

## INTERPRETING GROKSTER: WHAT IS THE PRACTICAL IMPACT AND WHAT IS LEFT FOR CONGRESS TO DO?

**What the Supreme Court Did:** On June 27, 2005 the Supreme Court issued its opinion in *MGM v. Grokster*. The unanimous opinion vacated the Ninth Circuit's decision – in which Grokster and StreamCast were found exempt from secondary liability – and sent the case back to lower courts for further proceedings.

**Impact of the Opinion:** The Supreme Court seems to have preserved a reasonable balance between the goals of intellectual property law: to protect creativity and promote innovation. While the impact of the opinion will ultimately depend on the lower courts' application of the opinion, ADP's initial view is that Court has:

- Recognized the need for balance between the development and distribution of innovative products and the importance of deterring piracy;
- Helped content providers protect their copyrighted material with an "inducement" rule that should help buttress efforts to curtail on-line piracy and promote a legal on-line marketplace for content; and
- Rejected mandating that technology providers include anti-piracy technology in their products

**The Supreme Court Has Preserved the Ability To Develop and Distribute Innovative Products:** The Court stated that the mere act of developing and distributing technologies such as software and computers does not create liability. The ruling should not compromise legitimate commerce or discourage innovation that has a lawful purpose. Additionally, the Court clarified that companies are able to offer customers technical support and product upgrades, observing that "ordinary acts incident to product distribution do not support liability in themselves."

**The Court's Ruling Prohibits Active "Inducement" of Copyright Infringement:** Under the "inducement" rule that the opinion articulates, liability is premised on *purposeful, culpable expression and conduct*. The Court opinion establishes the fact 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 under the law for resulting acts of infringement." This ruling should be very helpful to content providers who are seeking to curtail on-line piracy. Indeed, the Court opinion indicates that the lower court record with respect to Grokster & StreamCast is "replete" with evidence of "purposeful culpable expression and conduct".

**The Supreme Court Did Not Mandate Anti-Piracy Technologies in Products:** Significantly, the Court did not impose a duty on technology providers to include filtering or other anti-piracy technologies in their products. While the Court identifies the failure of Grokster and StreamCast to adopt filtering technology as part of the evidence of their unlawful intent, the Court was clear that the lack of filtering technology was only relevant in light of other evidence of intent. In the unanimous opinion Justice Souter writes, "of course, in the absence of other evidence of intent, a court would be unable to find contributory liability merely based on a failure to take affirmative steps to prevent infringement, if the device was otherwise capable of substantial non-infringing uses. *Such a holding would tread too close to the Sony safe harbor.*"

**Congressional Action:** ADP Believes that Legislation Seeking to Codify or Clarify the Court's Opinion is Unnecessary and Premature.

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