GROKSTER IN THE INTERNATIONAL ARENA

Jonathan Band and Matt Schruers[1]

The revolution in consumer electronics and information technology over the past half century has placed ever more powerful technologies in the hands of end users. Users have employed these technologies to infringe the copyrights of entertainment and software companies. In 1984, the United States Supreme Court made its first attempt to assess the responsibility of a technology company for the infringing conduct of its customers. In *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984), the Supreme Court ruled the sale of copying equipment did not constitute contributory copyright infringement if the equipment was "merely … capable of substantial noninfringing uses."

In the two decades after the *Sony* decision, with the advent of the personal computer and the Internet, the ability of users to infringe copyrights increased exponentially. This led entertainment companies to initiate a series of cases against technology companies, where the entertainment companies argued for narrow interpretations of *Sony*. These cases culminated in *MGM Studios v. Grokster*, which the Supreme Court decided in June 2005. The question initially framed for the Supreme Court was whether a product was "capable of substantial noninfringing uses" if 90% of the product's uses were infringing, as the entertainment industry alleged with respect to defendants Grokster and StreamCast.

The Supreme Court had at least four choices on how to answer this question: 1) it could rule that the peer-to-peer technology at issue was still *capable* of substantial noninfringing uses, even though it in fact was overwhelmingly being used for infringing purposes; 2) it could rule that a small percentage of noninfringing uses could not be considered *substantial*, even if the absolute number of noninfringing uses was large (ten percent of 100 million uses is 10 million uses); it could amend or abandon the "capable of substantial noninfringing use standard," or 4) it could divert the inquiry from the design and distribution of the technology to other conduct by the technology provider relating to the technology.

The Court ultimately chose the forth option. Rather than explicate the phrase "capable of substantial noninfringing uses," the Court held that "one 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." *MGM Studios Inc. v. Grokster, Ltd.*, 125

---

[1] Jonathan Band represents technology companies on intellectual property and Internet policy matters (www.policybandwidth.com). Matt Schruers is senior counsel for litigation and legislative affairs at the Computer & Communications Industry Association (www.ccianet.org). The opinions expressed in this article are those of the authors alone. Schruers can be reached at mschruers@ccianet.org, and Band can be reached at jband@policybandwidth.com.

S. Ct. 2764, 2770 (2005). Thus, the Court decided the case on the basis of inducement, a theory that centers the defendant's intent rather than his technology's characteristics.

For entertainment and technology companies participating in the U.S. market, the question now becomes: what conduct meets this new inducement test? This question has relevance beyond the borders of the United States; an Australian court has already followed the Supreme Court's reasoning, and the courts of other countries are likely to as well, not withstanding formal differences between their copyright laws and those of the United States. This article will first examine the *Grokster* decision and attempt to interpret the inducement test. Then, the article will compare *Grokster* with the recent Australian decision in *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.*, [2005] FCA 1242. The article will conclude with practical guidance for technology companies participating in the global marketplace.

I. *MGM STUDIOS v. GROKSTER*

Theoretical Underpinnings

Prior to this case, contributory copyright infringement was typically defined as knowingly making a material contribution to a direct infringement. *See Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159 (2nd Cir. 1971). *Sony* was viewed as an exception to this rule, but the precise doctrinal basis for exception was unclear. Thus, the U.S. Court of Appeals for the Ninth Circuit in both *A&M Records v. Napster,* 239 F.3d 1004 (9th Cir. 2001), and *Grokster,* 380 F.3d 1154 (9th Cir. 2004), interpreted *Sony* as modifying the knowledge prong of contributory infringement – that *Sony* stood for the proposition that the distributor of a product capable of a substantial noninfringing use could not be presumed to know that the product was being used to infringe. Having thus interpreted *Sony*, the Ninth Circuit concluded that if a distributor had actual knowledge of specific infringing uses at a time when the distributor could prevent the infringement, but declined to do so, the distributor could incur liability. Both Napster and Grokster had actual knowledge, but only Napster had the ability to respond to it. Since Grokster did not maintain a centralized server, it had no way to react to a claimed infringement. Accordingly, the Ninth Circuit did not find it liable for contributory infringement. By attaching *Sony* to the knowledge prong, the Ninth Circuit limited *Sony* in a way that had no real basis in the *Sony* decision, and fashioned a rule that led to inconsistent results.

