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The Copyright Paradox

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Copyright law has become an important part of American industrial policy. Its rules are felt by every industry that touches information, and today that means quite a bit.[1] Like other types of industrial policy, copyright in operation purposely advantages some sectors and disadvantages others. Consequently, today's copyright courts face hard problems of competition management, akin to those faced by the antitrust courts and the Federal Communications Commission.[2]

How should courts manage competition using copyright? Over the last decade, writers have begun to try to understand the "other side" of copyright, variously called its innovation policy, communications policy, or regulatory side.[3] Here I want to focus attention on a crucial problem of decisional method that is becoming more clearly important to copyright decisions. Courts in both copyright and antitrust face a choice between what we can characterize as a "bad

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[1] Copyright today affects not only the traditional entertainment industries, but also the electronics industry, computer manufacturers, software designers, internet companies, telecommunications companies, and other sectors of the economy. Through trade agreements bilateral and multilateral, copyright also aspires to regulate those industries in the developing world as well. *See, e.g.*, the Trade Related Intellectual Property agreements, which became law by operation of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994), a comprehensive act dealing with matters of international trade. 18 U.S.C. § 2319A (which corresponds to § 513 of the URAA, 108 Stat. at 4975).

[2] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 3-11 (1978).

[3] *See* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1618 (2001); Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004); Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004); *see also* Yochai Benkler, Intellectual Property and the Organization of Information Production, 22 Int'l Rev. of L. & Ec. 81 (2002).

actor" and "welfarist" models of deciding cases. The "bad actor" approach punishes alleged wrongdoers based on malicious behavior of the suspect and the prospect of harm to favored sectors of the economy, like small businesses (in antitrust) or the entertainment industries (in copyright). The "welfarist" approach, by contrast, calls for judges generally to ignore intent or "bad behavior" in exchange for a disciplined focus on questions of industry economics and consumer, or user, welfare. The welfarist approach accepts Adam Smith's premise that certain forms of malicious behavior may promote overall social well-being, on balance, though some may not.

The tension between these approaches became clear in the Supreme Court's 2005 decision in *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd*.[4] In *Grokster* the Court side-stepped a welfarist calculation called for by existing law, and turned instead to a "bad actor" approach. Faced with a vicious fight between disreputable firms and the incumbent industry, the Court chose to punish the bad guys. To the Court, and to many observers, the *Grokster* decision was a good political way out of a very difficult problem. As a one-shot political compromise, the decision managed to avoid outraging either the electronics or incumbent distribution industries, and was successful in that regard. However if *Grokster* is also meant to serve as a model of how copyright should manage competition, the drawbacks of the *Grokster* model are manifest.

First, if we accept that courts should be actively choosing winners and losers among various types of market entrant, we need to ask whether *Grokster's* focus on intentionally bad behavior is a good way to create market entry rules. As discussed below, the approach can be defended, particularly under the facts of *Grokster* itself. But at its worst, the Court's approach in *Grokster* risks putting copyright where antitrust was in the 1960s, punishing businesses without asking whether consumer welfare is served or harmed by the business model in question. That's not to say *Grokster* is an easy case either way. But it can be a dangerous business to create industrial policy focused on the perceived malice of the defendant as opposed to measures of economic consequence. That's, at least, what antitrust writers long ago concluded. As the late Phillip Areeda put it, "'purpose' or 'intent' have been particularly slippery, ambiguous, and unsatisfactory in the antitrust world."[5] The problem that antitrust scholars point out is that "bad behavior" is sometimes just another name for competitive behavior, of the kind the legal system might want to encourage.

Second, even within the welfarist approach to copyright, an old but still uncomfortable question remains. How comfortable are we with the federal

[4] 125 S.Ct. 2764 (2005).
[5] AREEDA & HOVENKAMP, III ANTITRUST LAW ¶601 (2d ed. 2002).

courts, as in *Grokster* or *Sony,* using the copyright code to set market-entry policy for new technologies at all? The answer isn't entirely obvious. Some might argue that since copyright infringement is a tort, the Court has the duty to work out a full theory of secondary liability. Others might prefer the federal courts' relative insulation from interest group politics. But arguably what the Court is doing with copyright's competition policy is as technical and economic as the problems the Supreme Court routinely defers to the Federal Communications Commission. The case *National Cable & Telecommunications Assn. v. Brand X Internet Services*,[6] released the same day as *Grokster*, makes this institutional contrast clear. In both cases the Court faced hard problems of technology and economics. In *Grokster*, the Court has little hesitation in making policy for an extremely complex and evolving technological problem, but in *Brand X* the Court bent over backward to defer to an expert agency.

What the courts in cases like *Grokster* is doing is akin to trying to decide on the right level of an industrial subsidy in the face of technological change. That's a hard challenge for any branch of government, including Congress, and indeed Congress' interest-group dominated method has a mixed record.[7] But as the federal courts continue to encounter the question of just how much protection is warranted in the face of disruptive technologies, the questions of institutional competence may become even more intense. Stated otherwise, beyond the question of decisional method lies unanswered questions of legal process.[8] Where does the courts' relative institutional competence to handle adjustments to copyright in face of technological change begin and end? That's not an easy question to answer. Yet it is beyond question that at some point the Court may need to relearn how to hand problems over to a Congressional process.

How Copyright and Antitrust Manage Competition

While traditionally associated with the promotion of individual authorship, copyright in operation also creates industrial policy. It provides some level of support and protection to a group of favored industries—the film industry, recording industry, software, and publishing—at some expense to other industries and consumers. The theory is that, absent such protection, the favored industries would not be viable, hence the need for government

[6] 125 S.Ct. 2688 (2005).

[7] Perhaps the best known failure is the Audio-Digital Home Recording Act of 1992, which was an effort to handle the invention of digital recording technology. The Act focused on the Digital Audio Tape, which it simply managed to render uncompetitive, and as a whole the Act was almost irrelevant to the struggle over digital copyright discussed in this paper.

[8] *Cf.* HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994) (""What is each of these institutions good for? How can it be made to do its job best? How does, and how should, its working dovetail with the working of the others?").

protection.[9] For various reasons, expressive works are unusual and less likely to be produced at optimal levels absent government intervention. Yet this leaves open a very hard question: what is the right degree to which other industries should sustain such costs to support the creation of expressive works that is necessary to copyright-dependent industries?

