

SEPARATING THE *SONY* SHEEP FROM THE *GROKSTER* GOATS: RECKONING THE FUTURE BUSINESS PLANS OF COPYRIGHT-DEPENDENT TECHNOLOGY ENTREPRENEURS

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In MGM v. Grokster, the U.S. Supreme Court established that businesses built from the start on inducing copyright infringement will be held liable, as judges will frown on drawing one's start-up capital from other people's copyrights. The Court's elucidation of the elements of inducement suggests that even businesses not initially built on infringement, but in which infringement comes to play an increasingly profitable part, may find themselves liable unless they take good faith measures to forestall infringements. This Article addresses the evolution of the U.S. judge-made rules of secondary liability for copyright infringement, and the possible emergence of an obligation of good faith efforts to avoid infringement. Recent inter-industry principles suggest that proactive avoidance measures may become a matter of "best practice." The Article next considers whether statutory safe harbors insulate entrepreneurs who would have been held derivatively liable under common law norms. Finally, the Article compares the U.S. developments with recent French decisions holding the operators of "user-generated content" and "social networking" websites liable for their users' unauthorized posting of copyrighted works.

INTRODUCTION

With the evolution of digital communications, the means of reproducing and disseminating copyrighted works increasingly leave the control of copyright

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