

A HELPFUL LOSS? THE IMPLICATIONS OF *METRO-GOLDWYN-MAYER STUDIOS, INC. v. GROKSTER, LTD.*, ON FUTURE DISTRIBUTION OF PRODUCTS CAPABLE OF INFRINGING USES

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I. INTRODUCTION

At the end of its 2005 term, the Supreme Court sent shockwaves through the technology community when it held in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,¹ that producers of peer-to-peer file-sharing software who intentionally induce their users to commit copyright infringement could be found liable for such infringement. The *Grokster* decision is significant because it is another attempt by the Court to find a balance between encouraging technological innovation and providing legal protection of creative pursuits.² Public reaction to the Supreme Court decision was both immediate and keen, with one advocate for the communications and computer industry claiming, “This is a very dangerous decision for technology and for innovation.”³ By contrast, entertainment industry proponents insist that *Grokster* was a commonsense decision that prevents the formation of businesses that illegitimately benefit from copyright infringement.⁴ At this point, the full implications of the *Grokster* decision remain far from clear, but the holding may actually be more favorable to the technology industry than initially perceived.

This Recent Development will discuss the *Grokster* decision and to what extent, if any, it will effectively curb the increasing instances of copyright infringement that result from technological innovations. Part II provides a basic overview of the purpose and functionality of copyright law and outlines the procedural and factual history of the *Grokster* case.

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1. 125 S. Ct. 2764 (2005). For simplicity and clarity, I will refer to the Supreme Court decision as *Grokster* and separately identify earlier dispositions of the case. See *infra* Part II.B.

2. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); see also discussion *infra* Part II.A.

3. Krysten Crawford, *Hollywood Wins Internet Piracy Battle*, CNNMONEY.COM, June 27, 2005, <http://money.cnn.com/2005/06/27/technology/grokster> (quoting Edward Black, president of the Communications and Computer Industry Association).

4. See *id.*

Part III begins by analyzing the Supreme Court's reasons for holding that a party may be liable for secondary copyright infringement by intentionally inducing the infringement of another. Part III then addresses the implications of the *Grokster* decision and concludes that the holding may actually be favorable to innovators distributing products that enable consumers to commit infringement because the decision both reaffirms the holding in *Sony*⁵ and provides future distributors with some guidance on when liability may be imposed for secondary copyright infringement.

II. BACKGROUND

A. Copyright Law Basics

Metro-Goldwyn-Mayer-Studios, Inc. v. Grokster, Ltd., is the latest chapter in an ongoing struggle to strike a sound balance between the conflicting values of "supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement."⁶ The purpose of copyright protection is "[t]o promote the Progress of Science and useful Arts" by assuring authors that they will have exclusive rights to their writings and other works for a prescribed amount of time.⁷ Although copyright law ultimately aims to stimulate creativity, it also serves the immediate interest of insuring a fair return for the author's intellectual labor.⁸

Practically, copyright law often operates as a "gatekeeper system."⁹ Liability is more often attached to intermediaries, entities capable of copying and distributing protected works—i.e., directly infringing on the authors' exclusive rights¹⁰—on a massive scale, rather than end users, such as the individual book reader or music listener.¹¹ The reasons for reliance on this system are twofold.¹² First, end users are not as likely to copy works of authorship, and when reproduction occurs, historically it often has been minimal or immaterial.¹³ Second, targeting end users is both costly and generally unpopular.¹⁴ However, due in large part to advancing technology, and digitalization in particular, the usefulness of

5. 464 U.S. at 456.

6. *Grokster*, 125 S. Ct. at 2775.

7. U.S. CONST. art. I, § 8, cl. 8.

8. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

9. Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 711–12 (2003).

