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Waiting for Grokster

By Eric Hellweg June 3, 2005

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When the Supreme Court issued its Arthur Andersen accounting scandal decision on May 31, technology observers snapped to attention. Why? Because that ruling signaled that pending Supreme Court decisions will start coming at a rapid clip.

Sometime before early July, when the current Supreme Court term ends, the justices will hand down their decision on the MGM v. Grokster case, which will decide if a peer-to-peer technology company can be held financially liable for an illegal activity taking place on its network.

Originally argued in April 2003, the case wended its way through federal district and circuit courts, until the Supreme Court agreed to hear it in December 2004. In each lower court decision, judges had ruled in favor of the defendants, stating that the service could not be shut down. Their reasoning was that "substantial non-infringing uses" of Grokster exist, citing the 1984 Sony Corp. v. Universal Studios ruling that found that VCR manufacturers couldn't be held liable for any illegal copying done by users.

Now, as the Grokster case has reached the Supreme Court, interest among observers and participants has been rekindled -- with opinions about the outcome varying wildly.

Wendy Seltzer, attorney and special projects coordinator at the Electronic Frontier Foundation (EFF), who was involved with crafting Grokster's argument before the Supreme Court, cautions that it's "hard to bet on a pending Supreme Court case," but Seltzer is also "encouraged at the hearing by the number of questions focusing on innovation. That suggests that the justices understand that the issue is bigger than piracy and file sharing."

For the EFF and other supporters, a ruling against Grokster would be a blow for technology innovation. If innovators have to worry about any and every use their invention may be put to, they argue, it will stifle the desire to create.

E. Michael Harrington, a professor of intellectual property and the music business at Belmont University in Nashville, Tennessee, believes that the court will find in Grokster's favor, because the law explicitly states that if substantial non-infringing uses are present, the service or device is legal.

"In Nashville, I'm in the minority in this opinion," Harrington says, laughing, "but I think Grokster has the right argument. The lower two courts thought so."

A representative from Streamcast, another defendant in the case, didn't return emailed requests for comment, and a spokesperson for Grokster said the company is "keeping a very low profile" until the decision is announced.

But former Grokster CEO Wayne Rosso, thinks the Grokster court battle is far from over. He left Grokster a year and a half ago to start Mashboxx, a label-friendly, peer-to-peer service.

"I think the Supreme Court will remand the suit back to the district courts for a retrial with specific instructions," Rosso says.

If Rosso's prediction comes true, users of services such as Grokster and other peer-to-peer networks can likely expect more lawsuits against individual users while the courts take up the cause again.

The peer-to-peer world today is about to enter a new phase with the impending launch of Mashboxx. Rosso says the launch date of the beta version of his new service -- which will have a major label partner next week -- is imminent. Mashboxx will be deployed with both a centralized

element, which the labels can control, and a decentralized element, which will be run by users.

Users will connect with each other over a decentralized network, looking for music files on other's hard drives. If the file being swapped is owned by one of Mashboxx's partner labels, the song will be downloaded directly from the Mashboxx servers, and will be playable only on that user's computer, with no burning or transfer options. A "Buy this song" link will sit next to the song. If the user decides to buy the track, he or she will get full burning and transfer rights.

If the file isn't owned by a Mashboxx partner, users will be able to download the song -- free and clear -- directly from a peer on the Mashboxx network.

Rosso isn't the only member of P2P's old guard who's taking a shot at developing file-trading networks -- this time working with the record labels instead of against them. Shawn Fanning, the founder of Napster, is currently running Snocap, a company that handles the back-end file management requirements for legal peer-to-peer services such as Mashboxx.

No one expects the recording industry to simply shrug its shoulders and walk away from the case, of course, if the Supreme Court rules in Grokster and Streamcast's favor. The next course of action for the labels, say observers, will be to lobby Congress for tougher legislation against file-sharing.

Putting the decision in Congress' hands isn't such a bad idea, says one Grokster defender.

"This rapidly changing technology environment is best addressed by Congress," says EFF's Seltzer. "If Congress thinks copyright needs to be changed to address specific technology issues, it can address that in a number of ways. For example, it can create compulsory licenses or royalty pools...But the courts can only say there's liability or no liability."

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