The False Origins of the Induce Act

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THE FALSE ORIGINS OF THE INDUCE ACT

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I. INTRODUCTION

For the entertainment industry, the battle over peer-to-peer technology ("P2P") took a turn for the worse during the summer of 2004. After federal courts outlawed Napster,\(^1\) Scour,\(^2\) MP3.com\(^3\) and Aimster\(^4\) in a series of successive secondary liability litigations, companies belonging to the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) next challenged P2P software manufacturers in *MGM v. Grokster* but to no avail.\(^5\) Unlike the entertainment industry's previous prey, however, the defendants in *Grokster* did not have the same control over their P2P systems – and thus the same liability – as their predecessors.\(^6\) Thus, the plaintiff companies were compelled to argue an unprecedented set of theories – ones that, if adopted, would expand secondary copyright liability far beyond the reaches of the United States Supreme Court's decision in *Sony Corporation of America v. Universal City Studio, Inc.* ("Sony-Betamax")\(^7\) and even the United States Court of Appeals for the Ninth Circuit's holding in *A&M Records, Inc. v. Napster, Inc.* ("Napster").\(^8\) Rejecting the plaintiffs' unprecedented arguments, both the United States District Court for the Central District of California and the Ninth Circuit held that *Sony-Betamax* and *Napster* continued to define the boundaries of current secondary liability law.\(^9\) Both courts instructed plaintiffs that the proper forum for such a drastic alteration in the default rules for secondary copyright liability was Congress rather than the judiciary.\(^10\)

Following the courts' instruction, the RIAA and other entertainment contemporaries lobbied Senator Orrin Hatch, former Chairman of the Committee on the Judiciary, to introduce the Inducing Infringement of Copyrights Act of 2004 ("The Induce Act").\(^11\) Senator Hatch's intentions behind introducing the Induce Act were crystal clear – to overturn the Ninth Circuit's *Grokster* decision.

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2. Motion Picture Ass'n of Am. v. Scour.com, Inc., No. 00-CIV-5885 (S.D.N.Y. 2000). This case was filed but never litigated.
4. *In re Aimster Copyright Litigation*, 334 F.3d 643, 656 (7th Cir. 2003).
5. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1157 (9th Cir. 2004). Note: The author is counsel for one of the defendants in the *Grokster* case, Streamcast Networks.
6. *Id.* at 1158-60. See *supra* notes 1-5.
8. 284 F.3d 1091, 1096-98 (9th Cir. 2002).
and expand the reach of secondary copyright liability. Nonetheless, Senator Hatch introduced the Induce Act as if it were a mere codification of existing and analogous legal regimes. In making such a portrayal, he cited the following three origins of the standard of liability as provided under the Induce Act: (1) the current secondary liability standard in copyright law; (2) the Patent Act’s “active inducement” test; and (3) aiding and abetting liability in criminal law.

This article argues that, contrary to Senator Hatch’s introduction, the Induce Act was not a mere codification of existing and analogous legal regimes. Rather, the Induce Act reflected a radical and unprecedented departure from copyright law. Part II explains the legal background of the Induce Act. Part III challenges the validity of Senator Hatch’s portrayal of the Induce Act and includes the following subsections: (1) the false factual origins of the Induce Act; (2) the false legal origins of the Induce Act; and (3) the true origins of the Induce Act. Part IV explores the impact that the Induce Act would have, if passed. Part V discusses a preferred solution to the problem of P2P. Part VI concludes this article.

The goal of this article is to recognize a simple reality: the Induce Act is a controversial piece of legislation. Proponents justify the Act as deterring the damage that P2P is doing to the entertainment industry. Opponents contest the Act as a price too high to pay, especially in terms of limits on technological innovation. Regardless of the various policy benefits and drawbacks, the Induce Act must be debated for what it is—a radical shift, not merely a codification or adoption of current legal principles.