These problems are faced in their most difficult form when copyright considers the market entry of new technologies of copying and distribution, like the electronics and telecommunications industries.[10] New communications industries, like radio, cable, or internet distribution, inevitably threaten existing companies. And copyright, for better or worse, has emerged as a central tool for managing the market entry of certain types of disruptive technology. The challenge is, in some rough way, to allow new technologies to emerge while still fairly protecting the incentives to create expressive works. Those are not goals easily reconciled, and the result has always been some kind of messy tradeoff.

The copyright system in the 20th century often dealt with these problems with through a mixed Congressional and Court-driven process that led to legally-managed settlements called compulsory licensing schemes.[11] Stated briefly, the new industry and the incumbent distributors, sometimes over a period of decades, would fight both in the courts and in Congress until finally arriving at a settlement. These deals, placed directly in the copyright statute as compulsory licensing schemes, typically struck a balance. The new industry got a right to access copyright works crucial to its commercial success. In exchange, the new industry would make some kind of ongoing transfer payment, set by statute, to the incumbent copyright owners and incumbent distributors.[12]

Since the 1980s copyright has mainly taken a different approach and used a different policy tool for managing market entry problems. Perhaps in reaction to the decades-long battles that led to compulsory licenses, the new system is more clearly court-managed. It is usually called the *Sony* system, after the decision on the legality of the Sony Betamax VCR in *Sony Corp. of America v. Universal City Studios, Inc.*[13] As the Court said at the time, it was "strik[ing] a balance between a copyright's holders' legitimate demand for effective [protection]… and the rights of others freely to engage in substantially unrelated areas of commerce."[14]

[9] There are some analogues in copyright policy to strategic trade policy. *Cf.* ELHANAN HELPMAN & PAUL KRUGMAN, TRADE POLICY AND MARKET STRUCTURE (1989).
[10] *See generally* Picker, *supra* note 3.
[11] *See* Wu, *Copyright's Communications' Policy*, *supra* note 3, at 288-297, 309-325.
[12] *Id.*
[13] 464 U.S. 417 (1984).
[14] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

What is the *Sony* rule, and how does it manage competition? The *Sony* Court ruled the VCR a legal technology, despite the fact that it could be and was used for infringing purposes. Interestingly, the *Sony* Court claimed to be deferring to a Congressional resolution of the battle between Hollywood and Sony – yet it still went ahead and created a judge-centric rule meant to distinguish desirable from undesirable market entrants. The Court said (using language that most copyright lawyers know by heart) that a manufacturer of copying technology is not liable for the infringements of its users "if the product is widely used for legitimate, unobjectionable purposes." "Indeed," said the Court, "it need merely be capable of substantial non-infringing uses."[15]

While there is great disagreement over the meaning of the *Sony* rule, its *method* is fairly clear. At bottom, the *Sony* test asks courts to conduct some weighing of the social costs and benefits of any new technology. The disagreement over meaning arises over what can legitimately constitute a cost or benefit of a new technology, and in which direction the presumptions should run.

There are obvious ambiguities on both sides of the *Sony* ledger. The benefits are a technology's "legitimate purposes"— the benefit to consumers of a new technology (in *Sony* itself, the luxury of taping TV programs and watching them later). Later courts, including the *Grokster* Court, describe this as the interest in "innovation," and it can also be described as the consumer surplus generated by a rightward shift in the supply curve.[16] But here's the problem: should the Court focus on consumer uses clearly manifest at the time of decision, or try to take into account future uses of the technology? In other words, if a new technology has a social value of 10 today, but a future value of 1000, is it worth a present harm of 100?[17] The Court, in *Sony,* unsurprisingly, didn't answer that question.

One reading of *Sony* takes the language "merely capable" to create a presumption—that judges should not block any technology unless it is absolutely clear that the product is not even theoretically capable of uses that are not illegal. While not quite so saying, the Ninth Circuit came close to endorsing this position in the *Grokster* litigation.[19] But others firmly reject the idea that *Sony* has any such presumption. Judge Posner has interpreted *Sony* as limited to

[15] *Id.*
[16] *See* Wu, *Copyright's Communications Policy*, *supra* note 3, at 292-95.
[17] *Cf.* Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002).
[19] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd. 380 F.3d 1154 (9th Cir. 2004).

extant uses on the record. "It is not enough" he said, "that a product or service be physically capable, as it were, of a noninfringing use." [20]

Aside from the meaning of "merely capable" it is also not so easy to say what should count as a cost. Courts say the costs are those of "infringement," but what does that mean? The difficult fact is that if we ignore dynamic effects, infringement benefits consumers. Any single instance of infringement is not a cost at all, but just a transfer of wealth to the individual infringer. Rather in the sense that Jesus was able to feed 5000 people with "five loaves, and two fishes,"[21] millions of infringing consumers get something that costs $15 for free, and no honest economist can ignore billions in consumer surplus.

The costs, of course, are dynamic—the diminution of incentives to produce things that society wants produced. Without reasonable financial incentives to create new works, unpaid creativity may continue,[22] but investments in commercial entertainment will diminish or disappear. But here the tricky question is distinguishing the costs to *authors* as opposed to *distributors.* Given the advent of a new technology, some of the "costs" may represent the fact that outdated technologies are being put of business, in the sense that computers imposed costs on the typewriter industry. Should a court try to figure out whether the costs of infringement are really costs that will be felt by authors, as opposed to incumbent distributors?

One more thing need be said. The *Sony* Court tried to fit its rule somewhere within the traditional common-law doctrine of contributory liability. So while everyone knows that *Sony* asks courts to judge the costs and benefits of a new technology, its doctrinal cast is different. *Sony* purports to be about *mens rea* – deciding whether constructive knowledge of infringement is sufficient to constitute knowledge for purposes of contributory liability. (Non-copyright lawyers are often surprised to find out that major questions of competition policy are settled this way). As we shall see, this link to "knowledge" is the "bad actor" side of the test for contributory liability. The idea is that, regardless of the costs and benefits discussed in *Sony,* a company that knowingly helps infringe copyright ought be liable no matter how beneficial its technology is.

The *Sony* court did something unusual: it put an economic test in the middle of a *mens rea*-driven standard. That, as we shall see, had important

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[20] In re: Aimster Copyright Litigation, 334 F. 3d 643, 653 (7th Cir. 2003) (Posner, J.) ("It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use [to escape liability under contributory infringement].").

