FINAL TRANSCRIPT

Thomson StreetEvents℠

**ACC - MGM v. Grokster: The aftermath and implications

Event Date/Time: Oct. 05. 2005 / 12:00PM ET

CORPORATE PARTICIPANTS

Karen Bourdreau
Association of Corporate Counsel - Chair

Matthew Neco
StreamCast, Inc. - General Counsel

Donald Verrilli
Jenner and Block - Partner

PRESENTATION

Karen Bourdreau - *Association of Corporate Counsel - Chair*

Good noon, everyone. My name is Karen Bourdreau, and I'm the Chair of the Association of Corporate Counsel's Information Technology Law and eCommerce Committee. We're thrilled, today, to be presenting a webcast with the Committee's 2005, and hopefully 2006, Committee-sponsored Jenner and Block.

We're honored to have today's presenters as Don B. Verrilli, Jr., of Jenner and Block, and Matt A. Neco, General Counsel of StreamCast, Inc., to speak, who also spoke at the Association of Corporate Counsel and Pepperdine University School of Law's Sixth Annual Technology Law Conference just days before the Grokster decision was handed down. That presentation was spectacular.

If you don't already know, these two are probably the two leading experts on this case. The focus on this case in both the media and legal circles has been unbelievably unprecedented. The National Law Journal called Metro-Goldwyn-Mayer Studios Inc. vs. Grokster, Ltd. and StreamCast Networks, Inc., the most important copyright challenge in decades. Since the court continued its decision in June, much has been written and said about what the ruling means for both business and consumer interest.

Today, both Matt and Don will talk about their views on what Grokster means to all of us as partitioners, and what the implications may be for the business planner going forward.

We really want this webcast to be interactive, so please send your questions directly to my email address at techshark@prodigy.net, and I'll share them with the speakers. You'll also find this email address on every page of the presentation, and I think it's also on the webcast introduction.

I'm now pleased to introduce today's speakers. Matt Neco is Vice President and General Counsel for L.A. based Stirling Bridge, Inc. and its subsidiaries, including the most notorious Morpheus, the decentralized public peer-to-peer file search and sharing software application developer and distributor.

Before joining Stirling Bridge, Matt worked for various privately held entertainment, media, and technology entities, including the law and mediation firm he founded and operated for ten years in Los Angeles. During his career, he has focused on various aspects of the entertainment industry, in film, television, the music industry, and the Internet and new media, as well as any actors, writers, and independent producers, and labels. Matt is actively involved in P2P United, a non-profit organization of peer-to-peer software publishers, focusing on providing a balanced point of view to Congress, helping artists, writers, and creators of works of authorship and inventions get paid, establishment of code of conduct, protecting against threats for our national security interest, and our civil liberties and campaigning the right of Americans' privacy, debate, and free exchange of ideas. Matt received his B.A. from the University of Albany, State University of New York, and his J.D. from the University of Wisconsin Law School.

Don B. Verrilli, Jr. is a partner in Jenner and Block's Washington, D.C. office, and serves as Chair of the firm's technology practice and is Co-Chair of its Appellate and Supreme Court practice. Don concentrates his practice on Supreme Court and appellate

litigation, public communications, and first amendment and media litigation. Don has argued numerous cases, working on the state's Supreme Court. Most recently, he argued on behalf of the entertainment industry and Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., where he successfully urged the Justices to hold software companies that build businesses on the illegal distribution of copyrighted material liable for copyright infringement. He was counsel for Reno v. American Civil Liberties Union, the Supreme Court decision establishing the First Amendment rights of Internet speakers. Mr. Verrilli also represents the Recording Industry Association of America on matters arising out of the Digital Millennium Copyright Act.

Don received his B.A. from Yale University and his J.D. from Columbia University, where he is also Editor-in-Chief of the Columbia Law Review. Don has worked for Associate Justice William J. Brennan, Jr., of the United States Supreme Court, and Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia.

At this point, I'd like to turn this over to the speakers. Please remember to email your questions to me at techshark@prodigy.net. The speakers will begin with a background of this case, and now, Don and Matt.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Good morning, and thank you. This is Matt Neco speaking.

First of all, I'd like to say hello to Don.

Donald Verrilli - *Jenner and Block - Partner*

Hello, Matt. How are you?

Matthew Neco - *StreamCast, Inc. - General Counsel*

I'm doing well, thank you. The Gods and the Saints seem to be conspiring against us, this morning, since my servers are down and I'm technologically impaired, which is a horrible thing for a technology company, and there's a jackhammer outside my office door, breaking the sidewalk apart, so I hope that doesn't cause too much disturbance. But in any event, moving on, we are going to talk about the case, today. I'm going to start off by talking about the technologies and the underlying litigation, and then, Don, I believe, is going to talk about the Supreme Court decision. For those of you that are utilizing the PowerPoint slide presentation, we're going to kind of be prompting you to turn the page and move on to the next slide, as appropriate, and we are currently going to move to slide number three.

