

**Will Free Speech Walk the Plank at The Pirate Bay?  
Anti-Piracy Enforcement Measures and the Threat to Online Peer-to-Peer  
Networks and the Commercial Speech Doctrine**

**Abstract:** Concerned about online piracy, Congress recently debated new measures designed to crack down on intellectual property theft. The proposed laws would have granted government the power to block the Internet addresses of sites that are “dedicated to copyright infringement.” The proposals stemmed in part from the battle against The Pirate Bay, a notorious peer-to-peer network that flaunts its contempt for intellectual property rights. But the fight over The Pirate Bay has overshadowed a more important development: the growth of legal peer-to-peer networking as a component of online social media. This paper argues that peer-to-peer networks, once associated exclusively with copyright theft, have evolved into robust channels for free speech, particularly commercial speech. As such, peer-to-peer networks that attempt to follow the law deserve protection under the court’s commercial speech doctrine. Any future effort to deny that protection would pose a serious threat to free speech rights online.

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The major entertainment industries – the producers of movies, television shows, recorded music, and video games – are waging an aggressive campaign to battle online piracy. Their lobbyists in Washington have pressed Congress to target so-called peer-to-peer networks that allow users to share digital content online. They gained traction in the past year with proposals known as the Protect Intellectual Property ACT (PIPA) and the Stop Online Piracy Act (SOPA). But late opposition led by Google and other Silicon Valley companies have killed those bills, at least temporarily. Nonetheless, the entertainment and software industries believe they must

contain peer-to-peer networks to stop online theft.<sup>1</sup> They have suggested they will continue to fight for restraints on peer-to-peer networks that were proposed in the PIPA and SOPA legislation.<sup>2</sup>

More than a decade ago, companies such as Napster, Grokster, and Kazaa pioneered the use of peer-to-peer file sharing technology to allow users to share digital music. In doing so, they triggered a legal war with the music recording industry.<sup>3</sup> Since then, new technology has radically altered the world of peer-to-peer networking. The development of so-called bittorrent file sharing has enhanced the transfer speed of these peer-to-peer networks and made it possible for users to trade movies and video games as well as audio files. Where it once took hours, users can now download a Hollywood feature film or a complicated software program in a matter of minutes. A journal that follows online and digital technology estimates that more than 100 million Internet users worldwide have downloaded a bittorrent application.<sup>4</sup>

Four self-proclaimed Internet rebels founded one of the most notorious bittorrent file-sharing networks in Sweden in 2005. The purpose of their enterprise was summed up perfectly by its name: The Pirate Bay. The Swedish team developed a bittorrent client – or web site – that allowed Pirate Bay members to share copyrighted material. Because that material never sat on a Pirate Bay server, the Swedes claimed they had not infringed on copyright law.<sup>5</sup> In true pirate fashion, they mocked those

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1 Associated Press, “MPAA Head Chris Dodd says Hollywood Must Befriend Silicon Valley to Combat Film Piracy,” *Washington Post*, April 24, 2012. [http://www.washingtonpost.com/national/mpaa-head-chris-dodd-says-hollywood-must-befriend-silicon-valley-to-combat-film-piracy/2012/04/24/gIQAMnZleT\\_story.html](http://www.washingtonpost.com/national/mpaa-head-chris-dodd-says-hollywood-must-befriend-silicon-valley-to-combat-film-piracy/2012/04/24/gIQAMnZleT_story.html)

2 Art Brodsky, “The Long and Winding Road to a Bad Policy on Piracy,” *Huffington Post*, April 25, 2012. [http://www.washingtonpost.com/national/mpaa-head-chris-dodd-says-hollywood-must-befriend-silicon-valley-to-combat-film-piracy/2012/04/24/gIQAMnZleT\\_story.html](http://www.washingtonpost.com/national/mpaa-head-chris-dodd-says-hollywood-must-befriend-silicon-valley-to-combat-film-piracy/2012/04/24/gIQAMnZleT_story.html)

3 Metro-Goldwyn-Mayer Studios, Inc., et al., v. Grokster, Ltd., et al. 545 U.S. 913.

4 “The Bit Torrent Effect,” *Wired Magazine*,

5 “The View from The Pirate Bay,” *BBC News*, Nov. 30, 2007. [http://news.bbc.co.uk/2/hi/programmes/click\\_online/7120845.stm](http://news.bbc.co.uk/2/hi/programmes/click_online/7120845.stm)

who tried to protect their intellectual property. They posted all legal threats on their website, and included their own colorful annotations. When a lawyer for the band The White Stripes reserved the right to “institute proceedings” against The Pirate Bay, the pirates replied: “And you have the right to institute sodomizing of yourself, preferably with barbed wire.”<sup>6</sup> The cheeky founders of The Pirate Bay embraced an ideology that said information should be free, and they distributed a web product designed to circumvent copyright law.<sup>7</sup>

Understandably panicked by the spread of networks like The Pirate Bay, the motion picture industry has led the fight for new legislation.<sup>8</sup> If they had passed, PIPA and SOPA would have granted sweeping new powers to both the U.S. government and individual copyright holders to try to prevent online theft of intellectual property. The government or an individual copyright holder could have requested a court order requiring Internet service providers to block the domain name of web sites that are deemed to be “dedicated to infringing activities.”<sup>9</sup> A court could have forced this action before trial. The justice department or the complaining copyright holder would have merely needed a temporary restraining order or preliminary injunction, both of which could be issued the same day the complaint was filed. Thus a web site could

