

Ronnie Schwartz
Science and Law
Dr. B. Langer
May 2005

Piracy and the Internet: How MP3's Changed the World

Internet Piracy is huge! Currently people download software, music, and movies, costing the respective industries billions every year. In this paper, we will go through the history of piracy with the pirates at sea to the Internet technologies currently used for pirating. Then we will analyze the various copyright infringement laws piracy relates to. After that, we will visit the present technologies and advances with Digital Rights Management. Concurrently, the major case of MGM vs. Grokster will be fought out. Finally, we will take a look at the future and see if there will be any progress in piracy prevention.

History of Piracy

When we think of pirates, we instantly see a man with a patch over one eye, wearing a triangular hat, a hook as a hand, and a bird on his shoulder. So much has changed, but the concept is still the same. Classically, a pirate was defined as, “One who robs at sea or plunders the land from the sea without commission from a sovereign nation.”¹ That definition is poles apart from the modern definition, “One who makes use

¹ The American Heritage® Dictionary of the English Language, Fourth Edition

of or reproduces the work of another without authorization.”² Piracy at sea being nearly extinct, computer related piracy is often what people refer to when they think of piracy.

Computer piracy has been around since the first computer was used. Computer piracy involves someone who illegally copies either software or some other copyrighted work using a computer. The term “illegal” is principal here because a person is allowed to make a copy of software as a backup in case the original fails. Computer piracy is costing the software industry 29 billion dollars a year and that number keeps climbing.³ “Thirty-six percent of the software installed on computers worldwide was pirated in 2003.”⁴ The software industry already suffered the transition of piracy. Virtually all software manufacturers have piracy built in to their budget.

The Internet is a web of computers interconnected so that any computer in the web can communicate with any other. This worldwide network makes it very simple to shares files. Piracy is a natural fit for the Internet. Copying a file across the world does not cost any money and can be conducted in a matter of milliseconds. But it can be illegal. Now people can exchange files without the need for any physical medium. This is the major distinction that sets computer piracy apart from all other piracy. Shoplifting is a very physical thing, whereas copying a file does not require any more physical resources then a “double-click.” By removing the physical action, a lot of people feel that they are not doing anything wrong. United States Copyright Code considers “copies” as “material objects, other than [in the case of] phonorecords, in which a work is fixed by any method now known or later developed.”⁵

² See id

³ <<http://www.bsa.org/globalstudy/>> (2003)

⁴ See id

⁵ 17 U.S.C. § 101 (2003)

Internet Technologies for Pirating

Millions of pieces of software, music, movies, pictures and even books are pirated over the Internet every day. The most interesting of these involves the pirating of music files known as mp3's. An mp3 file is a special file that holds a complete song compressed into a tiny footprint. "MP3 compresses CD-quality sound by a factor of roughly 10, while retaining most of the original fidelity; for example, a 40MB CD track is turned into a 4MB MP3 file."⁶ This makes it ideal for transmitting across the globe. Not only are mp3 files small, they also boast near "CD quality" sound. They instantly became a hit with computer users. People began to convert their CDs into mp3's – a process known as "ripping" – in order to consolidate their music library in one central location. It was not long before people started emailing their friends copies of their songs. However, it was still not simple to quickly get the song you just heard on the radio. That is what Napster was all about.

Napster, conceptualized in 1998 by a college student Shawn Fanning, was a system that allowed any registered user to find an mp3 on any other registered user's computer assuming they were logged into the system.⁷ This system made it very easy to search for your favorite song and have it within minutes or even seconds. The process involves a user who registers for an account at no cost. Once registered, the user can log in using special client software downloaded from Napster's website. The software was also provided free of charge. The user logs into the system and is presented with a box to type in keywords to search for. He then can enter in the name of the song, author or any other distinguishing characteristics of the song or file and press "search." In a matter of

⁶ Computer Desktop Encyclopedia (2005)

⁷ A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000).

seconds a results screen appears that lists all of the files matching the search criteria. Each line shows the file name, the size of the file and the registered user that you would download it from, as well as the speed of that person's Internet connection. The user can then either double click on a file to download it, or refine his search to better find what he was looking for. If the person double clicks on the file, a connection will be made between him and the user offering the file. The file is then transferred between the two parties and Napster is not involved. It is worth mentioning that Napster does not host the mp3 files. The files remain on the individual user's machines until they are requested.

