

FALL 2005 SUPPLEMENT TO

CYBERLAW

**PROBLEMS OF POLICY
AND JURISPRUDENCE IN THE
INFORMATION AGE**

Second Edition

By

Patricia L. Bellia

*Lilly Endowment Associate Professor of Law
Notre Dame Law School*

Paul Schiff Berman

*Professor of Law
University of Connecticut School of Law*

David G. Post

*Professor of Law
Beasley School of Law, Temple University*

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Chapter Three

PROBLEMS OF GEOGRAPHY AND SOVEREIGNTY

SECTION B. JURISDICTION TO PRESCRIBE

1. Extraterritorial Regulation of Speech

Page 104:

At the end of note 7, add:

The Supreme Court subsequently affirmed, though the Court suggested that the Third Circuit had unnecessarily construed various statutory definitions not considered by the district court. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, ___, 124 S. Ct. 2783, 2791 (2004). Accordingly, the Court limited itself to ruling that the district court did not abuse its discretion in granting preliminary injunctive relief. *Id.* at ___, 124 S. Ct. at 2795. For further discussion, see Casebook p. 429 and Supplement p. 5.

2. The “Dormant” Commerce Clause

Page 121:

Delete the last paragraph of note 10 and add:

In a lawsuit challenging the Pennsylvania statute on these grounds, as well as on First Amendment grounds, a district court concluded that the statute failed the *Pike* balancing test. The court reasoned that the act had minimal local benefit, because those interested in “obtaining or providing child pornography can evade blocking efforts using a number of different methods,” and that the act substantially burdened interstate commerce, because providers seeking to comply with the act were forced to disable sites that did not in fact contain child pornography. *Center for Democracy and Technology v. Pappert*,

337 F. Supp. 2d 606, 662 (E.D. Pa. 2004). The court also concluded that the act “has the practical effect of exporting Pennsylvania’s domestic policies,” because some ISPs are only able to implement blocking orders on a nationwide basis. *Id.* at 645-46, 662-63.

SECTION C. JURISDICTION TO ADJUDICATE

2. Jurisdiction Based on Online Interaction

Page 164:

At the end of note 5, add:

Subsequent to *Gutnick*, the British House of Lords likewise ruled that internet publication takes place in any jurisdiction where the relevant words are read or downloaded. See *Lewis v. King*, [2004] All E.R. (D) 234 (Oct.) (C.A.) (Eng.); see also *Richardson v. Schwarzenegger*, [2004] All E.R. (D) 432 (Oct.) (Q.B.) (Eng.) (relying on *Lewis* to assert jurisdiction over a libel suit arising from an article in the *Los Angeles Times* that was available online).

Page 164:

At the end of note 6, add:

The British House of Lords has specifically rejected any reliance on whether the site in question targeted viewers in a specific jurisdiction or not. According to the Lords,

it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has “targeted”, when in truth he has “targeted” every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to “target”, it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.

Lewis v. King, [2004] All E.R. (D) 234 (Oct.) (C.A.) (Eng.), at ¶ 34. Do you find this reasoning convincing? If so, is there any way for judges to devise a test that would help combat such manipulation?

SECTION D. THE POWER TO ENFORCE

1. Judgment Recognition and the Power of Persuasion

Page 174:

Following note 4, insert a new note:

4A. The district court's opinion was subsequently reversed by the United States Court of Appeals for the Ninth Circuit. See *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 379 F.3d 1120 (9th Cir. 2004), *reh'g en banc granted*, 399 F.3d 1010 (9th Cir. 2005). The appeals court declined to reach the First Amendment question, however, instead ruling only that the district court did not have proper jurisdiction over the French defendants because the defendants had insufficient contact with California. Although this decision was framed as a matter of jurisdiction, it can also be thought of as a ripeness question. After all, part of the reason the French complainants had insufficient contact with California is that they had chosen not to seek an enforcement order in the United States. Thus, dismissing for lack of jurisdiction was functionally equivalent to preventing Yahoo!'s claim from going forward unless and until a U.S. court is actually asked to enforce the French order. At that point, the controversy would become ripe for review, and at the same time jurisdiction would presumably no longer be a problem.

Chapter Five

PROBLEMS OF “PUBLIC” VERSUS “PRIVATE” REGULATION

SECTION C. GOVERNMENT REGULATION VERSUS PRIVATE FILTERING

1. Government Regulation of Sexually Explicit Speech

Page 429:

In the last paragraph of note 7, delete “On remand . . . First Amendment scrutiny?” and add:

On remand, the Third Circuit again struck down the statute as unconstitutional. *See American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). The Supreme Court subsequently affirmed, though the Court suggested that the Third Circuit had unnecessarily construed various statutory definitions not considered by the district court. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, ___, 124 S. Ct. 2783, 2791 (2004). Accordingly, the Court limited itself to ruling that the district court did not abuse its discretion in granting preliminary injunctive relief. Central to the Court’s conclusion was the fact that the government had failed, at least at the preliminary injunction stage, to show why use of blocking and filtering software would not constitute a less restrictive alternative to COPA. The Court, however, left open the possibility that the district court could conclude, after a full trial on the merits, “that COPA is the least restrictive alternative available to accomplish Congress’ goal.” *Id.* at ___, 124 S. Ct. at 2795. The next section discusses filtering and blocking technology in greater detail.

2. Filtering Sexually Explicit Speech

Page 437:

Following note 3, insert a new note:

3A. Assuming the government cannot require use of filtering software, is it appropriate for courts to evaluate the availability of filtering technology in examining government attempts to restrict sexually explicit speech? In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S. Ct. 2783 (2004), the Supreme Court held that a district court did not abuse its discretion in granting preliminary injunctive relief where the government had failed to demonstrate that use of filtering and blocking software did not constitute a less restrictive alternative to the Child Online Protection Act. In dissent, Justice Breyer objected to the Court's treatment of filtering software as an "alternative" to regulation rather than merely as a feature of the technological landscape: "Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i.e.*, the backdrop against which Congress enacted the present statute." 542 U.S. at ___, 124 S. Ct. at 2801 (Breyer, J., dissenting). Which approach is correct?