That being said, let me be very, very clear that I want to, throughout the course of today's discussion, let everyone know that I am in no way actively inducing anyone to engage in copyright infringement and that the viewpoints and opinions that I'm going to express, today, are those -- are my own viewpoints and not those of my client or clients, and I'm not going to be using any confidential information gained from the clients.

Moving on, let's talk about the technology of this, and Don, feel free, of course, to jump in whenever you'd like. The technology that we're talking about, here, in this case, is called peer-to-peer file search and sharing technologies. Many people may have become aware of peer-to-peer file sharing technology, initially, in connection with a software program and a company called Napster. What Napster did was have this technology that allowed people to utilize the Internet to communicate directly with each other by, in essence, anyone that had this program on their computer and had it up and running was able to put into a particular folder, their share or their download folders, whatever files that they wanted to, and in the Napster case, the files were limited to files that were mp3 files. Only files that ended in the extension .mp3.

So, anybody that had an mp3 collection could put files into their share folders and other people could, in essence, search for those files, locate them, and download them from their peer, which is why it's called peer-to-peer file sharing technology. An important component of the Napster technology is that it utilized central computer servers in order to, in essence, index the files that were available on other peoples' computers.

So, for example, if I were to ask, if I were to search for a file and that file was on Don's computer, first, there would be an index on the master computer that would indicate that the file that I was searching for was on Don's computer, so it would kind of act as a -- a central server would act as a policeman, as it were, to point me to Don's share folder and allow me to download that particular file. So that was the first incarnation of peer-to-peer file search and sharing technology.

Shortly after Napster became embroiled in the tainted litigation in the Ninth Circuit, called the Napster litigation, there were several advances in the peer-to-peer file search and sharing technology that made the application and software that much more elegant by taking away the need for any sort of central servers to act as the index, and instead, turned every computer user's computer into something of an investing function. So, in fact, any time that a user wanted to search for a file, it could do so without the inter media and the central server involved.

The other change that was involved in this technology was that it was no longer -- the files are no longer limited to mp3 files. The types of files that could be searched for and found were any type of files, be it a Word document or an audio file or a video file or a PowerPoint presentation. Any type of file, whatsoever, and so that was a -- those were two of the most radical changes in this technology. It became content (inaudible) and really became a true, elegant, decentralized peer-to-peer file search and sharing technology.

So, that's the technology. Don, would you have anything that you would want to add to that?

Donald Verrilli - *Jenner and Block - Partner*

No, Matt. I think that's a fair summary of the situation. You might as well go ahead and continue.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Okay, great. So, what then ended up happening is that there were some lawsuits brought by 28 of the largest entertainment and media companies, called the MGM litigation. This was brought in October of 2001. There was also -- and this was brought in the Central District of California -- against the developers and distributors of this peer-to-peer file sharing technology. Those parties included Grokster. They included StreamCast Networks, which is the developer and distributor of the Morpheus peer-to-peer file search and sharing technology and several entities that have been involved in the KaZaA file search and sharing technology.

In addition to the movie studios and the record labels, another lawsuit was brought by music publishers and songwriters, which was certified as a class action. I think it is about 27,000 music publishers and songwriters in that class. The case was consolidated. Litigation continued, discovery ensued, and at a certain point, the parties brought cross motions for partial summary judgment to determine whether or not that the then current version of the software that was being utilized could be enjoined from further distribution. The District Court examined that issue and determined that leaving aside whether the parties and defendants were liable for damages arising from past versions of their software from past activities. The District Court determined that the parties or the defendants could not be held secondarily liable for copyright infringement, and therefore, could not be enjoined from continuing to develop and distribute the then current version of their software. That decision was appealed to the Ninth Circuit. The Ninth Circuit Court of Appeals upheld the District Court, and then it found its way to the United States Supreme Court. Don?

Donald Verrilli - *Jenner and Block - Partner*

Okay, and I think it might be useful before talking about exactly what the Supreme Court ruled, to talk about the arguments that were placed before the court and give you some sense of context in which the decision was rendered.

The entertainment industry companies -- the movie studios and the record companies -- essentially advanced three series of liability to the Supreme Court. The first one was a theory of Internet liability, which essentially said that if a business is actively promoting copyright infringement and essentially has a business model that is centered on and derives profit from copyright infringement and goes out there and promotes it, that the business can be held liable in damages and appropriate injunctive relief for any and all copyright infringement that results from the activities of the business. That's the Internet theory.

