

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

The Grokster decision attempts to balance the desires of two groups:

- The desire of copyright holders to maintain complete control over their creative works.
- The desire of innovators and the public for new technologies that allow cheaper, easier, more flexible, more convenient access to these same creative works.

Legislative and judicial resolution of this conflict dates back to such innovations as player pianos, radio, cable TV, and, most famously, videocassette recorders. Today, the technologies hanging in the balance range from MP3 players (such as iPods) to digital video recorders (such as TiVo) to the Slingbox, which allows purchasers to acquire and store content at home and then access that content from elsewhere on the Internet. And we can only guess about tomorrow's innovations.

For 20 years, technologists understood they were free to develop and market any technology that had "substantial non-infringing uses". While leaving this "Betamax standard" intact for now, the Grokster decision establishes a new potential liability for entrepreneurs: Did they base their business model on the intent to induce their customers to infringe copyright?

This decision properly recognizes the use of a technology, and not the technology itself, as the subject of analysis. But it replaces a bright-line objective test of technological capability with a subjective state-of-mind test. What once would have been a clearly legitimate technology will now be subject to expensive litigation, arguing over the meaning of years-old e-mails and business plans. This will chill both the innovative spirit and the venture capitalists who underwrite that spirit.

Innovation will also be chilled by uncertainty about whether new uses of content constitute infringement. In light of the well-known claim by a Turner Broadcasting executive that "skipping the advertisements is stealing the content", would TiVo have risked including a feature to do just that? Until only recently, recording industry executives questioned the legitimacy of copying purchased CD's to MP3 players. What of the iPod? And the Slingbox "me-to-me" function is already under attack. Tomorrow's courts might find tomorrow's innovative consumer capabilities to be non-infringing, but the new legal uncertainties are likely to keep us from finding out.

What is Left for Congress to Do

To avoid chilling innovation, Congress should make clear that liability for "inducement" is limited to only the most flagrant cases of abuse. In particular, non-commercial deployment of an innovative technology should not be subject to "inducement" liability. Further, in order to encourage experimentation with new ways to treat content, "inducement to infringe" should interpret "infringement" very narrowly.

Since many innovative technologies are designed to enhance consumers' fair use rights, and since those rights are under constant challenge, Congress should pass legislation to strengthen and broaden fair use. The Digital Media Consumers' Rights Act, for example, contains such provisions.

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