No. 07-1026

In The
Supreme Court of the United States

PERFECT 10, INC.,

Petitioner,

v.

VISA INTERNATIONAL
SERVICE ASSOCIATION, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF IN OPPOSITION

ANDREW P. BRIDGES
Counsel of Record
DAVID S. BLOCH
WINSTON & STRAWN LLP
101 California Street, 39th Floor
San Francisco, CA 94111
(415) 591-1000
Counsel for Respondent
MasterCard International Incorporated

[Additional Counsel Listed on Inside Cover]

MARK T. JANSEN
NANCY L. TOMPKINS
ANTHONY J. MALUTTA
TOWNSEND AND TOWNSEND
AND CREW LLP
Two Embarcadero Center,
Eighth Floor
San Francisco, CA 94111
(415) 576-0200
Counsel for Respondent
Visa International
Service Association

MICHAEL H. PAGE
ROBERT A. VAN NEST
JOSEPH C. GRATZ
KEKER & VAN NEST LLP
710 Sansome Street
San Francisco, CA 94111
(415) 391-5400
Counsel for Respondents
First Data Corp.;
CardService International,
Inc.; *and Humboldt Bank*

QUESTION PRESENTED

Did the Ninth Circuit correctly rule that Petitioner, the publisher of an erotic magazine and website, failed to state a claim of copyright infringement against Respondents, operators of payment card networks, based upon their failure to exclude merchants from the payment networks upon Petitioner's mere accusation that the merchants violated its copyrights?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Perfect 10, Inc., and Respondents Visa International Service Association; MasterCard International Incorporated; First Data Corporation; CardService International, Inc.; and Humboldt Bank (now known as Umpqua Bank).

RULE 29.6 STATEMENT

Visa International Service Association is a subsidiary of Visa Inc., a publicly held corporation. Visa International Service Association, a nonstock corporation, does not issue stock. Accordingly, no publicly held corporation owns 10% or more of Visa International Service Association's stock. Visa Inc., however, owns all of the equity membership interests in Visa International Service Association.

MasterCard International Incorporated is a publicly held corporation. It has no parent corporation and to its knowledge no publicly held corporation owns 10% or more of its stock.

First Data Corporation is a privately held company. No publicly held company owns 10% or more of its stock.

CardService International, Inc. is a privately held company and is a subsidiary of First Data Corporation. No publicly held company owns 10% or more of its stock.

RULE 29.6 STATEMENT – Continued

Umpqua Bank (formerly known as Humboldt Bank) is a subsidiary whose parent is Umpqua Holdings Corp., which is a publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTRODUCTION

This case does not deserve the Court's review. The decision Petitioner challenges is neither remarkable nor at odds with that of any other court. The courts below recognized, and properly rejected, Petitioner's claims of copyright infringement as promoting a radical new theory that would impose substantial liabilities on a wide variety of enterprises for providing services that may be described as "critical support" to infringers, regardless of whether the services specifically involve or promote the infringing conduct. No court has extended secondary liability so far, and Petitioner has furnished no compelling reason why this Court should do so now. The Court should deny the petition.

STATEMENT OF THE CASE

1. Petitioner is the publisher of an erotic magazine and website. It claims to hold copyrights in its website, its magazine, and in images of nude women featured on its website and in its magazine. It claims to have ceased publication of its magazine because of infringement of its copyrights on the Internet. Pet. 8.

This case is one of at least five filed by Petitioner targeting "intermediaries" for indirect liability on account of the activities of unrelated websites alleged to be infringing Petitioner's copyrights. In three of these lawsuits, Petitioner has sued the providers of search engines, such as Google and Microsoft, on the theory that they allow users free access to infringing copies of its photographs. In those cases Petitioner alleges that free competition is ruining its business. The Ninth Circuit consolidated Petitioner's cases against Google and Amazon.com's A9 search engine, and decided them in *Perfect 10, Inc.* v. *Amazon.com, Inc.,* 508 F.3d 1146 (9th Cir. 2007). Petitioner has sued Microsoft for virtually identical claims in *Perfect 10, Inc.* v. *Microsoft Corp.,* No. CV07-5156-AHM (SHx) (C.D. Cal. filed Aug. 8, 2007).[1] Each of Petitioner's numerous lawsuits seeks a massive windfall of statutory damages as well as potentially crippling injunctions against the normal operation of the defendant-intermediaries.

In this case, instead of alleging that *free* images are the threat, Petitioner alleges that the *charging* of subscription fees for access to infringing content is the cause of its harms. It sues Respondents for failing to monitor, investigate, and punish the merchants Petitioner accuses of violating its rights. Petitioner claims that Respondents' failure to exclude these unrelated merchants from the payment networks upon Petitioner's mere accusation should subject the Respondents to injunctions and statutory damages for copyright infringement.

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[1] Petitioner also sued companies providing web hosting and specialized payment processing services in a lawsuit that the Ninth Circuit decided in *Perfect 10, Inc.* v. *CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied,* ___ U.S. ___, 128 S.Ct. 709 (2007).

