

Interpreting *Grokster*: What is the Practical Impact and What is Left for Congress to Do?*

The U.S. Supreme Court's recent decision in the case *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* ("*Grokster*"), No. 04-408 (June 27, 2005) reaffirmed the rule of law it announced in 1984 in *Sony v. Universal*, 464 U.S. 417 (1984) ("*Sony-Betamax*"), but held that the *Sony-Betamax* rule does not immunize the distributor of a technology from liability for secondary copyright infringement where the distributor of the technology intentionally induces direct infringement by others. The Court sent the case back to the trial court to determine whether the defendant companies intentionally encouraged infringement.

1. The Supreme Court's decision recognized that imposing secondary liability for the mere distribution of a technology that is capable of substantial noninfringing uses would fundamentally alter the existing balance of power between the technology and entertainment industries. As the Court acknowledged, for more than twenty years, both the technology and entertainment industries have experienced unprecedented technological innovation and economic prosperity under the fundamental framework created by the *Sony-Betamax* rule. The Court's decision deliberately left intact the existing balance of power between these two industries, paving the way for companies on both sides to continue to prosper and innovate.

2. There is no need for Congress to re-visit the Court's affirmation of *Sony-Betamax*. The Supreme Court correctly and strongly (splitting 6-3) rejected each of the alternative secondary liability standards for which Petitioners and a number of *Amici* argued because these standards would dramatically change the balance of power between the entertainment industry and the technology industry and would create instability and confusion, which in turn would severely impair innovation and technological development.

3. The Court's adoption of an active inducement rule has adequate basis in the patent law. Existing patent law cases interpreting the active inducement standard will provide the lower courts with adequate guidance for applying the new inducement rule in the copyright context. These cases will serve as the basis for courts to make individualized determinations based on "clear expression or other affirmative steps taken to foster infringement" by particular companies.

4. Congress should allow time allow for the lower courts to apply the standard articulated by the Supreme Court. The Court's decision essentially preserved the existing balance of power between two important industries, which Congress should not further alter by legislating without first allowing the Court's new standard to be applied in practice by the lower courts. There may be a current role for Congress, however, in modernizing the existing statutory music licensing scheme for the online era, so that a robust legitimate market in online music downloads can satisfy the clear user demand for access to music and provide fair compensation to artists and copyright holders.

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