

Saint Louis University Law Journal

Volume 50
Number 3 (Spring 2006)

Article 12

2006

Inducing a Remedy or Courting a Solution? A Comparative Institutional Analysis of the P2P Dilemma

Ben Aranda

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Ben Aranda, *Inducing a Remedy or Courting a Solution? A Comparative Institutional Analysis of the P2P Dilemma*, 50 St. Louis U. L.J. (2006).

Available at: <https://scholarship.law.slu.edu/lj/vol50/iss3/12>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**INDUCING A REMEDY OR COURTING A SOLUTION? A
COMPARATIVE INSTITUTIONAL ANALYSIS OF THE P2P
DILEMMA**

I. INTRODUCTION

In June 2005, the U.S. Supreme Court proposed the latest resolution to peer-to-peer (P2P) copyright infringement in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹ The Court held that Grokster could be secondarily liable for the copyright infringement of its users, even if the software was capable of substantial non-infringing uses.² The Court had granted *certiorari* in *Grokster* to clear legal misconceptions lower courts had developed in offering their own solutions.³

These misconceptions first began with *A&M Records, Inc. v. Napster, Inc.*, in which the Ninth Circuit held Napster liable for secondary copyright infringement by utilizing its own judicially crafted criteria.⁴ Three years later, the Ninth Circuit, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, absolved Grokster, which offered Napster-compliant file sharing software, of any wrongs associated with copyright infringement by applying its previously established criteria found in *Napster*.⁵ Copyright holders were furious, especially because the Ninth Circuit's *Grokster* decision arrived at a different conclusion than the Seventh Circuit, which had applied its own unique interpretation of the law in *In re Aimster Copyright Litigation*,⁶ even though all three companies—Napster, Grokster, and Aimster—distributed software that allowed the direct infringement of copyrights.⁷

Surely academics will debate the substantive merits of the Court's most recent decision, but, as many copyright and intellectual property enthusiasts are aware, the Court's decision was only the latest proposed adaptation to copyright law. Before the Court stepped in to remedy this quagmire, Sen.

1. 125 S. Ct. 2764 (2005).

2. *Id.* at 2780; *see also* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

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

4. 239 F.3d 1004, 1024 (9th Cir. 2001).

5. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1158–60, 1164, 1166 (9th Cir. 2004).

6. 334 F.3d 643, 650 (7th Cir. 2003).

7. *Grokster*, 380 F.3d at 1158; *Aimster*, 334 F.3d. at 645; *Napster* 239 F.3d at 1013.

Orrin Hatch introduced legislation designed to negate and neutralize the implications of the Ninth Circuit's holding in *Grokster*.⁸ By introducing the Inducing Infringement of Copyrights Act of 2004 (the Induce Act),⁹ Hatch reacted to the swelling of dissension emanating from the copyright industry in the aftermath of the Ninth Circuit's disposition of the *Grokster* case.¹⁰ Ferociously advocated for by "copyright holders," the Induce Act was also diametrically opposed by other interests—those that disapproved of this proposed application of an additional form of secondary liability to P2P software providers.¹¹ This loosely formed group, including "innovators" and "Internet users," with their recent victory in hand in the Ninth Circuit, kept the copyright holders at bay by stalling the legislation until the end of the congressional session, even though copyright holders ultimately received a favorable ruling in the Supreme Court's decision.¹²

What is largely ignored is the process by which these groups shifted this conflict from the courts, to the legislature, back to the courts, and perhaps back to the legislature—a seemingly ineffective method to influence the evolution of copyright law. Group behavior, when examined within a law-making context, receives substantial academic attention, specifically from cross-over political scientists and economists.¹³ The evolution of this thought culminates in public choice theory, which analyzes government and group action and interaction through the basic assumptions of economics,¹⁴ hypothesizing that groups will maximize their benefits while deflating costs.¹⁵ A myriad of methods are used to increase benefits and decrease costs, but all of these methods are affected by the particular institution that the group decides to operate under; a phenomenon central to comparative institutional analysis, which seeks to determine the most efficient institution to target for a favorable policy solution.¹⁶

Comparative institutional analysis can be used in a predictive manner by forecasting the "different outcomes that will arise in various institutional settings based on the actors' incentives in each setting,"¹⁷ as well as in a normative manner, by determining the institution that should be utilized by

8. 150 CONG. REC. S7189 (daily ed. June 22, 2004) (statement of Sen. Hatch).

9. S. 2560, 108th Cong. (2004).

10. 150 CONG. REC. S7192 (daily ed. June 22, 2004) (statement of Sen. Hatch).

11. See *infra* Part IV.A.

12. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2780 (2005).

13. See *infra* Part II.A.

14. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) [hereinafter FARBER & FRICKEY, LAW].

15. See *id.* at 14–15.

16. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 575 (2001).

17. *Id.*

groups to attain a particular social goal, but nonetheless requires choices based on the costs and the benefits of the actions necessary to influence different institutions.¹⁸

This Note seeks to examine, through a comparative institutional analysis, the utilization of certain institutions by these disparate interests, and to make an assessment as to which particular institution would be best suited to maximize these groups' resources in their battle for the proper standard for secondary liability of copyright infringement. In Part II, this Note will examine public choice theory and its evolution generally, and then, more specifically, the tenets of comparative institutional analysis. Part III will discuss the controversy surrounding *Grokster* and the Induce Act, concentrating on the actions of the opposing groups, and how their interactions led to the demise of effective legislative bargaining. Finally, Part IV will examine the institutions utilized by the factions and will conclude by arguing that the current legislative and judicial battles forced by copyright holders actually led to the inefficient uses of their resources.

II. THE INSTITUTIONS

Comparative institutional analysis "predicts the different outcomes that will arise in various institutional settings based on the actors' incentives in each setting . . . [and] chooses the best institution by determining the outcome that best furthers a particular social policy goal."¹⁹ Neil Komesar's "participation-centered approach" to comparative institutional analysis is instructive because it focuses on the actions of the participants²⁰ and assumes a "number of plausibly efficient scenarios."²¹ These scenarios only become possible when interested parties advocate for a particular goal, and will only do so in a particular forum where the benefits outweigh the costs.²² Certain institutions, such as the legislature, the market, and the courts, allocate different benefits, which require differing costs, and therefore, the choice of the respective institution becomes an important decision for motivated actors.

A. *The Legislature*

The study of the effects of groups on our political process is by no means a modern discourse; indeed, our constitutional structure was designed to limit the power of factions, to keep any group from demanding a disproportionate

18. *Id.*

19. *Id.*; see also NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

20. KOMESAR, *supra* note 19, at 97.

21. *Id.* at 28.

22. Freiwald, *supra* note 16, at 576.

amount of political power, which would thwart our young democracy.²³ This distrust of factions and its corresponding minoritarian influence has influenced some thinkers, while others perceive this minoritarian influence as promoting democracy.²⁴

Interest group theorists, when hypothesizing about the effects of interest groups and their corresponding minoritarian influence, generally argue that these groups either promote democracy, by operating under the tenets of pluralism, or limit democracy, as theorized by economists.²⁵ Pluralism, in conceptualizing that “power is widely dispersed among many separate groups, all held in check by the public and by each other,”²⁶ perceives group pressure as resulting in the promotion of democratic values.²⁷ Implicit in this theory are certain assumptions about the formation of groups and the group behavior itself that help to deconstruct group tendencies and analyze the distribution of power that culminates in the democratic passage of legislation. A major assumption of pluralism is that power is dispersed among many groups, with coalitions of groups operating in distinct areas of policy making.²⁸

Part of the reason for this dispersal of power . . . is that many different resources of power exist in our society . . . wealth, expertise, access to the media, prestige, position in a major institution—each of which may be decisive in one area but not in others.²⁹

23. Fears of the effects of interest groups were present even before the Constitution was ratified. In a series of articles, Alexander Hamilton, James Madison and John Jay anonymously editorialized in support of the proposed Constitution. In the tenth article, Madison wrote:

Complaints are everywhere heard from our most considerate and virtuous citizens . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

THE FEDERALIST NO. 10 (James Madison); *see also* Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184 (1991).

24. I am not attempting to say which theory is right, or even that the following discussion and analysis will be guided by any one theory exclusively. Rather, the following discussion of interest group theory generally highlights several incidents within the peer-to-peer (P2P) filesharing debate that are instrumental to choosing a particular institution as the most desirable from a group perspective.

25. Beermann, *supra* note 23, at 188–97. Beermann states: “Public choice theory depends most fundamentally on the assumption that government officials, parties regulated by government, and all private citizens, when they engage in political activity, are acting out of self-interest and not altruistically.” *Id.* at 188; *see also* FARBER & FRICKEY, LAW, *supra* note 14, at 13–14.

26. JANET A. FLAMMANG ET AL., AMERICAN POLITICS IN A CHANGING WORLD 140 (1990).

27. *See id.* at 155.

28. *Id.*

29. *Id.*

Thus, although a group may not be well financed, it may have a large number of members, or it may have a membership that is well-respected in a particular field.

But these resources themselves do not translate into legislative success. Ideally, “representatives would measure the will of the people as expressed through groups and direct public policy in accordance with their best estimate of overall societal sentiment.”³⁰ Nevertheless, government actors must have some incentive to listen to one group over another; the resources a group can offer make it influential with lawmakers.³¹ Groups that represent a large number of members can aid the legislator in re-election by promising favorable portrayal within the group, which would theoretically translate into votes.³² Groups that have large coffers can offer the legislator, or withhold from him or her pending cooperation, large amounts of money to finance reelection campaigns.³³

Implicit in maintaining the “balance of the system” is an inherent competition between groups. According to pluralists, even if a group has more resources than a competing group, that competing group will, by necessity, reorganize to an extent to restore balance to the system thereby maintaining certain necessary democratic principles.³⁴ Assuming groups have a resource that is important to legislators, like money from wealthy groups or electoral support from highly populated groups, each group then possesses a finite amount of influence on the legislative process. Through bargaining and compromise, facilitated by the legislators and other governmental officials, the groups wield their power only as much as a competing group allows.³⁵

Also important to the balance of the system is a group’s relative accessibility to the political process, especially when a group feels strongly about an issue.³⁶ The theory assumes that when a particular group is too powerful, another group will form to offset the original group’s power and

30. Beermann, *supra* note 23, at 191.

31. *See id.*

32. *Id.*

33. *Id.*

34. *See* ROBERT L. LINEBERRY ET AL., *GOVERNMENT IN AMERICA: PEOPLE, POLITICS, AND POLICY* 218 (2d ed. 1995).

35. *See* JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 10–11 (3d ed. 1997); *see also* DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 534 (1953) (“Such partisan activities . . . consist of aid to candidates for Congress even in districts where the formal members of these groups are few. Such efforts may eventually create a situation in which legislators are responsible to more than a purely local constituency.”). Generally, as used here, a competing group is one that takes an opposite position to a group that is promoting some policy change.

36. *See* W. LANCE BENNETT, *INSIDE THE SYSTEM: CULTURE, INSTITUTIONS, AND POWER IN AMERICAN POLITICS* 21 (1994).

influence, thus maintaining a democratic check on any one group's ability to implement a comprehensive design.³⁷

Empirical studies supported these conceptions of group behavior. In 1935, E. E. Schattschneider, in analyzing the Smoot–Hawley Tariff of 1930, concluded that participating groups' economic objectives largely shaped the ensuing legislation.³⁸ Robert Dahl, in his study of New Haven politics, found pluralist theory helpful in analyzing the behavior of various groups and political leaders as there was no one group that dominated the political process.³⁹

Later developments in the political arena, however, led to the questioning of certain tenets of pluralism, including the democratic assumption of equal access to power.⁴⁰ Pluralism, holding true to democratic principles, demands that "government is open to new groups who enter the competition for power . . . all groups have equal chance to compete effectively . . . and . . . people can organize effectively and be heard when they feel their interests are on the line."⁴¹ Several real-world events suggested otherwise. "The civil rights movement . . . made it all too clear that blacks were wholly outside the normal workings of the political system. . . . [T]he inadequacy of pluralist theory to explain the position of blacks in society became increasingly evident."⁴² It was apparent to social science theorists that pluralism did not account for the excessive privilege and governmental influence of particular interest groups.⁴³

Interest group liberalism, a pluralist-based theory that attempted to plug the holes left in the previous conception of pluralism, "sees as both necessary and good a policy agenda that is accessible to all organized interests and makes no independent judgment of their claims. . . . [I]t defines the public interest as a result of the amalgamation of various claims."⁴⁴ Building on the assumptions of interest groups and their key role in the formulation of policy, interest group liberalism's analysis emphasized that "the role of government is one of insuring access to the most effectively organized, and of *ratifying the agreements and adjustments worked out among the competing leaders*."⁴⁵

37. See FLAMMANG ET AL., *supra* note 26, at 159, 164; see also BENNETT, *supra* note 36, at 21; LINEBERRY ET AL., *supra* note 34, at 218.

