

## Public Knowledge on the *Grokster* decision July 14, 2005

The Supreme Court's decision in the *Grokster* case underscores a principle Public Knowledge has long promoted -- punish infringers, not technology. The Court has sent the case back to the trial court so that the trial process can determine whether the defendant companies intentionally encouraged infringement. What this means is, to the extent that providers of P2P technology do not intentionally encourage infringement, they are exempt from secondary liability under our copyright law. The Court also expressly acknowledged, importantly, that there are lawful uses for peer-to-peer technology, including distribution of electronic files 'by universities, government agencies, corporations, and libraries, among others.

The Court is clearly aware that any technology-based rule would have chilled technological innovation. That is why their decision today re-emphasized and preserved the core principle of *Sony v. Universal City Studios* -- that technology alone can't be the basis of copyright liability -- and focused clearly and unambiguously on whether defendants engaged in intentional acts of encouraging infringement. The Court held that liability for providing a technological tool such as the *Grokster* file-sharing client depends on "clear expression or other affirmative steps taken to foster infringement."

It is clear that the content companies didn't get everything they had been asking the Court for. They didn't get a ruling that would penalize any company that made a product widely used for infringement, regardless of what the company intended. At the same time, Public Knowledge believes the *Grokster* decision has given the content owners the legal tools they need to target bad actors. As a consequence, Congress and other policymakers should be skeptical about implementing "the broadcast flag" or imposing other mandates on consumer technologies.

Until now, the *Sony* decision provided a clear rule for lawful technologies-if your tech was "capable of substantial noninfringing use," you were home free, or so it was widely thought, and this was true even if some people used your technology for illegal purposes. Challenges to new technologies, such as the legal challenges brought against the makers of the iPod's precursor MP3 music players, could be wrapped up quickly, without a lot of litigation, just by applying the *Sony* rule. The new decision blurs the bright line of *Sony*. But nothing in this decision called into question the Court's recognition that the *Sony* case had allowed two decades of breathing space for technological innovation that included CD and DVD burners, iPods, and TiVos.

Public Knowledge has voiced concerns about earlier attempts to create an inducement standard -- notably the efforts in the Senate last year -- because we believed the proposals getting the most attention swept far too broadly. Given that the Supreme Court has attempted to craft a narrower version of "inducement," Public Knowledge looks forward hopefully to courts' applying the new standard precisely and in ways that target true bad actors and that do not merely penalize innovative technologies.

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**Public Knowledge** is a public-interest advocacy and education organization that seeks to promote a balanced approach to intellectual property law and technology policy that reflects the "cultural bargain" intended by the framers of the constitution. More information available at: <http://www.publicknowledge.org>.