Respondents are the providers of the Visa and MasterCard payment networks, two payment processing companies (First Data Corp. and CardService International), and one bank (Humboldt, now known as Umpqua). All play a vital role in the nearly instantaneous processing of payment card transactions. Visa and MasterCard operate networks by which banks and other financial institutions exchange consumer and merchant credit information to assist in the completion of a payment by one party to another. A consumer wishing to make a purchase typically presents a card to a merchant. The merchant sends card information to its bank, which interacts with the network to communicate with the cardholder's bank. The cardholder's bank approves the transaction and transmits its acceptance back through the network to the merchant's bank and in turn to the merchant. Upon completion of the transaction, money moves from the cardholder's bank to the merchant's bank, and a corresponding debit and credit are issued. Visa and MasterCard process hundreds of millions of transactions each day, and these nearly instantaneous payment transactions power the national and international economies.[2]

Notably, neither Visa nor MasterCard has a direct relationship with any alleged infringer. Visa and MasterCard do not issue payment cards, extend

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[2] The operation of Respondents' credit clearing systems is described in more detail in *Emery* v. *Visa Int'l Serv. Ass'n,* 95 Cal. App. 4th 952, 116 Cal. Rptr. 2d 25 (2002).

credit, or hold merchant accounts. Instead, they provide the network services described above to banks and other financial institutions, which use the networks for swift authorization, clearance, and settlement of electronic payment transactions, in which the banks' customers (both merchants and consumers) engage. It is the affiliated banks that provide payment services to millions of merchants throughout the world.

As a result, while Petitioner and the courts below have described this case as relating to Respondents' alleged *secondary* liability for their dealings with allegedly infringing merchants, in fact Respondents Visa and MasterCard are at least two steps removed from the unidentified merchants that Petitioner says are infringing its copyrights. On these facts, "secondary liability" is a misnomer. The liability would be *tertiary* – a concept never before endorsed by any court. The dissent below acknowledged but sidestepped this fact. Pet. App. 43a n.2.

2. Perfect 10 sued all Respondents for copyright infringement, trademark infringement, trademark disparagement, wrongful use of a registered mark, violation of publicity rights assigned to Petitioner by its models, unfair competition, false and misleading advertising, libel, and intentional interference with prospective economic advantage. The district court dismissed the complaint in its entirety, without prejudice except as to the last two causes of action. Pet. App. 92a. Petitioner reasserted the other causes of action in an amended complaint. Pet. App. 117a.

After further briefing and a hearing, the district court dismissed the amended complaint with prejudice. Pet. App. 76a.

3. Petitioner appealed the dismissal of all causes of action to the United States Court of Appeals for the Ninth Circuit, which affirmed. Pet. App. 1a. The court of appeals relied upon this Court's decision in *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005), as well as its own and other circuits' case law, to determine that it would be improper to extend secondary liability to entities such as Respondents: providers of general-purpose financial services that had not promoted or advertised the infringing activities of third parties, had no legal right to control or direct those activities, and had not provided the equipment or processes used for infringement.

a. The court of appeals recognized that liability for contributory infringement requires proof that defendant had actual knowledge of another's direct infringement and that defendant induced, caused, or "materially contribute[d] to the infringing conduct." Pet. App. 6a. Petitioner argued below, as it does again here, that "by continuing to process credit card payments to the infringing websites despite having knowledge of ongoing infringement, [Respondents] induce, enable, and contribute to the infringing activity in the same way the defendants did in *Fonovisa, Napster,* and *Grokster.*" Pet. App. 9a-10a. The court of appeals correctly rejected that argument, recognizing that, when one reviews the details of the actual "'cases and controversies' before the relevant court in each of the test-defining cases and the actual holdings in those cases, it is clear that the factual circumstances in this case are not analogous." Pet. App. 8a.

The court of appeals observed that no published appellate decision had ever held it sufficient to allege that defendants "have contributed to the general business of the infringer." Pet. App. 97a. Rather, the court of appeals held that, for there to be "material contribution," defendants must have a "direct connection to th[e] infringement," Pet. App. 10a; their "assistance must bear some direct relationship to the infringing acts." Pet. App. 97a (quoting 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.04[A][2][a] (2004)). *See also Fonovisa, Inc.* v. *Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) ("one who *directly* contributes to another's infringement should be held accountable") (emphasis added).

The court of appeals explained that Petitioner failed to allege the necessary direct connection of Respondents to the underlying acts of infringement:

> The credit card companies cannot be said to materially contribute to the infringement in this case because they have no direct connection to that infringement. Here, the infringement rests on the reproduction, alteration, display and distribution of Perfect 10's images over the Internet. Perfect 10 has not alleged that any infringing material passes over Defendants' payment networks

> or through their payment processing systems, or that Defendants' systems are used to alter or display the infringing images.

Pet. App. 10a. The court of appeals thus recognized that Respondents' electronic payment network and payment-processing services differ fundamentally from the flea market stalls, performance venues, computer systems, and infringement-facilitating software that defendants in the other cases had provided to third parties, and which third parties had directly used to infringe. The court of appeals, responding to a counterfactual argument by Petitioner, explained that the fact that Respondents "have the power to undermine the commercial viability of infringement does not demonstrate that the Defendants materially contribute to that infringement." Pet. App. 18a-19a.[3]

b. Turning next to inducement, the court of appeals invoked and applied the standard articulated by this Court in *Grokster*. The court determined that Petitioner had not alleged an inducement claim against Respondents for providing general transaction processing services for a vast array of merchants.

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[3] Petitioner mischaracterizes the court of appeals' decision on contributory infringement as based upon the existence of "other viable funding mechanisms" to keep infringing Internet sites in operation. Pet. 11. But that discussion by the court of appeals was mere *dictum*, responding to Petitioner's unsupported conclusion that Respondents were essential to the business of infringing websites.