Page 441:

At the end of note 2, add:

In either case, of course, the measure may raise significant constitutional concerns: If the ISPs cannot comply with the statute without blocking material that is not child pornography, the statute may burden protected speech. A district court so concluded in *Center for Democracy and Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

Chapter Six

PROBLEMS OF SPEAKERS AND CONDUITS

SECTION B. OPEN ACCESS

Pages 491-492:

Delete third full paragraph through end of introductory text and add:

The open access debate has nevertheless persisted. The debate reflects both a highly technical statutory issue and broader policy and constitutional issues. The statutory issue concerns how to classify cable modem service under the federal Communications Act: as a “telecommunications service,” 47 U.S.C. § 153(46), an “information service,” *id.* § 153(20), a “cable service,” *id.* § 522(6), or some combination thereof. The choice among these statutory classifications has important implications for whether cable modem service providers will be required to grant nondiscriminatory access to unaffiliated ISPs. In particular, the Communications Act imposes common carrier requirements on providers of telecommunications services, but does not impose such requirements on providers of information services or cable services. Settling on the proper statutory classification for cable modem service providers, however, does not fully resolve the underlying policy and constitutional questions. Even with respect to providers of telecommunications services, the Act permits the FCC to forbear application of the common carrier requirements. Moreover, although the Communications Act does not directly impose open access obligations on providers of information services, it arguably permits the FCC to do so. And the Act allows local franchising authorities to impose certain regulatory conditions upon providers of cable services.

The statutory issue was the subject of conflict among federal courts until the Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, __ U.S. __, 125 S. Ct. 2688 (2005), excerpted below. One district court concluded that cable

modem service providers offer “cable services” and that local franchising authorities could permissibly condition the transfer of a cable franchise on the provider’s agreement to provide nondiscriminatory access to its cable modem platform. *AT & T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (2000). The Court of Appeals for the Ninth Circuit reversed that decision on statutory grounds, concluding instead that cable modem services constitute telecommunications services. 216 F.3d 871 (9th Cir. 2000). Another district court concluded that cable modem providers offer cable services but found that federal law barred imposition of open access requirements, *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), and the Court of Appeals for the Fourth Circuit affirmed, 257 F.3d 356 (4th Cir. 2001). See also *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 (11th Cir. 2000) (concluding that internet service is neither a telecommunications service nor a cable service).

Partly in response to the conflicting decisions, the FCC issued a notice of inquiry announcing its intent to determine how to classify cable modem service and whether to impose open access conditions on providers of such services. In 2002, the FCC issued a Declaratory Ruling classifying cable modem services as information services but deferring the question of how such services should be regulated, if at all. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf. The FCC’s ruling was challenged by numerous parties, including ISPs, state and local agencies, and DSL providers. As you read the Supreme Court’s opinion, consider whether the FCC’s interpretation—even if a permissible one as a matter of administrative law—reflects the best reading of the statute.

National Cable & Telecommunications Ass’n v. Brand X Internet Servs.

Supreme Court of the United States, 2000
125 S. Ct. 2688

JUSTICE THOMAS delivered the opinion of the Court.

Title II of the Communications Act of 1934, as amended, subjects all providers of “telecommunications servic[e]” to mandatory common-carrier regulation. 47 U.S.C. § 153(44). In the order under review, the Federal Communications Commission concluded that cable companies that sell broadband Internet service do not provide “telecommunications servic[e]” as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II. We must decide whether that conclusion is a lawful construction of the Communications Act under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the Administrative Procedure Act, 5 U.S.C. § 555 *et seq.* We hold that it is. * * *

II

The [Communications] Act, as amended by the Telecommunications Act of 1996, defines two categories of regulated entities relevant to these cases: telecommunications carriers and information-service providers. The Act regulates telecommunications carriers, but not information-service providers, as common carriers. [Under Title II of the Act,] [t]elecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, design their systems so that other carriers can interconnect with their communications networks, and contribute to the federal “universal service” fund. These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.

These two statutory classifications originated in the late 1970’s, as the Commission developed rules to regulate data-processing services offered over telephone wires. That regime, the “*Computer II*” rules, distinguished between “basic” service (like telephone service) and “enhanced” service (computer-processing service offered over telephone lines). *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417-423, ¶¶ 86-101 (hereinafter *Computer II Order*). The *Computer II* rules defined both basic and enhanced services by reference to how the consumer perceives the service being offered.

In particular, the Commission defined “basic service” as “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” By “pure” or “transparent” transmission, the Commission meant a communications path that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network—such as via a telephone or a facsimile. Basic service was subject to common-carrier regulation.

“[E]nhanced service,” however, was service in which “computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber’s information,” such as voice and data storage services, as well as “protocol conversion” (*i.e.*, ability to communicate between networks that employ different data-transmission formats). By contrast to basic service, the Commission decided not to subject providers of enhanced service, even enhanced service offered via transmission wires, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier

regulation given the “fast-moving, competitive market” in which they were offered.

The definitions of the terms “telecommunications service” and “information service” established by the 1996 Act are similar to the *Computer II* basic- and enhanced-service classifications. “Telecommunications service”—the analog to basic service—is “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.” 47 U.S.C. § 153(46). “Telecommunications” is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” § 153(43). “Telecommunications carrier[s]”—those subjected to mandatory Title II common-carrier regulation—are defined as “provider[s] of telecommunications services.” § 153(44). And “information service”—the analog to enhanced service—is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” § 153(20).

In September 2000, the Commission initiated a rulemaking proceeding to, among other things, apply these classifications to cable companies that offer broadband Internet service directly to consumers. In March 2002, that rulemaking culminated in [*In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 117 FCC Rcd 4798 (2002) (hereinafter *Declaratory Ruling*),] the *Declaratory Ruling* under review in these cases. In the *Declaratory Ruling*, the Commission concluded that broadband Internet service provided by cable companies is an “information service” but not a “telecommunications service” under the Act, and therefore not subject to mandatory Title II common-carrier regulation. In support of this conclusion, the Commission relied heavily on *In re Federal-State Joint Board on Universal Service*, 113 FCC Rcd 11501, 11531 (1998) (hereinafter *Universal Service Report*). The *Universal Service Report* classified “non-facilities-based” ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service providers. Unlike those ISPs, cable companies own the cable lines they use to provide Internet access. Nevertheless, in the *Declaratory Ruling*, the Commission found no basis in the statutory definitions for treating cable companies differently from non-facilities-based ISPs: Both offer “a single, integrated service that enables the subscriber to utilize Internet access service . . . and to realize the benefits of a comprehensive service offering.” Because Internet access provides a capability for manipulating and storing information, the Commission concluded that it was an information service.

The integrated nature of Internet access and the high-speed wire used to provide Internet access led the Commission to conclude that cable companies providing Internet access are not telecommunications providers. This conclusion, the Commission reasoned, followed from the logic of the *Universal Service Report*. The *Report* had concluded that, though Internet service “involves data transport elements” because “an Internet access

provider must enable the movement of information between customers' own computers and distant computers with which those customers seek to interact," it also "offers end users information-service capabilities inextricably intertwined with data transport." *Universal Service Report* 11539-11540, ¶ 80. ISPs, therefore, were not "offering . . . telecommunications . . . directly to the public," § 153(46), and so were not properly classified as telecommunications carriers. In other words, the Commission reasoned that consumers use their cable modems not to transmit information "transparently," such as by using a telephone, but instead to obtain Internet access.