II. BACKGROUND LAW: STOP, REWIND, AND FAST-FORWARD AGAIN

A. Precedent Concerning Secondary Liability in the Copyright Litigation Context

Universal City Studio, Inc. ("Sony-Betamax"). In Sony-Betamax, two movie studio plaintiffs, Universal Pictures and Walt Disney Productions, sought to enjoin the sale of Sony Corp.'s Betamax video tape recorder ("VTR"). This device, plaintiffs argued, was built for one primary purpose - to permit end-users to copy television and movie programs on videotapes off the airwaves without authorization. Plaintiffs presented the following evidence at trial: (1) that Sony's executives knew that end-users would make such copies, both legally and illegally; (2) that Sony explicitly advertised the copying and storage features of the VTR to its customers; and (3) that Sony could have reduced the number of infringements substantially if they had installed a "jammer" into the Betamax that would have prohibited reproductions on content flagged by the copyright owner as copy-restricted.

The United States District Court for the Central District of California rejected plaintiffs' arguments that such evidence made Sony secondarily liable for copyright infringement committed by its customers. Relying on copyright's constitutional companion, the court imported patent law's protections for "staple articles of commerce" and refused to hold Sony liable as a contributor. The district court held that even though Sony's VTR could potentially lead to substantial copyright infringements, Sony's VTR was still a staple article because it had substantial non-infringing uses. On appeal to the United States Court of Appeals for the Ninth Circuit, plaintiffs again argued the thrust of their case that the primary use of the VTR, knowledge of its infringing uses, advertising infringing features, and the ability to reduce infringement rendered Sony secondarily liable for copyright infringement. The Ninth Circuit reversed the district court's judgment on the copyright claim, holding that when a technology's primary use is infringement, and when the manufacturer knew or should have known that their device would be put to such use, it can be held contributorily liable. The United States Supreme Court granted Sony's petition for writ of certorari. In a five-to-four decision, the Supreme Court supported the district court's adoption of the patent law test for contributory infringement,

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20 Sony-Betamax, 464 U.S. at 428-56.
21 Id. at 419-20.
23 Id. at 433-42.
24 Id. at 454-68.
25 Id. at 454 (relying on the "First Amendment[']s policy of providing the fullest possible access to information through the public airwaves") (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).
26 Id.
27 Sony Corp. of Am. v. Universal City Studios, Inc., 659 F.2d 963, 964 (9th Cir 1981).
28 Id. at 963-77.
29 Id. at 977.
finding that staple articles with substantial noninfringing uses were not prohibited by copyright law. Specifically, the majority held:

[T]he contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must 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. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

The Court further held that time-shifting, the act of recording a program off the air for later viewing, was capable of a substantial non-infringing use, thus making the VTR a staple article of commerce. Consequently, the Court found that Sony was not liable for contributory infringement. The four dissenting justices, led by Justice Blackmun, argued that instead of a bright-line rule, the Court should adopt a balancing test that weighs the non-infringing uses against the infringing uses.

Following Sony-Betamax, few cases advanced to the decision stage on this issue, in large part, due to the clarity in applying the bright-line rule established in Sony-Betamax. As long as a technology was merely capable of substantial non-infringing uses, a plaintiff could not successfully pursue a claim against such technology for contributory infringement under copyright law.

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31 Id. at 442.
32 Id. at 442.
33 Id. at 423.
34 Id. at 456.
35 Id.
36 Id. at 457-500 (Blackmun, J., dissenting).
37 Sony-Betamax, 464 U.S. at 428-56. The only reported appellate decision within the first 15 years of the Sony-Betamax decision was Vault Corp. v. Quaid Software Ltd., a Fifth Circuit case involving software for making copies of computer programs. 847 F.2d 255, 255-70 (5th Cir. 1988). In that case, the court had no problem applying the Sony-Betamax rule because even though Defendant’s software had many infringing uses (mass duplication), it also had substantial non-infringing uses (making backups). Vault, 847 F.2d at 255-70.
As a result, the world of technology exploded. From 1985 to 1999, the United States of America realized one of the largest expansions in innovation and technology in its history. With the Sony-Betamax rule governing secondary liability, venture capitalists and engineers could be assured that their digital devices would make it to market without copyright troubles, and lawyers could advise their clients with clarity and confidence as to the rules of secondary liability.\footnote{Id. at 442.}

In 1999, much of that changed when Napster, Inc. released a software program permitting millions of Internet users to copy files to their computers at an unprecedented rate.\footnote{A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002); A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901-11 (N.D. Cal. 2001).} The primary use of the Napster system was to exchange and copy music files back and forth among Napster users.\footnote{Napster, 284 F.3d at 1095; Napster, 114 F. Supp. 2d at 901-11.}

