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Grokster was a P2P file-sharing service. There was no dispute that it was used extensively to pirate copyrighted material. The issue was whether the service -- the business -- could be held responsible for the infringements of its users. The unanimous opinion of the Supreme Court was that it could be held liable, and the case was remanded for further inquiry into the facts. But the unanimity papered over a big divide that must be bridged in future cases.

The dispute was always over Grokster the *business and the service*, not P2P *the technology*. No one in the case ever argued that P2P as a technology should be banned or its inventors held liable. In this respect the case was not like the 1984 *Sony* case, where the argument was that selling the VCR machine was itself contributory infringement..

There were three basic possible outcomes in *Grokster*:

- (1) The content providers dream: If a service is used overwhelmingly for infringement, then its proprietors can indeed be held liable, whatever their intent.
- (2) At the other end of the spectrum, the tech industry's dream: If a service is capable of legitimate purposes, then no use of it -- no business model -- is illicit.
- (3) The "inducement" solution -- which was adopted -- that a business is liable for the infringing uses made of it if it actively encourages the infringement.

This result is not surprising -- most people expected it -- but the Court threw in a couple of interesting zingers that made the content industry happy. It said that two items relevant to proving the existence of an intent to induce infringement are failure to filter out copyrighted content, and a revenue model that depends on infringement.

The two concurrences (each joined by three justices) push toward the two ends of the spectrum. In another case, where the overt inducement is less, Breyer would clearly come down for no liability, while Ginsburg would make a more detailed inquiry.

Everyone is happy with the decision. Each side is relieved that the other did not get a total victory. The content industry is also happy because the filtering and business model evidentiary standard will make it much more difficult for pirate services to game the Court's decision, while tech is happy because these factors, standing without other more overt acts, are not sufficient to prove inducement.

Future battles will be over two issues:

- (1) More debate about exactly what factors are relevant to proving an intent to induce. (PFF has a discussion of the possibilities in its [amicus brief](#), pp. 11-16 [www.copyright.gov/docs/mgm/progress-foundation.pdf].)
- (2) As content providers increase their reliance on DRM and on such self-help techniques as spoofing, the illicit P2P sites will be forced to take measures to nullify the protection. The courts can, and should, hold that interfering with such legitimate methods of self-protection is in itself conclusive evidence of an intent to "induce infringement" within the meaning of *Grokster*.