10. See 17 U.S.C. § 106 (2000).

11. Wu, *supra* note 9, at 712.

12. See Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995).

13. See *id.*

14. See *id.*

the gatekeeper system currently is in decline because end users also are now capable of reproducing works of authorship on a large scale.¹⁵

Copyright law also allows for secondary liability under the theories of contributory or vicarious infringement.¹⁶ Contributory infringement results when one intentionally encourages another to reproduce a protected work.¹⁷ Similarly, vicarious infringement results when one fails to affirmatively prevent or limit another's direct infringement and thereby profits from it.¹⁸ Under both theories, liability is attached to the secondary party as an abettor to a direct infringer.¹⁹

Despite the growing importance of secondary liability due to technological advances, before *Grokster* the Supreme Court had addressed this issue only once. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court held that the mere distribution of a commercial product that was capable of other substantial legitimate uses may not give rise to a claim of secondary liability for copyright infringement.²⁰ In *Sony*, copyright holders sued Sony for distribution of video cassette recorders (VCRs), arguing that Sony should be liable for the alleged copyright infringement committed by VCR owners because Sony had knowledge that its product could, and probably would, be used for such infringement.²¹ The Court disagreed, borrowing heavily from patent law's treatment of infringement, which provides that a seller of an article of commerce is not liable for patent infringement when the product has other substantial lawful uses.²² Therefore, because the VCR had numerous lawful uses, Sony was not liable for contributory copyright infringement, despite the fact that its product could be used to unlawfully copy protected works.²³ The Court did not address the issue of secondary copyright infringement again until it granted certiorari in the *Grokster* case.

15. See Wu, *supra* note 9, at 716–17. The author defines digitalization as “the ability to make perfect digital copies of content.” *Id.* at 716. This capability marked the beginning of the problems that the gatekeeper system now faces. However, digitalization was not, by itself, the end of the gatekeeper system. See *id.* Rather, digitalization simply made mass reproduction accessible to many more people. *Id.*

16. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2776 (2005).

17. See *id.*

18. See *id.*

19. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 645–46 (7th Cir. 2003). The Seventh Circuit analogized secondary liability for copyright infringement to the tort of intentional interference with contract, which is the inducement of a breach of contract, and stated that “[i]f a breach of contract (and a copyright license is just a type of contract) can be prevented most effectively by actions taken by a third party, it makes sense to have a legal mechanism placing liability” on both the third party and the party who broke the contract. *Id.* at 646.

20. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

21. *Id.* at 419–20. The Court refers to the VCR as a “video tape recorder” or “VTR.”

22. *Id.* at 442. The Court noted that allowing liability for the distribution of an article that is adapted for both infringing uses and substantial lawful uses would “block the wheels of commerce.” *Id.* at 441 (quoting *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds by Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)).

23. *Id.* at 442.

B. Factual and Procedural History of Grokster

Metro-Goldwyn-Mayer Studios (MGM) brought suit against defendants Grokster and StreamCast Networks in the Central District of California under the theories of contributory and vicarious copyright infringement.²⁴ Specifically, MGM claimed that the defendants should be liable for the alleged copyright infringement committed by users of the defendants' software products because the defendants enabled and induced these users to commit infringement.²⁵ The defendants provided software programs that allowed users to share files already stored on their computers, such as music, videos, and text documents, by automatically connecting users to a peer-to-peer network.²⁶ The software helped users locate desired files among the shared files of any other user concurrently on the network by providing detailed search commands, a list of shared files matching the search request, and a list of other users concurrently on the network.²⁷ The user could download the requested file simply by clicking on a listed file, which would then be directly transferred from the source computer to the requesting computer.²⁸ Upon completion of the transfer, the requesting user would have an exact replica of the file located on the source computer and could freely share the file as desired.²⁹

Despite their many similarities, the defendants' products differed slightly in their specific methods of operation. Grokster used FastTrack technology, which transferred a user's file request to another computer designated by the software to be a supernode because of its indexing capacity.³⁰ The supernode searched its own index for the requested file as well as other supernodes, if necessary.³¹ After locating the requested file, the supernode informed the user of the file's location, at which point the user could download the file directly from that computer.³² StreamCast Networks operated with Gnutella technology, which neither used the supernode method employed by FastTrack nor passed communication through any other central point.³³ Rather, the software sent file requests to all other users simultaneously connected to the network.³⁴ The software then relayed the search results to the requesting

24. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster I*), 259 F. Supp. 2d 1029, 1034 (C.D. Cal. 2003). The plaintiffs consisted of a group of songwriters, recording companies, music producers, and motion movie producers. *Id.* For simplicity, I refer to the plaintiffs as MGM.