The Commission applied this same reasoning to cable companies offering broadband Internet access. Its logic was that, like non-facilities-based ISPs, cable companies do not "offe[r] telecommunications service to the end user, but rather . . . merely us[e] telecommunications to provide end users with cable modem service." Though the Commission declined to apply mandatory Title II common-carrier regulation to cable companies, it invited comment on whether under its Title I jurisdiction it should require cable companies to offer other ISPs access to their facilities on common-carrier terms. Numerous parties petitioned for judicial review, challenging the Commission's conclusion that cable modem service was not telecommunications service. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge.

The Court of Appeals granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded to the Commission for further proceedings. In particular, the Court of Appeals vacated the ruling to the extent it concluded that cable modem service was not "telecommunications service" under the Communications Act. It held that the Commission could not permissibly construe the Communications Act to exempt cable companies providing Internet service from Title II regulation. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron*, however, the Court of Appeals grounded its holding in the *stare decisis* effect of *AT & T Corp. v. Portland*, 216 F.3d 871 (C.A.9 2000). *Portland* held that cable modem service was a "telecommunications service," though the court in that case was not reviewing an administrative proceeding and the Commission was not a party to the case. Nevertheless, *Portland's* holding, the Court of Appeals reasoned, overrode the contrary interpretation reached by the Commission in the *Declaratory Ruling*.

We granted certiorari to settle the important questions of federal law that these cases present.

III

We first consider whether we should apply *Chevron's* framework to the Commission's interpretation of the term "telecommunications service." We conclude that we should. We also conclude that the Court of Appeals should have done the same, instead of following the contrary construction it adopted in *Portland*.

A

In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

The *Chevron* framework governs our review of the Commission's construction. * * * *

B

The Court of Appeals declined to apply *Chevron* because it thought the Commission's interpretation of the Communications Act foreclosed by the conflicting construction of the Act it had adopted in *Portland*. It based that holding on the assumption that *Portland's* construction overrode the Commission's, regardless of whether *Portland* had held the statute to be unambiguous. That reasoning was incorrect.

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. * * * [The Court of Appeals'] decision in *Portland* held only that the *best* reading of § 153(46) was that cable modem service was a "telecommunications service," not that it was the *only permissible* reading of the statute. * * * Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction. *Portland* did not do so. * * *

IV

We next address whether the Commission's construction of the definition of "telecommunications service" is a permissible reading of the Communications Act under the *Chevron* framework. *Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful. At the first step, we ask whether the statute's plain terms "directly address[s] the precise question at issue." 467 U.S., at 843. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is "a reasonable policy choice for the agency to make." *Id.*, at 845. The Commission's interpretation is permissible at both steps. * * *

B

[The Commission's] construction passes *Chevron's* first step. ["Telecommunications service" is "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46).] Respondents argue that * * * cable companies providing Internet service necessarily "offe[r]"

the underlying telecommunications used to transmit that service. The word “offering” as used in § 153(46), however, does not unambiguously require that result. Instead, “offering” can reasonably be read to mean a “stand-alone” offering of telecommunications, *i.e.*, an offered service that, from the user’s perspective, transmits messages unadulterated by computer processing. That conclusion follows not only from the ordinary meaning of the word “offering,” but also from the regulatory history of the Communications Act.

1

Cable companies in the broadband Internet service business “offe[r]” consumers an information service in the form of Internet access and they do so “via telecommunications,” § 153(20), but it does not inexorably follow as a matter of ordinary language that they also “offe[r]” consumers the high-speed data transmission (telecommunications) that is an input used to provide this service, § 153(46). * * * It is common usage to describe what a company “offers” to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product * * *. One might well say that a car dealership “offers” cars, but does not “offer” the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as “offering” consumers the car’s components in addition to the car itself. Even if it is linguistically permissible to say that the car dealership “offers” engines when it offers cars, that shows, at most, that the term “offer,” when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well. It does not show that no other usage is permitted.

The question, then, is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. We think that they are sufficiently integrated * * *.

2

The Commission’s traditional distinction between basic and enhanced service also supports the conclusion that the Communications Act is ambiguous about whether cable companies “offer” telecommunications with cable modem service. Congress passed the definitions in the Communications Act against the background of this regulatory history, and we may assume that the parallel terms “telecommunications service” and “information service” substantially incorporated their meaning, as the Commission has held. * * *

The Commission has long held that “all those who provide some form of transmission services are not necessarily common carriers.” *Computer II Order* 431, ¶ 122. For example, the Commission did not subject to common-carrier regulation those service providers that offered enhanced services over telecommunications facilities, but that did not themselves own

the underlying facilities—so-called “non-facilities-based” providers. See *Universal Service Report* 11530, ¶ 60. * * *

Respondents’ statutory arguments conflict with this regulatory history. They claim that the Communications Act unambiguously classifies as telecommunications carriers all entities that use telecommunications inputs to provide information service. As respondent MCI concedes, this argument would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public. For example, it would subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities. * * * Respondents’ position * * * therefore entails mandatory common-carrier regulation of entities that the Commission never classified as “offerors” of basic transmission service, and therefore common carriers, under the *Computer II* regime. * * *

C

We also conclude that the Commission’s construction was “a reasonable policy choice for the [Commission] to make” at *Chevron’s* second step. 467 U.S., at 845.

Respondents argue that the Commission’s construction is unreasonable because it allows any communications provider to “evade” common-carrier regulation by the expedient of bundling information service with telecommunications. Respondents argue that under the Commission’s construction a telephone company could, for example, offer an information service like voice mail together with telephone service, thereby avoiding common-carrier regulation of its telephone service.

We need not decide whether a construction that resulted in these consequences would be unreasonable because we do not believe that these results follow from the construction the Commission adopted. As we understand the *Declaratory Ruling*, the Commission did not say that any telecommunications service that is priced or bundled with an information service is automatically unregulated under Title II. The Commission said that a telecommunications input used to provide an information service that is not “separable from the data-processing capabilities of the service” and is instead “part and parcel of [the information service] and is integral to [the information service’s] other capabilities” is not a telecommunications offering. *Declaratory Ruling* 4823, ¶ 39.

