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IN THE SUPREME COURT OF THE UNITED STATES

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METRO-GOLDWYN-MAYER STUDIOS, INC., :  
ET AL., :  
Petitioners, :  
v. : No. 04-480  
GROKSTER, LTD, ET AL. :  
- - - - - x

Washington, D.C.

Tuesday, March 29, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf of the Petitioners.

PAUL D. CLEMENT, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioners.

RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DONALD B. VERRILLI, JR., ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PAUL D. CLEMENT, ESQ.	
7	On behalf of United States,	
8	as amicus curiae, supporting Petitioners	18
9	ORAL ARGUMENT OF	
10	RICHARD G. TARANTO, ESQ.	
11	On behalf of the Respondents.	28
12	REBUTTAL ARGUMENT OF	
13	DONALD B. VERRILLI, JR., ESQ.	
14	On behalf of the Petitioners	50
15		
16		
17		
18		
19		
20		
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25		

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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: Yeah. 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 judgement, 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 judgement, Your Honor, and we lost summary  
11 judgement, 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: Your argument, I take it, would  
18 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 and 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 --

4 JUSTICE O'CONNOR: -- question?

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

19 The District Court granted summary judgement  
20 against us and gave a clean bill of health, gave  
21 absolution, essentially, to the current versions of the  
22 services. The only thing that was left to us, as the  
23 Ninth Circuit and the District Court -- and the District  
24 Court, both, understood the law, is that we can go back  
25 and try to show that, with respect to specific past acts



1 of infringement, if we can show that they occurred at a  
2 time when we had given them notice that they were about to  
3 occur, and that we had the power to -- and they had the  
4 power to stop them at the moment we gave them the notice,  
5 that we can get damages for those specific things, and  
6 those specific things only. That's all that's left in  
7 this case. And I think it's quite clear, from the Rule  
8 54(b) certification order of the District Court that it  
9 was only damages with the past services and the past acts  
10 --

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

18 MR. VERRILLI: Here's what I -- here's where I  
19 think the test --

20 JUSTICE KENNEDY: Leaving aside the inducement.

21 MR. VERRILLI: Right. Here's what I -- here's  
22 what we think the test is on the -- what we'll call the  
23 Sony aspect of the case, that it's -- the question here is  
24 -- Sony poses to us -- is really a touchstone kind of  
25 question, not a numerical kind of question. The question

1 under Sony is whether this is a business that is  
2 substantially unrelated to infringement. In other words,  
3 are they building their business on supporting legitimate  
4 activity, or, instead, are they building their business  
5 supporting infringing activity?

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

8 MR. VERRILLI: No, I think --

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

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

21 JUSTICE BREYER: You're not saying -- now you're  
22 using different tests. Your test is "substantial." All  
23 right, on your test, are we sure, if you were the counsel  
24 to Mr. Carlson, that you recommend going ahead with the  
25 Xerox machine? Are you sure, if you were the counsel to

1 the creator of the VCR, that you could recommend, given  
2 the use, copying movies, that we should ever have a VCR?  
3 Are you sure that you could recommend to the iPod inventor  
4 that he could go ahead and have an iPod, or, for that  
5 matter, Gutenberg, the press? I mean, you see the  
6 problem.

7 MR. VERRILLI: Yeah, I think my answer to --

8 JUSTICE BREYER: What's the answer?

9 MR. VERRILLI: -- those questions are: yes, yes,  
10 yes, and yes.

11 [Laughter.]

12 JUSTICE BREYER: Because in each case -- for all  
13 I know, the monks had a fit when Gutenberg made his press  
14 --

15 [Laughter.]

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

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

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

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

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

19 MR. VERRILLI: Well, I --

20 JUSTICE SCALIA: And it's one thing to sit back  
21 and, you know, calculate with this ongoing business, it's  
22 90 percent/10 percent. But I'm a new inventor, and I'm --  
23 you know --

24 MR. VERRILLI: I think the weight --

25 JUSTICE SCALIA: -- I'm going to get sued right

1 away. I know I'm going to get sued right away, before I  
2 have a chance to build up a business.

