US Supreme Court rules in favor of entertainment giants and big cable Internet providers

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On June 27, the US Supreme Court decided two important cases involving Internet use.

In *Metro-Goldwyn-Mayer Studios v. Grokster*, the Court ruled that providers of software for peer-to-peer networks may be liable for copyright infringement by their users who download copyrighted music or videos.

In *Federal Communications Commission v. Brand X Internet Services*, the Court upheld the refusal of the Federal Communications Commission (FCC) to regulate cable modem companies that provide high-speed broadband Internet service, although the FCC regulates telephone companies that provide Digital Subscriber Line (DSL) broadband Internet service.

In 2000, giant record companies got the federal courts to shut down Napster, a file-sharing Internet service, for contributing to copyright infringement. Napster used a central computer server to receive and respond to requests for music from its software users.

Grokster and Streamcast then stepped forward to offer software that dispensed with a central mediating server. Grokster employs FastTrack technology that permits supernodes or other indexing computers to link computers of end-user "peers" who want to exchange digital files.

StreamCast's Morpheus software relies on a similar Gnutella protocol to connect the user computers, in some versions directly. File exchange on these networks is faster and is less subject to the disruption of central server glitches.

Hundreds of millions of copyrighted songs and videos have been exchanged in these decentralized peer-to-peer networks without compensation to the copyright owners. As of 2003, about 90 percent of the files available for download on them were copyrighted works.

The big movie studios, record companies and a number of songwriters sued Grokster and Streamcast for contributing to that copyright infringement.

The lower federal trial court and the Ninth Circuit Court of Appeals ruled that the defendants were not liable because, unlike Napster, (1) they could not track and were not involved in specific instances of the exchange of copyrighted works, and (2) their software was often used to legally swap digital files that were not copyrighted.

Those courts relied on a 1974 US Supreme Court decision involving copyright infringement by persons who used Sony's videocassette recorders to tape movies and build film libraries. There, Sony was found not liable for contributing to that infringement, because its VCRs had substantial other lawful uses, such as taping a film for later viewing, and because Sony had no knowledge of specific infringing activity by persons using its products.

All nine of the Supreme Court's justices agreed that the lower courts were mistaken in applying the earlier Sony decision. The lead opinion written by Justice David Souter explained that, unlike with Sony, there was a great deal of evidence that Grokster and StreamCast had intentionally and actively promoted infringing activity by its software customers by word and deed.

This evidence included advertising and internal documents showing an intent to capture former Napster users who were looking for an alternative—distribution of software permitting the relaying of files from Napster-using computers, distribution of a newsletter monitoring the number of songs of certain artists available on the defendants' network, the sending to users of a newsletter with links to articles promoting the software's ability to provide particular copyrighted works, and a business model that tied revenue growth to streaming advertising upon each use of the software. The Court also found it significant that neither defendant tried to develop filtering tools to lessen infringing activities by users of his software.

In terms of legal doctrine, the case is a plausible application of longstanding rules about when a person who is not himself engaged in copyright infringement can be liable for contributing to infringement by others. Of more interest is the tension it addresses between supporting artistic pursuits through copyright protection and promoting innovation in new communication technologies.

Movie studios and record companies in the case argued that infringement activity through peer-to-peer networks was so widespread and difficult to police that the earlier rule from the Sony case should be tightened up. The Court, however, declined to revisit the wisdom of the Sony case.

Thus, mere knowledge of the likelihood of infringing use of a product still will not lead to liability, where the product is capable of substantial other uses that are lawful. The decision implies that if the software provider does a better job than Grokster or StreamCast in concealing any intention to promote sharing of copyrighted works, it can evade legal liability.

Likely reflecting the studios' angst, Justice Ruth Bader Ginsburg wrote an opinion concurring in the result, joined in by Justices William Rehnquist and Anthony Kennedy, that argues that courts should carefully scrutinize and view with skepticism evidence that a product is capable of developing substantial or commercially significant non-infringing uses over time. That approach in effect produces a case-by-case review, weakens the Sony rule and leaves developers of new technology with less comfort in predicting the lawfulness of new products.

