

UC Santa Barbara

CCCC Intellectual Property Annual

Title

Major Intellectual Property Developments of 2005 for Scholars of Composition and Communication

Permalink

<https://escholarship.org/uc/item/103449k2>

Authors

Logie, John
The Intellectual Property Standing Group of the Conference on College Composition and Communication

Publication Date

2006-04-01

Copyright Information

This work is made available under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives License, available at <https://creativecommons.org/licenses/by-nc-nd/4.0/>

Major Intellectual Property Developments of 2005 for Scholars of Composition and Communication

The first of the enumerated goals in the Intellectual Property Committee of CCCC's mission statement reads as follows: "keep the CCCC and NCTE memberships informed about intellectual property developments, through reports in the CCCC newsletter and in other NCTE and CCCC forums." To this end, the Intellectual Property Committee is, with this publication, inaugurating an annual report on major developments in intellectual property law, policy, and research. The following three articles — written by scholars from both the Intellectual Property Committee and the Intellectual Property Caucus (CCCC-IP) — will serve to inform and orient others in the field who increasingly find themselves engaged with intellectual property questions as they pursue their teaching and research.

John Logie
Chair, Intellectual Property Committee
Department of Rhetoric
University of Minnesota

Google Faces Legal Challenges in its Effort to Digitize University Library Contents

*Krista Kennedy, PhD Student, University of Minnesota
Assistant Chair, CCCC Intellectual Property Caucus*

CASE OVERVIEW

In December 2004, Google announced an ambitious new attempt to scan and render searchable millions of volumes from the libraries of Harvard, Stanford, Oxford, and the University of Michigan, as well as the New York Public Library. The original project name was Google Print, which was changed to Google Book Search in November 2005. There are two central facets to the initiative: Google Publisher and Google Library. The first works with publishers to coordinate permissions, direct contributions of texts, and promotion. Compensation is provided in the form of links that encourage searchers to purchase the product from booksellers or directly from the publisher. Publishers may also share in contextual advertising (“Google ads”) revenue if they agree that advertising be included on the pages for their books. All material generated under this project is digitized and offered with full permission of the copyright holder.

Google Library, on the other hand, partners with libraries to arrange and facilitate scanning of materials under fair use doctrine. No permission is sought from the publisher for reproduction of these materials. The initial stage of the Google Library project involves a six-year partnership between Google and the University of Michigan called the Michigan Digitization Project. The seven million volumes in the UM Libraries collection would constitute the initial acquisitions for Google Book Search. In return for their cooperation, the Libraries will receive digitized copies for their own use. While UM has been a leader in digital preservation and has pursued an internal digitization project for a number of years, they have only been able to digitize about 5,000 volumes annually. At that rate, digitization of the entire collection would take approximately 1600 years. By partnering with Google, they are able to drastically increase the pace of this project while also making strides toward opening their collection to users worldwide. In the process, they also reduce their own digitization expenses, since Google bears the costs of reproduction, conversion, and transmission, as well as costs associated with pulling and reshelving materials. Scanned and converted works are made available immediately through Google as they are processed and are stored in perpetuity on the company servers.

From the project launch, Google has drawn a sharp distinction between public and proprietary works. Works that have passed into the public domain are made available in full. Out-of-print works whose copyright is still in duration are made available in “snippets” consisting of approximately three sentences. Availability of in-print works is at the discretion of the copyright holder, who may choose to allow availability of the entire work, of a few sample pages, or of a snippet. The owner may also choose to opt out of the project altogether, much in the way that domain owners can request that Google not catalogue digital works. On August 22, 2005,

Google announced that it would not begin the project until November, so as to give publishers a chance to make decisions about participation and submit a list of works to be excluded from the project.

On September 20, 2005, the Author's Guild (AG) filed a class action complaint against Google. The three named plaintiffs were authors whose works are in the UM collection and the Class was initially defined as all persons or entities holding copyright to one of the seven million volumes in the UM Libraries. It alleged that "by reproducing for itself a copy of those works that are not in the public domain, Google is engaging in massive copyright infringement. It has infringed, and continues to infringe, the electronic rights of the copyright holders of those works." This infringement, it was claimed, adversely affected the market for their works and damaged their goodwill and reputations. They also claimed that Google intended to derive revenue from those works by using them specifically to attract visitors and consequently generate advertising revenue.