[21] *Matthew* 14:15-21 (King James).

[22] For a description of some of the mechanisms underlying non-commercial creativity, see Yochai Benkler, Coase's Penguin, or Linux and the Nature of the Firm, 112 Yale L. J. 369 (2002).

consequences for the *Grokster* litigation. But first we turn to antitrust, where Courts have been asking *Sony*-like questions for more than a century.

Two Antitrust Approaches

In antitrust, courts regularly face the same "industry injury" problem just described in the copyright context. In copyright, the problem is that one company's business model (in *Sony*, the VCR) is seen as injurious to the business model of others (in *Sony*, the film industry). Antitrust is similarly faced with problems of allegedly injurious behavior between firms. Predatory pricing, plaintiffs have long argued, is a dastardly practice that big business uses to kill the little guy. Mergers will create dangerous giants that will drive smaller competitors out of business. A variety of business practices, many of which are quite ungentlemanly, are alleged to be dangerous. The challenge for courts is to figure out which of the many forms of "bad behavior" should amount to illegal behavior.

Over the course antitrust history there have been many schools of antitrust thought, and this paper is no survey. [23] But on this issue of intent and motive, to simplify enormously, over the least several decades we have seen reflections of two main and competing decisional approaches, the "bad actor," and "welfarist" approaches.

The "bad actor" approach to antitrust aims to punish or block various ill-intended business practices that are regarded as wrongful, and likely damaging to favored sectors of the economy. In the case law, it is distinguished by an emphasis on motive or "economic purpose," rather than net economic effect or consumer welfare. During the 1950s, 60s, and 70s, when the approach was at the peak of its popularity, the courts did not allow what they considered "bad" practices to be justified by the prospect of gains in business efficiency.[24] They were willing to punish what they called bad behavior regardless of proof of injury to consumers or to the economy as a whole. Conduct was punished on the basis of its effects on favored sectors, such as "small dealers and worthy men" against the abuses of the market.[25]

A well-known symbol of the "bad actor" method is the famous case of *Brown Shoe Co. v. United States*,[26] decided in 1962. *Brown Shoe* concerned a

[23] This is an enormous simplification. The history of battling "schools" of antitrust thought is described in Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust, in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1 (Antonio Cucinotta et al. eds., 2002).

[24] *See* Bork, *supra* note 2.

[25] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343 (1897).

[26] 370 U.S. 294 (1962).

proposed merger between two shoe manufacturers and retailers who, collectively, would control about 5% of the manufacturing market and 2.1% of the retail market (this number was higher in some cities). Despite the relatively small numbers, the Court blocked the merger, in large part based on the purpose of the merger. The Court ruled that it was essential to examine the "very nature and purpose of the arrangement,"—the "economic purpose" of the merging companies. The merger, it turned out, was motivated not by an interest in rescuing a failing company, or even by an interest in allowing two small companies to defeat larger opponents. Instead, it featured two successful companies who hoped to use their new size to aggressively expand their market share. That, said the Court, was a trend that should be halted.[27] The Court justified the decision by declaring that antitrust had a particular concern for a certain "economic way of life."[28] That meant using the law for the protection of certain sectors of the economy – to protect against adverse effects "upon local control of industry and upon small business."[29]

As everyone familiar with antitrust knows, the "bad actor" approach represented by *Brown Shoe* has been not only criticized, but also renounced, and ultimately upended. Most of the attack came from the "Chicago School," historically composed of people who at some point or another worked with Aaron Director at the University of Chicago. Writing in 1976, for example, Richard Posner said of *Brown Shoe*, "one has no sense that the Court had any notion of how a non-monopolistic merger might affect competition."[30] Robert Bork, in his book *The Antitrust Paradox,* wrote that "[i]t would not be overhasty to say that the *Brown Shoe* opinion is the worst antitrust essay ever written." Bork, paraphrasing Justice Stevens, also left us with this memorable description of the "bad actor" approach to antitrust:

> Antitrust … is in the good old American tradition of the sheriff of a frontier town: he did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people.[31]

Even Phillip Areeda, writing at greater distance from the Chicago School, wrote "in the great majority of antitrust cases, talk of 'purpose or intent' is largely diversionary or redundant… one must concentrate on conduct and define its characteristics that are undesirable."[32]

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[27] Id. at 333.
[28] Ibid.
[29] Ibid.
[30] Richard A. Posner, ANTITRUST LAW 102 (1976).
[31] *See* Bork, *supra* note 2, at 6.
[32] Areeda & Hovenkamp, III ANTITRUST LAW ¶651 (2d ed. 2002).

The principal criticism advanced by the Chicago School was simple: the courts had relied too much on considerations like "bad motives" and failed to justify their intervention by any reference to the effects on the economy as a whole. The Chicago School proposed the alternative and now dominant approach, a welfarist approach. Its central argument is that the maximization of consumer welfare should in all cases be the primary goal of competition policy. In judicial practice, that meant that every condemnation of a given business practice should be accompanied by some proof that the practice in general is actually bad for the consumer.

In contemporary antitrust theory and judicial practice, the welfarist approach now dominates. Yet that doesn't mean that we have Robert Bork's antitrust law. There remains much disagreement, within the welfarist decisional method, over whether writers like Bork were correct about what counts as harmless or efficiency-promoting business practice. For example, many scholars in the "new institutional economics" school take a very different view of vertical integration than Bork did.[33] But the Chicago School's larger point – that damage to consumer welfare should be the sine qua non of antitrust illegality – is today essentially uncontested.[34]

Grokster

It was perhaps inevitable that the Court in copyright would one day face a *Brown Shoe*-like case, and it turned out to be *Grokster.* The *Grokster* case was the culmination of nearly five years of constant litigation centered on the invention of mass "filesharing" technology in the late 1990s.[35] The questions in *Grokster* were created, at the broadest level, by the popularization of the internet, which makes possible mass dissemination of expressive works without the industries that have long specialized in such dissemination. To be blunt, the internet threatened to make large parts of the incumbent distribution industries obsolete. Online distribution is a particular threat to the recording industry and its favored model of the retail compact disc.

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[33] *See* Hovenkamp, *The Reckoning of Post-Chicago Antitrust, supra* note 22.

