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EDITORIAL

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## No License to Steal

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THE CASE OF *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* presented a thorny problem for the Supreme Court: how to punish companies knowingly facilitating rampant piracy of music and movies, without inhibiting important and legitimate innovations. The court, in an unanimous opinion Monday, threaded this needle with impressive care and precision.

The defendants in this case are two companies -- Grokster Ltd. and StreamCast Networks Inc. -- that distribute file-sharing software to enable millions of people to steal. These products have potentially legal uses: sharing of material that the intellectual property holder authorizes for distribution, for example. But these uses account for only a small percentage of the services' popularity and traffic, which is overwhelmingly by people who wish to get free material that isn't supposed to be free. The companies have struck a pose of helplessness in the litigation. Unlike the old Napster, they don't play a direct role in the illegal file sharing their software permits. If they disappeared, it would still function.



As a formal matter, this makes them rather like a lot of perfectly respectable products, which also can make copyright infringement easier. And as long as the maker is not playing a direct role in the infringement, the court's case law has been generally protective of such innovations. The leading case involved the old Sony Betamax videocassette recorder, which movie studios saw as nothing more than a piracy machine but which the court protected on the grounds that legitimate uses for it existed. If that's the case, a federal appeals court had held, Grokster and StreamCast, which were likewise sued by copyright holders, must be immune as well.

But copyright infringement *is* not, in this case, the downside of a product sold for some more acceptable purpose. As Justice David H. Souter's opinion for the court makes clear, illegality is the purpose: "from the moment [the companies] began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement."

This is a reasonable and important distinction. In a digital world, where all content is infinitely replicable, file sharing -- including illegal file sharing -- is going to happen a lot. That a given device makes it easier cannot be the test for liability. Yet it would be

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wrong to conclude from that principle that anything goes or that paying for music, movies and other content should be a kind of honor system in which theft, no matter how flagrant, must be tolerated. The answer, as the court held this week, has to be that motive matters. By drawing a clear line between products specifically marketed for theft and innovations that may -- among their many uses -- aid in piracy, the court at once protects innovation and intellectual property.

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