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High Court To Weigh File Sharing

Industry Likens Practice to Theft

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The Supreme Court agreed yesterday to hear the entertainment industry's case against two Internet-based file-sharing services through which millions of people swap music and movies online, a decision that sets up a potentially decisive digital-age battle over copyright-infringement rules.

The court said it would rule on an appeal by movie and record companies, headed by Metro-Goldwyn-Mayer Studios, that say they should be able to sue the file-sharing services, Grokster Ltd. and StreamCast Networks Inc., because their customers copy and trade copyrighted material online without paying for it.

And in taking the case, the court signaled that it would take the lead on the issue rather than wait for Congress, which is considering various solutions but was unable to hammer out compromise legislation earlier this year.

The entertainment industry says more than 2.6 billion copyrighted music files are downloaded each month, along with about half a million movie files per day. This, it says, is a mortal threat to intellectual property and, thus, to the entertainment business's viability. Lawsuits forced one company, Napster, to shut down its file-sharing service.

In urging the court to take the new case, the companies said it was "one of the most important copyright cases ever to reach this Court. Resolution of the question presented here will largely determine the value, indeed the very significance of copyright in the digital era."

But Grokster and StreamCast say that their services rely on a different technology from the one Napster used -- one that

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they say has many legitimate uses, so it would be unfair to make them liable for the alleged wrongdoing of customers over whom they

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have no direct control. They cite a 1984 decision, *Sony Corp. v. Universal City Studios*, widely known as the Betamax case, in which the Supreme Court refused to make Sony liable for alleged bootlegging of movies and TV shows by its customers as long as its video recorders also could be used for many other legal purposes.

"The evidence that file sharing has significantly hurt the large content companies is very thin," said Gigi B. Sohn, president of Public Knowledge, a digital rights advocacy group. "But the tradeoff of giving content companies more control over the development of technologies and of overturning Betamax would be very significant and very harmful to consumers and to our economy."

In August, the San Francisco-based U.S. Court of Appeals for the 9th Circuit ruled in favor of Grokster and StreamCast, saying that their position was essentially the same as that of Sony in the 1984 case.

Whereas Napster had employed a technology that gave Napster itself direct control over access to a centralized index of files available for downloading, the court noted, Grokster and StreamCast use a "peer-to-peer" technology that enables computer users to search one another's files, then download the songs and films they want.

Grokster and StreamCast make money by selling advertising.

The 9th Circuit also expressed concern that subjecting the file-sharing services to suits by intellectual property owners could strangle a promising new industry for the sake of an older one.

"We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation," the court said.

But the record and movie industries contend that the illegal uses of peer-to-peer services far outweigh their legitimate ones.

"It is undisputed that those who use Grokster and StreamCast . . . are committing copyright infringement and that this infringement constitutes 90 percent of the activity on the services," Donald B. Verrilli Jr., the entertainment industry's lawyer, wrote in his brief.

The Betamax case did not attempt to address the unique circumstances presented in this case, Verrilli argued, noting that "the 9th Circuit's decision threatens the very foundations of our copyright system in the digital era."

He asserted that Grokster and StreamCast have "designed their services to disable mechanisms that would prevent the very infringement that sustains their businesses."

It also promises to leaven the court's usually somber atmosphere with a pinch of stardust. Among the names on a friend-of-the-court brief supporting the entertainment industry's appeal are the Dixie Chicks, Sheryl Crow, Jimmy Buffett and Stevie Nicks.

The case is *MGM Studios v. Grokster*, No. 04-480. Oral argument is set for March, and a decision is expected by July.

Staff writer Jonathan Krim contributed to this report.

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