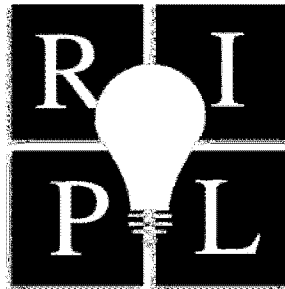


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



CONGRESS WANTS TO GIVE THE RIAA CONTROL OF YOUR IPOD: HOW THE
INDUCE ACT CHILLS INNOVATION AND ABROGATES *SONY*

MICHAEL RAUCCI

ABSTRACT

The addition of “active inducement” to the Copyright Act would compliment the doctrine of contributory liability by punishing those who actively encourage copyright infringement. Actively inducing infringement can include advertising an infringing use or other affirmative acts. Therefore, active inducement provides a technology-neutral standard that would not look to punish bad technology but rather bad actions by the technology distributor. In contrast, the reasonable person standard of the Inducing Infringement of Copyright Act of 2004 (“Induce Act”) permits an inappropriate extension of the exclusive rights given to copyright holders by lowering the threshold for litigation. Consequently, the Induce Act improperly places policy questions on the merits of technology in the hands of the judiciary which becomes antithetical to intellectual property laws by chilling innovation.

Copyright © 2005 The John Marshall Law School



Cite as Michael Raucci, Comment, Congress Wants to Give the RIAA Control of Your iPod: How the Induce Act Chills Innovation and Abrogates Sony, 4 J. MARSHALL REV. INTELL. PROP. L. 534 (2005).

CONGRESS WANTS TO GIVE THE RIAA CONTROL OF YOUR IPOD: HOW THE INDUCE ACT CHILLS INNOVATION AND ABROGATES *SONY*

MICHAEL RAUCCI*

INTRODUCTION

The VCR became a staple in American homes and launched a multi-billion dollar video rental and sales industry.¹ Personal video recorders have begun to take the VCR's place, becoming so well liked that the phrase "TiVo it" is beginning to replace "record it."² Even trendier is the iPod®, which has allowed millions of people to unchain their music library from the home computer.³ These technologies have seamlessly integrated into everyday life, but most people are ignorant of proposed legislation that will chill the innovation that generated these technologies: the Inducing Infringement of Copyright Act of 2004 ("Induce Act").⁴ The Induce Act will allow copyright holders to control any technology that is simply capable of facilitating infringement.

Demonstrating the scope of the Induce Act, the Electronic Frontier Foundation drafted a hypothetical claim for the music recording industry against Apple Computer.⁵ Essentially, the major copyright holders would seek to hold Apple liable

* J.D. Candidate, May 2006, The John Marshall Law School, Chicago, Illinois; B.S. Chemical Engineering, University of Illinois, Urbana-Champaign, Illinois.

¹ See Clayton Collins, *Why Blockbuster Clings to its DVDs and Rentals*, CHRISTIAN SCIENCE MONITOR, Feb. 24, 2005, at 12 (stating that in 2003, video rental sales were \$8.2 billion and that VHS and DVD purchasers spent \$14 billion combined).

² Rachel Singer Gordon, *TiVo For Dummies*, LIB. J. REVS, Oct. 1, 2004, 104 (comparing the phrase "TiVo it" to "Google it").

³ Rob Pagararo, *Apple Makes Tiny Steps For the Masses*, WASH. POST, Jan. 12, 2005, E1 (stating that "Apple has sold more than 10 million iPods to date and 230 million songs online at its iTunes Music Store.").

⁴ Inducing Infringement of Copyright Act of 2004, S. 2560, 108th Cong., 2d Sess. (2004). Senator Orin Hatch introduced Senate Bill 2560, commonly known as the Induce Act, on June 22, 2004. The Induce Act would add a cause of action for inducing infringement to Section 501 of the Copyright Act:

(g)(1) In this subsection, the term "intentionally induces" means 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.

(2) Whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer.

(3) Nothing 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.

Id.

⁵ Letter from Cindy A. Cohn, Esq., Legal Director, Electronic Frontier Foundation, to the General Public (June 24, 2004), *available at* http://www.eff.org/IP/Apple_Complaint.pdf (last visited Apr. 6, 2005) [hereinafter Apple Complaint].

as an inducer for selling the iPod®.⁶ For example, Apple is aware, as is most of the world, that millions of computer users are engaging in the unauthorized download of MP3 files using peer-to-peer (“P2P”) file swapping programs.⁷ Further, Apple chose to design the iPod® with a 10,000-song capacity and the widely used MP3 format.⁸ Under these circumstances, Apple is arguably subject to liability under the Induce Act, even though the iPod® has noninfringing uses and Apple has no control over those who use the iPod®.⁹

This hypothetical claim shows how the Induce Act gives courts the power to punish Apple for producing “bad technology.”¹⁰ From a policy standpoint, the Induce Act inappropriately extends secondary liability and puts questions fit for Congress in the hands of the judiciary.¹¹ Furthermore, the Induce Act does not define the technology that Congress wishes to eliminate.¹² Instead, the Induce Act allows the judiciary to determine the liability of a technology distributor based on the actions of its users.¹³

Any legal discussion about finding a balance between new technology and copyright holders must begin with *Sony v. Universal*.¹⁴ In 1984, the Supreme Court found Sony not liable for its VCR sales because VCRs have a “substantial noninfringing use.”¹⁵ Under this objective test, technology companies are allowed to innovate without the fear of being hauled into court for a device that consumers might use to infringe someone’s copyright.¹⁶ In its place, the Induce Act threatens to subject innovators to liability whenever their technology is capable of facilitating infringement.

Unquestionably, the recording industry’s recent courtroom loss against P2P distributors motivated the proposal of the Induce Act.¹⁷ In *MGM v. Grokster*, a California federal district court found two distributors of P2P software not subject to secondary liability for the infringement of its users, a decision seemingly contrary to

⁶ *See id.*

⁷ *Id.* at 4. Apple also arguably encouraged piracy through its “Rip, Mix, and Burn” campaign. *Id.* at 5. The MP3 is a digital file standard set by the Moving Picture Experts Group in 1987. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). By “ripping” the analog format of a song off a compact disc (“CD”), and compressing the song into a digital format, the MP3 version of the song will be smaller in size than the original audio file on the CD. *See id.*

⁸ Apple Complaint, *supra* note 5, at 5. Arguably the size of the iPod® hard drive is unnecessarily large and would encourage the purchaser to download music in order to fill it up. *Id.*

⁹ *See id.* 3–9.

¹⁰ *See id.* A “bad technology” simply facilitates infringement, regardless of whether its distributor actively encourages infringement, allowing a court to determine when a technology causes more harm than good.

¹¹ *See* Michael Grebb, *Hollywood Files P2P Appeal*, WIRED NEWS, Oct. 8, 2004, at <http://www.wired.com/news/digiwood/0,1412,65290,00.html> (last visited Apr. 6, 2005). The Induce Act will overturn the legal precedent that “lead to the largest and most profitable period of technological innovation in this country’s history.” *Id.* ¶ 8.

¹² *See* Inducing Infringement of Copyright Act of 2004, S. 2560, 108th Cong., 2d Sess. (2004).

¹³ *See, e.g.*, Apple Complaint, *supra* note 5, 1–9.

¹⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹⁵ *Id.* at 442.

¹⁶ *See* Grebb, *supra* note 11, para. 8 (quoting GiGi B. Sohn, president of Public Knowledge, a public-interest advocacy group).

¹⁷ 150 CONG. REC. S7189–92 (2004) (statement of Senator Orin Hatch). Senator Hatch is introducing the Induce Act to fight P2P software because “[s]ome P2P software appears to be the definition of criminal inducement captured in computer code.” *Id.* at S7189.

the Ninth Circuit's decision in the famous *Napster* trial.¹⁸ Since the proposal of the Induce Act, however, the Ninth Circuit has affirmed *Grokster*.¹⁹ This decision encouraged the recording and motion picture industries to petition the Supreme Court for certiorari and lobby Congress in support of the Induce Act.²⁰

This behavior should not come as a surprise.²¹ The recording and motion picture industries have been trying to use the legal system to preserve their share of media distribution rights with the introduction of every new copying and distribution technology.²² For example, the introduction of FM radio, the VCR and cable television each led to a battle from the established content distributors to chill the adoption of these technologies.²³ Consistently, Congress and the courts have chosen to protect innovation at the expense of copyright holders, allowing the market to set a new equilibrium on its own.²⁴ The internet, however, has changed the mood of the courts and Congress.²⁵

¹⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003). The district court dismissed the case against the P2P software distributors Grokster and Streamcast on a summary judgment motion. *Id.* The *Napster* decision can be found in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–29 (9th Cir. 2001). The court shut down the popular file-swapping service of Napster because it was subject to contributory and vicarious liability for the unauthorized downloading of copyrighted music that the Napster program facilitated. *Id.*

¹⁹ *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004).

