

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

**When will a technology company be held responsible for copyright infringements committed by third parties it does not control?** This was the central question asked in *MGM v. Grokster*. Unfortunately, rather than answer this question, the Supreme Court left technology companies and their attorneys to pick their way through a dangerous minefield of legal uncertainties.

***Why Secondary Copyright Liability Is Different.*** Holding product distributors secondarily liable for the misdeeds of others is rare in American law—Ford is not held responsible for every bank robbery committed with its cars. Secondary liability in copyright law is different from most other areas of the law in ways that create special problems for innovators:

- **Mandatory statutory damages of as much as \$150,000 per work infringed.** Thanks to statutory damages, a single iPod filled with infringing songs could give rise to more than half a billion dollars in damages; a single CD burner or broadband connection could do the same.
- **No corporate veil.** In addition, unlike in other areas of the law, copyright owners can sue a company's officers, directors and investors in their personal capacity, putting personal assets of at risk despite the corporate veil.

These risks raise the stakes for both innovators and investors in legitimate, multipurpose digital products. Because these risks chill potentially valuable innovation, they also harm consumers, the economy, and ultimately copyright owners themselves. These risks are why the technology sector, including major broadband ISPs, the Business Software Alliance, Intel, and the National Venture Capital Association unanimously sought **clear, bright-line rules** in *Grokster* so that they could evaluate and manage that risk before being exposed to potentially ruinous corporate and personal liability.

***MGM v. Grokster Leaves Uncertainty:*** Unfortunately, the Supreme Court left the job unfinished. The trouble is less the new doctrine of inducement announced by the Court, than with the continued uncertainty surrounding two important issues:

- **No clarity about Betamax:** The Court failed to resolve the scope of the “Betamax defense,” the principle announced in the famous 1984 Supreme Court ruling establishing the legality of products like the VCR that have both infringing and noninfringing uses.
- **No clarity about filtering:** The Court also refused to decide whether or when technology companies have an obligation to redesign their products to suit the demands of copyright owners.

### ***A Legislative Agenda to Promote Innovation and Protect Copyright.***

**Licensing for P2P:** Today, 1 in 5 American Internet users is downloading from P2P networks, despite more than 12,000 lawsuits filed by the entertainment industry against individuals and P2P companies. More lawsuits will not resolve the P2P dilemma. Congress needs to clear the way for collective licensing of P2P file-sharing, allowing P2P users to pay a reasonable fee to “get legit.” The Register of Copyright's recent proposal to reform digital music licensing is an important first step. For more, see EFF's white paper, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*.

**Reform Statutory Damages:** Congress should abolish statutory damages for secondary copyright claims. This would leave copyright owners actual damages and injunctive remedies, putting them in no worse a position than litigants in most other areas of civil law. Technology companies and investors, meanwhile, would be able to make reasonable business decisions about manageable levels of legal risk, rather than face the prospect of crushing statutory damages based on unpredictable legal standards.

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