ネットワーク社会法制度論
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2003.05.19

Summary of MGM Studios v . Grokster: April 25, 2003

Plaintiffs		Defendants
Metro-Goldwyn-Mayer (MGM) Studios (Movie & Music Company)	vs.	**Grokster** (P2P Software Distributors)
Leiber et al (Song writers & Music Publishers)		**Streamcast** (Morpheus), **Sharman** (Kazaa) (P2P Software Distributors)

I. Introduction

Plaintiffs state that defendants are liable for copyright infringement committed by users of their software. Defendants state that they merely provide software to users over whom they have no control, and therefore are not liable in this case. Judgment has been requested on whether the defendants committed contributory and vicarious infringement. There are no disputed issues of fact in this case.

II. Background Information

A. General Information

FastTrack networking technology initially supported Grokster, Streamcast, and Kazaa. Streamcast later switched to Gnutella technology. All three companies provide their software free of charge. Kazaa failed to defend itself, so the rest of the decision does not apply to it. (Kazaa was later purchased by Sharman, but Sharman's liability is not being questioned in this case.)

B. Operation of the Software

Grokster and Morpheus work in a similar way to Napster, but with important distinctions. Users download the software then elect to share files from their computers. The files can include music files, video files, software, e-books, text files, etc. The software allows users to search for files being shared by other users using keywords and filter searching techniques. When a desired file is located, the user starts the download process. When the download is finished, the two users have identical copies of the same file. Simultaneous and multiple uploads and downloads are possible.

C. Limitations of this Decision

The court will only decide if the **current iterations** of the software cause the Defendants to be liable. Previous versions and previous actions will not be considered.

III. Summary Judgment Standard

The plaintiffs must explain their position, then the defendants have to agree that there are no facts in dispute. If they both agree, and the court agrees that there doesn't seem to be anything amiss, summary judgment can proceed.

IV. Discussion

In order to prove that the defendants are liable for contributory and vicarious copyright infringement, the plaintiffs must prove that the end users are directly infringing copyright.

A. Direct Infringement

In order to prove contributory or vicarious infringement, plaintiffs must first prove that direct infringement is taking place. Plaintiffs must prove that they own copyright for the materials that are being shared and they must also show that copying is being done. In this case, **there is no dispute that some end users engage in direct copyright infringement**. (Defendants argued that Plaintiffs misuse their copyrights by violating US Antitrust laws, but the court did not make a decision on that matter.)

B. Contributory Infringement

Defendants can be said to be liable for contributory infringement if they contribute in some material way to the infringing. In order to satisfy this requirement, plaintiffs must prove that the defendants had knowledge of the infringing activity and that they made a material contribution.

1. <u>Knowledge of Infringing Activity</u>

Knowledge that copying is possible does not fulfill this requirement. It was decided in Sony v. Universal Studios that the sale of copying equipment does not constitute contributory infringement.

> **<u>Sony v. Universal Studios (1984)</u>**
> Sale of VCRs did not subject Sony to contributory copyright liability.

In order for this argument to hold, there must be **substantial non-infringing uses** possible. Both the plaintiffs and the defendants agree that there are substantial non-infringing uses: distributing movie trailers or works in the public domain, using the software in countries where it is legal, etc. Streamcast claims that Morpheus is used for searching for public domain materials, government documents, media content for which distribution is authorized, etc.

Also, the court must consider not just current non-infringing uses, but also possible future non-infringing uses.

In the Napster decision, which cited the Sony decision, it was concluded that a computer system operator cannot be held liable for contributory infringement merely because the structure of a system allows for the exchange of copyrighted materials.

> **<u>A&M Records v. Napster (2001)</u>**
> Napster could not be held liable simply because it distributed software that could be used to infringe copyrights. However, even though it provided its software free of charge, it was found liable of contributory infringement because it supplied the software, search engine, servers, and means of establishing a connection.