The Supreme Court in *Grokster* stated that "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement." *Grokster,* 125 S. Ct. at 2776. This is a new definition for contributory infringement – in essence, the Court replaced knowledge with intent. *Sony* also has a new meaning within this new understanding of contributory infringement: "*Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement." *Id.* at 2778. Here, too, the Court replaced knowledge with intent – *Sony* now forbids imputing intent, rather than imputing knowledge, as the Ninth Circuit suggested. Thus, although Sony *knew* that the Betamax could be used for infringing purposes, the *Sony* rule "limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product." *Id.* at 2779. Since "[t]here was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping," *id.* at 2777, and since such an unlawful objective could not be presumed, Sony was not liable for contributory infringement.

In contrast, it appears that Grokster and StreamCast did intend for users to employ their software to infringe. And the Supreme Court explained that "nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence…." *Id.* at 2779. If the evidence at trial demonstrates that the defendants intended to encourage infringement, they can be found liable for infringement – even if their products are capable of substantial noninfringing uses.

By redefining contributory infringement to focus on intent to induce, and reinterpreting *Sony* to forbid presuming intent from mere design or distribution, the Supreme Court appears to have sought an elegant way of preserving *Sony* while capturing "bad" actors. Under this approach, the *Sony* safe harbor could apply to the provision of services as well as the distribution of products. If the service were capable of noninfringing uses, the service provider would incur liability only if it manifested unlawful intent in some manner beyond providing the service. Of course, an Internet service provider would still be entitled to 17 U.S.C. § 512's limitations on remedies, if the provider satisfied Section 512's requirements.

Significantly, under the *Grokster* Court's new definition of contributory infringement, inducement is not a separate cause of action. Rather, it is a specific form of contributory infringement that applies to technology providers. And inducement is not an exception to the *Sony* safe harbor. To the contrary, *Sony* is a limitation on inducement liability. That is, *Sony* (as interpreted by *Grokster*) teaches that a court cannot impute intent to infringe by virtue of the distribution of an infringing technology if that technology is capable of substantial noninfringing uses. Instead, the intent must be shown "by clear expression or other affirmative steps taken to foster infringement...." *Id.* at 2780.

The Contours of Inducement

The Supreme Court defined the inducement rule as: "one 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." *Id.* What "clear expression or other affirmative steps" are sufficient to manifest an intent to induce infringement? The Court did not provide a definitive answer; instead, it provided a series of clues.

One the one hand, the Court wrote that mere distribution, even with knowledge of infringing potential or actual infringement, would not be enough to subject the distributor to liability. Nor "would ordinary acts incident to product distribution, such as offering technical support or product updates, support liability in themselves." *Id.* at 2780. Further, the Court indicated that a "classic case" of inducement would involve advertising an infringing use or instructing how to engage in an infringing use. *Id.* at 2779.

On the other hand, the Court also made clear that "[p]roving that a message was sent out … is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts…." *Id.* at 2781. Internal communications can also demonstrate the defendant's "unlawful purpose." *Id.* The Court then provided three examples of "other evidence" that demonstrated that the defendants "acted with a purpose to cause copyright violations…." *Id.* These fact-specific examples of other evidence are troubling, and could lead to wasteful litigation if the federal courts interpret *Grokster* overbroadly.

The examples are:

- Evidence that showed that "each company aimed to satisfy a known source of demand for copyright infringement…." *Id.* While this objective certainly reflects unlawful purpose, the evidence the Court cited is quite thin – e.g., constant reference in internal email to Napster, or Grokster's derivation of its name from Napster.