A month later, the Association of American Publishers (AAP) also filed suit. The named publishers include McGraw-Hill, Pearson Education, Penguin, Simon & Schuster, and John Wiley & Sons. They claimed that they were engaged or planned to engage in similar digitization endeavors that would eventually be made available to all search engines, including Google. Google's project impinges on this potential market. The suit also objects specifically to Google's announcement that publishers could provide the company with a list of books to be excluded from the project by November 2005, arguing that it is a clear inversion of the default rights afforded authors to control of reproduction, distribution, and display of their works in 17 U.S.C. §106. It further characterizes Google's actions as willful infringement executed with conscious disregard for author and publisher rights.

DISCUSSION OF THE CASE

The primary decision to be made in this case concerns the application and limits of fair use doctrine. The application of fair use rests on a four factor test: the purpose and nature of the use, the nature of the copyrighted work, the amount and substantiality of the work taken, and the effect of the use upon the potential market.

The precedent most often cited in fair use issues relevant to search engine operations is *Kelly v. Arriba Soft*, 336 F.3d 881 (9th Cir. 2003). Much like Google Image Search, Arriba Soft created a database of images from websites without obtaining the permission of the site owners or copyright holders. They then displayed the images as thumbnails that linked to the original content on external sites. Kelly, a photographer, discovered that his images were being used as thumbnails and sued for copyright infringement. The court found that the reproduction of the photographs as thumbnails did satisfy the conditions of fair use, and the Ninth Circuit affirmed the opinion. The opinion addressed the four factors as follows:

- *Purpose and character of the use:* Arriba was not using the images to promote itself nor did it attempt to profit through their use. Kelly's images were only a few among many thousands in the database. More importantly, their use of images served a different function than the original prints, namely directing access to material on the Internet rather than facilitating original expression. The court ruled that this use was sufficiently

transformative, since the images were reduced in size and reproduced at a lower resolution. Since their use was not exploitative, the commercial aspects of Arriba's venture weigh only slightly against their favor.

- *The nature of the work:* The court observed that while creative works are closer to the core intent of copyright law than factual works, "published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." Kelly's works were both creative and published. Because of their publication, the court ruled that fair use only slightly favored Kelly.
- *The amount and substantiality of the portion used:* Arriba copied each of the images in their entirety. However, the court ruled that this was necessary in order to construct an identifiable link that would allow users to recognize the content and decide whether or not to continue on to the originating website. In the end, this factor favored neither party.
- *The effect of use upon the potential market:* By providing direct links to Kelly's original site and content, Arriba steered potential customers directly to him. Since the thumbnails were small and of low resolution, the court ruled that they did not dilute Kelly's market for full size images. This final factor favored Arriba.

The purpose and nature is a primary aspect of concern in both the AG and AAP complaints. Fair use doctrine extends protections for specific types of use: critical comment, parody, educational purposes, and news reporting. Google satisfies none of these criteria. While the materials in question largely come from educational institutions, Google itself is not a neutral or altruistic entity or technology. Rather, it is for-profit, publicly traded venture. Its business model relies heavily on contextual advertising, and a significant portion of its revenues come from advertisements of one sort or another. It will in fact profit from advertising associated with this new material. (The fact that Google's market value three months after their IPO was half that of Viacom lends some perspective.) However, it will not profit directly from the sale of reproduced copies. On the contrary: search results will bring the texts to the attention of the reader, and links to booksellers and the publisher will encourage the reader to purchase a hard copy of the text.

The question of the nature of the work is easily satisfied in this case: all of it is previously published. While some of it is indeed creative, the majority of the texts in question are non-fiction and technical works. (It's perhaps relevant to note that all of the named authors in the AG suit are authors of creative works.)

As in *Arriba*, duplication of entire works is necessary in order to ensure effective operation of the search engine. However, Google will not provide users with access to the entire text. In most cases, users will receive only snippets or a few pages in their search results. If the search term appears multiple times throughout the work, Google will return only three results. Repeat access attempts will be blocked in order to reduce the chances of the searcher viewing too much of the text.

Through the use of direct links to purchasing opportunities, Google Book Search will increase the demand for searchable texts. This should be particularly true for lesser-known texts that readers might not happen upon in any other fashion. Even if the reader checked out the book at a library rather than purchasing it themselves, the libraries will in turn respond to increased

demand. If users were able to print out entire works, diminishment of the market would be conceivable. A three-sentence snippet simply cannot do similar harm.

The McGraw-Hill suit suggests that the project restricts their ability to license digitized copies themselves, thus reducing potential market share. In his copyright analysis of the Google project, Jonathan Band argues that the existence of the Publisher program negates this complaint. By opting to license works through the Publisher program, publishers receive revenue from contextual advertising and linkage, thus opening up revenue streams unavailable to them elsewhere.