That was so, the court explained, because Petitioner alleged no facts suggesting that Respondents promote, advertise or advocate infringing activities. Pet. App. 20a-21a. Respondents do not understand Petitioner to contend there was any error in this aspect of the court of appeals' ruling.

c. Finally, the court of appeals held that Petitioner failed to state a vicarious liability claim because Petitioner's "allegations of fact cannot support a finding that [Respondents] have the right and ability to control the infringing activity." Pet. App. 25a.

Noting the harmony of its decision with *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the court explained that Napster, which ran a centralized index for its peer-to-peer file-sharing system that enabled consumers to find infringing files, "had the right and ability to block user access to its program and thereby deprive particular users of access to their forum and use of the location and distribution tools." Pet. App. 27a. In contrast, the court recognized that, while "[Respondents] can block access to their payment system, . . . they cannot themselves block access to the Internet, to any particular websites, or to search engines enabling the location of such websites." *Id.* The court of appeals further noted that Respondents' "'policing' power is limited to refusing to process payments resulting from such violations and does not extend to directly stopping the violations themselves." *Id.* n.14.

The court stated that the mere "ability to exert financial pressure does not give [Respondents] the right or ability to control the actual infringing activity at issue in this case." Pet. App. 29a. Responding to Petitioner's unsupported argument that Respondents' networks were "essential" to third-party infringements, the court of appeals identified numerous other services required for infringements, including the provision of electricity to power the infringing operations. The court then observed:

> All these services are essential to make the businesses described viable, they all profit to some degree from those businesses, and by withholding their services, they could impair – perhaps even destroy – the commercial viability of those businesses. But that does not mean, and *Grokster* by no means holds, that they are all potentially liable as vicarious infringers. Even though they have the "right" to refuse their services, and hence the literal power to "stop or limit" the infringement, they, like [Respondents], do not exercise sufficient control over the actual infringing activity for vicarious liability to attach.

Pet. App. 33a.

Judge Kozinski filed a dissent positing that Respondents were not merely secondarily liable for copyright infringement but also for a direct infringement claim based upon an argument that Petitioner never even made. Pet. App. 43a & n.3. The dissent offered no substantive rebuttal to the majority's observation that Petitioner's theory of liability would apply equally to electric companies and other providers of "critical support" to alleged infringers. The dissent merely hypothesized: "Were we to rule for plaintiff, as we should, I have every confidence that future courts would be able to distinguish this case when and if they are confronted with lawsuits against utility companies, software vendors and others who provide incidental services to infringers." Pet. App. 55a.

The dissent mentioned supposed allegations that "defendants have adopted special rules and practices that apply only to the Stolen Content Websites," citing the amended complaint at paragraphs 33-37. Pet. App. 63a-64a. But those portions of the amended complaint reveal no such allegations. *See* Pet. App. 63a-64a (Amended Complaint ¶¶ 33-37). To the contrary, Petitioner alleged that the standard merchant agreement employed by one Respondent, attached as an exhibit to that complaint, was used with "Stolen Content Websites" and the provisions were "typical of merchant agreements throughout the Visa and MasterCard systems." *See* Pet. App. 123a (Amended Complaint ¶ 16). Petitioner's allegations about Respondents' regulation of so-called "Stolen Content Websites" all invoke that standard agreement. *See, e.g.,* Pet. App. 123a (Amended Complaint ¶¶ 17-19).

Judge Kozinski did acknowledge that having "a formal contractual or principal-agent relationship with the infringer" is a precondition for vicarious liability. Pet. App. 68a n.23. Notably, he also observed: "Visa and MasterCard don't deal directly with merchants; rather, merchants obtain credit card accounts from banks, which are in turn authorized by Visa or MasterCard to use their respective payment systems. Some of the other defendants are involved in clearing these transactions." Pet. App. 43a n.2. While the dissent suggests that discovery would illuminate the matter, it could identify no allegation in the Complaint that any of the Respondents had direct contact with any alleged infringer.

5. The court of appeals denied a petition for *en banc* review with no judge having requested a poll. Pet. App. 114a.

REASONS FOR DENYING THE PETITION

Nothing about this case warrants review. Petitioner asked the district court and the court of appeals to assign to Respondents a new legal obligation to deny payment network access to third parties that Petitioner claims are infringing its copyrights. Those courts properly refused this request, finding no congressional authority or common-law precedent for doing so. The dissent's suggestion that "you can't do business at all on the internet without credit cards," Pet. App. 52a, is manifestly contradicted by this Court's opinion in *Grokster* and by Petitioner's arguments and allegations in its cases against Google, Amazon.com, and Microsoft. But even if that suggestion were true, there would still be no basis to conclude that Respondents "aid and abet" every wrongdoing in connection with which payments occur over their networks.

The petition fails to satisfy any of the traditional criteria justifying this Court's review. Petitioner's argument that there is a conflict among the courts of appeals, relegated to the closing pages of its brief, identifies no rule announced by any court of appeals whose application would have resulted in a different outcome on the facts presented here. There is simply no conflict among the circuits for this Court to resolve. Furthermore, the opinion below fully accords with the decisions of this Court and with traditional common-law principles, the necessary source for any rule of contributory infringement or vicarious copyright liability. The courts below properly declined to extend these doctrines of secondary liability to actors that, like Respondents, neither directly contribute to, nor induce, nor have a direct right of control over the allegedly infringing conduct.

Petitioner and its *amici* thus seek the Court's review of an uncontroversial and correct decision by suggesting that the Respondents have a duty to foil Internet-based copyright infringements. Petitioner would create a striking new rule pairing such responsibility with concomitant liability for Respondents' failure to impose a boycott upon merchants that stand merely *accused* of copyright infringement. No case to date has recognized any such duty or any such liability. Indeed, the uniform jurisprudence of this

Court and several courts of appeals stands athwart the goals of the petition.