The Recording Industry Association of America (RIAA) quickly picked up on Napster. It was now easier and cheaper to download your music off Napster than it was to purchase the CD from a record store. At the very end of 1999, the RIAA sued Napster through A&M Records, Inc. for "contributory and vicarious federal copyright infringement."⁸ (We will go into the different copyright infringements later on.) The reason for the suit is that Napster provided a platform that helped people infringe on the copyright of music artists. The RIAA's claim was that ultimately, this caused CDs sales to drop and hampered creativity in the music field by not permitting new artists to join the field. The other side agreed about the decline in CD sales, but said the market grew, specifically in regards to concerts and people trying new music.

Almost immediately software developers began figuring out techniques to avoid the legal issues Napster had by removing the "central server" from the picture. The new technology was a "decentralized" Peer-to-Peer (P2P) system as opposed to Napster's centralized P2P system. Technically, using new software like Kazaa or Limewire helped software vendors steer clear of any liabilities. True P2P software works by having the

⁸ A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136, (N.D. Cal. May 12, 2000)

computers connect directly to each other. Once that is done, when a search is made, the software polls the members of its network for the requested files. The computers on the network respond if they found a match. Then the person making the query gets presented with a list of computers that have the file. This user must then “double-click” or issue a command in order to download the file. This process connects the user who requests the file with the user that has the file. Throughout the process, the software vendor is out of the picture and never contacted. How will the government regulate a system in which everyone can infringe on copyrights and not have a central entity to blame? The answer is easy; go after the users. They would be liable for direct copyright infringement.⁹ The problem is that the users of the Internet are anonymous. They are simply IP addresses to most machines. How would that number be converted into a person? Go to the Internet Service Providers (ISPs). The ISP has the capability to convert the IP address into a paying customer. However, there is one small issue involved in doing that; it is an invasion of privacy and ISP’s have always sold the “anonymous” nature of the World Wide Web.

The Law

United State Code considers “copies” as “material objects, other than [in the case of] phonorecords, in which a work is fixed by any method now known or later developed.”¹⁰ This most probably applies to compact discs (CDs) being “ripped”¹¹ on a computer to form an mp3 file. A music artist is entitled to hold a copyright on a specific

⁹ “RIAA v. Napster: A Window onto the Future of Copyright Law in the Internet Age” John Marshall J. Computer & Information Law, Ariel Bershadsky, (Spring 2000) (V) (B) (1)

¹⁰ 17 U.S.C. § 101 (2003)

¹¹ “Ripped” refers to the process of converting a CDs audio to digital audio format such as mp3.

song for “the life of the author and 70 years after the author’s death.”¹² The code includes “any tangible medium of expression” which would include an mp3 player.¹³ The Digital Millennium Copyright Act was created in 1998 to amend title 17 (copyright code) and “to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.”¹⁴ Among it’s important duties are to free ISPs of the infringing behavior of their users and make it illegal to thwart anti-piracy pieces of software. As with most of these acts, people in the academic and scientific worlds are irritated with the lack of an open software world. They feel that their freedom has been taken away. Organizations such as the Electronic Frontier Foundation have rallied legislation in Washington D.C. by “Defending Freedom in the Digital World.”¹⁵

Copyright infringement basically falls into three distinct categories: direct, contributory, and vicarious liabilities. Direct Liability comes to play when the “copied material [is] protected by a valid copyright” and was copied by the offender.¹⁶ Contributory Liability speaks of “one who directly contributes to another’s infringement.”¹⁷ Vicarious Liability is when a person or entity has the ability to see infringing behavior and “has induced, caused, or materially contributed to the infringing activity; and has a direct financial benefit from the infringing activity.”¹⁸ These three types of liabilities are the fundamental laws that people and entities are liable when dealing with Internet piracy. In *A & M Records, Inc. vs. Napster Inc.*, Napster was being