- The defendants' failure to attempt to develop a filtering tool to diminish infringing activity. This hints at inviting courts to scrutinize technology companies' design decisions.

- Evidence that the defendants' profitability relied on infringing conduct. *Id.* Because the defendants adopted an advertising-based business model, they generated more revenue as more people used the software, and the software's utility for infringement drove its high volume use. This focus on an advertising based business model could be problematic for the many Internet companies that rely on advertising or volume-based revenue.

To be sure, the opinion does include language that mitigates these examples. "[I]n the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device was otherwise capable of substantial noninfringing uses. Such a holding would tread too closely to the *Sony* safe harbor." *Id.* n.12. Similarly, with respect to the business model, the Court says that "[t]his evidence alone would not justify an inference of unlawful intent…." *Id.* at 2782.

Moreover, the Court's rhetoric suggests that the intent to encourage infringement must be blatant: "[i]f liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was." *Id.* Similarly, the Court referred to "unequivocal indications of unlawful purpose." *Id.* at 2781.

Thus, it is unlikely that a person can be liable for inducement if he advertises a use that he reasonably believes to be a fair use, but which turns out to be an infringement. The language of the opinion suggests that liability should attach only if the defendant had the specific intent to cause infringement: "the object of promoting its use to infringe," *id.* at 2770, "their principal object was use of their software to download copyrighted works," *id.* at 2774, "an actual purpose to cause infringing use," *id.* at 2778, "statements or actions directed to promoting infringement," *id.* at 2779, "purposeful, culpable expression and conduct," *id.* at 2780, "a message designed to stimulate others to commit violations," *id.*, "acted with a purpose to cause copyright violations," *id.* at 2781, "a principal, if not exclusive, intent on the part of each to bring about infringement," *id.*, "intentional facilitation of their users' infringement," *id.*, "unlawful objective," *id.*, "the distributor intended and encouraged the product to be used to infringe," *id.* at 2782, n.13, "a purpose to cause and profit from third-party acts of copyright infringement," *id.* at 2782, and "patently illegal objective." *Id.*

Furthermore, the Court places the inducement rule in a framework that expressly seeks to balance the goals of copyright protection and technological innovation. The Court makes clear that it is targeting only "purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 2780. Hopefully, lower courts will take this admonition seriously, and will not impose inducement liability promiscuously. Indeed, an argument could be made that since these other forms of evidence are "complements to direct evidence of unlawful objective," *id.* at 2781, summary judgment must be granted absent direct evidence of the classic sort: a public message such as an advertisement encouraging infringement.

Nonetheless, the possibility remains that a court could view an advertising-based business model taken together with a failure to filter as sufficient grounds to find inducement liability – or at least sufficient grounds to allow extensive discovery of internal communications to uncover an expression of intent to promote infringement. While these indicia would not appear to satisfy the Court's call for "unequivocal indications of unlawful purpose," trial courts confronted by sympathetic plaintiffs and unsympathetic defendants may interpret inducement over broadly. Such misinterpretations probably will be corrected by dispassionate courts of appeals, but by then the damage to a thinly capitalized defendant will have been done.

Another troubling feature of the inducement theory articulated by the *Grokster* Court is that "the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use." *Id.* at 2782, n.13. This means that injunctive relief can extend beyond the affirmative inducing act and encompass product distribution. Moreover, the Court rejected defendants' argument that inducing conduct with respect to earlier releases of the software should not be attributed to the current release. Evidently, the Court viewed the current release as "fruit of the poisonous tree."

Grokster* on *Sony

By finding direct evidence of inducement, the *Grokster* Court managed to decide the case without interpreting *Sony*'s staple article rule. But interpretation of *Sony* can still be relevant to inducement. *Grokster*'s conclusion that *Sony* "barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution," *id*. at 2778, suggests that if a technology is *not* capable of substantial noninfringing uses, then intent to promote infringement can be inferred from the act of design and distribution. When direct evidence of inducement is present, as in *Grokster*, a court need not explore whether the technology is capable of substantial noninfringing uses, because liability can be imposed by virtue of the direct evidence of inducement. If, however, such evidence is absent, a court would need to wade into the staple article rule to determine whether to infer intent from the distribution of the technology.