²⁰ See Neil Portnow, *Taking Stock: A Matter Of Respect*, BILLBOARD, Sep. 11, 2004, (Neil Portnow is the President of the National Academy of Recording Arts & Sciences).

²¹ See *Grokster*, 380 F.3d at 1158. There is a rich history of litigation accompanying the introduction of new technologies that affect media distribution:

From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation. This appeal is the latest reprise of that recurring conflict, and one of a continuing series of lawsuits between the recording industry and distributors of file-sharing computer software.

Id.

²² See *id.*

²³ See, e.g., LAWRENCE LESSIG, *FREE CULTURE* (2003). The owners and operators of AM radio stations tried to stop the introduction of FM technology. *Id.* at 3–7. Disney and Universal tried to stop Sony from selling the Betamax videocassette recorder because users could tape their television programming. *Id.* at 75–77. The major over-the-air broadcast networks tried to stop cable television from re-transmitting their programming. *Id.* at 59–61.

²⁴ See *Grokster*, 380 F.3d at 1167. The court explained the policy rationale behind allowing the free market to come to equilibrium, stating:

The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.

Id.

²⁵ LESSIG, *supra* note 23, at 194. Lessig states “the pattern of deference to new technologies has now changed with the rise of the Internet.” *Id.* The courts chose to “[smother] the new to benefit the old,” instead of finding a balance between the new technology and established distribution systems. *Id.*

The introduction of broadband internet brought with it the well-known problem of unauthorized file sharing.²⁶ Furthermore, there are prohibitive transactional costs associated with bringing an infringement suit against even a substantial number of the estimated 60 million Americans downloading copyrighted music.²⁷ For example, even if the Recording Industry Association of America (“RIAA”) were to sue 10,000 file sharers a month, all things being equal, it would take 500 years to sue 60 million infringers.²⁸ Consequently, copyright holders decided that their only effective recourse was attempting to hold P2P distributors subject to contributory and vicarious liability. When this course of action failed, the Induce Act was proposed.

The goal of this comment is to explore how the Induce Act improperly places policy questions on the merits of technology in the hands of the judiciary and this becomes antithetical to intellectual property laws by chilling innovation. The journey to this conclusion begins with Part I, the background section. Part I is divided into three sub-parts. Part A discusses the general facets of copyright law. Part B discusses the landmark case, *Sony v. Universal*, which established the “substantial noninfringing use” defense to contributory liability.²⁹ Part C outlines the development of secondary liability in P2P litigation. Next, Part II introduces Congress’ current solution to the confusion created by the background cases. Part III analyzes the Induce Act in light of its goal to stop unauthorized file sharing. Ultimately, Part IV proposes that the Induce Act should not leave Congress and explores alternatives to its passage.

I. BACKGROUND

This section presents the major case law concerning secondary liability in copyright law. Particularly, Part C discusses the relevant case law concerning P2P file-sharing technology.

A. General Copyright Law

Congress has the authority to enact copyright laws pursuant to its Constitutional power to promote the progress of science and useful arts.³⁰ In order to foster innovation, Congress extended several exclusive rights to copyright holders,

²⁶ See Grebb, *supra* note 11, para. 10 (according to the entertainment industries’ petition for certiorari in *Grokster*, P2P networks are responsible for the unauthorized downloading of over 2.6 billion music files and at least 400,000 movies every month).

²⁷ LESSIG, *supra* note 23, at 67 (citing a 2002 study estimating that roughly 60 million Americans have downloaded music via the internet).

²⁸ RIAA, *About Us*, available at <http://www.riaa.com/about/default.asp> (last visited Apr. 6, 2005) (explaining that the “RIAA is a trade group that represents the U.S. recording industry”).

²⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

³⁰ U.S. CONST. art. I, § 8, cl. 8. The Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.*

including the right to control distribution.³¹ Additionally, copyright infringement can involve the trespass on any one of these exclusive rights.³²

The introduction of a new copying technology traditionally brings cries of infringement and piracy from established media distributors.³³ In fact, the invention of the printing press was the impulse behind the creation of the first copyright laws.³⁴ These laws were enacted to establish a balance between an author's right to protect their works and the public interest in the free flow of information.³⁵ In contemporary times, new technologies are still affecting this balance.

B. *The Sony Test*

In *Sony v. Universal*, the Supreme Court attempted to establish a balance between the interests of copyright holders and the public after the introduction of the VCR.³⁶ Sony produced one of the first VCRs, the Betamax.³⁷ One function of the Betamax technology allowed users to record copyrighted television programs.³⁸ The Betamax users were committing copyright infringement without any encouragement or control from Sony.³⁹ Therefore, the Court evaluated whether Sony was liable for supplying a product capable of facilitating copyright infringement.⁴⁰

Although Sony had no control over the use of the Betamax after the point of sale, Disney and Universal argued that Sony was liable as a secondary infringer.⁴¹ A literal reading of the Copyright Act, however, did not expressly provide for secondary

³¹ 17 U.S.C. § 106 (2000). The Copyright Act grants the copyright holder "exclusive rights to do and to authorize" the following: reproduction, derivation, distribution, performance and display. *Id.*

³² *See id.* § 501(a).

³³ LESSIG, *supra* note 23, at 61 (stating "[i]f piracy means using value from someone else's creative property without permission from that creator . . . then every industry affected by copyright today is the product and beneficiary of a certain kind of piracy."). Piracy is commonly defined as "a use that robs an author of his profit." *Id.* at 66.

³⁴ *See* Tyler T. Ochoa, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 914 (2002) (stating that a "near-monopoly on printing and publishing" led to the first copyright statute).

³⁵ *See id.* at 914–19.

³⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Supreme Court explained the policy considerations in evaluating this case by stating:

Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

Id. The respondents, Walt Disney Productions and Universal City Studios, are the owners of many copyrighted motion pictures broadcast across television networks. *Id.* at 420–22. The respondents alleged that Betamax users were illegally recording their copyrighted programs. *Id.*

³⁷ *Id.* at 422–23.

³⁸ *Id.* (the court determined that "time shifting," recording a program to watch it at later time, was fair use, but "library building," recording a program in order to watch it multiple times, was copyright infringement). *See id.* at 447–55.

³⁹ *Id.* at 439 n.19.

⁴⁰ *Id.* at 420 (stating that the primary inquiry will be "whether the sale of the [Betamax] to the general public violates any of the rights conferred upon respondents by the Copyright Act").

⁴¹ *Id.* at 438.

liability.⁴² The Court opined it would be unjust to hold Sony liable as vicarious infringers where Sony had only constructive knowledge of the fact Betamax users may use the Betamax to infringe.⁴³ Furthermore, the Court found no precedent in common law to hold Sony liable under the copyright laws when Sony had no way to control how Betamax owners used its product.⁴⁴

For guidance, the Supreme Court looked to the Patent Act.⁴⁵ In contrast to the law governing copyright, the Patent Act expressly dealt with inducement and contributory infringement.⁴⁶ First, the Court reasoned that the patent laws were analogous to the copyright laws because they share a similar “kinship.”⁴⁷ Second, the Court declared that there are fundamental aspects of tort law which hold persons responsible for the actions of others.⁴⁸

However, the contributory liability element of the Patent Act contains a limitation.⁴⁹ The distributor of an article of commerce with a “substantial noninfringing use” will not be liable as a contributory infringer.⁵⁰ In addition, a finding of contributory infringement under patent law would not remove the article from commerce, but instead would act to extend the patent holder’s monopoly to include the infringing article.⁵¹ For example, a finding of contributory liability would force Sony to pay a royalty to the copyright holders for simply placing the Betamax in the stream of commerce.⁵² The Supreme Court believed that extending a copyright holder’s rights to include the Betamax would be inappropriate.⁵³ Ultimately, the Court held:

⁴² See 17 U.S.C. § 501 (2000). The Copyright Act only codifies direct infringement. *Id.*

⁴³ See *Sony*, 464 U.S. at 437–39 (stating there is no precedent in copyright law to find someone subject to contributory liability for the knowledge of possible infringement).

⁴⁴ *Id.* (holding that subjecting Sony to vicarious liability for the sale of the Betamax with the constructive knowledge buyers would make unauthorized copies of copyrighted material would be inequitable).

⁴⁵ *Id.* at 434–35.

⁴⁶ 35 U.S.C. § 271(b)–(c) (2000).

⁴⁷ *Sony*, 464 U.S. at 439.

⁴⁸ See *id.* at 435 (stating “vicarious liability is imposed in virtually all areas of the law” and contributory infringement is an equitable doctrine).

⁴⁹ 35 U.S.C. § 271(c).

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

Id. (emphasis added).

⁵⁰ *Id.*; see *Sony*, 464 U.S. at 440.

