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

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

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

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

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

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, faciliate 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 NIUs (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