While Justice Souter's opinion for a unanimous Court did not consider the staple article rule, the two concurring opinions offered different interpretations of the phrase "capable of substantial noninfringing uses." Justice Breyer, in an opinion joined by Justices O'Connor and Stevens, argued that *Sony* prevents contributory liability for product distribution "unless the product in question will be used almost exclusively to infringe copyrights…." *Id*. at 2791. In his view, this standard would be met if 10% of the uses were noninfringing.

Justice Ginsburg, in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, rejected this interpretation as departing from the facts and holding of *Sony*. Nonetheless, Justice Ginsburg appeared to require a showing of overwhelming infringing use before imposing liability on the distributor: "there was evidence that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe, … and that this infringement was the overwhelming source of revenue from the products…." *Id*. at 2786. She acknowledged that the absolute number of noninfringing uses of defendants' software may be large, but those uses were "dwarfed" by the number of infringing uses. *See id*. While Justice Ginsburg did not offer a specific benchmark, "overwhelming" infringing use represents a far more stringent standard than one requiring only "that a product [be] used 'principally' for infringement…." *Id*. at 2778. This weaker threshold of 50% was advocated by the entertainment industry. *Id*.

In other words, while the concurring opinions disagreed with one another, they both articulated a narrower standard than that sought by the entertainment companies. Six justices would require a showing of at least overwhelming infringing use that dwarfs noninfringing use before denying the distributor *Sony*'s safe harbor.[2] This narrow

[2] Since *Grokster*, however, Chief Justice Rehnquist passed away and Justice O'Connor announced her retirement.

standard ensures that *Sony* "leaves breathing room for innovation and a vigorous commerce." *Id.*

At the same time, advocates of a sweeping, Breyer-like interpretation of *Sony* were also disappointed. With Justice O'Connor's retirement, only two sitting justices seem willing to sanction products with noninfringing uses of just 10%, even if that 10% represents millions of uses. Moreover, even these two justices believe that *Sony* does not protect distributors who intend to induce infringement.

II. UNITED MUSIC v. SHARMAN

Just over two months after the U.S. Supreme Court decided *MGM Studios v. Grokster*, the Federal Court of Australia on September 5, 2005, decided *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.*, [2005] FCA 1242. Justice Wilcox of the Federal Court held that certain defendants associated with Sharman Networks were liable for "authorization" of copyright infringement as a result of having distributed the Kazaa file-sharing software. Notwithstanding substantial differences between the legal systems and copyright jurisprudence in Australia and the United States, *Grokster* and *Sharman* demonstrate remarkable similarities in analysis.

Summary of Decision

The copyright holders advanced several causes of action against Sharman, the owner of the peer-to-peer file sharing service Kazaa: violations of the Australian Trade Practices Act of 1974 and the Fair Trading Act of 1987, conspiracy, and claims of copyright infringement under the Australian Copyright Act of 1968, as amended in 2000. Justice Wilcox of the Federal Court of Australia rejected all claims except copyright infringement. As to infringement, he found that six of the named respondents had "authorized" infringement of 98 specific sound recordings listed in the decision.

Australian copyright law addresses secondary liability through statute, in Section 101(1) of the Copyright Act of 1968. Section 101(1) proscribes direct "authorization" of infringement. *Sharman* ¶¶ 357-58. Australia's Copyright Amendment (Digital Agenda) of 2000 elaborated on this prohibition, creating a three-prong inquiry:

> (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
> (b) the nature of any relationship existing between the person and the person who did the act concerned;
> (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Id. ¶ 359. The court added that, although not a statutory element, "[k]nowledge, or lack of knowledge, is an important factor in determining whether a person has authorized an infringement." *Id.* ¶ 370.

