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File-Sharing in the Post-'Grokster' World

In the past decade, the rise of peer-to-peer (P2P) sharing of music files on the Internet has had a radical impact on the music industry and the way music is distributed. In response, the music industry and other copyright holders have fought to defend this valuable right.

In June 2005, the U.S. Supreme Court rendered its landmark decision in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 US__, 125 SCt 2764 (2005). In a relatively short time, the Court's decision has had a number of practical implications on P2P file sharing which are shaping the future of music and video distribution, and the licensing of other copyrightable content online.

This article will briefly summarize the *Grokster* decision and the consequences to the parties involved in the litigation, as well as other companies involved in peer-to-peer (P2P) file-sharing; generally summarize the unsettled international P2P file-sharing landscape; and highlight the entertainment industry's continuing concern over those developing the next generation of P2P networks.

'Grokster': A Brief Summary, the Fallout

Grokster involved consolidated cases brought by a coalition of music publishers, songwriters and motion picture studios against Grokster Ltd. and StreamCast Networks (maker of the Morpheus P2P program). The issue before the court was the legality of the use of P2P file-sharing software that enabled computer users to easily exchange digitized music, video, software and motion picture files over the Internet "on a gigantic scale," without the use of a centralized server.[1]

In rendering its decision, the Supreme Court in *Grokster* was not concerned with how the technology worked and whether it was capable of "substantial non-infringing use." In the end, the Court fashioned an "active inducement" rule for copyright, relying on common-law principles and

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the active inducement rule in patent law (codified at 35 USC §271(b)). Generally speaking, in the file-sharing arena, "active inducement" involves the distribution of software "with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement."[2]

Following the *Grokster* decision, Grokster Ltd. shut down its services as part of a $50 million settlement with the plaintiffs, a judgment it may not be able to pay due to insufficient resources. However, in April 2006, settlement talks with the co-defendant StreamCast broke down. Recently, the district court ruled in favor of the entertainment companies on summary judgment and against StreamCast, citing the Supreme Court's *Grokster* decision, in finding instances of "massive" copyright infringement on the defendant's P2P network and "overwhelming" evidence of StreamCast's unlawful intent.

Beyond the defendants in the case, the Court's decision also affected other file-sharing companies. For example, in September 2005, WinMX stopped operating in response to cease-and-desist letters from the Recording Industry Association of America (RIAA), and one month later, i2hub, another file-sharing network, closed its site. In July 2006, Kazza, one of the most popular worldwide file-sharing networks, reached a settlement with several major music companies, whereby it agreed to pay over $100 million dollars to U.S. and Australian recording companies and become a legal file-sharing network through the use of filtering technology to prevent P2P file-sharing.[3] This past summer, the RIAA filed suit against P2P software maker and distributor LimeWire in the U.S. District Court for the Southern District of New York for copyright infringement under an "active inducement" theory. The plaintiff claimed, among other things, that the defendants, like prior services such as Napster, Aimster and Grokster, "have continued to promote, market, and distribute LimeWire as the successor-in-infringement to these pirate services." See *Arista Records LLC et al. v. LimeWire LLC*, No. 06 CV 5936 (SDNY Complaint filed Aug. 4, 2006), at ¶3. In response, LimeWire filed a countersuit, alleging that the record companies engaged in "unfair business practices" and acquired "a monopoly over digital distribution of commercially valuable copyrighted music and movie content."

Indeed, the RIAA has been relatively successful in its litigation campaign against both direct and indirect infringers in the United States since it began filing lawsuits in 2003. As of August 2006, the RIAA has filed over 18,200 actions, most of which have been against individual file-sharers.[4] Still, the RIAA, despite a drop in the number of lawsuits filed during the first half of 2006, seemingly has achieved its "initial goal" of deterring illegal file-sharing of music through an aggressive litigation approach.[5]

Unsettled International Landscape

Given that the Internet has no real geographical boundaries, the entertainment industry's fight against P2P file-sharing extends beyond the United States. Although *Grokster* is one of the earliest court decisions to address the issue, other courts, including Canadian and Australian, have weighed in on the legality of the practice.

