No. 05-15170
Decided July 3, 2007
Before the Honorable Stephen Reinhardt,
Alex Kozinski, and Milan D. Smith, Circuit Judges

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERFECT 10, INC.,

Plaintiff - Appellant,

v.

VISA INTERNATIONAL SERVICE ASSOCIATION,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. C04-0031 JW

BRIEF OF *AMICUS CURIAE* RECORDING INDUSTRY ASSOCIATION OF AMERICA IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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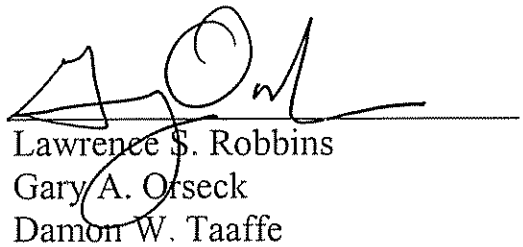
RULE 26.1 STATEMENT OF PROPOSED *AMICUS CURIAE*

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, *amicus curiae* the Recording Industry Association of America states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.



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INTEREST OF *AMICUS CURIAE*

Amicus the Recording Industry Association of America ("RIAA") is the trade association that represents the sound recording industry in the United States. Its members are United States record labels that own thousands of valuable copyrights and collectively create, manufacture, and distribute the vast majority of all sound recordings legitimately produced and sold in the United States. The RIAA has a unique perspective on the importance of secondary infringement that would be valuable to the Court in considering the pending rehearing petition. All parties have consented to the filing of this brief.

The panel majority's holding, if left undisturbed, would further devastate a music industry already reeling from rampant internet piracy. The "Stolen Content Websites" at issue here (*Perfect 10, Inc.* v. *Visa Int'l Service, Assoc.*, 2007 WL 1892885, *1 (9th Cir. July 3, 2007)) are among the most pernicious of the online infringers. These entities – typically based overseas – sell massive volumes of stolen content to anyone in the world armed with an internet connection and a credit card. Traditional remedies are generally useless against them, due to both a lack of local law enforcement and their ability quickly to set up camp elsewhere in the event the law is brought to bear.

By holding that credit card companies' knowing and willful processing of copyright-infringing transactions neither "materially assists" infringement, nor provides grounds for a vicarious infringement claim, the panel majority marks an alarming and dangerous departure from established principles of secondary liability. In addition to creating a stark intra-circuit split in this commercially critical area of law, the holding threatens to undermine one of the few effective tools of intellectual property rights enforcement in the digital age. The RIAA urges this Court to reconsider its decision before embracing that alarming result.

SUMMARY OF ARGUMENT

By departing from what had been settled law in this Circuit, the majority opinion threatens to destroy one of the few demonstrably effective means of combating online piracy. Since 1999, when the file-swapping Napster service went live,[1] annual sales of compact discs have plummeted by a staggering 324 million units, or 35% of overall volume. Academic and industry research confirms that this timing is not coincidental. When faced with a choice between paying market rates for music or downloading it for free, the choice for many is all too obvious. When those individual

[1] File-swapping (or "peer-to-peer") networks operate by connecting users' computers to one another over the internet, and enabling users to download files from one another.

decisions are aggregated, the results almost defy comprehension – in 2005 alone, approximately *20 billion* songs were swapped or downloaded illegally, at a cost of billions of dollars to the musicians themselves and legitimate music distributors.

The RIAA has won injunctions and monetary damages on behalf of its members against domestic file-swapping networks such as Napster, Grokster, and Aimster. These hard-fought victories have facilitated the rise of legitimate digital music retailers like iTunes, which sell copyrighted works directly to consumers and share the revenue with the copyright holders.

The demise of all but a few of the high-visibility file-swapping services, however, has spawned a new breed of pirate – off-shore Stolen Content Websites that sell pirated works to the public without permission from the copyright holders and without paying royalties. These renegade websites often make no colorable claim to legitimacy, but nevertheless operate secure in the knowledge that they have no physical presence or assets in the United States, and that even if the copyright holders eventually reach them, they can swiftly shift their operations to a new physical location and web address.