⁵¹ *Sony*, 464 U.S. at 441. In patent infringement cases, subjecting a defendant to contributory liability is the “functional equivalent of holding that the disputed article is within the monopoly granted by the patentee.” *Id.* Therefore, products infringe when there is no other substantial use for the product other than the infringing use. See *id.*

⁵² See *id.*

⁵³ *Id.* at 441 n.21. In effect, Disney and Universal told the court they were “willing to license their claimed monopoly interest in [VCRs] to Sony in return for a royalty.” *Id.* The Supreme Court, however, stated that from a policy interest it would be “extraordinary to suggest that the Copyright Act confers upon copyright owners collectively . . . the exclusive right to distribute [VCRs] simply because they may be used to infringe copyrights.” *Id.*

The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective . . . protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.⁵⁴

C. P2P Litigation

The introduction of P2P technology challenged the applicability of the objective "substantial noninfringing use" test and the balance of interests. Three major cases in P2P litigation confronted the *Sony* test. Part 1 of this section presents *Napster*, the first case to find the distributors of a file-sharing program subject to secondary liability. Part 2 discusses *Grokster*, declaring the sale and distribution of P2P legal. Part 3 discusses *Aimster*, suggesting that "willful blindness," the conscious design of P2P software to avoid secondary liability, can subject a P2P distributor to liability.

1. Napster—*Liability for Control*

Fast-forwarding almost twenty years from *Sony*, the Ninth Circuit considered the question of holding a distributor of file-sharing software subject to secondary liability in *Napster*.⁵⁵ Napster was the first widely adopted online file-sharing clearinghouse, amassing 80 million registered users in the first eighteen months.⁵⁶ Napster gained this widespread adoption and popularity because it made possible the unauthorized downloading of copyrighted music in MP3 format.⁵⁷

Similar to the Sony Betamax, however, the Napster software is a copying technology that cannot infringe by itself.⁵⁸ Therefore, the recording industry claimed secondary liability, arguing that Napster should be subject to liability under copyright law because it encouraged and enabled internet file sharing of copyrighted works.⁵⁹ Napster attempted to escape liability by asserting the *Sony* test, but the court found the facts to be distinguishable.⁶⁰ Unlike Sony, Napster had specific

⁵⁴ *Id.* at 442. Hereinafter, this objective test that places limitation on contributory liability will be referred to as the *Sony* test. *See id.*

⁵⁵ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001).

⁵⁶ LESSIG, *supra* note 23, at 67 (discussing the rapid growth of Napster file-swapping program and the number of Americans believed to be illegally file sharing).

⁵⁷ *See id.*; *Napster*, 239 F.3d at 1011–13.

⁵⁸ *See Napster*, 239 F.3d at 1011–13. The users supply the music and chose what to download. *Id.*

⁵⁹ *Id.* at 1019–24 (discussing the two prongs of secondary liability: contributory and vicarious liability).

⁶⁰ *Id.* at 1020 (rejecting the substantial noninfringing use test because Napster knew of the infringement of its users).

knowledge of the infringing acts.⁶¹ For example, the RIAA notified Napster of 12,000 infringing files being swapped via the file-sharing software, and Napster executives had actually used the system to download copyrighted works.⁶² The court concluded that the *Sony* test would not apply where a defendant has specific knowledge of infringement.⁶³

The court began by defining a contributory infringer as “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”⁶⁴ Here, the court determined that the services provided by Napster equated to providing the “site and facilities for direct infringement.”⁶⁵ For example, Napster “supplies the proprietary software, search engine, servers, and means of establishing a connection between users’ computers.”⁶⁶ Therefore, Napster was subject to contributory liability for their specific knowledge of infringement and material contribution.⁶⁷

The court then looked at whether Napster engaged in vicarious copyright infringement.⁶⁸ The Ninth Circuit stated, “vicarious liability extends . . . to cases in which a defendant has the right and ability to supervise the infringing activity and

⁶¹ *Id.* at 1020 n.5. Napster had both actual and constructive knowledge of direct infringement. *Id.* According to the Court, “Napster had constructive knowledge where (a) Napster executives have recording industry experience; (b) they have enforced intellectual property rights in other instances; (c) Napster executives have downloaded copyrighted songs from the system; and (d) they have promoted the ‘site screen shots listing infringing files.’” *Id.*

⁶² *Id.*

⁶³ *Id.* at 1020. The Ninth Circuit distinguished *Napster* from *Sony*, where liability could only be imposed on Sony for its constructive knowledge that Betamax purchasers may use the technology to make unauthorized copies of copyrighted material. *Id.*

⁶⁴ *Id.* at 1019 (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The court in *Gershwin* supported this contributory liability rule using the reasoning of two cases. First, the *Gershwin* court stated, “mere quantitative contribution cannot be the proper test to determine copyright liability.” *Gershwin*, 443 F.2d at 1162 n.8 (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396–97 (1968)). Second, the court agreed with the result of *Screen Gems*, finding an advertising agency which placed noninfringing advertisements for the sale of infringing cassette tapes liable as a contributory infringer where it was shown to have had knowledge, or reason to know, of the infringing nature of the records. *Gershwin*, 443 F.2d at 1162 (discussing *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966)).

⁶⁵ *Napster*, 239 F.3d at 1022 (citing *Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (finding the operator of a flea market liable for infringing cassette tape sales taking place on its grounds). However, in *Fonovisa* the court held that Cherry Auction “actively strives to provide the environment and the market for counterfeit recording sales to thrive. Its participation in the sales cannot be termed passive.” *Fonovisa*, 76 F.3d at 264. Thus, the court’s statement that “providing the site and facilities for known infringing activity is sufficient to establish contributory liability” is discussed as dicta. *Id.*

⁶⁶ *A&M Records, Inc. v. Napster, Inc.* 114 F. Supp. 2d 896, 919–20 (N.D. Ca. 2000). This factual determination was accepted by the Ninth Circuit in *Napster*. *Napster*, 239 F.3d at 1022.

⁶⁷ *Id.* By using their specific knowledge of the infringing material and the support services that contributed to the infringement, the court held that Napster could have blocked access to suppliers of infringing material. *Id.*

⁶⁸ *Id.* at 1022–24 (holding that “in the context of copyright law . . . vicarious liability extends beyond an employer/employee relationship”). The court also construed that the *Sony* test does not apply to vicarious liability because that question was not before the Supreme Court. *Id.* at 1022; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984).

also has a direct financial interest in such activities.”⁶⁹ Here, Napster generated revenue by increasing their user base and possessed a level of supervision and control over the users of the software by directly controlling the Napster servers and software.⁷⁰ For example, Napster had the “ability to locate infringing material . . . and terminate users’ access to the system.”⁷¹

Ultimately, the control and knowledge possessed by Napster distinguished this case from *Sony*. However, with the legal “flaws” of *Napster* in mind, developers designed a new flavor of P2P to avoid secondary liability, similar to a corporation attempting to avoid tax law.⁷² As a result, the Ninth Circuit’s decision in *MGM v. Grokster* shocked the recording industry.⁷³

2. *Grokster*—No Liability without Control

In *Grokster*, the Ninth Circuit found *Grokster* and *StreamCast* not subject to secondary liability for the distribution of P2P file-sharing software.⁷⁴ The defendants distributed a decentralized P2P file-sharing system, similar to that of *Napster* in function, but significantly dissimilar in design.⁷⁵ Employing a decentralized design, the individual computer users operating the software form a “spider web” network that does not require a central server.⁷⁶ Specifically, the defendants’ programmed a file-sharing technology that removed the functional ability to know or control what files were being swapped.⁷⁷ As a result, the court’s summary judgment in favor of the defendants turned directly on the facts.⁷⁸

⁶⁹ *Napster*, 239 F.3d at 1022.

⁷⁰ *Id.* at 1022–24. Napster’s revenue is directly dependent upon the number of users of the software and the amount of music available. *Id.* at 1023. The court then compared the abilities of the *Napster* software to the *Fonovisa* flea market meet case. *Id.* (discussing *Fonovisa*, 76 F.3d at 262–63). *Napster* officials knew of the infringement and had the ability to choose not to authenticate users who were known to infringe or go as far as removing the infringing files from its search database. *Id.* at 1024. Similarly, in *Fonovisa* the swap meet operators knew that infringing cassette tapes were being sold and could have stopped the sellers from participating in the swap meet. *Id.* at 1023. Ultimately, the failure to “police the premises” subjected both *Napster* and *Cherry Auction* to vicarious liability. *Id.* at 1024.

⁷¹ *Id.*

⁷² Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679, 682 (2003) (stating that a programmer “targets specific weaknesses in legal regimes, and has no means to rewrite laws in general”). Ultimately, P2P programmers have lowered the costs of the copyright system. *Id.* at 683. The new flavors of P2P technology include: *KaZaA*, *Grokster*, *Morpheus*, and *Bearshare*. *Id.* at 733.

