THE INDUCE ACT DEBATE

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LITIGATION TIMELINE

• MGM brought suit vs. Grokster, Streamcast, Kazaa in October 2001
  – 9th Cir’s Napster decision (Feb. 2001)
• DCt decided partial summary judgment in MGM v. Grokster in April 2003
  – Certified for appeal in June 2003
• 7th Cir’s Aimster decision was argued on June 4, 2003, and decided June 30
  – That’s REALLY fast

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APPEAL TIMELINE

• MGM moved for expedited review in July
  – Aimster decision bolstered their appeal
  – Repeatedly asked the court for argument date
• But MGM v. Grokster was not argued to Ninth Circuit until Feb. 2004
  – Tenor of the argument did not bode well for MGM
• Wait, wait, wait…
• 9th Cir didn’t issue opinion till Aug. 9, 2004
• Cert. granted in Dec. 2004
  – Fast briefing schedule, argument scheduled March 29

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LEGISLATIVE TIMELINE

• June 2004: Hatch & Leahy introduce INDUCE Act (S. 2560)
  – Seemed to believe it would be uncontroversial (tech firms had been notified & reassured)
• July 22 hearing: 4 of 6 witnesses vs. bill
  – Mitch Glazier (RIAA), Mary Beth Peters (Register of ©) for it
  – BSA, CEA, NetCoalition, IEEE-USA vs. it

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LEGISLATIVE TIMELINE

• After 9th Cir Grokster decision, Hatch & Leahy referred the matter to the Copyright Office, asking it to bring the parties together and try to reach a consensus
• Copyright Office convened such a meeting, but no consensus was achieved
• Cop Office made a recommendation in late Sept.
• Hatch tried to move the CO bill without further hearings
• Oct 6 letter from tech & other industry assns strongly objected to this
• Hatch convened closed-door meeting of key players in Oct, but still no consensus—very far apart
• Then it was election season

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LEGISLATIVE TIMELINE

• On the House side, several bills were in process during the summer & fall of 2004, which focused on file-sharing, not on file-sharing technologies (we’ll study soon)
• Also pending in the Senate were bills to outlaw camcorders in movie theatres and a legislative fix to the ClearPlay litigation
• “Omnibus” bill to combine all (including INDUCE) in conference was possible, though it didn’t happen in the fall of 2004

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LET’S IMAGINE…

• Suppose SCt didn’t take MGM’s appeal
• Do you think Congress should legislate in response to the 9th Circuit’s ruling in MGM v. Grokster?
• If so, what should it do and why?
• If not, why? Which is least bad option if legislation is inevitable?

2nd THOUGHT EXPERIMENT

• How do your answers change based on SCt’s decision to take the appeal?
• How do you predict the Court will decide MGM v. Grokster?
• How does that affect your assessment—of the need for legislation?
  – of the best (or least bad) legislative alternative?

EFFECT OF SCT RULING ON LEGISLATION

• Possibly none
  – If SCt reverses and remands for findings on some issue (e.g., active inducement), then the crisis will be put off a few years till case is resolved and wends its way through courts
• If Grokster wins, legislation is likely
  – But Sony safe harbor will be the baseline, so legislation is likely to be narrowly crafted
• If MGM wins, uphill battle to restore Sony safe harbor, broader 2ndary rules likely

LEGISLATIVE OPTIONS

• Codify equivalent of patent secondary liability rules in copyright (IEEE-USA proposal)
• Codify inducement of infringement only
  – S. 2560 reasonable foreseeability
  – Patent-like (overt act, specific intent)
• Intentional design to facilitate widespread infringement
• Primary purpose or effect of technology to enable, facilitate infringement
• Providing technology, the business model for which is based on infringement

LEGISLATIVE OPTIONS

• Balancing test
  – Aimster-like: cost of deterring infringement cf. how much infringement would be avoided
  – SG-like: how market the technology, how efficient it is, what steps taken to avert infringement
• Specific intent to develop technology to facilitate massive infringement + active encouragement of such infringement + business model based on infringement (CEA proposal)
• Technology lacking commercially significant NIs (measured by viability of business if no infringement)
• Compulsory license

INDUCE ACT (S. 2560)

• Intentionally aids, abets, induces, or procures
• Intent may be shown by acts from which a reasonable person would find intent to induce infringement
  – based upon all relevant information about such acts then reasonably available to the actor,
  – including whether the activity relies upon infringement for its commercial viability
• No effect on vicarious or contributory infringement
ACTIVE INDUCEMENT

• Issue not addressed in 9th Cir decision, nor in cert. petition, but in brief to SCT
• “Next Napster,” “Napster” in metatags as indicators of inducement?
• Technology design as inducement?
• “Rip, mix, burn” as inducement?
• Business model (serving ads to user base) as inducement?
• In patent law, stringent standards: overt acts + specific intent to induce infr.
  – Not enough to sell staple article knowing purchaser will infringe
  – Active inducers can’t be enjoined from selling technologies with SNIUs

© OFFICE DRAFT

• Whoever manufactures, offers to the public, provides or otherwise traffics in
  • Any product or service
  • That is a cause of individuals engaging in infringing public dissemination of © works
  • Shall be liable as an infringer if
    – Relies on infringing public dissemination for commercial viability,
    – Derives predominant portion of its revenues from infringing dissemination, or
    – Principally relies upon infringing public dissemination to attract users

© OFFICE REMEDIES

• No statutory damages unless willful
• Court should limit scope of injunction so as not to prevent non-infringing acts (if feasible)
• Not enlarging or diminishing vicarious or contrib or defenses or remedies
• Not enlarging or diminishing 106(1), 106(2) (reproduction, public distribution)

DESIRABLE QUALITIES

• Technology-neutrality
• Targeted at certain bad acts, bad actors
  – Neither too restrictive (not catching enough bad fish)
  – Nor too expansive (catching too many fish)
  – But flexible enough to apply to future similar cases
• Susceptible to efficient litigation
  – Comprehensible elements, not too many of them
• Precise enough to give notice to potential malefactors, and not deter the daring
• Predictable enough to contribute to business certainty
• Balanced and just rule