Because of this stipulation, contributory infringement depends on the defendants knowing about the infringement when it is happening, and contributing to it at that time. Also, the plaintiffs must prove that the defendants did nothing to stop the infringement.

For example, **if there is infringing material on a server and a computer administrator does nothing to remove it, that administrator is guilty of contributing to direct infringement**.

However, the defendants point out that they must have actual knowledge of the infringement at a time when they could be expected to stop it. In the case of Religious Tech. Center v. Netcom, it was decided that networks retain control over their use and are able to suspend user accounts, therefore they can be found liable for contributory infringement. The question, therefore, is whether the defendants can be shown to have materially contributed to infringement in a way that taking away that contribution could have prevented or stopped the infringement.

Religious Tech Center v. Netcom (1995)
Landlords cannot be held liable for what is done on their property unless they have knowledge of the intended use at the time of the signing of the lease. However, unlike landlords, networks retain some control over the use of their systems. In Netcom's case, though, it was difficult to ascertain whether Netcom knew of any infringement before it was too late to do anything about it.

2. Material Contribution
In Fonovisa vs. Cherry Auction and the Napster case, it was decided that encouraging or assisting the infringement of others constitutes contributory infringement. The plaintiffs argue that the defendants, too, facilitate the actual exchange of copyrighted files, and are therefore liable. The issue here is whether the defendants provide the network equivalent of "**site and facilities**", as Cherry Auction and Napster were found to have done. Grokster and StreamCast have to be considered separately in order for this point to be decided.

Fonovisa v. Cherry Auction
Cherry Auction provided a location for vendors to sell counterfeit goods. They also provided utilities, parking, advertising, plumbing, and customers. They were held liable for contributory infringement because it was proven that their assistance was not passive.

a. Grokster
Grokster does not have access to the source code for the application (Kazaa Media Desktop) and cannot alter it in any way. Its ability to communicate with the user is limited to the contents of a startup page and advertising. It does not operate a central server as Napster did. It employs FastTrack networking technology, which it also does not own. The technology relies on "supernodes" which help users to access the network. Grokster does not now operate a root supernode, although they may have in the past. Also, Grokster originally required users to register with a name and password, but that too is not a characteristic of the current iteration. **When users search for and transfer files, they do not use any computer owned or controlled by Grokster**.

b. StreamCast
As of March 2002, StreamCast, unlike Grokster, does control its

application's source code. Also, it runs on Gnutella, an open-source peer-to-peer network, not FastTrack, which is proprietary. Gnutella doesn't use supernodes, but runs through the computers of the people who are currently online. **There are directories that reveal who is online at any given time, but StreamCast does not operate or control any of them**.

c. Analysis

Neither Grokster nor StreamCast provides "site and facilities" the way that Napster did. Neither company facilitates the exchange of files the way Napster did. Users connect, search, download, and share files with no direct involvement of the defendants. **If the defendants closed their doors and turned off all their computers, the users could continue their actions uninterrupted**. If Napster did the same, the users would not be able to share files through the Napster network. The plaintiffs had to prove that the defendants were providing an infrastructure, but that doesn't seem to be the case.

The plaintiffs cite the defendants' technical support services and discussions on unmoderated discussion forums in which users discussed exchanging copyrighted materials. None of the emails (which, unlike the discussion forums, can be traced back to the companies themselves) mentioned any of the copyrighted works noted by the Plaintiffs. It has been noted in the record that the defendants discouraged the use of their software for illegal purposes. Furthermore, the technical assistance that was provided happened after the alleged infringements took place, so it cannot be said to have contributed to the infringement. In fact, Grokster users who reported files that contained viruses were given form letters that reminded them that Grokster had no control over the files that were shared – even if the files might be harmful to the users.

The plaintiffs also claim that the defendants can communicate with their users through the startup pages, but the court found that this is not relevant to the facilitation of copyright infringement.

The plaintiffs also asked a computer science expert to give his judgment, but the court recommends leaving judgment up to the court.

