Secondary Liability: Grokster

William Fisher
Adapted from Webnoize
User 1
User 2
User 3

Adapted from Webnoize

Fasttrack
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Secondary Liability in Copyright

Contributory Infringement requires
- Direct infringement
- Knowledge (actual or constructive) by the defendant
- Material contribution

Vicarious Infringement requires
- Direct infringement
- Financial interest in the infringement
- Right and ability to supervise the direct infringer
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**Grokster:** No VI because:
- No “monitoring and supervisory relationship”
- But-for causation and capacity to shut down operations are insufficient
Various parties ask Supreme Court to modify Sony standard

◊ Petitioners: Sony should not apply “when the primary or principal use of a product or service is infringing”

◊ SG: secondary liability should be imposed “[i]f the defendant’s product is overwhelmingly used for infringing purposes and the viability of the defendant’s business depends on the revenue and consumer interest generated by such infringement”

◊ Lichtman & Landes: secondary liability should be imposed if the defendant “could eliminate or greatly reduce the level of infringement without significantly cutting down on the quantity and quality of lawful uses”

◊ Arrow et al.: Lower courts should consider all economic variables in particular cases when deciding when to impose secondary liability
Response: **Sony** standard should be preserved, because:

- Tighter standards would endanger some socially valuable technological innovations
  - E.g., TiVo; iPod; CD burners
- Unpredictability of the alternative standards + threat of statutory damages would chill additional innovation
- Variety of new business models reduce need to modify the law to protect the entertainment industry
- If reform proves essential, other options would be more effective and have fewer negative side-effects
  - Streamlined civil enforcement systems
  - Alternative compensation systems
Grokster decision
Grokster decision

(1) Leave **Sony** doctrine intact

- Breyer concurrence sings the praises of **Sony** and interprets it generously
- Ginsburg concurrence interprets it more narrowly
- Souter’s majority opinion formally avoids the question of whether Sony should be modified (p. 17), but is structured so as to preserve its “safe harbor” (p. 22, n. 12)
Grokster decision

(2) Modified “inducement” theory

- “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”
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Not pertinent

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Product support
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- Advertising illegal uses
- Targeting customers known to engage in illegal uses
- Failure to adopt infringement-reducing technologies
  - Insufficient on its own – n. 12
- “commercial sense” of the enterprise depends on illegal uses
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Objective standard
- Only affirmative acts fostering illegal activities would be relevant
Grokster (Streamcast) on Remand (Sept. 27, 2006)

Focus entirely on inducement theory
- No mention of contributory infringement

Sony COSNU defense plays no role in the analysis
- Patry: shows that Sony is no longer a stumbling block for copyright owners

Judge Wilson:
- “Plaintiffs need not prove that StreamCast undertook specific actions, beyond product distribution, that caused specific acts of infringement. Instead, Plaintiffs need prove only that StreamCast distributed the product with the intent to encourage infringement.”
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Likely effects of the decision

- Technologies whose developers have advertised illegal uses are in trouble
- Technologies whose developers have consistently adopted neutral postures toward the uses to which they are put will survive
  - E.g., BitTorrent
- Lawyers fearful of the subjective interpretation will advise clients never to acknowledge purpose of fostering illegal uses
  - Cf. equal-protection doctrine
- Technological innovation will continue largely unimpeded
  - Slowed only by unfortunate need to consult lawyers
- P2P file-sharing will continue to grow
  - Pressure for some alternative solution will intensify