Following the line of argument presented here, the Google Book Search project is lawful under U.S. fair use doctrine. However, Google results are available internationally, and copyright exceptions vary from country to country. Band reminds us that copyright infringement is specific to the jurisdiction it was committed within. Since Google is working in the United States to scan books from United States libraries, the relevant law concerning these actions is U.S. law. While few other countries would allow reproduction of entire texts, most countries do permit short quotations similar to what might appear in a snippet. Band suggests that these exceptions for quotations should protect Google's international transmission of search results.

IMPLICATIONS FOR EDUCATORS AND WRITING TEACHERS

In a statement issued the day after the AG suit was filed, UM associate provost and interim librarian James Hilton addressed the crux of this issue:

This is tremendously important public policy discussion. ... We need to decide whether we are going to allow the development of new technology to be used as a tool to restrict the public's access to knowledge, or if we are going to ensure that people can find these works and that they will be preserved for future generations.

As educators, we should be particularly concerned about the preservation of our written culture and the access that we and our students have to written artifacts. Our cultural history is rapidly disappearing, as Lawrence Lessig has pointed out in various books, articles, and lectures. In his lecture on Google Print, he reminds us that only 9% of published American literature is currently in print and under copyright. 16% of it is in the public domain. The remaining 75% is out of print but still in copyright. Because of our loose registration requirements, there is no practical means of obtaining permission from the owners. The volume in this predominant segment of written culture are largely orphaned works. We are faced with opposing options: either reproduce the materials without permission and preserve them, or observe the letter of the law and lose them. Copyright exceptions (such as fair use doctrine) and complements (such as Creative Commons licenses) provide the only viable solutions to this current and future dilemma.

We are also faced with deciding exactly how we should harness emerging technologies. Whenever we discuss issues of cultural production, be it text, audio, or video, we are also forced to discuss control of the technology that delivers and transmits them. Will the Internet be a technology that helps us preserve and share our culture, or will it be a means for corporations to sell our culture to us bit by bit and destroy whatever isn't profitable?

A different but related question is, what sort of texts do we want to see on the Internet? As teachers of research and argumentation, we often caution our students about wholesale acceptance of materials found online. We hold a wide variety of opinions about the value and reliability of collaboratively constructed resources such as Wikipedia. If a wide range of vetted publications from established publishing houses was available for searches (whether the results be full-text or snippets), would we feel that the Internet had become a more reliable place? Would a mix of commercial and personal publication increase its inherent value?

As educators who are also advocates of culture, our basic responsibilities lie in the preservation of cultural works. As educators who are also intellectual property scholars, our responsibilities lie in the creation and dissemination of a technological philosophy that encourages progress and creativity. And as writing teachers and disciples of text in all its forms, it is imperative that we work toward converting those commitments into policy and law.

RELEVANT SOURCES

Band, Jonathan. "The Google Print Library Project: A Copyright Analysis." www.policybandwidth.com/doc/googleprint.pdf

Google Books. <http://print.google.com/googlebooks/about.html>

Hilton, James. "U-M Statement on Google Library Project." <http://www.umich.edu/news/?Releases/2005/Sep05/r092105>

Kelly v Arriba Soft, 336 F.3d 881 (9th Cir. 2003). [http://homepages.law.asu.edu/~dkarjala/cyberlaw/KellyvArriba\(9C2003\).htm](http://homepages.law.asu.edu/~dkarjala/cyberlaw/KellyvArriba(9C2003).htm)

Lessig, Lawrence. "Google Book Search: The Argument." <http://www.lessig.org/blog/archives/003292.shtml>

Michigan Digitization Project. <http://www.lib.umich.edu/mdp/index.html>

Download Author's Guild v Google
<http://files.findlaw.com/news.findlaw.com/hdocs/docs/google/aggoog92005cmp.pdf>

Download McGraw-Hill et al. v Google
<http://files.findlaw.com/news.findlaw.com/hdocs/docs/google/mcgggoog101905cmp.pdf>

MGM v. Grokster: Implications for Educators and Writing Teachers

James E. Porter, PhD, The WIDE Research Center, Michigan State University

Martine Courant Rife, MA, JD, The WIDE Research Center, Michigan State University

Acknowledgement:

This paper was supported and originally published by the WIDE Research Center at Michigan State University. Originally published July 2005, revised for further publication venues March 2006.