The second argument that the entertainment companies made to the Supreme Court was that in addition to inducement, that a defendant running a business could be held liable under traditional theories of contributory copyright infringement if they had met the traditional requisites, mainly that they acknowledged that they were contributing to material levels of infringement in a significant way, and that they, in fact, took significant steps to contribute to infringement, and that was true whether or not they could be showing they were actively inducing infringement, and that the (inaudible), the Safe Harbor of the Sony-Betamax case from 1984, and the Supreme Court did not apply here and should not apply in situations like this one, where the record shows that the overwhelming majority of the use of the defendant's business -- here, the Morpheus and Grokster services -- is devoted to copyright infringement. To make that argument, we focused on the fact that the disputer record showed that at least 90% of the material available on the services was copyrighted material being exchanged without authorization and violation of copyright loss.

The third argument we advanced to the Supreme Court was the argument that there ought to be vicarious liability, here, because this was a situation fitting the requisites of the traditional doctrine of vicarious copyright liability, mainly that the defendant had the ability to supervise or control the infringing activity. Here, the infringing activity would be that people used the services and then garnered profits directly from the infringing actions.

Now, the main issues that I think engaged the attention of the many, many (inaudible) who filed briefs -- I don't remember, Matt, exactly how many there were. Maybe you do, but it was upwards of 60 different (inaudible) and probably several 100 groups encompassed in those (inaudible).

The focus of the briefing was much more on the second and third of the theories of liability in that there was a real outcry from the technology community, in particular, that the adoption of what they saw as a very flexible or low standard under the Sony case, would/could threaten innovation because it could allow for the imposition of secondary copyright liability based on any technology that has the potential to be used for infringement, whether or not it is, in fact, used for a beneficial technology for the public.

Now, what'd the court do? The court ended up not deciding the question of contributory infringement, and in particular, not deciding what the bounds of the Sony Safe Harbor should consist of.

The court also declined to decide anything about vicarious liability, except I should say with respect to those two issued, that the court did vacate the decision of the Ninth Circuit on those questions, but decided to leave for another day, and the effort to tackle the substance of those two issues. Instead, the court ruled unanimously, an opinion by Justice Suiter (ph) that the summary judgment record here contained very, very significant evidence that the defendants had, in fact, built the business deliberately designed to promote and profit from copyright infringement on a massive scale, and in that, you have a unanimous agreement of justices on that score, saying that -- on that point, and that that was a valid theory of secondary copyright liability, that the lower court hadn't considered it, and that they needed to consider it, and that indeed the record was sufficiently strong that it would be in order with the District Court to consider a remand, whether summary judgment should simply be awarded for the copyright owners, and then the company.

What I would like to do, now, is shift a little bit from a direct description of what the court did, to tell you why I think what the significance is of the court's ruling and what the court said in this ruling. I'm sure that's something Matt will want to react to and have a different perspective on, but I think I'll go ahead and give you my two cents on it, and then, I'll turn it back to Matt. And Matt, you can go ahead and react as you think is appropriate.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Sure, that sounds great.

Donald Verrilli - *Jenner and Block - Partner*

My sense of the Grokster decision is that it said and did three very important things. The first one is this -- that it declared, I think, unambiguously, in a unanimous opinion, that the underlying activity here, namely the copying and distribution without authorization of copyrighted songs and movies through peer-to-peer services, is copyright infringement -- that it's an unlawful activity, that it violates the copyright laws, and the court acknowledged that it's occurring on a massive scale with very threatening consequences.

And I think that's important because I think it conclusively settled that question of whether this is lawful or unlawful activity. But I think it's important to also, beyond the mere confines of the judicial doctrine of secondary copyright infringement, but I think the opinion and the attention it garnered in the public was very important in helping to set a clear cultural norm that the activity in question, here, are unlawful. Is that going to stop the activity from occurring? Of course not, but it is our hope and belief that it's going to play an important role in diminishing it and helping to cement an understanding that the activity here that's causing all these problems, is activity that you shouldn't engage in, and that's that.

Now, the second of the three important points, I think, is that the court recognized inducement cause of action, quite clearly, instead, in common sense terms, "Look, if you go out and build a business that's based on promoting copyright infringement, you're going to be liable," and you can be told by a court to stop, and you're going to be liable for the copyright infringement that results from the business that you run. We think it's important that that's clear. We think that's having an important positive effect out of the marketplace already, today.

The third important legal principle that the court, I think, spoke unanimously about and I think is quite important, too, is to understand that the law in this area, the doctrine of secondary liability, that is essentially a doctrine of balance in which there are legitimate interests on both sides. The copyright owners have legitimate interests of not being subjected to environments in which their copyrighted intellectual property can be ripped off at will without having recourse from people who profit from that activity.

On the other hand, the doctrine needs to recognize that there are important interests in promoting technological innovation that can be used for legitimate non-infringing purposes, and that's the doctrine of secondary liability has got to strike a balance between those competing interests, and I think the court -- the one thing that troubled my clients in the intellectual property community, I think, going into this case, and what's especially troubling about the Ninth Circuit's opinion is that Lancet's (ph) opinion seemed to be premised on a sense that so long as one can come up with any hypothetical or theoretical non-infringing use for a service offered to the public, or a product offered to the public, then there can be no secondary copyright liability.