38. See E. E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* 16–17, 288–89 (1935).

39. See generally ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961).

40. See *id.* at 1 (referring to American beliefs in democracy and equality).

41. See BENNETT, *supra* note 36, at 21 (emphasis omitted).

42. BERRY, *supra* note 35, at 13.

43. See *id.* at 14.

44. THEODORE J. LOWI, *THE END OF LIBERALISM* 51 (2d ed. 1979).

45. *Id.* (emphasis added).

Toward these ends, the relationship between the government and the groups often becomes too intimate: since the legislators cannot choose a solution to a problem, because they rely on the competing groups for resources like money or votes, policy stagnation often results.⁴⁶ Thus, if the competing groups cannot fashion a solution, a solution will, theoretically, not be had.

These attempts to mold a theory to best fit those events that occurred in the political world while keeping its democratic gloss intact eventually led to the demise of these pluralist theories.⁴⁷ Increasingly, political scientists began to challenge the basic democratic belief that groups were at the center of political decision-making.⁴⁸ By the late 1950s, it seemed that many groups were “underfinanced, poorly organized, overworked, and often counterbalanced by each other’s efforts. . . . [T]he lobbyist functioned more as a ‘service bureau’ for legislators than as an ‘agent of direct persuasion.’”⁴⁹ Instead of scrapping interest group theory altogether, however, economists re-focused the discussion by postulating that economic realities cause groups to operate anti-democratically.⁵⁰

The formation of legislation from an economic perspective is best understood when “legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare”⁵¹ The means with which legislative goods are acquired consist of promises for electoral support, financial support, or informational support, much like the pluralists had hypothesized.⁵²

Public choice theory emphasizes the role of the interest group, assuming that since the rational legislator mostly desires to get re-elected, it is the interest group that offers comparatively more benefits than a competing group that emerges victorious, often with anti-democratic results.⁵³ But there are

46. See LINEBERRY ET AL., *supra* note 34, at 220.

47. See generally Beermann, *supra* note 23, at 189–90.

48. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 884–85 (1987).

49. *Id.* at 885–86.

50. *Id.*

51. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

52. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230 (1986). Certainly, large groups have many members who ideally vote for politicians who support their views. See *id.* Wealthy groups are able to not only make campaign contributions, but also to employ legislators for speaking engagements and sometimes just make outright bribes. See *id.*

53. FARBER & FRICKEY, *LAW*, *supra* note 14, at 23. However, this model negates the role of the voter, postulating that “[b]ecause voters don’t know much about a legislator’s conduct, elections may turn on financial backing, publicity, and endorsements. . . . [This theory] assume[s] that ideology, defined simply as individual beliefs about the public interest, influences neither

costs associated with group formation and these groups' subsequent wielding of influence, mainly information and transaction costs.

The initial transaction cost of any group is the initial influx of capital necessary to ensure group formation.⁵⁴ Specifically, transaction costs "are the costs of organizing these similarly situated individuals into effective political coalitions."⁵⁵ Group formation is closely followed chronologically by group organization, which requires the identification of members who share the group's position, and then education of those members when potentially harmful legislation is proposed.⁵⁶ Then, groups must acquire information on a particular issue and information on how to influence the legislative process. "The more complex and extensive the political process, the more difficult it is to understand its rules and discover its channels of influence—both formal and informal."⁵⁷

Not only are there certain costs associated with group formation, but certain obstacles must be overcome through the expenditure of additional resources. Mancur Olson, in his seminal work on the free-rider dilemma, posited that the average person is not likely to actually influence political decisions,⁵⁸ as the majority of people do not possess the resources to actually influence political outcomes.⁵⁹ "While large groups of relatively impecunious individuals might theoretically pool their resources to defeat the wealthier interests, the costs of organizing will usually outweigh the potential benefits of the influence sought."⁶⁰ The group must convince the previously located individuals that their action and support is imperative to the common goal.

Another impediment to group formation is the irrationality of pursuing benefits derived from public policy.⁶¹ "Most public policies are public goods, that is, once a policy is produced, everyone, not just participants in the political process, is free to enjoy the benefits of the policy."⁶² This in turn destroys most incentive for participation in influential groups, as it is often difficult to restrict the benefits to only the members of the group, and thus creates the free rider problem.⁶³ "[V]oluntary groups will not organize around policies that affect large numbers of individuals . . . [g]roup membership will not, therefore,

voters nor legislators. . . . [S]elf-interest is the exclusive causal agent in politics." *Id.* at 23–24.

54. Macey, *supra* note 52, at 229.

55. *Id.*

56. KOMESAR, *supra* note 19, at 71–72.

57. *Id.*

58. See Beermann, *supra* note 23, at 194 (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965)).

59. *Id.*

60. *Id.*

61. *Id.* at 194–95.

62. *Id.* at 195.

63. Beermann, *supra* note 23, at 195.

represent democracy in any relevant sense, but will instead reflect interests that happen to be able to overcome the impediments to organizing.”⁶⁴ Overall, pre-existing groups of like-minded individuals will more effectively influence the political process than otherwise dispersed individuals.⁶⁵

Information costs also must be taken into consideration when evaluating the effectiveness of group formation or issue involvement. Information costs are “incurred by an individual or group in the process of discovering the impact of an issue on the wealth of that individual or group, as well as the costs of identifying similarly situated individuals or groups who are likely to share the costs of obtaining political action.”⁶⁶

Groups attempting to influence a legislator on a particular issue must incur the costs of educating the legislator on the group’s position.⁶⁷ Controlling the flow of information benefits not only the legislator, by giving justifications for a particular policy position, but the group itself. Particularly, interest groups, especially when dealing with complex legislation, are able to “distort” the thinking of the legislator by providing information supportive of the group’s policy goal.⁶⁸ It follows then that groups that have already organized are again in an advantageous position when compared to those groups that must incur substantial transaction and information costs to support or oppose particular legislation.⁶⁹

However, information costs vary depending upon the targeted institution. For instance, the structural characteristics of the institution, such as “size and population of the jurisdiction, size of the legislature (number of legislators), frequency of election, size and scope of the legislative agenda, and the rules of the legislature (and agencies),” have an impact on how a group will expend its resources.⁷⁰

Since resources are limited, there is a threshold amount that groups will “pay” for particular legislation. Assuming that groups are pursuing public policies that do not cost them more in taxes or any other sort of wealth, groups will strive for a policy benefit that exceeds their costs, which is known as

64. *Id.* at 195.

65. Macey, *supra* note 52, at 229. This is not to say that large groups cannot be effective. The main assumption of public choice theory is that political actors behave rationally. If certain members of a group are funding the group, and the desired policy is a collective good, i.e., a good shared by a large number of people, those members of the group will be spending more resources than they are receiving, which, discounting ideological fervor, is an irrational behavior. See FARBER & FRICKEY, *LAW*, *supra* note 14, at 23.

66. Macey, *supra* note 52, at 229.

67. *Id.* at 230–31.

68. *Id.*

69. Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 47 (1988).

70. KOMESAR, *supra* note 19, at 73.

“rent-seeking.”⁷¹ Accordingly, the higher the benefit to the group, the more the group will be willing to spend. “Rent seeking is the purposeful pursuit, through the political process, of above-normal profits. By engaging in rent-seeking activities, private parties ‘compete for artificially contrived transfers.’”⁷² Those groups will continue to “pay” legislators up to the amount of the total benefit of the legislation, or to the point where the group is no longer making a profit on the transaction, thereby defeating their attempt to rent-seek.⁷³ Therefore, rational legislators acting in their self interest will advance particular legislation from groups that have low transactional and informational costs and tend to ignore those groups whose costs are relatively higher, as they will theoretically be less effective.⁷⁴

Komesar’s conception of group interaction focuses intently on the resources of the group and negates the interest of the legislator—as the legislator, either self-interested or publicly interested, will always react to group pressure.⁷⁵ As such, Komesar posits that a well-organized and well-informed small group will be more influential than a poorly organized and a poorly formed large group regardless of the legislator’s interests; but, when “the majoritarian influence grows, we can get a countervailing of sorts between the two forces and, with it, political outcomes that are more ‘balanced’ than predicted by a model that focused on only [minority groups].”⁷⁶

B. *The Market*

The market, like the political system, serves as an avenue for the achievement of social goals or interests.⁷⁷ “As with the political process, this focus on the mass of participants hardly suggests that all participants are created equal. Some people or entities participate more or more effectively.”⁷⁸

71. Michael E. DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 HARV. J.L. & PUB. POL’Y 205, 214 (1991).

72. *Id.* at 214–15.

73. *Id.* Surely, legislators can act in a way not consistent with powerful groups; Komesar refers to it as “slippage.” KOMESAR, *supra* note 19, at 57.

74. Macey, *supra* note 52, at 230.

75. KOMESAR, *supra* note 19, at 64.

76. *Id.* at 75. But, “[w]here minoritarian influence predominates . . . the resulting broad-based legislation may be illusory.” *Id.*

Mobilizing for political action often prompts opposing groups to mobilize in opposition.

The ultimate outcome is often no action, or a messy compromise that is not terribly satisfactory, or even a result that leaves the group that moved first worse off than it was before it attempted to secure political action.

Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 978 (1997).

77. KOMESAR, *supra* note 19, at 98.

78. *Id.* at 99.

Use of the market requires significant transaction costs, as compared to the relative benefits received by the participants.⁷⁹ Transaction costs are significantly dominated by information costs, which include the costs of acquiring and understanding essential information.⁸⁰ Many of the same information costs discussed earlier apply, as groups attempting to solve a problem must first recognize the problem, determine the best solution to a problem, and then finally implement that solution.⁸¹ Other pertinent decisions include “the choice whether to subcontract an activity or to internalize it in a firm via vertical or conglomerate integration” and the process of distributing the goods or services.⁸²

The large numbers of participants necessary to reach a solution often make the minimization of transaction costs and the maximization of benefits difficult, as several intermediaries must usually be dealt with in bringing goods to a market.⁸³ “[E]ven with a very confined distribution of impacts, the costs of transacting are not negligible and might deter either party from transacting. . . .”⁸⁴

However, much like groups in the legislature, groups in the market can rent-seek. For example, advertising can be used to differentiate otherwise very similar products, producing artificial monopolies to the extent that the cost of the advertising does not exceed the benefits to the brand.⁸⁵ As such, however, “these efficiency losses due to monopoly may well be dwarfed by the efficiency losses caused by the waste of resources expended on the advertising used to create these monopoly rents.”⁸⁶ The success of the advertising, and in turn the rent-seeking, largely depends on the level of sophistication of the consumer: “[I]t is harder to fool [consumers when] higher stakes justify a greater willingness to obtain alternative sources of information or to obtain the sophistication necessary to critically examine any distorted information provided.”⁸⁷

C. *The Judiciary*

The adjudicative process exhibits certain structural elements that determine its efficacy. Courts have defined rules and requirements that determine participation, such as the requirements of standing and an actual case or

79. See Freiwald, *supra* note 16, at 601.

80. KOMESAR, *supra* note 19, at 105–06.

81. See *supra* note 66 and accompanying text.

82. KOMESAR, *supra* note 19, at 107.

83. *Id.* at 100, 112.

84. *Id.* at 101.