Although the pirate websites pose a formidable challenge, they do have one distinct vulnerability: Like the legitimate businesses with which they compete, they are in it for the money, and Judge Kozinski correctly observes that "there are no adequate substitutes for credit cards when it comes to paying for" online products. *Perfect 10*, 2007 WL 1892885 at *19. Thus, when credit card companies process payments to websites while knowing that the payments will finance copyright infringement, they "materially assist" infringers; indeed, they effectively *cause* the infringement, because most online infringing transactions would not otherwise occur.

In recent years, credit card companies have increasingly recognized how their services are being used to facilitate online piracy. In many cases, the companies cooperate with the government and with civil plaintiffs in curtailing such misconduct. This cooperation works. And far from constituting a departure from national policy (as the panel majority mistakenly supposed), *the government itself* has imposed liability on credit card companies for their role in facilitating online malfeasance.

In one stroke, the decision in this case threatens to curtail this progress. The panel majority held that credit card companies that *knowingly* process (and profit from) infringing transactions are nevertheless free from

liability for contributory or vicarious infringement. The novel principles adopted by the panel majority depart radically from settled law. Both the Supreme Court and this Court have sustained contributory infringement claims against those who knowingly and "substantially contribute" to the infringing conduct (*A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001)), and vicarious infringement claims against those who profit from direct infringement without exercising their "practical ability" to "stop or limit" the infringing conduct. *Perfect 10, Inc.* v. *Amazon.com, Inc., et al.*, 487 F.3d 701, 730 (9th Cir. May 16, 2007). This case should have been treated as a run-of-the-mill application of those settled principles.

Instead, by effectively insulating credit card companies from secondary liability for copyright infringement, the panel majority creates an intra-circuit split. Equally important, the ruling removes any meaningful incentive for credit card companies to filter out the infringing transactions, including when they are explicitly put on notice. The consequences will cost musicians and record companies billions of dollars per year.

This Court should reconsider its decision before charting such a novel and destructive course. First, the case is of exceptional importance because of the enormous impact of internet piracy on the economy. Second, the panel majority badly misapprehends the critical role of credit card

companies in facilitating e-commerce (including piracy). Finally, the panel majority misperceives the contours of public policy by sanctioning free but unlawful commerce in the name of free and lawful commerce.

ARGUMENT

"The criteria for taking a case *en banc* are clear and well-established – either necessity 'to secure or maintain uniformity of the court's decisions,' or to decide 'a question of exceptional importance.'" *United States* v. *Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring) (quoting Fed. R. App. P. 35(a)(1) and (2)). Further review is warranted on both of those grounds.

Just months ago, this Court held that an actor is liable for secondary infringement if he "knowingly takes steps that are substantially certain to result in * * * direct infringement." *Amazon.com*, 487 F.3d at 727. It is difficult to see why that principle does not apply to a credit card company that processes a payment that it *knows* will immediately result in the unauthorized exchange of copyrighted material. As for the importance of this issue, Judge Kozinski is exactly correct that the majority opinion "will prove to be no end of trouble." *Perfect 10*, 2007 WL 1892885 at *27. Indeed, it will undermine efforts to combat a type of digital music piracy