Once again, plaintiffs from the entertainment industry brought suit in \textit{A & M Records, Inc. v. Napster, Inc.}\footnote{Napster, 114 F. Supp. 2d at 911-27.} arguing that even if Napster had the capability for substantial non-infringing uses, the company contributed to copyright infringement by indexing every traded music file on the Napster server.\footnote{Id. See also Napster, 284 F.3d at 1096-99.} Both the United States District Court for the Northern District of California and the Ninth Circuit found such reasoning persuasive.\footnote{Napster, 284 F.3d at 1096-99.} The Ninth Circuit held that because Napster provided the “site and facilities” for infringement by providing a centralized index server that was under its control, it could be held liable for the infringements of its users.\footnote{Id. See generally Motion Picture Ass’n of Am. v. Scour.com, Inc., No. 00-CIV-5885 (S.D.N.Y. 2000); In re Aimster Copyright Litigation, 334 F.3d 643, 656 (7th Cir. 2003)}

During the following three years, the entertainment industry relied heavily on the holding of \textit{Napster} in digital copyright litigation.\footnote{Id. For purposes of copyright law, even when there are noninfringing uses of an Internet file-sharing service, if the infringing uses are substantial, then to avoid liability as a contributory infringer, the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses. \textit{Aimster}, 334 F.3d at 656.} The RIAA and MPAA employed and manipulated the Ninth Circuit’s ruling to successfully sue several other P2P companies (such as Audio Galaxy, Scour, and Aimster), primarily because they too utilized central servers to assist all uploading and downloading.\footnote{Id.}
The "site and facilities" theory of liability reached a pinnacle in July of 2003 when the RIAA and MPAA companies succeeded in convincing the United States Court of Appeals for the Seventh Circuit to affirm an injunction against *Aimster*. 48 *Aimster* was a service much like *Napster*, except that it had limited itself technologically from interfering with end-user uploading and downloading by encrypting all traffic through its central server so that it could not tell what files were being traded. 49 Judge Posner, writing for the Seventh Circuit, rejected this defense. 50 The court held that *Aimster* had failed to prove that its service had any substantial non-infringing uses. 51 The court further held that by instructing users on how to infringe (with infringing examples) and purposely encrypting its traffic, *Aimster* was guilty of "willful blindness" and was thus secondarily liable for infringements of its end users. 52 In this decision's dicta, Judge Posner addressed the ruling and policy set forth in *Sony-Betamax*. 53 In a lengthy discussion, Judge Posner concluded that a weighing of infringing uses versus non-infringing uses - the test explicitly advocated by the dissent in *Sony-Betamax* and rejected by its majority - was in fact, the better test. 54 Notably, Judge Posner did not address the conflict between his opinion and the *Sony-Betamax* decision. 55

During the *Aimster* litigation, the entertainment companies also sued a new generation of P2P companies, including Grokster, KaZaA and Streamcast (the makers of Morpheus). 56 In these litigations, the entertainment companies sued under the same theories, asserting the following claims against the defendant companies: (1) that the defendant companies' P2P products had few, if any, non-infringing uses; (2) that the defendant companies had both constructive and actual knowledge of numerous infringements using their software; and (3) that the defendant companies had the ability to implement control mechanisms in their software to prevent infringement. 57

In the *Grokster* litigation, the United States District Court of Central California and the Ninth Circuit panel, however, rejected the plaintiffs' theories. 58 Unlike *Napster* and *Aimster*, the above-stated courts found that the *Grokster* defendants used no centralized server to coordinate the transfer of