[34] Essentially, but not entirely. See, e.g., David W. Barnes, *Revolutionary Antitrust: Efficiency, Ideology, and Democracy*, 58 U. CIN. L. REV. 59 (1989) (defending *Brown Shoe* approach as more consistent with American democracy); Kenworthey Bilz, *Populist Wealth in Legal Economic Analysis* (Oct. 12, 1998) (unpublished manuscript).

[35] For an account of the evolution of filesharing technologies, see Timothy Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 726-43 (2003).

[37] Jane C. Ginsburg, *Putting Cars On The "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995) (discussing the role of intermediaries); Wu, *When Code Isn't Law, supra* note 34 (same).

Filesharing, or "peer-to-peer" (P2P) software, in its various forms, is a type of program that lets people to share information without help from any centralized distributor. These programs make it easy for millions to copy and distribute information without permission, while the copyright law has long been premised on the fact that doing so is hard.[37]

The filesharing attack on industry structure came in waves. As everyone knows, the first came from a college dorm and a student nicknamed "Napster." His Napster program was the first to make filesharing a mass phenomenon. But Napster's design also gave its owners both knowledge and control of the sharing it facilitated, and Napster was quickly buried by the Ninth Circuit.[38]

The *Grokster* litigation, the second wave, was a truer test of filesharing technology. Napster's greatest successor was a program named Kazaa, produced by the Amsterdam-residing Swede named Niklas Zenstrom, aided by a mysterious team of Estonian programmers. Kazaa's basic design concept was adopted or licensed by other companies, including "Grokster," the first defendant by alphabetical order in the *Grokster* litigation. The difference between Napster and Kazaa is slightly technical, but suffice to say that Kazaa was by design much closer to a purely neutral filesharing technology.[39] The programs could be used to swap just about any kind of file, and the producers of Kazaa or Grokster had no immediate control over their users, and no specific knowledge of what any one user was up to.

I have described filesharing technology as just a technology for sharing information. But despite the great labors of the defendants and other groups, the social meaning of filesharing was and is quite different. Programs like Kazaa and Grokster have always been understood not just as a new means of disseminating information, but as a way to get music and sometimes movies for free. They had a reputation, in other words, as pirates.

For many, P2P's rebellious nature was the whole point – it was a new technology that might to liberate music from the chokehold of what some saw as a corrupt and abusive recording industry. Professor Siva Vaidhyanathan has called the use of filesharing networks "civil disobedience." As Justin Frankel, "the world's most dangerous geek" put it, the point of filesharing programs was "giving power to people, and what can be wrong with that?"[40]

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[38] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[39] See Wu, *When Code Isn't Law*, *supra* note 34, for a description of the technical differences between Napster and Kazaa.

[40] David Kushner, *The World's Most Dangerous Geek*, ROLLING STONE, Jan. 13, 2004.

But P2P's reputation didn't help in the quintessentially uptight city of Washington D.C. The filesharing movement was seen less as a legitimate market entrant and instead as a bunch of radicals hailing from the West Coast and Amsterdam. The contrast with Sony from the 1970s is important. Then, the film industry tried to portray Sony as a foreign "invading" force -- Jack Valenti, lobbyist for the film industry, called the VCR "a great tidal wave just off the shore."[41] But it didn't work.[42] Sony was the inventor of the walkman and other gadgets and widely beloved. It came to Court as a respectable, even earnest company whose products were used by decent citizens. That cultural difference between Kazaa and on the one hand, and Sony on the other, arguably made a difference in the *Grokster* litigation.

The Court, in deciding *Grokster*, faced the problem of method we described in the antitrust context. Would it try to decide the case under *Sony,* by assessing whether, on balance, the benefits of Grokster's technologies were worth the costs measured in terms of authorial incentives? Or might it be easier to decide the case by looking at the motives of the actors involved? In Bork's terms, might it just be easier to pistol-whip a few bad guys?

The Court took the easy way out, and the reasons are easy to understand. The Justices couldn't agree on the hard question—whether the *Sony* rule, which calls for some balance of costs and benefit, allowed Grokster to survive (in concurrences, they split 3-3 on the question). The Seventh and Ninth Circuits had announced very different views of what *Sony* should mean. And the briefing also gave the Court plenty of reasons for staying away from *Sony*. Both sides warned of the terrible consequences of adjusting the *Sony* rule. The recording industry and some academics warned of chaos that might attend adopting an expanded *Sony* that declared Grokster legal.[43] On the other side, the computer hardware, software and electronics industries and others warned of the toil and trouble that

[41] *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong, 2d Sess. 5 (1982) (statement of Jack Valenti, President, Motion Picture Assoc. of America)[hereinafter VCR Hearings].

[42] James Lardner, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR 21 (1987).

[43] *See, e.g.*, Brief for Motion Picture Studio and Recording Company Petitioners, at 19, Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 125 S.Ct. 2467 (arguing that the Ninth Circuit's *Sony* theory "perversely encourages such efforts to defeat copyright enforcement, and disadvantages businesses that seek in good faith to prevent violations of copyright holders' rights."); Brief Of *Amici Curiae* Law Professors, Economics Professors, And Treatise Authors, Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 125 S.Ct. 2467 (Upholding Ninth Circuit "could negatively affect myriad existing technologies, undermine the copyright system, destroy the economic viability of legitimate file-sharing services, and retard future innovation in both the technological and authorial communities.").

would attend the destruction of their beloved *Sony* safe-harbor.[44] Whatever the Court did with *Sony*, it was sure, or so the amici seemed to suggest, to make life in American unlivable.

Meanwhile there was a much easier way out. All of the Justices could plainly see that Grokster, Kazaa and the like were running a crooked business. Everyone knew these companies weren't "legitimate" market entrants like Sony, but rather companies trying to make a quick buck on copyright infringement. So the Court pistol-whipped Grokster out of business. In doing so, it purported to leave *Sony* alone, hoping to mollify everyone by grabbing a rule from the patent statute that fit what they didn't like about Grokster's business model. The Court created a test designed to catch companies with a bad attitude.

The result is the "active inducement" test, the first test in copyright history that asks a court to look at a defendant's business model and decide whether its motives are crooked. It is a test that bears strong similarities to similar intent-based approaches in antitrust law. But before getting to analysis of that test, a few notes on the opinion.