⁷³ See *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004).

⁷⁴ See *id.* at 1167.

⁷⁵ *Id.* at 1158–60; see Wu, *supra* note 72, at 737–39.

⁷⁶ *Grokster*, 380 F.3d 1158–60; see Wu, *supra* note 72, at 737–39.

⁷⁷ *Grokster*, 380 F.3d at 1160–64. The capabilities of the defendant’s software should not come as a surprise in light of dicta by the Ninth Circuit in *Napster*:

Conversely, absent any specific information that identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use.

The court began its analysis of contributory infringement by looking at the P2P distributors' knowledge and material contribution to the infringement.⁷⁹ The Ninth Circuit's construction of the *Sony* test required the plaintiff to show the defendant had "reasonable knowledge of specific infringement," where a technology has a substantial noninfringing use, in order to meet the knowledge requirement of contribution.⁸⁰ The music industry could not contradict evidence of the P2P's substantial noninfringing uses.⁸¹ In addition, the design of the decentralized P2P was important. The file-sharing software distributed by Grokster and StreamCast could be distinguished from *Napster*.⁸² Neither technology provided for the creation or control of a central index of the swapped files.⁸³ Therefore, the "plaintiff's notices of infringing conduct are irrelevant because they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement."⁸⁴ Consequently, the P2P distributors escaped the knowledge requirement.⁸⁵

The material contribution element turned on similar facts. In contrast to *Napster*, the defendants did not provide the "site and facilities."⁸⁶ Again, Grokster and StreamCast did not create or control indices to the infringing files and could not remove an offending user's account.⁸⁷ Rather, "it is the users of the software who, by connecting to each other over the internet, create the network and provide the access."⁸⁸ In light of the public benefit of P2P and the fact that contributory infringement does not require a showing of financial gain, the court refused to extend contributory liability to the decentralized P2P.⁸⁹

The court then determined that the P2P distributors did not engage in vicarious infringement.⁹⁰ Grokster and StreamCast did not have the "right and ability to supervise the infringers."⁹¹ Here, the design of the decentralized P2P network

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001) (citation omitted).

⁷⁸ Tim Wu, *Grokster Wins*, Lessig Blog, Aug. 9, 2004, at <http://www.Lessig.org/blog/archives/wu.shtml> (last viewed Apr. 6, 2005) [hereinafter Wu Blog] (stating that "[t]he Ninth Circuit has decided that, on the facts developed, Grokster-style P2P technology is an easy case under *Sony*").

⁷⁹ *Grokster*, 380 F.3d at 1160 (stating the elements of contributory infringement are: "(1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement").

⁸⁰ *Id.* at 1161. In contrast, the distributor of a technology with no capability of a substantial noninfringing use need only be held to have a constructive knowledge of infringement in order to meet the knowledge requirement. *Id.*

⁸¹ *Id.* at 1162. The court discusses the example of the band Wilco receiving widespread popularity through P2P and obtaining a subsequent record deal, where previously the record company did not see market viability for the band. *Id.* at 1161; see Lawrence Lessig, *Why Wilco is the Future of Music*, WIRED, Feb. 2005, at 69.

⁸² *Grokster*, 380 F.3d at 1163.

⁸³ *Id.*

⁸⁴ *Id.* at 1162. Even after pulling the plug on each one of the P2P distributors' computers, the users of their P2P file-swapping programs could continue sharing files with little or no interruption. *Id.* at 1163.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1164.

⁹⁰ *Id.* at 1164–66.

⁹¹ *Id.* at 1165.

directly influenced the distributors' ability to police the network.⁹² In short, the defendants escaped liability under both contributory and vicarious liability by removing knowledge and control from a technology similar in function to Napster. Additionally, the *Grokster* court maintained public policy by allowing some infringement in order to protect innovation.⁹³

3. *Aimster—Liability for Willful Blindness*

Judge Posner decided the *Aimster* case between the time the Ninth Circuit analyzed *Napster* and *Grokster*.⁹⁴ The decision is similar to that of *Napster*, finding a P2P technology distributor subject to contributory liability.⁹⁵ Noting that both sides were construing *Sony* in their favor, the court attempted to find a middle ground.⁹⁶ Judge Posner added to the *Sony* test the caveat that a capability of noninfringing use was not enough to evade liability where there was no proof of an actual ongoing noninfringing use.⁹⁷ Here, *Aimster* could not prove any ongoing noninfringing uses of the *Aimster* system.⁹⁸ Additionally, *Aimster's* central server directly encouraged infringement by conveniently listing the top 40 downloaded songs, which were invariably copyrighted.⁹⁹ Judge Posner shifted the burden to the P2P distributor to show actual, ongoing noninfringing uses, and not just a capability of noninfringing use.¹⁰⁰

Although dicta, *Aimster* is important for the idea of "willful blindness."¹⁰¹ Judge Posner opined that a person who knows infringement is likely to take place, but specifically designs a P2P program to avoid the knowledge requirement, should be subject to secondary liability.¹⁰² The recording industry asked the Ninth Circuit to adopt this standard in *Grokster*, but the court disagreed.¹⁰³

⁹² *Id.* at 1166.

⁹³ *Id.* at 1167 (stating that new copying technology is always disruptive to old established markets, but the market will establish a new equilibrium).

⁹⁴ *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (various recording industry plaintiffs claimed that *Aimster* was a secondary infringer of their copyrights for providing software that allowed for the sharing of music files, even though the files were encrypted).

⁹⁵ *See id.* at 653.

⁹⁶ *Id.* at 651 (noting the disagreement about whether the capability of a single noninfringing use provides complete immunity to contributory infringement).

⁹⁷ *See id.* at 653 (stating the mere possibility that a file-sharing tool could be used in noninfringing ways is not enough to escape liability where the product is used solely to facilitate copyright infringement).

⁹⁸ *Id.*

⁹⁹ *Id.* at 652.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 653. The willful blindness theory is dicta because *Aimster* was shown to actively induce infringement. *See id.* at 652. Willful blindness establishes an economic test:

if the infringing uses are substantial . . . the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses *Aimster* blinded itself in the hope that by doing so it might come within the rule of the *Sony* decision.

Id. at 653.

¹⁰² *Id.* at 650. Judge Posner believes "willful blindness is knowledge." *Id.* For example, One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the

II. EXPLANATION OF THE PROBLEM

Not only have two circuits applied the *Sony* test differently, but the decisions have also combined elements of contributory and inducing infringement. This disparity most likely led the Supreme Court to accept certiorari in *Grokster*.¹⁰⁴ Contributory and vicarious liability, standing alone, do not appear to be the solution to the problem of widespread internet piracy. Furthermore, the *Sony* test, by itself, was ill prepared to meet the challenges to copyright law that came with the introduction of the internet. Congress has attempted to clear up this confusion by codifying a test for inducing infringement.¹⁰⁵ Proposed in June 2004 by Senator Orin Hatch, the Inducing Infringement of Copyright Act of 2004, would create a new “inducement” cause of action under federal copyright law.¹⁰⁶ As proposed, a copyright owner could sue anyone who “intentionally aides, abets, induces or procures” a third party to commit infringement.¹⁰⁷ In addition, the Induce Act defines intent as wherever the circumstances would lead a “reasonable person” to find intent.¹⁰⁸

The Induce Act came under immediate attack, however, by academics and the technology community, arguing that a “reasonable person” standard is broad enough to encompass any technology that is simply capable of permitting infringement.¹⁰⁹ This test may place new technologies in the control of the recording and motion picture industries by forcing an innovator to implement certain design changes to avoid liability. Part III of this comment examines the Induce Act for its appropriateness as an addition to copyright law.

nature and extent of those dealings is held to have a criminal intent, because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.

Id. (citation omitted).

¹⁰³ *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1166 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004) (stating “there is no separate ‘blind eye’ theory or element of vicarious liability”).

¹⁰⁴ See Wu Blog, *supra* note 78. Wu discusses the court’s decision in *Grokster* in light of the “willful blindness” standard:

On one account, *Grokster* escaped liability because it deliberately created a P2P network over which it had no control over specific file transfers. If it is trivially easy to create a network that makes it easy to stop copyright infringement, cannot *Grokster* be accused of trying to make an “end run” around the law, or making itself “willfully blind” to the infringement it is contributing to?

Id.

¹⁰⁵ Inducing Infringement of Copyright Act of 2004, S. 2560, 108th Cong., 2d Sess. (2004).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Katie Dean, *Induce Act Talks Sputter*, WIRED NEWS, Oct. 7, 2004, para. 14, at <http://www.wired.com/news/politics/0,1283,65255,00.html> (last visited Apr. 6, 2005) [hereinafter *Induce Talks*] (suggesting that the entertainment industry was more interested in punishing technology than behavior).