The court concludes that **Grokster and StreamCast are not significantly different from companies that sell VCRs or photocopiers**. Just because someone invents a technology that can be used for illegal purposes does not make that technology illegal – unless it can be proved that the technology itself substantially contributes to the illegal act.

C. Vicarious Infringement

1. Financial Benefit

The judgments in Fonovisa and Napster indicate that financial benefit includes something that acts to draw people in. The defendants clearly do receive financial benefit in this way. Furthermore, **the defendants receive substantial revenue from advertising**.

2. Right and Ability to Supervise

The ability and right to supervise includes the right to terminate use, the right to promote, the right to control access, the right to patrol, the right to create rules and regulations. The Fonovisa and Napster cases showed this kind of supervision. Napster had control over the file index, which resided on its servers and its users were required to register. Napster could block access to the network. Napster had both knowledge of what was being exchanged and the ability to control it, as was the case in the Aimster decision.

Aimster

Aimster was found to have the right and ability to supervise because it could terminate users and control access.

The defendants argue that they do not have any control over who uses the system or what they exchange. The plaintiffs argue that the software could be altered to prevent transfers of copyrighted materials. The defendants say that such alterations are not possible. The court says that it doesn't matter because **the defendants do not have the right or ability to supervise**. Furthermore, Grokster and StreamCast do not control the networks that are used to exchange the materials. FastTrack is not controlled by Grokster and **Gnutella is open-source which places it outside the control of any single entity**. The defendants cannot be held liable for vicarious infringement just because the software hasn't been altered yet, especially in a case like this where it is clear that the defendants do not have any control over the user.

V. Conclusion

The defendants may have intentionally structured their business to avoid secondary liability for copyright infringement. Additional legislation is necessary in this case. The plaintiffs encourage stronger judicial reinforcement of copyright laws, but the court emphasizes that this must be an issue for Congress, not the court, to decide. As the Supreme Court has noted, Congress is the only body with the constitutional authority and institutional ability to tackle this issue.

? Is this software really the same as copying equipment? It's true that it makes copies, but the fact that the copy is transmitted is the real point, isn't it?

? How does Sony feel now that it is on the contents side of the transaction?

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MGM v. Grokster: Complaint news.findlaw.com/wp/docs/mgm/mgmgrokster100201.pdf

MGM v. Grokster: Order news.findlaw.com/wp/docs/mgm/mgmgrokster42503ord.pdf

Sharman's Response news.findlaw.com/hdocs/docs/mgm/mgmshrmnt12703cc.pdf

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Issues that have appeared since the ruling…

April 25, 2003
File Sharing Forfeits Right To Privacy: Judge Tells Verizon To Identify Customer
Jonathan Krim, Washington Post
www.washingtonpost.com/wp-dyn/articles/A34917-2003Apr24.html

In Recording Industry Association of America v. Verizon, Verizon was told to give the name of one of its subscribers to the RIAA. Verizon said that would be a breach of privacy. RIAA intends to subpoena service providers for a substantial number of names of users. Parents of children who swap files could be implicated. Verizon refuses and will seek a delay from an appeals court. According to the DCMA, copyright holders have the right to request a subpoena if they assert that a violation has occurred. The judge adds that copyright infringers should not expect the right of privacy. Copyright holders were unsuccessful in implicating file-sharing services, so now they will go after individuals.

25 April, 2003
In defence of copyright protection
Bill Thompson, BBC News
news.bbc.co.uk/2/hi/technology/2975929.stm

Linus Torvalds, the creator of Linux, believes that Digital Rights Management (DRM) technology is not incompatible with the principles of free software development. Thompson agrees and says that we have to give copyright holders some way to control access to their materials. He thinks that copy protection is not all bad, and that we need to aim for more reasonable laws.

April 26, 2003
File-Swap Sites Not Infringing, Judge Says
Frank Ahrens, Washington Post
www.washingtonpost.com/wp-dyn/articles/A39322-2003Apr25.html

Comments on the MGM v. Grokster case. Plaintiffs strongly disagree with the ruling and will take it to the court of appeals. They believe that the distinction between Napster and the defendants is not significant. All intentionally facilitate massive piracy.