25. *See id.* at 1039.

26. *Id.* at 1032.

27. *Id.*

28. *Id.*

29. *Id.* at 1032–33.

30. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2771 (2005).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

user, who could then directly download the file from any peer's computer.³⁵

The district court dismissed the case in favor of the defendants on a cross motion for summary judgment.³⁶ The court ruled that, although the users of the defendants' products directly infringed the plaintiff's protected works,³⁷ distributing the product did not lead to liability because there was no evidence that defendants had knowledge of or contributed to the infringement.³⁸ In addition, the defendants had no control over how their products were used by consumers after they were distributed.³⁹ The Ninth Circuit upheld the district court.⁴⁰

III. ANALYSIS

A. *The Supreme Court's Decision in Grokster*

The Supreme Court granted certiorari to determine "under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product."⁴¹ The Court held that the *Sony* decision did not prevent a finding of liability for secondary copyright infringement when an innovator purposely induced consumers to copy protected works.⁴² Nonetheless, the *Grokster* decision may in fact be a victory for the technology industry because the Court not only reaffirmed the *Sony* decision, but also provided some guidelines for future distributors of products capable of infringing uses.

1. *Actively Encouraging Infringement*

Critical to the Court's holding that the defendants were liable for secondary copyright infringement was the fact that the defendants undertook active steps to encourage infringement by their consumers, as opposed to merely introducing an article into the chain of commerce that was capable of both lawful and unlawful uses.⁴³ The Court placed considerable emphasis on both the volume of infringing acts likely to occur due to use of the software products and the manner in which the defendants marketed and distributed the products.⁴⁴ After outlining the

35. *Id.*

36. *Grokster I*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003).

37. *Id.* at 1035.

38. *Id.* at 1043.

39. *Id.* at 1045-46.

40. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (Grokster II)*, 380 F.3d 1154, 1157 (9th Cir. 2004).

41. *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (2005).

42. *Id.* at 2779.

43. *See id.* at 2772.

44. *Id.*

basic mechanism of peer-to-peer file sharing,⁴⁵ the Court explained the specific implications of the defendants' software products. The Court acknowledged that because the defendants could not have known precisely which files were being shared,⁴⁶ it was impossible to determine with any certainty how often the defendants' products were used to download protected works.⁴⁷ However, evidence entered by MGM strongly suggested that a vast majority of users' downloads were infringing acts.⁴⁸ Given that over 100 million copies of defendants' software products were downloaded and that billions of files were shared each month, the Court found the likely scope of copyright infringement to be "staggering."⁴⁹

The Supreme Court then turned to the method by which the products were distributed, concluding that "the record was replete with evidence" that the defendants intended their software to be used to download protected works.⁵⁰ First, the Court determined there was little question that the defendants had targeted their products to former users of the first major peer-to-peer network, Napster.⁵¹ For example, company documents and promotional materials from StreamCast showed the company intended to advertise its product as the primary alternative to Napster.⁵² Moreover, although there was little direct evidence that Grokster sought to target Napster users, the company had designed its Web page so that users searching for Napster's Web site also would find Grokster's.⁵³ Once on Grokster's Web site, users were informed that they could download the file-sharing software for free.⁵⁴ Thus, although the general public was largely unaware of the defendants' marketing schemes, the Court determined that this evidence clearly demonstrated the defendants' purpose for creating these products, which was to allow and even encourage users to download copyrighted works.⁵⁵