This construction does not leave all information service offerings exempt from mandatory Title II regulation. “It is plain,” for example, that a local telephone company “cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.” *Universal Service Report* 11530, ¶ 60. That is because a telephone company that packages voice mail with telephone service offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voice mail. * * *

Respondents answer that cable modem service does, in fact, provide “transparent” transmission from the consumer’s perspective, but this argument, too, is mistaken. Respondents characterize the “information-service” offering of Internet access as consisting only of access to a cable company’s e-mail service, its Web page, and the ability it provides consumers to create a personal Web page. When a consumer goes beyond those offerings and accesses content provided by parties other than the cable company, respondents argue, the consumer uses “pure transmission” no less than a consumer who purchases phone service together with voice mail.

This argument, we believe, conflicts with the Commission’s understanding of the nature of cable modem service, an understanding we find to be reasonable. When an end user accesses a third-party’s Web site, the Commission concluded, he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company’s own Web site, its e-mail service, or his personal Web page. For example, as the Commission found below, part of the information service cable companies provide is access to [Domain Name System (DNS)] service. A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or “clicks” on with his mouse) with the IP address of the Web page’s host server. It is at least reasonable to think of DNS as a “capability for . . . acquiring . . . retrieving, utilizing, or making available” Web site addresses and therefore part of the information service cable companies provide. 47 U.S.C. § 153(20). Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or “cache,” popular content on local computer servers. [Caching] obviates the need for the end user to download anew information from third-party Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval. * * * “The service that Internet access providers offer to members of the public is Internet access,” *Universal Service Report* 11539, ¶ 79, not a transparent ability (from the end user’s perspective) to transmit information. We therefore conclude that the Commission’s construction was reasonable.

V

Respondent MCI, Inc., urges that the Commission’s treatment of cable modem service is inconsistent with its treatment of [Digital Subscriber Line (DSL)] service and therefore is an arbitrary and capricious deviation from agency policy. See 5 U.S.C. § 706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology in addition to telephone service, the Commission applied its *Computer II* facilities-based classification to them and required them to make the telephone lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms. MCI claims that the Commission’s decision not to regulate cable companies similarly under Title II is inconsistent with its DSL policy. * * *

The Commission's decision appears to be a first step in an effort to reshape the way the Commission regulates information-service providers; that may be why it has tentatively concluded that DSL service provided by facilities-based telephone companies should also be classified solely as an information service. See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, 3030, ¶ 20. The Commission need not immediately apply the policy reasoning in the *Declaratory Ruling* to all types of information-service providers. It apparently has decided to revisit its longstanding *Computer II* classification of facilities-based information-service providers incrementally. Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities. We express no view on those matters. In particular, we express no view on how the Commission should, or lawfully may, classify DSL service. * * *

The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I, dissenting.

The Federal Communications Commission (FCC or Commission) has once again attempted to concoct "a whole new regime of regulation (or of free-market competition)" under the guise of statutory construction. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 234 (1994). Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of *non*-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.

I

The first sentence of the FCC ruling under review reads as follows: "Cable modem service provides high-speed access to the Internet, *as well as* many applications or functions that can be used with that access, over cable system facilities." *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4799, ¶ 1 (2002) (hereinafter *Declaratory Ruling*) (emphasis added, footnote omitted). Does this mean that cable companies "offer" high-speed access to the Internet? Surprisingly not, if the Commission and the Court are to be believed.

It happens that cable-modem service is popular precisely because of the high-speed access it provides, and that, once connected with the Internet, cable-modem subscribers often use Internet applications and

functions from providers other than the cable company. Nevertheless, for purposes of classifying what the cable company does, the Commission (with the Court's approval) puts all the emphasis on the rest of the package (the additional "applications or functions"). It does so by claiming that the cable company does not "offe[r]" its customers high-speed Internet access because it offers that access only in conjunction with particular applications and functions, rather than "separate [ly]," as a "stand-alone offering." *Id.*, at 4802, ¶ 7, 4823, ¶ 40. * * *

The Court concludes that the word "offer" is ambiguous in the sense that it has "alternative dictionary definitions" that might be relevant. It seems to me, however, that the analytic problem pertains not really to the meaning of "offer," but to the identity of what is offered. The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way. * * *

Despite the Court's mighty labors to prove otherwise, the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative. The Commission's ruling began by noting that cable-modem service provides *both* "high-speed access to the Internet" *and* other "applications and functions," *Declaratory Ruling 4799*, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things.

The consumer's view of the matter is best assessed by asking what other products cable-modem service substitutes for in the marketplace. Broadband Internet service provided by cable companies is one of the three most common forms of Internet service, the other two being dial-up access and broadband Digital Subscriber Line (DSL) service. In each of the other two, the physical transmission pathway to the Internet is sold—indeed, *is legally required* to be sold—separately from the Internet functionality. With dial-up access, the physical pathway comes from the telephone company and the Internet service provider (ISP) provides the functionality. * * *

As the Court acknowledges, DSL service has been similar to dial-up service in the respect that the physical connection to the Internet must be offered separately from Internet functionality. Thus, customers shopping for dial-up or DSL service will not be able to use the Internet unless they get both someone to provide them with a physical connection and someone to provide them with applications and functions such as e-mail and Web access. It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer * * * .

Finally, I must note that, notwithstanding the Commission's self-congratulatory paean to its deregulatory largesse, it concluded the *Declaratory Ruling* by asking, as the Court paraphrases, "whether under its Title I jurisdiction [the Commission] should require cable companies to offer other ISPs access to their facilities on common-carrier terms." In other words, what the Commission hath given, the Commission may well take away—unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.*, its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under § 160 (which it has already tentatively concluded it would do. Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications. For that simple reason set forth in the statute, I would affirm the Court of Appeals. * * *

I respectfully dissent.

Notes and Questions

1. The Supreme Court concludes that the Communications Act is ambiguous, thus triggering application of the *Chevron* doctrine. In what respect does the Court find the statute ambiguous? Do you agree with the Court's assessment?
2. Even assuming the Act is sufficiently ambiguous to permit multiple interpretations, how would you have interpreted the statute if you served on the FCC? Why?
3. Note that in deeming the FCC's approach "reasonable," the Court rejects the argument that cable modem service involves "transparent" transmission from the consumer's perspective. In particular, the Court focuses on the fact that cable providers facilitate access to the DNS service and perform caching functions. Why do such services make the transmission path any less "transparent" than it might otherwise be? How does the transmission path offered by the cable modem service provider differ, from the user's perspective,

from the path offered through DSL or dial-up service? And how do the ancillary functions the Court identifies differ from those offered by ordinary ISPs?

4. The Court proceeds from the premise that the FCC's "ancillary" jurisdiction to regulate interstate and foreign communications allows it to impose certain obligations on cable modem service providers, even if such providers do not offer telecommunications service. Should the FCC impose open access conditions on cable modem service providers? What goals does open access serve? If one goal is to achieve consistent treatment across high-speed providers, should the FCC simply forbear application of common carrier requirements to DSL providers, rather than imposing analogous requirements on cable modem service providers? The FCC has preliminarily concluded that it will take such an approach. See FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260433A1.pdf. Do considerations other than consistent treatment counsel in favor of imposing open access requirements?