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6 “Re: White Stripes,” retrieved from the file: Legal Threats at PirateBay.org, Sept. 19, 2011. <http://thepiratebay.org/legal>

7 The Pirate Bay’s founders argue that file-sharing sites benefit most artists by promoting their work; they say major studios and recording companies are angry because file-sharing sites expand choice for consumers. See, “Is Online Piracy a Good Thing,” CNN.com, April 17, 2009. <http://edition.cnn.com/2009/SHOWBIZ/Movies/04/17/online.piracy.for.against/index.html>

8 “MPAA demands \$15 million from The Pirate Bay,” TorrentFreak.com <http://torrentfreak.com/mpaa-demands-15-million-from-the-pirate-bay-080508/>; “MPAA to Google, Colleges: Get Rid of The Pirate Bay,” GigaOm.com <http://gigaom.com/video/mpaa-to-google-colleges-get-rid-of-the-pirate-bay/>; Protect IP – PIPA – is a revision of a even broader measure that failed to pass Congress in 2010.

9 S. 968, *To Prevent Online Threats to Economic Creativity and Theft of Intellectual Property, and For Other Purposes*, introduced in the Senate May 12, 2011. <http://leahy.senate.gov/imo/media/doc/BillText-PROTECTIPAct.pdf>

have been blocked even before its owners knew it was the subject of a complaint. Additionally, the measures proposed in PIPA and SOPA would have required credit card companies and advertisers to refuse to do business with the owners of targeted sites, and search engines would have been forced to block access to those sites.<sup>10</sup>

The Supreme Court's ruling in *MGM v. Grokster* in 2005 would seem to provide constitutional approval for that approach to piracy control. In *Grokster*, the court ruled that a company that distributes a device "with the object of promoting its use to infringe copyright ... is liable for the resulting acts of infringement by third parties."<sup>11</sup> The justices based their decision on the so-called Sony VCR case decided in 1983. Videocassette recording technology clearly allowed users to record and share copyrighted television programs. But the court held that the VCR was capable of "commercially significant non-infringing uses," and that Sony did not promote the VCR as a means of circumventing copyright law. Thus, the court ruled Sony was not guilty of "contributory infringement" simply because it distributed the device.<sup>12</sup> In the *Grokster* case, the high court said the peer-to-peer networks failed to show evidence of significant "non-infringing uses," and thus were liable for contributing to the copyright theft that occurred on their web sites.

The online world is a fast-moving place. In the six years since the *Grokster* ruling, the nature of peer-to-peer networks has evolved and matured. Early networks like Napster and Grokster were employed primarily to share copyrighted material. Since then, the number of peer-to-peer networks has multiplied dramatically – and the way they are used has changed. For every Pirate Bay, there exist dozens of peer-to-peer sites that are devoted to legal communication.<sup>13</sup> These social media outlets serve as niche forums for like-minded people to share content and ideas. As such, many have blossomed into friendly outlets for savvy marketers eager to lure new customers.

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<sup>10</sup> Ibid.

<sup>11</sup> *Metro-Goldwyn-Mayer Studios, Inc., et al., v. Grokster, Ltd., et al.* 545 U.S. 913.

<sup>12</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417.

<sup>13</sup> For examples, see: Dimeadozen.org, Losslesslegs.org, gdvault.com, hungercity.org, zombtracker,the-zomb.com, etc.

In its *Grokster* ruling, the court noted the need to balance copyright protection with other community interests. I argue that the pendulum has shifted in that balancing act. In regulating the Internet to protect intellectual property, the law should consider the growing use of peer-to-peer networks as outlets for legal and protected expression. Where *Grokster* was decided exclusively on copyright law, I argue that measures similar to those proposed in the PIPA and SOPA acts would deserve closer scrutiny under the First Amendment. One could argue that peer-to-peer networks, which include file sharing and discussion forums, are capable of enabling a broad range of communication and thus warrant the strict scrutiny that the U.S. Supreme Court has afforded political speech.<sup>14</sup> Perhaps these networks will reach that magnitude of communication in the future. At present, however, it is clear that legal peer-to-peer networks have developed into robust commercial and marketing venues. Thus, I argue the constitutionality of the measures like PIPA and SOPA should receive that intermediate scrutiny that regulation of commercial speech has received under the First Amendment.

The Supreme Court has been hesitant to define commercial speech narrowly, merely describing it as “proposing a commercial transaction,”<sup>15</sup> or as “an expression related solely to the economic interests of the speaker and its audience.”<sup>16</sup> This paper argues that the increasing use of peer-to-peer networks as marketing vehicles for music, movies, and video games qualifies as commercial speech under the court’s definitions. Additionally, the on-going discussion about those products that occurs on peer-to-peer networks qualifies as “expression related ... to the economic interests of the speaker and its audience,” and thus fits the definition of commercial speech as well. Therefore, the enforcement mechanisms proposed in PIPA and SOPA should be tested under the commercial speech doctrine as established by the U.S. Supreme Court in *Central Hudson v. Public Service Commission*, and later elaborated in 44

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<sup>14</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>15</sup> *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, at 455-56 (1978).

