

# MGM v. Grokster

If you sell or make devices that are used to make illegal copies, are you yourself doing anything wrong?

There have now been several high-profile cases about music downloading, and this is the most recent.

In this case, the court created a new test of “inducement” asking whether your business encouraged people to violate copyright.



# History

If a device has only illegal uses, its sale can be prohibited. For example, cable TV descramblers and radar detectors are illegal in (respectively) all or some states.

If a device has primarily legitimate uses, its sale is OK. Baseball bats are occasionally used by muggers, but their primary purpose is to play baseball.

More relevant to copyright, photocopier machines are used mostly to copy things you've

What about devices which are often used illegally but have some legal uses?

# Sony v. Universal

This is the most important case: whether VCRs could legally be sold. In 1984 the Court held that a device was legal if it had “significant non-infringing uses”. VCRs, of course, are often used (a) for personal videos (parents taping their children and sending copies of the video to the grandparents) and (b) for time-shifting, which the Court felt was legal as fair use.



# A&M v. Napster

Napster was held illegal; the court held that it knew there were copyright infringements on its system, and that it was responsible for policing. Napster had a continuing relationship with its clients, since it had a large database of music locations which people regularly searched.

As a result the music file-sharers moved to software configurations with no centralized list of files, based on software such as Gnutella or Kazaa.

# Now Grokster

Grokster did not maintain a centralized database and thus tried to argue that it didn't know whether its users were trading copyrighted or non-copyrighted material. (This does seem a little disingenuous). The Court noticed advertising in which Grokster advertised itself as the next Napster and urging people to use Grokster as a music source.

The Court condemned Grokster largely on what seems to me a matter of bad faith: Grokster was encouraging (“inducing”) people to use it for copyright infringement. The Court was split on whether a service similar to Grokster that did not encourage its users to do anything and could not be shown to know of infringements and profit from them would be legal.

# Chilling effects?

Does this case imply a check on new technology? Under *Sony v. Universal*, you could make technology as long as you could point to significant “non-infringing” use. Now you also have to be sure that you can not be shown to be “inducing” illegal copies. The fear of some technologists is that there will be a burden on them to show that they are taking all possible steps to discourage copying. The decision requires, in order to outlaw a device or technology, an affirmative step by its maker to encourage copyright infringement. It is however unclear how dramatic that step must be: whether, for example, one corporate e-mail will be enough, or whether there must be widespread advertising. We don't know yet.