THE RECORDER

128TH YEAR NO. 162 www.therecorder.com FRIDAY, AUGUST 20, 2004

Peer-to-peer wins at 9th circuit

Grokster's no Napster — found not liable for copyright violations

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Grokster is good to go.

A unanimous panel of the Ninth Circuit U.S. Court of Appeals on Thursday said the controversial software program and its competitors do not infringe film and music copyrights by facilitating file-sharing over the Internet.

A coalition of movie studios and record companies had sued Grokster Ltd. and StreamCast Networks Inc. — distributor of Morpheus — in an attempt to shut down the trading of pirated content.

But the three-judge panel flatly rejected the industry argument and ruled that the suit fails two legal tests used to determine liability for copyright infringement.

"The copyright owners urge a re-examination of the law in the light of what they believe to be proper public policy, expanding exponentially the reach of the doctrines of contributory and vicarious copyright infringement," according to the opinion. "Not only would such a renovation conflict with binding precedent, it would be unwise. Doubtless, taking that step would satisfy the copyright owners' immediate economic aims. However, it would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context," Judge Sidney Thomas wrote.

He was joined by Senior Judges Robert Boochever and John Noonan Jr. The panel upheld a partial summary judgment granted by Central District of California Judge Stephen Wilson.

It's not the first time file-sharing has come before the Ninth Circuit. Previously, the court curtailed the practice with two decisions involving Napster.

Thursday's panel drew a distinction between Grokster and Napster, which shut down after *A&M Records v. Napster*, 239 F.3d 1004, and *A&M Records v. Napster*, 284 F.3d 1091. Its assets were purchased, and Napster is now a paid service.

Where Napster used a centralized index to tell people where to look for files, the newer programs do not, meaning they have less control over the traded content, according to Thursday's opinion.

Michael Page

The Keker & Van Nest partner pinned Grokster's hopes on the famed Sony Betamax case.

Michael Page, the Keker & Van Nest partner who argued on behalf of Grokster, said because Grokster cannot police its index, like Napster was required to do, the only other recourse would be to shut down completely.

"But they won't do that because of non-infringing uses," Page said, pointing out that lots of people use the program to trade content that is not protected by copyright.

Besides the Napster cases, the ruling also heavily relied upon the historic U.S. Supreme Court decision involving Sony Betamax. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, the high court in 1984 decided that the sale of videocassette recorders did not create liability for copyright infringement even though the defendants knew that's what people were doing with the machines.

"If the Supreme Court had gone the other way in [Sony] Betamax, it would have made VCRs illegal," Page said.

The Sony Betamax case is also one of the reasons why many people, including Page, believe Thursday's ruling will actually benefit the movie and record industries down the line. If VCRs had been outlawed, the video business that studios profit from today would not exist, Page said.

"Every time new technology comes along, studios first try to [shut it down], and each time courts say 'no you can't,'" Page said. "And each time, they turn around and figure out a way to make money."

The movie and music industries could start subscription services, use peer-to-peer to distribute premium content, sell advertising — "there are all sorts of examples," Page added.

So far, though, the plaintiffs don't agree.

"We remain committed to fighting piracy by educating parents, students and consumers," said Motion Picture Association of America President Jack Valenti in a statement. "Our direction and conviction will not falter, and we will continue to pursue all avenues in our power to fight those who illicitly profit from our members' valuable property."

Russell Frackman of Mitchell Silberberg & Knupp in Los Angeles, and Carey Ramos of Paul, Weiss, Rifkind, Wharton & Garrison in New York, argued on behalf of the plaintiffs at the Ninth Circuit.

Neither could be reached for comment.

Valenti's statement indicated the plaintiffs were assessing whether to appeal.

Cindy Cohn, legal director at the Electronic Frontier Foundation, which represented StreamCast, agreed with Page that the studios eventually will be the winners because of the decision.

She also believes the decision will be a "great boon" to technological innovation, which has been curtailed by the fighting over copyrights.

"I think this will take a chill off of any area where the technology created deals with copyrighted works. I think we will see more products," she said.

Along with suing the creators and distributors of the computer programs, the movie and record industries have also begun suing the computer users who share content — a tactic Cohn says is a bad idea.

"The problem is not peer-to-peer, it's how do you get artists paid. The problem needs to be redefined in that way," Cohn said.

The case is *Metro-Goldwyn-Mayer v. Grokster*, 04 C.D.O.S. 7624.

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