¹² 17 U.S.C. § 302 (2003)

¹³ 17 U.S.C. § 102 (2003)

¹⁴ PL 105-304, HR 2281 (1998)

¹⁵ see <www EFF.org>

¹⁶ “*RIAA v. Napster: A Window onto the Future of Copyright Law in the Internet Age*” John Marshall J. Computer & Information Law, Ariel Bershadsky, (Spring 2000) (V) (B) (1)

¹⁷ id at (V) (B) (2)

¹⁸ id at (V) (B) (3)

accused of both contributory and vicarious liability for its users behavior.¹⁹ Quoting the appellate decision, “Traditionally, one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory copyright infringer; liability exists if the defendant engages in personal conduct that encourages or assists the infringement.”²⁰ The original case was in favor of the RIAA. However, Napster later appealed and won. Let’s see how the cases unfold.

Under contributory liability, the RIAA failed to show that Napster “induced” the piracy. Rather, Napster was simply a mechanism to search for music. Even if the users downloaded copyrighted music, they were in no way forced to do so. On top of that Napster’s users initiated the transfers themselves and once initiated, Napster was out of the picture – now it was strictly P2P. Citing the case:

Record companies and music publishers were likely to succeed on merits of contributory infringement claim against Internet service that facilitated transmission and retention of digital audio files by its users, for purpose of companies' and publishers' motion for preliminary injunction, in view of evidence that service had actual knowledge that specific infringing material was available using its system, that it could block access to system by suppliers of infringing material, that it failed to remove infringing material, and that service materially contributed to infringing activity by providing site and facilities for direct infringement.²¹

The flaw with this was that the "district court should have considered system's capabilities for noninfringing uses, in addition to current infringing uses.”²² There was a vast amount of legitimate material on their service. Independent artists used Napster to spread their music in hopes of one day being discovered. The district court did not take this into account and therefore the decision was reversed. In the Betamax Sony case, the Supreme Court explained that the product “does not constitute contributory infringement

¹⁹ A&M Records v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136, (N.D. Cal. May 12, 2000)

²⁰ A&M Records v. Napster, Inc., 239 F.3d 1004, (C.A.9 Cal. 2001) at Headnote 21

²¹ id at Headnote 22

²² id at Headnote 24

if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses.”²³

Vicarious liability was the last attempt for the RIAA to attack Napster for its users actions. Citing the case:

Record companies and music publishers were likely to succeed on merits of claim of vicarious copyright infringement against Internet service that facilitated transmission and retention of digital audio files by its users, for purpose of companies' and publishers' motion for preliminary injunction, in view of evidence that service had direct financial interest in the infringing activity and that service had limited right and ability to police its system but failed to exercise that right to prevent the exchange of copyrighted material.²⁴

The appellate court reviewed the vicarious nature and analyzed it step by step. Financial Benefit – the appellate court agreed that Napster received financial benefit because users were satisfied with the system because they found what they wanted – copyrighted music for free.²⁵ Supervision – Napster was able to supervise the music on the service and was able to block it and therefore was still liable under this section.²⁶ Napster was unable to monitor its users once they clicked to download something. However, without Napster’s service, downloading copyrighted music would not have been so effortless. So Napster should, with the help of the artists, filter the search results to exclude copyrighted material. Also, it should block repeated infringers.

Napster was not the only company being sued for its user’s actions. In 1998, Congress instituted the Online Copyright Infringement Liability Limitation Act, which removed monetary penalties from the hands of the Internet Service Providers (ISPs).²⁷

This was an important step to protect ISPs from the unmanageable behaviors of their

²³ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S.Ct. 774 (U.S.Cal.1984.) at (III)

²⁴ id

²⁵ id at (V) (A)

²⁶ id at (V) (B)

²⁷ “RIAA v. Napster: A Window onto the Future of Copyright Law in the Internet Age” John Marshall J. Computer & Information Law, Ariel Bershadsky, (Spring 2000) (V) (C)

users. Now that ISPs were not monetarily responsible, the RIAA sued Verizon to get the names of people using their service.²⁸ This is clearly direct liability; and the RIAA directly attacked the users of the system. The direct liability code is covered in detail in section 501 of the copyright code. Many users of P2P systems, including Napster, were sued for direct copyright infringement. The RIAA is suing hundreds of people and in most cases the users are settling for “penalties ranging from \$2,500 to \$7,500 each.”²⁹ Although these were serious charges, and there was lots of money involved, people continue to pirate music over the Internet using P2P software.