III. ANALYSIS

Part A of the analysis presents the argument in support of the Induce Act by analyzing Senator Orin Hatch's proposal before the Senate Committee on the Judiciary. Part B explores the Supreme Court's policy reasoning for adopting the article of commerce limitation to contributory infringement in *Sony*. Part C compares the language of the Induce Act to "active inducement" in patent law.

A. Senator Hatch's Proposal

Senator Hatch disliked the Ninth Circuit's construction of *Sony*.¹¹⁰ Specifically, he disagreed with the application of the *Sony* test in *Grokster* that allowed P2P distributors to evade liability.¹¹¹ The Senator asserted that the court forgot that secondary liability usually targets: "(1) those who induce others to break the law, and (2) those who control others who break the law."¹¹² For example, inducement is present in the Patent Act and criminal law.¹¹³

Grokster and *Morpheus*, the Senator argued, were criminally inducing people to infringe copyrights and were profiting from this illegal activity.¹¹⁴ In fact, the Senator went as far as to say that no "civilized country" would allow a company to profit by inducing children to break the law.¹¹⁵ Additionally, in support of his proposal, Senator Hatch seemed particularly distressed by the idea that P2P is an outlet for distributing pornography to children.¹¹⁶ Contrary to Senator Hatch's rationale for the proposal, many individuals in the technology sector believe the RIAA and Motion Picture Association of America ("MPAA") are the primary supporters of this legislation.¹¹⁷

¹¹⁰ See 150 CONG. REC. S7190 (daily ed. June 22, 2004) (statement of Senator Orin Hatch). (pointing to the fact that Napster and Grokster have the same file sharing functionality but were decided differently).

¹¹¹ *Id.*

¹¹² *Id.* at S7189.

¹¹³ See *id.* (stating that criminal law defines inducement as "that which leads or tempts to the commission of crime").

¹¹⁴ *Id.* at S7191. The Senator proposed the Induce Act to allow creative artists to sue corporations that profit by encouraging others to commit acts of copyright infringement. See *id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at S7190 (stating that most file sharing networks are filled with obscene, illegal child pornography, which is harmful to minors). However, a search engine can be just as harmful to a child inclined to view pornography. See Google, at <http://www.google.com>. Searching for the word "porn" using Google's search engine produced 25 million results. *Id.* (search conducted April 6, 2005). Each page would be one click away for any child or adult to easily view, without the effort of downloading a P2P program. See *id.*

¹¹⁷ But see Portnow, *supra* note 20. Portnow claims the supporters of the Induce Act include "ASCAP, BMI and SESAC; the American Federation of Musicians and American Federation of Television and Radio Artists; and the Recording Artists' Coalition, the Songwriters Guild, the Nashville Songwriters Assn., the Music Managers' Forum and others all join the Recording Academy." *Id.* The MPAA serves as the voice and advocate of the American motion picture, home video and television industries. MPAA, at <http://www.mpaa.org/home.htm> (last visited Apr. 6, 2005).

Nevertheless, the Senator maintained that secondary liability must remain flexible through judge-made law because it is difficult to codify without being reactionary to each new technology.¹¹⁸ For example, in *Sony* the Supreme Court attempted to strike a flexible balance between copyright owners and the distribution of new copying technologies.¹¹⁹ According to the Senator, this balance has been lost:

In cases like *Napster* and *Grokster*, lower courts misapplied the substantial noninfringing use limitation. These courts forgot about “balance” and held that this limitation radically alters secondary liability. In effect, these cases retained secondary liability’s control prong but collapsed its inducement prong. The results of these cases prove this point: *Napster* imposed liability upon a distributor of copying devices who controlled infringing users; *Grokster* did not impose liability upon distributors who appeared to induce and profit from users’ infringement.¹²⁰

Senator Hatch believed that a misunderstanding of *Sony* led to the irony of the court system only punishing control, but his assessment of the function of the *Sony* test is incorrect.

The Senator’s attempt to rectify the confusion created by *Napster* and *Grokster* is broad, allowing a court to punish both control and a lack of control.¹²¹ Applying the Induce Act to the Apple iPod®, where the technology has a substantial noninfringing use, the acts of the users of its technology could lead to inducement liability.¹²² Apple becomes liable for simply distributing the technology, without looking at its actions to encourage infringement.¹²³ Senator Hatch wanted the Induce Act to “preserve the *Sony* ruling” by “simply [importing] and [adapting] the Patent Act’s concept of ‘active inducement’ in order to cover cases of intentional inducement that were explicitly not at issue in *Sony*.”¹²⁴ However, the iPod® example shows that the Induce Act effectively abrogates the *Sony* test for contributory

¹¹⁸ 150 CONG. REC., at S7190. Senator Hatch stated that Congress re-codified the Copyright Act in 1976 to avoid readjusting it with the advent of each new technology. *Id.*

¹¹⁹ *Id.* (stating that the *Sony* doctrine would not have been problematic if courts correctly applied it); see *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984). “The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective . . . protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.*

¹²⁰ 150 CONG. REC., at S7190.

¹²¹ See *Protecting Innovation and Art while Preventing Piracy: Hearing on S. 2560 Before the S. Comm. On the Judiciary*, 108th Cong. (2004) (statement of Andrew C. Greenberg, Vice Chairman, Intellectual Property Committee, IEEE-USA), available at <http://www.ieeeusa.org/policy/policy/2004/072204.pdf> [hereinafter Greenberg]. The Induce Act will allow the judiciary to punish what it believes are bad technologies rather than punishing bad behavior. See *id.* at 15.

¹²² See Apple Complaint, *supra* note 5.

¹²³ See Greenberg, *supra* note 121, at 15. Greenberg points out that this result is opposite to Congress’ goal of promoting the progress of science and arts. See *id.* In effect, the Induce Act would chill innovation at both the development and investment level. See *id.*

¹²⁴ 150 CONG. REC., at S7192. Clause (g)(3) of the Induce Act states that the act will not “diminish the doctrines of vicarious and contributory liability.” *Inducing Infringement of Copyright Act of 2004*, S. 2560, 108th Cong., 2d Sess. (2004).

liability.¹²⁵ The simple act of distributing a technology with noninfringing uses should only be analyzed under a contribution standard.

In addition, the Induce Act can be viewed as the reactionary strike the Senator distinctly argued against codifying.¹²⁶ First, the primary motivation for its proposal is to combat a new type of program on the internet. Second, Congress had not seen fit to legislatively reverse or clarify *Sony* for over 20 years and failed in an attempt to codify a law declaring P2P technology illegal.¹²⁷ Third, any confusion will not be cleared up with an untested standard. Finally, the Induce Act fails to target P2P alone because of its breadth.¹²⁸

B. *Sony Stands for Separation of Powers*

The *Sony* opinion not only involved the law governing copyright, but also decided a fundamental Constitutional question addressing separation of powers.¹²⁹ In *Sony*, the Supreme Court declared that Congress would be better at balancing copyright law demands than the judiciary.¹³⁰ Therefore, the Court stressed its historical deference to Congress for guidance when technological advances present questions pertaining to the Patent and Copyright Clause.¹³¹ Functionally, the Court did not want the judicial system in charge of determining the liability of a technology that had both infringing and noninfringing uses.¹³² Congress is the branch of the federal

¹²⁵ See Apple Complaint, *supra* note 5, at 1–9. Because this is a new cause of action, a court is not likely to allow a technology distributor to evade liability using the *Sony* test. See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 323–24 (S.D.N.Y. 2000).

¹²⁶ 150 CONG. REC., S7190. Hatch says that Congress has attempted to avoid legislating every new technology that alters the media landscape. *Id.* Examples include amendments to the Digital Millennium Copyright Act. *Id.* at S7189.

¹²⁷ See H.R. 5211, 107th Cong., 2d Sess. (2002) (proposed “to limit the liability of copyright owners for protecting their works on peer-to-peer networks”).

¹²⁸ See Greenberg, *supra* note 121, at 16. The Induce Act punishes bad technology instead of bad actions. See *id.* at 15. Passage of the Induce Act could lead to liability for many of the technologies that people use in their everyday lives. *Id.* at 16.

¹²⁹ See Lawrence Lessig, *Continuing Congressional Confusion on Copyrights*, Lessig Blog, July 7, 2004, at <http://www.lessig.org/blog/archives/002015.shtml> (last visited Apr. 6, 2005) [hereinafter Lessig Blog] (arguing that the Supreme Court was balancing the interests of copyright owners and technology creators and asserting its belief that Congress was the proper realm to debate a technology that has a noninfringing use). This would not be the first Constitutional challenge to Copyright laws. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (challenging the Sony Bono Copyright Term Extension Act on the ground it violated the “for limited times” provision of the Patent and Copyright clause).

¹³⁰ See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984). The Court stated that:

it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries . . . and society's competing interest in the free flow of ideas, information, and commerce . . . our patent and copyright statutes have been amended repeatedly.

Id.