Petitioner urges, in effect, that any vendor whose services could be described as providing "critical support" for an infringer's business should be liable for infringement. That proposition would make infringers of not only the Respondents but also of electric utilities, telephone companies, accountants, landlords, transportation companies – even janitorial services – once they receive notices alleging that their customers engage in infringements.

Petitioner argues that secondary liability for infringement attaches when a provider of "critical support" to any infringing business fails to take affirmative steps to impair that business's operations. Petitioner places weight in its allegations on "Perfect 10's request that Respondents cease their support" of alleged infringers (Pet. 8) and on its having "asked Respondents to stop providing credit card services to these [accused] websites." Pet. 9. But what Petitioner did *not* allege in the amended complaint is that credit card companies have entered into any relationship with alleged infringers justifying indirect liability, alleging only that Respondents provided access to a payment network.

Petitioner's proposed theories of liability would allow copyright holders to erect an economic blockade around businesses merely by alleging that the businesses are engaged in copyright infringement. Petitioner proposes liability for payment networks and other service providers that continue to serve customers after a notice of claimed infringement, even if those service providers do not materially contribute to infringing activity, merely because those service providers furthered the ordinary business operations of the challenged enterprise.

The new rule sought by Petitioner and its *amici* would, without congressional authority, fundamentally transform copyright law to conscript a wide variety of enterprises into service as arbiters of the copyright status of billions of transactions and of the activities of millions of persons and companies that may, at one time or another, stand accused of copyright infringement or other unlawful behavior. Under Petitioner's proposed regime, service providers receiving a demand from a copyright holder would have to: (1) investigate particular transactions and the parties (merchants and customers) engaging in them; (2) review the products and/or services involved in those transactions; (3) determine whether the materials and/or activities constitute copyright infringement, or some other alleged unlawful conduct, taking into account (a) the laws of the respective jurisdictions, (b) the rights of a copyright holder that may be implicated, and (c) other considerations that may affect the analysis, such as questions of substantial similarity, express or implied license, and fair use; (4) decide whether the transaction must be blocked before it is completed; (5) assess whether a merchant's or customer's activities may be segregated into infringing and noninfringing categories; and finally (6) block such merchants either entirely or with respect to only some specific payments. Thus Petitioner suggests that the payment card companies become investigators, prosecutors, judges, juries, and executioners upon the initiative of an accuser who claims to own copyrights but who has not proven its case in a court of law.

None of this can happen without undermining the benefits – chief among them the speed of payment processing – that Respondents' services bring to the world of commerce. The potential burden on the payment networks, on electronic and other commerce, and on the consuming public is enormous.

Payment network systems allow affiliated banks to make transaction authorization and merchant/customer credit approval decisions nearly instantaneously. These decisions are based upon factors such as system integrity and transaction security. Respondents' automated systems, however, are not competent to make legal judgments involving complex and often subtle criteria that depend upon case-by-case analysis of particular facts, such as the analysis courts perform in copyright litigation. Under Petitioner's proposed regime, payment card networks would be forced to require their affiliated banks to drop merchants like hot potatoes upon a mere accusation of merchant wrongdoing so as to avoid potential liability to third-party accusers. In doing so, however, the banks might risk claims brought by the merchants themselves.

As the dissent below noted, "the mere threat of stopping an essential service can be implemented at once, without hiring an army of lawyers or persuading judges and juries of the rightness of one's cause." Pet. App. 62a n.18. Courts should not countenance a legal regime in which a copyright holder's mere accusation can destroy a merchant. Giving copyright holders such leverage over third-party intermediaries would be unnecessary, imprudent, and unprecedented; and it would create burdens on commerce that neither this Court's cases nor Congress itself ever contemplated. Moreover, Petitioner and its *amici* suggest no basis for confining their proposed new regime to payment card companies, to the resolution of copyright as opposed to other claims, or to electronic commerce and the Internet. Under the new rule Petitioner advocates, Visa, MasterCard, and others would be required to investigate and adjudicate a multitude of claims about supposed unlawful conduct by a variety of entities that rely upon their payment networks, ranging from stores accused of employment discrimination to airlines accused of antitrust violations.

I. THE DECISION BELOW WAS CORRECT IN LIGHT OF THE TRADITIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Accords with the Decisions of This Court, Congressional Intent, and the Traditions of Secondary Liability.

The court of appeals' refusal to allow Petitioner to proceed with its claims against Respondents was in accord with this Court's decisions and with congressional intent regarding the proper scope of secondary liability for copyright infringement. The decision below is also consistent with the common-law doctrines from which any vicarious or contributory infringement liability must derive. This Court has addressed the question of secondary liability for federal statutory torts in a number of key decisions over the last 25 years, including *Sony Corp. of Am.* v. *Universal City Studios, Inc.,* 464 U.S. 417 (1984) (Copyright Act); *Central Bank* v. *First Interstate Bank,* 511 U.S. 164 (1994) (Securities Exchange Act); *Meyer* v. *Holley,* 537 U.S. 280 (2003) (Fair Housing Act); and *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster, Ltd.,* 545 U.S. 913 (2005).