85. See *id.* at 116.

86. *Id.*

87. KOMESAR, *supra* note 19, at 117.

controversy.⁸⁸ The court system is also significantly smaller in scope, tending only to solve a problem based on particular facts, and does not necessarily provide for the desired social benefit, as the ability of courts to fashion broad and long reaching relief is limited.⁸⁹

Komesar also highlights the contention that judges and juries may not be good decision-makers. Specifically, judges may have trouble comprehending the factual situations in highly complex and technical litigation.⁹⁰ Contributing to this potential ignorance is that judges are often insulated from information concerning the benefits and detriments to the public, starkly contrasted with legislators.⁹¹ Instead, judges “depend on others to convince them by evidence and reason, but they do not depend on these others for their jobs and livelihood.”⁹² However, this independence provides an essential advantage, as biases in other institutions are often avoided or reduced in the adjudicative process because of the many rules and standards employed by the judiciary.⁹³

While all three of these institutions are available to groups in pursuing their desired policy goal, some inevitably pose higher participation costs than others. Further, the actions emanating from these institutions result in varying levels of benefits for the “victorious” conglomeration of interests. The resulting actions from one institution may even have effects on the solutions of other institutions. “[N]ot only may Congress be ill-suited to make a change, but, once it does, that decision may compromise the ability of other institutions to solve the problem.”⁹⁴ This volleying of problems from one institution to the next is illustrated in the evolution of the legal conundrum of peer-to-peer (P2P) networks and secondary liability, and the inability of the current law to provide an acceptable remedy.

III. *GROKSTER* V. THE INDUCE ACT

The Supreme Court, in *Grokster*, reviewed the opinion of the Ninth Circuit, which held the P2P software provider Grokster free from liability even though it found that some P2P software “may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares.”⁹⁵ The Induce Act

88. *Id.* at 123–26.

89. *Id.*

90. *Id.* at 138–39.

91. *Id.* at 141.

92. KOMESAR, *supra* note 19, at 141.

93. *Id.*

94. Freiwald, *supra* note 16, at 582.

95. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 125 S.Ct. 2764 (2005). Even though not part of the Ninth Circuit opinion, this quote from the District Court is instructive in illustrating the reasoning of the circuit court.

was introduced to amend section 501 of the Copyright Act to create a “new form” of secondary liability for intentionally inducing copyright infringement and to overrule the District Court’s decision and the Ninth Circuit’s subsequent affirmation.⁹⁶

The debate over the Induce Act, like most legislative battles, brought together a collection of groups that opposed the legislation as well as a collection of groups that endorsed the legislation. For purposes of simplicity, these varying interests will be cataloged and discussed in this Note through the following labels: software distributors, who are fighting to ensure that secondary liability is not expanded to the extent that it would chill innovation of technology that has a legitimate and legal purpose but could be used for copyright infringement; Internet users, who are fighting for P2P technology that facilitates the downloading of copyrighted music and movies at lower than market prices; and copyright owners, who include the individual artists as well as the overarching labels,⁹⁷ trade groups, and other industries aimed at stopping the worldwide infringement on copyrights. The Internet users and software distributors have teamed up, for different reasons, to defeat the Induce Act, and to leave the copyright owners searching for an alternate solution.

Part A of this section will discuss the evolution of copyright infringement, which was, until the recent barrage of attempted legislative efforts, generally judicially crafted. Part B of this section will examine the Induce Act, written largely by legislators and numerous interested groups that have become involved in this process. Parts C and D will discuss other institutional solutions to the development of online piracy, namely market and judicial solutions, respectively.

A. *Historical Analysis of Copyright Infringement*

Presently, the traditional cause of action for copyright owners against a secondary copyright infringer exists in common law, as the Copyright Act of 1976 did not specifically codify any sort of secondary liability for copyright infringement.⁹⁸ In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, the court held that when a concert manager knew that the musicians were to include performances of copyrighted compositions, the manager was both a contributory and vicarious infringer of the copyrights.⁹⁹ The court explained that “one who, with [1] knowledge of the infringing activity, [2] induces, causes, or materially contributes to the infringing conduct

96. Michael Warnecke, *Critics Fear ‘Induce Act’ Will Undo Sony; Could Perfect 10-Visa Be Wave of Future?*, PAT., TRADEMARK & COPYRIGHT J., July 16, 2004, at 318, 318.

97. The labels usually own the copyright to reproduce the actual music.

98. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161–62 (2d Cir. 1971).

99. 443 F.2d at 1162–63.

of another, may be held liable as a ‘contributory’ infringer.”¹⁰⁰ The court also elaborated on the doctrine of vicarious liability: “[A] person who has promoted or induced the infringing acts of the performer has been held jointly and severally liable as a ‘vicarious’ infringer, even though he has no actual knowledge that copyright monopoly is being impaired.”¹⁰¹ Noting that vicarious liability has its roots in the employment field, the court held that the liability should also exist in this situation, when the concert manager “[1] has the right and ability to supervise the infringing activity and [2] also has a direct financial interest in such activities.”¹⁰²

The present clash between copyright owners and P2P software producers is not the first time that technology producers defended a product from a secondary liability claim. In 1984 the Supreme Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, where owners of copyrighted television programs brought an infringement action against the manufacturers of videotape recorders.¹⁰³ The Court noted that while the Copyright Act grants certain exclusive rights to the holder, “[a]ll reproductions of the work, however, are not within the exclusive domain of the copyright owner . . . [a]ny individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.”¹⁰⁴

Because of Congress’s constitutional grant of power to regulate copyrights, the Court looked to contributory infringement under patent statutes so as not to expand the protections of copyrights without legislative guidance.¹⁰⁵ “These cases deny the patentee any right to control the distribution of unpatented articles unless they are ‘unsuited for any commercial noninfringing use.’ Unless a commodity ‘has no use except through practice of the patented method,’ the patentee has no right to claim that its distribution constitutes contributory infringement.”¹⁰⁶ The Court held that because the VCR merely “time-shifted” television programs, which was actually encouraged by the copyright holders, it was capable of a substantial non-infringing use, and Sony could not be held liable when consumers used the VCR to make illegal copies of other copyrighted videos.¹⁰⁷ The Court’s holding in *Sony* and its subsequent application varied among the circuits; while trying to hold true to the logic set forth in *Sony*, the Seventh and Ninth Circuits developed different methods to

100. *Id.* at 1162.

101. *Id.*

102. *Id.*

103. 464 U.S. 417, 419–20 (1984).

104. *Id.* at 433.

105. *See id.* at 439.

106. *Id.* at 441. (citing *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176, 198, 199 (1980)).

107. *Id.* at 446, 456.

deal with contributory liability and the *Sony* defense of a “substantial noninfringing use.”

The Ninth Circuit was first presented with the opportunity to weigh in on the application of *Sony* to P2P networks in *A&M Records, Inc. v. Napster, Inc.*¹⁰⁸ Napster, which facilitated the exchange of digital audio files over the internet (through these P2P networks), was alleged to vicariously and contributorily infringe on certain copyrights held by record companies.¹⁰⁹ To use Napster, an individual would simply download the necessary software, which allowed the search for and transfer of exact copies of the digital audio files.¹¹⁰ The software enabled a user to “share” audio files on a computer by uploading the Napster-verified files to a Napster-controlled central database.¹¹¹

In finding Napster liable, the Ninth Circuit adopted the definition of contributory infringement from *Gershwin*: “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”¹¹² Finding that Napster had both actual and constructive knowledge of direct infringement, the court held that the first prong of the test for contributory infringement was met.¹¹³ Applying *Sony*, the court enunciated “a limited interpretation of the *Sony* rule, declining to interpret the ‘substantial noninfringing use’ test as an absolute shield against secondary liability.”¹¹⁴ According to the court, the substantial noninfringing use is not restrained to current uses of the service, but instead should focus “on the proportion of current infringing use as compared to current and future noninfringing use.”¹¹⁵ Thus, the Ninth Circuit developed a two-part knowledge test: if a defendant’s product is found to have substantial noninfringing uses, they will not be charged with constructive knowledge of infringement, but actual knowledge of infringement automatically satisfies this element despite substantial noninfringing uses.¹¹⁶

As to the material contribution element, the district court concluded that “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant

108. 239 F.3d 1004 (9th Cir. 2001).

109. *Id.* at 1010–11.

110. *Id.*

111. *Id.* at 1012.

112. *Id.* at 1019 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

113. *Napster*, 239 F.3d at 1020. The first element in a contributory copyright infringement case is actually direct infringement by a primary infringer, but this element is almost always undisputed in these cases, and is nevertheless not relevant to this Note’s discussion. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004).

114. Elizabeth Miles, Note, In *Re Aimster & MGM, Inc. v. Grokster, Ltd.: Peer-to-Peer and the Sony Doctrine*, 19 BERKELEY TECH. L.J. 21, 27–28 (2004).

115. *Napster*, 239 F.3d at 1021.

116. Miles, *supra* note 114, at 28.

boasts.”¹¹⁷ Thus, satisfying both of the elements of contributory infringement, the Ninth Circuit upheld the district court’s opinion, holding that Napster had committed contributory infringement of the plaintiff’s copyrights.¹¹⁸

The court then moved to the vicarious liability of Napster, asking if the defendant “ha[d] the right and ability to supervise the infringing activity and also ha[d] a direct financial interest in such activities.”¹¹⁹ The Ninth Circuit upheld the district court’s ruling that Napster had a direct financial interest in the infringing activity, noting that the “[f]inancial benefit exists where the availability of infringing material ‘acts as a “draw” for customers.’”¹²⁰ The district court had relied on the finding that Napster’s future revenue is directly connected to the increase in registered users, and registered users increase as the “quality and quantity of available music increases.”¹²¹

Even though the Ninth Circuit found that Napster’s “right and ability to supervise” is limited to the system’s architecture of uploaded files, the court nevertheless held that Napster “ha[d] the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system,” and therefore held that the duty element of vicarious liability was satisfied as well.¹²²

However, the Ninth Circuit’s decision was not the last word on the application of copyright law to the unique situations of copyright infringement facilitated by the use of P2P networks. In the case *In re Aimster Copyright Litigation*, the Seventh Circuit upheld an injunction, finding that Aimster was likely to be a contributory infringer.¹²³ The use of the Aimster service, like the Napster service, required certain downloadable software, which allowed registered users to send messages back and forth with audio files attached.¹²⁴ The court found that the Aimster system had the following elements:

[P]roprietary software that can be downloaded free of charge from Aimster’s Web site; Aimster’s server . . . which hosts the Web site and collects and organizes information obtained from the users but does not make copies of the swapped files themselves and that also provides the matching service described below; computerized tutorials instructing users of the software on how to use it

117. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 920 (N.D. Cal. 2000).

118. *Napster*, 239 F.3d at 1022.

119. *Id.* (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

120. *Id.* at 1023 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263–64 (9th Cir. 1996)).

121. *A&M Records*, 114 F. Supp. 2d at 902.

122. *Napster*, 239 F.3d at 1024.

123. 334 F.3d 643, 653, 656 (7th Cir. 2003).

124. *Id.* at 646.

for swapping computer files; and “Club Aimster,” a related Internet service . . . that users . . . can join for a fee.¹²⁵

In discussing the “substantial non-infringing use” test, the Seventh Circuit reasoned that “the ability of a service provider to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer.”¹²⁶ However, the court held that this factor is not controlling, as the court noted that if the “detection and prevention of the infringing uses would be highly burdensome,”¹²⁷ then a balancing test is required, “[b]ut the balancing of costs and benefits is necessary only in a case in which substantial noninfringing uses, present or prospective, are demonstrated.”¹²⁸ Unfortunately for Aimster, this test was never applied, as Aimster produced no evidence that the service had been used for a noninfringing use.¹²⁹

The Seventh Circuit also disagreed with the discussion of the knowledge prong of contributory infringement in *Napster*, stating that “the Ninth Circuit erred . . . in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer.”¹³⁰ Nevertheless, the court still found that Aimster was willfully blind, satisfying the knowledge element, and was therefore a contributory infringer.¹³¹

The Ninth Circuit had a chance to refine its application of *Sony* and secondary liability in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*¹³² The court began its analysis by distinguishing the different “architectures” of P2P systems.¹³³ The first was a centralized indexing system that maintained a listing of the available files on a company-owned server, which Napster used.¹³⁴ The second was a decentralized indexing system, where the company only maintained a list of available files on the network.¹³⁵ The third was a “supernode” system, where there were no lists and each connected computer listed its available files.¹³⁶

The court continued by highlighting the substantial non-infringing use test that it elicited in *Napster*:

125. *Id.*

126. *Id.* at 648.

127. *Id.*

128. 334 F.3d at 650; *see also* Miles, *supra* note 114, at 36.

129. *Aimster*, 334 F.3d at 653.

130. *Id.* at 649.

131. *Id.* at 650.

132. 380 F.3d 1154 (9th Cir. 2004).

133. *Id.* at 1158–59.