And while the Supreme Court did not conclusively resolve the question of what the contours of the Sony Safe Harbor are going to be, going forward, and did not conclusively embrace our view or Matt's companies and the other defendants' view of what that Safe Harbor should look like. I think the court did found that very important theme that the doctrine's got to be one that strikes a balance, and that's something that we strove to achieve in this litigation and we feel that the court has been unanimous to acknowledge that.

So that's my sense of what's significant in the Supreme Court's opinion, but let me now bounce it over to Matt.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Thank you, Don. I, surprisingly enough, perhaps, I don't disagree entirely with those three points that you've indicated. I do think that it is clear that there is some amount of direct infringement that's occurring, utilizing peer-to-peer software. The question, of course, is what the amount of direct infringement may be, because there are certainly non-infringing uses for peer-to-peer technology that is currently occurring and will occur in the future, as well as fair-use uses for the technology, which is not infringing. I kind of distinguish a bit between non-infringing that's authorized, that is the copyright holders have authorized users to distribute their files, and that occurs in many instances, such as by bands that may be called a jam band (ph), who allow for their music to be -- their live performances that have been recorded -- to be distributed for non-commercial, non-profit purposes, as well as the things that are in the items that are in the public domain for items that are -- that there may be a fair use to engage in sharing those files.

I do think that on your second point, Don, that the court recognized an inducing theory that if you build your business based on copyright infringement, that you'll be liable. I think that that is something that the court -- that has -- did enunciate, and set a standard that I think is going to be subject to interpretation by lower courts, and that is whether one did build the business based upon actively inducing copyright infringement, and that's something I think we'll talk a bit about more and whether that subjects a developer or distributor of a product or device that's capable of dual uses that is both infringement and not being utilized for infringement, whether that person or entity should be held secondarily liable.

And then, your third point that the law on secondary liability is that balance is true, also, but that balance has yet to be conclusively determined, and I think that the Grokster case, if it is read broadly, can tip the scale in a direction that is more in favor of the proprietors of copyrighted material than the developers and distributors of technology.

But if read narrowly by lower courts, will hopefully help to achieve something of that balance not without some cost, however, if in fact, there are going to be arguments or discussions by the copyright and content industry in connection with a developer or distributor of a new technology that if the copyright industry feels that this technology might be utilized for infringement, and therefore, requires or demands that the technologist do attempt to impose some types of restrictions or limitations on the ability of the product to be used for copyright infringement, whether there are going to be -- whether that provides the copyright holders with some sort of a hammer against those technologists who don't heed the desires of the copyright industry, and I think that that is -- that that balance is something that is yet to be achieved, and we're going to see some interesting outcomes over the next few years on the weighing of that balance.

Donald Verrilli - *Jenner and Block - Partner*

Okay. I'm wondering whether we might move to the next slide, now. Does that make sense, Karen?

Karen Bourdreau - *Association of Corporate Counsel - Chair*

Sure. I think, Don, the next is really about implications of this for our organizations and what you all think the legislature is going to do, following the U.S. Congress, and how this is going to affect the business climate and your advice on solutions.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Great. Thank you. Don, let me -- well, before I speak about implications for an organization, I think it might be helpful to kind of set the stage by asking this question -- do you think, Don, that most copyright holders, in the future, when they spring a secondary copyright infringement action, are going to heed active inducement theories?

Donald Verrilli - *Jenner and Block - Partner*

Well, I think, you know, it's impossible to know unless you know what the facts are, but I think that inducement is going to be a -- I think it is a significant cause of action, a significant opportunity to remedy the consequences of massive infringement, and hopefully, a significant deterrent, so I would guess it's likely that inducement is going to be a significant subject of any litigation that copyright owners bring, and obviously, you're not going to bring a case, alleging induced and nonexistent facts that would support doing so. So, we can't say it with 100% certainty, how many of those cases it will be or what they'll look like, but it certainly does seem to me that this is going to be a significant part of thinking about what a litigation strategy would look like, going forward.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Okay. That being said, I think that the implication then for an organization that is developing or distributing any sort of product that could possibly be used by a direct infringer for direct copyright infringements include needing to be aware that active inducements might reach to the level of business plans, marketing activities, product design and development, as well as finance raising efforts.

So what that means, in essence, is that lawyers are going to be pretty busy, whether you're in-house counsel or you're outside counsel. If your client happens to be engaged in either developing, distributing, or financing a product that is capable of copyright infringement, that you're going to have to be pretty hands on and pretty involved right from the very get go.

When a guy or a gal in a garage is developing a new technology, the question is going to, of course, be -- well, what were they thinking? Were they thinking that this technology could be used for copyright infringement? And, if so, how did they express that intention? How would you advise them? If, in fact, that guy and the gal in the garage is savvy enough to consult with an attorney, or bring an attorney onboard from the very beginning, how do you advise them?

