

## THE GROKSTER SCORECARD

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*MGM v. Grokster*, now before the U.S. Supreme Court, has provoked a torrent of amicus briefs: 23 in support of the entertainment industry Petitioners, 25 in support of the software company Respondents, and 7 in support of neither party. The large volume of briefs reflects the high stakes involved. On the one hand, the entertainment industry believes it will suffer irreparable injury from Internet based copyright infringement if it cannot prevent the distribution of peer-to-peer software by companies such as Grokster. On the other hand, the information technology industry feels that the tests for secondary copyright infringement liability advocated by Petitioners and their amici will significantly impede innovation. Public interest groups concerned about the dissemination of harmful material over the Internet line up behind the entertainment industry (which is ironic, given that these same groups often criticize the content distributed by the entertainment industry). At the same time, public interest groups that represent consumers or promote free speech tend to support Grokster.

The attached charts attempt to summarize the various positions taken by the parties and the amici.

The central question is how does the “*Betamax* Rule” fashioned by the Supreme Court in the 1984 case concerning Sony’s *Betamax* video cassette recorder apply to the facts of this case. In *Betamax*, the Supreme Court stated that a manufacturer of a product is not liable for infringing uses of the product so long as the product was capable of substantial noninfringing uses. In their cert. petition, the Petitioners argued that there was a split between the Ninth Circuit’s interpretation of *Betamax* in this case, and the Seventh Circuit’s interpretation of *Betamax* in *In re Aimster*. Petitioners further suggested that the Seventh Circuit’s interpretation was superior to the Ninth Circuit’s. Interestingly, notwithstanding this framing of the issue, few of the 53 briefs filed fully endorse either circuit’s interpretation.

### TOPSIDE BRIEFS

#### **A. The *Betamax* Rule.**

Among the “topside” briefs – the briefs filed by amici supporting Petitioners or supporting neither party – five basic interpretations of *Betamax* were advanced.

**1. Plain Language.** Associations representing technology companies argued that the “capable of substantial noninfringing use” means exactly that: “if there exists a reasonable possibility that there will be substantial current or future use of a technology for noninfringing activities, the provider of the technology is not secondarily liable.” This interpretation recognizes that the current or future noninfringing uses might well be well a minority of the uses.

**2. Principal or Primary Use.** The motion picture and recording industry Petitioners and several of their entertainment industry amici argued that the *Betamax* safe harbor applied only if lawful uses predominate over unlawful uses – in other words, only if a majority of actual uses were noninfringing.

**3. *Aimster*.** The songwriter Petitioners and a few amici appeared to support the *Aimster* interpretation: that liability attaches if there are substantial infringing uses and the provider of the technology fails to implement available means to prevent the infringement that are not disproportionately costly. Thus, even if a majority of the uses are noninfringing, liability could attach if the provider did not take

sufficient steps to prevent infringement. In this vein, several amici argued that filtering technology currently exists that could reduce infringement without interfering with legitimate uses.

**4. Willful Blindness.** Several amici argued that the *Betamax* defense should not apply when a provider took affirmative acts to evade responsibility for infringement, or when the provider had actual knowledge of the infringing activity and profited from it.

**5. Sliding Scale.** The Solicitor General advocated different tests for liability depending on the relative amount of infringement. On the one extreme, when a technology is overwhelmingly used for infringing purposes, and the commercial viability of the product is dependent on the infringing uses, there should be liability. On the other hand, there should be no liability if the primary use of the product is noninfringing. In between these extremes – when infringing uses are predominant but not overwhelming – a court should consider “subsidiary indicia” such as what steps the seller could have taken – but didn’t – to eliminate infringing. This is somewhat different from the *Amster* approach, because *Amster* considers preventative measures even when the predominant use is noninfringing, while the Solicitor General would consider such measures only when the predominant use is infringing. The motion picture and recording

industry Petitioners seem to agree with the Solicitor General on this point.