SUMMARY

In an apparent loss for promoters and users of peer-to-peer filesharing technologies, the US Supreme Court unanimously (9-0) overturned the Ninth Circuit Court of Appeals ruling in the case of *MGM v. Grokster* (2005), a case testing whether companies running filesharing services (like Grokster and StreamCast) could be held indirectly liable for the copyright infringements of people using their software for peer-to-peer filesharing.

The Court found that Grokster and StreamCast (the licensors of the Morpheus software) were not “merely passive recipients of information about infringing use” of their software. Rather “each took active steps to encourage [copyright] infringement”; the companies “promoted and marketed themselves as Napster alternatives.” In other words, the companies promoted copyright infringement and sold their services on that basis. The Court found this behavior egregiously blatant, and that was the primary basis for its finding.

It is important to understand the reasons supporting the Court’s opinion. The Court did not rule against peer-to-peer technology per se. Rather the problem, as the Court saw it, was in the way that the companies constructed and subsequently marketed their filesharing software – explicitly as a way to circumvent and subvert copyright holders’ rights. This decision leaves open the possibility that other companies could develop and market P2P filesharing technologies, as long as such companies are sure to promote noninfringing uses.

The Court went to great lengths to distinguish its *Grokster* decision from its 1984 ruling in *Sony v. Universal*. Although the Court upheld its position in *Sony*, reinforcing that mere knowledge that a product or technology might potentially be used to infringe is not a sufficient basis for indirect liability, it did broaden what constitutes “inducement” of copyright infringement, leaving some ambiguity on an important point: To what extent must distributors filter, reprimand, educate, or police copyright infringement on their sites?

What are the implications of this case for educators and writing teachers?

The recording and film industries (e.g., RIAA, MPAA) are likely to read the Court’s opinion as broadly as possible and may use it to pursue another type of filesharing intermediary: the university. We have already seen evidence of the recording industry’s willingness to do this. In

2003 the recording industry did not hesitate to file high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute seeking billions of dollars in damages (Yu). Clearly universities are not promoting copyright infringement by their students, as were Grokster and StreamCast – and universities could just as easily use the Court’s opinion in *Grokster* to *defend* its practices. Nonetheless, the recording and film industries are likely to use the ruling as additional basis for litigation holding universities responsible for copyright infringements by students – and such action could well have an unfortunate chilling effect on universities.

On a more general level, what the case implies for writing teachers is that you cannot show disregard for the rights of copyright holders. Copyright holders DO have rights, and those rights must be respected. You cannot encourage and promote copyright infringement. You cannot “turn a blind eye” to copyright infringement, even by others, if it is occurring in/across/through an electronic space that you are responsible for -- that is, you have set up an electronic “intermediary space” (e.g., your class web site, your blog). At the same time, you are not responsible for infringements by others if you are acting in good faith to promote respect for copyright and if the intermediary service or server you are sponsoring clearly is intended for “substantial noninfringing purposes.”

DISCUSSION OF CASE

On June 27, 2005, the Supreme Court handed down its unanimous opinion in the Grokster case, *Metro-Goldwyn-Mayer Studios Inc., et al. v Grokster, Ltd., et al. (MGM v. Grokster)*. The case was argued before the Court on March 29, 2005, having come up on certiorari from the 9th Circuit Court of Appeals. Before the Supreme Court was the issue of whether the technology distributing companies Grokster and StreamCast were liable for the infringing uses, mainly by private (and young) individuals, of their free P2P filesharing software.

The issue in this case concerned contributory/secondary/vicarious liability, because it is difficult for entities like MGM and other big media copyright holders to locate and go after private individuals who are infringing on their copyrights. In the August 19, 2004 lower court opinion (*MGM v. Grokster*), the 9th Circuit held in favor of Grokster, relying on the 1984 case *Sony Corp. of American v. Universal City Studios, Inc* (the so-called Betamax case). The 9th Circuit stated that because, unlike the scenario in *A&M Records v. Napster* wherein the centralized supernode provided by Napster allowed the company to have actual knowledge of infringing uses, the de-centralized configuration of Grokster et al. shielded those companies from liability (i.e., the difference between actual and constructive knowledge). The 9th Circuit granted Summary Judgment in favor of Grokster, et al., stating that no liability exists when the product distributed is capable of “substantial non-infringing uses” unless the distributor has actual knowledge of the specific instances of infringement and fails to act on that knowledge. The 9th Circuit did not focus on “intent” to cause infringement or on the marketing strategies of Grokster.