And, I think that it's important to advise so that a client, in the very initial stages, the test stage, to make sure that they're not actively inducing copyright infringement. If, in fact, their product or service is capable of both infringing and non-infringing uses, that they certainly emphasize and stress the non-infringing uses. I think that the next major course is in writing a business plan, and those sorts of implications need to be taken into consideration, as well, because of course, if there's going to be litigation, business plans are going to be subject to discovery, and if, in fact, the business plan talks about how copyright infringement that might occur using this particular product or tool or service, that you've got to be cognizant of that and help your client to make sure that it's not perceived as being active inducement.

Then, moving to your marketing department, I think that many attorneys, in house, as well as outside counsel, will find that there will be a dynamic tension here because marketing folks like to be very creative. They don't, often times, like to be told by counsel that they can't say or do this, that, or the other thing. They want to be able to market their product by using -- a very popular example -- Apple, a number of years ago, had a fantastic ad campaign that basically just said rip, mix, burn. Well, the question -- your marketing department has to know to bring that to you as counsel and ask you whether you, as counsel, think that that could be perceived as being active inducement, and in the context of whatever your product may be and other ways that it may be marketing, you'll have to advise as to whether or not that sort of marketing campaign can be utilized.

Then, moving on to design development. I think that in-house counsel and outside counsel have to be very active and involved with the development teams of a product and counsel them on how that product is developed, and if, in fact, if it's capable of being utilized for infringement, whether it makes sense to attempt to develop the product in such a way as to minimize or eliminate the possibilities of copyright infringement.

So, the implications, I think, are the organization that you've got to be very, very active in counseling against active inducements and counseling in such a way that there is minimal evidence of that inducement. That's something that's going to be very important.

The other implication for your organization, of course, is that if your organization is subject to a lawsuit, there is going to be a tremendous amount of discovery on whether or not there has been active inducement, and that discovery may reach, as I implied, to the pre-funding guy or gal in the garage who developed the technology. They're possibly being deposed to determine what they were thinking, let alone how they were presenting their technology or their product. Were they thinking, in fact, that the product could be used for copyright infringement? Were they thinking that a majority of their customers or users were going to use the product for copyright infringement? And if so, were they then possibly building their business on the backs of copyright holders?

Then, moving onto other aspects of your organization. Every single email, of course, that is sent that talks about the product and how it could be used and how it could be marketed and how it is being used and whether there can be any source of devices or limitations to develop into the product to minimize the risks of copyright infringement will all be subject to discovery, so the implications from the perspective of being aware that your organization might be subject to discovery is pretty broad. And discovery, as we all know in today's day and age, with electronic data, is and can be extraordinarily expensive just from the document production side, let alone talking about deprivations of all sorts of different people that have been involved in the organization.

So that, from my perspective, is pretty much an overview of what to be aware of regarding the implications for your organization.

Don, what do you think about that?

Donald Verrilli - *Jenner and Block - Partner*

Yes, I guess I would go back to what the court said. I think there's three features of what the court focused on that are important and then provide guidance, and what the court said with respect to Grokster and StreamCast, was that there were three features of the evidence in the case that were particularly notable.

The first was the court pointed out was that the companies showed themselves to be aiming to satisfy a known source of demand for copyright infringement, so essentially, if you're bringing a service to market or product to market and it's clear that what you are trying to do in part -- as Matt focused on -- as part of your business plan is to capture a significant amount of infringing use. That's what you're aiming to do. Then, you're going to be at significant risk of being liable for inducement, and it seems to me, that it should be. If you can't come up with a business plan that allows you to bring a product to market based on the profitability that can be generated by legitimate uses or even if you can, but you nonetheless can reap very significant profits from illegitimate uses and that's what you aim to do, there's no good reason why you want to be held immune from liability for the consequences.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Don, before you move on to features two and three of the evidence -- if you don't mind my interjecting -- this is to bring clarity as one of the -- when you talk about aiming status for a known source of demand, you are of course referring to Napster. And so, what I think the court was saying, basically, that if StreamCast and Grokster were marketing their products so as to be a substitute to Napster and everyone that knew or should have known that Napster was being used massively for copyright infringement, that they should indeed be held -- that that would be evidence of, or part of evidence of, the intent to actively induce copyright infringement.

I think that one thing to bear in mind is that it's not always known what a tool will be used for in terms of percentages, and often times, it may take a while for a product or a service to really find this market, for the streets to find the market for that product or service. And often times, this is another implication that's what I think an organization needs to be aware of and that is that in the development of, or the ongoing development of, and growth of a product, it may change from being utilized predominantly for one thing to being utilized predominantly for a second or third purpose, and one of the things that we have to be conscious of is hopefully not (inaudible) the ability of product to find them their market.