134. *Id.*

135. *Id.*

136. *Id.*

Thus, in order to analyze the required element of knowledge of infringement, we must first determine what level of knowledge to require. If the product at issue is not capable of substantial or commercially significant noninfringing uses, then the copyright owner need only show that the defendant had constructive knowledge of the infringement. On the other hand, if the product at issue *is* capable of substantial or commercially significant noninfringing uses, then the copyright owner must demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement.¹³⁷

The court, finding that the software had substantial non-infringing uses, continued the analysis by determining if Grokster had reasonable knowledge of specific infringement.¹³⁸ The court held that the decentralized structure of the network, which enabled the P2P sharing, did not provide Grokster actual, specific knowledge of infringement.¹³⁹

Moving to the material contribution prong of contributory infringement, the court noted that Grokster did not provide the site and facilities used for infringement.¹⁴⁰ The court elaborated by stating that “it is the users of the software who, by connecting to each other over the internet, create the network and provide the access. ‘Failure’ to alter software located on another’s computer is simply not akin to the failure to delete a filename from one’s own computer.”¹⁴¹ Therefore, the plaintiff had proved neither prong, and the court dismissed the claim that Grokster was liable for contributory copyright liability.¹⁴²

In analyzing Grokster’s vicarious liability and, more specifically, Grokster’s right and ability to supervise, the court noted that “[i]t does not appear from any of the evidence that either of the defendants has the ability to block access to individual users. . . . [They had] no ability to actually terminate access to file sharing functions.”¹⁴³ The plaintiffs, arguing the willful blindness theory used by the Seventh Circuit, met opposition by the court:

If the Software Distributors had a right and ability to control and supervise that they proactively refused to exercise, such refusal would not absolve them of liability. . . . However . . . there is no separate “blind eye” theory . . . that exists independently of the traditional elements of liability.¹⁴⁴

137. *Grokster*, 380 F.3d at 1161.

138. *Id.* at 1161–62.

139. *Id.* at 1163.

140. *Id.*

141. *Id.*

142. *Grokster*, 380 F.3d at 1164.

143. *Id.* at 1165.

144. *Id.* at 1166.

Therefore, the court found that since there is no ability for Grokster to control the direct infringement, it was not vicariously liable.¹⁴⁵

At the end of the decision, the court discussed the Supreme Court's reluctance in *Sony* to change the applicable laws when presented with a difficult case, stating "the Supreme Court has admonished us to leave such matters to Congress . . . the district court . . . properly declined the invitation to alter [applicable copyright law]."¹⁴⁶ Congress heard the call of the court and introduced the Inducing Infringement of Copyrights Act in an attempt to correct what was seen as an inconsistency in the application of secondary copyright infringement.¹⁴⁷

B. *Inducing Infringement of Copyrights Act*

Aiming to answer the courts' call for legislative guidance, Sen. Hatch and the Act's co-sponsors originally introduced the Induce Act on June 22, 2004.¹⁴⁸ There have been two substantive drafts that will be discussed to illustrate the divide between the two sides of the debate and their respective interests.

1. Analysis of Original Draft of the Induce Act

Hatch, in his introduction of the bill, described the current state of affairs: "[I]t is illegal and immoral to induce or encourage children to commit crimes. Artists realize that adults who corrupt or exploit the innocence of children are the worst type of villains."¹⁴⁹ Sen. Leahy, who co-sponsored the Induce Act, insisted it would only target P2P software providers:

[T]he bill will continue to promote the development of new technologies as it will not impose liability on the manufacturers of copying technology merely because the possibility exists for abuse . . . the makers of electronic equipment . . . the Internet service providers . . . have nothing to fear from this bill.¹⁵⁰

The Induce Act, which would have amended section 501 of Title 17 of the U.S. Code, contained three subsections: the first subsection defined "intentionally induces"; the second subsection added the new classification of

145. *Id.*

146. *Id.* at 1167.

147. *See supra* notes 8–11 and accompanying text.

148. 150 CONG. REC. S7189 (daily ed. June 22, 2004) (statement of Sen. Hatch).

149. *Id.* The discussion of the Induce Act's language and subsequent congressional hearings is done for the purpose of setting up the debate between the two disparate interests, as this Note is more concerned about what the groups believed that would lead them to fight for or against the Induce Act with such fervor. An in-depth analysis of the claims of the supporters and opponents of the bill is beyond the scope of this Note.

150. 150 CONG. REC. S7193 (daily ed. June 22, 2004) (statement of Sen. Leahy). *But see infra* Part III.B.1.a–d (discussing criticisms of the Induce Act).

liability: intentional inducement; and the third subsection was a savings clause for the already established doctrines of secondary liability.¹⁵¹

According to the bill, “intentionally induces” was defined as “intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.”¹⁵² “Intentionally aids, abets, induces, or procures” was borrowed from the criminal code concerning copyright infringement.¹⁵³ The second substantial part of this subsection introduced a reasonable person standard (a question of fact for a jury) into the equation of intentional inducement.¹⁵⁴ Finally, the bill described an infringing activity as one that “relies on infringement for its commercial viability,” intending to formulate the law in such a way as to treat services like Napster and Grokster equally.¹⁵⁵

The second subsection statutorily defined the intentional inducement form of liability,¹⁵⁶ stating that “whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer.”¹⁵⁷ The final section of the legislation notes that “[n]othing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement or require any court to unjustly withhold or impose any secondary liability for copyright infringement.”¹⁵⁸ Sen. Hatch described this section as a “savings clause to ensure that it provides the ‘guidance’ courts have requested—not an iron-clad rule of decision for all possible future cases.”¹⁵⁹

Needless to say, this initial draft met a good deal of opposition from software distributors and Internet users, mostly through congressional testimony, the media, and the use of Internet sites, and generally focused on how the bill could chill innovation.¹⁶⁰

151. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).

152. *Id.* at § 2.

153. *Id.*; 150 CONG. REC. S7189 (daily ed. June 22, 2004) (statement of Sen. Hatch).

154. *See id.*

155. *See id.*; 150 CONG. REC. S7190–92 (daily ed. June 22, 2004).

156. *See* Explanatory Memorandum from Copyright Office, <http://www.copyright.gov/docs/S2560.pdf> (last visited Apr. 24, 2006).

157. S. 2560 at § 2.

158. *Id.*

159. 105 CONG. REC. S7192 (daily ed. June 22, 2004) (statement of Sen. Hatch).

160. A good example of “chilling innovation” is the recent release of a movie jukebox whose manufacturers aimed to please Hollywood by going to great lengths to ensure that the content on the device could not be shared. Cory Doctorow, *Go Ask Hollywood*, POPULAR SCI., Jan. 2005, at 40. Nevertheless, the Motion Picture Association of America (MPAA) is still contemplating litigation. *Id.*

a. The Induce Act Does Not Adequately Change Existing Law

The confusion concerning the application of law to P2P networks that, while operating differently, still enabled illegal infringement, exhibited the necessity for the Induce Act. However, varying interpretations could render the bill useless,¹⁶¹ as some believe that the Induce Act would not change the Ninth Circuit's result in *Grokster*.¹⁶² "The entertainment industry contends that Grokster . . . induce[d] infringement. . . [h]owever the *Grokster* court found no evidence of such seduction. . . . [T]he suit would probably fail at trial unless the industry could produce more solid evidence of intent to induce infringement."¹⁶³

Instead of changing existing law, it appeared that the bill merely adopted existing case law.¹⁶⁴ Commentators believed that uncertainty brought about by vague language in the initial draft of the bill would accomplish little but to chill innovation.¹⁶⁵ Because the definition "is not simple, clear or predictable. . . . [A] too-broad definition of inducement may impose a dangerous burden to development of and investment in useful and beneficial technologies to the detriment of U.S. competitiveness."¹⁶⁶

b. Following Patent Law Standards of "Intentional Inducement" Would Bring About More Certainty

The Supreme Court relied on patent law when constructing the substantial non-infringing use test of *Sony*, and many commentators believe that Congress should continue to refer to patent law when attempting to correct the problems with the current law as applied to P2P networks.¹⁶⁷ Andrew Greenberg of the Institute of Electrical and Electronics Engineers, in his congressional testimony before the Senate Judiciary Committee, stated:

For example, the standard of "intentional inducement" does not appear to require actions independent of lawful marketing of features of a technology capable of both infringing and noninfringing uses; does not appear to require knowledge that the acts were induced to find an infringement; and does not appear to require a subjective specific intent to induce the infringing acts.¹⁶⁸

161. *The Intentional Inducement of Copyrights Act of 2004: Hearing on S. 2560 Before the S. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearings on S. 2560*] (statement of Andrew Greenberg, Vice-Chairman, Intellectual Property Committee of the Institute of Electrical and Electronics Engineers-United States of America).

162. *Id.* (statement of Kevin McGuiness, Executive Director and General Counsel, Net Coalition).

163. *Id.*

164. *Id.* (statement of Andrew Greenberg).

165. *Id.*

166. *Hearings on S. 2560*, *supra* note 161.

167. *Id.*

168. *Id.*

Adopting patent law standards that have been interpreted by the courts adds a certain amount of predictability that is important to technology developers when designing a new product, which critics say has been ignored by the Induce Act.¹⁶⁹

c. The Induce Act Could Create an Inordinate Amount of Litigation

Since this bill adopted a reasonable person standard, courts may be reluctant to dismiss a case in order to allow a plaintiff an opportunity for discovery.¹⁷⁰ “Although intentional inducement standard in the bill might sound like a difficult standard to meet, it does not require proof that the defendant actually intended to induce infringement. Rather, the defendant[‘]s intent can be inferred, culled from literally any document within the defendant[‘]s possession.”¹⁷¹

Not only will it be more difficult to convince a court to dismiss a claim under this bill, the Induce Act could also open up many other parties to potential liability.¹⁷² “Under this bill, anyone who can be considered to be aiding, abetting, procuring, or inducing someone to engage in copyright infringement is subject to liability. . . . [V]enture capitalists [and] credit card companies . . . could find themselves the target of litigation.”¹⁷³

d. The Induce Act Attempts to Overturn *Sony*

The Supreme Court’s decision in *Sony Corp. of America v. Universal Studios, Inc.* is the “tech industry’s Magna Carta. . . . It gives security to venture capitalists that they can invest in new technologies without being sued. It is responsible for the burst of tech innovation we’ve seen in the past 20 years. This bill would change all that.”¹⁷⁴ Some from the software distributor camp believed that Sony would not have been liable for contributory infringement, but could have been found to have induced infringement.¹⁷⁵

Proponents of the bill disagree with this analysis. The copyright holders insist that since the “inducement” language is taken from the Patent Act, courts would look to rulings under the Patent Act.¹⁷⁶ “Knowing that some customers are going to infringe isn’t enough to establish inducement. . . . [a] seller must

169. *Id.*

170. *Hearings on S. 2560, supra* note 161 (statement of Kevin McGuiness).

171. *Id.*

172. *See id.*

173. *Id.*

174. Steve Seidenberg, *Senate Bill Puts Power in Hands of Copyright Owners*, CORP. LEGAL TIMES, Sept. 2004, at 16 (quoting Michael Petricone, vice president of technology policy for the Consumer Electronics Association).

175. *Id.*

176. *Id.*

communicate in some way that you can use the machine for an infringing purpose.”¹⁷⁷

2. Copyright Office Draft

After the initial congressional hearing, extensive media coverage and increased lobbying influenced the Copyright Office to issue a revised draft aimed to appease both sides of the debate.¹⁷⁸ The Copyright Office operated under the main assumption, which it perceived as legislative intent, that the bill should be technology-neutral and impose liability based on the circumstances in which the technology is used.¹⁷⁹ The language employed should also provide an effective cause of action against those services that have escaped liability through the court’s interpretation of the current law.¹⁸⁰ As previously mentioned, the Ninth Circuit’s decision in *Grokster*, and the resulting discontent of the copyright holder lobby, was one of the main motivations for this bill.¹⁸¹ To satisfy the innovators, the Copyright Office draft was structured to only target technology that does intentionally induces others to infringe copyrights; recognizing that some technology has dual uses, these innovators should not be liable if the public uses their technology for illegal purposes.¹⁸² If the first draft of the legislation was vague, which many opponents of the bill argued, the Copyright Office draft detailed more of the specifics of what it perceived to be the Senate’s intent.¹⁸³

The Copyright Office draft has four main subsections. The first section highlighted three elements, one of which must be met to impose liability:

Whoever manufactures, offers to the public, provides, or otherwise traffics in any product or service, such as a computer program, technology, device or component, that is a cause of individuals engaging in public dissemination of copyrighted works shall be liable as an infringer where such activity: (A) relies on infringing public dissemination for its commercial viability; (B) derives a predominant portion of its revenues from infringing public dissemination; or (C) principally relies on infringing public dissemination to attract individuals to the product or service.¹⁸⁴

In drafting the language of the bill, the Copyright Office, consistent with what it perceived as legislative intent, claimed to focus on the business model

177. *Id.* (quoting patent and copyright lawyer Ronald Clayton).

