

## REMAND DECISION IN *GROKSTER*

Jonathan Band

[jband@policybandwidth.com](mailto:jband@policybandwidth.com)

The federal district court hearing the remand in the *Grokster* case ruled on summary judgment against StreamCast, the remaining defendant. In a relatively straightforward application of the Supreme Court's legal standards, the district court identified facts demonstrating StreamCast's intent to encourage infringement.

However, the district court's detailed recitation of these facts may be helpful to future defendants, because it allows a favorable interpretation of the standards articulated by the Supreme Court in *Grokster*. One of the most problematic aspects of the *Grokster* decision was the Court's statement that evidence of intent to encourage infringement includes 1) the failure to take steps to prevent infringement; and 2) a business model based on advertising revenue that increases with the amount of infringement. Here, the district court found extensive evidence of inducement beyond these two elements. Thus, future defendants will be able to argue that these two elements by themselves are insufficient to show inducement.

Moreover, when considering these two elements, the district court found facts far more egregious than those mentioned by the Supreme Court. Future defendants can attempt to argue that the Supreme Court's standard should be interpreted in light of these facts. Thus, the district court opinion can be understood as raising the bar on the standards set by the Supreme Court in *Grokster*. The district court found the following evidence of inducement:

A. Streamcast's software was overwhelmingly used for infringement. One study showed that 87.3% of the files offered for distribution were infringing or highly likely to be infringing. Another study showed that almost 97% of the files actually requested for downloading were infringing or highly likely to be infringing. The court stated that "while infringing use by third parties is not by itself evidence of StreamCast's intent, the staggering scale of infringement makes it more

likely that StreamCast condoned illegal use, and provides the backdrop against which all of StreamCast's actions must be assessed.”

B. StreamCast targeted Napster users. The court found extensive evidence – particularly internal emails – demonstrating that StreamCast sought to capture Napster users when Napster was shut down, and migrate those users to fee-generating services. The court found that “StreamCast sought to offer the same exact service Napster did to the same group of users, even after a federal court had entered a preliminary injunction against Napster for secondary infringement.” This manifested intent to encourage infringement.

C. StreamCast provided assistance to infringers. The court found evidence of StreamCast tech support explicitly telling users how to engage in infringing activity.

D. StreamCast ensured its technology had infringing capabilities. The court found evidence of StreamCast employees testing the technology to make sure that it could be used to locate popular songs. Moreover, StreamCast took affirmative steps to interfere with the enforcement efforts of the copyright holders. Specifically, it blocked MediaEnforcer, a program that allowed copyright owners to track infringement on the Internet. It also blocked from its network plaintiffs' counsel and an anti-piracy firm. Finally, there was evidence that StreamCast began to use encryption not to protect users' privacy, but to prevent copyright enforcement.

E. StreamCast's business model depended on massive infringing use. The Supreme Court identified an advertising based business model, where ad revenue increased as infringement increased, as possible evidence of unlawful intent. The district court found much stronger evidence than this easy-to-meet standard: “StreamCast knew its business model depended on massive infringing use, and acted to grow its business accordingly.”

F. StreamCast took no affirmative steps to prevent infringement. This too was one of the problematic factors identified by the Supreme Court as evidence of intent.

Once again, the district court found evidence that StreamCast greatly exceeded this low threshold. StreamCast executives resisted filtering not because they thought it was an ineffective technology, but because they thought it might actually prevent infringing activity, and thereby interfere with their business objectives. In other words, the court found a malicious intent underlying StreamCast's decision not to use filtering technology.

The district court did include this troubling *dicta* in its opinion: "although StreamCast is not required to prevent all the harm that is facilitated by its technology, it must at least make a good faith attempt to mitigate the massive infringement facilitated by its technology." The court seems to state that if a technology facilitates massive infringement, failure to make a good faith effort to mitigate the infringement "support[s] an inference of intent to encourage infringement." However, the court found that inferring StreamCast's intent was unnecessary given its "expressed attitude toward filtering." Thus, the court's speculation concerning the inferences that could be drawn from a failure to filter was, in the court's own words, "beside the point." Accordingly, future courts should give little weight to this *dicta*.

G. StreamCast cannot reasonably claim ignorance of infringement. StreamCast argued that it could not have intent to induce infringement if it was not aware that copyrights were being infringed with its technology. That court concluded, "this argument is implausible. StreamCast cannot seriously argue that it did not know that the popular music and movies traded on its network were copyrighted, particularly in light of the publicity surrounding the Napster litigation and StreamCast's clear plans to exploit Napster's legal troubles....[I]t is common knowledge that most popular music and movies are copyrighted."

The court held that "evidence of StreamCast's objective of promoting infringement is overwhelming." The court's recitation of all this evidence will be helpful to future defendants, because they will be able to distinguish themselves from the facts here. As the only example of an inducer of copyright infringement, StreamCast sets the bar

extremely high – indeed, higher than the Supreme Court itself set the bar.