Much of the music swapping is conducted on college campuses. That is where many people have tight budgets, fast Internet connections, and high-tech devices.

Ramapo College of New Jersey posted the following policy regarding file sharing at

<<http://resnet.ramapo.edu/policies.php> >

RESNET FILE SHARING STATEMENT

Many people have engaged in downloading and sharing digital content - music, movies, software in a legal and responsible manner. As a responsible member of the Ramapo College community, one must remember that you are expected to comply with College policy and appropriate state and federal laws. Of particular interest should be the Acceptable Use Policy (http://www.ramapo.edu/policy/policy_statement.html) and Title 17 of the United States Code also know as the "Copyright Act," and the Digital Millennium Copyright Act (1998).

WHAT YOU CAN DO: Make a backup copy of a CD or software that you purchased. Copy music or movies that you purchased to your computer. Copy music or movies that you purchased to your PDA, iPod, or MP3 music device. Make a CD/DVD for yourself from music you purchase from appropriate sites on the Internet.

WHAT YOU CANNOT DO: Share, for others to download, music, movies, or software via a network (over the Internet). Make copies of a CD, DVD, or software to give to a friend or that you borrowed from a friend. Distribute for personal or financial gain music, movies, software you have purchased or downloaded. Download music, movies, or software without purchasing unless it is explicitly free.

²⁸ “Peer-to-Peer File Sharing and Copyright Infringement: Danger Ahead for Individuals Sharing Files on the Internet” Santa Clara Law Review, Richard Swope (2004) (II) (C)

²⁹ More Lawsuits Filed Against Downloaders, CNN, (2003)

<<http://www.cnn.com/2003/TECH/internet/10/31/downloading.suits.ap/>>

CONSEQUENCES OF VIOLATIONS: Disciplinary action through the College's judicial process Threat of lawsuit by the RIAA* or the MPAA* for violation of copyright Fines can be levied up to \$150,000 per instance of copyright violation RIAA (Recording Industry Association of America); MPAA (Motion Picture Association of America);

Note that the RIAA settled cases against 4 students in spring 2003. The fines ranged from \$12,500 to \$17,000. There have been around a thousand civil law suits settled for around \$3,000 each. In addition, the RIAA has issued over a thousand subpoenas since July 1, 2003 for information from network service providers asking for disclosure of names associated with IP addresses. Many of the subpoenas went to colleges and universities.

Colleges are not the only ones posting warnings on their websites. Kazaa, a major P2P software vendor stated, "Copyright infringement can result in significant monetary damages, fines and even criminal penalties" on their "Using Kazaa Safely" page.³⁰ Most P2P software sites have some sort of advisory for safely using their software. So how come they are all still in business? Napster has reopened their doors and even had a Super Bowl commercial this year. The bottom line is that people still use the P2P software to download music. While Napster converted it's business model to a legal music downloading system,³¹ more and more P2P software for illegally downloading copyrighted music appears every day.

Another major issue with Internet piracy is that legal battles are difficult to fight outside the United States. Web sites containing pirated material are abroad and are not covered by the U.S. Copyright laws. Also, companies producing P2P software abroad often are out of reach for many legal battles. The World Intellectual Property Organization (WIPO) is a worldwide alliance to try to unify the different copyright needs of the world as a whole. Many countries, one being the United States, are members in the WIPO. Unfortunately, many are not and Internet pirates take advantage of that. The

³⁰ <<http://www.kazaa.com/us/p2padvisory.htm>>

³¹ For \$9.95/month, Napster gives access to millions of songs. See www.napster.com for more details.

Digital Millennium Copyright Act as mentioned earlier deals with the various worldwide intellectual property organizations.