The court made clear that "express or formal permission or sanction… is not essential to constitute an authorization." *Sharman* ¶ 367. Thus, authorization extends beyond copying which is explicitly directed, and includes "inactivity or indifference… from which an authorization or permission may be inferred." *Id.* ¶¶ 366-67.

From a U.S. perspective, the term "authorization" is confusing, for it refers to copying *un*authorized by the copyright holder. As discussed above, secondary copyright liability also exists in the United States, but as judge-made rather than statutory doctrines. This absence of statutory secondary liability language in the U.S. Copyright Act led Justice Wilcox to observe that "much of the Australian statutory law had no counterpart in United States law." *Sharman* ¶ 30.

After a lengthy exploration of Australian precedent applying the principle of authorization, Justice Wilcox held that the Sharman parties qualified for a statutory safe harbor enacted in 2000, Section 112E. Under the safe harbor, a person is not to be held responsible for authorization of infringement merely because it provided the facilities used to infringe. *Id.* ¶ 396. Nevertheless, Justice Wilcox determined that Section 112E "does not confer general immunity against a finding of authorization." *Id.* ¶ 399. Because Justice Wilcox found "something more" – additional evidence of authorized infringement – the Section 112E defense did not exonerate the Sharman parties from liability.

Justice Wilcox relied on various facts to find authorization of infringement. Aside from statements on the Kazaa website admonishing users against infringing copyright, and statements in the Kazaa software's end user license agreement, Sharman parties had not otherwise engaged its users an effort to limit copyright infringement by users. The decision states that Sharman could have taken certain actions to restrict infringement. It contains a lengthy discussion about the viability of keyword filtering of the filenames of shared content. *Id.* ¶¶ 254-94. Similarly, the decision discusses at length the possibility of using "gold files." These files, provided by Sharman's co-respondent Altnet, represented digital rights management (DRM) protected files. Experts for the copyright holders suggested that Sharman could have "flooded" search results for copyright-protected content with these gold files, which could have either been legitimate, DRM-protected files, or empty 'dummy' files. *Id.* ¶¶ 300-310. In light of his conclusions regarding these strategies, Justice Wilcox found that Sharman had the "power" to prevent or reduce infringement, but did not. *Id.* ¶ 411.

On the contrary, because Sharman relied upon advertisement revenue, it was "understandable that the respondents would wish to increase file-sharing." Citing Kazaa's "Join the Revolution" ad campaign, Justice Wilcox concluded that Sharman knew that users were infringing copyrighted content. While noting that the "Kazaa Revolution" promotions did not advocate directly the infringement of copyright, Justice Wilcox determined that Sharman had endeavored to popularize unlawful file-sharing by imbuing it with a sense of "cool." *Id.* ¶¶ 190-92, 404.

Based upon these findings, Justice Wilcox held that the Sharman parties infringed by authorizing Kazaa users to copy recordings and communicating them to others, and by "entering into a common design to carry out, procure, or direct" that authorization. *Id.* ¶ 517.

In issuing an injunction in favor of the copyright holders, Justice Wilcox stated that "[t]here needs to be an opportunity for the relevant respondents to modify the Kazaa system in a targeted way, so as to protect the applicants' copyright interests (as far as possible) but without unnecessarily intruding on others' freedom of speech and communication. The evidence about keyword filtering and gold file flood filtering, indicates how this might be done." *Id.* ¶ 520. Thus, the ruling provided for a period of time in which the parties could develop a protocol to filter infringing material, so as to preserve the system for its recognized non-infringing uses. The court indicated that it would rule on damages at a future date.

***Sharman* and *Grokster* Compared**

Notwithstanding the differences in the copyright systems of Australia and the United States, the reasoning of the *Grokster* and *Sharman* courts is remarkably similar. Both courts found that the users of the file sharing software engaged in direct infringement, and considered whether the distributor of the software was liable for the users' infringement. In the United States, the court asked whether Grokster contributed or induced the infringement; in Australia, the court examined whether Sharman authorized the infringement. Although the courts phrased the questions differently, the inquiry was the same.