45. *Id.* at 2770–71. The Court first described the benefits of peer-to-peer file sharing, including the ability to operate without a central computer, which reduces cost and the need for storage space. *Id.* at 2770. The Court also noted that peer-to-peer file sharing tends to provide faster file requests and retrievals while eliminating the risk that a central computer will break down and disable the network. *Id.* Given these benefits, government agencies, universities, corporations, and libraries frequently employ peer-to-peer file sharing. *Id.* The Court also outlined some disadvantages of peer-to-peer file sharing, such as having redundant copies of files and an inability to control the content of a file. *Id.*

46. *See id.* at 2771.

47. *See id.* at 2772.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 2772–73.

52. *Id.* at 2773. The Court noted that the record was not clear whether these advertisements were released to the public. However, the Court highlighted the proposed promotional techniques to provide insight into StreamCast's purpose for creating the product. *Id.* at 2773 n.7.

53. *Id.* at 2773.

54. *Id.* Grokster also distributed a newsletter advertising its ability to provide protected works. *Id.* at 2774.

55. *See id.* at 2773–74.

Second, to further demonstrate the improper purpose behind the defendants' products, the Court referred to the business models employed, along with other evidence demonstrating the defendants' failure to prevent, or even attempt to prevent, their consumers from committing infringement. For example, the Court noted that, although the defendants did not receive revenue from their users, they profited by selling advertising space on their networks.⁵⁶ Thus, the more users on the network, the more advertising revenue the defendants received.⁵⁷ While this final piece of evidence was not by itself sufficient to establish unlawful intent, it complemented the entire record by adding context to the defendants' inducing motives.⁵⁸ Moreover, there was no evidence to suggest that the defendants undertook steps to prevent copyright infringement.⁵⁹ On the contrary, the Court pointed out StreamCast's attempt to block users who may have been monitoring acts of infringement on its network.⁶⁰

2. *The Court's Rationale for Imposing Liability*

Despite the abundance of evidence in the record demonstrating that the defendants encouraged infringement, the Court reiterated the delicacy required to strike the appropriate balance between protecting creative works and promoting technological innovation.⁶¹ The Court also emphasized the difficulty in distinguishing between direct infringement, contributory infringement, and vicarious infringement.⁶² Not surprisingly, the Court applied patent law principles of infringement to resolve the analogous issue of copyright infringement at hand.⁶³ In summarizing the now codified requirements for the distribution of a patented device, the Court pronounced that there is no public interest in making available an article of commerce that is "good for nothing else" except infringement.⁶⁴ The defendants, however, maintained that the Ninth Circuit properly interpreted *Sony* in not imposing liability on innovators for distributing products capable of both substantial lawful and unlawful uses.⁶⁵ MGM, though, alleged that the appellate court misapplied *Sony* because, even if the software products were capable of some lawful uses, the vast majority of use was for infringing purposes.⁶⁶

56. *Id.* at 2774.

57. *Id.* at 2781–82.

58. *Id.* at 2782.

59. *Id.* at 2774. The Court acknowledged that, although Grokster sent out e-mail messages warning users about infringement, Grokster never prevented users from sharing protected works. *Id.*

60. *Id.*

61. *Id.* at 2775.

62. *Id.* at 2776.

63. *See id.* at 2777.

64. *Id.*

65. *See id.*

66. *Id.* at 2778.