The *Grokster* opinion is notable, compared to the Court's earlier decisions, for how little awe the Court seemed to have for the internet. Back in 1997, the Court called the internet "a unique medium – known to its users as 'cyberspace' — located in no particular geographical location but available to anyone, anywhere in the world …."[45] But by 2005, the honeymoon was over. The fact that the internet was part of the litigation was important, but there was little of the techno-libertarianism that characterized many of the internet decisions of the 1990s. Stated otherwise, with *Grokster,* internet analysis has come to splinter largely based on usage, or application.[46]

Second, the Court described a central question in copyright as follows:

> The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.[47]

[44] *See, e.g.*, Brief of Intel Corporation as *Amicus Curiae* Supporting Affirmance, at 5, Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 125 S.Ct. 2467 (If Sony were uprooted, "innovators, such as Intel, would have no choice but to withhold from the market socially and economically useful products. The national economy, which has grown through technological innovation over the 20 years since this Court decided *Sony*, would suffer.") .

[45] *See* Reno v. ACLU, 521 U.S. 844, 851 (1997).

[46] *See* Timothy Wu, *Application Centered-Internet Analysis*, 85 VA. L. REV. 1163 (1999) (describing future where internet cases split by application type).

[47] 125 S. Ct. at 2775.

That isn't the traditional way that the court discusses copyright's balance. The traditional way of describing the balance is that copyright is either "a tax on readers for the benefit of writers," or "a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[48] The Supreme Court's words in *Grokster* may reflect some awareness that the court was dealing with the "communications policy" side of copyright, or regulation of new and old technologies of dissemination, where the interests at stake are indeed different than in the purely authorial context.

Onto the test itself. The active inducement test itself says that a company is to be punished if it "distributes a device with the object of promoting its use to infringe copyright."[49] That, the court explained, is "shown by clear expression or other affirmative steps taken to foster infringement."[50] What such "affirmative steps," might be the Court didn't explain completely, but it did find enough of them evident in the *Grokster* litigation. Most importantly, said the Court, were three things: solicitation of infringement, design, and commercial interest.

The programs in question had a suspect lineage: all were designed to appeal to the users of the "notorious … Napster."[51] The Court made much of the fact that one of the defendants, Streamcast, developed advertising materials that called the product the "#1 Alternative to Napster." (Notably, the advertisements weren't actually released, on the advice of Streamcast's lawyers). Second, none of the companies designed their products to prevent infringement (though the court quickly added that merely not designing a product to prevent infringement wasn't enough—more on this in an instant). And, finally, the Court pointed out, ad-driven business models need volume to succeed, and since the demand is for infringement, their commercial interest was served by infringement.[52] The Court found what it wanted to confirm what it already thought: these guys were up to no good.

Readers who are not copyright lawyers may be curious to know how, exactly, a major economic decision about the future of industry competition could come to be influenced by the contents of a proposed advertising campaign. The doctrinal answer is, as we discussed above, that the common law of contributory copyright liability left an opening, for it makes everything depend on the *mens rea* of the alleged contributory infringer. *Sony*, while really a decision

[48] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
[49] 125 S.Ct. at 2780.
[50] 125 S.Ct. at 2780.
[51] 125 S.Ct. at 2772.
[52] 125 S.Ct. at 2781-82.

about market entry, is doctrinally a decision about when constructive knowledge suffices to create contributory copyright liability. In other words, for better or for worse, you can find a "bad actor" approach is already built into copyright's common law contributory infringement doctrine.

Another reason, which may seem absurd to non-lawyers, is that there was a pleasing doctrinal symmetry in adding an "active inducement" test to copyright. In *Sony* itself, the Court had declared that the "substantial non-infringing" test was based on a doctrine in §271(c) of the patent statute. The active inducement test is just one statutory section away, in §271(b). (As Randal Picker put it, "you might say it took the Court took 20 years to move us one section into the patent law.") [53] Since the patent law has these two bases for infringement, why not copyright?

What Does Grokster Mean?

Within hours of the decision's release, copyright watchers were asking "but what does it mean?" The "induce" formulation, as many have complained, is open-ended. What is a "clear expression or other affirmative steps taken to foster infringement?" As Rebecca Tushnet asked, are Apple's famous "rip, mix, burn" advertisements enough?[54] We may organize the discussion by saying that Grokster leaves behind three sets of questions. First, what's left of *Sony*? Second, what, exactly, does *Grokster* say about product design? And third, what will *Grokster* mean for actual copyright litigation?

The main doctrinal question after *Grokster* is what, if anything, remains of the *Sony* safe harbor. It is true that the Court on several occasions expressly said it was leaving the *Sony* rule alone, that it would "leave further consideration of the *Sony* rule for a day when that may be required. "[55] But if the *Grokster* rule makes *Sony* irrelevant for most cases, then *Sony* may be merely preserved, as Fred Von Lohmann puts it, "in amber."

The question can be framed by asking what happens to the next program that has only a few, or even none of the elements *Grokster* described as probative to an intent to induce infringement, yet still is widely used for infringement. Recall that *Grokster* named three things that courts might look at as acts probative of inducement:

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[53] *See* Randal Picker, Remarks at the Telecommunications Policy and Research Conference, Sep. 23, 2005.

[54] Posting of Rebecca Tushnet to http://www.scotusblog.com/discussion/archives/grokster/ (June 28, 2005, 13:27 EST).

[55] 125 S.Ct. at 2779; s*ee also id.* at 2781 note 12.

(1) Promotion or solicitation of infringement (i.e., advertising);
(2) Failure to filter; and
(3) A business model dependent on massive infringement.

(The Court also added that neither evidence of (2) nor (3) standing alone would be sufficient evidence of intent).[56]

Consider three problems. First, a "copyright liberation" website might promote infringement and fail to filter, but have no business model.[57] Second, a company (Apple is arguably in this category) might benefit and arguably depend on mass infringement, yet not take any steps to encourage it, and even use encryption technology to discourage infringement. And finally, consider the "passive enabler" a site that facilitates infringement, yet otherwise does nothing: it takes no proactive steps, other than existing to encourage infringement. For these kinds of problems, does copyright liability attach, and is *Grokster* the relevant rule, or *Sony?*

A key question for each of these examples is whether the bare fact of massive infringement means the software manufacturer has the "object of promoting [the program's] use to infringe copyright." It is not a question answered in the opinion, and it seems the only way to get at it is to ask whether willful blindness suffices to create liability under *Grokster*. To restate, if you know, for contextual reasons, that your program will be used for massive infringement, and you release the product anyway, is the act of releasing the product the inducement of copyright infringement?

