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Commentary

Grokster Means More Litigation for Tech Firms

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Since the explosion in popularity of the Internet in the late 1990s, file-sharing software has been used to distribute record companies' copyrighted content for free on the Internet without the copyright holders' permission. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, record companies and motion picture studios sought to enjoin two software companies from offering such file-sharing software. The case thus pitted "content" industries against technology firms. The latter entities, though renegades of a sort, served as proxies for the tech revolution of the past 20 years.

Some expected the Supreme Court's decision to announce a bold new rule that would reconcile the conflict between content protection and technology in the Internet era. The Court, per Justice David Souter, basically left the issue for another day, sending the case back to the lower courts to litigate the intent of the defendants in offering the offending software.

Central in *Grokster* was a 1984 Supreme Court precedent, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which the lower courts had relied upon to exonerate the defendants. In *Sony*, the Court held that the manufacturer of the "Betamax" — a form of VCR — was not liable for contributory copyright infringement because the device was capable of what it termed "substantial non-infringing uses" (e.g. recording a show for personal use to watch at another time). Tech firms viewed the "Betamax" rule as a holy grail that allowed new digital industries to flourish and, in the process, transform the way we work and are entertained.

As in *Sony,* the defendants in *Grokster* were accused of contributory infringement on the theory that their software permitted users to file-share copyrighted material. The defendants sought to fit within the "Betamax" rule by arguing that perfectly legitimate file-sharing can occur using their software. Rather than decide the case on the basis of the "Betamax" ruling, the Court remanded the case to the lower courts with instructions to scrutinize record evidence suggesting that the defendant software companies intended to induce infringing conduct in marketing their products.

This leads to the question: What quantum of evidence is necessary to incriminate tech firms targeted for inducing infringement? One example cited by the Court is telling: StreamCast apparently had disclosed a "proposed" advertisement that described its software as a way around any injunction that might be entered against the infamous Napster file-sharing service, which was shut down in 2000 for copyright infringement, later to re-emerge as a pay service.

The Supreme Court seized upon this document even though the public apparently never saw it: "One proposed advertisement read: 'Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?'" Thus, draft internal documents about how to pitch a product can lead to liability.

The Court went on to summarize three features of the evidence. First, each company showed itself to be aiming to grab the market of former Napster users. On this point, the way Grokster sought search engine "hits" was deemed significant: "Grokster … inserted digital codes into its Web site so that computer users using Web search engines to look for 'Napster' or '[f]ree filesharing' would be directed to the Grokster Web site, where they could download the Grokster software."

Second, neither company attempted to develop tools to "filter" infringing activity, though the record did not indicate the feasibility of such filters.

Finally, both companies' revenue streams were derived from advertising; more file-sharers meant more traffic and more revenue; and illegal file-sharing means more traffic, and so on.

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From this basic evidence, the Court concluded that, "from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement." The Court directed the lower court to reconsider this evidence as proof of inducement liability.

The result in *Grokster* will likely mean more litigation for tech firms as creative counsel for content industries search through servers for evidence of an intent to benefit from infringing conduct. More important, if the evidence relied upon by the Court in *Grokster* is any indication, it will hardly take a "smoking gun" to find against the technology firm. ■