178. See Gigi B. Sohn, *Radical Act Would Induce Big Chill*, LEGAL TIMES, Oct. 11, 2004, at 19.

179. *See id.*

180. *See id.*

181. *See id.*

182. *See generally id.*

183. *See* Sohn, *supra* note 178.

184. Explanatory Memorandum from Copyright Office, *supra* note 156.

surrounding the technology, rather than the behavior or technology itself.¹⁸⁵ This illustrates the reasoning behind the language of the first section, which specifically defined the infringing activities. “Under this approach, there is no need for the courts to get into thorny questions about how a particular technology was designed, what its particular functions can or can’t do, or difficult questions of intent.”¹⁸⁶ The Copyright Office attempted to classify a product or service as an inducer of infringement of copyrights according to the percentage of revenue that the particular product or service derives from the dissemination of copyrighted material.¹⁸⁷

Another doctrinally relevant phrase refers to products that are “*a cause of individuals engaging in infringing public dissemination of copyrighted works.*”¹⁸⁸ One of the principal arguments of the innovators concerning the first draft of the bill was that it was too vague, and that no one could predict how the courts would interpret a term like “induce,” which, if misinterpreted, could chill innovation.¹⁸⁹ The Copyright Office discarded the possibility of using the term “cause,” stating that “[p]redicating liability on whether the defendant ‘causes’ infringement could be interpreted as requiring that the defendant’s conduct be the proximate or ultimate cause of the infringement, which we rejected as too high a burden.”¹⁹⁰

The second subsection defined the term “public dissemination” as “digital transmission to the public of copies or phonorecords or any other exercise of any of the rights set forth in sections 106(3), 106(4), 106(5) or 106(6).”¹⁹¹ Importantly, to allay the concern of the software distributors, “the mere infringement of the reproduction right or the derivative work right, without any of these additional elements, would not constitute ‘public dissemination’ [and could not] be used to target manufacturers and marketers of devices used for copying.”¹⁹²

Other concessions were made to the technology innovators in the third section of the Copyright Office draft, which discussed two possible remedies for those found to induce the infringement of copyrights: statutory damages and injunctions.¹⁹³ Statutory damages are only available if the violation is

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (emphasis added).

189. *Hearings on S. 2560, supra* note 161 (statement of Andrew Greenberg).

190. Explanatory Memorandum from Copyright Office, *supra* note 156.

191. *Id.*

192. *Id.*

193. *Id.* The section states specifically:

(A) No award of statutory damages under Section 504(c) shall be made for a violation of this subsection unless the copyright owner sustains the burden of proving, and the court finds, that such violation was committed willfully. (B) In granting injunctive relief under Section 502 for a violation of this subsection, the court shall, to the extent practicable,

found to be willful; however, even nonwillful violators would be liable for actual damages and lost profits.¹⁹⁴ Further, the draft also addressed the concerns that the Induce Act would increase the amount of litigation to which software distributors would be subjected by making unsuccessful plaintiffs liable for the defendant's attorney fees.¹⁹⁵ An injunction, the second remedy, "must, where practicable fashion the scope of the injunction not to restrain or prevent the noninfringing uses of the product or service at issue. . . . [That is] a critical aspect of the Sony decision. . . ." ¹⁹⁶

The final subsection of the Copyright Office draft attempted to preserve the settled law of the doctrine of secondary liability, as well as the established defenses.¹⁹⁷ Again, trying to appease the innovators, this subsection attempted to save the *Sony* doctrine that appeared to be the deal-breaker for the innovators.¹⁹⁸

Nevertheless, this draft suffered the same fate as the original draft, as both sides were still wary of the unclear language. Sen. Hatch, after realizing that the parties could not reach a compromise, asked the interested parties to propose acceptable language, and then left it to them to work out the details.¹⁹⁹ As imagined, the parties were unable to reach a compromise.²⁰⁰ "[T]he talks appeared to have collapsed because neither side could agree on how to achieve a balance between protecting technology companies from litigation for their products while, at the same time, outlawing file-sharing companies that profit from the illegal distribution of copyrighted works."²⁰¹

3. Earlier Attempted Solutions to the P2P problem

When Napster, the first notable P2P service, was publicly introduced in September 1999, it became immediately popular, with the number of users doubling every five or six weeks.²⁰² In February 2001, Napster had 80 million users trading songs online.²⁰³ This massive distribution of copyrighted

limit the scope of the injunctive relief so as not to prevent or restrain noninfringing uses of the product or service.

Id.

194. *Id.*

195. Explanatory Memorandum from Copyright Office, *supra* note 156.

196. *Id.*

197. *Id.*

198. *Id.*

199. Sarah Lai Stirland, *Talks Collapse in Effort to Reach Deal on File-Sharing Bill*, CONGRESSDAILYAM, Oct. 7, 2004.

200. *Id.*

201. *Id.*

202. Matthew Green, Note, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 801 (2002).

203. *Id.* at 802.

material was undoubtedly a major concern of the music industry, but the bigger concern was how to stop the illegal downloading. Several artists spoke out against Napster, including Don Henley, Garth Brooks, Art Alexakis of Everclear, Elton John, and Puff Daddy.²⁰⁴ In December 1999, the Recording Industry Association of American (RIAA) brought litigation against Napster.²⁰⁵ In March 2000, Metallica and Dr. Dre soon followed with their own suits against Napster.²⁰⁶ However, the music industry could not ensure a solution by itself. Acting on behalf of the music interests, the RIAA was joined by other stakeholders, including the Motion Picture Association of America (MPAA), the Music Producers Guild (MPG), the Business Software Alliance (BSA), and other parties who had an interest in keeping property rights from being infringed upon by internet users.²⁰⁷

Nevertheless, the Induce Act was not the first piece of legislation aimed at curbing the illegal downloading of copyrighted material over P2P networks. In 1998, in response to the fears of Internet service providers (ISPs) concerning their liability for the direct copyright infringement of their users, Congress enacted the Digital Millennium Copyright Act (DMCA).²⁰⁸ In this legislation, Congress identified “safe harbors” for these ISPs, but only “to the extent that the infringement involves four functions: transitory network transmissions, caching, storage of materials on behalf of users (e.g., web hosting, remote file storage), and the provision of information location tools (e.g., providing links, directories, search engines).”²⁰⁹

Generally, the DMCA strengthened copyright protection by prohibiting the “circumvention of copy-protection technologies” and the distribution of information detailing how to overcome those technologies.²¹⁰ Some believed that the safe harbors constructed within the DMCA could be undermined by the Induce Act.²¹¹ “While these limits would continue to apply with respect to the services offered by ISPs . . . under [the Induce Act], an ISP could be sued for inducing infringement by distributing software that enables infringement, such as software enabling broadband services.”²¹² Nevertheless, most of the law revolving around secondary liability of copyright infringement is case

204. *Id.* at 803.

205. Reuters, *Metallica Raps Napster*, Mar. 29, 2001, <http://www.cbsnews.com/stories/2001/03/29/archive/technology/main282384.shtml>.

206. *Id.*

207. Green, *supra* note 202, at 804.

208. Elliot M. Zimmerman, *P2P File Sharing: Direct and Indirect Copyright Infringement*, FLA. B. J., May 2004, at 40, 41; *see* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

209. Zimmerman, *supra* note 208, at 41.

210. Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 911 (2004).

211. *Hearings on S. 2560*, *supra* note 161 (statement of Kevin McGuiness).

212. *Id.*

developed, and few pieces of legislation have attempted to modify it until the proposal of the Induce Act.²¹³

Other proposed legislation attempted to solve the problem of illegal file-sharing over P2P networks. In 2002, Rep. Howard Berman introduced the “P2P Piracy Prevention Bill,”²¹⁴ which was “essentially a self-help provision that would have allowed a copyright owner to use technology to deter or prevent the unauthorized use of her works over the internet, so long as the owner did not significantly impair the unauthorized user’s computer.”²¹⁵ Predictably, the bill was received well by copyright owners but vigorously opposed by the innovators and Internet users, as it gave copyright owners unprecedented self-help power, while offering very little protection for individual Internet users.²¹⁶

The Digital Media Consumers’ Rights Act,²¹⁷ introduced in January 2003, would have mandated that CDs with copy protection be properly identified, as well as making sales of mislabeled, copy-protected CDs illegal.²¹⁸ “The proposal serves the public access interests in the constitutional grant by enabling consumers to exercise their property interests as well as to create

213. 150 CONG. REC. S7189 (daily ed. June 22, 2004) (statement of Sen. Hatch).

214. H.R. 5211 pmbl., 107th Cong. (2002). The bill specifically stated:

A copyright owner shall not be liable in any criminal or civil action for disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.

Id. at § 1(a)(a).

215. Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J.L. & ARTS 371, 398 (Summer 2003).

216. *Id.* at 400.

217. H.R. 107, 108th Cong. (2003).

218. The Digital Media Consumers’ Rights Act details:

[A] prerecorded digital music disc product shall be considered mislabeled if it 1) bears any logo or marking, which, in accordance with common practice, identifies it as an audio compact disc; 2) fails to bear a label on the package in which it is sold at retail in words that are prominent and plainly legible on the front of the package that—A) it is not an audio disc; B) it might not play properly in all devices capable of playing audio compact discs; and C) it might not be recordable on a personal computer or other device capable of recording content from an audio compact disc; or 3) fails to provide the following information on the packaging which it sold at retail in words that are prominent and plainly legible— A) any minimum recommended software requirements for playback or recordability on a personal computer; B) any restrictions on the number of times song files may be downloaded to the hard drive of a personal computer; and C) the applicable return policy for consumers who find that the prerecorded digital music disc product does not play properly in a device capable of playing an audio compact disc.

Id. at § 24A(c).

technologies that serve non-infringing purposes.”²¹⁹ Both of these bills were referred and eventually stalled out in the House Subcommittee on Courts, the Internet, and Intellectual Property.²²⁰

C. Market Solutions

Even though prior legislation had not been incredibly successful in stemming illegal file-sharing, the RIAA and other copyright owners had employed other means to protect against copyright infringers. Possible market-related solutions included the education of the file-sharing public, the increased use of copy-protection techniques, and the alteration of the business model to attract those users who want to possess cheap digital files.

The RIAA's purpose in launching an education campaign was to educate consumers on the negative impact of pirating music.²²¹ The RIAA's Web site displayed anti-piracy quotes from a wide variety of artists, while some artists even took education into their own hands.²²² “[T]he Dixie Chicks and Missy Elliot have appeared on MTV and BET to relay artists' concern. Even Madonna chastised her fans for downloading an illegal copy of her new single, American Life.”²²³ At the 2004 GRAMMY Awards, the Recording Academy unveiled a major education campaign, which included a new Web site entitled “whatsthe download.com,” various print and radio advertisements, grassroots activities, and retail appearances.²²⁴ Music United for Strong Internet Copyright, another group advocating the protection of intellectual property rights, purchased educational advertisements in newspapers and secured a series of radio and television commercials featuring artists discussing the negative impacts of illegal file-sharing.²²⁵

The mass number of lawsuits filed by the RIAA against individual file-sharers also served to further educate the public, although inadvertently.²²⁶ If the passive file-sharer was previously unaware of the intricacies of copyright law, and thought Napster was merely an affordable way to build a music collection, surely the thousands of lawsuits filed enlightened even the least

219. Rebekah O'Hara, *You Say You Want a Revolution: Music & Technology—Evolution or Destruction?*, 39 GONZ. L. REV. 247, 288 (2004).

220. *Id.* at 285.