As the Court has recognized in its two most recent secondary copyright infringement cases, the doctrines of vicarious and contributory copyright liability "emerged from common law principles and are well established in the law." *Grokster*, 545 U.S. at 930. In *Sony,* this Court explained that "vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony*, 464 U.S. at 435. The Court, in determining that the manufacturers and distributors of Betamax video tape recorders could not be secondarily liable for copies of television programming given the machines' capability for substantial legitimate uses, recognized that there necessarily are limits on secondary copyright liability. The Court thus rejected Respondents' argument, based on an unduly broad reading of language in *Kalem Co.* v. *Harper Bros.,* 222 U.S. 55 (1911) – a case in which this Court affirmed the liability of a defendant who produced and sold an unauthorized movie version of the copyrighted novel, "Ben-Hur" – that merely "supplying the 'means' to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement." *Sony*, 464 U.S. at 436. The Court explained that "[t]he producer in *Kalem* did not merely provide the 'means' to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression." *Id.*

In *Grokster*, the Court revisited the concept of contributory copyright infringement, clarifying that active, purposeful inducement of copyright infringement could give rise to civil liability as a form of conduct-based contributory infringement distinct from, and unshielded by, the technology-based standard announced in *Sony*. On the contributory infringement issue before it in *Grokster* the Court adopted an inducement rule. It held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Grokster*, 545 U.S. at 936-37. The Court then cautioned:

> We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U.S. at 439, n. 19, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. *Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves.*

Grokster, 545 U.S. at 937 (emphasis added).

The defendants in *Grokster*, unlike Respondents here, distributed software that was not only *capable* of being directly used for making unauthorized copies, but in fact was used overwhelmingly for unlawful peer-to-peer file sharing purposes. The record showed further that the defendants had purposefully developed, promoted, and advertised their product for this unlawful use. 545 U.S. at 937-40. As the court below properly recognized, no such allegation has been, or could be, made about Respondents.

The Court in *Grokster* addressed only the question of contributory infringement and did not review the vicarious liability portion of the decision below. *See Grokster*, 545 U.S. at 930 n.9. This Court recently reviewed vicarious liability under another federal statutory scheme and explained that, as an outgrowth of the common-law doctrine of *respondeat superior*, vicarious liability traditionally attaches only when the defendant enjoys an employer-employee or principal-agent relationship with the party that directly committed the offense. *Meyer*, 537 U.S. at 285. In *Meyer*, the Court cautioned against the extension of vicarious liability beyond that narrow context. *Id.* at 286-87. The Court explained that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Id.* at 285. The Court held (in connection with the Fair Housing Act) that vicarious liability applies only in this "traditional" principal-agent context unless Congress has clearly indicated in the statute its intent to expand vicarious liability beyond the "traditional" context. *Id.* at 287. The decision below is consistent with this Court's recognition that vicarious liability may not be extended to entities such as Respondents, who provide financial and credit clearing services for allegedly infringing businesses but have no "control" over them in the traditional sense.

In two other recent cases, *Central Bank*, 511 U.S. at 191, and *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.,* 552 U.S. ___, ___, 128 S.Ct. 761 (2008) (slip op. at 10-12), the Court expressed its reluctance to import common-law liability doctrines not expressly authorized by Congress, refusing to impose aiding and abetting liability in connection with private lawsuits brought under Section 10(b) of the Securities Exchange Act.

Even the legislative history of the 1976 Copyright Act shows the intent of Congress to limit the classes of persons who may be held liable for the infringing activity of others. When a House committee rejected an amendment intended to exempt night club and theatre operators from any liability for infringing performances on their premises, it explained that then-existing court-created limitations on secondary liability were appropriate:

> To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefits from the infringing performance.

H.R. Rep. No. 94-1476 at 159-60 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5775-76.

The decision below accords with these well-established principles. Respondents are not in any relationship that imposes on them a duty to investigate and control the merchants' activities. Under the common law, "[u]nless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, defendants are not liable in tort for a pure failure to act for the plaintiff's benefit." 2 D. Dobbs, The Law of Torts, § 314, p. 853 (2001); *see also* Restatement (Second) of Torts § 315(a). "The fact that the defendant foresees harm to a particular individual from his failure to act does not change the general rule." *See* Dobbs at 853. *See also, e.g.*, Restatement (Second) of Torts §§ 314-319.

The refusal of the common law to extend duty in this way explains the "dance hall" cases and their progeny, under which the courts have recognized that secondary copyright liability can be imposed on certain online service providers, online bulletin boards and others who provide the instrumentalities – described metaphorically in some contexts as the "site and facilities" – used by others to infringe. *See, e.g., Napster*, 239 F.3d at 1022; *Fonovisa,* 76 F.3d at 264; *Amazon.com*, 508 F.3d at 1171. But Respondents do not have any special relationship with the merchants creating a traditionally-recognized right of control or a duty to police for Petitioner's benefit.

Courts have long held that financial institutions do "not have a special relationship with [their] depositors such that [they have] a duty to control their conduct for the benefit" of unrelated persons. *Mid-Cal Nat'l Bank* v. *Federal Reserve Bank*, 590 F.2d 761, 763 (9th Cir. 1979); *see also, e.g., Mellon Bank* v. *Ternisky,* 999 F.2d 791, 796-797 (4th Cir. 1993) (lenders are not required to police the actions of their borrowers); *Arbest Constr. Co.* v. *First Nat'l Bank & Trust Co.*, 777 F.2d 581, 584 (10th Cir. 1985) (issuing institution has no duty to police the underlying transaction supported by letter of credit); *FDIC* v. *Imperial Bank*, 859 F.2d 101, 104 (9th Cir. 1988) (no duty owed because no special relationship exists); *Kools* v. *Citibank, N.A.*, 872 F. Supp. 67, 72 (S.D.N.Y. 1995) (issuer of a letter of credit has no obligation to police underlying transactions); *E.F. Hutton Mortg. Corp.* v. *Equitable Bank*, 678 F. Supp. 567, 577 (D. Md. 1988) (even if bank knew of or suspected customer's fraudulent scheme, it owed no duty to a third-party, non-customer plaintiff); *Emery* v. *Visa Int'l Serv. Ass'n,* 95 Cal. App. 4th 952, 965-966 (2002) ("we are unwilling to foist upon VISA the onerous role of the global policeman plaintiff seems to think it should be").