Slightly more than a month prior to the *Grokster* decision, the Canadian Federal Court of Appeal addressed the issue of the Canadian Recording Industry Association's (CRIA) right to identify and sue individual file-sharers. The Federal Court of Appeal, in *BMG, Inc. Canada v. John Doe*, 2004 FC 488, aff'd. 2005 FCA 193,[6] issued an opinion that denied CRIA's motion to reveal the identities of 29 alleged file-sharers, focusing on CRIA's evidentiary threshold and the privacy of the anonymous defendants. The Canadian Court set forth a test or "road map" to be used before identities of file-sharers could be revealed. 2005 FCA 193 at ¶15. In addition,

the appellate court questioned the trial judge's "statements relating to what would or would not constitute infringement of copyright" in the file-sharing context, cautioning about the "danger in reaching such conclusions at the preliminary stages of an action without the availability of evidence nor consideration of all applicable legal principles…." Id. at ¶¶46-48. Ultimately, the court dismissed the appeal without prejudice, permitting the plaintiff to commence a further application to identify the users. Id. at ¶55. How the issue of the legality of file-sharing in Canada plays out and the degree, if any, to which *Grokster* might impact it, remains to be seen.

In France, a number of French court decisions have cleared users of file-sharing or handed down light punishments.[7] For example, a court decision in February 2006 suggested that P2P downloading of music for private, noncommercial gain may be fair use. The French recording industry organization has since appealed the decision.[8]

More in line with the *Grokster* decision and suggesting that it may have had some international influence, an Australian court, in September 2005, found operators of the Kazaa file-sharing system liable for infringement under Australian copyright law for the unauthorized trading of copyrighted works by users of their system. See *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd.* (Australian Fed. Ct. Sept. 5, 2005). This legal decision prompted Kazaa's aforementioned $100 million settlement with the recording industry.

Similarly, in June 2006, a Dutch appeals court overturned an earlier favorable ruling, and upheld an injunction against the Web site www.zoekmp3.nl, which provides links to MP3 files, and ruled that it would have to pay damages. The court said that failure to adhere to the injunction would result in fines of 10,000 euros per day or 1,000 euros per infringing file. In July 2006, however, a Dutch appeals court, in another matter, blocked the Dutch antipiracy organization (BREIN) from learning the identities of alleged file-sharers from various ISPs. The court ruled that the method used by a private company hired by the plaintiff to collect IP addresses of alleged file-sharers was unlawful under European privacy laws.[9]

On the legislative front, the French parliamentary lower house has been debating the legalization of P2P through charging a flat, global licensing fee to Internet users. Like France, the Swedish government is considering a fee to be imposed upon broadband use, which would compensate film and music companies for downloading of their works, thereby changing current law, which makes it illegal to download copyrighted material. Despite the aforementioned *BMG v. John Doe* decision in Canada, lobbying continues in the Canadian legislature, as the industry seeks to declare file-sharing illegal.

Cooperation, Legalization

Some companies, perhaps concerned with being sued for copyright infringement in the post-*Grokster* environment, have cooperated with the entertainment industry and have "retooled" their operations. For example, in November 2005, BitTorrent, a software used for file compression and easier distribution of content over the Internet, announced that it had entered into an agreement with the Motion Picture Association of America (MPAA) to help prevent illegal downloading of movies on its Web site. Additionally, BitTorrent executed licensing deals with at least four independent movie studios, as well as Warner Bros. Entertainment Group, to distribute video titles over the Internet. Similarly, in November 2005, iMesh music service became a legal license service of music downloading.

On the consumer side, legal downloading has been on the rise.

As of February 2006, one billion songs were downloaded from the Apple iTunes Music Store. And in June 2006, EMI Music arranged to deliver its music over a legal P2P network constructed by LTDnetwork. EMI also has begun negotiations with YouTube and other video-sharing sites to work together to help prevent copyright infringement from the unauthorized posting of music videos that appear on their sites.

Some programmers are developing so-called "anonymous" P2P networks known as "darknets," which make it more difficult to detect users and identify the content being shared. Generally, darknets are "closed" networks used by a small group of individuals who know and trust each other.