In conducting this inquiry, both courts recognized that the act of distributing the software was insufficient to trigger liability. In Australia, Section 112E of the Copyright Act provides that a person does not authorize an infringement "merely because" he has provided the facilities used by others to engage in infringement. Likewise, the *Grokster* court found that its 1984 *Sony* decision "barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use….." 125 S. Ct. at 2778.

For both courts, however, a distributor could still incur liability if it engaged in "something more" that authorized or induced the infringement. *See Sharman* ¶ 401. The "something more" in both cases were strikingly similar. In *Sharman*, the court found that Sharman included on its website exhortations to users to "Join the Revolution" by increasing their file-sharing in the face of the record companies' opposition to file sharing. While the website did not expressly encourage the infringement of copyright, the website "scorns the attitude of record an movie companies in relation to their copyrighted works." To a young audience, "the 'Join the Revolution' website material would have conveyed the idea that it was 'cool' to defy the record companies and their stuffy reliance on their copyrights." *Sharman* ¶ 405.

By the same token, the *Grokster* Court stated that "the classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." 125 S. Ct. at 2780. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. Additionally, Grokster and StreamCast aimed to "satisfy a known source of demand for copyright infringement, the market comprising former Napster users." *Id.* at 2781. For example, StreamCast advertised its services to Napster users, and made clear that its software could perform the same functions as Napster.

In addition to advertising campaigns that indirectly promoted infringement, both courts highlighted the defendants' failure to adopt available technological measures to prevent infringement. Once aware that its software was being used to infringe, "Sharman took no steps to include a filtering mechanism in its software, even in software intended to be provided to new users. There is no credible evidence that filtering was ever discussed." *Sharman* ¶ 407. Likewise, neither defendant in *Grokster* "attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software." 125 S. Ct. at 2781. The Court found that this failure "underscores Grokster's and StreamCast's intentional facilitation of their users' infringement." *Id.*

Finally, both courts recognized that the defendants benefited financially from their users' infringement, and had no incentive to prevent it. The Sharman court noted that had efforts to prevent infringement been successful, "they would greatly reduce Kazaa's attractiveness to users and, therefore, its advertising revenue potential." *Sharman* ¶ 407. The *Grokster* Court observed that "[s]ince the extent of their software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing." 125 S. Ct. at 2782.

III. INTERNATIONAL REVERBERATIONS

Although Justice Wilcox stated that the litigants' "comments confirmed my impression that the differences, both legal and factual, are such as to render *Groskter* of little assistance to me," *Sharman* ¶ 30, it is safe to assume that Justice Wilcox's reasoning was influenced in some manner by Justice Souter's opinion in *Grokster*. Still, it is premature to conclude that a global consensus is emerging on this issue. First, Sharman may appeal the Australian decision to a higher court, which may reverse the trial court's ruling. Second, in December 2003, the Supreme Court of Netherlands affirmed a lower court ruling that Kazaa was not liable for the infringing conduct of its users.

Nonetheless, technology companies around the world should not ignore *Grokster*. It unquestionably will have a gravitational effect, even in countries with frameworks for secondary liability different from those of the United States. Accordingly, all technology companies, including those that do not participate in the United States market, should take measures to avoid the appearance of inducing users to infringe. These include:

- Take care in advertisements, product names and descriptions, and manuals not to appear to encourage infringing activity.

- Obtain opinion letters from copyright counsel concluding that uses encouraged through public communications are not infringing.
- Include statements in manuals, end-user licenses, etc., encouraging users not to infringe.
- Sensitize employees to be careful in internal communications – to avoid even joking references to infringing uses of the product.
- Explore and document the feasibility of reducing infringement by technological measures.

Technology companies should remember that after the Supreme Court issued its decision, Grokster agreed to pay the entertainment companies $50 million and went out of business.