Split Decision On File-Sharing

Grokster may be a goner, but swaping is here to stay.

By Mike Godwin

The Supreme Court's June 27 decision in *MGM v. Grokster* is not quite as bad as the tech companies feared it would be, and not nearly as good as the content companies hoped it would be. Unfortunately, the decision also lacks the clarity that the rest of us hoped it would have. As a result, we can reasonably expect more litigation for some time to come.

In *Grokster*, the Court reversed lower courts' summary judgment on the issue of whether the current software offered by defendants Grokster and Streamcast was lawful, and then went on to adopt a new theory for liability—the intentional "inducement of infringement."

The new rule marks a departure from the two-decade old "bright line" test of *Sony Corp. v. Universal City Studios*, which held that a technology is lawful if it is "capable of substantial noninfringing use," even when that technology is widely used for infringement. Post-*Grokster*, a technology-providing defendant will have to prove it didn't create or distribute tools that can be used for copyright infringement with the intent of causing such infringement.

Proving a negative is hard in any situation, and for a defendant in this type of case, it probably means turning over just about all records to whoever is suing you, so that the plaintiff can dig for incriminating e-mails and memos about what the defendants knew and when they knew it.

It's clear the Supreme Court was trying to preserve the fundamental effect of the *Sony* rule, which has given breathing space for the development of new consumer technologies from the iPod to TiVo. Still, the Grokster case likely means that U.S. technology developers will be thinking a lot harder in the future over whether the *next* iPod or TiVo is going to trigger litigation, and about how they describe the features of new technologies, both in public statements and in private communications. Whether this means a "chill" on product innovation in the long term is still up for grabs, but the tech community—including companies that disapprove of the file-sharing tech providers like Grokster—is fearing the worst.

What probably won't be affected, however, is the willingness of ordinary Americans to share their cultural enthusiasms—music, TV, movies, and everything else—in the online world. That impulse has accompanied every era of recording technology—it's why our fathers and grandfathers hooked up reel-to-reel tape recorders to their hi-fi equipment. Regardless of the outcome of the Grokster case and the cases that are sure to come, file-sharing won't be going away anytime soon. It's up to the content creators and our culture at large to adapt to a new world. ■

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Freedom of Repression

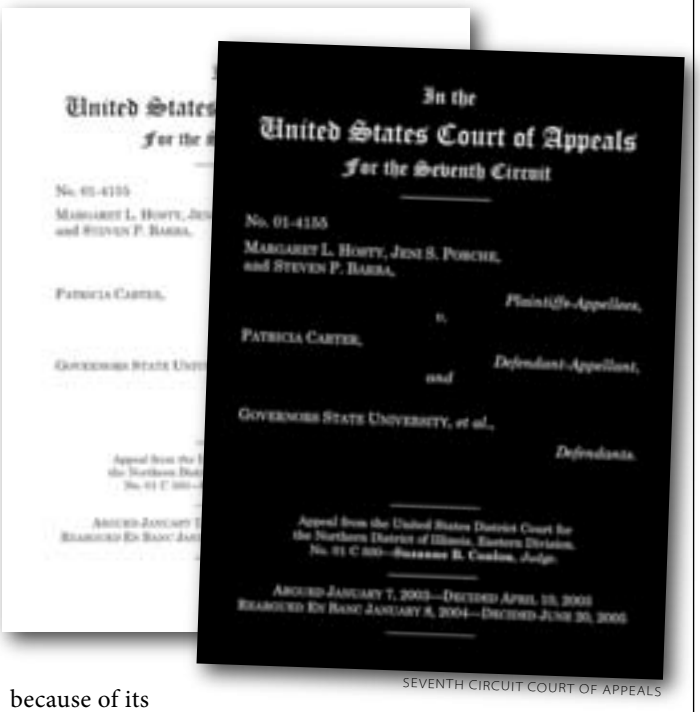
New ruling will allow censorship of campus publications. *By John K. Wilson*

For almost five years, the *Innovator* newspaper at Governors State University has been absent from the suburban Chicago campus, banished by the administration's demands for prior approval of its content.