¹³¹ *Id.* at 431.

¹³² See Greenberg, *supra* note 121, at 9.

government with the authority and ability to evaluate the competing interests that will be affected by new technological innovations that alter the market for copyrighted materials.¹³³ Furthermore, the Constitution places the power to promote the progress of science and the arts within the realm of Congress.¹³⁴ Therefore, the *Sony* test bars a court from analyzing the merits of a technology that is capable of a noninfringing use.¹³⁵

A broad Induce Act, however, will force the judiciary to determine the appropriateness of a technology; much like the Ninth Circuit chose to do in *Napster*.¹³⁶ Sensing wrongdoing, the court chose to implement alternate theories of liability by extending vicarious liability.¹³⁷ Traditionally, vicarious liability held “a principal liable for the tortious conduct of agents acting within the scope of their agency.”¹³⁸ In contrast, after *Napster*, a technology creator may be liable for a failure to prevent infringement, rather than actively encouraging it.¹³⁹

This extension of liability for a failure to control is responsible for Senator Hatch’s realization of the current confusion in P2P secondary liability.¹⁴⁰ A system built on control is punishable while a system designed without control goes unpunished.¹⁴¹ Adding a cause of action for inducement would be a more appropriate standard.¹⁴² For example, advertising or distributing a technology that is simply capable of infringement should be analyzed under a different standard than advertising a cassette tape with the specific knowledge the tape is counterfeit.¹⁴³ The Patent Act provides a test for inducement that may be appropriate.

¹³³ See *Sony*, 464 U.S. at 431.

¹³⁴ See U.S. CONST. art. I, § 8, cl. 8.

¹³⁵ See *Sony*, 464 U.S. at 442.

¹³⁶ Greenberg, *supra* note 121, at 10–12.

¹³⁷ See *id.* 9–10. The court in *Napster* followed its precedent set in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) to extend control principles. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022–24 (9th Cir. 2001). In *Fonovisa*, the defendants, operators of a flea market, allowed vendors to sell counterfeit music recordings in violation of plaintiff’s copyrights and trademarks. *Fonovisa*, 76 F.3d at 261. *Fonovisa* held that “even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Id.* at 262.

¹³⁸ Greenberg, *supra* note 121, at 6.

¹³⁹ See *Napster*, 239 F.3d at 1024; 150 CONG. REC. S7190 (daily ed. June 22, 2004) (statement of Senator Orin Hatch); *Fonovisa*, 76 F.3d at 264.

¹⁴⁰ 150 CONG. REC., S7190 (proposing that any secondary liability rule “punishes control and immunizes inducement is a public policy disaster”).

¹⁴¹ *Id.*

¹⁴² See *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (proposing a “willful blindness” theory to remedy this paradox). However, the Ninth Circuit believed Judge Posner misread *Sony*. See *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1166 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004). (stating that there is no separate “blind eye” theory or element of secondary liability).

¹⁴³ See *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 401 (S.D.N.Y. 1966).

C. Comparing the Language of the Induce Act to the Patent Act

By developing a theory that finds secondary liability for the failure to exercise control, the Ninth Circuit has already crossed its judicial boundary to decide when a technology creates more benefit than harm. There is support, however, for the addition of “active inducement” to the Copyright Act.¹⁴⁴ The addition of active inducement to the Copyright Act would compliment the doctrine of contributory liability by punishing those who actively encourage copyright infringement.¹⁴⁵ Adopting this technology-neutral standard would also harmonize copyright and patent law.

Part 1 of this section compares the level of intent required for active inducement under the Patent Act with the level of intent required for the Induce Act. Part 2 compares the actions that give rise to liability under active inducement and the Induce Act. Part 3 compares the application of the article of commerce doctrine under active inducement and the Induce Act.

1. Intent and Knowledge in Active Inducement

For active inducement under the Patent Act, liability may be established where the defendant takes active steps to induce infringement through “advertising, instruction, or the like.”¹⁴⁶ For example, the mere sale of an article of commerce with the constructive knowledge of a buyer’s intended use is not active inducement.¹⁴⁷ Consequently, there is no intent to induce infringement where a product has a substantial noninfringing use, even when the defendant has constructive knowledge that some users of its product may be infringing the patent.¹⁴⁸ Under an active inducement test, *Sony* would have been decided in the same way, even though Sony had constructive knowledge that their product might be used for copyright infringement.¹⁴⁹ In contrast, under a reasonable person standard of intent, the act of distributing a product with the capability to facilitate infringement could subject the distributor to liability.

¹⁴⁴ See Greenberg, *supra* note 121, at 16–17. (proposing that Congress finish what the Supreme Court began in *Sony* and appropriate the active inducement from the Patent Act).

¹⁴⁵ See Greenberg, *supra* note 121, at 12–14.

¹⁴⁶ 5 DONALD S. CHISUM, CHISUM ON PATENTS § 17.04.3 (2004). Simply advertising or explaining how the technology operates would not be inducement. *Id.* § 17.04.4. Rather, to be liable for inducement the infringer would have to teach the infringing use. *Id.*

¹⁴⁷ *Id.* § 17.04.2.

¹⁴⁸ *Id.* § 17.04.3, (citing *Warner-Lambert Co. v. Apotex Corp.*, No. 98-C-4293, 2003 U.S. Dist. LEXIS 23784 (N.D. Ill. Dec. 3, 2003)).

¹⁴⁹ See Greenberg, *supra* note 121, at 15–16.

2. Actions Constituting Active Inducement

Patent case law construes facilitation to require an affirmative action.¹⁵⁰ An omission, or simply allowing users of a technology to infringe, is not an affirmative act that will lead to a finding of inducement.¹⁵¹ Applying this bad action requirement to P2P cases, a programmer could legally code for an absence of control and knowledge, creating a model that is superior to the Napster style of client/server file-sharing technology.¹⁵² In contrast, combining *Napster's* control theory with the Induce Act chills technology innovation.¹⁵³ Obviously, punishing control removes the incentive to code for it.¹⁵⁴

A solution adopting active inducement would allow an innovator to build control into their technology, but would punish behavior that actively or directly encouraged inducement.¹⁵⁵ Furthermore, this test removes the necessity for extending vicarious liability that the Ninth Circuit performed in *Napster*, where the court felt there was wrongdoing, but could not find liability with a direct application of *Sony*.¹⁵⁶ In cases applying active inducement under the Patent Act, the marketing and sale of a product having a substantial noninfringing use, without more, can never be active inducement.¹⁵⁷ This standard would allow Apple to sell the iPod® without fear.¹⁵⁸

3. Article of Commerce Limitation Applies to Active Inducement

When Congress added section 271(b) to the Patent Act, the active inducement element did not include the article of commerce limitation.¹⁵⁹ However, courts still applied the substantial noninfringing use test.¹⁶⁰ This limitation prevents patent owners from expanding their exclusive rights over an article of commerce.¹⁶¹ That would upset the delicate balance established by section 271(d), codified to balance contributory infringement and patent misuse.¹⁶² A finding of active inducement would not stop an inducer's sale of the article of commerce, but instead would put an injunction on the bad actions of the inducer.¹⁶³ In contrast, the Induce Act would

¹⁵⁰ See CHISUM, *supra* note 146, § 17.04.4. For example, "it is not enough to show that [a party] failed to take steps to prevent its . . . affiliates from servicing [infringing machines]." *Id.*

¹⁵¹ *Id.*

¹⁵² See Greenberg, *supra* note 121, at 9–10; *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004).

¹⁵³ Greenberg, *supra* note 121, at 15.

¹⁵⁴ See Wu, *When Code Isn't Law*, *supra* note 72, at 682 (stating that a programmer will target specific weaknesses in legal regimes where it is trivially easy to do so).

¹⁵⁵ See Greenberg, *supra* note 121, at 16–17.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.* at 16–17.

¹⁵⁸ See Apple Complaint, *supra* note 5 (claiming Apple is subject to Induce Act liability for simply distributing a device capable of facilitating infringement, the iPod®).

¹⁵⁹ See 35 U.S.C. § 271(b) (2000).

¹⁶⁰ See CHISUM, *supra* note 146, § 17.04.

¹⁶¹ *Id.*

¹⁶² *Id.* at § 17.02.

¹⁶³ *Id.* at 17.04.3 (stating that because mere sale is not wrongful under Patent §§ 271(b) or (c), a court would not put an injunction on the sale of an article of commerce, but rather extend an injunction against conduct actively inducing infringement).

abrogate the *Sony* test because the bad actions of the users of a technology lead to liability, even where that technology has a substantial noninfringing use.¹⁶⁴

D. The Supreme Court's Review of *Grokster*

The Supreme Court's decision in *MGM v. Grokster* will undoubtedly have an effect on the law governing secondary liability in copyright infringement cases.¹⁶⁵ Especially if Congress chooses not to revisit the Induce Act.¹⁶⁶ In order to protect innovation, an appropriate standard would not subject a technology distributor to contributory liability for simply distributing a technology capable of facilitating infringement. Assuming the Court is against directly overruling the "substantial noninfringing use" limitation to the doctrine of contributory liability developed in *Sony v. Universal*, the Court is likely to develop a test for inducing infringement. However, this standard is not likely to resemble the Induce Act but rather active inducement.