In the present case, the Supreme Court chastised the 9th Circuit, in part for a wrongful reliance on and interpretation of *Sony*, and remanded the case back to the lower court for reconsideration of the Summary Judgment and the award of possible damages and injunctive relief for MGM et al. (The case eventually settled out of court [Borland, 2005]). The Court stated that the previous

9th Circuit decision was erroneous. Clearly in its opinion, of import was the fact that the business model pursued by Grokster et al., was one that encouraged, or “induced,” copyright infringement. The Court noted that any reading of *Sony* that sees *Sony* as holding that a substantial non-infringing use component can shield a technology distributor from liability, is an erroneous interpretation, but instead pointed to the fact that Grokster had designed its product for and marketed its product specifically to former Napster customers, had failed to invent filtering tools to prevent infringement, and had an economic/advertising scheme that depended on high volume use. Thus, the Court held that one who distributes devices with the “object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties using the device, regardless of the device’s lawful uses.”

IMPLICATIONS FOR EDUCATORS AND WRITING TEACHERS

What are the implications of this case for institutions of higher education in general, for research, for rhetoric and writing, and for writing teachers?

The recording and film industries (e.g., RIAA, MPAA) are likely to read the Court’s opinion as broadly as possible and may use it to pursue another type of filesharing intermediary: the university. We have already seen evidence of the recording industry’s willingness to do this. In 2003 the recording industry did not hesitate to file high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute seeking billions of dollars in damages (Yu). Clearly universities are not promoting copyright infringement by their students, as were Grokster and StreamCast – and universities could just as easily use the Court’s opinion in *Grokster* to *defend* its practices. Nonetheless, the recording and film industries are likely to use the ruling as additional basis for litigation holding universities responsible for copyright infringements by students. Few if any universities will have the will or resources to fight such litigation – and so the result of *Grokster*, unfortunately, could be a chilling effect: Universities might crack down on students’ (and teachers’) filesharing practices.

In our view, this would be an unfortunate reaction. The Court’s decision in *Grokster* could just as easily be used to argue to support the university, because universities are not marketing their services as those intended to avert copyright laws. University servers are clearly intended for substantial noninfringing uses, and most universities actively promote responsible use of copyrighted materials. However, universities fearing litigation may react by clamping down even more on student filesharing — and that is the kind of chilling effect that worries us about this case. (It worried Justice Breyer as well, in his concurring opinion.)

What the case does tell us -- on a more general level -- is that you cannot show wanton disregard for the rights of copyright holders. Copyright holders DO have rights, and those rights must be respected. You cannot encourage and promote copyright infringement. You cannot “turn a blind eye” to copyright infringement, even by others, if it is occurring in/across/through an electronic space that you are responsible for -- that is, you have set up an electronic “intermediary space” (e.g., you are maintaining the server; you are sponsoring the blog; you are running the course web site; you are marketing P2P software; you are teaching your students document design, designs which may include the addition of potentially infringing materials; you are requiring students to create web pages as part of class work). At the same time, you are not responsible for infringement by others if you are acting in good faith to promote respect for copyright and if the

intermediary service you are providing is not intended for copyright infringement. In short, as long as your intentions are honest and your behaviors ethical, you do not need to be fearful of this decision.

However, as far as current bountiful conversations about the need to change the US copyright regime, this opinion validates current copyright law as a continuing legitimate protection of content. While Lawrence Lessig may wish for an opt-in regime as the ultimate way to go for US copyright law, we are still in an opt-out regime. (An opt-out regime means that we all automatically receive copyright protection on any fixed work unless we opt out by adopting some kind of license, or by donating our work to the public domain. An opt-in system imagines that copyright protection only comes to those who register their work). It is our view that the entities that are working towards upholding access and sharing of information, such as EFF (Electronic Frontier Foundation) and Creative Commons, are now more important than ever. In fact, within 24 hours of the Supreme Court opinion, EFF sent out an email on its mailing list asking for support: “There is no question that there will be a flood of litigation as a result of this decision, as well as congressional hearings. EFF must be there to represent the rights of innovators and consumers in the fights to come. Now, more than ever, we need your support to continue to protect innovation and new technologies in cyberspace.”

Since the case validated a strong view of copyright maximalism, not only do we need to continue to support entities such as EFF which are working towards protecting Fair Use and access to information, we need to be sure to continue to educate ourselves, our students, our business partners, and our communities about how they can control the information streams they create, for example by providing easily accessible, clearly written use policies, or by selecting Creative Commons licensing to apply to their own digital work. Creative Commons share-alike licenses could be one significant way to increase access and sharing because the relatively unhindered use of our work becomes dependent on others making the use of their work unhindered.