Ultimately, the Court agreed with MGM, holding that the Ninth Circuit misapplied *Sony* as a proper basis to dismiss the plaintiff's claim of secondary copyright infringement.⁶⁷ The Ninth Circuit reasoned that as long as a product had substantial lawful uses, a producer could never be held liable for a user's infringement, regardless of the purpose for which it was created.⁶⁸ The Court disagreed, stating that the *Sony* decision merely prevented a finding of secondary liability based solely on the product's potential infringing use when that product had other lawful uses.⁶⁹ However, the *Sony* rule was never intended to prevent consideration of evidence that a product was distributed for the purpose of encouraging its users to commit infringement, even if the product had significant lawful uses.⁷⁰ Therefore, because there was ample evidence to suggest that the defendants purposely distributed their products to encourage consumers to commit infringement, the narrow *Sony* decision was not applicable.⁷¹ Thus, the Court refrained from clarifying the issue of when, if ever, producers may be liable for secondary infringement due to the mere knowledge that their products could be used for unlawful purposes.⁷²

Having determined that *Sony* did not prevent liability under a theory that reflected patent law's staple article of commerce doctrine,⁷³ the Court then extended the inducement rule of patent law to copyright law.⁷⁴ The Court traced the evolution of copyright and patent law's liability for inducing infringement from common law and concluded that an individual was originally liable for inducing infringement through advertising or other marketing methods.⁷⁵ This inducement theory remains intact today, as courts often conclude that evidence of the encouragement of patent infringement through advertising, or the provision of instructions for using a product to commit infringement, will override the law's usual unwillingness to impose liability for producing an item that has both lawful and unlawful uses.⁷⁶ Thus, the Court concluded that "[f]or the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright."⁷⁷

67. *Id.*

68. *Id.*

69. *See id.* at 2778.

70. *See id.* at 2778–79.

71. *See id.* at 2778.

72. *Id.* at 2778–79.

73. *See id.* at 2777. Patent law's staple article of commerce doctrine, now codified, provides that a producer or seller of a patented device shall not be liable for contributory patent infringement if the product is capable of other suitable uses. *See* 35 U.S.C. § 271(c) (2000).

74. *Grokster*, 125 S. Ct. at 2780.

75. *Id.* at 2779 (citing *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911)).

76. *Id.* at 2779 (citing, for example, *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988)).

77. *Id.* at 2780.

In determining that patent law's inducement rule should be incorporated into copyright law, the only remaining question was whether MGM produced sufficient evidence to overcome summary judgment by demonstrating that communications from defendants to their users induced infringement and that such users actually committed infringement.⁷⁸ As to the first prong, the Court concluded that MGM clearly provided sufficient evidence of inducement for three reasons.⁷⁹ First, the defendants sought the market of former Napster users.⁸⁰ For example, memos within the StreamCast organization consistently referenced Napster, and the company's software was initially compatible with Napster's.⁸¹ Similarly, Grokster, whose name is obviously derived from Napster, also initially offered software compatible with Napster's.⁸² Second, the defendants did not attempt to develop safeguards that would diminish the likelihood of copyright infringement that could result from using their software products.⁸³ Finally, because the defendants' only source of revenue was through advertising, it was essential that each company attain as many users as possible.⁸⁴ The defendants' enterprises depended on a high volume of users, whose activities had been shown by the record to be infringing.⁸⁵ Again, this final fact, while not direct evidence of infringement, added context to the defendants' inducing purpose.⁸⁶ Taking these three pieces of evidence together, the Court determined that defendants' "unlawful objective [was] unmistakable."⁸⁷ As to the second prong, the Court concluded that MGM provided sufficient evidence of infringement by users to overcome a motion for summary judgment, even though the actual amount of infringement that occurred as a result of defendants' products was in dispute.⁸⁸ Finally, the Court concluded by reiterating that even if an article of commerce had both lawful and unlawful uses, distributors still may be liable for secondary copyright infringement if their actions demonstrated an intent to profit from the infringing activity of their users.⁸⁹

B. Beyond Grokster: Are There Any Losers?

Many claim that the *Grokster* decision will stifle innovation because producers will be more hesitant to distribute products capable of

78. *Id.* at 2780–82.

79. *Id.* at 2780–81.

80. *Id.* at 2781.

81. *Id.*

82. *Id.* at 2780–81.

83. *Id.* at 2781.

84. *Id.* at 2781–82.