<sup>16</sup> *Central Hudson*, 447, at 561.

*Liquormart v. State of Rhode Island*.<sup>17</sup> This paper concludes that the PIPA and SOPA measures would violate two components of the four-part *Central Hudson* test: The laws were unlikely to serve the interest asserted by the government, and their impact will be more extensive than is necessary to achieve the government's stated goals.

The PIPA and SOPA laws were designed to confront notorious outlier sites like The Pirate Bay, but it would impact peer-to-peer networks that strive to practice legal communication. The new measures were unlikely to do more than existing laws to curb the worst excesses of online piracy. But the act's heavy-handed tactics would inhibit and perhaps even shut down legal peer-to-peer networking. Like the popular video-sharing site YouTube, these legal networks live in a grey area. They discourage copyright infringement and are used primarily for legal communication, but they cannot control every upload and download. Under the *Grokster* ruling, companies can avoid "contributory infringement" liability by showing "significant non-infringing uses" for their product.<sup>18</sup> The PIPA and SOPA measures would have turned that standard on its head. It allows the government to block a site if it is "dedicated to infringement."<sup>19</sup> Under the proposed laws, overzealous enforcement could have put every peer-to-peer network at risk, and thus inhibit innovation and retard the growing beneficial and legal uses of these sites.

### ***PEER-TO-PEER FILE SHARING AND COPYRIGHT LAW***

As an 18-year-old college dropout, Shawn Fanning had a lot of time on his hands. He had no job, few friends, and no real home. He was crashing in his uncle's old office above an abandoned restaurant in Hull, Mass. But Fanning did have a big idea, and it consumed all his waking hours during that summer of 1999. After a series of marathon code-writing sessions, Fanning developed the peer-to-peer file-sharing program that would become Napster. Like most transformative ideas, this one was deceptively simple: a program that would let computer users swap bits of data –

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17 *Central Hudson Gas & Electric v. Public Service Commission* 447 U.S. 557; 44 *Liquormart and People's Super Liquor Stores, Inc. v. State of Rhode Island* 517 U.S. 484.

18 *Grokster*, 545, at 932.

19 S. 968, <http://leahy.senate.gov/imo/media/doc/BillText-PROTECTIPAct.pdf>

specifically, music files – directly with each other, rather than going through a central server. Within a year, Napster had grown from a jumble of code on Fanning’s laptop into a national obsession. By fall of 2000, 25 million people were using the site to trade music.<sup>20</sup> Fanning appeared on the cover of *Time* magazine. And a shell-shocked recorded music industry, its business model now in shambles, gathered its lawyers and mapped out a strategy to fight back.

Backed by the major record companies, the Recording Industry Association of America filed suit against Napster charging Fanning’s file-sharing website with both “contributory and vicarious copyright infringement.”<sup>21</sup> Judge Marilyn Hill Patel of the Northern District of California agreed with the plaintiffs and issued a temporary injunction that prohibited Napster from allowing its users to share music without permission of the copyright holder. Napster appealed to the United States Court of Appeals for the Ninth Circuit. On Feb. 21, 2001, the court upheld the key findings of the lower court’s injunction. The Ninth Circuit ruling essentially ended the original Napster’s brief but remarkable life.<sup>22</sup>

The issue of contributory infringement centered on Napster’s knowledge of copyright theft. The appeals court accepted the record industry’s argument that Napster users were in fact distributing copyrighted material illegally. But was it reasonable to expect Napster’s owners to know when copyright infringement was taking place, and should they be expected to prevent it? Attorneys for Napster cited the Supreme Court’s ruling in the Sony VCR case to claim that Napster had other “commercially significant non-infringing uses” and that Napster employees had no way of monitoring the specific content of files shared by computer users accessing its network. The Ninth Circuit agreed that, as in the Sony case, the fact that new technology could be used to circumvent copyright did not necessarily impute knowledge of that infringement to its owners. The court also accepted Napster’s argument that the company’s software program was “capable of commercially

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<sup>20</sup> “Meet the Napster,” *Time*, Oct. 22, 2000.

<sup>21</sup> *A&M Records v. Napster* 114 F. Supp. 2<sup>nd</sup> 896 (N.D. Cal. 2000).

<sup>22</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3<sup>rd</sup> 1004 (9th Cir. 2001).

significant non-infringing uses.” In the end, however, the appeals court ruled that Napster knew infringement was occurring and had the means to stop it. The court said “regardless of the number of Napster's infringing versus non-infringing uses,” the company could not ignore the theft occurring right beneath its nose. The court ruled that Napster had “*actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”<sup>23</sup>

Oddly enough, it was Fanning’s effort to make Napster easy to use that sowed the seeds of its demise in the Ninth Circuit. In designing Napster, Fanning combined three existing computer programs: file sharing, live chat, and online search.<sup>24</sup> The Napster software created an index of all files available on computers in the network, thus allowing users to browse files and search for specific music. While the copyrighted content never passed through a Napster server, the titles of the underlying files did reside in the Napster index. In the Sony case, the company had no way of knowing the content its customers might copy on its VCR product. But with Napster, the Ninth Circuit believed the index of file titles hosted on the company server provided ample evidence that copyrighted material was passing through its peer-to-peer network. “We are compelled to make a clear distinction between the architecture of the Napster system” and the videocassette recorder in the Sony case, the court ruled. The appeals court believed Napster could monitor the titles on its index and demand that copyrighted material be removed from the network.<sup>25</sup> Fanning’s inclusion of a file index made life easy for Napster’s users – but his company would pay a steep price for it in court.