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

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

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

20 JUSTICE KENNEDY: Or did I misunderstand your --

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

25 JUSTICE SCALIA: But the inventor of Xerox does

1 that. I mean, he puts out the machine. He knows some --  
2 he knows a lot of people are going to use it to Xerox  
3 books.

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

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

11 MR. VERRILLI: -- realistic.

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

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

1 JUSTICE SOUTER: Well, there's never evidence at  
2 the time the guy is sitting in the garage figuring out  
3 whether to invent the iPod or not. I mean, that's --

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

5 JUSTICE SOUTER: -- the concern.

6 MR. VERRILLI: -- I think when you have vast-  
7 majority infringing use, they should be on the hook. Now,  
8 I don't think --

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

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

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

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

13 JUSTICE SOUTER: -- you're not answering --  
14 you're not answering the question. The question is, How  
15 do we know in advance, on your test, anything that would  
16 give the inventor, or, more exactly, the developer, the  
17 confidence to go ahead? As was said a minute ago, he  
18 knows he's going to be sued immediately. There isn't a  
19 product performance out there, as there is in this case.  
20 So, on your substantiality theory, why isn't it a foregone  
21 conclusion in the iPod that the iPod loser -- or developer  
22 is going to lose his shirt?

23 MR. VERRILLI: Well, first of all, I don't -- I  
24 think it's just counterfactual to think that there is  
25 going to be overwhelming infringing use of the iPod in the

1 way that there indisputably is here. Second, to the  
2 extent you get the closer cases, it is our position, as I  
3 gather it is the position of the United States, that you  
4 look at -- to see what kind of business model the  
5 Defendant is operating under. Is it a -- is it -- are  
6 they marketing it for legitimate purposes? Are they  
7 taking reasonable steps to prevent infringement? If they  
8 are, then they -- then they're not liable. Third --

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

13 JUSTICE SOUTER: Yeah, that's inducement.

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

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

25 MR. VERRILLI: No, I don't think that's right,



1 Justice Kennedy. If there's vast-majority infringing use,  
2 and you continue to operate your business with the  
3 knowledge that there's vast-majority infringing use, then  
4 you've got liability. Now, of course, we do have all the  
5 additional inducement facts here, but we've also got those  
6 facts. And in the real world --

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

10 MR. VERRILLI: I think that it is a -- I think  
11 --

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

13 MR. VERRILLI: Neither, is the answer.

14 JUSTICE O'CONNOR: -- your pitch.

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

18 JUSTICE GINSBURG: But you couldn't get summary  
19 judgement. Your reply brief said, "This case is so clear  
20 that we should get summary judgement." If inducement is  
21 the theory -- you have just said, you have to show intent  
22 --

23 MR. VERRILLI: Yes.

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

25 MR. VERRILLI: We --

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

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

8 JUSTICE GINSBURG: Sony itself had a trial --

9 MR. VERRILLI: That's right.

10 JUSTICE GINSBURG: -- a full trial.

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

20 If I could reserve the balance of my time, Mr.  
21 Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
23 Verrilli.

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

25 ORAL ARGUMENT OF PAUL D. CLEMENT

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FOR UNITED STATES, AS AMICUS CURIAE,  
SUPPORTING PETITIONERS

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

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

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

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

JUSTICE KENNEDY: And what -- and your test is

1 whether there's a substantial use that's lawful?

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

13 CHIEF JUSTICE REHNQUIST: Where did the 90  
14 percent figure come from? I know we have to accept it  
15 because it's summary judgement, but where did it come  
16 from?

