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OPINION

■ 'GROKSTER': COUNTERPOINT ■

Grokster is not Napster

By Charles S. Baker SPECIAL TO THE NATIONAL LAW JOURNAL

WE ARE ON the eve of a decision by the U.S. Supreme Court that may affect how you and I have access to technological advances made in this country. And many do not realize the potential technological repercussions because the MGM *v. Grokster* case has been wrongfully portrayed by many as nothing more than the "next Napster." But there is much more at risk here than just stopping illegal file sharing, for if the Supreme Court were to adopt the petitioners' arguments in this case, there stands a good chance that technological innovations will be stifled.

Throughout the *Grokster* litigation, the copyright owners have taken every opportunity to equate the defendants with Napster, the pioneer in digital file sharing. But StreamCast's Morpheus software (as well as Grokster's product) is not a file-sharing "service," nor does it maintain any computers that participate in the exchange of files in any way. Instead, it allows its users to connect to one another to create an open, publicly available, peer-to-peer (P2P) network directly among their own computers. Unlike Napster, StreamCast and Grokster have no involvement with, or control over, what their users do with the software, just as Xerox has no control over what its customers do with its photocopiers. There is no dispute that direct copyright infringement occurs over these, and many other, P2P networks. But there is also indisputable evidence that the software is being used for noninfringing activity.

Copyright protection, for the most part, is a matter relegated to the power of Congress. Our copyright laws give copyright owners an exclusive monopoly to control the reproduction and distribution of their works. The Copyright Act is a powerful tool: Its enforcement and damages provisions are fairly draconian, allowing ex parte impoundments and recovery of statutory damages of $150,000 per act of infringement. Copyright owners, unhappy with the recourse afforded them, have continually tried to expand the reach of their enforcement mechanisms by resorting to suits against those who contribute to infringement. This, in turn, has led to a new form of technology regulation by the judiciary.

This is nothing new, for history has shown that copyright owners, when faced with a new technology that is disruptive to their distribution models, are quick to seek judicial relief before a technology can prove itself. This same history has also shown that time and market forces often provide equilibrium in balancing new interests, whether the new technology be a player piano, a copier, a tape recorder or an MP3 player.

Follow the 'Sony' precedent

The Supreme Court's 1984 decision, *Sony Corp. v. Universal City Studios Inc.*, made it clear that the mere capability of substantial noninfringing uses is all that is required to protect a new technology from attack based on allegations of secondary copyright infringement. The central holding in *Sony* is that one who distributes a technology to the public shall not be held responsible merely because the technology may be (and is) used for illegal purposes. The court also rejected the argument that merely showing constructive knowledge of the fact that the VCR could be used to make unauthorized copies of copyrighted material was a basis for liability. The court found no precedent for such a theory; it expressly noted that such a rule would improperly extend the copyright monopoly to include most consumer technology generally.

This "capability" bright-line test has served innovators and technologists well for decades. It is clear that the rise in technological innovation over the past 20 years happened for a reason: Technology innovators knew they would be protected from charges of secondary copyright infringement. The resulting technological innovation has delivered enormous benefits, both for society at large and for the copyright industries. Look at the VCR, the audiocassette recorder, the personal computer, the CD burner and the Internet. Nearly every American has enjoyed the benefit of these technological innovations. The copyright industries, meanwhile, have seen their own market size increase dramatically as a direct result of innovations that, arguably, contribute to direct copyright infringement.

Abandonment of the *Sony* rule would threaten innovation in many obvious ways. It would no longer provide a bright-line test that inventors require when deciding to go forward with a particular innovative technology. If the Supreme Court were to adopt the petitioners' arguments, technology of this sort would never have a chance of getting out of the gate because investors, concerned with the risk of litigation, would shy from investing in these "disruptive" technologies, to the detriment of innovators and the public alike. Copyright liability for general distribution of a dual-use product inevitably harms the legitimate use of a product as well as impedes its improper uses. Awareness of that harm as beneficial new products are created is the overwhelming rationale for continued adherence to the *Sony* rule. NLJ

Charles S. Baker is a partner in the Houston office of Porter & Hedges. He represents co-defendant StreamCast in the Grokster *case before the high court.*