Physicists tell us that the universe abhors a vacuum, and the business universe is apparently no different. The demise of the original Napster appeared to create opportunities for other web entrepreneurs. Peer-to-peer file sharing had changed the way millions of Americans accessed information and entertainment, and no matter

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<sup>23</sup> *A&M Records*, at 22.

<sup>24</sup> “Meet the Napster, *Time*, Oct. 22, 2000.

<sup>25</sup> *A&M Records*, at 22.



how hard the entertainment industries tried, that genie was not going back into the battle.

Two start-ups, Grokster and Streamcast, emerged as the leading candidates to assume Napster's role as the nation's most popular peer-to-peer file-sharing network. A consortium of 28 entertainment companies promptly sued both of them, and the case that came to be known as *MGM Studios, Inc. v. Grokster* began its life before a U.S. District judge in California's central district. This was three years after the Napster case, however, and peer-to-peer networking had matured even in that short time. Napster had failed to convince a district court judge that the company's "non-infringing uses" were significant enough to warrant protection from copyright infringement liability, but the lawyers for Grokster and Streamcast succeeded. By 2003, the companies were able to produce significant evidence to support their claim that the peer-to-peer networks provided an outlet for legitimate file sharing. They pointed to the growing number of artists who uploaded copyrighted material voluntarily to generate interest in their work. And they showed the increasing number of electronic books and other materials in the public domain that were being shared on their peer-to-peer networks.<sup>26</sup>

Based on this new argument, the district court sided with Grokster and Streamcast. The court granted summary judgment dismissing the claim that the two companies were guilty of contributory infringement simply because they distributed their software product to the public. The entertainment companies appealed, and when the Ninth Circuit court upheld the lower court ruling, the companies turned to the Supreme Court. The high court granted certiorari, and it eventually overturned the Ninth Circuit order and ruled against Grokster and Streamcast. In doing so, the justices re-examined the Sony ruling, and they engaged in a fierce new debate on the question of what constitutes "contributory infringement." The eventual outcome of this debate among the justices will be critical in determining the future use of peer-to-peer technology on the web.

### ***THE GROKSTER RULING AND "CONTRIBUTORY INFRINGEMENT"***

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<sup>26</sup> See *amicus curiae* briefs filed in *Grokster*, 545.

Justice David Souter made it clear in delivering the court's unanimous opinion that the U.S. Supreme Court believed Grokster and Streamcast both knowingly aided in the theft of copyrighted material. Like Napster before them, Grokster and Streamcast argued that copyrighted material never passed through their servers, and therefore they never knew their users were violating copyright law. But the court found that argument specious. As evidence, the court cited marketing records that showed Grokster and Streamcast intended to lure the users of the former Napster site. Streamcast promoted a program called OpenNap that clearly served as an invitation for former Napster users to resume downloading copyrighted music on the Streamcast site.<sup>27</sup> Grokster distributed an electronic newsletter containing links to articles promoting its ability to access popular copyrighted music. Based on this evidence, the court determined that Grokster and Streamcast "induced" and "persuaded" users to violate copyright laws. According to the court's unanimous ruling, a company that distributes a device "with the object of promoting its use" to infringe, and that takes "affirmative steps to foster infringement," is liable for the copyright violation that occurs.<sup>28</sup>

The justices parted ways, however, on the important question of contributory infringement. In two concurring opinions, the justices debated the meaning of the court's ruling in the Sony VCR case. In Sony, the court said the "sale of an article ... adapted to an infringing use" does not necessarily make the seller a "contributory infringer." If the article or product can also be "adapted to other and lawful uses" then the distributor should not be liable for contributory infringement.<sup>29</sup> The court found the VCR could be widely used for legitimate purposes. But the court never quantified just how widespread a product's legal use must be to protect the distributor from contributory infringement liability. In fact, the court in Sony said the product "need merely be capable of commercially significant non-infringing uses."<sup>30</sup> Following the

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<sup>27</sup> The Streamcast peer-to-peer network was marketed as Morpheous.com.

<sup>28</sup> *Grokster*, 10, 11.

<sup>29</sup> *Sony v. Universal Studios*, 464 U.S. 417, at 11.

<sup>30</sup> *Ibid*, at 11.

Sony ruling, both the district court judge and the Ninth Circuit Court of Appeals in California used this test to clear Grokster and Streamcast of contributory copyright infringement.