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

24 JUSTICE BREYER: I thought it was just limited  
25 to music.

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

3 JUSTICE BREYER: I know, but I thought the study  
4 was about music.

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

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

11 MR. CLEMENT: Well --

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

16 MR. CLEMENT: Actual inducement?

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

23 MR. CLEMENT: Well, based on our review of the  
24 record -- and we haven't been able to see the entire  
25 record -- I agree with you, the Petitioners ought to be

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

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

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

23 Now, if that were the right reading of Sony,  
24 with respect, I would suggest that footnote 23 of this  
25 Court's Sony decision would have been the sum total of the

1 Court's analysis, because in that footnote the Court  
2 observed that there were broadcasts of public-domain  
3 works.

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

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

17 JUSTICE KENNEDY: Yes, that he can --

18 MR. CLEMENT: He can --

19 JUSTICE KENNEDY: -- use the program.

20 MR. CLEMENT: -- use the program. I mean, as we  
21 suggest, if you're at a 50-50 -- I mean, if you're  
22 anywhere below 50 percent, we think that there should be  
23 no liability under the Sony standard. If you're above  
24 that level and there's sufficient evidence that you're  
25 really targeting infringing uses, then I think maybe there

1 would be liability. But in the hypothetical you suggest,  
2 there would clearly not be liability in that situation.

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

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

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



1 to obviate the need for a trial, based on a showing that  
2 there are such things as public-domain works.

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

10 MR. CLEMENT: I think that's potentially right  
11 --

12 JUSTICE SCALIA: Which is why you need --

13 MR. CLEMENT: -- Justice Scalia --

14 JUSTICE SCALIA: -- the Sony --

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

1 of the item.

2 JUSTICE SCALIA: Will you give a company ten  
3 years to establish that?

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

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

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

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

1 individuals come along and seek to capitalize on that  
2 market. That is their business plan from day one. And  
3 it's not some newfangled idea. The only newfangled idea  
4 here is that if you give something of value away for free  
5 by ignoring the copyright laws, you're likely to draw  
6 consumers to your site, and you're likely to attract  
7 advertisers. But that cannot be the kind of innovation  
8 that we want to further through development of secondary  
9 liability into the copyright laws.

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

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

20 JUSTICE SOUTER: Congress of laches.

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

22 JUSTICE SOUTER: Congress of laches.

23 MR. CLEMENT: Right. I mean, I think -- the way  
24 I would style it is to develop a substantive standard  
25 that's very forgiving of brand-new technologies and allows

1 people to point to, in those situations, capabilities for  
2 future uses. I do think that --

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

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

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Clement.

13 MR. CLEMENT: Thank you.

14 CHIEF JUSTICE REHNQUIST: Mr. Taranto, we'll  
15 hear from you.

16 ORAL ARGUMENT OF RICHARD G. TARANTO

17 ON BEHALF OF RESPONDENTS

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

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

1 overkill. The Sony rule safeguards legitimate uses by  
2 protecting the product and --

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

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

14 Questions about past acts not inherent in the  
15 distribution of our product --

16 JUSTICE SCALIA: But they are inherent. They  
17 are inherent. I mean, the point is that those ASDACS are  
18 what have developed your client's current clientele.

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

1 case. Beyond that, the question whether there were  
2 encouraging acts, any kind of promotional activity that  
3 says, "We ask you to, and urge you to, use this product  
4 for infringement," that is not here, because that was  
5 explicitly part of the past activities, removed from the  
6 District Court decision. And when the Petitioners sought  
7 interlocutory appeal, they said, expressly, these were  
8 "distinct and severable," in their terms -- that's a quote  
9 --

10 JUSTICE SOUTER: But I don't --

11 MR. TARANTO: -- from the past.

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

21 MR. TARANTO: No, I'm not. Let me try to be  
22 clear. There is a theory, not present here, along exactly  
23 those lines, which Petitioners are entitled to argue, back  
24 in the District Court, without a remand, because that  
25 issue remains in the District Court. It is a theory that

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

12 JUSTICE SOUTER: Then why was current -- why was  
13 inducement, as a current theory of recovery, even the  
14 subject of summary judgement? It seems to me that to make  
15 it a summary judgement is implausible to a non worldly  
16 degree.