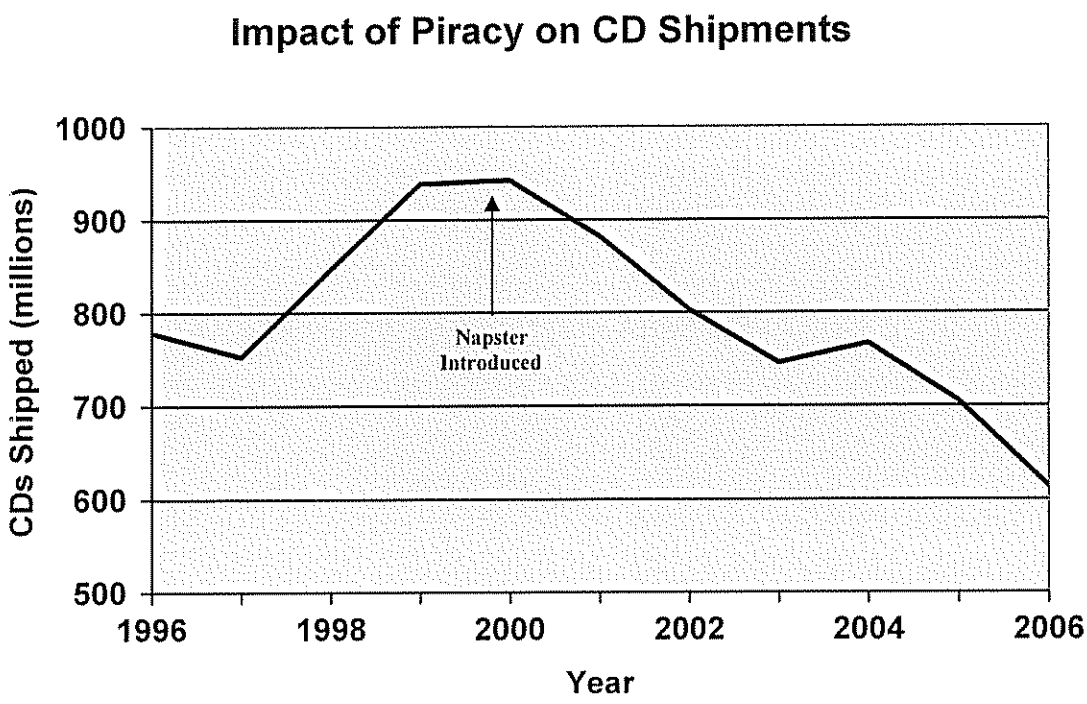
that costs the United States economy billions of dollars and tens of thousands of jobs each year.

I. This Case Presents An Issue Of Exceptional Importance Because The Panel's Decision Materially Impairs The Ability Of The Music Industry To Combat Rampant Online Piracy

A. Online Piracy Of Copyrighted Digital Music And Other Works – Virtually All Of It Financed By Credit Cards – Is A Matter Of Surpassing Importance To The Music Industry And To The Economy As A Whole

To appreciate the impact of the panel majority's decision, it is helpful to understand the recent history of copyright piracy in the music industry.

The past decade has seen a dramatic reversal of fortune for the music industry. From 1996 through 2000, annual sales of CDs by RIAA members jumped 21%, from 779 million to 943 million, and the total value of music and music video sales increased from $12.5 billion to $14.3 billion during that same period. See RIAA 2006 Year-End Shipment Statistics (available at http://www.riaa.com/keystatistics.php?content_ selector). With the advent of Napster in late 1999, however, music piracy began to take increasing market share from legitimate businesses. As the graph below shows, the impact of music piracy has been unmistakable:



Ibid. From 2000 through 2006, annual CD shipments fell by 35% (or 328 million), and the total value of music products shipped plummeted by nearly $3 billion. *Ibid.* Unsurprisingly, profits have plunged and repeat rounds of layoffs have hit the recording industry. See Alex Veiga, *Warner Music Group 2nd-Quarter Loss Widens* (AP, May 8, 2007) (Warner Music Group was forced to eliminate 400 jobs – 10% of its workforce – following a $27 million quarterly loss).

There is no doubt that the rise of internet piracy lies behind these unprecedented declines in legitimate music sales. Indeed, several studies have underscored the direct cause-and-effect relationship between online piracy and the recording industry's hardships. See Norbert J. Michel, *The*

Impact of Digital File Sharing On the Music Industry: An Empirical Analysis, Topics in Economic Analysis & Policy Vol. 6, Issue 1, Art. 18 at 1 (2006) (internet file sharing decreases CD purchases by 13% to 30%); Peitz and Waelbroeck, *The Effect Of Internet Piracy On Music Sales: Cross-Section Evidence*, Review of Economic Research on Copyright Issues, 2004, vol. 1(2) 71, 72 (finding "a significant negative effect of MP3 downloads on music sales").