48 *Aimster*, 334 F.3d at 656.
49 Id. at 645-55.
50 Id. at 655.
51 Id. at 652-53.
52 Id. at 650-51.
53 Id.
54 *Aimster*, 334 F.3d at 649-54.
55 Id. at 645-56.
57 Id. at 1158-66.
files. Instead, each individual P2P application that a user downloaded onto their personal computer looked to other individual user applications on the Internet to create a collective group index without any guidance from any central or parent entity. Thus, the courts found that there was no connection whatsoever between the manufacturers of the P2P software and the activities of their users concerning usage of their software. Moreover, the Grokster defendants had introduced significant evidence of substantial non-infringing uses on the networks their software generated. Examples of such substantial non-infringing uses include the authorized sharing of music (such as Wilco, Dave Matthews Band, Phish, and Bella Fleck), movies, music licensed under the liberal Creative Commons non-commercial distribution scheme, public domain works (such as the Koran, the Bible, the complete works of Shakespeare), and numerous government documents. Much like the Supreme Court in Sony-Betamax, both the district court and the Ninth Circuit in Grokster were confronted with a technology that had numerous legal and illegal uses and defendants who, although knowing of the illegal uses, had no ability to police or control them as they occurred. In summarizing its findings, the Ninth Circuit said:

While Grokster and StreamCast in particular may seek to be the “next Napster,” Grokster I, 259 F. Supp. 2d at 1036, the peer-to-peer file-sharing technology at issue is not simply a tool engineered to get around the holdings of Napster I and Napster II. The technology has numerous other uses, significantly reducing the distribution costs of public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution.

It then went on to note that the district court’s grant of partial summary judgment to the Software Distributors is dictated by current precedent. Although the Copyright Owners advocated a significant expansion of the doctrines of contributory and vicarious copyright infringement, the court stated not only

59 Grokster, 380 F.3d at 1163-64; Grokster, 259 F. Supp. 2d at 1035.

60 Grokster, 380 F.3d at 1163-64.

61 Id. at 1161-62; Grokster, 259 F. Supp. 2d at 1035. There was some connection between Defendants’ servers and the P2P applications for the purpose of displaying advertisements while the program was running, but the Defendants had no way of knowing what the user was doing while the advertisements were on screen. Grokster, 380 F.3d at 1161-62. In fact, the user could be sitting idle at the keyboard or reading a book and the ads would be displayed in the same manner as if the user was searching or downloading music. Id.

62 Grokster, 380 F.3d at 1161-62; Grokster, 259 F. Supp. 2d at 1035.

63 Id.

64 Id.

65 Grokster, 380 F.3d at 1164.
would such a renovation conflict with binding precedent, it would be unwise. The court recognized taking that step would satisfy the Copyright Owners’ immediate economic aims. However, the court stated that this would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context. The Court went on to say:

Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 1999). The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude. Indeed, the Supreme Court has admonished us to leave such matters to Congress. In *Sony-Betamax*, the Court spoke quite clearly about the role of Congress in applying copyright law to new technologies. As the Supreme Court stated in that case, “The direction of Art. I is that Congress shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress.” 464 U.S. at 456 (quoting *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972)).

B. Inducing Infringement of Copyrights Act of 2004

As a result of the *Grokster* ruling, the entertainment companies lobbied Senator Orrin Hatch, Chairman of the Committee on the Judiciary, to introduce the Inducing Infringement of Copyrights Act of 2004. The language of the act was brief. The Induce Act states: “Whoever intentionally induces any violation [of the Copyright Act] shall be liable as an infringer.” The bill then states:

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66 *Id.* at 1166-67.
68 *Id.*
69 *Id.* § 2(g)(2).
In this subsection, the term intentionally induces means intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.\textsuperscript{70}

This test, while seemingly simplistic in its formulation, subsequently generated a controversy concerning the standard for liability under copyright law.\textsuperscript{71} The reason being, the Induce Act described a general standard but, in contrast to \textit{Sony-Betamax}, did not provide any guidance as to the boundaries of liability.\textsuperscript{72} To exemplify the controversy that followed, soon after the Induce Act’s introduction, intense debate transpired among technology policy analysts as to whether the act preserved or overturned the \textit{Sony-Betamax} protections themselves.\textsuperscript{73} Much of the debate focused on whether the Induce Act would be seen as a “mandate” on technology companies, forcing them to radically redesign their technology in order to avoid any appearance that they might be aiding and abetting infringement.

