[US] P2P Networks not Liable for Copyright Infringement

IRIS 2004-8:1/30

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On 19 August 2004, the Ninth Circuit Court of Appeals unanimously affirmed the decision of the district court, which held the distributors of Grokster and Streamcast, software for the peer-to-peer exchange of computer files, not liable for copyright infringement (see IRIS 2003-6: 14).

The parameters of the analysis were set out in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). In that case, the Supreme Court held that the manufacturers of VCRs were not liable for copyright infringement by users of their machines. The court analyzed the case in terms of contributory infringement and vicarious liability. The first doctrine required the plaintiff to prove (1) direct infringement by a primary infringer, (2) knowledge of the infringement by the defendant, and (3) defendant's material contribution to the infringement. The doctrine of vicarious liability required proof of (1) direct infringement by a primary party, (2) a direct financial benefit to the defendant, and (3) defendant's right and ability to supervise the infringers.

Meticulously considering each of the elements in the above tests, the district and circuit courts easily found that Grokster and Streamcast were not liable under either theory. The primary factor in the Sony case was the finding that a VCR is capable of substantial noninfringing uses, particularly the time shifting of programs, which the Court concluded was a fair use. In the Grokster case, the plaintiffs had alleged that 90% of the files exchanged through peer-to-peer file-sharing infringed upon copyrights in music, about 70% of which was allegedly owned by the plaintiffs. In granting partial summary judgment to the defendants, the Ninth Circuit Court effectively recognized that even a small amount of noninfringing use will insulate distributors of peer-to-peer software from lawsuits against them, if the other factors weigh in favor of the distributors.

In reaching its decision, the Ninth Circuit distinguished three different methods of indexing used in peer-to-peer distribution systems. (1) A centralized indexing system maintains a list of available files in a central location. This was the method employed by Napster. The Ninth Circuit, in A&M Records v. Napster,239 F.3d 1004 (9 Cir. 2001) (see IRIS 2001-4: 13 and IRIS 2000-9:13; for a detailed explanation of the Napster case, see IRIS 2000-8:14 or IRIS FOCUS pp.21-27), found that, with such a centralized indexing system, the suppliers of the software were subject to copyright liability. Napster was effectively shut down by the court. (2) At the other

extreme is a completely decentralized indexing system, as employed by Grokster and Streamcast in the instant case. It is this decentralized system that allowed the courts in this case to distinguish the Napster case, and reach the opposite conclusion. Some commentators read In re Aimster, 334 F.3d 643 (7 Cir. 2003) as reaching a conclusion inconsistent with the holding of the Grokster case. However, the Aimster decision had less to do with the merits of the case than it did with the burden of proof. The Grokster case may be explained by the court's willingness to accept the existence of substantial noninfringing use without requiring specific proof on the subject. (3) Some peer-to-peer software, such as that used by KaZaa, employ a "super-node" system, in which a select number of computers act as indexing servers. The partial summary judgment granted by the district court in the Grokster case was specifically limited to the Grokster and Streamcast defendants; the district court reserved judgment about the super-node systems, and the circuit court case therefore does not resolve the legal status of such hybrid systems.

Although each technology has to be weighed on its own merits, it is clear that at least some peer-to-peer distribution systems do not subject the distributors to copyright liability under current U.S. copyright law. We can expect that the record companies will shift their focus, as they have already begun to do, from the distributors of peer-to-peer software to (1) the users who actually make infringing copies of copyrighted works, and (2) technological protection systems, such as those authorized by the Digital Millennium Copyright Act.

Metro-Goldwyn-Mayer v. Grokster, No. 03-56236 D.C. No. CV-01-08541-SVW, 19 August 2004

http://www.eff.org/IP/P2P/MGM_v_Grokster/20040819_mgm_v_grokster_decision.pdf