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

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

21 MR. TARANTO: Yes.

22 JUSTICE SOUTER: -- the only summary judgement  
23 that was granted was with respect to current acts of  
24 inducement, the way the company is acting now, not the way  
25 the company was acting last year. And my question is --

1 if that is correct, then I don't see how summary judgement  
2 could even intelligibly have been considered.

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

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

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



1 JUSTICE KENNEDY: Well, then why don't you tell  
2 us what's wrong with the Government's test and with the  
3 Petitioner's test, the substantial-use part of it?

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

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

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

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

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

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

1 user. And the inquiry there is, Is this a product whose  
2 -- where the same features that are alleged to cause the  
3 infringement are also, in some nontrivial way, used for  
4 noninfringement?

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

11 MR. TARANTO: Yes.

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

19 MR. TARANTO: I -- because I --

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

22 MR. TARANTO: Right. Because I think any  
23 alternative is worse. A focus on intent to profit means  
24 that virtually every business which requires money and has  
25 the least bit of sensible forward-looking thinking about

1 what the usage is going to be will be subject to  
2 litigation, arguing about their knowing that a substantial  
3 amount of the value of the product was going to be based  
4 on infringement.

5 JUSTICE KENNEDY: But --

6 MR. TARANTO: Every --

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

11 MR. TARANTO: I -- well --

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

15 MR. TARANTO: Well, I'm not entirely sure about  
16 that formulation. Sony clearly sold many more tapes  
17 because of the illicit activity of Library. Sony  
18 presumably sold more machines, maybe even priced them  
19 higher, because there was a group of people who wanted the  
20 machine for the illicit activity. The Apple iPod, in the  
21 60 gigabit version, holds 15,000 songs. That's --

22 JUSTICE KENNEDY: So you think that --

23 MR. TARANTO: -- a thousand CDs.

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

1           MR. TARANTO: No, I -- what I think is that, as  
2 a matter of general judicially formulated secondary  
3 copyright liability law, there is no better policy balance  
4 that the Court can strike, and that only Congress can make  
5 the judgements about what the industry-wide facts are.  
6 And I -- let me pause there a minute -- there are no  
7 industry-wide facts in this record. Every citation in the  
8 Petitioner's brief about the magnitude of harm to the  
9 industry is extra-record citation. There are 26 billion  
10 --

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

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

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

25           MR. TARANTO: As does the personal computer and

1 the modem and the Internet service provider and the  
2 Microsoft operating system. There's -- everything in the  
3 chain that makes this work is absolutely essential to  
4 facilitating the copying. The question is which pieces,  
5 if any, and under what standard, get singled out for a  
6 judicially fashioned secondary copyright liability  
7 doctrine.

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

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

1 giving assistance. That is a classic contributory  
2 infringement case based on specific knowledge of  
3 infringement. And the reason --

4 JUSTICE SOUTER: Why isn't this a classic  
5 willful-ignorance case?

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

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

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

1 would require, getting permission in advance, the change  
2 of tool is not just some way of blinding oneself to the  
3 information.

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

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

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

21 MR. TARANTO: I think --

22 JUSTICE BREYER: Because -- as I had gotten that  
23 from one of these amicus briefs, you know, that's their  
24 standard -- they say a willful -- of willful, deliberate  
25 inducement. And that, it seems to me, important that they



1 be able to argue that. Now, can they argue it, in your  
2 opinion, if we do nothing but affirm the Ninth Circuit?

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

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

24 JUSTICE STEVENS: Mr. Taranto --

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

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

3 MR. TARANTO: Yes.

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

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

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

21 MR. TARANTO: I think that's just because each  
22 side filed summary judgement. Each side filed extensive  
23 --

24 JUSTICE STEVENS: So then your answer to my  
25 question is that, yes, if we affirm, as a possibility,

1 they could continue to seek damages on an active-  
2 inducement theory.