In response, Senator Hatch made numerous assurances, both in introducing the bill and later at a hearing on the bill, asserting that the Induce Act was not a radical departure from current copyright law and, in fact, was heavily based upon current doctrines in patent and criminal law.\textsuperscript{75} However, when the Induce Act and its congressional record are examined more closely, numerous statements by Senator Hatch turn out to be inaccurate, both in terms of their facts and their explanation of the law.\textsuperscript{76}

\textsuperscript{70} Id. § 2(g)(1).
\textsuperscript{73} \texttt{http://www.washingtonpost.com/wp-dyn/articles/A6843-2004Jul22.html} (last visited Apr. 11, 2005).
\textsuperscript{76} Id.
III. Analysis

A. The False Factual Origins of the Induce Act

In his floor statement introducing The Induce Act, Senator Hatch explained his philosophical (and apparently literary) basis for liability under the Induce Act:

Mr. President... it is illegal and immoral to induce or encourage children to commit crimes. Artists realize that adults who corrupt or exploit the innocence of children are the worst type of villains. In Oliver Twist, Fagin and Bill Sikes profited by inducing children to steal. In the film Chitty-Chitty Bang-Bang, the leering “Child-Catcher” lured children into danger with false promises of “free lollipops.” Tragically, some corporations now seem to think that they can legally profit by inducing children to steal— that they can legally lure children and others with false promises of “free music.”

He then went on to scold these “Child-Catchers” not only for their illegal conduct but also for their attempt to evade law enforcement by “intentionally structur[ing] their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares.”

Both of these premises are misleading. First, none of the defendants in Grokster were “lur[ing] children and others with false promises of ‘free music’” on P2P networks. The reality is that free, legal music does exist on P2P networks in substantial quantities. There is nothing false about this promise. As the Ninth Circuit noted in its Grokster opinion, bands such as Dave Matthews Band, Wilco, Bella Fleck and Phish have authorized their fans to trade various songs on P2P networks. Moreover, thousands of new artists are using liberal copyright licenses such as Creative Commons to allow free sharing of their works, both auditory and visual. This is above and beyond the massive amount of public domain works available on P2P, via Project Gutenberg.

77 Id.
78 Id.
79 Id.
80 Id. at S7189-90.
82 Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd., 380 F.3d 1154, 1161 (9th Cir. 2004).
83 Id. at 1161-62.
Archives, and the Internet Archive. Such free material was the basis for the Ninth Circuit’s finding in Grokster that “it is undisputed that the software distributed by each defendant was capable of substantial non-infringing uses.”

Second, intentionally structuring one’s business to avoid liability is not an illicit act that should be punished; it is in fact the very basis of many legal practices in this country. One need only look to product liability law, labor law, environmental law, tax law – even criminal law – to see numerous examples where lawyers are constantly counseling their clients on the limits of the law and advising them as to how to maximize business profitability without crossing the legal line. Patent law is also a prime example of this kind of business model, where companies are constantly turning to lawyers to construe the boundaries of patent claims so they can design around any conduct that would make them potentially liable for infringements. As such, it cannot be, as Senator Hatch asserts, that “intentionally structur[ing] . . . businesses to avoid secondary liability . . . while benefiting financially” is alone a legitimate reason to change the law to impose additional sanctions.

On July 22, 2004, Senator Hatch also made a misleading statement at the Senate Committee on the Judiciary’s hearing on the Induce Act. In his testimony at the hearing, Senator Hatch said:

[The Induce Act] is technology neutral: It does not single out peer-to-peer networking technology for punitive regulation just because a few bad actors have misused it. This technology has intriguing, legitimate uses: Pioneering companies like Wurld Media, Snowcap, and UniConnect Software in Utah are developing innovative and legitimate new peer-to-peer services for consumers. [The Induce Act] thus targets only bad behavior – and only intentional behavior that is bad enough to trigger criminal liability under existing law. This type of behavior-based, technology-neutral approach has been long advocated by technology interests.

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89 See WMS Gaming, Inc. v. Int’l Game Technology, 184 F.3d 1339, 1355 (Fed. Cir. 1999) (noting patent law encourages competitors to design around existing patents).
90 Id.
92 Id.
Senator Hatch had alluded to this before in his floor statement where he said “[f]or example, the designers of most filesharing software choose to lack the ability to remove or block access to files known to contain viruses, child pornography or pornography mislabeled to be appealing to children” and “[w]orse yet, artists must sue their fans for the sin of misusing devices designed to be easy and tempting to misuse.” He also said, “[a] secondary-liability rule that punishes control and immunizes inducement is a public-policy disaster. It seems to permit the distribution of ‘piracy machines’ designed to make infringement easy, tempting, and automatic.” He went on to say: “[u]nfortunately, ‘piracy machines’ designed to mislead their users are just one of the perverse effects of a secondary-liability rule that punishes control and immunizes inducement.”