"Darknets"

Although the entertainment industry has been successful in litigation in the U.S. and some foreign courts in finding the makers or distributors of P2P software contributorily liable for copyright infringement and prodding other sites into legal business models, rapid advances in technology may provide the next challenge. Certain computer programmers are developing so-called "anonymous" P2P networks known as "darknets," which make it more difficult to detect users and identify the content being shared.[10] Generally speaking, darknets are "closed" networks that are used by a small group of individuals who know and trust each other and share files among themselves. Given the "closed" nature of these networks, the potential for both noninfringing and infringing use exists (e.g., free communication outside of state censorship or the exchange of copyrighted music). In essence, information that is transmitted over these networks might be encrypted and "routed-through" other users of the network to cloak the particular user and the content delivered.[11]

Conclusion

To date, lower courts have begun to apply *Grokster's* rule of law. For example, in one music file-sharing case where the defendant downloaded and retained entire, unauthorized copies of copyrighted works that were available for retail sale, the U.S. Court of Appeals for the Seventh Circuit held that *Grokster* forecloses the argument that such downloading in order to sample prior to purchase is fair use.[12] However, the struggle to control the distribution of copyrighted material over the Internet continues. In the future, copyright holders will likely continue the pattern of filing lawsuits and lobbying in legislatures to protect content, while facilitating commercial online distribution. Still, some users will continue to look for easy and free online distribution of music and motion pictures that disregard the rights of copyright owners.

1. Both the trial court and the Ninth Circuit ruled that because the vendors had no knowledge of specific infringing files being traded and no ability to control the file-sharing, they could not be held secondarily liable for copyright infringement. The courts also concluded that the software was capable of "substantial non-infringing use," relying on the Supreme Court's decision in *Sony Corp. Of America v. Universal Studios Inc.*, 464 US 417 (1984) (the "Betamax case") which had carved out a safe harbor to copyright infringement.
2. These included, among other things, StreamCast's development of materials promoting itself as the best alternative to Napster (a defunct P2P site) and Grokster's targeting of former Napster users. For a more detailed discussion of the *Grokster* decision, see our previous column, "MGM *v. Grokster*: Finding Another Theory of Secondary Liability," published on July 12, 2005. A copy of article can be viewed at http://www.brownraysman.com/frame.html?pubs/articles.
3. Outside the United States, Belgian and Swiss police shut down Razorback2 file-sharing system in March 2006. In June 2006, Swedish officials raided The Pirate Bay, seizing servers and making arrests in connection with illegal downloading of music and movies. Despite the raid, service was restored soon after. That same month, Moscow-based AllofMP3.com, surges in popularity, despite record companies' efforts to convince government officials to shut down company. In September 2006, Taiwanese file-sharing network, Kuro, agreed to shut down and pay undisclosed damages to the recording industry to settle a lawsuit.
4. See Erik E. Larsen, "Recording Industry Leads Big Drop in Copyright Suits," IPLaw 360, Aug. 7, 2005, available at http://ip.law360.com/Secure/ViewArticle.aspx?id=8149 (subscription required).
5. Id.
6. A copy of the decision can be viewed at http://www.cippic.ca/en/news/documents/19May2005Ruling.pdf (last visited Sept. 26, 2006).
7. See "French law would make file-sharing cheaper, easier," CBC Arts (Feb. 5, 2006), available at: http://www.cbc.ca/story/arts/national/2006/02/05/france-file-sharing.html.
8. See Ken "Caesar" Fisher, "French court rules in favor of private P2P use," ars technica (Feb. 7, 2006), available at: http://arstechnica.com/news.ars/post/20060207-6135.html.
9. Jan Libbenga, "File-swappers' identities protected by Dutch court," The Register (July 14, 2006), available at: http://www.theregister.com/2006/07/14/fileswappers_protected/.
10. See John Markoff, "New File-Sharing Techniques Are Likely to Test Court Decision," New York Times (Aug. 1, 2005) available at http://www.nytimes.com/2005/08/01/technology/01file.html?ex=1280548800&en=2af1bf4f4cb327bc&ei=5088&partner=rssnyt&emc=rs.
11. On a more sophisticated level, some darknet software requires a user to surrender some of his bandwidth as well as his hard drive space to be a working node or part of the network. One of the most widely used and well-known darknet software that employs this model is "freenet." See The Free Network Project, "What is Freenet?" available at http://freenet.sourceforge.net (last visited Sept. 20, 2006).
12. *BMG Music v. Gonzalez*, 430 F3d 888 (7th Cir. 2005). See also *Lions Gate Films, Inc. v. Twentieth Century Fox Film Corp.*, 2006 U.S. Dist. LEXIS 47690 (N.D. Ind. July 6, 2006) (default judgment against file-sharer who downloaded movies).

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