#### **B. Inducement.**

Many topside amici asserted that certain conduct that induces infringement falls outside of the scope of the *Betamax* defense, and that the provider of the technology could incur liability for engaging in such conduct. However, there were significant disagreements concerning the type of conduct that might trigger liability.

#### **1. Inducing Acts Other Than Design and**

**Distribution.** Several of the technology associations that advocated a plain language reading of *Betamax* asserted that a provider could incur liability for acts other than the design and distribution of the technology that encouraged infringement. For example, instructions on how to use the technology to engage in specific acts of infringement could lead to liability.

#### **2. Inducing Acts Including Design and**

**Distribution.** Petitioners and entertainment amici argued more broadly that if a provider engaged in a pattern of encouraging or assisting infringement, where part of the pattern was providing a technology with certain functionalities, liability could attach. Several amici stated that a business model based on encouraging mass infringement would lead to liability. To some extent this pattern of encouragement

approach is predicated on the existence of a continuing relationship between the provider and the user, which was absent in *Betamax*.

#### **C. Rejection of *Betamax***

Several law professors and economists argued that *Betamax* was wrongly decided, or should be limited to its facts. In its place, the Court should adopt a comprehensive balancing test, or perform a cost-benefit analysis regarding design choices.

#### **D. Vicarious Liability**

Several topside briefs addressed vicarious liability. Some amici argued that *Betamax* provides a defense to vicarious liability as well as contributory infringement. Others argued that *Betamax* does not provide a defense to vicarious liability because the right and ability to control infringement implies a continuing relationship. Several amici argued that the ability to redesign a product to prevent infringement satisfies the “right and ability to control” prong for vicarious liability. Thus, a provider has the right and ability to control misconduct that it can reasonably foresee and which it can reasonably combat with available technology. As noted above, several amici argued that effective filtering technologies now exist.

## **BOTTOMSIDE BRIEFS**

In general, the bottomside briefs were far more consistent with one another than were the topside briefs.

### **A. The *Betamax* Rule.**

As noted above, the bottomside briefs did not endorse the Ninth Circuit's rather idiosyncratic interpretation of *Betamax*. Instead, they universally adopted a plain language interpretation of the "capable of substantial noninfringing use" rule. They then variously argued that 1) the rule so interpreted is good for innovation, free expression, democracy, and education; 2) the other interpretations advanced by Petitioners and their amici have no basis in law; 3) the other interpretations of *Betamax* would harm innovation and free expression; 4) using rigorous economic analysis rather than anecdotal evidence, the overall harmful impact of P2P software is far from clear; and 5) reinterpreting the *Betamax* rule would have little positive impact on unlawful P2P file sharing, while it will have a significant negative impact on lawful activity. Accordingly, Respondents asked the Court to respect *stare decisis* and not overturn or modify the *Betamax* rule.

Respondents and their amici then argued that because the software distributed by Respondents, and P2P software generally, is capable of substantial

noninfringing uses, the Ninth Circuit's decision should be affirmed.

Respondents and some of the amici further argued that only Congress has the institutional competence and the legal ability to modify and expand principles of secondary copyright liability.

### **B. Inducement**

Some amici argued that the inducement liability advocated by the Petitioners and their amici did not exist under current copyright principles. Other amici argued that even if such a theory did exist, the allegedly inducing acts mentioned by Petitioners all related to earlier releases of the software which are still before the district court and therefore are not before the Supreme Court at this time.

### **C. Vicarious Liability**

Numerous amici asserted that *Betamax* provided a defense to vicarious liability. Others rejected Petitioners' argument that the ability to redesign constitutes the right and ability to control infringement. Some amici responded to the topside argument that existing filtering technologies could effectively reduce infringement. These amici observed that the filters could be easily circumvented and thus would have little impact on infringement.

### **D. Other Arguments**

A group of law professors questioned the premise that underlay this entire case: that file trading constituted an infringement. They argued that in this and other file sharing cases (*Napster* and *Aimster*), no direct infringers had been named as defendants, and thus the issue of whether file trading was an infringement had not been fully explored. They further argued that many acts of file trading could constitute a fair use.