Senator Hatch’s attempt to distinguish “good” versus “bad” technology based on its design is also misleading. Any bill that defines a “good” technological design versus a “bad” technological design cannot be technology neutral. It would be like saying a law banning “good” speech while allowing “bad” speech is content neutral under the First Amendment. Here, Senator Hatch is clearly giving preferential treatment to technologies that attempt to filter out copyrighted works (which he even mentions by name) and denounces technologies that “choose to lack” these features and are designed for their ease of use. There is nothing neutral about such an approach.

B. The False Legal Origins of the Induce Act

In his floor statement and hearing testimony, Senator Hatch identified the following three legal origins to support enactment of the Induce Act: (1) current copyright law; (2) patent law’s “active inducement” standard; and (3) criminal law’s “aiding and abetting” doctrine. However, each of these is false and will be discussed in turn.
1. The First False Origin: The Induce Act Is Not a Codification of Current Copyright Law

In his floor statement, Senator Hatch said, “[t]his bill will also preserve the Sony-Betamax ruling without reversing, abrogating or limiting it. The Induce[] Act will simply import and adapt the Patent Act’s concept of ‘active inducement’ in order to cover cases of intentional inducement that were explicitly not at issue in Sony.” Senator Hatch makes two assertions in this statement. First, that the Induce Act is consistent with Sony-Betamax’s protection of staple articles of commerce. Second, that the Induce Act codifies additional secondary liability implicitly recognized by the Sony Court. Both assertions are inaccurate.

First, nothing in the language of the Induce Act protects a manufacturer, seller, or distributor of a device with substantial non-infringing uses from an “inducement” suit for the mere act of making, selling, or distributing the device. This protection was the explicit safe harbor recognized in Sony-Betamax. While the Induce Act states, “[n]othing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement or require any court to unjustly withhold or impose any secondary liability for copyright infringement[,]” this statement is deceptive. Not enlarging “vicarious or contributory liability” does not provide that Sony-Betamax’s “staple article of commerce” defense will apply to allegations of an independent claim of inducing infringement.

Thus, notwithstanding its attempt to acknowledge the limitations of contributory and vicarious liability, the Induce Act attempts to undermine Sony-Betamax by creating a new theory of secondary liability, inducement, that Sony-Betamax’s “staple article” rule does not protect against.

Second, the Induce Act codifies a radical departure from traditional secondary liability in copyright law; nothing in the act’s language derives from the Sony-Betamax case, explicitly or implicitly. In fact, what it proposed was in direct contradiction to the limits on secondary liability explained in Sony-Betamax. Secondary liability cases in copyright law can historically be divided

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104 Id. at S7192.
105 id.
106 Id.
108 Id.
110 Id.
111 Id.
113 Id.
114 See Sony-Betamax, 464 U.S at 442.
115 Id.
into two types. First, those in which the defendant had some form of control over third-party infringement and, second, those in which the defendant produced a product that had no use other than infringement. The following discussion of the two types of secondary liability demonstrates the Induce Act’s distinct departure from traditional copyright law.

The first type of secondary liability case is those cases in which the defendant had some form of control over third-party infringement. This type of secondary liability is also referred to as the “ability to control” theory. One of the earliest cases to find contributory copyright infringement under this theory is Shapiro, Bernstein & Co. v. H.L. Green Co. In Shapiro, an owner of a chain of retail stores hired the direct infringer to run its record departments. The United States Court of Appeals for the Second Circuit held the defendant contributorily liable for copyright infringement because under this contractual relationship, the defendant could control the third-party’s conduct.