ISSUES FOR FURTHER DISCUSSION

There are several other issues that we’d like to see addressed as the *Grokster* opinion spins out. First, what is the current status of Fair Use for educators and researchers? While the *Grokster* opinion, delivered by Justice Souter, didn’t directly address Fair Use, it did narrow the potential holding of *Sony*, and *Sony* validated Fair Use, stating, “[a]ny individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.” In the *Grokster* case, the concurring opinions of Breyer, Stevens, and O’Connor, and Ginsberg, Rehnquist, and Kennedy, mention Fair Use in passing as at least a consideration in evaluating whether or not a use is infringing. However, Souter’s opinion makes no mention of Fair Use. This could be viewed as an erasure or erosion of the importance of Fair Use. Educators need to pay attention to this development.

We are also concerned about the general tenor of the case, and the way the Court construed the issues before it. For example, the Supreme Court justices write that the tension in the case is about balancing the values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The Court sees the issue as balancing the interests of “artistic protection” and “technological innovation.” But we are concerned with this interpretation,

because it is quite apparent that the “artistic protection” the Court speaks of has little to do with protecting artists, and everything to do with protecting the interests of conglomerated media and big business. After all, in the end, the Court places the burden of “filtering” and preventing infringing uses on the technology distributors, not on those who could best bear the costs, i.e., big media.

We are also concerned with a Court that characterizes the conflict before it as one that illustrates how, potentially, “Digital Distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy and many (especially the young) people use file sharing software to download copyrighted works.” It concerns us that the Court characterizes the distribution of information as threatening, when it is our view that the *withholding* of information is the key way control is exercised over individuals and populations. However, importantly, the Court notes that because of the import and breadth of this tension, the public may be drawn “directly” into the discussion of copyright policy. We very much favor greater public participation in the copyright debate.

A last issue that might be addressed within our scholarly community is, what are the cultural and international implications of this? Does the world care about the *Grokster* decision, and should it? Will international companies arise to take the place of Grokster, knowing they can possibly avert liability under US law? And, if filesharing of copyrighted material through free P2P software becomes “outlawed,” what kind of commercial interests will take its place? For example, per a June 27 interview on “Talk of the Nation,” Wayne Rosso, former president of Grokster, and current CEO of Mashboxx.com (<http://www.mashboxx.com/>), is overjoyed about the *Grokster* opinion because Mashboxx.com has a new P2P application ready for release that Rosso claims allows users to legally and “freely” sample music which they can then eventually purchase. However, he says, only copyright holders who register with Mashboxx receive Mashboxx’s protection.

FINAL THOUGHTS

Does this case mean that people will stop file sharing? Justice Breyer’s concurring opinion was particularly worried about “the chilling effect” on the development of P2P technologies – and his concurrence worked hard to deflect some of the possible implications of the main decision. Unfortunately, he only got two other justices to sign on with him (O’Connor, Stevens). Breyer does not want the ruling to discourage entrepreneurs wishing to “bring valuable new technologies to market.” He’s worried about the *Grokster* ruling working against *Sony* and creating an “additional chill of technological development” and notes that “the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software.” It is these future markets that we as educators and researcher should work to protect.

RELEVANT SOURCES

A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=9th&navby=case&no=0016401&exact=1>

Borland, John. (2005, Nov. 7). Last waltz for Grokster. C/net news.com.
http://news.com.com/Last+waltz+for+Grokster/2100-1027_3-5937832.html

EFF listserv email. 27 June 2005.

EFF Resources on P2P File Sharing <http://www.eff.org/IP/P2P/>

EFF Summary of *MGM v Grokster* http://www.eff.org/IP/P2P/MGM_v_Grokster/

EFF Summary of *Sony v. Universal Studios* (aka, the Betamax case) *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) <http://www.eff.org/legal/cases/betamax/>

Foster, Andrea. (2005, June 28). Campus officials disagree on how the Supreme Court's filesharing decision will affect colleges. *The Chronicle of Higher Education*.
<http://chronicle.com/prm/daily/2005/06/2005062801t.htm>

IAAL*: What Peer-to-Peer Developers Need to Know about Copyright Law by Fred von Lohmann http://www.eff.org/IP/P2P/?f=p2p_copyright_wp_v4.html

* an excellent overview of all the relevant P2P cases leading up to *MGM v. Grokster*

