

# High-Tech Tension Over Illegal Uses

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In 2002, a young software programmer in Seattle named Bram Cohen solved a vexing Internet problem: how to get large computer files such as home movies or audio recordings of music concerts to travel rapidly across cyberspace.

Among the benefits of the invention, called BitTorrent, was that millions of users could quickly see lengthy amateur videos documenting the devastation of the December tsunami in the Indian Ocean, helping to spur an outpouring of charitable aid.

But BitTorrent also is wildly popular because the technology makes it easier to freely trade Hollywood movies and television shows, putting it in the cross hairs of the entertainment industry.

Increasingly, that same tension surrounds a dazzling new generation of high-tech products and services that help people copy, customize and increase the portability of digital works, sparking a sharp legal debate: How should courts view technologies that have beneficial uses but also are heavily used for illegal acts?

Next month, the U.S. Supreme Court is scheduled to hear arguments on whether a filesharing service named Grokster should be held liable for the millions of people around the world who use it to illegally trade music, movies and software.



Elliott Frutkin, chief executive of Time Trax Technologies of Gaithersburg, said that while his product is in line with the law, some users of technology are bound to push legal boundaries.

The entertainment industry is asking the court to rule that even though Grokster itself does not engage in stealing files, the service is responsible because it is predominantly used for theft and has done nothing to try to stop that use.

The prospect that the court might adopt this legal reasoning is sending shudders through the technology and consumer electronics communities. Hundreds of existing products could be threatened, they say. And they fear that new products, and early funding, will die in the crib if the gear might be co-opted by people wishing to use it improperly.

"If it's so risky for me to try out new things or put new things on the market, you are really going to devastate people's willingness to innovate," said Elliott Frutkin, chief executive of Time Trax Technologies Corp., a Gaithersburg start-up.

His company's hardware and software turn individual songs or entire programs from XM and Sirius satellite radio broadcasts into digital files that can be stored on a computer, burned to a CD or transferred to portable players like Apple Computer Inc.'s iPod.

Frutkin said his product safely falls on the legitimate side of current law and regulations. But he also knows that many users of technology, especially those who are the quickest to latch onto new gadgets and services, may be willing to push legal boundaries.

**Photo Credit:** Jahi Chikwendiu -- The Washington Post

"The first people who were playing with the technology TimeTrax is based on weren't people that I would have over for dinner with the family," said Frutkin, who does not condone stealing. "But that's the way things happen."

Major technology companies, including Microsoft Corp., Google Inc., Yahoo Inc. and America Online Inc., have urged the court to avoid basing its decision on how much a product is used for nefarious purposes. They argue that courts should look at whether Grokster actively encourages and helps users to steal, which would be punishable under existing copyright law.

Officials of the Motion Picture Association of America and the Recording Industry Association of America say that approach would make it too easy for companies to avoid prosecution for acts they tacitly approve but never explicitly encourage.

The Grokster case, they insist, is not about scaring off new inventions. It focuses purely on file-sharing services -- including Kazaa and several others -- whose operations the entertainment companies claim are built to encourage, support and profit from piracy, even if the underlying technology has legal uses.

Firms that do not have illegal file-sharing as their primary business model have nothing to fear, said Fritz Attaway, chief policy counsel for the MPAA.

As an example, Attaway said the MPAA has not sued Cohen, the inventor of BitTorrent, instead targeting several operators of Web sites that serve as BitTorrent directories and openly list copyrighted movies.

Cohen said he developed the technology to allow devotees of bands that allow their concerts to be recorded to share copies with other fans. But he is well aware of the misuse by some BitTorrent index sites, whose operators have openly pitched their directories as resources for copyrighted movies.

"That's like putting a big 'shoot me' sign on your forehead," Cohen said of the sites.

Device makers have fended off the entertainment industry before. In a case that set the legal standards that will be reviewed in the Grokster case, the movie industry sued Sony Corp. over its Betamax recorders, arguing that copying television programs violated copyright laws.

In 1984, the Supreme Court ruled that making a copy to view at another time -- or "time-shifting" -- was an acceptable personal use. More broadly, it determined that device makers could not be held responsible for illegal acts of users as long as the product was "merely capable" of substantial uses that were legal.

The decision did not stop the entertainment industry from targeting, sometimes successfully, other products, including digital audio tapes, an early MP3 player and ReplayTV, a digital television recorder that also allowed users to skip commercials and send program copies to a handful of others.

In ReplayTV's case, the company was forced to shut down rather than fight industry lawsuits, said Andrew Wolfe, who was the company's chief technology officer. He said that once the litigation started, the company could not raise additional money from venture capitalists or other investors.

"What would have happened if you applied these same standards [sought by the entertainment industry] when people were shown the first Xerox machine?" Wolfe asked.

The ReplayTV brand was later purchased by another company.

One problem, many technologists said, is that it is hard to know what the entertainment industry deems to be acceptable use.

The recording industry, for example, has never explicitly said whether burning songs to CDs is acceptable use, said Steven M. Marks, general counsel of the RIAA. But burning a CD and distributing it to others is "clearly illegal," he said.

There is also a difference of opinion about what someone can record with a VCR. According to the MPAA's Attaway, the Betamax case gave consumers the right to record over-the-air television transmissions, but not programs via cable or satellite TV.

Such distinctions could pose problems for the burgeoning business of digital television recorders, said Gary Shapiro, head of the Consumer Electronics Association, the lobbying arm of roughly 2,000 device makers.

"The content people will tell you that everything that is not authorized . . . is infringing," he said. "This is the corporate equivalent of living under a tyrannical dictator. You are not breaking the law, but you want to keep your head down and not be noticed because the dictator randomly kills."

In one ongoing dispute, the movie industry is challenging Federal Communications Commission approval of a new feature from digital-recorder maker TiVo Inc. that allows its users to make copies of digitally enhanced television programs and transfer them to a limited number of other locations.

Attaway argues that product and service providers who base their businesses around piracy should not be able to hide behind the mantle of innovation.

"Why should device manufacturers be exempt from all possibility of litigation?" he asked.

Another source of tension will probably be copying of digital radio programs and other broadcast "streams" designed to be listened to but not downloaded.

Marks of the RIAA said his organization has told the FCC that users should be allowed to record only an entire program or stream, not cherry-pick individual songs to build their own music libraries.

TimeTrax allows recording of individual elements of a program, Frutkin said, but to demonstrate the company's anti-piracy commitment, it electronically stamps any recorded element so that if it showed up on a file-sharing network it would be easy to trace.

Other small companies are working to steer clear of any potential confrontation with the entertainment industry.

A California company called Grouper Networks Inc. makes file-sharing software for the private use of family members or other small groups, mostly aimed at those wanting to share photos. The software prevents the copying of music files and imposes restrictions on the size of any group wishing to share photos.

"We know what people want to do" with the software, said founder Josh Felser, "but we are not going to get embroiled in the controversy surrounding file-sharing."

Some who are concerned about the Grokster case say no matter what the Supreme Court does, the movie studios and recording labels are ultimately fighting a losing battle by trying to bottle up new technologies.

"We are moving into a world where access to information is more democratized," said Brad Burnham, a New York venture capitalist who works with early-stage media companies. "It's too easy to move it around. Value is going to shift from the creation of content to the organization and customization of that content."