Another example is Gershwin Publishing Corp. v. Columbia Artists Management, Inc. In this case, defendants were a management company established to support artists and local performance groups. Meanwhile, the artists were performing copyrighted works without authorization. The United States Court of Appeals for the Second Circuit held that the “contributory infringer... was in a position to police the infringing conduct of the artists, and derived substantial benefit from the actions of the primary infringers” and therefore liable. This case is most famous for its single-line quote that many have used to define the modern day test for contributory infringement: “One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a
However, when one looks at the facts of Gershwin, one can see that the court referred to inducement as a way of describing overt acts of control, supervision, and promotion. The defendant in Gershwin had “organize[d], nurture[d] and maintain[e]d” hundreds of infringing third-party associations and had sent “field representatives” to visit each infringing organization every concert season, meeting with their management, reviewing their budgets, assisting in their tentative selection of artists, and helping plan their concert schedule. The defendant also supplied the artists to perform at many of these events and printed up programs for each concert to promote it. These programs always included the specific names of the musical works to be played, none of which were cleared with plaintiff. In other words, there was active conduct—not the sale of a staple article—that directly increased specific infringement of specific copyrighted works with the actual knowledge that those works were being infringed at the promoted events. This conduct created a direct relationship with each infringer and allowed the defendant to supervise and control all infringing conduct. In fact, in Gershwin, the ability to control was even more glaring than in Shapiro, and went beyond even the modern vicarious cases such as Napster. Thus, the United States District Court for the Southern District of New York found that the defendant was liable for “organizing, supervising, and controlling” the local performances and by “knowingly participat[ing]” in the infringement were contributors. The United States Court of Appeals for the Second Circuit affirmed, finding that defendant’s “pervasive participation in the formation and direction of this association and its programming of compositions presented ample support [for] the district court’s finding that it had caused this copyright infringement.”

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128 Id. at 1162.
129 Id. at 1160-63.
130 Id. at 1161.
131 Id.
132 Gershwin, 443 F.2d at 1161.
133 Id. at 1161-63.
134 Id.
135 Compare Gershwin, 443 F.2d at 1160-63, with Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 305-10 (2d Cir. 1963), and A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1091-99 (9th Cir. 2002).
137 Gershwin, 443 F.2d at 1163 (citing Gershwin, 312 F. Supp. at 583). See also Kalem Co. v. Harper Bros., 222 U.S. 55 (1911). In Kalem, the Court held the defendant liable not merely for supplying the means to “accomplish an infringing activity,” but for supplying the infringing work itself. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 438 (1984) (citing Kalem, 222 U.S. at 55). In Kalem, the Court further noted that subsequent lower court precedents were limited: they involved “an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred,” where the latter “was in a position to control
Another exemplary case of the “ability to control” theory is *Fonovisa, Inc. v. Cherry Auctions, Inc.*, one of the predecessors to the *Napster* case.\(^{138}\) In *Fonovisa*, the record company plaintiffs filed a contributory infringement claim against a flea market provider, claiming that because the provider knew that infringing music CDs were being sold in the marketplace and did nothing to stop it, it should be held liable even though it had no active role in the direct infringement.\(^{139}\) The defendant flea market provider allowed vendors to sell counterfeit recordings of music in violation of the plaintiff’s copyrights.\(^{140}\) The Ninth Circuit agreed, holding that because the flea market had hired security guards for each event and rented booths to the infringers that the guards could police, it had the ability to intervene and control the sale of infringing goods.\(^{141}\) The *Napster* and *Aimster* cases also followed this trajectory, finding that the architecture of both systems allowed the companies to supervise and control infringing conduct because any infringer had to use their servers to accomplish any illegal conduct.\(^{142}\)

The second theory for holding defendants secondarily liable derives from *Sony*’s “staple article of commerce” rule.\(^{143}\) Under this rule, infringement occurs when the defendant has no ability to supervise and control infringing activity but instead provides some sort of contribution to make infringement easier or more successful.\(^{144}\) As described above, the *Sony* case defines the legal limitations in such circumstances, holding that as long as the contribution provided has some substantial non-infringing use, the provider cannot be held liable for the infringing acts of its users without actual knowledge at the time of the contribution.\(^{145}\) In contrast, when a component has no significant non-infringing

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\(^{138}\) *Fonovisa*, Inc. v. Cheery Auction, Inc., 76 F.3d 259, 261-65 (9th Cir. 1996). *See also A&M Records*, 284 F.3d at 1091-99.

\(^{139}\) *Fonovisa*, 76 F.3d at 260-61.

\(^{140}\) *Id.*

\(^{141}\) *Id.* at 261-65.