221. Norman, *supra* note 215, at 403.

222. *Id.*

223. Yu, *supra* note 210, at 921.

224. *Id.*

225. Norman, *supra* note 215, at 403.

226. Yu, *supra* note 210, at 922. The MPAA is also attempting to educate consumers on the negative effects of downloading movies, by pointing out that downloaded movies are of a poor quality, the effect movie piracy will have on non-movie star employees, and the risk of criminal prosecution. Anna E. Engelman & Dale A. Scott, *Arrgh! Hollywood Targets Internet Piracy*, 11 RICH. J.L. & TECH. 3, 62 (2004).

legal-savvy Internet user. According to a July 2004 survey, it appeared that the education efforts had been successful: “64 percent of those surveyed believed it is illegal to make music from the computer available for others to download for free.”²²⁷ In fact, the Internet traffic related to P2P applications decreased by almost 50% on university networks.²²⁸

The recording industry also explored increased copy-protection on the media itself. After observing the positive effects copy-protection technology had on the pirating of DVDs, the recording industry began to experiment with its own version of copy-protection technology.²²⁹ These methods, however, are quite controversial as they would not allow consumers to make copies of purchased media, even for personal use.²³⁰ Another possible copy protection method is encryption, where only a person who has a “key” can gain access to the media file.²³¹ Still another method would allow the files to be identified through the use of a digital watermark or fingerprint, which would allow the copyrighted material to be controlled and located and could prevent infringing files from being swapped over P2P networks.²³²

Commentators have also proposed an alteration of the business models of copyright owners, which have included special materials or features in a retail-bought CD, thus making pirated products less valuable, or possibly the creation of commercial P2P networks, which in fact is currently being utilized.²³³ There have been a number of successful business models based on the sale of

227. Grant Gross, *RIAA Files 896 New File-Trading Lawsuits*, INDUSTRY STANDARD, Aug. 25, 2004, <http://www.thestandard.com/article.php/20040825203958223>.

228. John Borland, *College P2P Use on the Decline?*, CNET NEWS.COM, http://news.com.com/College+P2P+use+on+the+decline/2100-1027_3-5322329.html (Aug. 24, 2004). *But see* Jefferson Graham, *Online File Swapping Endures*, USA TODAY, http://www.usatoday.com/tech/news/2004-07-11-fileswap_x.htm (July 11, 2004) (stating that in June 2004, 8.3 million people were using P2P programs, an increase of 19% from a year earlier, discounting current surveys stating that people were using P2P services less); Brian Hindo, *Did Big Music Really Sink the Pirates?*, BUSINESSWEEK ONLINE, http://www.businessweek.com/print/technology/content/jan2004/tc20040116_9177_tc024.htm?chan=tc& (Jan. 16, 2004) (citing that these polls are inaccurate because of a skewed sample, by only phoning U.S. adults and restricting questions to only a small number of P2P services, excluding newer P2P services, like Bit Torrent and eDonkey).

229. Matthew C. Mousley, Note, *Peer-to-Peer Combat: The Entertainment Industry's Arsenal in Its War on Digital Piracy*, 48 VILL. L. REV. 667, 689–90 (2003).

230. Norman, *supra* note 215, at 406. However, iTunes has had much recent success, even though the ability to manipulate the files is limited. *iTunes Music Store Sells over One Million Songs in First Week*, www.apple.com/pr/library/2003/may/05musicstore.html (May 5, 2003).

231. Kristine Pesta, Comment, *The Piracy Prevention Bill, H.R. 5211: The Second Generation's Answer to Copyright Infringement over Peer-to-Peer Networks*, 33 SW. U. L. REV. 397, 406 (2004).

232. *Id.* at 406–07.

233. Doris Estelle Long, *E-Business Solutions to P2P Piracy: A Practical Guide*, 779 PRAC. L. INST. 727, 761 (2004).

MP3s on the Internet.²³⁴ “[A] full 3 percent of Internet users and 17 percent of music downloaders now currently use paid music services. Some 7 percent of the user population admits to buying music from these services at one point or another.”²³⁵

D. Judicial Solutions

The copyright holders were successful in *A&M Records, Inc. v. Napster, Inc.*, where the court enjoined Napster from “engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs’ copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner.”²³⁶ However, the damage was already done, as new P2P software was already developed, designed to circumvent the judicially constructed law in *Napster*. New networks appeared that conformed to *Napster* and attempted to resist litigation by shifting the liability from the network owners to the individual infringers.²³⁷ To add further urgency to the problem, the RIAA reported that the industry lost \$4.2 billion in 2001, and the BSA estimated a loss to the industry of \$10.97 billion in 2001.²³⁸

Frustrated by the inability of the judicial system to limit the P2P software, the RIAA decided to start suing individual users. In April 2003, RIAA filed suit against four university students, who quickly settled, and followed that success with suits against 261 more individuals in September of 2003.²³⁹

234. For a thorough discussion of the intricacies of alternative business models, see DEREK SLATER ET AL., HARVARD LAW SCHOOL, CONTENT AND CONTROL: ASSESSING THE IMPACT OF POLICY CHOICES ON POTENTIAL ONLINE BUSINESS MODELS IN THE MUSIC AND FILM INDUSTRIES, http://cyber.law.harvard.edu/media/files/content_control.pdf.

235. Michael A. Einhorn, *Music in the Crucible: A Year in Review*, 22 ENT. & SPORTS LAW 1, 24 (2004) (detailing an exhaustive discussion of the many different types of music services currently being offered).

236. 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000).

237. See discussion of *Aimster* and *Grokster*, *supra* Part III.

238. Mousley, *supra* note 229, at 669–71; see also SLATER ET AL., *supra* note 234, at 6 (“[O]nline infringements reasonably can be expected to reduce revenues in the long run.”). *But see* HINDO, *supra* note 228 (“[I]n 2003 CD album sales slipped 2%—a less dramatic drop than the 9% slide the previous year. Also, fourth-quarter 2003 sales picked up 5.6% over 2002.”); KOLEMAN STRUMPF & FELIX OLBERHOZER, THE EFFECT OF FILE-SHARING ON RECORD SALES: AN EMPIRICAL ANALYSIS (Mar. 2004), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

While 65% of users say downloading led them to not purchase an album, 80% claim they bought at least one album after first sampling it on a file sharing network. . . . While downloads occur on a vast scale, most users are likely individuals who would not have bought the album even in the absence of file sharing.

Id. at 3–4.

239. John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS.COM, Sept. 8, 2003, http://news.com.com/RIAA+sues+261+file+swappers/2100-1023_3-5072564.html.

However, in December 2003, the RIAA's lawsuits suffered a significant setback. In *Recording Industry Ass'n of America, Inc. v. Verizon Internet*,²⁴⁰ the RIAA's use of the DMCA to issue subpoenas was held invalid when applied to entities such as ISPs.²⁴¹ While this did not completely derail RIAA's judicial efforts, it certainly made it more expensive. "The RIAA would have to file a 'John Doe' lawsuit against each anonymous swapper, a process that would be considerably more labor-intensive and time-consuming. That in turn could limit the number of people the association ha[d] the resources to pursue."²⁴² Nevertheless, the RIAA has sued over 1,900 individual users, with each paying an average of \$3000 in fines.²⁴³ While it appeared that the RIAA was making progress, there was still a lack of enforcement of copyright law, as the RIAA simply could not sue every individual who illegally downloaded copyrighted files. "The reach of peer-to-peer file sharing is enormous, and the attempt to stop millions of people from file sharing through the use of the court has an enormous scope."²⁴⁴

The RIAA was unsuccessful in pursuing several legislative alternatives;²⁴⁵ was unsuccessful in the judicial arena,²⁴⁶ as the filing of individual lawsuits became increasingly expensive; and was generally unsuccessful in its efforts to utilize the market for solutions. The copyright holders thus had little choice but to continue its pursuit of P2P software, like Grokster and Napster, by persuading legislators to introduce the Induce Act. Sen. Hatch, who along with other co-sponsors of the bill, received significant campaign contributions from the TV, music, and media industries,²⁴⁷ had been a longtime supporter of artist rights and is himself a songwriter and a performer.²⁴⁸ The Ninth Circuit's

240. 351 F.3d 1229 (D.C. Cir. 2003).

241. *Id.* at 1231.

242. John Borland, *Court: RIAA Lawsuit Strategy Illegal*, CNET NEWS.COM, Dec. 19, 2003, <http://news.com.com/2100-1027-5129687.html>.

243. John Borland, *New RIAA File-Swapping Suits Filed*, CNET NEWS.COM, Mar. 23, 2003, <http://news.com.com/2100-1027-5177933.html>.

244. Beth A. Thomas, *Solutions Are on Track: Digital File Sharing Spun in a Positive Light*, 6 VAND. J. ENT. L. & PRAC. 129, 131 (2003).

245. See discussion *supra* Part III.B; see *supra* notes 199–200 and accompanying text.

246. See SLATER ET AL., *supra* note 234, at AII-10–AII-11 ("One study asserted that P2P usage dropped by 18 million users after the record industry's suits began, but other studies suggest that . . . 75% of people still believe that downloading should not be illegal. The suits might simply be shifting users toward more secretive systems while angering potential customers.").

247. See *Help Stop the Induce Act*, <http://www.savethe.org> (last visited Apr. 10, 2006) (stating that from 1999 to 2005 Sen. Hatch received \$158,860 from these industries; other legislators received the following amounts: Sen. Leahy, \$220,450; Sen. Frist, \$58,550; Sen. Boxer, \$517,660; Sen. Daschle, \$382,760; Sen. Graham, \$72,273; and Sen. Clinton, \$1,100,390).

248. Jay Rosenthal, *Congress Gets it Right*, BILLBOARD, July 24, 2004, at 10; see also David McGuire, *Uncertain Landscape Ahead for Copyright Protection*, WASHINGTONPOST.COM, Dec. 16, 2004, <http://washingtonpost.com/ac2/wp-dyn/A4003-2004Dec16?language=printer> (stating

decision allowed Hatch to further push one of his “pet” projects into the limelight, leading to the introduction of the Induce Act.

However, as outlined above, the Induce Act never made it out of committee. In an attempt to appease both sides of the debate, the committee and Copyright Office ended up pleasing neither. These two camps, represented each by a conglomeration of groups and individuals bound by a common goal, albeit against one another, wielded enormous power in this debate, which eventually led to the demise of the proposed legislation.

IV. COMPARATIVE INSTITUTIONAL ANALYSIS

In order to conduct a comparative institutional analysis, a policy goal must first be chosen so the various institutions can be examined through their ability to promote that chosen goal.²⁴⁹ “To consider institutional choice in depth, however, one must simplify the social policy goal discussion by assuming the goal rather than providing a detailed proof.”²⁵⁰ While not taking the social policy goal for granted, it seems rather constitutionally straightforward, to “promote the Progress of Science and useful Arts.”²⁵¹ This comparative institutional analysis, when translated with a public choice slant, suggests a social policy goal of “enabling cost-efficient innovation.”²⁵²

A. Group Formation

An interest group is “an organization of people with similar policy goals who enter the political process to try to achieve those aims A policy battle lost in Congress may be turned around when it comes to bureaucratic

that “the fact that the measure was being debated at all in October before a national election testified to the power that an influential committee chairman like Hatch has in managing the legislative agenda”).

249. See Freiwald, *supra* note 16, at 596–97.

250. *Id.*

251. U.S. CONST. art. 1 §8, cl.8; Daphne Keller, *A Gaudier Future That Almost Blinds the Eye*, 52 DUKE L.J. 273, 297 (2002) (reviewing LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001)).

252. See Brief for Progress & Freedom Foundation as Amici Curiae Supporting Petitioners, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480) (stating that “consumers have two strong interests: (1) Avoiding inhibitions on technological progress; and (2) Fostering the production of content by providing incentives to creators”). Note that the social policy goal is not the goal of either of the two groups per se, but instead the goal of society in general. See generally U.S. CONST. art. I, § 8. Generally, software distributors and Internet users champion technology that allows for the dissemination of information, while the copyright holders are more concerned with that technology being used for illegal purposes. However, both groups are concerned with rewarding creators for their intellectual and technological achievements by ensuring the effective distribution of the innovations and providing financial incentives to continue to innovate. See SLATER ET AL., *supra* note 234, at 26.

implementation or the judicial process.”²⁵³ Even though there are many distinct groups within this struggle to adapt copyright law, like the RIAA, MPAA, and BSA, it is simpler to view all these groups as a single group lobbying toward a common goal of the protection of copyrights.²⁵⁴ The combination of the software distributors, Internet service providers, civil liberty advocates, and Internet users combine to oppose legislation that may extend the copyright monopoly to the extent that innovation is inhibited.²⁵⁵ Joining the ranks of the software distributors²⁵⁶ are the Internet users, described as “new grass roots and lobbying organizations advocat[ing] for consumer and Internet user rights with respect to privacy, intellectual property, and free speech . . . these organized actors will likely push the equilibria of the substantive laws closer to outcomes that benefit Internet users.”²⁵⁷ This is significant because of the large numbers of individuals who belong to this informal group. “[T]he millions of users of peer-to-peer networks obviously place value on their ability to access content that they might otherwise have purchased . . . consist[ing] of . . . arguably the largest international networks of illegality in human history.”²⁵⁸

Despite their advancement of an arguably illegitimate political interest,²⁵⁹ this network of Internet users, forming a loosely knit group advocating privacy and speech rights, invariably subsidized the power of the software

253. LINEBERRY ET AL., *supra* note 34, at 216.

254. Interestingly, a December 2004 phone survey of artists found that only 52% of artists said unauthorized file-sharing of music files should be illegal, as compared to 37% who said it should be legal. MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, ARTISTS, MUSICIANS AND THE INTERNET, at v (2005), http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf.