The Present & Digital Rights Management (DRM)

Apple computer introduced the iPod in 2001.³² An iPod is an mp3 player that “unlike most (but not all) competing digital audio players available at the time, Apple relies on a hard disk for storage instead of flash memory or interchangeable CD-ROMs, and uniquely focuses on promoting the small size, power, and ease of use of its device.”³³

A marvel of an idea brought so much controversy. Many people believed that iPod’s, iTunes (a software-based mp3 player) and other mp3 players helped people manage their illegal music collections. This might be true, but Apple has also led the industry in anti-piracy software techniques. While the iPod can easily store and play your music collection, it can do only that. Unlike other mp3 players, Apple decided to lock down copying music from other people’s collection to your personal iPod. One must use Apple’s iTunes software to put music on their iPod.

In April of 2003, Apple introduced a new service to its iTunes software called “iTunes Store.”³⁴ It was a no-brainer for Apple. They already had the market share for portable mp3 players. The one thing Apple was looking for was a reputation in the music industry that was not pirated music but rather legitimate music. The iTunes Store features many songs that can be downloaded at a mere 99 cents a song. The real interesting thing about this is that the songs are not stored in mp3 format; they are stored

³² <<http://www.ipodlounge.com/index.php/articles/comments/instant-expert-a-brief-history-of-ipod/>>

³³ id

³⁴ <http://en.wikipedia.org/wiki/iTunes_Music_Store>

in a new format called Advanced Audio Coding (AAC).³⁵ AAC is used for numerous reasons. It is a lossless³⁶ format that sounded better than an mp3, and most importantly it can be used in conjunction with “FairPlay,” Apple’s name for its DRM technology.³⁷

FairPlay institutes the following restrictions:

FairPlay will allow a protected track to be used in the following ways:

- The protected track may be copied to any number of iPod portable music players.
- The protected track may be played on up to five (originally three) authorized computers.
- The protected track may be copied to a standard CD audio track any number of times. (The resulting CD has no DRM and may be re-converted to MP3, but this will aggravate the sound artifacts of encoding, since the resulting sound file will have been encoded twice; AAC is lossy.)

Circumventing the Fairplay protection scheme in this fashion may be a violation of the Digital Millennium Copyright Act and therefore illegal and subject to criminal penalties in the United States.³⁸

These are pretty open restrictions, but are strict compared to mp3’s lack of any restriction.

Despite the limiting file format, Apple has successfully sold millions of songs legally in its iTunes store. The conclusion is that people want the easy of use of finding music online. The benefits includes quick search, free 30 second previews, purchase a single song without having to get the entire album, and of course instant gratification.³⁹

Other companies have followed Apple’s successful business model and started offering songs for 99 cents too. Napster started a subscription based service called “Napster To Go” that allows one to fill up a compatible mp3 player with music, and refill as often as one feels necessary at no additional cost.⁴⁰

³⁵ <http://en.wikipedia.org/wiki/Advanced_Audio_Coding>

³⁶ Lossless means that it is compressed with virtual no lose of quality.

³⁷ <<http://en.wikipedia.org/wiki/FairPlay>>

³⁸ id see “Restrictions”

³⁹ More Info at: <<http://www.apple.com/itunes/store/>>

⁴⁰ <<http://www.napster.com/ntg.html>>

MGM vs. Grokster

The motion picture industry is currently in the beginnings of a piracy revolution. Until recently, downloading a movie over the Internet took almost a week and was likely not to be complete after all that time. However, with the growing numbers of households with broadband Internet access, downloading full movies is no longer a dream, it's a reality. Like Napster, Grokster – a P2P software client very popular for its use of downloading movies – was recently under fire for copyright infringement.⁴¹ Unlike Napster, Grokster does not run on a “centralized” P2P network, but rather, it runs using a “decentralized” P2P network. That means they have absolutely no control over its users activities. Metro-Goldwyn-Mayer Studios, better known as MGM, sued Grokster in April of 2003. The district court in California granted Grokster partial summary judgment in the case. MGM and Grokster had the opportunity to fight the many aspects of the case in the 9th circuit.