Creating an active inducement standard presents four benefits to creating a new contributory liability standard by reversing the Ninth Circuit's decision. First, active inducement provides a technology-neutral standard that would be applicable under circumstances other than P2P technology.¹⁶⁷ Second, active inducement was proposed in briefs amicus curiae by the United States and the IEEE-USA.¹⁶⁸ The United States Solicitor General's Office filed a brief in support of the petitioners and the IEEE-USA filed in support of neither party.¹⁶⁹ Third, active inducement would allow the court system to find *Grokster* and StreamCast liable for the infringement their programs facilitate based on their actions to expand the service.¹⁷⁰ Fourth,

¹⁶⁴ See Lessig Blog, *supra* note 129.

¹⁶⁵ Supreme Court Docket for 04-480, available at <http://www.supremecourtus.gov/docket/04-480.htm> (last visited Apr. 6, 2005). Oral arguments were scheduled for *Grokster* on Tuesday, March 29, 2005. *Id.*

¹⁶⁶ *But see* Gigi Sohn, *Getting Real About the Grokster Case*, CNET NEWS, Feb. 8, 2005, at http://news.com.com/Getting+real+about+the+Grokster+case/2010-1028_3-5566243.html (last visited Apr. 6, 2005) (stating his belief that regardless of the Supreme Court's decision in *Grokster*, the RIAA and MPAA will lobby Congress to codify a win or reverse a loss). Sohn is the President of Public Knowledge, a Washington DC based advocacy group working to defend rights in the emerging digital culture. *Id.*

¹⁶⁷ See 150 CONG. REC. S7190 (daily ed. June 22, 2004) (statement of Senator Orin Hatch) (expressing that Congress re-codified the Copyright Act in 1976 to avoid readjusting it with the advent of each new technology); Greenberg, *supra* note 121, at 12-14. A flexible, content-neutral standard, is important for not only promoting innovation but also because the content industry should not be put in control of the development of new technologies. For example, Jack Valenti is infamous for stating, "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." See *Home Recording of Copyrighted Works: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of Jack Valenti President, Motion Picture Ass'n of Am., Inc.), available at <http://cryptome.org/hrew-hear.htm> (last visited Apr. 6, 2005).

¹⁶⁸ Brief Amicus Curiae of United States at 12-14, 33-35, *Grokster* (No. 04-480); Brief Amicus Curiae of IEEE-USA in Support of Either Party *passim*, *Grokster* (No. 04-480).

¹⁶⁹ See sources cited *supra* note 168.

¹⁷⁰ See Reply Brief for Motion Picture Studio and Recording Company Petitioners at 13-16, *Grokster* (No. 04-480) (discussing the actions by *Grokster* and StreamCast Networks that actively induced infringement of copyrighted works).

adopting an active inducement standard avoids confusion and respects precedent by leaving the 20-year old *Sony* test intact.

IV. PROPOSAL

The Ninth Circuit has essentially legalized the distribution and design of P2P file-sharing technology. Whether legalization will spread among the court system depends upon the Supreme Court's review of *Grokster* and Congress' passage of the Induce Act. This comment focuses on the Induce Act, because there will be pressure on Congress to clarify secondary liability, regardless of the Court's decision in *Grokster*.¹⁷¹ Because of the broad intent standard of the Induce Act, the ultimate question of a technology's appropriateness in commerce would fall to the judiciary.¹⁷² However, the Constitution places the power to promote the progress of science and the arts exclusively in the hands of Congress.¹⁷³

This comment proposes three courses of action. Part A proposes that Congress should not pass the Induce Act as currently proposed. Part B recommends alternative language in order to harmonize patent and copyright laws. Part C explores a substitute to legislation that allows the free market to establish equilibrium through alternative compensation methods for copyright holders.

A. *The Induce Act Should Not Be Passed*

Senator Hatch proposed the Induce Act to create a cause of action enabling copyright holders to sue P2P distributors.¹⁷⁴ However, this overbroad cause of action will allow claims to be filed anytime a technology allows copyright infringement, regardless of the intent of its creator or distributor to encourage infringement. As a result, the determination of the legality of a technology capable of both infringing and noninfringing uses will fall to the judiciary.¹⁷⁵ This result violates the separation of powers ideology established by the Constitution and asserted by the Supreme Court in *Sony*.¹⁷⁶ In fact, Congress embodied that ideology in the article of commerce defense to contributory liability found in the Patent Act.¹⁷⁷

¹⁷¹ See Gigi Sohn, *supra* note 166.

¹⁷² See Greenberg, *supra* note 121, at 10–12. The legality of a new technology was an easy question under *Sony*. *Id.* However, after *Napster*, even a subsequent upgrade to a service may constitute control and lead to liability. See *id.* Under the Induce Act, a summary judgment in favor of a new technology will be impossible because a court must make a policy inquiry in each case into the reasonable person's state of mind in bringing a technology to the market. See *id.* at 15.

¹⁷³ U.S. CONST. art. I, § 8, cl. 8.

¹⁷⁴ See Hatch, *supra* note 17.

¹⁷⁵ See Greenberg, *supra* note 121, at 16. The Induce Act becomes a lawyer employment act because summary judgment will not be possible where a technology has infringing use capabilities, leaving liability as a policy question for the judiciary. See Lessig Blog, *supra* note 130.

¹⁷⁶ *Id.* Lessig states:

[*Sony*] is an opinion about separation of powers - about which branch is best able to do the necessary balancing that copyright law demands, "within the limits of the constitutional grant." [W]hen a technology is not simply a technology for

The article of commerce limitation coincides with public policy considerations and the goal of intellectual property law to promote the progress of arts and science.¹⁷⁸ In *Grokster*, the Ninth Circuit held that technological advancement could balance favorably against some infringing activity.¹⁷⁹ The court reasoned that sometimes it is necessary to allow infringement in order to encourage innovation.¹⁸⁰ Indeed, a contrary result would be antithetical to the intended purpose of the Progress Clause.¹⁸¹ “Rather than smothering the new to benefit the old,” the *Grokster* court properly “[struck] a balance between the claims of new technology and the legitimate rights of content creators.”¹⁸²

The Induce Act, on the other hand, would disastrously allow intent to be inferred whenever a reasonable person would find intent to induce. Applying this standard, intent to induce can be found whenever an innovator distributes a new technology that has the ability to infringe. This result does not accomplish the Act’s narrow purpose of fighting P2P, but envelops any technology that copies information.¹⁸³ Congress must not pass a law that has the ability to chill innovation across “virtually every general-purpose computer and technology tool [with] features that manipulate, control and display content.”¹⁸⁴ Overturning *Sony*, via *Grokster*, would have the same result.¹⁸⁵

violating the law, then it is left to Congress to decide whether and how that technology is to be regulated.

Id.

¹⁷⁷ See *id.* Lessig explained how innovation will be chilled if the *Sony* test is abrogated because:

courts are awful, expensive, and slow institutions for judging the economic effect of new technology The *Sony* rule says: let the innovation go, if there is a potential for a substantial noninfringing use, and if Congress wants to regulate it more, then let Congress weigh the benefits of the technology against its costs.

Id.

¹⁷⁸ See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984).

¹⁷⁹ See *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

¹⁸⁰ *Id.*

¹⁸¹ See Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 498 (2002) (arguing that copyright law chills innovation by “(i) giving content owners de facto control over new technologies of distribution, (ii) failing to encourage the development of (fair) use technologies, and (iii) giving content owners control over every step in the chain of distribution”).

¹⁸² LESSIG, *supra* note 23, at 194.

¹⁸³ See e.g., *Hatch’s Hit List*, at <http://techlawadvisor.com/induce/#hit-list> (last visited Apr. 6, 2005) (listing the products and services that could fall within the intent standard of the Induce Act, including: iPods®, TiVo®, Silly Putty®, Legos®, and the U.S. Postal Service).

¹⁸⁴ See Greenberg, *supra* note 121, at 16.

¹⁸⁵ See *Induce Talks*, *supra* note 109, para. 14 (stating that where a technology has dual uses the courts should not determine whether it is legal).

B. A Substitute to the Language of the Induce Act

In order to clarify copyright law, Congress should codify contributory infringement and inducement into the Copyright Act.¹⁸⁶ However, as the previous section proposed, the Induce Act is not the proper vehicle to accomplish this goal. Rather, a more appropriate addition would function similar to active inducement. Active inducement seeks to punish bad behavior that positively encourages infringement, rather than labeling a technology as bad because it is simply capable of facilitating infringement.¹⁸⁷ Active inducement is a technology-neutral standard that would keep policy questions concerning the legality of a technology that has a substantial noninfringing use, but allows its users the capability to infringe, out of the court system.¹⁸⁸ The user infringes, not the technology.