5. Would the imposition of open access requirements be constitutional? Does either *Tornillo* or *Turner* adequately resolve the issue? Consider the following two cases.

SECTION C. THE ROLE OF INTERNET SERVICE PROVIDERS AND OTHER INTERMEDIARIES

2. Copyright Liability

Page 525:

Following note 1, insert a new note:

1A. On the issue of direct infringement, note the district court's observation that Netcom designed a system "that *automatically* and uniformly creates temporary copies of all data sent through it." (Emphasis added.) Is a provider entitled to immunity from direct infringement even when its processes are not fully automatic? In *CoStar v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the court considered whether LoopNet was liable for direct infringement when it allowed real estate brokers to post descriptions of real estate automatically on its web site, but cursorily reviewed all photographs before permitting them to appear on the site so as to avoid obvious copyright infringement. The court held that LoopNet's conduct with respect to the photographs "does not amount to 'copying,' nor does it add volition to LoopNet's involvement in storing the copy." *Id.* at 556. One judge dissented on this point, arguing that LoopNet's "non-passive, volitional conduct" made the *Netcom* defense unavailable. *Id.* at 557 (Gregory, J., dissenting). How would a choice between the majority and dissenting approaches affect a

provider's incentives to prevent infringing material from being posted on or transmitted by its system?

Page 529:

Prior to note 1, insert a new note:

0. Does *Netcom's* holding that a provider is not liable for direct infringement when a subscriber posts infringing material survive enactment of the DMCA? In *ALS Scan v. RemarQ Communities, Inc.*, 239 F.3d 619, 622 (4th Cir. 2001), the U.S. Court of Appeals for the Fourth Circuit characterized the DMCA as a "codification" of *Netcom*, thus implying that a provider failing to satisfy the DMCA's requirements could not rely on *Netcom's* reasoning to defend against a claim of direct infringement. The same court later held that, whether or not it qualifies for one of the DMCA's safe harbors, a provider is not liable for direct infringement when passively storing material at the direction of users, because "Congress intended the DMCA's safe harbor for ISPs to be a floor, not a ceiling, of protection." *CoStar v. LoopNet*, 373 F.3d 544, 555 (4th Cir. 2004).

Page 529:

Following note 1, insert a new note:

1A. How does the scope of immunity for a service provider under subsection 512(a) differ from that under subsection 512(c)? In light of those differences, the question whether a service provider's actions can be characterized as providing "intermediate and transient storage of . . . material in the course of . . . transmitting, routing, or providing connections" under subsection 512(a) or as providing "storage at the direction of the user of material that resides on a system or network controlled by or operated for the service provider" under subsection 512(c) is likely to be crucial. Consider a provider that makes a USENET feed available to its subscribers and stores files related to USENET postings for 14 days. Should a court assess the service provider's immunity under subsection 512(a) or subsection 512(c)? See *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (remanding for consideration of whether service provider met threshold requirements of subsection 512(i), but concluding that district court otherwise appropriately found that subsection 512(a) applied).

Pages 540–49:

Omit *Metro-Goldwyn-Mayer* and accompanying notes and add:

Metro-Goldwyn Mayer Studios Inc. v. Grokster, Ltd.

Supreme Court of the United States, 2005
125 S. Ct. 2764

JUSTICE SOUTER delivered the opinion of the Court.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

I

A

Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and

distribute the copyrighted works in violation of the Copyright Act. MGM sought damages and an injunction.

Discovery during the litigation revealed the way the software worked, the business aims of each defendant company, and the predilections of the users. Grokster's eponymous software employs what is known as FastTrack technology, a protocol developed by others and licensed to Grokster. StreamCast distributes a very similar product except that its software, called Morpheus, relies on what is known as Gnutella technology. A user who downloads and installs either software possesses the protocol to send requests for files directly to the computers of others using software compatible with FastTrack or Gnutella. On the FastTrack network opened by the Grokster software, the user's request goes to a computer given an indexing capacity by the software and designated a supernode, or to some other computer with comparable power and capacity to collect temporary indexes of the files available on the computers of users connected to it. The supernode (or indexing computer) searches its own index and may communicate the search request to other supernodes. If the file is found, the supernode discloses its location to the computer requesting it, and the requesting user can download the file directly from the computer located. The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that folder.

In the Gnutella network made available by Morpheus, the process is mostly the same, except that in some versions of the Gnutella protocol there are no supernodes. In these versions, peer computers using the protocol communicate directly with each other. When a user enters a search request into the Morpheus software, it sends the request to computers connected with it, which in turn pass the request along to other connected peers. The search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers. As this description indicates, Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works. Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks, and some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an

example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

As for quantification, the parties' anecdotal and statistical evidence entered thus far to show the content available on the FastTrack and Gnutella networks does not say much about which files are actually downloaded by users, and no one can say how often the software is used to obtain copies of unprotected material. But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering.

Grokster and StreamCast concede the infringement in most downloads, and it is uncontested that they are aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when. From time to time, moreover, the companies have learned about their users' infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance. And MGM notified the companies of 8 million copyrighted files that could be obtained using their software.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them," App. 861; indeed, the OpenNap program was engineered "to leverage Napster's 50 million user base," *id.*, at 746.

StreamCast monitored both the number of users downloading its OpenNap program and the number of music files they downloaded. It also used the resulting OpenNap network to distribute copies of the Morpheus software and to encourage users to adopt it. Internal company documents indicate that StreamCast hoped to attract large numbers of former Napster users if that company was shut down by court order or otherwise, and that StreamCast planned to be the next Napster. A kit developed by StreamCast

to be delivered to advertisers, for example, contained press articles about StreamCast's potential to capture former Napster users, and it introduced itself to some potential advertisers as a company "which is similar to what Napster was." It broadcast banner advertisements to users of other Napster-compatible software, urging them to adopt its OpenNap. An internal e-mail from a company executive stated: "We have put this network in place so that when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative."

Thus, StreamCast developed promotional materials to market its service as the best Napster alternative. One proposed advertisement read: "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?" Another proposed ad touted StreamCast's software as the "# 1 alternative to Napster" and asked "[w]hen the lights went off at Napster . . . where did the users go?" StreamCast even planned to flaunt the illegal uses of its software; when it launched the OpenNap network, the chief technology officer of the company averred that "[t]he goal is to get in trouble with the law and get sued. It's the best way to get in the new[s]."