After a June 20 decision by the 7th U.S. Circuit Court of Appeals, the *Innovator* may never be seen again—and many other campus newspapers may join it on the list of publications censored or eliminated for questioning the status quo.

The decision in *Hosty v. Carter* demonstrates the threat that right-wing judges pose to freedom of expression in America. The majority opinion, written by conservative judge Frank Easterbrook and supported by other conservative justices such as Richard Posner, is a classic example of judicial activism. Easterbrook's convoluted opinion abandons well-established precedents supporting the free expression rights of college students, and gives college administrators near-absolute authority to control the content of student newspapers.

The facts of the *Hosty* case are particularly appalling. On November 1, 2000, Governors State Dean Patricia Carter called the *Innovator*'s printer, attempting to stop the publication of the newspaper. When she discovered that she was too late, she ordered the printer to give her future newspapers before they were printed so that she could approve content. Two days later, the president of the university wrote a campus-wide memo denouncing the *Innovator*



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because of its coverage of the firing of the newspaper's advisor (who later won an award for wrongful dismissal). Editor-in-Chief Jeni Porche and managing editor Margaret Hosty fought back, refusing to accept the administration's demands for censorship.

Easterbrook built his logic upon the Supreme Court's 1988 *Hazelwood* case, which gave high school principals limited authority to control newspapers created in the classroom. *Hazelwood* has had a disastrous impact, supporting censorship of the student press. The *Hosty* decision not only applies *Hazelwood* to college students, but greatly expands the scope of censorship to cover any newspaper or, potentially, any activity subsidized with student fees.

The *Hosty* case is only part of the growing conservative attack on freedom of speech on campus. An alternative newspaper at the University of Wisconsin at Eau Claire was denied funding in 2005 because the student government thought it was too "political." Arizona's state budget for next year includes a ban on state appropriations for college student newspapers after a campus sex column offended legislators.

And David Horowitz's Academic Bill of Rights has been introduced as legislation in more than a dozen state legislatures; some versions of the bill would compel grievance procedures at all public (and even private) colleges to enable students to start investigations against professors who express political views or who assign reading lists deemed "too liberal." Horowitz has even threatened to sue Lehigh University after it allowed Michael Moore to speak on campus last fall, claiming that this violated the school's nonprofit status.

But the *Hosty* decision is so extreme in denying student liberties that even conservatives are worried. Charles Mitchell, a program officer at the right-leaning civil liberties group Foundation for Individual Rights in Education, noted, "*Hosty* will give college administrators yet another excuse to indulge their taste for squelching speech—and that's never a good thing for liberty."

Although the 7th Circuit Court of Appeals only covers Illinois, Wisconsin and Indiana, the decision will enable administrators across the country to censor papers without penalty. Under the "qualified immunity" standard, state officials are only liable for violating constitutional rights when the law is clear, and the *Hosty* decision raises serious doubts about whether college students have any rights. And if administrators can legally treat college students the same as elementary school students, what will happen to academic freedom?

The Society for Professional Journalists (SPJ) president Irwin Gratz said, "It is a sad day for journalism in the United States." The SPJ and dozens of journalism groups joined an amicus brief in the case, urging the 7th Circuit to defend freedom of the press on campus.

"My co-plaintiffs and I are resolved to appeal to the nation's highest court," said Hosty. ■

JOHN K. WILSON *is coordinator of the Independent Press Association's Campus Journalism Project (www.indypress.org/cjp). He provided advice to the plaintiffs in* Hosty v. Carter, *and has a Web site about the case at www.collegefreedom.org/gsu.htm. His forthcoming book is* Patriotic Correctness: Academic Freedom and Its Enemies, *from Paradigm Publishing.*