After noticing widespread opposition to the Induce Act outside of Hollywood, Senator Hatch invited interested parties to submit substitute language.¹⁸⁹ Andrew Greenberg, vice chairman of the Institute of Electrical and Electronics Engineers' ("IEEE-USA") intellectual property committee, put forward an excellent proposal.¹⁹⁰ This proposal borrows the narrow principle of active inducement to complement contribution in circumstances where affirmative encouragement to infringe accompanies the distribution of noninfringing and noncontributory technology.¹⁹¹ Inducement under the Patent Act should be adapted to protect both the interest of copyright holders and that of society to limit the scope of copyright laws to preclude

¹⁸⁶ See Greenberg, *supra* note 121, at 16–18 (proposing Congress continue where *Sony* left off and appropriate the Patent Act's active inducement element in order to punish bad activity and not bad technology).

¹⁸⁷ See *Induce Talks*, *supra* note 109, para. 7 (suggesting that the entertainment industry was more interested in punishing technology than behavior).

¹⁸⁸ See Lawrence Lessig, *Bytes and Bullets*, THE WASH. POST, Nov. 24, 2004, A21 (illustrating that there is no difference in principle between regulating P2P distributors and gun manufacturers because both products cause harm). Similarly, the gun lobby would argue that a gun manufacturer is not liable for its destructive uses. See *id.*

¹⁸⁹ *Induce Talks*, *supra* note 109, para. 4.

¹⁹⁰ Greenberg, *supra* note 121, at 20. The IEEE-USA suggested the following substitute to the language of the Induce Act:

(g)(1) Inducement of Infringement. Whoever actively and knowingly induces infringement of a copyrighted work by another with the specific and actual intent to cause the infringing acts shall be liable as an infringer.

(2) Contribution to an Infringement. Whoever knowingly and materially contributes to the infringement of a copyrighted work by another shall be liable as an infringer.

(4) Limitations on Secondary Liability.

(A) manufacture, distribution, marketing, operation, sale, servicing, or other use of embodiments of an otherwise lawful technology by lawful means, with or without the knowledge that an unaffiliated third party will infringe, cannot constitute inducement of infringement under Subsection g(1) in the absence of any additional active steps taken to encourage direct infringement.

(B) manufacture, distribution, marketing, operation, sale, servicing or other use of embodiments of an otherwise lawful technology capable of a substantial noninfringing use cannot constitute contribution to an infringement under Subsection (g)(2).

Id.

¹⁹¹ See *id.*

an unhealthy and undue intervention in ongoing technologies.¹⁹² Piracy is wrong, but copyright laws should not give the RIAA effective control over what others have created.

Our laws must encourage technology innovators to develop pioneering and incremental improvements in technology. Innovation must not be chilled simply because a noninfringing technology might have an infringing use. It would be fair, however, to impose liability on innovators who, in the process of distributing their technology, actively induce someone to infringe. This new “induce act” would only punish bad behavior. It would punish independent acts of inducement beyond the mere sale and announcement of features. The policy behind active inducement is far healthier for innovation and is a familiar and proper question for the judiciary.¹⁹³

C. Alternative Compensation

In *Grokster*, the Ninth Circuit believed in letting the market adjust to P2P technology on its own.¹⁹⁴ The Copyright Act extends to artists the exclusive right to distribute their work.¹⁹⁵ The policy rationale behind the Copyright Act is not to make artists, composers or sculptors more money, but to promote the progress of science and the useful arts. The main incentive, however, for the major copyright holder’s struggle against P2P distributors is revenue. In essence, they are fighting disintermediation. Where the record labels would distribute compact discs to the market before, P2P technology has encroached and arguably taken a bite out of sales.¹⁹⁶ Currently, artists and their record labels do not earn revenue when their work is copied using a program like Grokster.

While it is the exclusive right of the composer to determine how his or her work is distributed, the public has shown their overwhelming support for MP3 technology and internet file sharing.¹⁹⁷ Given the fact that file sharing in some form will always

¹⁹² See Greenberg, *supra* note 121, at 16–17.

¹⁹³ See *id.* at 15.

¹⁹⁴ See *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004). The court explained the policy rationale behind allowing the free market to come to equilibrium, stating:

The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.

Id.

¹⁹⁵ 17 U.S.C. § 106 (2000).

¹⁹⁶ See RIAA, *RIAA Issues 2004 Year-End Shipment Numbers*, at <http://www.riaa.com/news/newsletter/032105.asp> (last visited Apr. 6, 2005) (stating CD sales increased in 2004 after declining the four previous years).

¹⁹⁷ See Katie Dean, *Song-Swap Networks Still Humming*, WIRED NEWS, Oct. 25, 2004, <http://www.wired.com/news/digiwood/0,1412,65427,00.html> (last visited Apr. 6, 2005) (stating that researchers at the University of California at Riverside and the Cooperative Association for Internet Data Analysis say P2P activity has not dropped off since the RIAA began suing individual P2P users); see LESSIG, *supra* note 27 at 67 (citing a study showing 60 million Americans use or have used P2P file-sharing programs).

be around, the record labels should adjust to the market (as the “old” learned to do with the introduction of cable and FM Radio) rather than suing their own customers and scrambling for Congress to pass ill-advised additions to the copyright laws.¹⁹⁸ As an alternative, the RIAA should focus its efforts not only on programs similar to Apple’s iTunes®, but also on working together with the P2P distributors.¹⁹⁹

For example, one promising solution proposes that each internet service provider (“ISP”) ask their users if they want to pay an additional \$1 per month for legal access to as many MP3s as they desire from a particular music channel or genre.²⁰⁰ Then, ASCAP, BMI, or others could track downloads and distribute more revenue directly to the artists based on their popularity.²⁰¹ Furthermore, ISP’s would be quick to offer such a service with their standard internet package in order to attract new subscribers.²⁰² In addition, current subscribers would most likely agree to pay a small monthly fee for the legal download of music.²⁰³ A solution that directly gives incentive to the creation of new works is not antithetical to the Patent and Copyright Clause and supports a free market economy.

V. CONCLUSION

The Patent and Copyright Clause of the Constitution values intellectual property laws that reward innovation in science and arts. The most recent innovation, P2P file sharing, is one of the most efficient technologies ever invented. One of its greatest assets is that P2P file sharing facilitates the quick spread of information.²⁰⁴ However, the recording and motion picture industries do not appreciate the significance of P2P file sharing and have attempted, through the court system and Congress, to hold the distributors of this innovation liable for P2P’s capability to facilitate piracy.

Recently, Congress proposed the Induce Act, attempting to create a new cause of action, available to any copyright holder, for the intentional inducement of copyright

¹⁹⁸ Mark Cuban, *When Will the Music Industry Do It Right?*, Blog Maverick, Nov. 8, 2004, at <http://www.blogmaverick.com/entry/3856521420807387/> (last visited Apr. 6, 2005).

¹⁹⁹ *See id.*

²⁰⁰ *Id.*; see LESSIG, *supra* note 27, at 296–302. Lessig discusses alternative compensation, suggesting:

all content capable of digital transmission would (1) be marked with a digital watermark (don’t worry about how easy it is to evade these marks; as you’ll see, there’s no incentive to evade them). Once this content is marked, then entrepreneurs would develop (2) systems to monitor how many items of each content were distributed. On the basis of those numbers, then (3) artists would be compensated. The compensation would be paid for by (4) an appropriate tax.

Id. at 301.

²⁰¹ *See* Cuban, *supra* note 198. For example, “200 million singles sold gets you \$200 million in gross revenue, one song at a time.” *Id.* However, “five million people buying five channels at five bucks per month gets you 300 million dollars in predictable annual gross revenues.” *Id.*

²⁰² *See id.*

²⁰³ *See id.*

²⁰⁴ *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004) (stating that P2P technology “significantly reduce[s] distribution costs of public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution”).

infringement. However, the Induce Act's reasonable person standard of intent seeks to punish bad technology instead of bad actions. This result violates the doctrine of separation of powers by forcing the judiciary to make policy decisions on the merits of a technology. Further, by abrogating the "substantial noninfringing use" test, the Induce Act is antithetical to the public policy of the Patent and Copyright Clause by chilling technological innovation. An innovator's entire company would be at risk just for releasing a new technology. For these reasons, the Induce Act should not be enacted or should be amended to incorporate active inducement from the Patent Act. Furthermore, codifying both contribution and active inducement will clarify copyright law and protect innovation. In the end, this codification supports the balance of interests between innovators and the public that should be integrated into intellectual property laws, and ultimately, is essential to the Constitution.