We can discuss three ways to answer the question. Jane Ginsburg provides the first. She believes that these kinds of hard *Grokster* problems will be effectively converted into *Sony* problems. "Speculation is hazardous," she writes, "but one might predict that where a device facilitates infringement on a massive scale, its distributor will likely be found to have intended that result. Where the infringement is relatively modest in scale, inducement will not be found, but neither will the *Sony* threshold for liability be crossed."[58] In other words, whatever the labels, everything will ultimately turn on the old *Sony* question of whether the technology facilitates too much infringement. We can call this theory the *Grokster* via *Sony* theory—the idea being that a device that fails *Sony* can easily and automatically be called a copyright inducer under *Grokster.*

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[56] 125 S.Ct. at 2780-2782.

[57] This example is taken from Jane Ginsburg & Sam Ricketson, *Inducers and Authorisers: A Comparison of the US Supreme Court's Grokster decision and the Australian Federal Court's KaZaa ruling* 7 (January 6, 2006 draft on file with author).

[58] *Id.* at 6-7.

A second, and perhaps less rigorous prediction is that the answer may end up having much to do with what I have called a program's "lineage." The Court in *Grokster*, in effect, was trying to kill a family line – Napster and its progeny. And one prediction is that programs inspired by and designed to do what Napster did – make filesharing easy for millions of people – will result in liability under *Grokster.* The idea is that if you design a follow-on program, you must know that you're trying to facilitate massive infringement whether under a willful blindness theory or otherwise. Meanwhile, passive enablers that do not share *Napster*'s lineage are safe.

The lineage theory suggests that *Sony* remains the rule for technologies that never knew Napster – technologies clearly and obviously designed for purposes other than infringement, and are used predominately for that purpose. For example, email and Microsoft's Explorer browser are in practice used to facilitate massive copyright infringement. But they don't have any historical connection to Napster / Grokster, are widely used for legitimate purposes, and were never designed for copyright infringement. Also, perhaps critically, the business model doesn't depend on infringement in an obvious way.

The third theory is the "active step" theory. The Supreme Court said in *Grokster* that

> mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.[59]

This suggests that so long as companies either don't actively take a single step to encourage infringement, they simply cannot be liable under an inducement theory. Instead, in the absence of any active steps, the relevant test is, again, *Sony.* If this reading is right, willful blindness is irrelevant – there has to be some affirmative act in question for inducement liability to exist.

The passive enabler question is sharpened by considering Bittorent. Bittorent has been widely seen as the "next wave" in filesharing software – one even more powerful than Kazaa, and more often used for legal reasons.[60]

[59] 125 Sp. Ct. at 2780.
[60] *See* Wikipedia, BitTorrent, http://en.wikipedia.org/wiki/BitTorrent (last visited Oct. 6, 2005)

As it stands, both the *Grokster* through *Sony* and lineage theory predict bad news for Bittorent sites. Even a passive site will held inducing for making the technology available with what they know, unless they take advantage of a *Grokster* safe harbor as I describe in a moment. Conversely, if the active step theory is right, a site that is purely passive cannot find itself liable under *Grokster* (though it may still face *Sony* liability).

But to fully answer the question we need to turn to the topic of safe-harbors. What did *Grokster* really say about product design? Does it require all copying devices to have filters or centralized control? Discussing product design, and in particular, filtering, *Grokster* said the following in Footnote 12:

> Of course, in the absence of other evidence of intent [other than a failure to screen], a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.[61]

This language says that failure to filter isn't, by itself, enough to prove infringement given a product that is otherwise legal under *Sony.* This language supports the conclusion that companies like email providers cannot be secondarily liable merely because they don't block all emails carrying infringing works. Yet one might also infer from this language that *Grokster* creates a kind of safe harbor that may prove important. It may be read to suggest that a product that *does* filter is presumptively not a product that is intended to promote infringement, even if it does, in practice, facilitate infringement.[62] In other words, *Grokster* is good news for Apple's iPod and iTunes download store, which, as in the example below, do lead to infringement, but also make some effort to prevent illegally copying. The opinion may have even been written with the iPod in mind.

The final set of important *Sony / Grokster* questions are procedural. What difference will *Grokster,* as opposed to *Sony,* make in actual copyright litigation? Will *Grokster* make it much easier to threaten innovators with lawsuits? We can probably assume that every copyright plaintiff will, as a matter of course, bring an inducement count in any future litigation. For summary judgment purposes,

[61] 125 S.Ct. at 2781 note12.

[62] The question is then this: what happens if a company puts in place a filter, or an encryption system, designed to prevent infringement, that fails? For example, while the iPod is meant to prevent people from sharing files, many have learned how to disable the protections. Is the manufacturer liable if it its systems fail? Does the analysis then turn to a Sony question – namely, how often is the system used illegally, versus illegally? My guess is that a good faith effort to filter will be enough, but only time will tell.

[64] FED. R. CIV. P. 56(f).

might we expect that *Grokster,* and not *Sony,* will drive the litigation? Perhaps the evidentiary issue of "intent" to be harder to escape on summary judgment, and in any cases more expensive to litigate than design alone. And that, obviously, favors copyright plaintiffs with lots of resources.[64]

In short, the procedural consequences of *Grokster* may be the most important for the future of innovation. One rather pessimistic view suggests that the *Grokster* rule will help big innovators at the expense of smaller innovators. As an innovation test, it creates some degree of uncertainty, which will lead to more deal-making, more settlement, and payoffs to industry, as in the example of Apple's iTunes. iTunes, a competitor to Kazaa at the time of litigation, keeps prices relatively high relative to its costs, and hands over much of its proceeds to the old recording industry, the existing copyright distributors. That, the argument goes, hurts smaller, newer innovators, who won't ever have the resources to pay off the incumbent industries. Indeed it is hard to imagine wanting to start or fund a company that has to worry a lot about *Grokster* issues, and lacks either the size or wherewithal to find partners.

Is there a contrary view of *Grokster*? It must be correct that, on balance, a new theory of liability does not help the new firms whose business models touch and concern copyrighted materials. But we also know that the decision was, as we've said, an effort to be minimalist – to kill Grokster without guaranteeing permanent life support for the recording industry. [65] And so a contrasting view is that *Grokster* may not mean much ("what decision?").