By any measure, the impact of online piracy on the music industry is enormous because of the piracy's nearly unfathomable volume. The International Federation of the Phonographic Industry ("IFPI") estimates that "almost *20 billion songs* were illegally downloaded in 2005." See IFPI, *The Recording Industry 2006 Piracy Report* at 4 (available at http://www.ifpi.org/content/library/piracy-report2006.pdf) (emphasis added). All told, IFPI estimates that the global traffic of pirated music was worth $4.5 billion in 2005, and that figure is based only on pirate (not retail) prices. *Ibid.*

B. Because Traditional Judicial Remedies Are Of Limited Use Against Agile Online Pirates, It Is Essential To Enforce Meaningful Secondary Liability Rules With Respect To Those Who Knowingly Facilitate The Piracy

The RIAA has vigorously defended its members' interests against the onslaught of digital music piracy. In 2001, it successfully pursued an

injunction against Napster that this Court affirmed (see *Napster*, 239 F.3d at 1004), and since then, Napster successors Kazaa, iMesh, Bearshare, and Grokster have settled with record labels for damages. A lawsuit against LimeWire, the largest remaining peer-to-peer ("P2P") network, is pending. These hard-fought successes against P2P file-sharing networks have helped set the stage for the emergence of legitimate digital music retailers, such as iTunes, that share revenue with the copyright owners on a contractual basis. This market is growing rapidly, reaching nearly $2 billion in 2006 in the United States alone. See http://www.riaa.com/keystatistics.php?content_selector. Unfortunately, that new source of revenue falls far short of offsetting the losses from piracy; despite the rise of iTunes and similar services, "college students illegally obtained two thirds of their music and accounted for 1.3 billion illegal downloads in 2006 alone." Amy Brittain, *Universities Strike Back In Battle Over Illegal Downloads*, Christian Science Monitor, June 18, 2007.

Online music piracy continues to thrive despite the victories against the P2P networks because with each such success, another type of pirate emerges to fill the vacuum. When some P2Ps began implementing copyright filters, consumers flocked *en masse* to new services like AllofMP3.com, a notorious pirate website based in Moscow that mimicked

iTunes by selling copyrighted recordings directly to the public. But whereas iTunes contracts with the record labels to sell their property, AllofMP3 simply helped itself to the copyrighted works, without the copyright holders' permission and without paying them a dime. AllofMP3 proceeded to sell these recordings for mere pennies apiece (a small fraction of the legitimate market price), allowing anyone who logged on to build a vast library of pirated music.

Pirate websites like AllofMP3 (and the Stolen Content Websites at issue in this case) pose a new set of challenges for copyright holders. Whereas the P2P systems attempted (unsuccessfully) to defend their activities on the theory that only their *users* engaged in infringement, Stolen Content Websites brazenly engage in direct copyright infringement. In most cases, their "defense" is to locate their assets overseas, where service of process is difficult and enforcement of intellectual property laws is lax at best. See *Filtering The Smoke Out of Cigarette Websites: A Technological Solution to Enforcing Judgments Against Offshore Websites*, Brook. J. Int'l L. Vol. 30:3, at 167 ("[S]maller actors who operate off-shore websites can find both geographical and virtual safe havens to avoid enforcement of judgments against them."). These actors know that if a record label successfully asserts its rights and shuts down an infringing website, they can

"easily move their operations to servers in other remote jurisdictions." *Perfect 10,* 2007 WL 1892885 at *26 (Kozinski, J., dissenting). The elusiveness of these illegal services is "why we have cases such as *Fonovisa*, *Napster*, *Aimster*, *Grokster* and *Amazon*" (*ibid.*); it is also why meaningful secondary liability standards are crucial.

