

June 27, 2005

Grokster Ruling: Supremes Preserve Betamax Standard, Turn Toward "Active Inducement"

Update: Press Release from USACM is below.

Original Post 6/27/05: At 10:30 this morning things looked bleak for the technology industry as headlines raced across the wire "Grokster Loses in Unanimous Decision." Now that the dust has settled a bit, the Supreme Court's [decision](#) actually looks quite balanced. (Justice Souter wrote [the opinion of the court](#), while Justices Breyer and Ginsburg wrote the concurrences [1](#), [2](#)).

The Justices did rule 9-0 against Grokster by overturning the 9th Circuit's summary judgment that the Sony "safe-harbor" rule protects Grokster from any liability in this case. In doing so, however, the Court upheld the heart of Sony by not trying to quantify the tipping point of when a technology's infringing uses outweigh its non-infringing ones, thereby creating liability for the developer. To many in the technology industry, such a vague test would have been devastating. The Justices stated:

" ... because we find below that it was error to grant summary judgment to the companies on MGM's inducement claim, we do not revisit Sony further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of Sony and to leave further consideration of the Sony rule for a day when that may be required."

(The Sony rule was at the heart of this matter, as it states companies that develop technology that can be used both for infringing and non-infringing purposes cannot be held liable strictly for producing the technology. For more background on Sony see the [EFF's website](#).)

The court did blast both Streamcast and Grokster's behavior. It made numerous findings that the defendants went out of their way to encourage downloaders to share copyrighted material or be in a position to facilitate this activity. (Streamcast is the other defendant in the case.) In short, the court said bad actors, even if they are not directly infringing on copyright, cannot hide behind Sony, stating:

" ... holding 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."

But the court did seek balance in this standard:

"The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise."

In doing so, the court creates an "inducement standard" that seems to be predicated on a company's specific actions (i.e. sending out e-mails to its customers telling them how to download or use copyrighted material) or its business model. It seems likely that technology companies and innovators may find this standard too vague and still open to debate and interpretation. Further, given the current litigious nature of the copyright environment, the discovery process inherent in determining a company's or developers intent may still be a burden on innovation. In fact, Ed Felten has some [thoughtful things to say on freedom-to-tinker](#) about the issues that this ruling raises for technology developers.

But the court's decision could have been much worse, and its focus on behavior instead of technology is one that many in the community will likely find comforting, and it is a position that USACM has advocated for on many different technology issues.

This week we will try to post Congress' take on the issue. Also, rumor has it that there will be a hearing on the subject in the House Judiciary Committee on Thursday. We'll try to cover that hearing as well.

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USACM REASSURED BY GROKSTER RULING

WASHINGTON, DC, June 27, 2005 - ACM's Public Policy Committee (USACM) said it is reassured by today's U.S. Supreme Court's decision in *MGM Studios v. Grokster*, which denies protection to developers of technologies from liability charges if their products are promoted to infringe on copyright protection. The Court left intact the Sony standard that protects the development of technologies that may have infringing uses so long as there are substantial non-infringing uses. The Court's decision returns this case to the lower courts for further consideration.

The case addressed whether Grokster, an international software company that provides peer-to-peer file sharing programs, should be held liable because its software can be used to infringe on copyrights. Since a landmark Supreme Court decision in 1984, known as *Sony Betamax*, the courts have held that developers cannot be held liable for infringement committed by their product's users so long as the tool is capable of substantial non-infringing uses. This decision has been referred to as the "Magna Carta" for the technology industry and is widely credited with creating a stable legal environment that fosters innovation.

The entertainment industry sought to overturn the Sony decision, citing the growth of peer-to-peer software and file sharing, which it claims has taken a toll on the industry's earnings.

"The liability standards supported by MGM would have dramatically changed the balance of power between the entertainment industry and the technology industry, said USACM Chair Eugene Spafford. "If the standards supported by MGM were adopted, researchers working in computing and communications development would need to fear liability for uses of their inventions that may not yet exist," he said, adding, "The Court affirmed the basic USACM position that laws should apply to people and their acts, and not to the technology involved in the act." He concluded that the MGM position would have far-reaching and chilling effects on technologists who might otherwise be developing new and innovative technologies.

USACM joined an amicus brief signed by sixty law professors in support of Grokster. USACM member and University of California Berkeley professor Pam Samuelson led the preparation of that brief. Many other briefs were prepared and/or signed by USACM members in support of the long-established Sony standard.

The Supreme Court's decision left the Sony standard intact, but found that evidence existed that Grokster may have promoted the use of its products for copyright violation, which was sufficient grounds for the lower courts to conduct a trial on secondary infringement. The Court said that encouraging others to violate copyright is sufficient cause for a court to hear evidence of infringement, but the mere existence of technology that might be used by others for infringement is still protected if substantial non-infringing uses are possible.

ABOUT USACM

USACM is the U.S. Public Policy Committee of the Association for Computing Machinery (ACM). USACM members include leading computer scientists, engineers, and other professionals from industry, academia, and government. ACM is widely recognized as the premier organization for computing professionals, delivering resources that advance the computing as a science and a profession, enabling professional development, and promoting policies and research that benefit society. ACM, the world's first educational and scientific computing society with more than 80,000 members worldwide, hosts the computing industry's leading Digital Library and Portal to Computing Literature. With its journals and magazines, special interest groups, conferences, workshops, electronic forums, Career Resource Centre and Professional Development Centre, ACM is a primary resource to the information technology field.

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