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The Morning After Grokster

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The Supremes have spoken. In a 9-0 decision on June 27 concerning the case of *MGM vs. Grokster*, the US Supreme Court implicitly affirmed that copyright is a very good thing and explicitly stated that "one who distributes a device with the object of promoting its use to infringe copyright...is liable for the resulting acts of infringement by third parties." In other words, if the primary or most common use of your firm's product is to help individuals with copyright infringement, and if your firm promotes the product as a way to violate copyrights, then your firm can be held liable for the resulting acts of copyright violations by individuals who use your product.

No question, this is a really big win for the music and movie industries. The Court's decision overturns two lower court rulings that Grokster (www.grokster.com), StreamCast Networks (www.morpheus.com), and other companies that produce and distribute peer-to-peer (P2P) software were not liable if individuals used these products to violate copyright. Indeed, the Supreme Court felt that there was ample evidence that Grokster and StreamCast clearly intended to aid and abet copyright infringement, stating "the unlawful objective was unmistakable." Writing for the Court, Justice David Souter's opinion stated that there was "evidence of [copyright] infringement on a gigantic sale" and that the "probable scope of copyright infringement is staggering."

Not surprisingly, there was a bit of a victory dance in the post-Grokster press releases from the entertainment industry. The Recording Industry Association of America (www.riaa.org), the trade group that has been aggressive in filing John Doe lawsuits for P2P copyright infringement, applauded the Supreme Court's unanimous decision, stating that the Court "has addressed a significant threat to the US economy," while "helping to empower the digital future for legitimate businesses—including legal file sharing networks— by holding accountable those who promote and profit by theft.... This decision lays the groundwork for the dawn of a new day...that will bring the entertainment and technology communities even closer together, with music fans reaping the rewards." Concurrently, Dan Glickman, president of the Motion Picture Association of America (www.mppaa.org) announced that the Court's "unanimous ruling is an historic victory for intellectual property in the digital age, and is good news for consumers, artists, innovation and lawful Internet businesses."

Not to be outdone by the music and movie associations, StreamCast Networks vowed in a post-*Grokster* press release "to continue its fight for freedom to innovate." The release proclaimed that "once all the evidence is put forward, we are confident that it will be proven that Morpheus did not, does not, and will not promote or encourage copyright infringement." Additionally, the StreamCast statement proclaims that the "Supreme Court decision is Orwellian in that Holly-wood—and the copyright and entertainment industries—now become the thought police."



Does this billboard violate the letter or the spirit of the Supreme Court's recent *Grokster* decision?

The 'Morning After' Challenge

Not surprisingly, Grokster and Morpheus software were both still readily available on the Web in the days after the Court's decision. Even as the decision was a clear victory for the plaintiffs, the music and movie industries confront a huge "morning after" problem: changing individual attitudes and behaviors about copyright infringement and P2P down-loading. A clear challenge for the media industries is that in this case, the genie—free P2P software—has been out of the bottle for a very long time (at least as measured by Internet years) and has a growing user base.

BigChampagne (www.bigchampagne.com), market research firm focused on media consumption, reports that the number of people in the US using P2P networks more than doubled between June 2003 and June 2005, from 2.9 million in 2003 to 6.2 million in 2005; moreover, the average download also more than

doubled in size, from 3.97MB to 8.99MB. The entertainment industry's inevitable follow-on lawsuits may eventually bankrupt Grokster and StreamCast, but the litigation will not necessarily change individual behaviors.

The morning (and months) after the Grokster decision may not have big consequences for colleges and universities, since they have been dealing with the problem for some time. True, many in the campus community will understandably lament the potential impact of the Grokster decision on legitimate P2P networking and future technological innovation. But as previously noted in "[Lost Under the Streetlight](#)," (Digital Tweed, November 2004), data from the Campus Computing Survey (www.campuscomputing.net) shows that the vast majority of four-year colleges and universities already have campus policies to address inappropriate P2P activity, as do more than half of community colleges. Additionally, growing numbers of institutions include copyright education as part of a mandatory (often online) "digital rights and responsibilities" program for new students and faculty.

Moreover, P2P infringement remains a consumer issue, not just a campus problem. Despite the RIAA's continuing efforts to portray college students as the primary population of digital pirates, as of March 31, 2005, only 4 percent of the 8,400-plus John Does targeted as part of the RIAA's P2P lawsuits were college students.

Intentionality and Liability

That said, the months after the Grokster decision may get very interesting for consumer ISPs. Consider, for example, a billboard promoting SBC/Yahoo's DSL service that I've seen in a number of locations in Los Angeles over the past few months (see image, page 10). SBC/Yahoo! is selling broadband access, but the marketing message specifically links the service to content: "faster downloads" of music and movies.

Viewed through the filter of the Grokster decision, the SBC/Yahoo! billboard could be read as encouragement to infringe on copyright. Paraphrasing Justice Souter in Grokster, "the [probable] unlawful objective is unmistakable." The SBC/Yahoo! billboard, like the marketing efforts promoting Grokster and Morpheus, can be read as encouraging "recipients [customers] to...download copyrighted works," while the advertising reflects "active steps to encourage infringement."

Perhaps the Grokster decision will prompt the RIAA and others in the media industries to turn their attention to P2P as a consumer issue, one that goes well beyond campus networks. Some months ago, an RIAA official told me that the association's press releases have targeted colleges and college students over consumers and consumer ISP services (for example, Adelphia, Comcast, Earthlink, SBC, TimeWarner, Verizon, and others) because colleges respond to the threat of litigation, whereas consumer ISPs and telcoms view litigation as a cost of doing business. But now that Justice Souter and his colleagues on the Supreme Court have told us that intentionality could lead to liability ("the unlawful objective is unmistakable"), perhaps the consumer ISPs will begin to acknowledge that they too have an obligation to promote copyright education, as opposed to promoting, aiding, and abetting copyright infringement. CT