April 30, 2003
Song Sharers Get an Instant Scolding: Record Firms Use Pop-Up Messages to Fight Piracy
Frank Ahrens, Washington Post
www.washingtonpost.com/wp-dyn/articles/A56869-2003Apr29.html

The RIAA is using instant messaging systems within Grokster and Kazaa to warn users of the illegality of their acts.
"COPYRIGHT INFRINGEMENT WARNING: It appears that you are offering copyrighted music to others from your computer. Distributing or downloading copyrighted music on the Internet without permission from the copyright owner is ILLEGAL. It hurts songwriters who create and musicians who perform the music you love, and all the other people who bring you music. When you break the law, you risk legal penalties. There is a simple way to avoid that risk: DON'T STEAL MUSIC, either by offering it to others to copy or downloading it on a 'file-sharing' system like this."
Defendants in the MGM v. Grokster case remarked on the irony of the RIAA using the technology for a non-infringing purpose.

May 1, 2003
Digital Copyright Fight
Online Newshour
www.pbs.org/newshour/extra/features/jan-june03/digital_5-01.html

Apple has started a service that allows people to download songs at 99 cents each or albums for $9.99. The songs can be burned onto CDs, transferred onto iPod players, and saved on up to 3 computers.

May 2, 2003
Four Students To Pay for Music File Swapping: Agreement Settles Suit By Recording Industry
Frank Ahrens, Washington Post
www.washingtonpost.com/wp-dynn/articles/A2755-2003May1.htm

Daniel Peng ($15,000), Jesse Jordan ($12,000), Aaron Sherman ($17,500), and Joseph Nievelt ($15,000) were ordered to pay damages for file-swapping, though far less than the $150,000 per song that the RIAA was entitled to ask for. They hosted file-swapping networks on their universities' LANs. They agreed not to knowingly infringe on song copyrights in the future and they took down their file-sharing websites. Critics say that RIAA moves are alienating one of their target audiences: students – who may have been driven to file swapping by the high prices of CDs in the first place. Since the ruling, at least 18 "Napster networks" have come down.

May 2, 2003
Recording Industry Settles With Students In File-Swapping Suit
Online Newshour
www.pbs.org/newshour/media/media_watch/jan-june03/riaasettle_05-02-03.html

Same as above. The plaintiffs note that they did not intend to financially cripple the students, just discourage file-swapping. This settlement marks the first time that copyright holders have been awarded damages from individual infringers.

May 5, 2003
Streamcast's new boss--same as the old boss
John Borland, CNET News.com
news.com.com/2008-1082-999581.html

Michael Weiss is returning as the CEO of StreamCast after a two-year hiatus. He feels that Morpheus is ready to compete in the file-swapping world now that the judgment has come down in their favour. He believes that Gnutella is just as strong as FastTrack and that Apple's new product is not an issue. He will focus on advertising revenues as the key to new development, and he says that he is prepared to fight appeals to last month's judgment.

May 9 2003
Lawrence Lessig: Grokster's victory for innovation
Lawrence Lessig, Financial Times
news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&cid=1051389898745

Lessig comments on MGM v. Grokster. He praises the court for recognizing the fact that this is a decision for Congress. Congress has to come up with a solution that protects the rights of copyright holders, but also allows and encourages innovation. Rather than slapping each innovation with a lawsuit, it is better to allow the innovation to happen then decide later if new legislation is required.

May. 15, 2003
Secure music at a crossroads; rights management vs. user-friendly tunes
Ron Harris, Associated Press
www.bayarea.com/mld/mercurynews/news/local/5871332.htm

Digital Rights Management (DRM) seems less necessary now that Apple is offering tunes with very little protection. DRM has been abandoned for about a year while technical difficulties and major opposition from consumers are sorted out. The more the industry tries to protect its copyrights, the more it hurts consumers. The Apple model seems to be a success (more than 1 million songs in the first week), so it may be able to compete with illegal downloading options.