This case is no different. The sound reasons for refusing to extend policing duties to banks apply equally to financial service providers such as Respondents, who process literally millions of transactions per day and cannot possibly vet each transaction or investigate claims that certain transactions are unlawful.

Measured against the standards set out by this Court and the common law, Petitioner's allegations that Respondents provide "critical support" to the businesses and infringements of third parties fail to establish secondary copyright liability claims under any theory.

First, Petitioner did not allege facts plausibly suggesting *Sony*-style liability based upon Respondents' furnishing devices for infringement that lack substantial non-infringing uses. Apart from the fact that Respondents' networks are not devices for copying or other actions exclusively reserved to copyright owners, there is no question that payment processing services are not merely capable of, but indeed actually have, abundant uses other than to infringe copyrights.

Second, Petitioner did not allege facts plausibly suggesting that Respondents have a *respondeat superior* relationship with infringers or that "the right and ability to supervise [otherwise] coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials" for them. *Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Respondents simply do not supervise the conduct of websites with which they do not even have a contractual relationship.

Third, Petitioner does not allege facts plausibly suggesting, under the *Grokster* standard, that Respondents have done anything, much less deliver an instrumentality of infringement "with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." *Grokster*, 545 U.S. at 936-37. Nor has Petitioner alleged facts plausibly suggesting that Respondents have engaged in "purposeful, culpable expression and conduct" that would justify contributory infringement liability. *Id.* at 937.

B. There is No Conflict Between the Ninth Circuit's Decision Below and Those of Other Circuits.

1. The Contributory Infringement Ruling Accords with Those of Other Circuits.

There is no conflict among the circuits warranting review. Not only is the court of appeals' decision consistent with the decisions of this Court, congressional intent, and the common-law principles of secondary liability, but it also perfectly accords with the decisions of the other circuit courts of appeals. Petitioner has made a half-hearted effort to identify a few cases from other circuits that it contends somehow contradict the decision below. Pet. 31-37. But one need not dig deeply to discern that all of the cited cases are vastly different from this case on their facts – and that they are consistent with the outcome below. Petitioner focuses on three principal cases, and Respondents will address them here specifically.

Columbia Pictures Indus., Inc. v. *Redd Horne, Inc.,* 749 F.2d 154 (3d Cir. 1984), is a classic inducement case, similar to *Grokster* but dissimilar to this case. As Petitioner itself concedes, liability in that case turned upon defendants' provision of an array of services, including "advertising, accounting, financial, and administrative services," to the primary infringer, Maxwell's Video Showcase, Ltd., which engaged in the unauthorized exhibition of copyrighted movies by providing "viewing booths" to its customers. Pet. 24.

In finding Glenn Zeny contributorily liable, the Third Circuit noted that Zeny – while "not a stockholder or officer" – "conducted negotiations and wrote letters, on Redd Horne, Inc., stationery, on behalf of Maxwell's and its predecessor corporation." *Id.*, 749 F.2d at 160. Zeny, the court observed, "participated knowingly and significantly in the infringing activity and ignored the plaintiffs' persistent requests that the activity cease." *Id.* "In addition," the Court held, "Glenn W. Zeny's knowledge of, and substantial participation in, the infringing activities may be imputed to his employer, Redd Horne, Inc." *Id.* at 161.

The Third Circuit grouped all of those actions, focusing on actual participation in the infringing activity and advertising services in particular, in applying secondary liability principles. Petitioner has alleged no remotely similar facts in this case. Petitioner's singling out of a vague reference to "financial and accounting" services does not candidly reflect the Third Circuit's decision.

Petitioner also invokes *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003). Pet. 33-34. But *Aimster*, too, is vastly different from this case. In *Aimster* the defendants, like the defendant in *Napster,* provided a peer-to-peer music downloading service, including both a software program and access to defendants' computer system. The software and computer system were specifically designed to enable users to swap copyrighted music files, and defendants expressly promoted that capability. The service and system were the very instrumentality of infringement, and the defendants offered no evidence whatsoever of non-infringing uses or purposes. The defendants in *Aimster* did far more than Petitioner has alleged Respondents did in this case.

In *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971), as Petitioner correctly notes, the defendant actually managed infringing performers, helped promote and stage an infringing performance, and was part of the "concert enterprise." Pet. 34. Petitioner correctly cites the Second Circuit's recognition that the defendant pervasively participated in the formation and direction of the infringement, developed and printed the programs for the infringing compositions at concerts, and actually created the audience as a market for the infringers. *Id.* Petitioners' non-factual rhetoric notwithstanding, Respondents cannot be considered likewise to "make a market" for infringing websites. *Id.*

Simply put, none of these cases supports liability upon facts similar to those alleged by Petitioner in this case, and any claimed conflict with the decision below does not exist. Petitioner's argument rests upon unsupportable generalities taken out of the context of the cases Petitioner cites.

