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Copyright Bandits at Large

Supreme Court should grant cert in Grokster case to address important business concerns.

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The Supreme Court will soon decide whether to hear one of the most important commercial cases to reach the Court in decades. *MGM v. Grokster* raises a copyright challenge to the Internet-based services that enable millions of users around the world to swap digital copies of sound recordings and movies with a few clicks of a mouse. At stake is the legitimacy of our copyright system in the digital age.

The U.S. Court of Appeals for the 9th Circuit held last summer that peer-to-peer (P2P) file-sharing services are immune from secondary liability under the copyright laws for the millions of infringing acts committed every day by their teems of happy users. A broad coalition—including Hollywood studios and recording companies, state governments, and international publishers—have urged the Supreme Court to review that decision. The Court should answer their call.

TOO LITTLE COMMERCE

Unfortunately, the Court's recent track record in such matters is not promising. Its annual argument docket seems to be shrinking faster than the polar ice caps. Twenty years ago, it was not uncommon for the justices to hear more than 150 cases a year. During the past three terms, the Court has only once broken the 90-case mark. And fewer and fewer of those cases involve significant commercial issues.

A substantial percentage of the cases that the Court does hear address criminal law and habeas corpus issues that, while important to those enmeshed in the criminal justice system, have little or no bearing on the lives of law-abiding Americans—or businesses. The few business cases that the Court does agree to hear are now more likely to involve claims of personal discrimination in the workplace than the kinds of legal issues that may be disrupting U.S. and even international markets on a wholesale basis.

One explanation for this trend is the formulaic manner in which the justices—aided by their 20-something law clerks—decide which of the nearly 8,000 cert petitions they receive each term to set aside for a full hearing on the merits. Under the current practice, the Court's "cert pool" focuses heavily on whether a case presents an issue that has divided the lower courts.

This conflicts-driven approach provides an objective basis for identifying which cases to hear, but it can also skew the high court's docket toward certain types of disputes. For example, cases involving the federal anti-discrimination statutes are sooner or later bound to generate conflicts because of the sheer number of suits filed under those laws. Conflicts should be resolved to ensure that laws have uniform effect across the country. But too often the Court closes its doors on truly important commercial issues simply because the magical conflict does not exist.

90 PERCENT ILLEGAL

Enter *Grokster.* The case was brought by a consortium of major motion picture studios, recording companies, and individuals who together claim to own the copyrights to the vast majority of sound recordings and movies in the United States. They contend that companies like Grokster that make and freely distribute P2P file-sharing software are liable under the copyright laws for the infringing uses committed by the P2P faithful.

File-sharing technology has created a digital haven for copyright piracy. Anyone connected to a P2P service over the Internet, anywhere in the world, can search the files of the millions of other users connected to such services at any given time and copy any of their files. Copyright infringement constitutes at least 90 percent of the activity facilitated by such technology. The companies that offer this technology seek to capitalize on such unlawful activity by selling advertising that pops up on the screens of millions of modern-day Internet pirates, more than 40 percent of whom are teenagers.

The global economic impact of this phenomenon is staggering. More than 85 million copyrighted songs and roughly a half-million movies are illegally downloaded over the Internet—every day. Sales of the most popular recordings have steadily declined over the past few years as the new generation of Internet users have become accustomed to simply downloading the latest hits for free. Lost music sales alone exceed a billion dollars annually. Those

losses have in turn led to layoffs in the recording industry, millions of dollars in lost royalties, and fewer contracts for emerging artists.

In *Grokster,* the 9th Circuit held that P2P file-sharing services nevertheless may escape secondary liability under the copyright laws. The court relied on a 20-year-old Supreme Court decision involving a similar copyright challenge brought against Sony, the manufacturer of Betamax videotape recorders. In *Sony Corp. v. Universal City Studios* (1984), the Supreme Court held that this manufacturer could not be held secondarily liable for the infringing uses committed by those who purchased its videotape recorders.

But the technology in *Sony* differs in a critical respect from the technology in *Grokster.* In *Sony,* the Supreme Court concluded that the Betamax recorder was used primarily for the lawful purpose of "time-shifting" free, over-the-air telecasts—i.e., recording a television program for personal viewing at a later time. By contrast, P2P file-sharing services have little utility today but to facilitate copyright infringement.

By overlooking that fundamental distinction, the 9th Circuit reached the counterintuitive result that a company may go into business to sell a product whose primary use is to facilitate copyright infringement and yet escape liability under the copyright laws.

SAVING COPYRIGHT

The *Grokster* case is critical to efforts by the federal government, which has recently launched an Internet piracy task force, and copyright holders to enforce the intellectual property laws. If the producers of such P2P file-sharing services cannot be held secondarily liable for the infringing activities of their users, then law enforcement authorities and copyright holders are left with no choice but to go after the millions of users who download the files on their personal computers. These lawsuits not only present formidable practical challenges, but also raise difficult privacy issues about how copyright holders may obtain the names of otherwise anonymous Internet surfers.

Few other cases have reached the Supreme Court in recent years with as much at stake for U.S. and global markets as *Grokster.* The 9th Circuit's decision arguably conflicts with the 7th Circuit's decision last year in *In re Aimster Copyright Litigation* with respect to the proper application of the *Sony* standard to Internet-based services, and thus the high court could grant cert to resolve this arguable conflict. But the extraordinary importance of the question presented to commerce in the digital age is reason enough to hear *Grokster.*

The Supreme Court has previously expressed a reluctance to entertain complex intellectual property disputes and observed that courts should defer to Congress to address such matters. Congress indeed has the primary responsibility for regulating copyrights. And legislators are considering a response to the *Grokster* case.

But given how rapidly technology is advancing, we cannot always afford to wait for the legislative process to resolve questions that arise in applying outdated laws to new technology—or to assume that Congress will act in time. Statutes passed just a few years ago, such as the Digital Millennium Copyright Act of 1998, are already being overcome by technological advances and the creative efforts of Internet-oriented entrepreneurs.

The *Grokster* case vividly illustrates this problem. The emergence of P2P file-sharing technology poses a potentially lethal threat to the authority of our copyright system and to two of America's most profitable and distinctive exports—sound recordings and movies that provide entertainment to billions of people across the world.

Grokster deserves its day in the Supreme Court.

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