liability, would just leave them to
4 paper over -- you know, we do have some paper evidence
5 here, a paper trail here, but that'll just -- they just
6 won't exist next time. And it's just -- it's just not
7 enough.

8 And I submit that Sony was quite clear on this.
9 Sony said that the staple article-of-commerce doctrine,
10 not copyright law, generally, and not secondary liability,
11 generally, but the staple article-of-commerce doctrine,
12 the noninducement part of the analysis, has got to strike
13 an effective balance -- a real balance that provides
14 effective protection of copyright, as well as protecting
15 unrelated lines of commerce.

16 Now, their rule is a rule of immunity. It's a
17 free pass. It says, all you've got to do is speculate
18 about noninfringing use, and you can continue with
19 infringement, ad infinitum. And that's not a rule that
20 protects innovation; that's a rule that destroys
21 innovation. It certainly destroys the innovation that the
22 creators of the copyright law is supposed to protect, and
23 that's supposed to be the effective protection part of the
24 balance that Sony said this law is supposed to strike.

25 It also -- it also deters legitimate

1 technological innovation moving towards legitimate means
2 of distributing this -- of distributing, in a digital
3 format, music and movies through the kinds of companies
4 that filed amicus briefs and that are trying to do this
5 legitimately. They are inevitably and invariably undercut
6 by the kinds of businesses that Respondents and the others
7 run, so it deters innovation; it doesn't move it forward.

8 And, beyond that, Justice Kennedy, as you
9 suggested, it isn't just that they get to use our
10 copyrighted -- the value of our copyrighted materials as
11 the seed capital, that's the whole business. That is the
12 whole business. And that's the reality here, and that's
13 the problem. They can talk about the hundreds of
14 thousands, or maybe even millions, of uses, but the
15 reality is that there are 2.6 billion downloads,
16 unlawfully, every month. So what they're talking about as
17 lawful is a tiny, teeny little fraction of what's really
18 going on here.

19 And the problem with the rule which they say is
20 a clear rule, but it obviously isn't in Sony, because Sony
21 said, "strike a balance." And the problem with that rule,
22 Your Honor, is that it gives them a perpetual license to
23 keep going forward with billions and billions of unlawful
24 downloads a month. They never have to do anything to try
25 to bring their conduct into conformity with law. They're

1 not in the position of that inventor that you identified,
2 Justice Scalia, who has to, sort of, think through, "What
3 am I doing?" They're just in a position where they have
4 every economic incentive in the world to maximize the
5 number of infringing uses, because they make more money
6 when they do so.

7 Now, and with respect to the reality of this
8 situation, let me just say -- and I must beg to differ,
9 Justice Breyer, with the suggestion that this industry is
10 thriving. What the -- the facts are that we have lost --
11 the recording industry has lost 25 percent of its revenue
12 since the onslaught of these services. And that's
13 particularly critical, because, remember, this is really
14 -- the recording business, in particular, is really a
15 venture-capital business. Most of the records we put out
16 don't make money. A few make a lot of money. Well, what
17 do you think's getting traded on Grokster and StreamCast
18 and the rest of them? It's the few that make all the
19 money. So they're draining all of the money out of the
20 system that we use to find new artists and --

21 CHIEF JUSTICE REHNQUIST: Thank you --

22 MR. VERRILLI: -- foster development.

23 CHIEF JUSTICE REHNQUIST: -- Mr. Verrilli.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: The case is submitted.

1 (Whereupon, at 11:14 a.m., the case in the
2 above-entitled matter was submitted.)
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