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Court Ruling May End Free Online Music Party

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consumers usually suffer.

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For those who can afford to use it, the internet has provided consumers with easy access to an unprecedented array of goods at bargain prices. For much of its existence, the internet has offered a means of acquiring copyrighted music for free, prices that even the best sale at the local record store could not match. The deal was evidently too good to pass up for millions of Americans. Unfortunately, like all good parties, the music had to stop sometime, which may have happened when the Supreme Court recently ruled 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."[70]

Music file sharing via the internet was made possible when the Motion Picture Experts Group made the format MPEG-3 (abbreviated as MP3) the standard for digital audio recordings in 1987.[71] After the standard was set, song recordings were digitized and placed on an audio compact disk (CD). Once on the disk, the MP3 files could be downloaded directly onto a computer's hard drive.[72] This process is known as "ripping."[73] The compressed format of the MP3 file allows for quick and easy transfer of the file between computers, either via email or another file transfer protocol.[74] The first widely popular file transfer software was Napster,[75] which at the

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[70] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2770 (2005).

[71] *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1011 (9th Cir. 2001).

[72] *A&M Records*, 239 F.3d at 1011.

[73] *Id.*

[74] *Id.*

[75] Napster was purchased by Roxio, Inc., in 2004, who then launched Napster as a legal music subscription service. At the time of publication, Napster sells memberships for $9.95 a month and provides over one million downloadable audio files. The files are playable for as long as the consumers membership is active. *See* May Wong, *Newer Napster – The Once-Renegade Music Provider is Going Legit With Roxio's Purchase of the Company and All of its Perks*, THE MIAMI HERALD, Sept. 21, 2004, at 8C, *available at* 2004 WLNR 6309749. For information on the Napster subscription service, *see* http://www.napster.com.

time was a "peer-to-peer"[76] file-sharing network that consumers could download and operate free of charge.[77] In 2000, record companies and music publishers sued Napster as a vicarious and contributory copyright infringer.[78] In this suit, Napster was found liable because it knew that its system was used to infringe on copyrighted material, and despite the fact that Napster's centralized file-management system provided it with the power to prevent the infringement, it allowed the infringement to continue.[79]

After the *Napster* ruling, new file-sharing networks emerged that were decentralized – meaning that files could be shared directly between users without routing the transfer through a centralized server.[80] One such service was Grokster.[81] Operating without centralized servers kept operating costs low and transfer speeds high, which have also been aided through the development of high speed broadband internet access.[82] Video files, which are larger than music files, can now also be shared between users, as well as almost any other digital file.[83] Because the networks are decentralized, Grokster, and the other software producers, have no way of knowing which files are available on the network.[84] Accordingly, Grokster and other software developers assumed that their ignorance would insulate them from liability under the *Napster* decision.

Movie studios and recording companies sued the developers of Grokster and Morpheus, another peer-to-peer file sharing software program, alleging vicarious and contributory copyright infringement.[85] The district court found that the developers were not liable for contributory copyright infringement as there was no evidence that they had any material involvement in the

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[76] Often abbreviated as P2P.

[77] *A&M Records*, 239 F.3d at 1011.

[78] *Id.*

[79] David Leit and Matthew Savare, *Grokster Decision Affects All Tech Companies*, 181 N.J.L.J. 1013 (2005).

[80] Leit & Savare, *supra* note 79.

[81] *Grokster*, 125 S.Ct. at 2770.

[82] *Id.*

[83] *Id.* at 2771.

[84] *Id.* at 2772.

[85] *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1031 (C.D. Cal. 2003).

infringement.[86] At the same time, the developers were not liable for vicarious copyright infringement since they had no ability to control or supervise the transfers made by users, thanks to the decentralized nature of the networks.[87] The decision was appealed to the Ninth Circuit, where it was affirmed, using much of the same analysis that was developed in the *Napster* decision.[88] The Ninth Circuit specifically pointed to the Supreme Court's *Sony-Betamax*[89] ruling, where the Court stated that the sale of video tape recorders could not give rise to contributory copyright infringement, even where the manufacturer of the recorders knew that they were used for infringement, so long as the devices are "capable of substantial" or "commercially significant noninfringing uses."[90] The Ninth Circuit found that Grokster and Morpheus were not only capable of substantial noninfringing uses, but such uses were commercially viable.[91]

The Supreme Court was not persuaded by the Ninth Circuit's rationale. In a unanimous decision, the Court reversed the lower courts' decisions and held that peer-to-peer network developers such as Grokster and Morpheus could be held liable when consumers use their software to obtain copyrighted works without permission.[92] In so holding, the Court noted that nothing in the *Sony-Betamax* decision precluded the Court from considering evidence of intent, and further stated that the decision did not foreclose common-law fault-based liability rules.[93] The Court found that one such rule, the inducement rule, was particularly applicable to its decision.[94] The Court read the inducement rule to mean "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

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[86] *Grokster*, 259 F.Supp.2d at 1043.

