

EXHIBIT 3

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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 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.