

On March 29, 2005, the Supreme Court of the United States will hear the case of MGM vs. Grokster and StreamCast Networks, the makers of the P2P applications Grokster and Morpheus, respectively. While most people have ignored every Internet piracy suit since the original Napster this case could have much greater implications than simply the ability to offer their product to Internet users. Last year when the Ninth Circuit Court found Grokster and Streamcast not liable for the piracy of their users, MGM and their allies decided to appeal to the Supreme Court of the United States having exhausted all other legal means of threatening StreamCast Networks.

The very concept of copyrights date back to the beginning of the Republic. Copyrights were enumerated in Article I, Section 8 of the US Constitution in which it state that Congress has the power "...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."¹

While the outcome of the case obviously affects the users of Grokster or Morpheus the effects of the case could be far reaching if the makers of P2P applications are deemed to be liable. Under current precedent from the landmark 1984 Supreme Court "Betamax" decision (Sony v. Universal Studios) makers of a tool that can be used to pirate copyrighted material can not be held liable provided that their tool is capable of non-infringing uses. In the majority decision in the case Justice Stevens wrote "The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective--not merely symbolic--protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."² The court in that decision found that one had the right to produce equipment that could copy copyrighted material due to a legal concept known as "fair use". According to the Stanford University Libraries "fair use is any copying of copyrighted material done for a limited and 'transformative' purpose such as to comment upon, criticize or parody a copyrighted work."³ Thanks to the "Betamax" decision the manufacturers of VCRs, DVRs like Tivo, the iPod, or other multipurpose tools capable of copying copyrighted work could not be sued out of business. In 1998, the RIAA attempted to stop the Diamond Rio, the first portable MP3 player, from being sold and the "Betamax" case was used as the precedent to defeat such a ludicrous lawsuit. While it may seem disturbing, MGM and its allies want the "Betamax" case overturned.

The list of organizations opposing MGM is from a broad political spectrum. The American Conservative Union and the National Taxpayers Union⁴ have both submitted amicus briefs for StreamCast. The ACLU has done so as well.

Even some musical artists oppose MGM's position even though they oppose piracy. One artist group with members including Steve Winwood, Chuck D, and Heart have filed an amicus briefing in favor of Streamcast. As the group notes, "musicians are not universally united in opposition to peer-to-peer file sharing as the major records companies claim."⁵ The briefing by the musician group notes that "many musicians find

1 <http://www.usconstitution.net/const.html#A1Sec8>

2 (Sony v. Universal Studios)
<http://cyber.law.harvard.edu/metaschool/fisher/integrity/Links/Cases/sony.html>

3 <http://fairuse.stanford.edu/>

4 http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_acu_ntu.pdf

5 http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_artists.pdf

peer-to-peer technology . . . allows them easily to reach a worldwide online audience,” and that for, “many musicians, the benefits of this . . . strongly outweigh the risks of copyright infringement.”⁶ Despite this position being supported by a minimum of the over 20 different musical artists who were willing to put their name of the briefing there is no mention of the division amongst musical artists ever mentioned by the RIAA.

In addition, technology companies across the the industry have pointed out the crippling effect that overturning the “Betamax” case would have upon their business. While some are obvious such as some competing P2P networks, many are companies that aren't so controversial. Intel, the leading maker of microprocessors for personal computers, added that personal computer themselves could have been threatened without the “Betamax” decision. As Intel's briefing notes, “even the personal computer might not have developed.”⁷ Along with Intel, numerous other technology companies have contributed to Streamcast's case including SBC, Verizon, Sun Microsystems, MCI, and AT&T. If we are to look at the economic arguments for overturning “Betamax” one must look at the billions of dollars in losses in the multibillion dollar technology sector were this pivotal court decision overturned, which the content companies never mention.

One of the leading defenders of P2P networks and the Electronic Freedom Frontier (EFF) notes, “when should the distributor of a multi-purpose tool be held liable for the infringements that may be committed by end-users of the tool?”⁸ Any set percentage that a network must have to be legal is wholly arbitrary. While much of the content traded on P2P networks is illegal, much of the content is legal. For example, many Linux distributions rely upon the P2P application Bittorrent for Internet distribution. As Fred von Lohmann, EFF's senior intellectual property attorney commented, “the copyright law principles set out in the Sony Betamax case have served innovators, copyright industries, and the public well for 20 years.”⁹

The Recording Industry Association of America and the Motion Picture Association of America, of which MGM is a member, have both been major critics of the 9th Circuit ruling in favor of Grokster and Streamcast. The primary arguments of their attorneys have revolved around the fact that they feel that the defendants and other P2P networks are complicit in the piracy that goes on on their networks. In the RIAA-MPAA brief they argued that “Grokster and StreamCast are liable as contributory infringers because they have “knowledge of infringing activity” on their services and they ‘induce[], cause[] or materially contribute[] to’ that infringing activity in myriad ways “¹⁰ How exactly Grokster or StreamCast “induce” piracy is not explained.

Mitch Bainwol, Chairman and CEO of the RIAA claims that the notion that their position has “a broad consensus...that the Sony-Betamax decision was never meant to provide cover for Grokster-style theft,”¹¹ While there are a number of briefs in favor of the plaintiffs virtually all of them except for the Christian Coalition are from groups that represent the music or motion picture industries.

6 Ibid.

7 http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_intel.pdf

8 http://www.eff.org/IP/P2P/MGM_v_Grokster/

9 Ibid.

10 <http://www.riaa.com/news/newsletter/012505.asp>

11 Ibid.

The RIAA-MPAA briefing further argues that:

Grokster and StreamCast 'depend[] upon this infringement' to make money. Id. They do not sell the specially designed software needed to gain access to the vast array of copyrighted material available through their services. Rather, they give away their software to build their networks of anonymous users, and then profit by selling advertising that they display to the millions of users committing infringement on the services.

They are correct in noting that there is a financial incentive to not crack down upon piracy because it would discourage use of their software, but the notion that because the client software is freeware that they are dependent upon infringement makes no sense. One could sell Grokster and the legal status of the product would not change. The files on the network do not need to be copyrighted to sell advertising. Advertisers are only concerned about consumer exposure. Piracy is not a prerequisite to receive advertising revenue. The mention that they "do not sell the specially designed software" is not only redundant, but has no relevance to the legality of the network.