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## Technology feels the chill

The result of America's biggest filesharing case is already hampering innovation, reports Ben Hammersley

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Just weeks after the US supreme court ruled against filesharing network Grokster, legal experts and industry insiders say the verdict is having a chilling effect on US technological innovation.

The Grokster case was the result of a lawsuit brought by 28 of America's largest entertainment companies against a group of peer-to-peer software developers. It hinged on a simple question: should the distributor of a tool be held liable for the copyright infringements that may be committed by that tool's users?

The answer, when it came, was vague. Under certain circumstances, the court said, programmers can be held responsible for the things people do with their applications.

The result, say some, is that venture capitalists made uneasy by the imprecise ruling are abandoning investments in filesharing technologies for more sedate arenas.

"Money has shifted into places which will avoid any conflict with the copyright holders," says Professor Larry Lessig, the top American advocate for copyright reform. "Why buy a [new innovation that gets you a] lawsuit when you can buy a new innovation that doesn't get you a lawsuit?"

The threat of legal action can be as dangerous as legal action itself, says veteran investor Joi Ito. "All of these

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laws and possible future laws ... increase the risk that someone will decide that the cool, new music distribution technology of the startup you invested in is illegal," he says.

"I think Grokster, as well as the possibility that Congress will pass new laws, creates a chilling effect by increasing the risk to companies and investors."

Braden Cox, technology counsel for the Competitive Enterprise Institute, a Washington thinktank, said: "Unfortunately, the verdict will have a chilling effect on innovation and may stifle the next generation of digital multimedia technology."

The aim of the lawsuit, apart from shutting down the peer-to-peer companies, was to overrule the so-called Betamax Doctrine. This has been a mainstay of US intellectual property law since the early 1980s, and emerged after Universal Studios sued Sony for producing the Betamax video recorder - which, Universal claimed, encouraged widespread piracy of TV shows.

At that time, the supreme court said that a manufacturer could not be held responsible for the illegal uses a user puts its product to. Sony won the case. Although the majority decision said that most of Betamax's users were breaking the law, their actions were not deemed to be Sony's fault. The company is not responsible for its users.

The difference between the users and their uses was again the key point this year when Grokster was in the firing line. The Grokster case rested on whether the writers of the peer-to-peer software could be held responsible for the copyright infringements made by its users.

In the end, the Grokster ruling didn't change the law - Betamax still stands - but it did add a new test. It says that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties".

In other words, if the product is promoted as just the thing to steal music with, the defence that it can do other things too now doesn't stand. An US manufacturer of such a technology can be sued by the owners of the copyrighted material in question.

This section of the ruling is quite straightforward. Industry analyst Om Malik says: "The bottom line is that, so far, many digital lifestyle related startups have used the Sony Betamax ruling as a crutch - more like an excuse for doing things which fall in the grey area. That's clearly not going to fly [any more]."

The first, more immediate, consequence of the ruling was that Grokster can now be sued. The plaintiffs claim that the company's business model was based on encouraging people to use their software to infringe copyright, and the more people did that, the more Grokster profited. They're all going back to court later in the year.

However, while the Grokster ruling seems fair, it is also not particularly precise. And here's the problem. Just what is the definition of the inducement to infringe copyright that pushes a company over the edge of illegality? The ruling says it is something "shown by clear expression or other affirmative steps", but does not elucidate further.

Just what "other affirmative steps" are is hard to say, and it is this doubt that may be having a damaging effect on technological innovation in the US. "The question of intent is highly fact-dependent, and discovery rules will afford plaintiffs wide latitude to seek probative evidence," warned the top Silicon Valley law firm Cooley Godward in an advisory to its clients. "It may be more difficult for defendants to obtain resolution of cases short of going to trial."

Copyright holders are invariably huge media companies with big legal budgets - and this means they can afford to pursue a legal remedy for as long as it takes.

The result is that programmers with a good idea will have to prove to everyone, and specifically their backers, that they are operating entirely without the risk of a lawsuit. This is hard to do: indeed, so hard, that many backers aren't giving them the chance in the first place.

Furthermore, given that the fundamental point of the internet is the moving of data from one place to another, the area of chilled innovation is greater than you might think. Does advertising a system that allows for large email attachments induce copyright infringement? Could the features of broadband connections, which make large files easier to deal with,

make it an inducement to illegal filesharing? When a photo-sharing site or blogging tool proudly proclaims the ease of placing material online, does that make it an inducement to breach copyright?

It doesn't really matter. The fact that the answers are fuzzy means that small innovators will run out of money for their lawyers long before the record labels do. Venture capitalists might not even take the risk of funding any such startups at all.

The future equivalents of the video recorder or the photocopier may well be throttled at birth by the risk of an expensive lawsuit, even if the result of such a day in court would be complete vindication. Some battles are too expensive to fight, even if you are bound to win.

These lawsuits may also become a great deal more complicated. The supreme court has given the go ahead for Grokster to stand trial, but it hasn't given any advice on what the punishment should be if it is found guilty.

As Ito says: "Any startup trying to innovate in the online music distribution business will be walking a minefield of unreasonable government legislation and industry patent litigation, which will scare away entrepreneurs and investors alike."

In the end, the problem is, at heart, a local one. Because the US supreme court only rules over the US, the rulings there don't make any difference to programmers in the rest of the world. And while Europe does sometimes take a lead from US law with respect to copyright issues, much of the developing world does not.

They are free from legal restraints - but, more importantly, they are free from legal uncertainty, and there lies the rub. Whether copyright infringement is their business or not, foreign developers now have the advantage.

Sadly for the copyright owners, while the new ruling might make it difficult for a company to make money from a commercial filesharing application, filesharing itself isn't affected. Because of the way that modern peer-to-peer networks operate, with no central organisation to shut down, you don't need a professionally produced or supported application to access them.

Most of the filesharing applications in use are open source, free to use and without any corporate backing.

There is no one but the individual filesharers themselves to sue - which is already happening in the UK - and no way to put the cat back into the bag.

Indeed, by forcing first Napster and then Grokster and the other filesharing entrepreneurs out of business, the record companies have created an enemy they can neither beat nor negotiate with.

An embrace of Napster at the start might have, in retrospect, made for a better strategy.

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