In the Supreme Court's *Grokster* ruling, Justice Ruth Bader Ginsburg called for a revision of *Sony*'s low standard for contributory liability. In her concurring opinion, with Chief Justice William Rehnquist and Justice William Kennedy joining, Ginsburg criticized the lower courts' broad reading of the Sony ruling. She found the evidence suggesting that legal file sharing was growing on peer-to-peer networks to be unconvincing. And even if the networks could prove more frequent legal use of their file-sharing sites, that would still be dwarfed by the "massive" amounts of daily copyright violation. Ginsburg believed the lower courts had turned Sony upside down. By focusing exclusively on its contributory infringement ruling, the lower courts had granted too much weight to the future development of non-infringing uses of peer-to-peer networks and overlooked what she considered to be the more pressing issue of actual and induced infringement. Ginsburg argued that Grokster and Streamcast's products were "overwhelmingly used to infringe, and that this infringement was the overwhelming source of revenue from the products." The lower courts had "misread" and "misapplied" Sony, and she suggested lower courts avoid focusing so much attention on non-infringing uses in future cases involving copyright and technological innovation.<sup>31</sup>

In a separate concurring opinion in *Grosser*, Justice Stephen Brayer offered a sharp rebuttal to Ginsburg. While he agreed that Grokster and Stream cast had induced infringement through their marketing campaigns, he disagreed on the issue of contributory infringement. Brayer saw the potential for peer-to-peer networks in general to evolve into channels for legal speech and commerce. And he feared Ginsburg's proposal for a stricter reading of the *Sony* ruling would inhibit that innovation. Brayer's concurring opinion in *Grosser*, with justices Stevens and

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31 Grokster, 545, Ginsburg concurrence at 942.

O'Connor joining, lays the groundwork for future arguments in favor of granting peer-to-peer networks greater First Amendment protection.<sup>32</sup>

Brayer began his critique by taking a fresh look at the *Sony* case. That company sold a machine, the videocassette recorder, that it knew could be used for both legal and illegal purposes. Sony understood full well that many customers would use the VCR to engage in what Justice Harry Blackmun described as “library building,” an act that clearly violated copyright law.<sup>33</sup> But the court said that fact alone did not make Sony a copyright infringer, either directly or as a contributor. The court in the *Sony* case recognized the need to tread carefully in the area of contributory infringement. It tried 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 to freely engage in substantially unrelated areas of commerce.”<sup>34</sup> The court cited the “staple article of commerce doctrine,” a component of patent law that says a product’s distributor is not liable for patent infringement unless that product is “unsuited for any commercial non-infringing use.”<sup>35</sup> In *Sony*, the court noted the sale of copying equipment, “like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.” Brayer paid special attention to the *Sony* court’s following line: “Indeed, (the product) need merely be capable of substantial non-fringing uses.”<sup>36</sup> For Breyer, the word “capable” was important. He noted the *Sony* ruling provided no “precise content” for what constituted “significant non-infringing uses.” It merely said the product must be “capable” of such legal and legitimate uses.

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<sup>32</sup> *Grokster*, 545, Breyer’s concurrence at 949.

<sup>33</sup> *Sony*, 464, Blackmun’s dissent at 457.

<sup>34</sup> *Sony*, 464, at 442.

<sup>35</sup> *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176.

<sup>36</sup> *Sony*, 464, at 442.

In *Sony*, Breyer pointed out, the court had evidence showing that roughly nine percent of all VCR recordings at the time were considered authorized and legal.<sup>37</sup> Yet the court found this magnitude of authorized recording was “significant,” and it also noted the “potential for future authorized copying.”<sup>38</sup> Based on these findings, the court determined that a substantial legal market existed for a non-infringing use of the VCR. Therefore, Sony could not be held liable for contributing to the copyright infringement committed by those who used its product illegally. Breyer noted the court went even further by finding separately that even some unauthorized taping – time-shifting, for example – was not infringement but in fact was covered by the “fair use” doctrine of copyright law.<sup>39</sup>

Breyer applied the *Sony* rule for contributory infringement to the *Grokster* case and found the peer-to-peer networks had passed the test. Unlike Ginsburg, Breyer believed both Grokster and Streamcast had produced evidence showing their networks were “capable of significant non-infringing uses.” He cited the authorized copies of music by artists such as Wilco and Janis Ian who wanted their music shared online. He noted the free electronic books available through Project Gutenberg, an online distributor of literature in the public domain. He also noted the growing number of software programs created by the so-called “open source” movement that posted on peer-to-peer networks for all to use. Where Ginsburg had dismissed these examples as marginal, Breyer believed they represented the cutting-edge of a wave of new legal uses for peer-to-peer networks:

“Such legitimate non-infringing uses are coming to include the swapping of: research information (the initial purpose of many peer-to-peer networks); public domain films; historical recordings and digital education materials ( e.g., those stories in the Internet Archive); digital photos; “shareware” and “freeware” (e.g., Linux and certain Windows software); secure licensed music and movie files (Intent MediaWorks, for example, protects licensed content

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37 Ibid, at 424.

38 Ibid, at 444.

39 Ibid, at 447-456.

across P2P networks); news broadcasts past and present (the BBC Creative Archive lets users “rip, mix and share the BBC”); user-created audio and video files; and all manner of ‘open content’ works collected by Creative Commons.” Breyer said he expected legal use of peer-to-peer networks to continue to grow, and he believed the court would impinge future online innovation if the justices tightened the *Sony* standard and made it easier to hold companies liable for contributory infringement.