If the "active step" theory of Grokster is right, then the consequences of *Grokster* may be fairly minimal. It all comes back to what are likely to be the hardest questions at summary judgment: to what extent can "intent" be inferred from "design." This is the same as the question discussed above – whether passive knowledge of widespread illegal use, plus a failure to design software or hardware to do anything about it, is enough to count as inducement.

***Grokster*'s Competition Policy**

Grokster was a political compromise. But the deeper questions raised by *Grokster* aren't what "induce" means, or even whether *Grokster* was a successful political settlement.[66] The question is how far the Court should go in deciding these kinds of cases with inducement rules that study the behavior of the particular companies in question. Why should the law care what some Swedish businessman was thinking when he wrote advertisements for Kazaa? Should the

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[65] *Cf.* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

[66] *See* Congressman Rich Boucher, Remarks at Stanford Law School (Sep. 19, 2005) (praising *Grokster* decision as "wise" because no one came to Congress afterward seeking legislation).

contents of proposed advertising campaigns really tip American industrial policy one way or another?

Remember what the court is doing: it is blessing or cursing the market entry of a given technological device. Whether the object was to "promote its use to infringe copyright," is arguably irrelevant. The right question is this: either a given technology is worth its costs, or it isn't. Either Grokster's or Bittorrent's efficiencies and gains in user welfare are worth the damage to authorial incentives, or they aren't. That's not an easy question, necessarily. But why should we care what Streamcast's advertising manager was thinking?

While I don't want to say that an intent test will never be a useful tool in copyright, the argument is that it's not the right tool for handling market entry problems. Let's look at the argument in favor of relying on a test of bad behavior. One defense might be that the *mens rea* of a defendant is, in fact, a good or useful way of deciding whether a given technology is worth its costs. A defense of this approach runs something as follows. *Mens rea* tests are good for identifying particularly dangerous actors. The criminal law does, for example, offer different punishments for people who kill people, depending on what they were thinking at the time. In that context, the premeditated killer is more dangerous to leave at large than, say, someone who was provoked. Translated to copyright, the idea might be that between company A and company B, even if both use the exact same technology, if company A encourages others to infringe copyright, it is the more dangerous actor and should be stopped.

A second answer is that the whole intent analysis in *Grokster* is really just a proxy for weeding out companies engaged something the copyright law knows to be bad. In support of this position we have Justice Kennedy's question at oral argument:

> JUSTICE KENNEDY: What you want to do is say that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product.
> MR. TARANTO: I – well --
> JUSTICE KENNEDY: And I – just from an economic standpoint and a legal standpoint, that sounds wrong to me.[67]

Justice Kennedy's arguments suggest that while we might not know much about copyright, we at least know that infringement upsets whatever balance the statute intended. So looking to matters like intent, advertising campaigns, and

[67] *See* Oral Argument Transcript at 36, *MGM Studios, Inc. v. Grokster Ltd*, 125 S. Ct. 2764(No. 04-480), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf.

so on are function as a kind of radar that detects mass infringement and lets a court put a stop to it.

But if the point of focusing on inducement is that it suggests mass infringement, why not just do so directly? Why not just ask whether the device creates too much infringement, and therefore, too much damage to authorial incentives? If infringement is in the end what we care about, the whole examination of the conduct of defendant companies may just be a distraction. And the problem, as antitrust law shows, is that the distraction can quickly take on a life of its own.

In the 1960s, the courts in cases like *Brown Shoe* were confident that a focus on motives, as opposed to effects, was a good way to regulate competition. But the problem is that even when people have what may seem like bad intentions, what they are doing may nonetheless be good for the economy. The point – that bad behavior may serve the common good – is really not new it all. It is Adam Smith's idea that much public good can result from self-interested, and even ungentlemanly, behavior. "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[68]

My argument that the court should care about infringement and its effects, period, is susceptible to one further, and powerful objection. In antitrust, there seems to be a better sense of what constitutes a well-functioning, competitive market. Meanwhile, as George Priest said of intellectual property generally, it is much harder to say what copyright constitutes optimal copyright scope.[70] Copyright policy is aiming for something hard – the optimal subsidization of desirable behavior. The good thing about *Grokster* is that it didn't actually focus on the *Sony* question, because the *Sony* question is just too hard for a court to answer. Instead, *Grokster* killed a few bad apples, and left the rest to the market.

While I appreciate the force of this argument, I think it leads in a completely different direction. It suggests not only that the Court shouldn't try and differentiate the good guys from the bad guys, but that it shouldn't be asking *Sony* questions either. Instead, it suggests that the Court should get out of the entire business of trying to bless or curse technologies, and implicitly adjusting the optimal subsidy to existing copyright industries. Instead, the Court

[68] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 119 (first printed 1776, Penguin Classics ed., 1999).

[70] *See* George Priest, *What Economists Can Tell Lawyers About Intellectual Property*, 8 Res. Law and Econ. 19 (1986).

should do everything it can to delegate these problems back to Congress. We'll consider these arguments in the last section.

Copyright's Legal Process – When is Deference Warranted?

Whether it uses *Grokster* or *Sony,* the Court has put itself, and lower courts, in the position of picking winners and losers out of the market entrants that the next decade will bring. In this respect the Court is, as we've already said, conducting industrial policy, along lines very similar to what the FCC does. Yet for a variety of reasons courts have long deferred to either Congress or the FCC when faced with such problems – because the questions are economic, and highly technical.

National Cable & Telecommunications Assn. v. Brand X Internet Services,[73] was released on the same day as *Grokster*, but the contrast in decisional method could not be stronger. The underlying policy question in *Brand X* was challenging: how should broadband competition be managed? Should the government try to prevent vertical integration by DSL and cable operators? And should it try to create a similar regulatory structure for the two main competitors? As we'll see, the Court was so allergic to trying to answer these questions and pick winners and losers that it bent backward to get itself out of broadband policy. That makes it more surprising that the Court hasn't tried to do the same in copyright.