85. *Id.* See *supra* text accompanying notes 43–49 for a discussion of the “staggering” amount of infringement committed by users of the defendants’ software products.

86. *Grokster*, 125 S. Ct. at 2782.

87. *Id.*

88. *Id.*

89. *Id.*

infringing uses knowing that they could be liable for secondary copyright infringement.⁹⁰ Despite this concern, the technology industry may benefit from the *Grokster* decision for the following reasons. First, the Court affirmed the *Sony* decision that the knowing distribution of a product capable of infringement will not warrant liability so long as that product has other substantial lawful uses. Although the Court declined to clarify the holding in *Sony*, it did use strong language in dicta that supported the doctrine.⁹¹ Specifically, the Court stated that, for the same reasons it adopted the *Sony* safe harbor provision, it was sensible to incorporate patent law's inducement rule.⁹² Furthermore, by deferring the issue of clarifying when an innovator can be liable for merely introducing into the chain of commerce a product that is capable of both substantial lawful and unlawful uses, the Court may have bought peer-to-peer developers some time.⁹³ It will likely be a few more years before the Supreme Court again grants certiorari to review a peer-to-peer file-sharing case or even a secondary copyright liability case. During that time, technology will develop rapidly, and it is likely that many legitimate uses of peer-to-peer file sharing will have established themselves.⁹⁴ Thus, peer-to-peer developers will have a stronger case for innovation under a *Sony* analysis.⁹⁵

Second, *Grokster* provided concrete guidelines to future innovators and distributors on how to avoid liability for secondary infringement. Even though there is a lack of case law clearly providing when distributors will be liable for secondary infringement, innovators can be relatively confident that no liability will result for refraining from taking affirmative steps to prevent infringement as long as there is no other evidence of intent to induce infringement.⁹⁶ Moreover, *Grokster* appears to place the burden on the plaintiff to establish a defendant's intent to induce, which may not always be straightforward.⁹⁷ In *Grokster*, the Court relied heavily on the defendants' specific actions of marketing themselves as alternatives to Napster and preventing network use by people who were attempting to monitor infringement.⁹⁸ However, in the future it likely will be difficult to establish an inducing intent without such clear actions. Thus, the *Grokster* decision puts an emphasis on punishing infringers and those who induce others to infringe, not on the

90. See Crawford, *supra* note 3.

91. See, e.g., *Grokster*, 125 S. Ct. at 2776–80.

92. *Id.* at 2780.

93. Ernest Miller, The Importance of . . . : Kicking the *Sony* Can down the Road, http://importance.corante.com/archives/2005/06/28/kicking_the_sony_can_down_the_road.php (June 28, 2005).

94. See *id.*

95. See *id.*

96. *Id.*

97. See *Grokster*, 125 S. Ct. at 2782 (holding that the plaintiffs produced enough evidence to overcome summary judgment).

98. *Id.* at 2781–82.

technology itself.⁹⁹ Therefore, innovators can continue to distribute products that serve their consumers' needs, so long as they do not engage in acts of inducement while distributing such products.

IV. CONCLUSION

The *Grokster* decision was the latest attempt by the Court to strike a delicate balance between protecting creative pursuits and encouraging technology and innovation. The Court held that distributors could be liable for secondary copyright infringement for affirmatively inducing users to commit infringement if the evidence shows that users did in fact illegally infringe protected works. However, the decision should not be seen as a defeat for the technology industry because the Court both affirmed its previous holding in *Sony* and provided some guidelines to future distributors as to when liability may be imposed for inducing infringement. Therefore, *Grokster* should reassure technological innovators that it is still within the confines of the law to knowingly distribute a product capable of lawful and unlawful infringing uses, so long as there is no evidence of intent to induce consumers to infringe.

99. See, e.g., Editorial, *Property Rights, Innovation Balanced*, SAN JOSE MERCURY NEWS, June 28, 2005, at A22.