### ***Peer-to-Peer Networks and the Marketing of Digital Entertainment***

Breyer’s concurrence was prescient. In the six years since the *Grokster* ruling, the growth in peer-to-peer networks has accelerated, driven in part by the emergence of bittorrent technology. Peer-to-peer networks are now faster and easier to use.<sup>40</sup> The rise of The Pirate Bay and its ilk<sup>41</sup> has received most of the media attention, which has overshadowed a more significant development: the creation and expansion of peer-to-peer networks as sites for marketing, commerce, and free speech.

In the music industry, for example, more musical acts have embraced the marketing strategy first pioneered by The Grateful Dead. In the early 1970s, the psychedelic rock band surprised the record industry by announcing a new policy: Fans would be allowed to set up taping equipment at live concerts. The band encouraged its followers to tape its concerts and share them with friends. In a sense, the Dead legalized the so-called bootleg tape. At first, the act appeared to be an anti-commercial protest – “music should be free!” – but the taping policy turned out to be marketing genius. It helped build and energize a massive global following for the band. Ignored by the mainstream music industry, the Dead built a billion-dollar enterprise that survives today, even after the death of its founder and front man, guitarist Jerry Garcia. The “tapers” policy created content that kept the band fresh and relevant to its followers. They eagerly traded and discussed the tapes, debating which live performances were the best. The free music served as a catalyst to build interest in the band. And the Dead turned that interest into revenue through live concert ticket

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40 “The bittorrent Effect,” *Wired Magazine*, Oct. 22, 2009.

41 See, for example, demoniod.me, a bittorrent “tracker” based in The Balkan nation of Montenegro; it proudly promotes itself as a “pirate” site.

sales and, surprisingly enough, strong album sales as well. The fans had access to hundreds of hours of free Grateful Dead music, but they continued to snap up the band's commercial releases.<sup>42</sup>

Other artists followed the lead of The Grateful Dead. The Dave Matthews Band, another billion-dollar enterprise, has encouraged fans to tape the band's concerts since its founding in Charlottesville, Virginia, in the early 1990s. The band has sold an estimated 30 million CDs the past 15 years, even though hundreds of hours of live concert audio are available online for free.<sup>43</sup> The band embraced the "trade friendly" marketing concept fully. In 2001, the Dave Matthews Band became the first group to release a free single on Napster as a way of promoting a new album. The band's record label, BMG Entertainment, defended the decision by citing a study that showed Napster users spent 45 percent more money on recorded music than non-Napster users.<sup>44</sup>

The use of peer-to-peer networks as marketing tools has continued to expand over the past decade. Some bands commit fully to the "tapers" policy and allow all live concerts to trade freely on the web. Others, such as the popular British band Radiohead, place small amounts of material online strategically, using those excerpts to engage their fan base and build interest in upcoming commercial releases. With the rise of bittorrent technology, movie studios and video game-makers have gotten into the act as well. Studios drop trailers and extended movie excerpts into peer-to-peer fan sites to generate interest in upcoming releases.<sup>45</sup> Video game makers often use the sites to test so-called "beta" versions of new and updated games. In a humorous twist, one company recently used The Pirate Bay as a promotional outlet for its highly

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42 Brian Halligan and David Meerman Scott, *Marketing Lessons from The Grateful Dead: What Every Business Can Learn from the Most Iconic Band in History* (Hoboken, N.J.: Wiley & Sons, 2010).

43 According to Nielson Soundscan figures, as reported in the music industry trade journal *Billboard*.

44 "Dave Matthews Band Releases Single on Napster," CNET, Jan. 12, 2001. <http://news.cnet.com/2100-1023-250953.html>

45 "Attention Web Surfers...", *The New York Times*, June 13, 2009.

anticipated game release. To emphasize the joke, the company dressed all the video game's characters in tiny pirate hats.<sup>46</sup>

These traditional marketing strategies have grown more common as bittorrent peer-to-peer sites have spread. While The Pirate Bay and its imitators receive most of the publicity from the mainstream press, legal sites represent the largest growth in peer-to-peer networks. Dimeadozen.org, for example, displays a prominent disclaimer warning its users to share so-called “trade-friendly” content only. The site is designed for users to trade “recordings of indeterminate origin (ROIO) *which have not been officially released*,” according to the homepage disclaimer. It encourages artists who oppose the sharing of these unauthorized recordings to contact the site and “opt out.” Dimeadozen.org promises to add their names to an NAB list – “not allowed band” list – and to “halt sharing on our trackers within minutes.” But the site points out politely that “these recordings exist – you can’t make them vanish,” and it urges artists to allow fans to share the recordings for free rather than forcing them to buy the recordings from a bootlegger.”<sup>47</sup>

Does the existence of a “not allowed” list mean all file sharing on the site is legal? Almost certainly not, but Dimeadozen.org encourages copyright holders to identify the use of illegal content so it can be blocked from the site. And Dimeadozen.org promises to take steps to ban those users who repeatedly traffic in copyrighted material. In doing so, Dimeadozen.com is operating within the legal framework of the Digital Millennium Copyright Act, the 1998 amendment to the U.S. Copyright Act of 1976. The DMCA protects Internet service providers and web sites from liability if third parties post copyrighted material illegally. Under the “safe harbor” provision, the sites cannot be held liable for copyright infringement – either direct or contributory – if they move quickly to remove the copyrighted material once notified of the infringement by the copyright holder.<sup>48</sup>

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46 “Indie Game Developers Post Pirate Game on The Pirate Bay,” TorrentFreak, Sept. 9, 2011.