255. See McGuire, *supra* note 248.

256. The software distributors, as discussed in this Paper, include those that support the *Sony* standard. Even though Internet Service Providers (ISPs) and rights advocates are active in this discussion, their position largely supports those of the Internet users, as ISPs generally do not want harm to come to their customers. However, the groups, as discussed here, are admittedly an oversimplification of all the interests involved. For example, even the Association of American Universities, the American Conservative Union, and the American Library Association support the defeat of the Induce Act. See Declan McCullagh, *Outgunned on Copyright?*, CNET NEWS.COM, Nov. 22, 2004, http://news.com.com/2102-1071_3-5460597.html?tag=st.util.print. For a discussion of the wide array of *Grokster* amicus briefs received by the Supreme Court, see Elizabeth Millard, *Supreme Court Flooded with File-Sharing Briefs*, NEWSFACTOR.COM, Jan. 27, 2005, http://news.yahoo.com/news?tmpl=story&cid=75&u=/nf/20050127/tc_nf/30028&printer=1.

257. Aaron Burstein, Will Thomas DeVries, & Peter S. Menell, *Foreword: The Rise of Internet Interest Group Politics*, 19 BERKELEY TECH. L.J. 1, 15–16, 20 (2004).

258. *Id.* at 15–16 (citation omitted).

259. See Patrick Ross, *File-Sharing Battles Leave Us Out*, CNET NEWS.COM, Jan. 27, 2004, http://news.com.com/Content+vs.+file+sharers+leaves+us+out/2010-1071_3-5551946.html (“You want name-calling? File sharers are ‘thieves’ and ‘pirates.’ The Recording Industry Association of American and the Motion Picture Association of America are ‘evil.’”).

distributors.²⁶⁰ Of particular interest was the rise of Web sites whose main agenda is to defeat the Induce Act.²⁶¹ These groups, consistent with the tenets of pluralism, organized and rose to the occasion when an important issue appeared on the agenda of many legislators. For example, in the first week of the “campaign,” more than 10,000 e-mails and faxes were sent to Congress demanding revision of the Induce Act.²⁶² Another group recruited over 5,000 volunteers to call members of Congress to express their discontent with the Induce Act.²⁶³ The Electronic Frontier Foundation, aligning with the software distributors, also recruited another 6,000 individuals to write their senators to express their discontent with the proposed legislation.²⁶⁴

As to the groups advocating increased copyright protection, their well-funded efforts translated into a legislative proposal by utilizing the same resources that ensured the attention of the issue in the first place and making its way onto the agenda of the legislature. The apparent limitless coffers of these interests were used to form a strong organization that persuades members of Congress to vote for pro-copyright protection legislation. However, the copyright protectors do not persuade with money alone, as the RIAA was also able to convince 3,000 of their members to e-mail their lawmakers.²⁶⁵

It is apparent that these two coalitions of groups were competing to ensure the protection of their vested interests, either in rights, as with the software distributors and Internet users, or in copyrights, as with the copyright holders. They utilized their resources in an attempt to guarantee the preservation or reformation of the system to best capitalize on their respective businesses.

260. *See id.*

261. *See, e.g.,* Corante, <http://www.corante.com/> (last visited Nov. 19, 2004); Legislating IP (An Intellectual Property Law Blog), <http://techlawadvisor.com/induce/> (last accessed Nov. 19, 2004) (formerly the Induce Act Blog); Save *Betamax*, <http://www.savebetamax.org/> (last visited Nov. 19, 2004). However, some feel that a larger, more organized interest group is needed to combat legislative proposals like the Induce Act. *See* Jim Rapoza, *IT Advocacy Group Still Needed*, EWEEK, Aug. 2, 2004, <http://www.eweek.com/article2/0,1759,1630450,00.asp>.

262. Save the iPod Update, <http://downhillbattle.org/node/view/314> (last visited Apr. 17, 2006).

263. Save *Betamax*, <http://www.savebetamax.org/> (last visited Nov. 9, 2004).

264. Posting of Kevin Heller to Induce Act Blog, http://techlawadvisor.com/induce/2004_07_01_archive.html; *see also* Katie Dean, *Techies Talk Tough in D.C.*, WIRED.COM, Jan. 20, 2005, http://www.wired.com/news/politics/0,1283,66329,00.html?tw=wn_tophead_1 (stating that while “technology companies haven’t focused much of their attention in Washington. They’re too busy building new products and keeping up with competition,” these groups have realized the importance of having influence with legislators); Katie Dean, *Battling the Copyright Big Boys*, WIRED.COM, Nov. 30, 2004, <http://www.wired.com/news/print/0,1294,65651,00.html> (discussing the success of technology groups in helping to elect sympathetic legislators, including the election of five representatives in the last election).

265. Brooks Boliek, *H’wood, P2P Operators Watch Hill*, HOLLYWOOD REP., Sept. 28, 2004, at 3.

B. *The Legislative Institution*

As suggested by Komesar,²⁶⁶ the copyright holders, being a minority voice, and the Internet users and software distributors, invariably composed of more members, basically counteracted one another to the extent that the Induce Act failed, as the groups were unable to reach a compromise, especially when the legislators, out of frustration for the lack of movement on the bill, put the reconciliation process into the hands of these groups.

This is indicative of “interest group liberalism”: “the role of government is one of insuring access to the most effectively organized, and of *ratifying the agreements and adjustments worked out among the competing leaders.*”²⁶⁷ Jessica Litman, in her book *Digital Copyright*, described the process as unique to the development of copyright law:

About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation. By the 1920s, the process was sufficiently entrenched that whenever a member of Congress came up with a legislative proposal without going through the cumbersome pre-legislative process of multiparty negotiation, the affected industries united to block the bill. Copyright bills passed only after private stakeholders agreed with one another on their substantive provisions.²⁶⁸

These established processes tend to result in a legislative process that has certain characteristics. First, the affected group will not support a bill that takes away certain rights that are granted by the current status of the particular law.²⁶⁹ Second, groups attempt to characterize the current status of the law in their favor, as the current law is where negotiations begin.²⁷⁰ If a group can cast the current copyright law in its favor, then it has more power at the bargaining table; if it appears that the group which the law favors is making concessions to the current law, and hence losing some sort of rights, then it is more likely to receive more of the rights that it favors in return. Finally, these “negotiations tend to result in very specific and detailed rules that resolve the main concerns of the players at that stage of the industry’s history.”²⁷¹

These tendencies of the formation of copyright law follow logically from basic interest group theory, all of which aid in the understanding of the introduction and subsequent failure of the Induce Act. First, according to

266. *See supra* text accompanying notes 75–76.

267. LOWI, *supra* note 44, at 51 (emphasis added).

268. JESSICA LITMAN, *DIGITAL COPYRIGHT* 23 (2001).

269. *Id.*

270. *Id.* at 24.

271. Pamela Samuelson, *Toward a “New Deal” for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1490 (2002).

interest group liberalism, the role of government in the legislative process is to graft a compromise between competing groups, which is extremely similar to the process in which copyright law is formulated, as suggested above.²⁷² However, it appears that the process, as described above, was not followed in the early stages of the Induce Act. Instead of consulting with the various groups that would be interested in this legislation, Hatch and Induce's co-sponsors neglected the large number of groups interested in this discussion.²⁷³ "The fact is that no one really wants to hear from the P2P networks concerning IICA. The Induce Act will put P2P out of business, why bother giving them a seat at the table?"²⁷⁴ Further evidence of the lopsided involvement in the original drafting of the law was evident when Hatch thanked the Business Software Alliance for "its invaluable assistance in crafting a bill that protects existing legitimate technologies" during his introduction of the bill.²⁷⁵

Eventually, many of the interested groups were brought into the discussion.²⁷⁶ Especially receptive to the various groups was the Copyright Office draft of the Induce Act, however, the sides were still too far apart on essential issues.²⁷⁷ As suggested above, these groups would not support a bill that significantly altered their rights under the current system.²⁷⁸

A subsequent hurdle proved to be the uncertainty of the law, as these groups would continue to portray the current law as favorable to their interests.²⁷⁹ Relying on *Grokster*, Internet users could easily argue that certain P2P applications are not liable as infringers, as the Ninth Circuit ultimately ruled.²⁸⁰ Software distributors could point to *Sony* to support their contention that certain P2P applications are legal because of their substantial noninfringing use.²⁸¹ Finally, the copyright holders could highlight *Napster* and *In re Aimster* to support their contentions that the P2P applications are being used for illegal purposes and should therefore be secondarily liable.²⁸²

This confusion about the current status of the law is exactly why the copyright holders wanted to pass the legislation, however Induce's opponents

272. See LOWI, *supra* note 44, at 51; see also LITMAN, *supra* note 268, at 23.

273. Posting of Chris Rush Cohen to Induce Act Blog, July 24, 2004, http://techlawadvisor.com/induce/2004_07_01_archive.html.

274. See *id.*

275. 150 CONG. REC. S7192 (daily ed. June 22, 2004) (statement of Sen. Hatch).

276. For a discussion of groups, see *supra* text accompanying notes 253–65.

277. See Posting of Kevin Heller to Induce Act Blog, Sept. 10, 2004, http://techlawadvisor.com/induce/2004_07_01_archive.html.

278. LITMAN, *supra* note 268, at 23.

279. *Id.*

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

281. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 441–42 (1984).

282. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001). See generally *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

wanted more discussion about the bill to ensure that Induce would not take away certain presently held rights, and therefore the parties were unable to reach a consensus on the proper language for the bill.²⁸³ There was not ample time in the legislative session to iron out the differences and enact the type of detailed bill that would be necessary to satisfy all the parties involved.²⁸⁴

It is clear that both sides disposed of a large amount of resources during the short life of the Induce Act. Discounting the possible effectiveness of the Induce Act in actually promoting innovation, which was highly disputed, the introduction of the Act, and all of the costs associated with it, was clearly not cost-effective. The information costs to the copyright holders were quite high,²⁸⁵ as the copyright holders spent political capital in ensuring the introduction and wide-spread support of the bill,²⁸⁶ not to mention the time and labor that was devoted to the defense of the bill. Although the transaction costs of the copyright holders were lower, as the free-rider problem was minimal because the groups were already formed and organized, the costs associated with the Induce Act were not proportional to the expected social benefit of promoting innovation.²⁸⁷

While the information and transaction costs for the software distributors is similar to that of the copyright holders, the Internet users experienced relatively higher transactional and informational costs when attempting to influence this legislation. The Internet users suffered from a free-rider problem, as the motivation for any individual internet user to actually lobby the government is relatively low, as all users are likely to receive the benefit or suffer the detriment of the legislation regardless of their involvement.²⁸⁸ The costs of participating and the expected benefit from such participation is similar to that of casting a vote. A rational actor does not believe that his vote actually makes a significant difference in the outcome of an election; similarly, a rational Internet user probably does not believe that his lobbying efforts would have a real effect on the outcome of the legislative battle. The costs of

283. See McGuire, *supra* note 248.

284. See Samuelson, *supra* note 271, at 1490.

285. It appears that the copyright holders are not limiting their scope to the federal government, as the California Legislature has proposed jail time for developers of P2P software. See John Borland, *State Bill Could Cripple P2P*, CNET NEWS.COM, Jan. 18, 2005, http://news.com.com/State%20bill%20could%20cripple%20P2P/2100-1028_3-5540937.html.

