

## Interpreting the *Grokster* Decision: What's Next?

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The Supreme Court's *Grokster* decision raises many questions. Perhaps this is as it should be, for the case is still ongoing, having been remanded back to the 9<sup>th</sup> Circuit. Still, what is the practical impact on copyright owners and for the technology industry? Should Congress do something? The short answer: it's too early to tell and Congress should wait to see how the case is resolved before it acts.

**The Grokster Rule:** Providers of P2P technology that do not intentionally encourage infringement will not be secondarily liable for the infringing acts of customers or other third parties.

This is a good rule. A company that advertises the ability to trade copyrighted material will be liable. A maker of a software product that has "clean hands" will not be liable. Punishing infringers and not technology is a sensible mantra for digital media.

However, the three factors outlined by the Court as evidence of intent were extremely fact-specific to the *Grokster* case. Policymakers should not necessarily adopt the Court's criteria for evidence of infringement if it considers future legislation.

Critiquing the Court's features of evidence of intent:

1. **Satisfying demand for infringement is not always bad.** The Court's observation that "Grokster's name is an apparent derivative of Napster" may be accurate but not particularly helpful for determining intent. P2P is really about consumer demand for music *downloading*, not necessarily music infringement. All download, pod-casting and peer networking services should be worried that their desire to satisfy music download demand might be mistaken for enabling infringement.
2. **Lack of filtering tools does not indicate intentional facilitation.** The Court referred to the fact that Grokster and StreamCast did not design their products to filter out copyrighted material as evidence of intent. Software products, like physical products such as automobiles, can't include every available feature. Having the courts second-guess product designs could increase product costs and chill new deployment.
3. **Advertising supported business models require widespread deployment but not necessarily infringement.** The Court's statement that Grokster received income by selling advertising and that the more its software is distributed, the more money it makes off of advertising is accurate. Ad-supported means for generating revenue should not show an unlawful objective.

All consumers have an interest in promoting and protecting content and encouraging technological innovation. Whether *Grokster* furthers this interest remains to be seen.