

WHERE DO WE GO FROM HERE?
THE IMPLICATIONS OF MGM v.
GROKSTER

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Today's Presentation

- Life Before *Grokster*
- *Grokster*
- Life After *Grokster*

LIFE BEFORE GROKSTER

Life Before Grokster ...

Courts developed common law theories of indirect liability for copyright infringements of others

- Contributory copyright infringement
- Vicarious copyright infringement

Life Before Grokster ...

Contributory Copyright Infringement

- Elements of Cause of Action
 - Direct infringement by a primary party
 - Knowledge on the part of defendants of primary infringement (actual knowledge or constructive knowledge)
 - Material contribution by the defendants to the infringement
- “Substantial non-infringing use” defense (Sony)

Life Before Grokster ...

Vicarious Copyright Infringement

- Elements of Cause of Action
 - Direct infringement by a primary party
 - Defendants receive a direct financial benefit from the infringement (ad revenue, etc.)
 - Defendants had a right and ability to supervise the infringing contract
- “Substantial non-infringing use” defense (Sony)

Life Before Grokster ...

- *Sony* (1984) --- Supreme Court held Sony not liable for contributory copyright infringement for manufacturing and selling Betamax VTR
- *Napster* (2001) --- Ninth Circuit construed *Sony* to apply to knowledge element of contributory copyright infringement. Napster lost big.
- *Aimster* (2003) --- Seventh Circuit found Aimster's service to be contributory and vicarious infringer.

GROKSTER

Grokster ...

Justice Souter --- “We hold 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.”

Grokster ...

- **“Classic” instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations**
- **Court found three categories of “evidence” that Grokster and Streamcast acted with a purpose to cause copyright violations by use of software suitable for illegal use**
 - P2P distributors showed themselves to be aiming to satisfy the market comprising former Napster users (A known source of demand for copyright infringement)
 - Neither defendant attempted to develop filtering tools or other mechanisms to diminish the infringing activity
 - Defendants make money by selling advertising space, then by directing the ads to the screens of computers employing their software

LIFE AFTER GROKSTER

Day 39 A.G. ---What We Know and
What We Don't Know

What We Know ...

Sony is still good law

- If there is no “inducement,” there is no contributory or vicarious infringement if the product is capable of substantial non-infringing use

What We Know ...

We Have a New/Revitalized “Inducement” Theory of Liability For Copyright Infringement

- Concept Borrowed from Patent Law
- Federal Circuit: “We have construed that statute to require proof of intent, although there is a “lack of clarity concerning whether the required intent must be merely to induce the specific acts [of infringement] or additionally to cause an infringement. ... Nevertheless, a patentee must be able to demonstrate that the alleged induce had knowledge of the infringing acts in order to demonstrate either level of intent.”
(*Mercexchange v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005))

What We Know ...

Peer-to-Peer Technology Is Not Illegal ... Yet

- Supreme Court decision focused on conduct, not on technology
- Congress has threatened to act if piracy and pornography concerns are not addressed

What We Know ...

The Battle Over File Sharing Rages On

- RIAA and MPAA continue to sue individuals
- Some P2P distributors (e.g. Trusty Files) are requiring “clickwrap” promise not to infringe
- Some P2P networks are moving toward authorized (licensed) model

What We Know ...

New Battlegrounds Are Forming

- Place shifting (Slingbox, Orb Networks)
- Darknets (Trusted/Closed P2P Networks)

What We Know ...

STEALING IS STILL WRONG!!!

- Does society need to be educated as to the difference between right and wrong online?
- Why does the illegal conduct persist in the face of the threat of lawsuits and adverse publicity?

What We Don't Know ...

How Much Non-Infringing Use is “Substantial”?

- Ginsburg --- Needs to be a significant (but undefined) % of users. 10% probably would not be enough.
- Breyer --- 10% probably would qualify as substantial
- *Sony* --- Timeshifting is a substantial non-infringing use

What We Don't Know ...

What Does “Right and Ability to Supervise” Mean?

- Lower courts in Grokster rejected argument that ability to redesign technology equates with ability to supervise.

What We Don't Know ...

How Should We Be Advising Clients?

- Are disclaimers or warnings not to use the technology to infringe enough? Clickthroughs?
- Can you avoid “inducement” by ignoring what customers are doing with your technology?
- Should you build in technology solutions when feasible?
- How much non-infringing use is “substantial”?

THE END