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

7 JUSTICE STEVENS: And then one other --

8 JUSTICE GINSBURG: I thought --

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

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

17 Let me comment a bit on what the record says  
18 about the substantial legitimate uses. This is not a  
19 question of --

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

23 MR. TARANTO: Yes.

24 JUSTICE GINSBURG: Because, as I read your  
25 briefing, it was, "Well, they can argue about some bad

1 things that Grokster was doing in the past, but this  
2 decision says: henceforth, what we're doing is okay. The  
3 case zeroed in on now and the future, and the only thing  
4 that was left open was something that was over and gone  
5 could get damages for it." But I thought that this  
6 judgement gave you an okay, a green light, from now on.

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

13 JUSTICE SOUTER: Then what is the point of the  
14 current summary judgement?

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

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

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

3 JUSTICE SOUTER: That's bizarre.

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

5 [Laughter.]

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

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

15 MR. TARANTO: Yes.

16 JUSTICE SOUTER: -- "even as to future  
17 activity."

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

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

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

19           MR. TARANTO: My understanding --

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

22           MR. TARANTO: -- my understanding is "some" is a  
23 great understatement, yes.

24           The bands talked about at 159 and 160 to '70 of  
25 the joint appendix, which have authorized their live

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

11 CHIEF JUSTICE REHNQUIST: Mr. Taranto?

12 MR. TARANTO: Yes.

13 CHIEF JUSTICE REHNQUIST: In your motion for  
14 summary judgement, did you ask that the Plaintiff's claim  
15 be dismissed?

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

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

23 MR. TARANTO: They had a generic claim about  
24 secondary copyright liability. We made the motion -- or,  
25 actually, StreamCast made a motion that said, "Let's carve

1 this piece out and talk just about whether the set of  
2 current activities supports secondary liability." The  
3 other side eventually agreed that that was distinct and  
4 severable from their claim of secondary liability as to  
5 past acts and as to past versions of the software, which  
6 has -- which has changed.

7 JUSTICE GINSBURG: Where does one find that?

8 CHIEF JUSTICE REHNQUIST: (Inaudible)

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

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

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

21 CHIEF JUSTICE REHNQUIST: The text on --

22 MR. TARANTO: -- 30 volumes.

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



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

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

25                   One final -- final word. We're not disputing

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

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Taranto.

16 Mr. Verrilli, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
18 ON BEHALF OF PETITIONERS

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

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

24 The reason, Justice Souter, you find it bizarre  
25 is because a shell game is going on here. What the

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

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

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

25           Now, why is infringement -- why is inducement

1 not enough? It's not enough because, as Justice Scalia  
2 suggested, these companies already operate in the shadows,  
3 and a ruling here, which would be, I submit, a significant  
4 cutback of the Sony rule, that inducement is the only  
5 available ground of liability, would just need them to  
6 paper over -- you know, we do have some paper evidence  
7 here, a paper trail here, but that'll just -- they just  
8 won't exist next time. And it's just -- it's just not  
9 enough.

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

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

1 balance that Sony said this law is supposed to strike.

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

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

21 And the problem with the rule which they say is  
22 a clear rule, but it obviously isn't in Sony, because Sony  
23 said, "strike a balance." And the problem with that rule,  
24 Your Honor, is that it gives them a perpetual license to  
25 keep going forward with billions and billions of unlawful

1 downloads a month. They never have to do anything to try  
2 to bring their conduct into conformity with law. They're  
3 not in the position of that inventor that you identified,  
4 Justice Scalia, who has to, sort of, think through, "What  
5 am I doing?" They're just in a position where they have  
6 every economic incentive in the world to maximize the  
7 number of infringing uses, because they make more money  
8 when they do so.

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

23 CHIEF JUSTICE REHNQUIST: Thank you --

24 MR. VERRILLI: -- foster development.

25 CHIEF JUSTICE REHNQUIST: -- Mr. Verrilli.

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Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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