Donald Verrilli - *Jenner and Block - Partner*

Let me pick back up if I could. With respect to that, if the first market is the one that's overwhelmingly and blatantly unlawful and the company knows it and goes after it, it doesn't seem to me and I think on other courts holding it won't be a valid argument to say, "Well, yes, you know, we went after this market of infringing use and we pocketed a lot of money doing so, but it was part of our overall strategy to get to this non-infringing use down the line." You can get to the non-infringing use and when you do, you won't be liable for the non-infringing use.

But if a step along the way is to promote infringing use, I don't think there's going to be room for that under this decision. I don't think there should be. I think it leads to a wider point, and I really think it's artificial, and playing off something Matt said here, to think about this is as about the guy in the garage and the technology, because the issue here is not about technology in these cases. It's about how the technology is used, and I think bit torrent is a really good example of that. Bit torrent is a terrific technology, and there are bit torrent sites that are used for very positive, constructive things -- Hurricane Katrina relief, other things that are really, really good for society. There are also bit torrent sites that are devoted to the swapping of pirated television shows and pirated movies, and those are bad things, and I think what this decision is saying is that you can't just say, "Well, bit torrent is a cool new technology," and defend yourself when it's obvious that you're running a site that's devoted virtually exclusively to the swapping of pirated television programs. In that situation, it's not about the technology. It's about the business you build around the way you use it, and I think that Grokster's trying and the Supreme Court's trying to get at that. And the first of the three factors that identified is really aiming to get at that, and I'll talk about the second and third now.

I do think they're significant. I think that in terms of what Matt was suggesting that the companies need to be thinking about, I think he essentially got it right. The second of these was that the court pointed to that is particularly notable was the fact that neither company, Grokster and StreamCast, attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software.

The court was quite clear that that's not a definitive, dispositive consideration on its own, but that it is relevant. It's relevant to assess whether there were reasonable straightforward steps that a business could take to allow the legitimate non-infringing uses to continue while diminishing or preventing the infringing uses, and if a business chooses not to take those steps when they're available to them, well, that's going to be evidence onto this case that the court can consider.

And third is a more general consideration of the business model. What the court pointed to here is that Grokster and StreamCast were advertising-based business models, and therefore, the higher the volume of use, the higher the revenues to them, and when you combine that fact with their knowledge that the overwhelming majority of the actual use of their services was for infringement, I think what the court is saying here is that if you're in a situation where you know that the overwhelming majority of the use is for infringement and you've got a volume-based business where the more use, the more money you make, and you go out and pump up use knowing what it's going to be used for, that that can be considered relevant evidence in making an inducement analysis, as well.

So, those are the things the court (inaudible) you got to think about, in particular, and I think actually that Matt's overall description of the kinds of analysis about the things you need to be thinking about is essentially right.

As I said, I disagree with the idea that this is about what's going on in the mind of the person in the garage. I really think that this is analysis that's focused on the behavior of the businesses that bring products to market and what they're aiming to do, and if they're aiming to satisfy a known demand for infringement, if they're aiming to promote infringing uses, and aiming to profit from infringement uses, then they're going to be useless under the Grokster decision. If they're not, then they're not.

Okay. I think that we probably covered that fairly well on the implication for organizations. I'm sure there'll be some questions that filter down through Karen on that. I think, now, we're going to move to slide number six, which talks about legislative action and whether post-Grokster -- any sort of legislative action is necessary.

On September 28, the Senate Committee of the Judiciary held a hearing and some testimony on the issue of attempting to achieve or maintain that balance that Don spoke of, earlier, on protecting both copyright and innovation in a post-Grokster world. We supplied, on the website, copies of that written testimony that had been submitted for anybody that wants to take a look at that. Don, I don't know if you've had a chance to consider what the testimony that had been given. I've read most of the testimony, and most of the testimony, I guess, falls into basically three camps.

The predominant camp, of course, is the wait-and-see camp. Let's not do anything at this point. Let's see what happens over the next several years with lower courts applying the newly annunciated active inducement standard to see how and whether, in fact, there needs to be any sort of legislation to achieve the balance that we've spoken of. That's one camp.

The other camp is a camp that basically has said -- okay, yes, maybe we should hold off and wait awhile, but we need to be very conscious of the fact that the balance can very easily tip in favor of the proprietors of copyrights, and then, that as a result, the technologies will suffer and the balance of what's good for society will be somewhat out of whack, so let's really be very cognizant of this. Let's be cognizant of the fact that ventured capitalists are perhaps going to be frightened to invest money into new technologies for fear that they might be subject to lawsuits. And so, actually as I think about it, I guess those are pretty much the two camps. I'm not sure that there was a third camp. Don, what do you think?