The history of AllofMP3 illustrates the point. After AllofMP3 unveiled its imitation iTunes website, the major record labels brought suit, seeking injunctive relief and damages. *Arista Records LLC, et al.*, v. *Mediaservices LLC*, No. 06 Civ. 15319 (NRB) (S.D.N.Y.). While the plaintiffs engaged in protracted efforts to serve the defendant in Russia, the United States Trade Representative convinced Russian authorities to shut down the site as a precondition to Russia joining the WTO. See Nate Mook, *All of MP3 Shuts Down, Resurfaces as "MP3Sparks"*, Betanews, July 3, 2007 (available at http://www.betanews.com/article/AllofMP3_Shuts_Down_Resurfaces_as_MP3Sparks/1183495726). *Ibid.*

Remarkably, however, the website was offline for only a week before reopening – with exactly the same content – under the name "MP3Sparks.com." In short, traditional judicial remedies are of limited use against the new breed of digital music pirates, which can easily inflict millions of dollars of damage while litigation is pending, and which are

effectively judgment proof even in the event that a record label succeeds in court. The future of the American recording industry – with its billions of dollars of annual revenue, and tens of thousands of jobs – depends on labels' ability to combat this growing threat, if not by pursuing legal remedies against the direct infringers themselves, then indirectly, by holding accountable those companies that knowingly enable the pirates to flout justice.

II. Credit Card Companies "Materially Assist" The Type Of Infringement At Issue Here And Have The "Practical Ability" To "Stop Or Limit It"

The panel majority's decision sharply departs from this Court's precedents, which find contributory infringement for anyone who knowingly and "materially" or "substantially" assists the infringing conduct (*Napster, Inc.*, 239 F.3d at 1019; *Amazon.com*, 487 F.3d at 729), and vicarious infringement for anyone who profits from direct infringement while declining to exercise a "practical ability" either "to stop or limit it." *Amazon.com*, 487 F.3d at 730, 725 (quoting *Metro-Goldwin-Mayer Studios, Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005)). By affirming the dismissal of these claims at the pleading stage, however, the majority held *as a matter of law* that the credit cards' role in these transactions is neither substantial nor necessary. That is incorrect, even under the majority's unprecedented

reading of those legal standards. The credit card companies' knowing (and highly profitable) processing of infringing transactions meets any definition of contributory and vicarious infringement; indeed, all available evidence shows that online copyright pirates could scarcely exist if not for the active support of the credit card companies.

In one critical way, the new generation of online music pirates that sell stolen sound recordings to the public, rather than just facilitate their illegal swapping, is perhaps more vulnerable than the P2P networks of years past. Whereas many of the P2P networks were started by college-student computer programmers, and had decentralized designs that required little in the way of bandwidth or server capacity, the new pirates are ruthlessly profit-minded, and their financial requirements are steep. The infringers themselves must host the massive volume of music they make available to customers, and they must also purchase sufficient bandwidth to stream each downloaded file. See Peace Not Profit FAQ (available at http://www.peacenotprofit.org/faq) ("[S]ince bandwidth costs money, spent band width is spent cash."). They must generate enough revenue not only to cover these significant costs, but also to make the venture financially worthwhile. Consequently, as the dissent observed, "[t]he weak link in the pirates' nefarious scheme is their need to get paid," and "for this they must use the

services of legitimate financial institutions." *Perfect 10,* 2007 WL 1892885 at *26. Indeed, "there are no adequate substitutes for credit cards when it comes to paying for [copyrighted material]." *Id.* at *19.

The recording industry's experience in dealing with AllofMP3 proves Judge Kozinski correct. Even before the Russian government cracked down on AllofMP3, credit card companies – including Visa and MasterCard – had ceased doing business with that website for fear of potential secondary copyright liability. And as e-commerce analysts observed, those steps "severely impact[ed] [AllofMP3's] ability to operate." Mook, *AllofMP3 Shuts Down*, BetaNews, July 3, 2007. See also *Credit Card Firms Cut Off AllofMP3.com* (AP, Oct. 19, 2006) (available at http://www.msnbc.com/id/15323093) (quoting AllofMP3's director general as admitting that credit card cutoff "has hurt our business"). That is because "you can't do business at all on the Internet without credit cards." *Perfect 10*, 2007 WL 1892885, at *19 (Kozinski, J., dissenting).