Finally, two amici argued that the plain language interpretation of the *Betamax* rule was consistent with international law. The copyright and IP treaties to which the United States is a party are silent on the issue of secondary liability; and the secondary liability regimes in other countries are no stricter, and often are more lenient, than the *Betamax* rule.

TOPSIDE GROKSTER BRIEFS

WHEN DOES BETAMAX APPLY				CONDUCT OUTSIDE OF BETAMAX		FORGET BETAMAX	VICARIOUS LIABILITY				
Not If There is Actual Knowledge or Willful Blindness	Not If There Are Substantial Infringing Uses and Available Means to Prevent Them	Principal or Primary Use Noninfringing	Reasonable Possibility of Substantial Noninfringing Uses	Merely Capable of Substantial Noninfringing Uses	Intentional Facilitation of Infringement, Including Design Decisions	Conduct Other Than Design That Encourages Infringement	Betamax No Defense	Ability to redesign is control	Ability to redesign is not control	Betamax provides defense	
<p><b>NAB</b> Taking affirmative steps to evade responsibility for infringement, while profiting from it, leads to liability.</p> <p><b>Country Music Association</b> <b>NARM</b> <b>State AGs</b> Betamax does not apply when defendant was actively aware of and intended infringement</p>	<p><b>Almister</b> <b>Supported By:</b> <b>VSDA2</b> <b>Songwriter Petitioners</b></p> <p><b>Sports Leagues</b> Different facts between here and Betamax justify Almister approach</p> <p><b>NARM</b> <b>Almister</b> <b>Opposed By:</b> <b>BSA</b> <b>DIMAN/C</b> <b>IEEE</b></p>	<p><b>Petitioners</b> (also: when primary use infringing and there is a way to block them without affecting noninfringing uses) - Commercial viability not relevant</p> <p><b>ASCAP/EMI</b> - Noninfringing uses must be probable, not merely possible - Liability if infringing uses predominate over lawful ones</p>	<p><b>DIMAN/C</b> If there exist a reasonable possibility that there will be substantial current or future use of a technology for noninfringing activities, the provider of the technology is not secondarily liable.</p>	<p><b>BSA</b> Where technology is capable of substantial or commercially significant non-infringing uses, and distributor has no direct involvement with any infringing activity, then manufacture, distribution, general advertising customer support, product manuals, upgrades).</p> <p><b>Hollaar, IPO</b> potential, not imaginary or illusory</p> <p><b>AIPLA</b> "a potential noninfringing use is not necessarily deficient, a noninfringing use that is merely a physical possibility may not be sufficient."</p>	<p><b>AIPLA</b> Active inducement when distributor intends product to be used to infringe, even when product has substantial non-infringing uses (e.g., supply to known infringer) - Knowledge of infringement suggests intent to facilitate infringement</p> <p><b>Hollaar</b> Intentional and knowing inducement of infringement - applies to acts beyond mere distribution.</p> <p>Circumstantial evidence includes: - reliance on infringement for commercial viability; - instruction on infringing use - adding features to conceal infringement - replacing an infringing system</p>	<p><b>IEEE</b> (i) an overt act that actually induces another to engage in infringing conduct exclusive from mere provision of a dual use technology (or incidental conduct, e.g., general advertising or product information); (ii) knowledge that the conduct induced constitutes infringement; (iii) internet that the induced acts would occur.</p> <p><b>IPO</b> - Objective action (objectively promotional behavior) that encourages infringement (safe harbor for honest developer of infringement neutral systems) - Subjective intent that infringement would result</p> <p><b>BSA</b> Activities beyond development, general advertising, distribution, and ordinary customer service that entail knowing and material encouragement of non-infringing uses must be both</p>	<p><b>Menell/Nimmer</b> - Supreme Court should not have imported § 271(c) from Patent Act - Instead, court should adopt comprehensive balancing test: • knowledge of infringing use • designed purposefully to evade liability • can non-infringing use be achieved through other, less infringing, means? • cost of enforcement</p> <p><b>Arrow/Ayres</b> - Betamax rule gives manufacturers no incentive to deter infringement even when deterrence could be accomplished at low cost and without significant interference with non-infringing uses - Betamax mistakenly considers non-infringing uses in isolation, rather than evaluating them in light of substitute mechanisms already available to accomplish the same ends</p> <p><b>Gibson</b> - Technology has rendered Betamax obsolete - Under Betamax, infringement uses must be both</p>	<p><b>Petitioners</b> had control over users to whom outsourced indexing function; elimination of log-in feature doesn't eliminate control <b>Kids First</b> Continuing relationship with infringers triggers liability; if lacked ability to supervise it was out of choice not technological constraints - technological advancements eliminate all or nothing Betamax choice</p>	<p><b>Petitioners</b> • Financial benefit creates obligation on business to adopt measures to prevent infringement. • Failed to implement with respect to both existing and new ones</p> <p><b>State AGs</b> P2P network designer has the right and ability to supervise and control misconduct that it can reasonably foresee and which it can reasonably combat with available technology. - Software code regulates conduct (citing Lessig) - Affirmatively choose not to present illicit sharing - choose not to supervise and control at code level - Product liability model considers</p> <p><b>Mesh.com:</b> <b>Snocap:</b> <b>Audible Music</b> Effective filtering technology now exists</p> <p><b>Directors Guild</b></p>	<p><b>SG</b> <b>DIMAN/C</b> <b>AIPLA</b></p>	<p><b>BSA</b> <b>DIMAN/C</b> <b>AIPLA</b></p>
<p><b>SG's Sliding Scale</b> primary purpose noninfringing = no liability</p> <p>50% &gt; x &gt; 10% subsidiary indicia</p> <p>a) how product marketed b) efficiency of product for noninfringing use c) what steps may seller take to eliminate or discourage infringement</p>		<p>overwhelming infringing use and commercial viability dependent on infringing use = liability</p>	<p>But not overwhelming infringing use: NAB, ATR, DPR, International Rights Owners</p>								