May. 15, 2003
Movie Studios Sue Makers of DVD Copying Software
Bob Tourtellotte, Yahoo News
story.news.yahoo.com/news?tmpl=story&cid=599&ncid=786&e=10&u=/nm/20030515/media_nm/leisure_dvd_lawsuit_dc

Movie studios are trying to convince the courts that DVD copying software is illegal.

Related Issues

Digital Millennium Copyright Act
www.loc.gov/copyright/legislation/dmca.pdf
This is a far-reaching act that seeks to define laws for the digital era. It is under attack by many endusers who complain that it gives too many rights to copyright holders.

Amendments to the Copyright Law
http://www.copyright.gov/title17/index.html
Copyright has been extended to 70 years. Many people believe that this is a case of protecting Mickey Mouse to the detriment of public interest and that it is the first step in the slippery slope towards copyright perpetuity.

Eric Eldred Act
eldred.cc
This act seeks to amend the copyright law to say that copyright extends for 50 years. After that the copyright holder has to pay a small fee (perhaps $1) to extend it for another 20 years. If it is not paid, the work will pass into the public domain.

Analysis

According to MGM v. Grokster, file swapping technology is not illegal. This is indeed a blow to copyright holders, who claim that illegal file sharing is killing the entertainment industry. While Napster was clearly liable for secondary infringement due to the centralization of its services, Grokster and Morpheus are clearly not liable as they do not control the networks that their software uses, nor can they restrict the actions of the users of their software. This paves the way for other file-swapping software developers to enter the scene.

However, the two rulings in favour of the Recording Industry Association of America (RIAA v. Verizon and the case against the four students) show, copyright holders still wield formidable powers. According to the Digital Millennium Copyright Act, copyright holders can demand user names from internet service providers with a mere subpoena obtained from a court clerk. Furthermore, individuals who can be shown to have infringed on copyright laws can be swiftly and harshly punished. The four students in this case were spared from devastating financial loss, but future infringers will not likely come off so easy.

It seems like common sense to uphold copyright holder’s rights over those of infringers. The answer is clearly not in more lawsuits, but it coming up with viable alternatives. People don’t want to commit crimes, but when the price of CDs skyrockets to $20 per disk, it is not surprising that people are looking for another way to enjoy music. Apple understands this, and has come up with a new product that provides music at a cost that most people would agree is reasonable: $1 per song, $10 per album.

The problem here is not that the average person wants to take money away from the artists – it’s that the record companies that represent the artists have become too greedy and have lost touch with their user base. Earlier experiments with Digital Rights Management (DRM) proved that customers do not take kindly to having access to their music compromised. File sharing is similarly a protest against the intrusion of the record company in the relationship between artist and fan.

Or is it? While the advent of peer to peer software makes it difficult to know exactly who is doing the swapping, it is fairly reasonable to suggest that more than half of the users are under 25. Are these kids protesting, or are they just taking advantage of a no-strings free lunch that’s been offered to them? Many of these kids have grown up in a world where the internet has always been available at home and have no idea what it was like when people actually purchased a music collection rather than having it given to them for free. It is not likely that these kids are aware of the bigger issues surrounding this debate. They are likely to use Aimster, Napster, Grokster – whatever – as long as no one seems to be getting caught. New developments involving the prosecution of individual users are going to prove quite eye-opening to this cyber-generation.

The debate will continue – and has already started to continue with the industry looking to ban DVD copying software – but the essence of the argument has remained unchanged. Copyright holders (or their agents) must be able to make money from their efforts, and users must be given reasonable access to the copyrighted material after fulfilling realistic requirements (be they financial or otherwise). The point is that technological innovation will always outpace legislation. In order to maintain rule in a society that thrives on innovation, the courts will have to continue to take the stance, as they did in MGM vs. Grokster, that legislation and not arbitration is the appropriate response to new developments.