The panel majority speculated that, "[i]f users couldn't pay for images with credit cards, * * * other mechanisms are available," such as "profits from advertising." *Id.* at *5. But a recent market research survey revealed that fully 76% of commercial websites reported that credit cards *are the only form of payment they accept.* See http://www.bizreport.

com/2007/04/more_online_stores_offering_nontraditional_payment_methods.html. The internet marketplace would rapidly disappear if customers had to mail checks to online retailers, or wire funds on faith that a small online merchant would prove to be legitimate. "After all, how many consumers would be willing to send a check or money order to a far-off jurisdiction in the hope that days or weeks later they will be allowed to download" infringing materials? *Perfect 10,* 2007 WL 1892885 at *22 (Kozinski, J., dissenting). Customers depend on credit cards for convenience and security in online transactions, which means that merchants must also depend on them if they wish to do business. The new generation of copyright infringers is no exception.

Because credit cards are so central to the business of online infringement, it necessarily follows that they "substantially assist[]" the illegal activity – the standard for contributory liability that this Court applied in *Amazon*, 487 F.3d at 729. There is nothing novel about that standard. As Judge Posner explained in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), the "substantial assist[ance]" standard derives from the common law test for aiding-and-abetting liability – "the criminal counterpart to contributory infringement." *Id.* at 651. See also Restatement of Torts § 876 (a person is liable for the conduct of another if he "knows that the

other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other"). Different formulations of this test are applied in a variety of contexts to impose liability on those who, like the credit card companies here, knowingly help to process illegal transactions. For example, the handling of funds used in online gambling is grounds for seizure under forfeiture statutes that prohibit "materially aid[ing] any form of gambling activity." *United States* v. *$734,578.82 in Currency*, 286 F.3d 641, 649 (3d Cir. 2002). Similarly, handling funds used to pay for illegal drugs is sufficient to constitute aiding and abetting drug distribution. See *United States* v. *Phibbs*, 999 F.2d 1053 (6th Cir. 1993). Subjecting the credit cards companies to potential liability here should present a straightforward application of these principles.[2]

The infringers' utter dependence on the willing participation of the credit card companies also means that, were those companies to take the steps necessary to block payments to known infringers, it would be "difficult for the infringing activity to take place in the massive quantities alleged,"

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[2] Because the credit card companies' role in the type of piracy at issue here is part and parcel of the infringement, the panel majority's concern that imposing liability would open the floodgates to liability for all "peripherally-involved third parties" (2007 WL 1892885 at *7) is unfounded. Contributory infringement requires knowing and *material* assistance to the infringer, and courts have "had no difficulty in distinguishing those who are materially involved in copyright infringement from those who are not." *Id.* at *20 (Kozinski, J., dissenting).

which is the standard for vicarious liability. *Fonovisa, Inc.* v. *Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)). Indeed, even the panel majority acknowledged that "at least some" illegal website operators would stop infringing if the credit card companies threatened to pull the plug. 2007 WL 1892885 at *11.

Given online infringers' dependence on credit cards, the Court should have denied the defendants' motion to dismiss even under *the majority*'s unprecedented "other viable mechanisms" tests for contributory infringement, and its "absolute right to stop" test for vicarious copyright infringement.

III. National Policy Favoring The Promotion Of Online Commerce Militates In Favor Of, Not Against, Holding Credit Card Companies Liable For Knowingly Facilitating Copyright Infringement

The panel majority suggests that a free pass for the credit card companies is consistent with the "polic[ies] of the United States * * * to promote the continued development of the Internet," and "to preserve the * * * competitive free market that presently exists for the Internet." 2007 WL 1892885 at *3. But shielding credit card companies from secondary liability when they knowingly process illegal transactions severely *undermines* those important goals. Indeed, both federal and state governments have long recognized the need for credit card companies to refuse to process

transactions involving online criminal enterprises, and have repeatedly threatened these companies with prosecution when they refuse to cooperate.

For example, in 2002, the Attorney General of New York reached financial and injunctive settlements with at least eleven banks "to block cardholders from using their credit cards for transactions identified as online gambling." See *Spitzer Hails Establishment of New Banking Industry Standard* (available at http://www.oag.state.ny.us/press/2003/feb/feb11b_03.html). As the Attorney General stated at the time, it is "essential that financial entities, including banks, credit card associations, and other payment and processing services, do everything in their power to avoid facilitating these illegal transactions." *Spitzer Hails*, *supra*.

