

*Grokster*, or how I learned to fear copyright infringement  
Grey Area Left of Center

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Recently, the United States Supreme Court decided a landmark case balancing the interests of advancing technology and protecting intellectual property rights. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, the Court determined that parties who distribute products with the intent to promote copyright infringement are liable for the resulting infringement by third parties using the device, regardless of the device's lawful uses when the intent is expressed in a manner that goes beyond mere knowledge of its use by a third party.

Grokster and StreamCast (producer of the P2P program Morpheus) advertised their software in a manner that promoted the violation of copyright. The business and distribution models of each company demonstrated that the primary selling point of the software was the illicit exchange of copyrighted material. StreamCast went so far as to categorize itself as an alternative to the previously defunct Napster.

In each case, the software operated as a vehicle for advertisement. While users logged on to search for the newest bootlegs of major motion pictures or copies of the next top 40 hit, the software ran ads marketing all manner of products. The revenue from advertisement space increased proportionally to the increase of regular users.

In the process, neither company made an effort to filter copyrighted material. Moreover, statistical analysis of material transactions indicated that 90% of regular usage involved copyrighted material.

Fundamentally, the Court had to weigh the balance between protecting artistic expression and technological innovation. Ideally, copyright law aims to weigh this balance by providing adequate protection of artistic expression while attempting to avoid any chilling effect on advancements in technology. Unfortunately, the situation lacks a panacea.

Under the law, someone may contributorily infringe a private party's copyright by intentionally inducing infringement. Similarly, someone may vicariously infringe on a copyright by profiting from direct infringement while declining to exercise the right to stop or limit the infringement.

Interestingly, the Court very clearly set software like Grokster and Morpheus apart from other technology designed to reproduce copyrighted material. Products like videocassette recorders do not promote the illegal activities because the intent of sale is not to encourage infringement, rather distribution of protected material. The difference appears minute. The intent behind the business model ultimately determines whether the law holds the producer/distributor liable for infringement by a third party.

Here, Grokster and StreamCast distributed its software with the intent to profit from infringement by third-party users. Videocassette recorders, though, have an alternative use. Unfortunately, the Court's reliance on intent makes the ruling problematic.

The line drawn by the Court's decision does little to define what kinds of technology fall prey to the decision. TiVo®, for example, distributes a product very similar to the now antiquated VCR. Like a VCR, a TiVo copies and stores television broadcasts. Under the alternative use and intent theories, TiVo does not violate copyright because the business model does not rely on known infringement of copyrighted material. Any infringement is a secondary effect of the technology's use. Similarly, the Napster's progeny and the omnibus online music store iTunes sell services, meaning the business focuses on providing access to material instead of relying on third party violations of intellectual property.

Oddly enough, BitTorrent®, an open source peer-to-peer (P2P) file distribution system aimed at personal distribution of information, is stuck in the middle. Within all the legal downloads lurks copyrighted material. Under the Court's analysis, websites (or torrents) distributing copyrighted material act as a riposte to the Court's decision. As a result, the use and intent theories destroy the protection imbued in the patent and copyright system.

Ultimately, the Court's decision served to put companies like Grokster, StreamCast, and eventually Kazaa, out of business. In the balance, the Court's decision prevents businesses from capitalizing on copyright violations by third parties but renders intent and use to issues of semantics. The Court has created a caveat reducing the protections of copyright to the narrow definition of the use and intent theories.

Pragmatically, the Court created a caveat in the law protecting the bleeding edge of technological advancement while denigrating intellectual property interests in artistic expression. Regardless, cases like *Grokster* will spur the debate on reform within the intellectual property system.