[87] *Id.* at 1045-46.

[88] *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

[89] *Sony Corp. of America, v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[90] *Grokster*, 380 F.3d at 1160.

[91] *Id.* at 1162 ("Indeed, even at a 10% level of legitimate use, as contended by the Copyright Owners, the volume of use would indicate a minimum of hundreds of thousands of legitimate file exchanges.").

[92] *Grokster*, 125 S.Ct. at 2782-83.

[93] *Id.* at 2779.

[94] *Id.* at 2780.

infringement, is liable for the resulting acts of infringement by third parties."[95] The fact that Grokster and Morpheus marketed their products at known copyright infringers[96] without developing tools to filter out copyrighted materials,[97] combined with the revenue generated from advertising sales[98] convinced the Court the software developers clearly intended infringement and took affirmative steps to foster that infringement.[99] These active steps were sufficient to overcome "the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use. . . ."[100]

The decision was hailed as a victory by the recording and motion picture industries, who claimed that internet file sharing was hurting their sales.[101] For example, MGM presented evidence during the Grokster litigation that over 100 million copies of either Grokster or Morpheus had been downloaded by consumers, with billions of files shared over the network every month.[102] The scale of the file-sharing was alleged to be the cause of recording industry revenues falling by 25 percent since the emergence of file-sharing software in 1999.[103] In addition, Dan Glickman, President and CEO of the Motion Potion Association of America, called the decision "good news for consumers" and said that the decision would "ensure a future of quality and choice for consumers in the United States and around the world."[104]

Aside from possibly illustrating a withdrawal from the

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[95] *Id.*

[96] *Id.* at 2781.

[97] *Grokster*, 125 S.Ct. at 2781.

[98] *Id.* at 2782

[99] *Id.*

[100] *Id.* at 2779.

[101] Scott Morrison, *Grokster ruling delights entertainment industry: Judgment welcomed by victims of piracy but not as onerous as technology companies feared*, THE FINANCIAL TIMES, June 28, 2005, p. 10, *available at* 2005 WLNR 10137431.

[102] *Grokster*, 125 S.Ct. at 2772.

[103] Deborah Charles, *Court Rules Against File-Trading Networks*, REUTERS, June 27, 2005.

[104] Press Release, Motion Picture Association of America, *Statement from MPAA President and CEO Dan Glickman RE: Supreme Court ruling on MGM v. Grokster*, June 26, 2005, *available at* http://www.mpaa.org/MPAAPress/2005/2005_06_27a.doc.

recording and motion picture industries previous tactic of suing its own customers, it is difficult to see how the decision is "good news for consumers." In a joint statement following the decision, the Consumer Federation of America, Consumers Union, and Free Press, said that the decision will "pose a significant challenge to consumers, innovators and the economy."[105] The consumer organizations noted that peer-to-peer networks offer an efficient and inexpensive distribution system that threatens the "anticompetitive oligopoly" of large, dominant media companies.[106] According to the consumer groups, the lawsuit was actually an assault on competition with the film and music industries fighting to "maintain their near monopolistic control over the prices consumers pay and the choices consumers make."[107] They point to the example of the inflated prices of music CDs charged by the recording industry while they simultaneously fight the adaptation of newer, more efficient distributions systems such as peer-to-peer file transfer networks.[108] Thus, not only must innovators and entrepreneurs bear the costs of developing and distributing new file-sharing software to consumers, they must now also bear the costs of defending lawsuits brought by media groups if consumers use their software for illegal purposes.[109]

Under the Court's *Grokster* ruling, it is not enough that software developers create software that can be used for substantial legal purposes. Now these developers and their networks will be scrutinized by the judicial system actively assessing "their marketing activities and business models."[110] As a result, innovation and competition will be stifled. While the decision gives the film and recording industries the resolution they sought, such a result is rarely, if ever, desirable or beneficial to consumers.

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[105] Press Release, Consumer Federation of America, Consumers Union, and Free Press, *Statement of the Consumer Federation of America, Consumers Union and Free Press On the Supreme Court's Decisions in MGM v. Grokster*, June 27, 2005, *available at* http://www.hearusnow.org/other/newsroom/internetbroadband/00/.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Press Release, Electronic Frontier Foundation, *Supreme Court Ruling Will Chill Technology Innovation*, June 27, 2005, *available at* http://www.eff.org/news/archives/2005_06.php.

[110] *Id.*

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