



## Technology Law and Electronic Media Update.

### **Federal Judge in Los Angeles rules that two distributed peer-to-peer (P2P) file-sharing services, Grokster and Morpheus, are not liable for copyright infringement. April 25, 2003**

The Federal Court, Central District of California issued a summary judgment<sup>1</sup> in favor of Grokster and Streamcast (developer of Morpheus), who distribute client software to users that permits file sharing across two distributed peer-to-peer architectures, Fast Track, operated by Kazaa and Gnutella, the free, open-source system. According to the court, distribution of software that facilitates direct infringement does not give rise to either contributory or vicarious liability if, after the software is distributed, the services cannot control its functionality. The court did not rule on whether Kazaa's distributed indexing database architecture is liable.

Comment: It is expected that this decision will be appealed, especially in light of the novel "control" test that was applied to the question of contributory infringement.

### **Apple<sup>2</sup> reports quick success selling music downloads without a subscription while rumors circulate of a peer to peer "backdoor" hack of the iTunes software client.**

**April 28, 2003**

iTunes Music Store, launched at the end of April, charges a fee per download whereby the downloads do not expire. The service relies on Fairplay for copy protection functionality, which was designed by Apple specifically for this service. It is reported that this DRM has some limited copy protection capability with regard to burning CDs but is designed to prevent redistribution of the tracks to more than three Macintosh computers. Despite the limited DRM functionality, major record labels have licensed their recordings for distribution through iTunes. Apple reports that over 1,000,000 paid downloads have already occurred.

Comment: Reports of a "hack" that exploits a backdoor peer-to-peer functionality raises questions as to whether the iTunes platform is sufficiently secure to be quickly ported to Windows, which does not run on a proprietary hardware architecture.

### **America Online (AOL) petitions Federal Communications Commission (FCC) to end Instant Messaging interoperability requirement. April 7, 2003**

AOL-Time Warner has petitioned<sup>3</sup> the FCC to vacate the requirement to permit interoperability of their instant messaging system with other competing services which was a regulatory condition for the merger of AOL and Time Warner. The timing of the petition is interesting in light of the recent announcement by AOL-Time Warner of the issuance of patent number 6,449,344, titled "Communications System" that appears to claim aspects of an instant messaging "buddy list."

<sup>1</sup> [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/030425\\_order\\_on\\_motions.pdf](http://www.eff.org/IP/P2P/MGM_v_Grokster/030425_order_on_motions.pdf) (Last visited May 9<sup>th</sup> 2003)

<sup>2</sup> [www.applemusic.com](http://www.applemusic.com)

<sup>3</sup> [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513982043](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513982043) (Last visited May 9<sup>th</sup> 2003)

Comment: This raises questions as to whether lifting of the interoperability restriction by the FCC will lead to a titanic patent battle in the instant messaging business, or to AOL-TW's submission of their IP to the IETF sponsored IM protocol standard.

**Digital “Goods” Providers Delivering into the EU will be subject to VAT liability beginning on July 1, 2003.** France is among the first countries to draft regulations to comply with the EU directive that establishes liability for non-EU companies that do not collect VAT from EU consumers on digitally delivered goods, which include “... software...images ... music ... films ... games ... sporting ... and entertainment broadcasts and events ....”<sup>4</sup> Although the directive is a year old, implementations in member countries has begun, but registration sites for foreign companies to establish payment procedures have not been completely set up. Because the VAT will be calculated on the basis of the destination country, taxes may range from 15% to 25%. In contrast, sales of digitally delivered goods from within the EU are taxed at the rate of the source country.

Comment: The lack of clear operational instructions for foreign companies will make the transition stage difficult to police, both for governments and for companies. Expect e-Commerce operators to quickly launch operating subsidiaries in EU countries like Gibraltar, which has no VAT.

**IBM Responds to Suit Threatening their Open Source Linux Business. May 6, 2003.** SCO, apparently the successor of ATT's Unix operating system, filed a complaint in March alleging theft of trade secrets and breach of contract, which centers around an ancient license to IBM from ATT, the originator of Unix. Alleged is a breach of a sublicensing covenant that “[n]o title to the intellectual property in the [sublicensed product] is transferred to such [IBM sublicensed] customer.”<sup>5</sup> Curiously absent from SCO's complaint was a copyright infringement claim. In response, IBM accuses SCO of “improperly seeking to assert proprietary rights over important, widely used technology and impeding the use of that technology by the open source community.” IBM appears prepared to contest the chain of title from Unix's beginnings at Bell Laboratories in the 1960's.

Comment: The viability of SCO's case may rest on whether the trade secrets at issue were already in the public domain as a result of prior disclosure of the operating principles of the Unix. This case raises concerns that incorporation of GPL or open-source code into products may result in later liability or injunction, which is problematic for software companies engaged in “extreme programming” practices.

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<sup>4</sup> [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_128/l\\_12820020515en00410044.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_128/l_12820020515en00410044.pdf)

<sup>5</sup> <http://www.sco.com/scosource/complaint3.06.03.html>