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for "Napster" or "[f]ree filesharing" would be directed to the Grokster Web site, where they could download the Grokster software. And Grokster's name is an apparent derivative of Napster.

StreamCast's executives monitored the number of songs by certain commercial artists available on their networks, and an internal communication indicates they aimed to have a larger number of copyrighted songs available on their networks than other file-sharing networks. The point, of course, would be to attract users of a mind to infringe, just as it would be with their promotional materials developed showing copyrighted songs as examples of the kinds of files available through Morpheus. Morpheus in fact allowed users to search specifically for "Top 40" songs, which were inevitably copyrighted. Similarly, Grokster sent users a newsletter promoting its ability to provide particular, popular copyrighted materials.

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases,

advertising opportunities become worth more. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files. Although Grokster appears to have sent e-mails warning users about infringing content when it received threatening notice from the copyright holders, it never blocked anyone from continuing to use its software to share copyrighted files. StreamCast not only rejected another company's offer of help to monitor infringement, but blocked the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks.

B

After discovery, the parties on each side of the case cross-moved for summary judgment. * * * The District Court held that those who used the Grokster and Morpheus software to download copyrighted media files directly infringed MGM's copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then current versions of their software. * * * The Court of Appeals affirmed. In the court's analysis, a defendant was liable as a contributory infringer when it had knowledge of direct infringement and materially contributed to the infringement. But the court read *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), as holding that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari.

II

A

MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy, and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection. As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies.

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.

One infringes contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.⁹ Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," *Sony Corp. v. Universal City Studios*, 464 U.S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law.

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent

9. * * * In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement. Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM's vicarious liability theory.

case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In *Sony Corp. v. Universal City Studios*, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur. At the trial on the merits, the evidence showed that the principal use of the VCR was for “time-shifting,” or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. Although Sony’s advertisements urged consumers to buy the VCR to “record favorite shows” or “build a library” of recorded programs, 464 U.S. at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of VCRs to consumers with knowledge that some would use them to infringe. But because the VCR was “capable of commercially significant noninfringing uses,” we held the manufacturer could not be faulted solely on the basis of its distribution. *Id.*, at 442.

This analysis reflected patent law’s traditional staple article of commerce doctrine, now codified, that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. * * * [W]here an article is “good for nothing else” but infringement, *Canda v. Michigan Malleable Iron Co.*, 124 F. 486, 489 (C.A.6 1903), there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe. Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and a vigorous commerce.

The parties and many of the *amici* in this case think the key to resolving it is the *Sony* rule and, in particular, what it means for a product to be “capable of commercially significant noninfringing uses.” MGM advances the argument that granting summary judgment to Grokster and StreamCast as to their current activities gave too much weight to the value of innovative technology, and too little to the copyrights infringed by users of their software, given that 90% of works available on one of the networks was shown to be copyrighted. Assuming the remaining 10% to be its noninfringing use, MGM says this should not qualify as “substantial,” and the Court should quantify Sony to the extent of holding that a product used

“principally” for infringement does not qualify. As mentioned before, Grokster and StreamCast reply by citing evidence that their software can be used to reproduce public domain works, and they point to copyright holders who actually encourage copying. Even if infringement is the principal practice with their software today, they argue, the noninfringing uses are significant and will grow.

We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement. The Ninth Circuit has read *Sony*'s limitation to mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties' infringing use of it; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, unless the distributors had “specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.” Because the Circuit found the StreamCast and Grokster software capable of substantial lawful use, it concluded on the basis of its reading of *Sony* that neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific unlawful uses.

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM's inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law. Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or “entic[es] or

persuad[es] another” to infringe, Black’s Law Dictionary 790 (8th ed.2004), as by advertising. * * * [O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

III

A

The only apparent question about treating MGM’s evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM’s part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast’s OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software’s ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster’s suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast’s case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users

(“When the lights went off at Napster . . . where did the users go?”) Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant’s own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast’s internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster’s name is apparently derived from Napster, it too initially offered an OpenNap program, its software’s function is likewise comparable to Napster’s, and it attempted to divert queries for Napster onto its own Web site. Grokster and StreamCast’s efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM’s showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants’ failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users’ activity, we think this evidence underscores Grokster’s and StreamCast’s intentional facilitation of their users’ infringement.¹²

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue

¹². Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

B

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests. Although an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief. * * *

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring.

I concur in the Court's decision, which vacates in full the judgment of the Court of Appeals for the Ninth Circuit, and write separately to clarify why I conclude that the Court of Appeals misperceived, and hence misapplied, our holding in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). There is here at least a "genuine issue as to [a] material fact," Fed. Rule Civ. Proc. 56(c), on the liability of Grokster or StreamCast, not only for actively inducing copyright infringement, but also or alternatively, based on the distribution of their software products, for contributory copyright infringement. On neither score was summary judgment for Grokster and StreamCast warranted.

At bottom, however labeled, the question in this case is whether Grokster and StreamCast are liable for the direct infringing acts of others. Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court's opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of "substantial" or "commercially significant" noninfringing uses. *Sony*, 464 U.S., at 442. While the two categories overlap, they capture different culpable behavior. * * *

In *Sony*, the Court considered Sony's liability for selling the Betamax video cassette recorder. It did so enlightened by a full trial record. * * * [T]o resolve the *Sony* case, the Court explained, it had to determine "whether the Betamax is capable of commercially significant noninfringing

uses.” *Id.* at 442. To answer that question, the Court considered whether “a significant number of [potential uses of the Betamax were] noninfringing.” *Ibid.* The Court homed in on one potential use—private, noncommercial time-shifting of television programs in the home (*i.e.*, recording a broadcast TV program for later personal viewing). Time-shifting was noninfringing, the Court concluded, because in some cases trial testimony showed it was authorized by the copyright holder and in others it qualified as legitimate fair use. Most purchasers used the Betamax principally to engage in time-shifting, a use that “plainly satisfie[d]” the Court’s standard. *Id.*, at 442. Thus, there was no need in *Sony* to “give precise content to the question of how much [actual or potential] use is commercially significant.” *Ibid.* Further development was left for later days and cases. * * *

This case differs markedly from *Sony*. Here, there has been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses. In finding the Grokster and StreamCast software products capable of substantial noninfringing uses, the District Court and the Court of Appeals appear to have relied largely on declarations submitted by the defendants. These declarations include assertions (some of them hearsay) that a number of copyright owners authorize distribution of their works on the Internet and that some public domain material is available through peer-to-peer networks including those accessed through Grokster’s and StreamCast’s software. * * * These declarations do not support summary judgment in the face of evidence, proffered by MGM, of overwhelming use of Grokster’s and StreamCast’s software for infringement.

Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared. * * *

In sum, when the record in this case was developed, there was evidence that Grokster’s and StreamCast’s products were, and had been for some time, overwhelmingly used to infringe, and that this infringement was the overwhelming source of revenue from the products. Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time. On this record, the District Court should not have ruled dispositively on the contributory infringement charge by granting summary judgment to Grokster and StreamCast.

If, on remand, the case is not resolved on summary judgment in favor of MGM based on Grokster and StreamCast actively inducing infringement, the Court of Appeals, I would emphasize, should reconsider, on a fuller record, its interpretation of *Sony*’s product distribution holding.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE O’CONNOR join, concurring.

I agree with the Court that the distributor of a dual-use technology may be liable for the infringing activities of third parties where he or she actively seeks to advance the infringement. I further agree that, in light of our holding today, we need not now “revisit” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Other Members of the Court, however, take up the *Sony* question: whether Grokster’s product is “capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” (GINSBURG, J., concurring) (quoting *Sony, supra*, at 442). And they answer that question by stating that the Court of Appeals was wrong when it granted summary judgment on the issue in Grokster’s favor. I write to explain why I disagree with them on this matter.

I

The Court’s opinion in *Sony* and the record evidence (as described and analyzed in the many briefs before us) together convince me that the Court of Appeals’ conclusion has adequate legal support.

A

I begin with *Sony*’s standard. In *Sony*, the Court considered the potential copyright liability of a company that did not itself illegally copy protected material, but rather sold a machine—a Video Cassette Recorder (VCR)—that could be used to do so. A buyer could use that machine for *noninfringing* purposes, such as recording for later viewing (sometimes called “time-shifting”) uncopyrighted television programs or copyrighted programs with a copyright holder’s permission. The buyer could use the machine for infringing purposes as well, such as building libraries of taped copyrighted programs. Or, the buyer might use the machine to record copyrighted programs under circumstances in which the legal status of the act of recording was uncertain (*i.e.*, where the copying may, or may not, have constituted a “fair use.” Sony knew many customers would use its VCRs to engage in unauthorized copying and “library-building.” *Id.*, at 458-459 (Blackmun, J., dissenting). But that fact, said the Court, was insufficient to make Sony itself an infringer. And the Court ultimately held that Sony was not liable for its customers’ acts of infringement.

In reaching this conclusion, the Court recognized the need for the law, in fixing *secondary* copyright liability, to “strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.*, at 442. * * * The Court ultimately characterized the legal “question” in the particular case as “whether [Sony’s VCR] is *capable of commercially significant noninfringing uses*” (while declining to give “precise content” to these terms).

It then applied this standard. The Court had before it a survey (commissioned by the District Court and then prepared by the respondents) showing that roughly 9% of all VCR recordings were of the type—namely, religious, educational, and sports programming—owned by producers and distributors testifying on Sony’s behalf who did not object to time-

shifting. * * * A much higher percentage of VCR *users* had at one point taped an authorized program, in addition to taping unauthorized programs. And the plaintiffs—not a large class of content providers as in this case—owned only a small percentage of the total available *unauthorized* programming. But of all the taping actually done by Sony’s customers, only around 9% was of the sort the Court referred to as authorized.

The Court found that the magnitude of authorized programming was “significant,” and it also noted the “significant potential for future authorized copying.” 464 U.S., at 444. The Court supported this conclusion by referencing the trial testimony of professional sports league officials and a religious broadcasting representative. *Id.*, at 444, and n. 24. It also discussed (1) a Los Angeles educational station affiliated with the Public Broadcasting Service that made many of its programs available for home taping, and (2) Mr. Rogers’ Neighborhood, a widely watched children’s program. *Id.*, at 445. On the basis of this testimony and other similar evidence, the Court determined that producers of this kind had authorized duplication of their copyrighted programs “in significant enough numbers to create a *substantial* market for a noninfringing use of the” VCR. *Id.*, at 447, n. 28 (emphasis added).

The Court, in using the key word “substantial,” indicated that these circumstances alone constituted a sufficient basis for rejecting the imposition of secondary liability. Nonetheless, the Court buttressed its conclusion by finding separately that, in any event, *unauthorized* timeshifting often constituted not infringement, but “fair use.” *Id.*, at 447-456.

B

When measured against *Sony*’s underlying evidence and analysis, the evidence now before us shows that Grokster passes *Sony*’s test—that is, whether the company’s product is capable of substantial or commercially significant noninfringing uses. For one thing, petitioners’ (hereinafter MGM) own expert declared that 75% of current files available on Grokster are infringing and 15% are “likely infringing.” That leaves some number of files near 10% that apparently are noninfringing, a figure very similar to the 9% or so of authorized time-shifting uses of the VCR that the Court faced in *Sony*. * * * [I]t is reasonable to infer quantities of current lawful use roughly approximate to those at issue in *Sony*. At least, MGM has offered no evidence sufficient to survive summary judgment that could plausibly demonstrate a significant quantitative difference. To be sure, in quantitative terms these uses account for only a small percentage of the total number of uses of Grokster’s product. But the same was true in *Sony*, which characterized the relatively limited authorized copying market as “substantial.”

Importantly, *Sony* also used the word “capable,” asking whether the product is “*capable of*” “substantial noninfringing uses. Its language and analysis suggest that a figure like 10%, if fixed for all time, might well prove insufficient, but that such a figure serves as an adequate foundation where

there is a reasonable prospect of expanded legitimate uses over time. See *ibid.* (noting a “significant potential for future authorized copying”). And its language also indicates the appropriateness of looking to potential future uses of the product to determine its “capability.”

Here the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software. Such software permits the exchange of *any* sort of digital file—whether that file does, or does not, contain copyrighted material. As more and more uncopyrighted information is stored in swappable form, it seems a likely inference that lawful peer-to-peer sharing will become increasingly prevalent. There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony*’s standard. And while *Sony* considered the record following a trial, there are no facts asserted by MGM in its summary judgment filings that lead me to believe the outcome after a trial here could be any different. The lower courts reached the same conclusion.

Of course, Grokster itself may not want to develop these other noninfringing uses. But *Sony*’s standard seeks to protect not the Groksters of this world (which in any event may well be liable under today’s holding), but the development of technology more generally. And Grokster’s desires in this respect are beside the point.

II

The real question here, I believe, is not whether the record evidence satisfies *Sony*. As I have interpreted the standard set forth in that case, it does. * * * Instead, the real question is whether we should modify the *Sony* standard, as MGM requests, or interpret *Sony* more strictly, as I believe JUSTICE GINSBURG’s approach would do in practice. * * * *Sony* itself sought to “strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.*, at 442. Thus, to determine whether modification, or a strict interpretation, of *Sony* is needed, I would ask whether MGM has shown that *Sony* incorrectly balanced copyright and new-technology interests. In particular: (1) Has *Sony* (as I interpret it) worked to protect new technology? (2) If so, would modification or strict interpretation significantly weaken that protection? (3) If so, would new or necessary copyright-related benefits outweigh any such weakening?

