

# Hollywood 1, Silicon Valley 0

Grokster decision could come back to haunt the entertainment industry.

By R. Scott Feldmann

Hollywood whipped Silicon Valley on Monday, but in the end only the technologists can save Tinseltown. The U.S. Supreme Court decided that a file-swapping software company, Grokster, contributed to the infringement of MGM's copyrights because Grokster promoted the illegal use of its software. Twenty-one years ago, the studios sued Sony, arguing that by selling videocassette recorders, Sony was contributing to the infringement of movies on TV. That time Hollywood lost, as the Supremes in *Betamax* held that selling devices with "significant noninfringing uses" was lawful. The *Betamax* court reasoned that copying movies for later viewing, or "time-shifting," was a "fair use." This time, Hollywood got from the Supreme Court what it could not get from Congress.

After *Betamax*, the infamous Napster started infringement via the Internet by permitting consumers to swap others' copyrighted files, such as music and movies. Napster lost in court because it maintained a central index of files that were being swapped, so it knew precisely what infringement was occurring. Napster also facilitated infringement since swapping had to occur through its central computers. Napster was "contributorily" liable, since it not only knew about the illegal copying but provided the computers and software to do it.

Learning from Napster's loss, Grokster made software available that was designed to distribute files in a decentralized fashion. Billions of files are now swapped directly from one home computer to another, or "peer-to-peer." Such software still makes tons of money for Grokster, as the use results in millions of users seeing Grokster's Internet banner advertisements. Grokster did not control the file-swapping software after distributing it, and did not know exactly what files were exchanged. It was possible that school librarians were swapping Shakespeare's plays or other public-domain works, so Grokster argued that there were "non-infringing uses."

The court would have none of that. Recognizing that the vast majority of swapping was illegal, it held that a company distributing copying devices who took affirmative steps to promote that activity was liable. The court also noted evidence that Grokster intended to benefit from illicit consumer demand, and, had in effect, induced consumers into "staggering" amounts of illegal copying.

The court's decision is troubling in two respects. First, Congress tried but failed to craft new legislation under the proposed "Induce Act" to strike a new balance between content owners and technology creators. Computer makers succeeded in

killing the proposed legislation. Computer manufacturers sell more products in part because of consumers' desire to copy content. Manufacturers worried that new technologies with multiple uses could result in lawsuits.

Given Congress' decision to leave the law alone, it is hard to see that tightening the Betamax "fair use" exception is a proper incremental common-law adjustment by the court. As it admitted, the "more artistic protection is favored, the more technological innovation may be discouraged." The Grokster decision states that it will not chill technological innovation, but that is a certain side-effect. These competing policy trade-offs are exactly the sort of thing that elected representatives are supposed to do, rather than unelected judges.

Eventually Hollywood will find itself a stranger in a strange land. In the past, new technologies such as VCRs and DVDs resulted in new revenue streams for the same content. Now, with unlimited distribution of perfect copies, Hollywood faces a continuing decline in its revenues. Technology lowers Hollywood's costs, provides platforms such as cell phones to experience content, and also makes it possible to experience content anywhere, at any time, such as through satellite radio. With unlimited bandwidth, though, and P2P software, the price of an illegal copy is zero. The only solution will be for Silicon Valley to develop secure distribution of Hollywood's content using much less bandwidth. With Grokster's chilling of technology development, it is ironic that in the long run Hollywood may have cheated itself of a happy ending.

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