Against the backdrop of these cases, one can see the radical nature of Petitioner's proposed theories. Petitioner seeks to impose liability on Respondents for (1) operating or participating in general-purpose payment networks, (2) having rules that generally prohibit illegal conduct, (3) receiving accusations from Petitioner that a broad range of ill-defined merchants are engaged in various bad acts, and (4) failing to investigate and suspend the accused merchants. The court of appeals rightly affirmed dismissal of Petitioner's action on the basis that the non-conclusory factual allegations offered by Petitioner failed plausibly to suggest contributory infringement liability. Petitioner failed to allege facts suggesting purposeful, culpable conduct, including clear expressions or other acts manifesting Respondents' intent to encourage or promote copyright infringement. The ill-pleaded complaint demonstrates why the petition should be denied.

Under Petitioner's theory, any provider of services that are alleged "essential" to an infringer's continued business existence would be contributorily liable simply on receiving notice that its customer is infringing and failing to terminate service. Broadening liability to all "but for" service providers is contrary to the case law of this Court and the federal courts of appeals.

In fact, by pointing to the existing distinction between the "absentee" and "dance hall" landlord cases (Pet. App. 54a), the dissent below points to the exact problem with adopting the expanded rule of "but for" liability urged by Petitioner. Even an absentee landlord provides an essential business service (a place in which infringing activities are conducted), so once it is put "on notice," even an absentee landlord such as the one in *Deutsch* v. *Arnold*, 98 F.2d 686, 688 (2d Cir. 1938), would be duty bound, under the expanded liability doctrine promoted by Petitioner, to evict his infringing tenant or be sued for copyright infringement.

Moreover, while it may be true that the denial of payment card processing services would make it more difficult for online merchants to make a profit, it would not put them out of business – a fact admitted by Plaintiff's own continued operation of its website after it could no longer accept credit cards. *See* Pet. App. 145a (Complaint ¶ 84).

More critically, if a "but for" standard of contributory liability were adopted, a multitude of other general-purpose service providers would be equally at risk upon "notice" and a demand that they withdraw their services. As even the dissent below recognizes, liability should not extend to utilities and other suppliers of routine business services. Pet. App. 55a. But there is no basis upon which to distinguish the "critical" contribution of a payment card network or processing service from the even more essential contribution of a utility company or domain name registrar. The line has to be drawn somewhere. Since the dissent does not suggest where or how to do so, *id.*, it is the dissenter's view that would "prove no end of trouble" if it were adopted.

2. The Vicarious Liability Ruling Accords with Those of Other Circuits.

Nor does the court's decision on vicarious liability conflict with those of other courts of appeals discussed by Petitioner. As explained above, vicarious liability is limited at common law to employer-employee and principal-agent relationships, which do not exist in this case. *Meyer,* 537 U.S. at 285-91. While some courts of appeals (including the Ninth Circuit) have extended vicarious liability to reach a limited class of landlords who have extensive control over the premises on which infringing activities are conducted, Respondents are nowhere on this spectrum.

Petitioner cites *Gershwin* for the proposition that vicarious liability could apply even though a defendant lacked the formal power to control the infringer. Pet. at 35. Thus Petitioner appears to cite *Gershwin* to contradict the very proposition for which *Gershwin* is usually cited, namely that the right and ability to control infringing conduct coupled with a direct financial benefit from the infringing activity are touchstones of vicarious liability. *See Gershwin,* 443

F.2d at 1162. But as Petitioner revealed, Pet. 36, in *Gershwin* the direct infringer *depended upon the defendant for direction* in the infringing activity. *See Gershwin*, 443 F.2d at 1163. Petitioner has alleged no facts plausibly suggesting that infringing websites depend upon Respondents for direction in their infringing activities.

Similarly, in *Shapiro, Bernstein,* while the defendant did not actively participate in the sale of infringing records, it set up the infringer as the phonograph record department of its store; it retained the right to control the employees operating on its premises and had the right to terminate those employees; it paid the employees' salaries out of proceeds it received and withheld taxes from those employee salaries; it issued receipts for the sale of counterfeit records in its name; and it had the "power to police carefully the conduct of its concessionaire." 316 F.2d at 308. Based on the particular relationship of the defendant to the infringer in that case, the court of appeals analogized the defendant's relationship with the infringer more to that of employer-employee than to that of landlord-tenant. *Id.*

Petitioner alleges no facts plausibly suggesting anything akin to the employer-employee relationship (or even a landlord-tenant relationship) in this case. Boilerplate contractual provisions requiring merchants to obey the law (with no particular reference to copyright law), and routine review of businesses by the banks participating in the payment networks, do not give rise to such a relationship, and Respondents Visa and MasterCard lack even those.

Finally, in *RCA/Ariola Int'l, Inc.* v. *Thomas & Grayston Co.,* 845 F.2d 773 (8th Cir. 1988), the manufacturer of a copying device was held vicariously liable for the acts of retailers using it to make infringing copies because it issued directives to the retailers regarding use of the devices and profited from that use, not merely because it retained title to the copying devices. Moreover, the manufacturer had specifically assured the plaintiffs' trade association that it policed the use of the machines and its officer had written to retailers outlining what uses to permit. *RCA/Ariola,* 845 F.2d at 781-82. Petitioner here has failed to allege facts plausibly suggesting such an involvement by Respondents in this case.

