

MGM v. Grokster

The Grokster decision appropriately focused on behavior, not technology.

Technology has enabled a panoply of innovative and remarkable content products and services. Consumers can now access content on various devices and in ways unthinkable just a few years ago. Yet as we have learned from the tech-enabled nuisances of spam, spyware, and viruses, the proper approach is to prevent bad actors and bad practices, not to regulate technologies. The Grokster case appropriately reinforces this approach, not indicting a particular technology, but demonstrating that behaviors and business models can be an outright invitation to infringe copyrighted material.

Lower courts must apply the new standard, not rewrite the Betamax rule.

The Supreme Court ruled that the lower Court misapplied the Betamax principle of “significant non-infringing uses” and created a new standard that relies on intent. Services that demonstrate overt intent or affirmative actions that encourage infringement can now be held liable for the infringing behaviors of their users. This new principle preserves the Betamax decision and applies a new legal standard for actions taken by companies and users. As cases involving file-sharing networks are decided, it’s crucial that the lower court carefully apply this new Supreme Court standard.

The Supreme Court wisely borrowed from patent law in establishing the new standard.

The Court opinion shows that core to this new test of infringing behavior is that of secondary liability. To support this conclusion for secondary liability, the Court explicitly incorporated into copyright law the inducement theory of liability from patent law: *[O]ne 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 of third parties.* This finely-threaded argument defines secondary infringement and should satisfy those in Congress who sought clarity through legislation.

Recommendations for policymakers in the aftermath of the Grokster decision:

ACT policy recommendations to properly balance the interests of content owners and IT innovators:

- **Use a comprehensive approach to keep copyright infringers in check.** Like the other technology-fueled menaces of spyware and spam, efforts to fight copyright infringement will require a multi-pronged, holistic approach. For example, public education campaigns about copyright and the illegality of infringement and targeted legislation that is laser-focused on bad actors and bad behavior—not focused on a particular technology or service.
- **Monitor lower court actions to make sure the Betamax principle is not undermined.** It will likely take over two years for lawsuits against Grokster, Streamcast, and other file-sharing services to conclude. As this process shakes itself out, it’s imperative that the lower courts don’t debunk the important principle upheld in the 1984 Betamax decision. That is, a technological tool that has significant non-infringing uses shouldn’t be outlawed simply because some may use that tool for infringing purposes.
- **Foster an environment where industry can continue to bring innovative content services and products to market.** In the Napster era, consumers flocked to the service as the only way to download digital music. Today, Apple’s iPod and iTunes service demonstrate that consumers will indeed pay for content with the right combination of price, packaging, and features. This kind of competitive environment will give consumers viable, legal alternatives for their content cravings.