

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