II. THIS CASE DOES NOT INVOLVE ANY URGENT HARM CALLING FOR THIS COURT TO FASHION NEW RULES OF SECONDARY LIABILITY.

Petitioner and its *amici*[4] vociferously argue the evils of online infringement and other forms of counterfeiting

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[4] The brief of *amici* International Anticounterfeiting Coalition et al. in this Court entirely misses the point. That brief, citing only the Lanham Trademark Act, argues that the Ninth Circuit erred in its treatment of secondary liability under trademark law. But the Petition for Certiorari in this case expressly seeks review of the Ninth Circuit's decision solely regarding secondary *copyright* liability. Accordingly, the Court should disregard the brief entirely. Whether standards of secondary liability in trademark law and copyright law should be harmonized is not before the Court.

in their briefs. They provide industry statistics and selectively favorable commentary – such as that claiming to link infringements to terrorism – to suggest an urgent need for this Court to provide immediate expansion of the law to address the challenges.

While their passion may be expected, their arguments fall short. Their grounds for supporting the petition, cloaked in invective and hyperbole about threats to copyright interests, are little more than industry pressure to achieve judicially what they have never before secured, either from Congress or the courts.

To begin with, the factual premise that payment is the bedrock of the infringements they abhor flies entirely in the face of the facts that they and this Court faced in *Grokster,* that the RIAA and the Ninth Circuit faced in *Napster*, and that the Petitioner and the Ninth Circuit faced in *Amazon.com*.

Moreover, the supposed severity of the problem they allege does not justify indiscriminate selection or creation of new targets for liability. Petitioner suggests that the only effective relief against evasive direct infringers is to impose secondary liability on participants in the electronic payment system, such as Respondents. That is untrue. To the extent a plaintiff sues a direct infringer and wins an injunction barring it from selling subscriptions and processing payments, and to the extent that plaintiff serves notice of the injunction upon that infringer's charge-processing bank, Respondents expect that the bank would obey the injunction. But the focus of the claim and the liability must remain on the infringer, and the remedy must emanate from the court's ruling with respect to that infringer. The process cannot be properly out-sourced to a payment system that has no competence or practical ability to adjudicate questions of infringement.

While *amici* sound the alarm about their own interests, they ignore the devastating impact on the global electronic payment system of extending indirect copyright liability to Respondents. The courts below rightly chose not to cause such a disturbance.

Indeed, this Court has previously expressed caution about judicial expansions of copyright liability, noting:

> The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.
>
> In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which

> never contemplated such a calculus of interests.

Sony, 464 U.S. at 431 (citations omitted).

While the Court in *Sony* recognized vicarious liability as a non-statutory basis for liability, it did so with the express understanding that "vicarious liability is imposed in virtually all areas of the law" and it identified contributory infringement as a species of that broader concept. *Sony*, 464 U.S. at 435. The Court has recently observed that, when applying general principles of vicarious liability in a field regulated by Congress, the courts must not exceed traditional boundaries of vicarious liability without explicit congressional direction. *Meyer,* 537 U.S. at 285-91.

As this Court has recognized, it is Congress that has the power to promote and protect copyrights through legislation. *Sony*, 464 U.S. at 456. "[O]ne may search the Copyright Act in vain for any sign that the elected representatives of the millions of people" who use payment cards to purchase goods and services have imposed on consumers the indirect costs of paying to police others' intellectual property rights. *Id.*[5]

[5] Petitioner's *amici* acknowledge that some Respondents, such as Visa, have voluntarily devoted resources to assisting government authorities in locating and prosecuting websites that publish child pornography or engage in other criminal activities. Proving yet again the adage that no good deed goes

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There is no justification for distorting established principles of secondary liability in this context. Indeed, this Court taught in *Sony* that copyright law always unfolds to meet new challenges, that secondary liability in copyright law derives from general principles, and that Congress has the authority to set different standards for secondary liability if the general principles are not sufficient. *See Sony*, 464 U.S. at 431. This Court in *Meyer* similarly ruled that traditional principles of vicarious liability apply to federal statutory torts unless Congress has spoken otherwise, even when an "overriding societal priority" interest is at stake. 537 U.S. at 290-91.

Copyright infringement is a serious problem. But it is one the law already addresses. This Court should decline Petitioner's invitation to depart from long-established legal rules to impose new responsibility for copyright infringement on those who, like Respondents, are engaged in lawful commerce far removed from the alleged acts of infringement.

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unpunished, Petitioner and the motion picture, photographic, publishing and recording industries now urge this Court to impose a legal duty on Respondents to incur the incredible expense and burden – and attendant legal risk – to investigate, adjudicate, and punish any website that an alleged rights holder claims is infringing its intellectual property. This result is unjustified, contrary to public policy, and unsupported by the Copyright Act as currently written and interpreted by this Court.

CONCLUSION

The Court's intervention is unwarranted here. The decision of the court of appeals does not depart from settled law, there is no conflict among the courts of appeals, and Petitioner's proposed expansion of secondary liability in copyright law is unwise. The Court should deny the petition.

Respectfully submitted,

ANDREW P. BRIDGES
Counsel of Record
DAVID S. BLOCH
WINSTON & STRAWN LLP
101 California Street,
39th Floor
San Francisco, CA 94111
(415) 591-1000
Counsel for Respondent MasterCard International Incorporated

MARK T. JANSEN
NANCY L. TOMPKINS
ANTHONY J. MALUTTA
TOWNSEND AND TOWNSEND AND CREW LLP
Two Embarcadero Center,
Eighth Floor
San Francisco, CA 94111
(415) 576-0200
Counsel for Respondent Visa International Service Association

MICHAEL H. PAGE
ROBERT A. VAN NEST
JOSEPH C. GRATZ
KEKER & VAN NEST LLP
710 Sansome Street
San Francisco, CA 94111
(415) 391-5400
Counsel for Respondents First Data Corp.; *CardService International, Inc.*; *and Humboldt Bank*

April 2008