MGM v. Grokster, 545 U.S. ____ (2005). http://www.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf

MGM v. Grokster, 380 F.3d 1154 (9th Cir. 2004).
<http://news.findlaw.com/hdocs/docs/mgm/mgmgrkstr81904opn.pdf>

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=464&invol=417>

Supreme Court Oral Transcript. (2005, March 29). *MGM v. Grokster*.
http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf

Talk of the Nation. (2005, June 27). "Supreme Court Rules Against Grokster." Legal Affairs.
<http://www.npr.org/templates/story/story.php?storyId=4720206>

Yu, Peter. (2003). The copyright divide. Michigan State University College of Law Working Paper Series. Research Paper No. 01-21. <http://ssrn.com/abstract=460740>

von Lohmann, Fred (2005, June 27). Supreme Court sows uncertainty. Electronic Frontier Foundation. <http://www.eff.org/deeplinks/archives/003749.php> - a summary of the chief legal issues in the case

BMG Music v. Gonzalez: Fair Use Tested in a Federal Court

*Jessica Reyman, PhD Candidate, University of Minnesota
Assistant Chair, CCCC Intellectual Property Caucus*

CASE OVERVIEW

BMG Music v. Gonzalez is an important case in a series of high-profile peer-to-peer file sharing cases in the past several years (including *MGM Studios v. Grokster*, discussed above) because it is the first in which the Court addresses a lawsuit against an actual individual user of peer-to-peer file sharing technology rather than a technology company. This case involved a copyright infringement claim against a 29-year-old woman, Cecilia Gonzalez, who downloaded over 1,370 copyrighted songs within the first few weeks of getting a broadband Internet connection in her home. Gonzalez argued that her use of the songs was a “fair use” (under Section 107 of the U.S. Copyright Act). She said she was just sampling music to determine which songs she would like to purchase. While Gonzalez was able to show that she purchased discs containing some songs she downloaded, she has never owned copies of at least 30 of the songs. BMG music sought damages based on those 30 songs.

The 7th Circuit Court, ruling in BMG’s favor, did not agree that Gonzalez’s downloading of songs with the purpose of “sampling” qualified as a fair use. After conducting a four factor fair use analysis (based on the purpose of the use, the nature of the work, the amount and substantiality of the work, and the market effect of the use), the Court concluded that Gonzalez’s use of the songs was not a fair use. It was argued that her fair use defense failed on two counts: first, the purpose of her use was not nonprofit and, second, she downloaded and kept entire songs, “for which, as with poetry, copying of more than a couplet or two is deemed excessive.” In addition, the Court made a distinction between the case and the 1984 *Sony-Betamax* case, arguing that “[t]he premise of *Betamax* is that the broadcast was licensed for one transmission and thus one viewing. *Betamax* held that shifting the time of this single viewing is fair use. The files that Gonzalez obtained, by contrast, were posted in violation of copyright law; there was no license covering a single transmission or hearing – and, to repeat.” In other words, according to this narrow reading of *Sony*, because Gonzalez did not erase the songs from her computer after listening to them once the downloaded songs could be viewed as a substitute for purchasing the songs.

Gonzalez further argued that her downloading activity might be perceived as “good advertising” that would lead to increased music sales. The Court rejected this argument as well, noting that there are existing markets for introducing potential consumers to music, including radio and sampling offered by licensed Internet sellers such as the iTunes Music store. These sellers pay royalty fees for the samples, and only use them with the copyright holders’ permission. In addition, the Court argued, these “previews share the feature of evanescence; if a listener decides not to buy (or stops paying the rental fee), no copy remains behind.”

Based on the reasoning above, the Court ordered Gonzalez to pay \$22,500 in damages to BMG Music. Gonzalez reported to the Court that “she has learned her lesson, has dropped her broadband access to the Internet, and is unlikely to download copyrighted material again.”

IMPLICATIONS FOR RHETORIC AND COMPOSITION TEACHING AND RESEARCH

One significant implication arising from *BMG Music v. Gonzalez* is its potential to place further limitations on what constitutes fair use. Fair use is an essential exemption to the exclusive rights of copyright holders for writing educators and researchers. It limits content owners’ rights in ways that allow uses related to instructional, scholarly, and artistic work, such as making classroom copies, quoting from material, building on existing studies and works, making parodies, and creating works of commentary and criticism. This decision has the potential to eliminate the use of a fair use defense for peer-to-peer file sharing activity altogether. While the ruling establishes that Gonzalez’s use was not a fair use, it isn’t clear what downloading activities *would* qualify as a fair use, if any. What if you already owned a legitimate copy of the work you downloaded? What if you erased the material from your computer after use? The decision leaves a window of opportunity open for these potential uses, but the Recording Industry Association of America is already doing what it can to close that window (the RIAA now arguing that copying files from a purchased CD is not protected under fair use).