The legal issue in *Brand X* was a *Chevron* question: whether the FCC had violated the plain-language of the telecommunication act when it classified internet cable-modem services as an "information service." In telecommunications law jargon, an "information service" is a highly discretionary category where the FCC has the power to impose as few or potentially (though it has not yet tried) as many regulatory requirements as it wants. "Information service," to exaggerate slightly, means *carte blanche* for the FCC and whatever it thinks might be best. In *Brand X,* the Court, relying on *Chevron*, deferred to the Commission's decision that cable-modem services could be classified as an "information service."

Deference sounds like a good idea – the only problem is something called *Chevron* and the plain language of the Telecommunications Act. Unfortunately, cable modem service doesn't come close to fitting the statutory definition of

[73] 125 S.Ct. 2688 (2005).

"information service."[74] What cable operators offer is usually a package of internet service plus the basic transport service, although sometimes the internet services are provided or offered by a third party. The raw transport of bits is a much closer fit with another legal category, "telecommunications."[75] But being a "telecommunications" service imposes all kinds of regulatory requirements. And since the Court, we can surmise, wanted to give the FCC room to decide how much regulation was appropriate, it had to somehow squeeze cable modem services into the "information service" definition.

Consequently the opinion in *Brand X* is a little off, and what it says about administrative law and the internet will, one hopes, be forgotten soon. Briefly, the FCC relied on the idea that internet and transport services are offered as a single integrated package. The Court concluded that the FCC was justified in calling that package an "information service." But the premise is wrong as both a technological and business matter.

AOL and Earthlink, among others, are called Internet Service Providers, or ISPs for short. They offer internet services, and even offer such services, on some networks, to cable-modem customers. That stubborn fact impeaches the "single service" theory, because if companies other than cable operators actually offer the internet side of the service, the transport service is *all* that the cable operator offers. Justice Scalia said, in dissent, that it would odd to say that a pizzeria that delivers pizza doesn't offer a "delivery service."[76] But the truth is even starker than Justice Scalia described. Imagine a company that did nothing but deliver other companies' pizzas. If that company doesn't offer delivery services, then what, exactly, do they offer?

Fortunately, the Court has shown no need to be consistent in how it characterizes the internet across different kinds of cases. What is more interesting in that all of the bending and squeezing out of *Chevron* and the plain language of the Act was for the purpose of getting the Court out of telecommunications policy. The Court didn't want to decide the truly difficult economic questions facing the broadband industry. It didn't want to decide whether open-access rules for cable might speed or restrict deployment, and whether horizontal parity might be a good idea. The result of the *Brand X* decision was to give the FCC more room to decide on the future of broadband.

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[74] "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing . . . ." 47 U.S.C. § 153(20) (1997).

[75] "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (1997).

[76] 125 S.Ct. at 2714 (Scalia, J. dissenting).

That "bend-over-backward" deference is what makes the contrast with *Grokster* so sharp. In both cases, the Court faced difficult economic questions centered on new technologies and dynamic industries. Yet in *Grokster* the Court decided that it was fully competent to decide that a given business model based on a new technology wasn't a good idea for the national economy. In *Brand X*, the same Court is positively terrified of trying to answer what amount to similar types of questions. There weren't obvious good guys and bad guys in *Brand X*, but is that really what should make the difference?

All this suggests that perhaps the most principled outcome in *Grokster* would have been for the Court to take a different course even than that suggested by the *Sony* decision. As we said earlier, *Sony* professed to defer to Congress, yet at the same time created a substantive rule for the market entry of new technologies. The Court might have gone back further, before *Sony*, and taken the approach of earlier cases like *Fortnightly Corp. v. United Artists*,[77] *Teleprompter Corp. v. Columbia Broadcasting Systems*,[78] and *White-Smith Music Publishing Co.* v. *Apollo Co.*[79] In each of those cases the court confronted the same problem it had in *Grokster* and *Sony* – a new technological industry (the record and piano player, and various kinds of cable television) the facing off against an incumbent industry. The Court in those cases, said, in essence, we don't have a clue, found no copyright liability and left things for Congress to fix. The Court in those cases made it clear that the Copyright Act, as written, had no answers to the problem presented, and that the Court didn't trust itself to fashion one.

It is a little too easy to just say a Court should have just deferred; some of the disadvantages of institutional deference are worth discussing. Had the Court let *Grokster* off with a note to Congress, the result would have been some kind of Congressional settlement of the dispute. However, that's another name for an interest-group free-for-all that would have been time-consuming, expensive, and may have damaged whatever integrity the copyright code still has.[80] The Congressional or more accurately, interest-group mode of copyright policy-making has well-documented weaknesses. Its record is a mix of arguable successes along with many outright failures.[81]

[77] 392 U.S. 390, 399 (1968).

[78] 415 U.S. 394 (1974).

[79] 209 U.S. 1 (1908).

[80] As David Nimmer points out, interest group-driven amendments have made a mess of the copyright statute. *See* David Nimmer, Codifying Copyright Comprehensibly, 51 UCLA L. Rev. 1233, 1238 (2004).

[81] For a general history of the interest group process in copyright and its results, see Wu, *Copyright's Communications Policy*, supra note 3; Jessica Litman, Copyright Legislation and Technological Change, 68 Ore. L. Rev. 275 (1989); Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622 (2001).

It may be that the Court in *Grokster* managed to replicate what Congress would have done, in less time. But as the comparison with telecommunications law makes clear, in the long run, the Court will need ask itself when it is and isn't competent to set industrial policy for the information sectors through ever-more elaborate interpretations of the copyright statute. Copyright, in this respect, faces a question of legal process that is difficult to answer. When do courts remain competent to answer the economic questions presented by disruptive technologies, and when does deference back to Congress become a better course of action? At a minimum the Court needs to give itself the option, when it faces copyright questions that are just too hard, to direct the problem to Congress with a "fix-me" attached.

Conclusion

When compared with either antitrust or communications' laws management of competition, copyright's approach is unusual. No one doubts that the underlying questions are hard no matter who asks them. Yet courts have taken to regulating the information industries by asking questions that have very little to do with the economic effects on the industries regulated. Discussing matters like "knowledge" or "inducement," is an unusual way to take into account matters like industry structure, innovation, and other macro-economic questions.

The results may be defensible in individual cases. But as rules for industry, they will be something of a random walk: sometimes defensible, but often not. The fact is that courts in antitrust, copyright, and telecommunications cases are now facing very similar problems. In coming years, the Court and federal courts would self-consciously accept the role they are playing in setting the terms of competition in information industries, and strive to make industrial policy the best it might be.