286. This was illustrated by the influential co-sponsors of the bill. See *supra* note 247.

287. The transactional costs of the copyright holders are likely to increase in the next legislative session, as Sen. Hatch's term has expired as chairman of the Judiciary Committee; he was replaced by Sen. Arlen Specter, whose views on the pertinent issues likely to come before the committee are not entirely clear. See McGuire, *supra* note 248.

288. See Brief for Progress & Freedom Foundation, *supra* note 252 (stating that consumers face a collective action problem, as "each consumer is better off if he or she has total access to unauthorized file-sharing while every other consumer pays for the music").

organizing and reaching other interested Internet users were also rather high, as this group was not previously formally organized to fight such legislation.

However, the Internet itself played a role in softening the blow of these high costs. The rather effortless lobbying techniques employed by the Internet users, like sending an e-mail or posting on a message board, helped to defray the effect of the free-rider problem and the problem of the expected benefit from actually lobbying the government. Once the individual was aware of the legislation and its potential repercussions, the experienced Internet user could express his political feelings without spending a lot of time or money.²⁸⁹ It is the relative ease of the Internet that allowed the Internet users to “spend enough” of their resources to cancel the copyright holders’ efforts. Again, as Komesar had suggested, a well-organized and well-informed small group, like the copyright holders, will be more influential than a poorly organized and a poorly formed large group, like the Internet users. However, when the Internet users, with the help of the software distributors, organized in such a manner as to increase their influence, “a countervailance of sorts between the two forces [resulted] and, with it, political outcomes that [we]re more ‘balanced.’”²⁹⁰

Nevertheless, when examining the relative nominal effect of the Induce Act on the social policy goal of the promotion of cost-efficient innovation protection, and the many resources that were spent by the two groups, the legislative process did not appear to be the effective institution with which to achieve the social policy goal.

C. *The Judiciary*

As discussed, the copyright holders have used the judiciary for two main types of claims: copyright infringement against individual file-sharers and secondary copyright infringement against those software producers that facilitate file-sharing. Both of these avenues, however, have high costs for both the plaintiff and defendant.

Internet users, to avoid suits from the copyright holders, must first understand that file-sharing is an illegal form of copyright infringement, which was, at least until recently, a large information cost. While the copyright holders have decided to shoulder a portion of the educational burden, there are still Internet users who do not realize that file-sharing is illegal. Further, the transaction costs forced upon Internet users who were thrust into litigation are

289. Also decreasing the expected information costs of the Internet user, but increasing the costs of the P2P companies and other potential infringing software, are warnings that are written into the software that informs the internet user of the repercussions of using the technology to download copyrighted media. John Borland, *FTC Spotlights Proposals on P2P Risks*, CNET NEWS, Dec. 7, 2004, http://news.com.com/2102-1025_3-5482429.html?tag=st.util.print.

290. KOMESAR, *supra* note 19, at 75. But, “[w]here minoritarian influence predominates . . . the resulting broad-based legislation may be illusory.” *Id.*; see also Erlanger & Merrill, *supra* note 76.

also quite high; relative to the benefit received, as in possession of illegally downloaded music or movies, the costs of hiring a lawyer and paying a settlement are very high. However, Internet users are not altogether deterred by these suits, as there is a free-rider problem, where not all Internet users who download pirated media are held accountable for their infringement. Therefore, many Internet users will continue to receive the benefit of copyrighted media, while not bearing any of the costs associated with litigation; as the possibility of being sued is fairly remote, the Internet users will generally continue to take advantage of the collective good of pirated media.

The copyright holders also suffer from high transaction and information costs when utilizing the institution of the judiciary. Transaction costs are high in almost any legal proceeding, as the many litigation costs continue to build over the life of the proceedings, which, especially when suing the P2P networks themselves, seem likely to be appealed several times, and sometimes on many different issues.²⁹¹ The copyright holders' information costs are also high when suing Internet users, as the "John Doe" subpoena process is significantly more expensive than the once relied-on power of subpoena found in the DMCA.

Not only are the costs high, but the expected benefit does not really satisfy the social policy goal of encouraging cost-efficient innovation. Any court adjudication is only based on the facts of the particular case, and these decisions do not promulgate rules which can be enforced without a subsequent lawsuit. "[C]ourt rulings apply only to the parties involved in the specific litigation. Stare decisis provides incentives for similarly situated actors to conform to the ruling, lest they be dragged into court, but such incentives are inadequate."²⁹² As seen with the evolution of P2P networks, the Grokster technology progressed after *Napster* so as not to fall under the specific facts that the court determined to be infringement.

This maxim is also illustrated in the inevitable result of the *Grokster* ruling by the Supreme Court. Even though the copyright holders arguably won the case, there is still much uncertainty as to the application of the Court's "inducement" theory—uncertainty that will take time to resolve through its application by lower courts.²⁹³ Adding to the uncertain application of the

291. *Napster* had several different interlocutory appeals, and *Grokster* will have gone in front of three separate courts. See *supra* Part III.A.

292. Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 559 (2002).

293. Robert A. Kalinsky & Gregory A. Sebald, *Supreme Court's Inducement Theory in Grokster Creates Uncertainty*, INTELL. PROP. TODAY (August 2005) ("[T]he opinion leaves uncertainty regarding what other activity might trigger liability under the new theory. This uncertainty will require further litigation to define the metes and bounds of active inducement in

Supreme Court's latest pronouncement, additional legislation by Congress is likely if the decision in *Grokster* ultimately harms technology companies or consumers.²⁹⁴

The main benefit of litigation against Internet users is education, as the settlement received is usually nominal in relation to the costs related to the litigation. Although education of Internet users of the negative effects of piracy is important, it can be, and certainly is, accomplished through other, less expensive means. Overall, the nominal benefits received from litigation, when compared to the relative high costs of pursuing solutions in the judicial institution, do not effectively allocate resources to accomplish the goal of securing innovation.²⁹⁵

D. *The Market*

When a solution is sought within the institution of the market, the transaction and information costs are significantly less for the Internet users, and are spent in a manner that best furthers the social goal of encouraging innovation. First, Internet users' information costs are lower, as the copyright holders have decided to educate the Internet users, and, when properly advertised and targeted to the least knowledgeable Internet users, these messages would ideally affect the file-sharing population. Internet users might take on additional information costs if they attempt to design software that circumvents certain copy-protected media, but this is probably negligible, as the technological savviness necessary to accomplish such methods is probably limited to a smaller percentage of Internet users, and will probably never be eliminated altogether.²⁹⁶ Internet users' transaction costs are also limited, as the main cost will be the increased price of media, but these additional costs are merely a function of the increase in price from nothing to the current market value, and from a consumer's perspective, should be expected.

copyright law."). Questions such as "When will a tech company know whether it will be held responsible for the infringements of a third party user?" and "How can we protect innovators from the threat . . . of lawsuits based on uncertainties?" demonstrate such uncertainty. Christine Mumford, *Panelists Unable to Agree on Propriety of Legislative Involvement in Grokster's Wake*, PAT., TRADEMARK & COPYRIGHT J., July 22, 2005, at 362, 362 (quoting Fred von Lohmann of the Electronic Frontier Foundation).

294. See Alexei Alexis, *Congress Expected to Examine Supreme Court File-Sharing Case*, PAT., TRADEMARK & COPYRIGHT J., July 1, 2005, at 260.

295. Nevertheless, just days after the Supreme Court granted certiorari in *Grokster*, the Motion Picture Association of America (MPAA) filed another round of lawsuits, this time against other decentralized P2P networks such as BitTorrent and eDonkey. Xeni Jardin, *Hollywood Wants BitTorrent Dead*, WIRED NEWS, Dec. 14, 2004, http://wired.com/news/digiwood/0,1412,66034,00.html?tw=wn_tophead_2.

296. But see Ed Felten, *Tiny P2P*, <http://freedom-to-tinker.com/tiny2p.html> (last visited Apr. 10, 2006) (displaying the code for a "tiny" P2P application, to illustrate the simplistic nature of the code, noting that "any moderately skilled programmer can write one").

However, the transaction and information costs of copyright holders are still high, at least initially. Developing either a new business model or technology that helps to ensure copyright protection will increase information costs. The advertising campaigns used to educate Internet users also keep transaction costs high, with the success of such advertising depending on the relative knowledge of the consumer. Nevertheless, transaction costs will most likely slowly decrease with a new business model, which utilizes the Internet, as it would inevitably be less expensive than relying on retail establishments to peddle the goods of copyright owners.²⁹⁷ More importantly, these costs will lead directly to the social policy goal. As the proposed restriction will be imposed only on media originating from copyright holders, other innovators will not have to be concerned with overbroad legislation or confusing court opinions. By only modifying CDs and DVDs, and not developing a new form of liability like that found in the Induce Act, innovation itself will not be stifled. Instead, file-sharing, being the targeted activity that these measures attempted to prevent, will decrease as the technologies become increasingly advocated for, advanced, and accepted. In reality, while file-sharing might be moderately discouraged through market measures, the real hindrance to P2P file-sharing would be the increased difficulty in exchanging copyrighted material, making it less desirable to the rational actor.

Through the use of the market, Internet users might lose their ability to gain access to free music and movies, at least with the present ease, but software distributors will not be stifled or discouraged from releasing new programs and devices. By stemming the reason for and the ease of file sharing, what could be possible “infringing” devices and programs could be used solely for their “substantially non-infringing use,” and at the same time not stifle innovation.

V. CONCLUSION

The American legislative process is not designed for efficiency. The American judicial system is not designed to promulgate effective, enforceable rules to cure social ills. In fact, influencing either of these institutions has certain built-in costs with unpredictable benefits. Copyright legislation, because of its intricacies and intimate involvement in many markets, inevitably has many suitors. It is exactly because of the number of interests, their fervor for their positions, and the vast amount of money at stake that these interests often clash, thus resulting in more gridlock. Copyright litigation, while not

297. Currently, Wal-Mart, Target, and Best Buy are responsible for over 50% of the retail business of CDs. Michael Geist, *Numbers Don't Crunch Against Downloading*, TORONTO STAR, Nov. 29, 2004, at D2; see also SLATER ET AL., *supra* note 234, at 7 (“[T]he Internet enables low cost distribution among content creators, retailers, and consumers, perhaps eliminating the need for standalone retailers altogether.”).

necessarily subject to group pressure, does not cast a wide net, and only affects the parties in the lawsuit. While groups certainly play a role in adjudications, as a wealthy litigant could assemble a large and talented legal team, thus making resolution more difficult, the rule of law governs more in the judicial system, which is virtually impossible to change without help from judicial confusion and the subsequent perversion of current law.

The market, however, is less subject to group pressure. Copyright holders are free to employ whatever business model or technology they desire, and the only guiding light is profitability. In the market, Internet users merely turn into consumers. Once the enemy of the copyright holder, they are now a highly desired commodity. High costs of frequent litigation and tireless lobbying of Congress are discarded. Nevertheless, there will undoubtedly be times, even when operating solely under the institution of the market, that access to the legislature or judiciary will be necessary. However, these branches were not designed to merely rubber-stamp policy desires of only private interests; money and influence is often needed to succeed, and, as shown, sometimes even that is not enough. However, in order for businesses to reshape their models in the digital age, the law must be settled and understood.²⁹⁸ Unfortunately, a vicious cycle seems to be forming: For businesses to understand what they are trying to protect against, the lines of legality need to be drawn, as this will allow the copyright holders to propose market solutions that will enable protection of their copyrights while not discouraging innovation, but this cannot be done with any certainty until the institutions of the legislature and judiciary remain quiet for at least a short time.

BEN ARANDA*

298. Unfortunately, with the Court's recent decision in *Grokster II*, this might not be the case, as it will inevitably take lower courts precious time to understand and apply the law as suggested by the Court. See Jeffrey D. Neuburger & Maureen E. Garde, *What's Left of Substantial Noninfringing Use After Grokster?*, PAT., TRADEMARK & COPYRIGHT J., Sept. 16, 2005, at 549, 549 ("The court in *Grokster* left reconsideration of *Sony* 'for another day.' That leaves a substantial amount of confusion on just how the *Sony* test should be applied until that day arrives.").

* I would like to thank the editors and staff of the *Saint Louis University Law Journal* for their diligent work on my note and this issue. Special thanks to Professor Mark McKenna and Professor Fred Bloom for offering their insight and encouragement throughout this process, as well as throughout my time at law school.