Grokster and the Future of Peer-to-Peer File Sharing

by Michael Geist

The release of the US Supreme Court's Grokster decision on June 27, 2005, generated, as expected, an avalanche of breathless headlines proclaiming victory for the recording industry and a "shutting the tap" of music on peer-to-peer file sharing systems. While the highest court in the United States did indeed unanimously rule that two file-sharing services—Grokster and Streamcast—can be sued for actively encouraging copyright infringement by their users, the decision is not the clear-cut win that its supporters suggest.

The latest chapter in the ongoing battle between the recording industry and peer-to-peer file sharing originated from the *Napster* fallout. Napster burst onto the scene in the late 1990s by linking users in a manner that enabled them to easily transfer music files from one computer to another without prior authorization. The recording industry reacted to the service with alarm, quickly suing it on copyright infringement grounds.

After the industry succeeded in shutting down the massively successful file-sharing network several years ago, dozens of alternatives filled the void. Many of those services adopted a distributed model of file sharing, hoping to avoid the legal pitfalls that befell Napster.

The industry quickly sued two of the most prominent services but failed to convince either a trial judge or a federal appellate court in California that the services should be held responsible for the conduct of their users. Those services relied on a 1984 US Supreme Court decision involving the Sony Betamax, arguing that new technologies that featured substantial non-infringing uses were protected under the law.

Sony, which developed the Betamax as an early rival to today's VCR, faced a hostile reception from the entertainment industry, which claimed that the device facilitated large-scale copyright infringement. The US Supreme Court ruled in Sony's favor, concluding that the company's ability to demonstrate that the Betamax was capable of non-infringing uses was sufficient to shield it from copyright infringement claims for the activities of its customers.

When the US Supreme Court agreed to hear the recording industry's case, analysts immediately recognized that the ramifications extended far beyond file sharing. Rather, the future of the principle established in the *Sony Betamax* case, viewed by many in the technology community as essential to innovation, was at stake. Accordingly, dozens of interested parties, including scientists, artists, and leading technology firms such as Intel, submitted briefs to the court.

The US Supreme Court found itself in a difficult position. Grokster and Streamcast did not make for particularly sympathetic defendants; however, punishing them could negatively impact the technology community and the innovation process.

The *Grokster* decision attempts to have it both ways by holding out the prospect of liability for these particular services but preserving the principles that the technology community holds dear. The court left the core Sony *Betamax* principle untouched (though it is clear from two concurrent judgments that the court is actually split three ways in its view of how far the principle should extend), yet it revived the doctrine of active inducement of copyright infringement. In applying the doctrine, file-sharing services that "actively induce" their users to engage in copyright infringement would be unable to rely on the protections afforded by the *Sony Betamax* case.

While that may be bad news for Grokster and Streamcast, the decision may actually provide helpful guidance to other file-sharing services on how they can survive in the current legal climate. In seeking to define the meaning of "active inducement," the court ruled that liability would require a demonstration of "purposeful, culpable expression and conduct." Moreover, it concluded that there would be no liability for knowledge of potential or actual infringement; no liability for product support or technical updates; and no liability for failure to take affirmative steps to prevent infringement.

In other words, so long as a peer-to-peer service demonstrates that it has non-infringing uses and that it does not actively market its service as an opportunity for infringement, it could argue that it is protected by the *Sony Betamax* principle. This would apply even in the face of evidence that it knew that its users were engaging in copyright infringement or that it could have adopted measures to prevent such infringement from occurring.

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HOW MIGHT THIS TEST BE APPLIED TO CURRENT P2P SERVICE PROVIDERS?

Consider the case of BitTorrent, which is currently responsible for the largest percentage of peer-to-peer (P2P) file-sharing traffic. With origins that were focused on non-infringing purposes, it is widely used for authorized distribution of independent films, software, podcasts, and even court files, as users value the efficiencies of distributing large files using peer-to-peer technologies. The service does not encourage copyright infringement, though some of its traffic may involve unauthorized activity. Given the test articulated by the US Supreme Court, BitTorrent would present a strong case for avoiding liability if it faced a Grokster-like lawsuit.

Recently, the Canadian Federal Court of Appeal issued a much-discussed decision that addressed the ability of the Canadian Recording Industry Association (CRIA) to sue individual file sharers. When the court denied CRIA's motion for information on 29 alleged file sharers, the media described the decision as yet another loss for the industry. CRIA claimed total victory, however, arguing that the decision provided it with a roadmap for future lawsuits.

In many respects the *Grokster* decision is a mirror image of the CRIA case. While the unanimous verdict left the industry calling it a "9-0 shellacking," the reality is that many file-sharing services will be pleased with the decision as it provides them with a roadmap to avoid future liability. Moreover, with US congressional leaders such as Senator Orrin Hatch indicating that there is now no rush to legislate, the threat of new anti-P2P statutes has also subsided.

It invariably takes several years for the effects of landmark court cases to emerge. The recording industry hopes that the *Grokster* case will end unauthorized P2P file sharing services. With the US Supreme Court upholding the potential legality of those services, however, it seems more likely that the decision will one day be viewed as the beginning of the end of the legal war against P2P services.