WHEN DOES BETAMAX APPLY				CONDUCT OUTSIDE OF BETAMAX		VICARIOUS LIABILITY					
Not If There Is Actual Knowledge or Willful Blindness	Not If There Are Substantial Infringing Uses and Available Means to Prevent Them	Principal or Primary Use Noninfringing	Reasonable Possibility of Substantial Noninfringing Uses	Merely Capable of Substantial Noninfringing Uses	Intentional Facilitation of Infringing Design, Including Design Decisions (unless takes steps to reduce infringement)	Conduct Other Than Design That Encourages Infringement	FORGET BETAMAX	Betamax No Defense	Ability to redesign is control	Ability to redesign is not control	Betamax provides defense
			<p><b>PFF</b> Business should be held liable if it encapsulates a technology w/in a web of practices that make the enterprise deliberately dependant on infringing Business practices include: - default settings - performance enhancements if upload more - continuing relationships</p>	<p><b>ATR</b> Business model built on encouraging mass theft of copyrighted works - designed network to emulate Napster - modify to make detection more - aids and abets unlawful conduct - more revenue if more infringement</p> <p><b>NARM</b> Business model based on infringement - provide site and facilities for infringement - conscious effort to evade liability</p>	<p><b>Macrovision</b> • Provide services over which they maintain and exercise control on ongoing basis</p> <p><b>DPR</b> • defendants took affirmative steps to assist and encourage infringement • configured service to facilitate illegal copying • limit own ability to prevent infringement • helpdesk, marketing campaign "design, marketing, and support activities directly assist infringers"</p>	<p>technology for particular infringement</p> <p><b>DIMANC</b> Sony does not shield vendor who, with knowledge of infringement, actively encourages user to infringe copyright</p> <p>But- 1) no liability merely because company profits from infringing use 2) designer's purpose irrelevant 3) ongoing relationship does not constitute encouragement 4) No act relating to design, manufacture, general advertising, routine support, or distribution should lead to liability</p>	<p>substantial and commercially significant - Betamax does not apply where infringing activity known and principal use - design choices should trigger liability; cost/benefit analysis must be employed</p>	<p>Liability for active role in inducing infringement. - marketed networks as optimally suited for infringement. - advised users how to download infringing options</p>			