47 From the Dimeadozen.org homepage. Accessed Oct, 23, 2011  
<http://www.dimeadozen.org/>

48 Digital Millennium Copyright Act, 1998 amendment to Title 17 U.S.C.



Dimeadozen.org is one example of a growing breed of peer-to-peer network that strives to operate legally. Usually formed around a common interest, these sites provide a forum for sharing both content and ideas. In this sense, they deserve protection as new-tech channels for speech and commerce. Under the SOPA and PIPA laws, the government would have assumed sweeping powers to identify and block sites “dedicated to infringement.” Would the incidental infringement on Dimeadozen.com warrant that death penalty? What quantity of infringement must occur for a site to be deemed “dedicated” to infringement?

In the early peer-to-peer cases involving Napster, Grokster, and Streamcast, the court considered the impact of those companies on intellectual property rights. Did those sites infringe on copyright directly? Did they induce others to infringe? The court tried to balance the rights of the copyright holder against the need to encourage technological innovation. With the development of bittorrent sites, which can share large files quickly, the entertainment industries are pleading with lawmakers to provide more powerful tools to fight the peer-to-peer networks. What has been overshadowed in this debate over piracy is the surprising growth in legal peer-to-peer networks. Like other forms of social media, they are growing in popularity, and they deserve protection as legitimate channels for both speech and commerce. Content creators such as movie studios, video-game makers, and musicians are increasingly using social media to market their products. Therefore, the measures like those proposed in PIPA and SOPA should receive First Amendment scrutiny, and its enforcement mechanisms should be tested under the commercial speech doctrine.

### ***THE PIPA AND SOPA LAWS AND THE COMMERCIAL SPEECH DOCTRINE***

In 1942, the U.S. Supreme Court refused to grant commercial speech any First Amendment protection. In *Valentine v. Chrestensen* the court found no constitutional restraints on government regulation of “purely commercial advertising.”<sup>49</sup> Over the next thirty-eight years, the court reversed *Christensen* through a series of rulings that, bit by bit, carved out some protections for commercial speech. By 1980, the justices

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49 *Valentine V. Chrestensen*, 316 U.S. 52 (1942).

saw the need to consolidate the court's position on commercial speech and articulate a clear doctrine to guide lower court rulings on the issue. They did so in the 1980 case of *Central Hudson v. Public Service Commission*.<sup>50</sup>

In *Central Hudson*, the court established a four-part test for determining the legality of any government attempt to regulate commercial speech. For commercial speech to warrant First Amendment protection, the court said it must first concern a legal activity and not be misleading. If the speech in question passes that test, then the government must show that its interest in regulating that speech is substantial. If the government interest is determined to be substantial, then the third prong of the *Central Hudson* test demands the government show that the proposed regulation will directly advance its asserted interest. Finally, under the fourth part of the test, the government must show that its proposed regulation is in proportion – that it is not more extensive than needed to carry out the government interest.<sup>51</sup> In 1989, the court clarified the test to say the proposed regulation need only be a “reasonable fit” with the government’s interest, with the means “narrowly tailored to achieve the desired objective.”<sup>52</sup> Seven years later, the justices reaffirmed the court’s commitment to the *Central Hudson* test in *44 Liquormart v. Rhode Island*, with Justice John Paul Stevens delivering the court’s strongest statement yet in support of First Amendment protection for commercial speech.<sup>53</sup>

To apply the *Central Hudson* test to the PIPA and SOPA regulations, we must first consider the nature of the peer-to-peer network in question. A site like The Pirate Bay would present an easy target for the first part of the test. Its founders proudly advertised the site as a device intended to circumvent copyright law. The speech involved concerned an illegal act, and thus does not meet the first standard for protected speech under the commercial speech doctrine.

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50 *Central Hudson v. Public Service Commission* 457 U.S. 557 (1980).

51 *Central Hudson*, 447 U.S., at 9;

52 *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989).

53 *44 Liquormart*, 517 (1996).

Playing out the *Central Hudson* test, however, reveals more complicated issues involving The Pirate Pay and the proposed PIPA and SOPA enforcement mechanisms. The government could argue that its interest – protecting copyright law – is substantial. But what about the third and fourth prongs of *Central Hudson*? The third question asks whether the government interest will be advanced. Under PIPA and SOPA, the government could have blocked the Internet address of web sites deemed to be dedicated to copyright infringement. But there is serious doubt among technologists and other Internet experts whether this action would actually deter a rogue site. Savvy web operators can easily shift to a new Internet address and be up and running again in a matter of minutes. Moreover, a targeted site could use a web proxy server, which can disguise the original Internet address and make it nearly impossible to locate the transgressing site. Consider the actual case of The Pirate Bay, for example. The Swedes who launched the site believed Swedish law protected them from prosecution. But in 2009, a Swedish court convicted the founders of the file-sharing site of abetting the violation of copyright law. The four men were sentenced to one year in prison and ordered to pay the equivalent of \$4.5 million in restitution.<sup>54</sup> While the Swedes appealed the ruling, their site reappeared under new management and a new name – PirateBay.org, rather than ThePirateBay.org – and essentially resumed business as usual.<sup>55</sup> Under the proposed new laws, the government could have blocked the web address of the new PirateBay.org, but the site could simply move to a new address. That game of whack-a-mole could be endless.