Donald Verrilli - *Jenner and Block - Partner*

Yes. My overall sense with respect to legislative action is that center of gravity really now is favoring wait-and-see, that there's -- in fact, a lot of the tech sector -- and as I'm hearing them talking about what's going to happen, what they'd like to see happen in the legislative arena is pronounced so I was quite satisfied with Grokster with what they were aiming for on the tech side, and I don't report to speak definitively for them, by any means, but what I'm hearing -- at least what I think I'm hearing is that what they were aiming for was a rule that focused on behavior rather than the underlying technology. Certainly, I feel like that's what they got out of Grokster, and now, what we ought to do is let the courts belief the behavior, and there isn't any need for further legislative intervention, at this point.

Again, without speaking for myself rather than for my own clients, the copyright owners, my sense is that that's where they are now, as well, that they feel like there isn't the need for legislature intervention, at this point, and hopefully, this decision can make a difference in trying to help us do what is my client's ultimate goal here, which is to migrate the activity from what we consider to be illegitimate business models that now exist out there and get it to move towards legitimate business models where we can take advantage of the wonderful potential of these new technologies, but do so in a way that's respectful of the copyright owners and that provides them with the fair enumeration and actually see that happening as I'm going to talk about that a little more, in a few minutes, but we see that happening almost in the immediate aftermath of Grokster.

So, I think our folks are pretty much in a wait-and-see mode, and I think the tech community's very much in a wait-and-see mode, so I would not anticipate there being any legislative action any time soon.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Right. I tend to agree with you. I would say that if folks are going to take a look at any of the testimony -- from my perspective, a couple of more relevant items of testimony were those of Gary Shapiro, on behalf of the Consumer Electronics Association and the Home Recording Rights Coalition, as well as that of Professor Mark Lemley, both of which, I think, are more of the -- on the camp of we need to be very cognizant of and careful about what's going to happen here. Mark Lemley spoke of a couple of things that I thought were pretty interesting that might be -- that did imply, has implications for legislation, as did Marybeth Peters, the Register of Copyrights.

A couple of things that they spoke of -- that Mark spoke of -- was, first of all, making it easier for copyright owners to target direct infringers. The second thing that he spoke of is legislation making it easier to clear rates in the digital environment. It's really difficult to clear all of the various rates that are associated with songs and music, and so, he's advocating that, as is Marybeth Peters, the Register of Copyrights.

And the third thing that is being advocated is insulating technology companies from unreasonable liability and to attempt to put some basis, some reasonable basis, for damages on technology companies that are found to be secondarily liable for copyright infringements, and I think there still is an open issue as to whether or not statutory damages apply to secondary copyright infringers or statutory damages only apply to direct copyright infringers.

So I think that we'll -- I think that it's something that we're going to need to keep our eyes on and see whether or not there is going to be legislation on whether the organization should be advocating for legislation in the near term or in the not-too-distant future.

Donald Verrilli - *Jenner and Block - Partner*

Move to the business climate?

Matthew Neco - *StreamCast, Inc. - General Counsel*

Yes, yes. So slide number seven, talking about the business climate. Don, do you want to --?

Donald Verrilli - *Jenner and Block - Partner*

Why don't you go ahead? It'll probably make some more sense to have you focus on that, first, and then I can give you my own take on it.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Okay. I'm going to try to move through this, quickly, since we only have about six minutes left. I know there are some questions out there. I think that in slide number seven, we talk about what's next for VCs in light of the Grokster decision. I think that VCs are -- my sense is that they are cautious in investing in anything that has implications for secondary copyright infringement, unless they know that their investments -- the company that they're investing in -- is in active talks, or will be in active talks, with the entertainment industry, and then basically would be getting the active endorsement or signoff by the entertainment industry in this technology.

So I think that there is something of a stifling effect that -- or chilling effect -- that's going on, and so I do think that the Grokster decision is having and will have something of a cooling effect for the development of these technologies. Don?

Donald Verrilli - *Jenner and Block - Partner*

Yes. My reaction to that is that -- the first half of what Matt said, I think is right, the second half isn't. I do think -- and we're seeing what Matt's describing, as well, that there's a move now to try to get the peer-to-peer companies that are out there to move to a legitimate business model, and that that's what the ventured capitalists want and it is -- it seems to me that that's a really good thing. When Matt and I talked out at Pepperdine, in June, I stressed the importance of getting the legal baselines right and that you had to get the legal baselines right before you could really move to a world in which you could come up with business models that allow the technology to flourish in its positive aspects and that protected the interest of the copyright owners. I think the court took a big step towards getting the baselines right in the Grokster decision, and I think that we're seeing, immediately, pretty significant movement in the direction of moving to business models that work for the technology folks and that work for the copyright owners, and that's a good thing.