## TOPSIDE DIRECTORY

- AIPLA\***
  - American Intellectual Property Law Association
- Arrow/Ayres**
  - Kenneth Arrow, Ian Ayres, and 8 other economists
- ATR**
  - Americans for Tax Reform
- BSA**
  - Business Software Alliance
- DIM/ANC\***
  - Digital Media Association, NetCoalition, the Center for Democracy & Technology, and the Informational Technology Association of America
- DPR**
  - Defenders of Property Rights
- Gibson**
  - 16 Law and Economics Professors on Brief Authored by Professor James Gibson
- Hollaar\***
  - Professor Lee Hollaar, University of Utah
- IEEE\***
  - Institute of Electrical & Electronics Engineers
- IPO\***
  - Intellectual Property Owners
- Menell/Nimmer**
  - Peter Menell, David Nimmer and two other law professors
- NAB**
  - National Association of Broadcasters
- NARM**
  - National Association of Recording Merchandisers
- SG**
  - Solicitor General of the United States
- State AGs**
  - Attorneys General of 40 States
- PPF**
  - Progress & Freedom Foundation
- VSDA**
  - Video Software Dealers Association

\*In Support of Neither Party

**BOTTOMSIDE GROKSTER BRIEFS**

NO LIABILITY UNDER BETAMAX	NO LIABILITY FOR URGING INFRINGEMENT OR ASSISTING SPECIFIC ACTS OF INFRINGEMENT			VICARIOUS LIABILITY		OTHER THEORIES		
<p><b>A) The Betamax Rule is that no secondary liability attaches to the distribution of a product that is capable of substantial noninfringing uses.</b></p> <p>Respondents (Normal incidents of distribution)</p> <ul style="list-style-type: none"> <li>Intel: ACLU/Libraries, Emerging Comp., DCIA</li> <li>NVCA: DCIA</li> <li>Telcos: Eagle</li> <li>NASCAT: Consumers</li> <li>Moritz Law Profs: Innovation Scholars</li> <li>Berkman Law: FSF</li> <li>CEA/C/CIA: Musicians</li> <li>ACU: Media Profs</li> <li>Nesson: Samuelson Law Profs (Capable = reasonable possibility of or suitability for noninfringing use)</li> </ul>	<p><b>Alleged Acts Outside Current Posture of Case</b></p> <ul style="list-style-type: none"> <li>Respondents</li> <li>Intel</li> <li>CEA/C/CIA</li> </ul>	<p><b>Only Narrow Relief Available</b></p> <ul style="list-style-type: none"> <li>Respondents</li> </ul>	<p><b>No Inducement Liability Under Copyright Law</b></p> <ul style="list-style-type: none"> <li>at least where inducement is no different from neutral act of selling dual use technology (Telcos)</li> <li>CEA/C/CIA</li> <li>Consumers</li> <li>Samuelson Law Profs</li> <li>FSF</li> </ul>	<p><b>Ability to redesign is not Control</b></p> <ul style="list-style-type: none"> <li>Respondents</li> <li>Intel</li> </ul>	<p><b>Betamax Provides Defense</b></p> <ul style="list-style-type: none"> <li>Telcos</li> <li>Berkman Law Profs</li> <li>CEA/C/CIA</li> <li>Innovation Scholars</li> <li>Samuelson Law Profs</li> </ul>	<p><b>Filering Will Be Ineffective</b></p> <ul style="list-style-type: none"> <li>Computer Scientists</li> <li>DCIA</li> </ul>	<p><b>No Direct Infringement</b></p> <ul style="list-style-type: none"> <li>Lunney Law Profs</li> </ul>	<p><b>Int'l Law Does Not Require Secondary Liability At All</b></p> <ul style="list-style-type: none"> <li>Sharman</li> <li>Samuelson Law Profs</li> </ul>
<p><b>1) Betamax Rule is good for innovation and First Amendment values.</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Nesson</li> <li>Intel: ACLU/Libraries, Emerging Comp., DCIA</li> <li>NVCA: DCIA</li> <li>Creative Commons: Eagle</li> <li>Telcos: Consumers</li> <li>Moritz Law Profs: Innovation Scholars</li> <li>Berkman Law Profs: Musicians</li> <li>CEA/C/CIA: Media Profs (education)</li> <li>ACU</li> </ul>	<p><b>3) Other interpretations will harm innovation and free speech.</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Intel</li> <li>NVCA</li> <li>Creative Commons</li> <li>Telcos</li> <li>NASCAT (Antitrust concerns)</li> <li>Computer Scientists</li> </ul>	<p><b>4) Stare decisis weighs against modification.</b></p> <p>Respondents</p>	<p><b>5) Overall harmful impact of P2P uncertain.</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Economists</li> <li>Berkman Law Profs</li> <li>Innovation Scholars</li> </ul>	<p><b>6) Rinterpreting Betamax will have little impact on P2P infringement.</b></p> <p>Consumers</p> <ul style="list-style-type: none"> <li>CEA/C/CIA</li> <li>Economists</li> <li>Innovation Scholars</li> </ul>	<p><b>2) Other interpretations (primary purpose, Alinster/redesign, commercial viability) have no basis in law.</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Eagle</li> <li>Consumers</li> <li>Samuelson Law Profs</li> <li>Intel: FSF</li> <li>Telcos: Media Profs</li> <li>NASCAT</li> <li>CEA/C/CIA</li> <li>DCIA</li> </ul>	<p><b>B. P2P Software is Capable of Substantial Noninfringing Uses</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Creative commons</li> <li>Moritz Law Profs</li> <li>Nesson</li> <li>ACLU/Libraries</li> <li>DCIA</li> </ul>	<p><b>C. Congress is the Proper Forum for Addressing Technology Specific Solutions</b></p> <p>Respondents</p> <ul style="list-style-type: none"> <li>Sharman</li> <li>Alinet</li> <li>Eagle</li> <li>Innovation Scholars</li> <li>Samuelson Law Profs</li> <li>FSF</li> </ul>	