Neither was that the only instance in which the government targeted credit card companies as the most effective means of halting illegal online activities. In 2005, in light of the fact that "[a]lmost all online purchases of cigarettes are paid for with a credit card," the California Attorney General announced a "public-private initiative by state and local law enforcement authorities and credit card firms to prevent the illegal sale of cigarettes over the net." March 17, 2005 Press Release (available at http://ag.ca.gov/newsalerts/release.php?id=588&year=2005&month=3&PPSESSID=5d5320608e1af33b6ab42dca5&PHPSESSID=5d5320608e1af33b6ab42dca5.). And

in 2006, a DEA official testified before Congress that, "[t]o successfully ply their trade, Internet drug traffickers must rely extensively on the commercial services of * * * financial services companies, including major credit card companies and third party payment service providers. The DEA has reached out to [these services] and is working to educate and facilitate their assistance in shutting down Internet drug trafficking operations." Statement available at http://www.justice.gov/dea/pubs/cngrtest/ct061606.html.

The government plainly agrees with Judge Kozinski that the willing participation of credit card companies is critical to the viability of illegal online enterprises, and that the credit card companies are legally obligated to decline to process transactions that they know to be illegal. For that reason, the government has obtained massive forfeitures against credit card companies that knowingly facilitate illegal activity. See *Company Reaches Deal with U.S. in Internet Gambling Case*, New York Times, July 19, 2007, available at http://www.nytimes.com/2007/07/19/business/worldbusiness/19neteller.html?_r=1&oref=slogin (Neteller, an online payment processor, will forfeit $136 million in connection with an online gambling crackdown). None of this, as Judge Kozinski pithily observed, has spelled "the end of Capitalism as we know it." 2007 WL 1892885 at *27. "It does not serve the

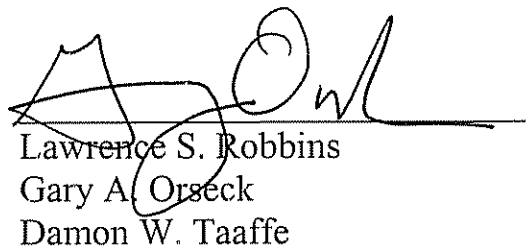
interests of a free market * * * to abet marauders who pilfer the property of law-abiding, tax-paying rights holders." *Ibid.*

Braced by this potential legal exposure, the credit card companies have of late been convinced, at least in some cases, to assist in combating online music piracy, as when Visa, MasterCard, and PayPal stopped processing payments to AllofMP3. The majority opinion threatens to call a halt to this progress. By shielding credit card companies from liability even when they knowingly process transactions that infringe valid copyrights, the decision removes any meaningful incentive for those companies to filter similar infringing transactions in the digital music setting. This Court should grant rehearing *en banc* to consider the majority's unwarranted departure from sound principle and sound policy.

CONCLUSION

The Court should grant the rehearing petition.

Respectfully submitted.



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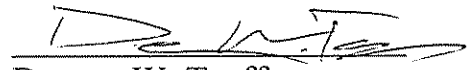
Dated: Washington, D.C.
August 2, 2007

CERTIFICATE OF COMPLIANCE

U.S. COURT OF APPEALS CASE NO. 05-15170

I certify that, pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Circuit Rule 29-2(c)(2), the attached Amicus Brief In Support Of Panel Rehearing Or Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points, and contains 4,189 words, as counted by Microsoft Word 2003.

Dated: August 2, 2007



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CERTIFICATE OF SERVICE

I certify that on August 2, 2007, I served copies of the foregoing Brief of *Amicus* Curiae Recording Industry Association Of America in Support of Panel Rehearing or Rehearing *En Banc* by First Class Mail and electronic mail on each of the following:

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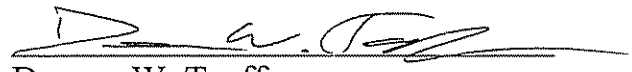

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