In addition, the ruling supports a larger trend on campuses toward what might be called a “permissions culture.” The ruling considers potential markets for digital works as part of the fair use analysis and suggests that if a use competes with such markets then it is not a fair use. As digital technology makes possible wide distribution of copyrighted works, it also makes possible new markets for restricting access through licensing mechanisms. With the proliferation of new markets for digital works, University officials have become increasingly wary of potential lawsuits for the use of digital versions of copyrighted works in teaching and research. It is now a widely accepted belief that the potential risks of copyright infringement lawsuits can (and should) be mitigated by paying royalties and engaging in the permissions market. In fact, paying royalties for using portions of copyrighted works in online coursepacks, copies posted on class WebCT and other course management sites, and in Internet publications has become the default model on many campuses, *without consideration of whether individual uses may qualify as fair uses*. We can see evidence of this trend in the recent release of a service from the course management software, Blackboard, that automates the permission process for any copyrighted works shared on course websites. Unfortunately, seeking permissions for educational or nonprofit uses often results in paying hefty royalties or, at times, denial to use the work at all.

Finally, the decision in *BMG Music v. Gonzalez* supports a common misunderstanding in the larger, ongoing debate surrounding copyright law that copyright infringement constitutes theft. In the oral argument, Justice Easterbrook asked how this case differs from shoplifting a book from Barnes & Noble, implying that it doesn’t. And in the judicial opinion, he reiterates that “music downloaded for free from the Internet is a close substitute for purchased music.” This analogy is misleading because it conflates stealing physical property with copying and using copyrighted works. The notion of “theft of intellectual property” fails to acknowledge the rights that users do possess under copyright law, and obscures the benefits that come with copying and distributing copyrighted materials. It suggests that intellectual property holds value only in the creation of exclusivity and the rewards granted to authors. Instead, the rhetoric of the debate

needs to openly acknowledge the way in which this pervasive analogy obscures the goal of copyright law to provide incentive for *future* works and to constantly replenish a very valuable public domain.

LOOKING AHEAD

The decision in *BMG Music v. Gonzalez* sends a clear message to individual file sharers that they will not likely be able to successfully challenge the infringement claims filed by content owners, at least not with a fair use defense. As a result, individual users weighing potential risks may choose to discontinue use of peer-to-peer file sharing networks, despite their potential noninfringing uses, or, like Gonzalez, drop their broadband access to the Internet altogether. As scholars and educators, we know that there are instances in which downloading digital copies of copyrighted works can be a fair use. And we likely cringe when hearing that cases like this encourage people to disconnect their Internet connections. Unfortunately, this ruling supports the perception, already held by many individuals in our classrooms and on our campuses, that nothing can be downloaded for free for any purpose and that fair use is a meaningless defense, particularly in digital contexts.

The recording and movie industries are doing what they can to communicate the powerful, though deceptive, message that all peer-to-peer file sharing is stealing. Two decisions this year alone, *MGM Studios v. Grokster* and *BMG Music v. Gonzalez*, only provide fodder for the inflated rhetoric of the content industry. As scholars of rhetoric, writing, and language, I believe that we can play key roles in the ongoing public debate surrounding these issues. We need to better articulate our defenses of peer-to-peer file sharing for legitimate purposes, and of our fair use rights more generally. We can begin in our classrooms, discussing with students the ways in which peer-to-peer file sharing technologies may prove useful to our research and writing activities. In our discussions with campus copyright officials, we can assert fair use defenses when they apply to our regular work activities. And among higher-level university administrators, we can raise the visibility of the damages caused by the “permissions culture” that has driven recent copyright policy-development and best practices. Finally, it is our responsibility to move these discussions into the high-profile public debate about peer-to-peer file sharing, articulating more clearly, perhaps in the model of this paper, what is at stake in recent intellectual property developments. We should work on all of these fronts to protect the intellectual property rights that are so important to teaching and scholarly activity in rhetoric and composition studies.

Download BMG Music v. Gonzalez Opinion

<http://www.ca7.uscourts.gov/tmp/RG0KJF5.pdf>

No. 05-1314 (7th Cir. Dec. 9, 2005)