

July 18, 2005

From: **Home Recording Rights Coalition**

One Pager On: **Significance of Supreme Court's *Grokster* Decision For Customary Consumer Practices and Product Innovation**

Contacts: Bob Schwartz                      202.756.8081                      rschwartz@mwe.com  
                 Michael Petricone                      703.907.7544                      mpetricone@ce.org

Web Site: [www.hrrc.org](http://www.hrrc.org)

***The Requirement Of A Specific Intent To Induce Clearly Culpable Conduct Should Not Threaten Products That Serve Reasonable And Customary Consumer Practices***

In *Grokster*, the Supreme Court left intact the standard established in the *Betamax* litigation: a product should generally be deemed lawful if it is “capable of substantial non-infringing uses.” However, the Supreme Court found liability in *Grokster* because the defendant *separately* had engaged in “purposeful acts” where there was evidence of specific intent and conduct directed toward “a patently illegal objective.” Properly construed, this new theory of liability applies to egregiously bad actors. Products that support reasonable and customary consumer practices and arguably lawful conduct should not be subject to liability. To preserve innovation and the introduction of popular new consumer products, it will be important to ensure that plaintiffs and lower courts do not stretch the doctrine in ways that chill electronics manufacturers and other innovators.

1. **The Court emphasized the egregious nature of the defendants’ conduct.** Procedurally, the Court was not willing to isolate the technology, itself, from the egregious acts by those who propagated the file-trading software. In particular, the Supreme Court relied on the fact that each defendant “showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users.” Hence, the Supreme Court told the district court that the practices of the defendants could not be walled off from their technology.
2. **The Court emphasized the respect that must be given to support of colorably legal consumer practices.** In discussing why there was no “active inducement” issue in the original *Betamax* case, the Court in *Grokster* observed that the consumer practices advertised by Sony – “time shifting” and the more permanent “librarying” of copies – were “not necessarily illegal.” This is a clear and strong indication that the Court did not intend its unanimous opinion to chill technologies, products, and services that support, or even induce, colorably lawful consumer conduct such as private, noncommercial home recording, consumer use of photocopiers, email, and web browsing, *etc.* – even where the fair use or authorized status of some practices is still a “gray area.”
3. **The evidence of intent to support a finding of “active inducement” must be substantial and unambiguous.** If the evidence of “imputed intent” in the *Betamax* litigation – which included knowledge and advocacy of practices that in some circumstances could be infringing – was not sufficient to keep the technology off the market, clearly the requirements of an *active inducement* standard require much more specific findings of intent. Indeed, the patent law cases from which the doctrine was derived recognize a *defense* that the inducements were in part directed at *substantial non-infringing uses*.