The fourth part of the *Central Hudson* test asks whether the government regulation is drawn narrowly so that it is no more extensive than necessary. Even when targeting a dedicated infringing site like The Pirate Bay, the new laws would have failed this test. Free speech and human rights advocates argue that allowing the U.S.

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54 “Swedish Court Upholds Pirate Bay Conviction,” Reuters, Nov. 26, 2010. <http://www.reuters.com/article/2010/11/26/sweden-piratebay-idUSLDE6AP1FJ20101126>

55 “The Pirate Bay Adds Domain to Bypass Court Order,” *Wall Street Journal Online*, Oct. 6, 2011. <http://online.wsj.com/community/groups/censorship-america-1369/topics/pirate-bay-adds-domain-bypass>

government to block web sites addresses sets a dangerous precedent and will encourage authoritarian governments to do the same. Washington frequently condemns China on principle for blocking Internet sites with which it disagrees. Will Beijing cite PIPA and SOPA and accuse Washington of hypocrisy? Of even more concern is the potential impact on security on the Internet. Technologists argue that allowing one country to block specific Internet address protocols disrupts the global network that comprises the Internet. Web security is based on the principle that any query submitted anywhere on the network will return with the same answer. Ironically, by blocking some Internet addresses, the U.S. government will make it more difficult to track the location and activity of other criminal sites.<sup>56</sup> Terrorist groups who use the Internet to recruit and communicate, for example, would find it easier to cover their tracks because of the enforcement mechanism in PIPA and SOPA.

Because it would fail the first test under *Central Hudson*, The Pirate Bay would not warrant First Amendment protection. Thus applying the final three questions might be seen as a mere academic exercise. But the problems identified in the final two prongs of *Central Hudson* would emerge as real and contentious issues when the peer-to-peer network in question falls the grey area. Like Dimeadozen.org, such a network strives to abide by intellectual property law, but it is clearly used on occasion for the illegal download of copyrighted material. Perhaps even more than “on occasion.” Would that warrant a justice department death penalty for that peer-to-peer network? If the case is determined exclusively based on copyright law, perhaps so. But such a ruling would also destroy the legal speech and commercial activity that flows through that piece of social media.

By applying the *Central Hudson* test, we can see the danger measures such as PIPA and SOPA would pose to peer-to-peer networks like Dimeadozen.org that fall into this grey area. Dimeadozen.org follows copyright law as outlined by the Digital Millennium Copyright Act and thus would pass the first test of Central Hudson; the speech on dimeadozen.org would warrant First Amendment protection.

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<sup>56</sup> “Protect IP Copyright Bill Faces Growing Criticism,” CNET.com, Jan. 7. 2011. [http://news.cnet.com/8301-31921\\_3-20069824-281/protect-ip-copyright-bill-faces-growing-criticism/](http://news.cnet.com/8301-31921_3-20069824-281/protect-ip-copyright-bill-faces-growing-criticism/)

The government could pass the second test by arguing the measures are a legitimate effort to curb a significant problem – online piracy. But the measures fall short on prongs three and four. The enforcement mechanisms would only stop sites that abided by the law; rogue sites would simply change Internet addresses. Further, the mechanisms would block the free speech flowing through the dimeadozen.org network and chill potential new peer-to-peer sites from setting up operation. And the new enforcement mechanisms would continue to impact Internet security and endanger free speech worldwide.

The theft of intellectual property is a legitimate concern. Copyright laws encourage individuals and companies to expend time and resources on artistic and commercial products. They do so with the knowledge that their intellectual property will be protected. If they generate a popular item, they believe they will be rewarded. But the legal weight placed on protecting intellectual property should be kept in proper proportion. In balancing the desire to prevent copyright infringement, the government and the courts should acknowledge a similar need to encourage technological innovation and to protect a core constitutional right – free speech. As a component of the emerging social media landscape, peer-to-peer networks play an increasingly important role in fostering free speech, both political and commercial. The entertainment industries have an array of powerful tools currently available to fight piracy. Those industries and U.S. lawmakers should continue the effort to improve global enforcement of copyright infringement laws through international trade pacts such as the Anti-Counterfeiting Trade Agreement, signed in October 2011.<sup>57</sup> The conviction of The Pirate Bay and its founders provides a dramatic example of how international cooperation can help curb piracy. But the focus of the crackdown should remain on individuals who commit egregious theft, not on innovative technologies that show promising legal and non-infringing uses. The enforcement mechanisms that were considered in the PIPA and SOPA laws would have done too little to protect copyright to risk the potential collateral damage they would have caused to free speech.

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<sup>57</sup> “U.S. Signs International Anti-Piracy Accord,” *Wired Magazine*, Oct. 3, 2011. <http://www.wired.com/threatlevel/2011/10/united-states-signs-acta/>