On February 3, 2004, MGM got their chance to orally dispute its case before the 9th circuit appellate.⁴² MGM's lawyer started out explaining to the judge how this case was different from the Sony Betamax case. How in this case there is not substantial legitimate use. Only 10% of the files on Grokster, according to their own research, were not copyrighted. The lawyer emphasized that within the 10%, he was not sure how much was in fact copyrighted, but there could be more. The judge argued that 10% is substantial enough for legitimate use. MGM considered, with the help of an expert witness, that shutting down Grokster would in fact kill off much of the infringement. However, others felt that that would not be the case. Since the software is decentralized,

⁴¹ Metro-Goldwyn-Mayer Studios, Inc. vs. Grokster Ltd. 380 F.3D 1154 (9TH CIR.) Cert. Granted, 125 S. CT. 686 (2004)

⁴² <http://www.eff.org/IP/P2P/MGM_v_Grokster/> see “Oral Arguments before the 9th Circuit”

it can live on it's own with or without financial backing, seemingly forever.

Additionally, MGM brought to the court that the software vendors could install filters that would weed out copyrighted files. Ask any programmer and they will tell you that doing so in decentralized P2P software would effectively slow it down to a crawl, making it useless. One of MGM's lawyers made the analogy between Grokster removing the registration portion of their software to avoid liabilities and "I think that's like taking the speedometer out of your car and think you can beat a speeding ticket based on that."

Grokster's defense was that this case is just like the Sony Betamax case. That in that case the percentage of infringement didn't matter because there was legitimate use. Even more, there is emerging technology at stake and we do not know how much benefit it can bring. One of Grokster's lawyers laid an example of what would have happened if someone sued Xerox because customers of Kinkos were violating copyrights. Photocopy machines could have been killed off. Look at how much good they have produced. P2P Technology, specifically through Grokster, has been used to spread legitimate music videos, religious books, and hundreds of lawful songs from bands such as Phish. In addition, Grokster brought up that when videocassettes first came in the market, the movie industry was extremely strict about any reproduction. After the court decision against them, they found that by using the technology, they could leverage the market for even more [financial] beneficial use. This was their argument against attacking a technology (P2P) in its "infancy."

Grokster's justification to the vicarious liability part was that it did not have any monitoring systems in place, nor was it even possible for them to make modifications because the core of their software is not their code. MGM's rebuttal was that Grokster

had the ability to police its users already in place and removed it prior to the case. The judge brought back the analogy of Xerox and asked MGM to explain why this case is different. MGM responded by saying that Xerox did not start a nationwide anonymous network based on infringement.

Both sides have very respectable arguments. On Thursday, August 19, 2004, the 9th circuit court of appeals ruled in favor of Grokster stating that they were not liable for the copyright infringement that took place using their software. This granted Grokster partial summary judgment. However, the court battle is not over. The dispute of whether Grokster is liable of its user's contributory and vicarious copyright infringement was heard in the U.S. Supreme Court on March 29, 2005 and will likely be decided after this paper was published.⁴³

Dozens of briefs have been filed before the Supreme Court by everyone from music artists to technology companies, intellectual property law professors to economists, motion picture studios to massive telecommunications companies. Specifically, worth mentioning is the brief filed by 60 intellectual property and technology law professors and the U.S. Public Policy Committee of the Association for Computing Machinery (ACM), the largest technical organization in the world, in support of Grokster.⁴⁴ The purpose of the brief was to illustrate that if MGM would win the case we “would have profoundly disruptive and destabilizing consequences in the copyright case law and in a wide array of industry sectors – thereby undermining, rather than promoting, the constitutional purposes of intellectual property law.”⁴⁵ Since people will infringe using P2P regardless of who wins, the brief “suggests” that this case not be about P2P

⁴³ Case to be decided in Summer of 2005

⁴⁴ <http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_tech_law_profs_usacm.pdf> (2005)

⁴⁵ id at pg. 1

technology and copyright infringement, rather it should be about “technology policy.”⁴⁶ The brief goes further stating that, “The *Sony* safe harbor further promotes business certainty and judicial efficiency because of its simplicity, clarity, predictability, and objectivity.”⁴⁷ This is in fact a key element here. If the rules change for every technology, that leaves every technology vulnerable to terrible lawsuits causing extinction or even worse, not even discovery of the new technology out of fear. The briefs walk through many scenarios of testing for problems with technology and finds flaws in each one, concluding that the judgment should affirm the court of appeals (9th circuit) decision.