With respect to the chilling effect, I just don't see it. You know, Napster was out there for five years before the Supreme Court decided the Grokster case, and the Ninth Circuit Napster decision was a heck of a lot broader and more favorable to the copyright owners. That was the Supreme Court's ultimate Grokster decision, and that didn't stop or slow down the development of any technology at all, and so, I think the reality is that there isn't a perfect 100% clarity in this area of the law. There never has been, and given its nature, there never will be. Technology flourished with that uncertainty before the Grokster decision. It's going to continue to flourish with whatever uncertainty there is after the Grokster decision.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Right. Okay. Then, let's move on to slide number eight -- possible solutions. Technology vs. compensating authors and other copyright holders. In this instance, I will speak on behalf of the company I represent and that is to express the viewpoint that in no means does StreamCast advocate not compensating authors and other copyright holders. They certainly believe that copyright holders should be justly compensated, but the question, of course, is how can that possibly be done? There are some technology solutions that are being worked on that involve, in essence, the filtering out of works that are not authorized by the copyright holder for distribution without that copyright holder being compensated in some fashion.

The question, of course, will be whether this technology is going to work effectively, what period of time is going to be necessary in order to help to perfect that technology, and what that technology does in the peer-to-peer environment, whether it impacts what is a pure decentralized peer-to-peer application and classed it in a way to make it into centralizing certain functions and whether that will scale on a massive basis. But it certainly is -- that is a solution that is being worked on. Don has referred to that, and so, we're certainly in favor of seeing the technology is developed, at least from peer-to-peer, and hopefully, in other types of devices and products that will work and at the same time, will not unduly restrict or hamper technology.

Donald Verrilli - *Jenner and Block - Partner*

I don't really need to add anything to that. Why don't we take our last few minutes and maybe use them for questions.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Sure. That sounds great.

QUESTIONS AND ANSWERS

Karen Bourdreau - *Association of Corporate Counsel - Chair*

I have a question, which is I know that it's extremely difficult for the general in-house attorney to even begin to understand how to do a clearance. In light of this, I know, Matt, I think you mentioned how difficult it was to do a clearance. Could you two talk about the sort of words to the wise for a general in-house practitioner for what they should do to comply and not accidentally get themselves in trouble?

Donald Verrilli - *Jenner and Block - Partner*

Go ahead, Matt.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Broad question, and I suppose that my question is compliance in respect to what? If we're talking about music that in getting clearances or licenses for music, that's one thing. I think that a practical implication is, in essence, I think if you've got a technology that's capable of dual uses and you want to avoid being sued by the larger, more well-funded entertainment companies, the implication is to try to talk to them. That doesn't ensure that you're not going to get sued by some abhorrent individual, who owns the copyright and is not associated with one of the major entertainment entities, but I do think that from a practical perspective, clearing and being assured of minimal chances or minimizing the risk of getting sued for secondary copyright infringement is going to be sitting down and doing your best to talk to the industries, and hopefully, they will sit and talk with you.

Karen Bourdreau - *Association of Corporate Counsel - Chair*

How do you know -- how can you define what to look for if your technology is capable of dual uses? A lot of us come not from -- I do come from a technology background, but many people do not. They came from a securities background or something else. How would they know what kind of audits they should be concerned about?

Donald Verrilli - *Jenner and Block - Partner*

Talk to your psychology development team.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Look at your business plan. I think that's the main thing, right? What it's going to be used for. What is the business plan aiming to do with this thing, right? And I think that you get a lot of important information from that, and if the business plan seems to raise red flags, then, I think, that that's when careful analysis ought to start.

Karen Bourdreau - *Association of Corporate Counsel - Chair*

And we do have a question about what the unexpected results might be for in-house practitioners as a result of this decision.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Unexpected results to in-house practitioners. Well, I think an expected result is more involvement and more work. Unexpected result is -- I guess it depends upon your entity and how you, as an attorney for your entity, have to counsel your client and

whether that takes the form of, I hate to say it but DIY type of activities, and make sure that you say -- Look. This is what I counsel. I'm being clear about what I'm counseling, and this is my viewpoint on what you can and can't do, and if you make the decision to not heed my advice, then you are doing so -- being with all the information that I help to bring to you. Don, would you add anything?

Donald Verrilli - *Jenner and Block - Partner*

No. Essentially, I think Matt's got it essentially right that you've got a series of factors that the Supreme Court has got to look at, and it seems to me, you've got to look at them.

Karen Bourdreau - *Association of Corporate Counsel - Chair*

I think we're at our 10:00 time. I very much appreciate, and I know all of our members appreciate your taking your time. I know that you all are both very busy with all sorts of matters, as well as this, and as you know, this webcast will be available for replay for our members who were unable to attend, for a year. And thank you also for providing all those other materials that you can look at, as well as developing the PowerPoint. This will conclude our webcast.

Donald Verrilli - *Jenner and Block - Partner*

Thank you.

Matthew Neco - *StreamCast, Inc. - General Counsel*

Thank you for being here. Hope it will be helpful to the members of the Association.

Karen Bourdreau - *Association of Corporate Counsel - Chair*

Thank you.
