

The Attack of the Torrents and Trackers: Grokster as Yesterday's News
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No offense to the US Supreme Court, but the stories about the Court's *Grokster* decision that appeared in headlines and business pages across the industrialized world really belonged on the obituary pages. The Court's order was dead on arrival.

As a matter of intellectual property law, *Grokster* holds that copyright owners can successfully sue technology providers that make available a technology they know or encourage third-party users to use to violate copyright laws. The allegation by big-media players such as MGM, the lead plaintiff in the case, was that Grokster, a company providing peer-to-peer file-sharing software, was really in the business of aiding and abetting consumers to avoid buying movies or music or whatever. One person could buy a film or music CD, and then countless others could download it through Grokster's software.

The Court pretty much accepted the allegations as true and has allowed a lawsuit to proceed to determine damages. Because Grokster actually made money by charging advertisers for the right to stream commercials to its users there may be damages to be had.

As a legal matter, the Court's decision is not especially surprising. But as a practical matter of marketplace reality, it's yesterday's news.

The technology at issue in the case has already been superseded, which raises a fundamental point about emerging digital technologies. They develop within a system of "entropy," a relentless movement of seemingly chaotic change.

Copyright lawsuits can succeed only if there is someone quite specific to sue. What's happening in Internet technology is that the technology gives end-users the ability to actually change the systems they use--almost like biological evolution. As "Old Hollywood" continues to pursue Grokster, downloaders are simply migrating to new file-sharing technologies.

In this new entropic system of downloading, end-users pick up digital bits and pieces of films or songs from a variety of sources--not wholly assembled works from just one source computer--and reassemble them into a finished product on their own computers.

Today's file sharers utilize "torrents" and "trackers," technologies that are developed and, unlike Grokster, made available for free. Like some symbiotic organism, which grows by

feeding from its hosts, torrent and tracker technologies allow users to identify, access and download bits of files and at the same time share bandwidth with everyone else accessing and downloading the same film or song. The effect of this is that as more connections are made and more files are downloaded the speed and efficiency of the whole process increases.

Ironically--and maddening for Paramount Pictures and Steven Spielberg--because most Internet downloading is for the newest, most popular music and video programs, a user can download a copy of "War of The Worlds," for example, in a small fraction of the time another can get J Lo's "Gigli."

Unlike Grokster, which used "supernode" central computers, torrents abandoned the enormous central server, opting instead to let its trackers link up participating computers directly.

And trackers, despite their name, keep no records of the files users are swapping and have no knowledge of the files swapped because there are no nodes. The trackers trade nodes for improved connectivity. Because of this, these trackers require little bandwidth to get started, yield no paper trail, can easily be harbored outside the jurisdiction of the United States, and have the capability of locking out those without an invitation to join. In this system there is little chance of developing mandatory protocols to maintain such trails.

There are at any given time literally thousands of unidentifiable people involved in the deconstruction and reconstruction of any given film or song. This system challenges the very underpinnings of the idea of a conspiracy. The participants have no knowledge of one another, have never initiated direct communication with one another and have no need to be bound together by large, easily identifiable (and thus prosecutable) servers or databases.

Because torrents and trackers are developed and made available for free by programmers more dedicated to file sharing than the potential for making a buck, they present the lawyers with the ultimate problem: they're judgment proof.

With apologies to both Gertrude Stein and the City of Oakland, "there's no there there."

Is there a solution outside the courthouse? Yes. There always is, and in the end it's a better one because it is to be found in the marketplace. Just as Hollywood made a mistake in thinking that videotape recorders posed a deadly threat, so too the mandarins of mass entertainment need to understand that entropy merely expands the opportunity for new talent and ideas to emerge that they can invest in and exploit. They have to stop thinking the way rich incumbents always have--slow and scared.

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