

THE GROKSTER DECISION: THE BASICS & KEY TALKING POINTS

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It is unlikely that a discussion about online music services on campus can take place without consideration of the “Grokster” litigation. What follows aims to keep such discussions well informed about the facts of this case and about what the US Supreme Court decision in this case does—and does not—say about peer-to-peer technologies and university responsibilities.

General Background of the Case

After the initial Napster software company went out of business as a result of a 2001 court decision,¹ other file-sharing software programs—such as Grokster and Streamcast—became popular. Grokster and Streamcast distribute free software that allows computer users to share electronic files through peer-to-peer (P2P) networks where computers communicate directly, not through a central server. The P2P software allows any kind of file to be shared, although most files shared in this way are copyrighted music and video.

Metro-Goldwyn-Mayer (and others) sued Grokster and Streamcast for contributory copyright infringement. The question asked in the litigation was “*When will a technology vendor be held liable for the copyright infringements committed by 3rd parties with its products?*”²

Lower Court Rulings

The District Court ruled in favor of Grokster and the 9th Circuit Court of Appeals affirmed. Their decision was based on a reading of the Sony case³ that found distributors of products capable of substantial noninfringing uses are not liable for contributory infringement if they had no actual knowledge of the infringement or failed to act when they did. The 9th Circuit further held that Grokster did not materially contribute to infringement because the users did their own searching, downloading, etc. Additionally, there was no vicarious liability because Grokster did not monitor or control the software’s use, there was no ability to supervise, and there was no independent duty to police the infringement.

Supreme Court Ruling

The US Supreme Court agreed to hear the Grokster case and issued its ruling on June 27, 2005.⁴ The Supreme Court held 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 infringement, going beyond mere distribution with knowledge of 3rd party action, is liable

for the resulting acts of infringement by 3rd parties using the device, regardless of the device’s lawful uses.”

Key Points About the Grokster Decision

1. The Grokster case is about uses of *Grokster and Streamcast’s technology*, it is *not* about uses of P2P technology generally.⁵ File sharing itself is not illegal. The Court recognized the benefits of P2P in security, cost, and efficiency—and that it is employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.
2. The Supreme Court held 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 infringement*, is liable for the resulting acts of infringement by third parties. Grokster and Streamcast were not just passive recipients of information regarding copyright infringement; instead, they had the clearly voiced objective that consumers use the software to download copyrighted works and they took active steps to encourage infringement.
3. As such, companies that make technology are not responsible for its use unless there is evidence of active steps taken to encourage direct infringement. The technological design is not a factor in determining infringement.
4. In other words, simply knowing a technology can be put to infringing uses *is not enough*; there must be active steps to encourage infringement, such as advertising and instructing how to infringe. Mere knowledge of infringing potential or of actual infringing uses would not be enough to subject a distributor (or a university) to liability, nor would ordinary acts incident to product distribution, such as offering technical support or product updates.
5. Filtering/policing is not required: In the absence of other evidence of intent (to induce), a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement if the device was otherwise capable of substantial noninfringing uses.
6. This is a pro-consumer decision that strikes a careful balance between encouraging innovation and protecting copyright. “A rule that premises liability on purposeful, culpable expression and conduct does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.”⁶
7. What do universities have to do as a result of this decision? “Georgia K. Harper, a lawyer for the University of Texas System, said the court’s decision was unlikely to affect the behavior of colleges

toward illegal file sharing. 'We are already doing pretty much everything we should do,' she said."⁷ This decision does not require monitoring, filtering, censoring, or outlawing P2P file sharing. Since universities do not ordinarily engage in active inducement of copyright infringement, they would not incur contributory liability for the acts of their students misusing file-sharing software. Furthermore, universities already engage in substantial copyright education activities, have copyright policies in place, and respond appropriately to DMCA complaints.

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¹ A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (CA9 2001).

² Metro-Goldwyn-Mayer Studios Inc., et al., v. Grokster, Ltd., et al., 125 S.Ct 2764 (2005), opinion of the court.

³ Sony Corp. of America v. Universal City Studios, Inc., 464 US 417, 78. L.Ed2d 574 (1984).

⁴ Metro-Goldwyn-Mayer v. Grokster, opinion of the court.

⁵ Metro-Goldwyn-Mayer v. Grokster, J. Ginsburg opinion concurring.

⁶ Metro-Goldwyn-Mayer v. Grokster, opinion of the court.

⁷ Andrea L. Foster, "Colleges Split Over Effects of Court Ruling on File Sharing," *Chronicle of Higher Education* 51, no. 44 (July 8, 2005): A1, <http://chronicle.com/free/v51/i44/44a00101.htm>.

AMICUS BRIEFS IN THE GROKSTER CASE

The Metro-Goldwyn-Mayer Studios v. Grokster case is important to the library, education, technology, and consumer electronics communities as there are significant implications for future technological development and innovation. As a consequence, ARL, with four other library associations, the Internet Archive, the American Civil Liberties Union, and Project Gutenberg, filed an amicus brief before the US Supreme Court (see <http://www.arl.org/info/ctcases/GroksterSupremeCourt.pdf>). The brief includes examples of peer-to-peer applications in the education and library arenas and also focuses on free speech issues. These organizations also filed an amicus brief when the case was before the Court of Appeals (see <http://www.arl.org/info/frn/copy/groksterbrief.pdf>).

THE ROLE OF FAIR USE IN LIBRARIES AND EDUCATION

The following is testimony from the Library Copyright Alliance (LCA) before the US House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection. The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, ARL, the Medical Library Association, and the Special Libraries Association. The testimony was presented on November 16, 2005, by Prue Adler, ARL, at a hearing on "Fair Use: Its Effects on Consumers and Industry."

Fair use is central to our ability to achieve many facets of our missions. Libraries are essential to the communities that they serve and to our Nation. Libraries preserve and provide access to our cultural, historical, and scientific heritage; support and encourage research, education, and lifelong learning; and provide a venue for community engagement on a host of issues.

Libraries, like many other sectors, are undergoing significant transformation in this rapidly evolving digital environment. Today, researchers, students, and members of the public can engage in sophisticated searching and manipulation of information including ready access to data, sound and image files, and more. Increasingly, the data and information available is both current and historical as many libraries, and others, such as Google, Yahoo, Microsoft, and the Internet Archive, digitize special collections that richly reflect the cultural and political history of our Nation.

In this time of transformation, intellectual property policies have been and will continue to be central to the library community. Historically, the library community has relied on copyright law as the policy framework for balancing the competing interests of creators, publishers, and users of copyrighted works. Copyright law balances the rights of authors, publishers, and copyright owners with society's need for the free exchange of ideas. Provisions in the Copyright Act including fair use and related exemptions for libraries and educational institutions allow libraries to achieve our mission of providing effective public access to and the preservation of information in all formats.

Each day teachers teach, students learn, researchers advance knowledge, and consumers access copyrighted information due to exemptions in the Copyright Act such as fair use. Fair use permits the use of copyrighted material without permission from the copyright holder under certain circumstances. For libraries and indeed for consumers, the Fair Use Doctrine is the most important limitation on the rights of the copyright owner—the "safety valve" of US copyright law for consumers.

Fair use or Section 107 of the Copyright Act allows reproduction and other uses of copyrighted works for purposes such as criticism, comment, news reporting,