Ginsburg's concurring opinion elicited yet another concurring opinion penned by Justice Stephen Breyer, in which Justices John Paul Stevens and Sandra Day O'Connor joined. Breyer argued that the Sony rule is a bright line that strongly protects developing technology. He said that Grokster-type peer-to-peer software, which permits the exchange of any sport of digital file, copyrighted or not, has already demonstrated a significant future market for non-infringing uses. He cited the availability on Grokster of copies of music authorized by various artists, research information, public domain films, historical recordings and digital educational materials, free electronic books, public domain and authorized software such as Linux, BBC news broadcasts, and the like.

All the justices take as their point of departure the interests of big corporate interests. Ginsburg's approach is responsive to the concerns of the giant entertainment conglomerates that have seen plunging sales of musical recordings and, more recently, declining receipts at the movie box office. Breyer takes up the positions of consumer and high-tech industries, which filed briefs in the case as "friends of the court." He also reflects the concern that US innovation not be stifled to the advantage of foreign competitors.

Artists are legitimately concerned with compensation for their efforts. But the Supreme Court has long recognized reward of creative work is but a means to an end, that private motivation must ultimately serve the broad public availability of literature, music and the other arts.

Moreover, at present, only a relatively small number of artists obtain distribution of their works through the giant entertainment conglomerates that dominate the film and music industries. Too often artistic content is ground down by the stultifying drive for hit-making and appeals to the formulaic and tried-and-true.

It is not surprising that consumers want to take advantage of Internet technologies to bypass the big monopolies. But the interests of artists, consumers and the public-at-large cannot be rationally and fairly protected within the framework of monopolistic capitalism, which the entire Court, whatever its internal divisions, defends.

The *Brand* X case decided by the Court about cable modem providers involves the distinction the US Congress made in 1996, when it passed a restructured telecommunications law, between telecommunications carriers, which are subject to mandatory regulation by the FCC, and information-service providers, which are not. Thus, the FCC regulates basic telephone service, but not Internet service providers (ISPs), who provide Internet access and computer processing services, even if over telephone lines.

The FCC requires telephone companies that provide DSL broadband Internet access to make their lines available to ISP providers like Earthlink. In 2002, it decided it would not require cable modem companies to provide similar access to ISPs.

The ISPs and the phone companies such as MCI that compete with cable giants like Time Warner responded with legal action. They challenged the FCC's interpretation of the federal law—its view that broadband Internet service provided by cable companies is an "information service" rather than a "telecommunications service" subject to regulation. The Ninth Circuit Court of Appeals agreed with that challenge.

The Supreme Court reversed the Ninth Circuit's decision by a 6-3 vote. It had previously ruled that if a statute is ambiguous, the interpretation of the government agency administering the statute will control, if reasonable. The majority opinion written by Justice Clarence Thomas states that the FCC's interpretation of the statute is reasonable.

Thomas's opinion and the dissenting opinion written by his usual far-right ally Justice Antonin Scalia labor for dry page after dry page over whether—even though cable companies in the broadband Internet service business "offer" consumers an information service in the form of Internet access "via telecommunications"—they also "offer" consumers the high-speed data transmissions (telecommunications) that is an input to provide the service, within the meaning of the federal statute. Thomas and the majority said yes; Scalia and the minority said no.

The real point is that the FCC has by its interpretation, as Scalia says, established a whole new regime of "non-regulation." Scalia doesn't object to non-regulation, only to an implausible reading of the statute that exceeds the authority given by Congress.

The result is a further step in the process of deregulation. Here, the public interest in Internet access over cable will not be a regulatory consideration. Consumers will have fewer Internet options.

The decisions in both these cases subscribe fully to the ideology of the "free market." But the questions they raise cannot be resolved in the interests of the majority of people under a capitalist framework, where control is placed in the private hands of a few huge corporations. The rational development of such promising technologies to the benefit of society and culture overall will only occur under public ownership and democratic control over technology by the working people.