Interesting enough, Napster along with seven other content providers that “offer *legal* music and/or film distribution over the Internet,” supplied a brief in support of MGM.⁴⁸ Napster, not so long ago in the same boat as Grokster, was now changing roles and fighting P2P technology. The brief starts with a bold statement; “a new mode of viral distribution of copyrighted works has cause the courts, the artistic and technology communities, and the public to re-define *Sony* in ways unimagined by this Court.”⁴⁹ The brief goes further in stating that, “the public good is not served by encouraging the public to engage in unlimited and unlicensed file sharing, which has been recognized by all courts as infringing conduct.”⁵⁰ The *Amici*’s argument is that they all are profitable in the same business, but follow legal guidelines, so why should Grokster be permitted to illegally conduct business to get bigger profit margins? The *Amici* are also stating that they have invested much more in the technology than Grokster and “this is innovation

⁴⁶ id at pg. 4

⁴⁷ id at pg. 13

⁴⁸ <http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_napster_etc.pdf> (2005)

⁴⁹ id at pg. 2

⁵⁰ id at pg. 3

that deserves protection.”⁵¹ The brief then concludes that they have suffered⁵² do to these illegal acts and that the court should reverse the decision of the 9th circuit court of appeals and accept MGM as the winner.

It’s unfortunate that the final decision has yet to be made in this case. The briefs have been submitted to the U.S. Supreme Court, as well as the oral arguments by both sides. The oral argument was given on March 29, 2005. Donald Verrilli, Jr., on behalf of MGM, raised the argument that the court unrightfully ignored his expert’s analysis. Justice Stevens asked if he meant “there is no other significant legitimate use” and Mr. Verrilli responded, “I don’t there [are]. I think it’s quite accurate on the summary-judgment record.”⁵³ He reiterated that they feel that the case does not fall under Sony’s guidelines and even if it did it then, “that’s no defense to a contributory infringement claim based on intentional building up of an infringing business.”⁵⁴ After much discussion MGM said that the purpose of this case was to sue for damages, nothing else.⁵⁵ The justice didn’t realize this and felt it was unclear. The purpose of protecting Sony is to keep innovation going without inventors feeling like they will get sued right away. After a long discussion about why this is not happening to the iPod, Mr. Clement was asked to speak on behalf of the petitioners, MGM. He supported all previous claims made and according to Justice Ginsburg felt “there should be not summary judgment for the Petitioners, but a trial.”⁵⁶ Grokster’s defense was principally that this is Sony and that

⁵¹ id at pg. 6

⁵² id at pg. 9

⁵³ <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf> (2005) at pg. 5

⁵⁴ id at pg. 6

⁵⁵ id at pg. 9

⁵⁶ id at pg. 24

everything applies. There is innovation at risk here, not one specific company. The P2P technology has many uses, some which are yet to be discovered.

The case is to be decided some time in the summer of 2005 and will no doubt be a landmark case. It will be interesting to see who wins. Technology innovators want this case to get into Congress's hands in order to finalize some rules on innovation to come. It's difficult to know for sure what will come out of all of this.

The Future

It is hard to predict the future with utmost certainty. However, given the past, there are two options: kill the pirates or adapt to their beliefs. The old pirate of the Caribbean ended up taking the first route while the computer and the music industries took the later. The only one left is the motion picture industry. With the big guys losing fights to the little P2P software companies, it looks like MGM and everyone else will have to adjust to the changing times. This is really a fight for innovation, not a specific technology or company.

People will be craving instant gratification through the Internet. Pay-per-view will not require cable access and iPods will not just be for music anymore. The big guys just have to adapt to the changing ways of the world paved by those creative computer geeks. There is much more innovation and controversy to come. The judicial system is definitely capable of handling these landmark decisions.