A

The first question is the easiest to answer. *Sony*’s rule, as I interpret it, has provided entrepreneurs with needed assurance that they will be shielded from copyright liability as they bring valuable new technologies to market.

Sony’s rule is clear. That clarity allows those who develop new

products that are capable of substantial noninfringing uses to know, *ex ante*, that distribution of their product will not yield massive monetary liability. At the same time, it helps deter them from distributing products that have no other real function than—or that are specifically intended for—copyright infringement, deterrence that the Court’s holding today reinforces (by adding a weapon to the copyright holder’s legal arsenal).

Sony’s rule is strongly technology protecting. The rule deliberately makes it difficult for courts to find secondary liability where new technology is at issue. It establishes that the law will not impose copyright liability upon the distributors of dual-use technologies (who do not themselves engage in unauthorized copying) unless the product in question will be used *almost exclusively* to infringe copyrights (or unless they actively induce infringements as we today describe). * * *

Sony’s rule is forward looking. It does not confine its scope to a static snapshot of a product’s current uses (thereby threatening technologies that have undeveloped future markets). Rather, as the VCR example makes clear, a product’s market can evolve dramatically over time. And *Sony*—by referring to a *capacity* for substantial noninfringing uses—recognizes that fact. * * *

Sony’s rule is mindful of the limitations facing judges where matters of technology are concerned. Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution. * * *

B

The second, more difficult, question is whether a modified *Sony* rule (or a strict interpretation) would significantly weaken the law’s ability to protect new technology. JUSTICE GINSBURG’s approach would require defendants to produce considerably more concrete evidence—more than was presented here—to earn *Sony*’s shelter. That heavier evidentiary demand, and especially the more dramatic (case-by-case balancing) modifications that MGM and the Government seek, would, I believe, undercut the protection that *Sony* now offers. * * *

C

The third question—whether a positive copyright impact would outweigh any technology-related loss—I find the most difficult of the three. I do not doubt that a more intrusive *Sony* test would generally provide greater revenue security for copyright holders. But it is harder to conclude that the gains on the copyright swings would exceed the losses on the technology roundabouts. * * *

Unauthorized copying likely diminishes industry revenue, though it is not clear by how much. The extent to which related production has actually and resultingly declined remains uncertain, though there is good

reason to believe that the decline, if any, is not substantial. More importantly, copyright holders at least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today's opinion makes clear, a copyright holder may proceed against a technology provider where a provable specific intent to infringe (of the kind the Court describes) is present. Services like Grokster may well be liable under an inducement theory. In addition, a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies. * * *

Further, copyright holders may develop new technological devices that will help curb unlawful infringement. Some new technology, called "digital 'watermarking' " and "digital fingerprint[ing]," can encode within the file information about the author and the copyright scope and date, which "fingerprints" can help to expose infringers. At the same time, advances in technology have discouraged unlawful copying by making *lawful* copying (e.g., downloading music with the copyright holder's permission) cheaper and easier to achieve. * * *

Finally, as *Sony* recognized, the legislative option remains available. Courts are less well suited than Congress to the task of "accommodat[ing] fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Sony*, 464 U.S., at 431.

I do not know whether these developments and similar alternatives will prove sufficient, but I am reasonably certain that, given their existence, a strong demonstrated need for modifying *Sony* (or for interpreting *Sony*'s standard more strictly) has not yet been shown. That fact, along with the added risks that modification (or strict interpretation) would impose upon technological innovation, leads me to the conclusion that we should maintain *Sony*, reading its standard as I have read it. As so read, it requires affirmance of the Ninth Circuit's determination of the relevant aspects of the *Sony* question.

Notes and Questions

1. The Court bases its conclusion that Grokster and StreamCast actively sought to induce infringement on three factors: evidence that the services targeted Napster's customers, the services' advertising-based business model, and the absence of any efforts to filter noninfringing uses. What weight should each of these factors have received? Would the last two factors have mattered in the absence of evidence that the services targeted Napster's customers? If not, has the Court simply constructed an inducement rule that is trivially easy to avoid?

2. What legal advice would you provide to companies seeking to develop other peer-to-peer technologies on how to avoid liability?

3. Assume that the Court had not been presented with evidence of Grokster's and StreamCast's intent to induce infringing activity. How should it have resolved the case? How are courts likely to resolve future challenges to peer-to-peer technology where such evidence does not exist?

4. Do the concurring opinions diverge solely in their evaluation of the quantum of evidence MGM presented concerning infringing and noninfringing uses, or do they reflect fundamentally different interpretations of *Sony*?

5. Return to Chapter Four and examine what triggered the *Sony* Court's conclusion that the Betamax was capable of substantial noninfringing uses. Note that Justice Ginsburg views *Sony* as holding that authorized copying and time-shifting that is unauthorized but a fair use, taken together, make up the noninfringing uses that the *Sony* Court deemed substantial or significant. Justice Breyer, in contrast, appears to suggest that authorized copying alone, which amounted to some nine percent of the Betamax's use, constituted a substantial noninfringing use. Which interpretation of *Sony* is correct? Which approach would be preferable as a matter of policy?

6. Assuming that courts are confronted in the future with the question of how to apply *Sony* to peer-to-peer technologies, how should courts determine when such technologies are capable of substantial noninfringing uses? By comparing the commercial significance of the noninfringing uses to the commercial significance of the infringing ones? By examining the economically feasible alternatives to the claimed noninfringing uses, and discounting such uses if alternatives do exist? Should *Sony*'s test be replaced by a different analysis, such as whether it would be disproportionately costly for the distributor of a technology to reduce or eliminate the infringing uses? *Cf.* In re Aimster Copyright Litigation, 334 F.3d 643, 653 (7th Cir. 2003).

Chapter Seven

PROBLEMS OF CONTROL OVER INFORMATION

SECTION C. CONTROL OF ACCESS TO DATA AND NETWORK RESOURCES

Page 645:

Replace the second paragraph of note 3 with the following:

In *Kelly*, the Ninth Circuit ultimately withdrew the opinion discussed by the *Ticketmaster* court. In its new opinion, the Ninth Circuit avoided resolving whether Arriba Soft's linking to or framing of the full-sized images violated Kelly's copyright, concluding that, since the parties did not request summary judgment on that issue, the district court erred in granting summary judgment to Arriba Soft. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).