## **BOTTOMSIDE DIRECTORY**

- ACLU/Libraries**
  - American Civil Liberties Union, American Library Association, Internet Archive
- ACU**
  - American Conservative Union and National Taxpayers Union
- Berkman Law Profs**
  - 3 Professors from Berkman Center at Harvard Law School
- CEA/CIA**
  - Consumer Electronics Association, Computer & Communications Industry Association and the Home Record Rights Coalition
- Computer Scientists**
  - 17 Professors of Computer Science
- Consumers**
  - Consumers Union, Consumer Federation of America, Public Knowledge
- DCIA**
  - Distributed Computing Industry Association
- Eagle**
  - Eagle Forum (Phyllis Schlafly)
- Economists**
  - Two economists
- Emerging Corp.**
  - Small technology companies including Kaleidescape
- FSF**
  - Free Software Foundation
- Innovation Scholars**
  - 3 professors of technology and economics
- Lunney Law Profs**
  - 11 Law Professors on Brief Authored by Professor Glynn Lunney
- Moritz Law Professors**
  - Three professors from Moritz Law School, Ohio State University
- Media Profs**
  - 21 Professors of communications and Media studies
- Musicians**
  - 23 Musicians and Artists
- NASCAT**
  - National Association of Shareholder and Consumer Attorneys
- Nesson**
  - Harvard Law Professor Charles Nesson
- NVCA**
  - National Venture Capital Association
- Pollack Law Profs**
  - 6 Law Professors on Brief Authored by Professor Malla Pollack
- Samuelson Law Profs**
  - 60 Law Professors and Association for Computing Machinery on Brief Authored by Professor Pamela Samuelson
- Telcos**
  - United States Telecom Association, Cellular Telecom & Internet, U.S. Internet Industry Association