\(^{142}\) Compare *Fonovisa*, 76 F.3d at 261-65, with *A&M Records*, 284 F.3d at 1091-99, and In re *Aimster Copyright Litigation*, 334 F.3d 643, 649-55 (7th Cir. 2003).


\(^{144}\) *Id.* at 442.

\(^{145}\) *Id.* at 428-56; *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 380 F.3d 1154, 1158-66 (9th Cir. 2004); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 255-70 (5th Cir. 1988).
uses, the distributor can be held liable as a contributor. Other courts have also found that the contribution must be specifically aimed at copyrighted content and not some generally applicable product or service.

Notably, the legislative history of the 1976 Copyright Act supports the aforementioned classifications of types of secondary liability. The House Report for the 1976 Copyright Act references but one example of “contributory infringers” – a classic case of direct participation in infringement of public performance rights: “for example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engaged in the business of renting it to others for the purpose of unauthorized public performance.” By contrast, the same report, in discussing “vicarious liability for infringing performances, noted that the committee had rejected an amendment to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent contractor. The committee explained,

to be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit [sic] from the infringing performance.

Thus, the current limits on secondary liability in copyright are focused on the ability to control the infringer’s conduct and the actual and potential substantial non-infringing uses of products or services, not solely on the intent or design choices of the manufacturer, seller, or distributor. The Induce Act, on the other hand, focuses entirely on the intent and/or design, using proxies like “reasonably available information” and “commercial viability” which have never

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149 Id.
150 Id.
151 Id.
been part of secondary copyright liability. It contains no limitations based on one’s lack of ability to control infringement or the actual or potential non-infringing uses of one’s product or service.

These distinctions are not accidental or incidental. From a technology policy point-of-view, using “ability to control” and “staple article of commerce” tests to limit indirect liability makes sense, especially in light of Congress’ enactment of statutory damages for copyright infringement. By limiting secondary liability to situations in which there is an ability to control third-party conduct or where a product has been designed with no other practical uses than infringing copyrights, one can be held liable for third-party infringements on a one-to-one basis. However, when one cannot control third-party use of one’s product or service or provides technology with substantial non-infringing uses, one has no ability to regulate or control potential damages; therefore liability is neither fair nor prudently imposed.


As noted above, Senator Hatch stated in his hearing testimony that the Induce Act “will simply import and adapt the Patent Act’s concept of ‘active inducement.’” However, like Senator Hatch’s other statements, this assertion is also incorrect.

In patent law, active inducement is defined by statute. Specifically, Title 35 § 271(b) of the United States Code states, “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” While this language is textually similar to the language in the Induce Act, the remaining sections of the patent statute along with the long history of patent case law, make it clear that the meaning of this language in patent law is drastically different from its use in the Induce Act. First of all, in the patent context, the active inducement
standard is tempered by the “staple article of commerce” test that the Supreme Court applied in Sony.\(^\text{164}\) Section 271(b) is directly followed by § 271(c)\(^\text{165}\) which lists the “staple article of commerce” standard from which the Supreme Court derived its Sony test.\(^\text{166}\) In the legislative history of § 271, Congress and the section’s authors make it clear that both §§ 271(b) (active inducement) and 275(c) (sale of a component) collectively define all of the basic principles of contributory infringement in patent law.\(^\text{167}\)

Furthermore, the elements of active patent inducement, as defined by the courts, also show the clear differences between the Induce Act and § 271(b).\(^\text{168}\) To establish active patent inducement, the plaintiff is required to show four distinct elements: (1) knowledge of the asserted patent, (2) direct infringement by third party, (3) the inducer’s actual intent to induce infringement, and (4) commission of an affirmative act that constitutes inducement, not merely the power to act or the failure to act.\(^\text{169}\) Thus, to show active patent inducement there is no inquiry into what was “reasonable” for the inducer to know at the time he acted,\(^\text{170}\) as well as there is no inquiry into the “commercial viability” of the product or service the defendant was providing, which are the only two tests the Induce Act requires to assess liability.\(^\text{171}\)

Moreover, the “staple article of commerce” defense applies to any accusation of active inducement.\(^\text{172}\) Specifically, both the leading patent treatise writer\(^\text{173}\) and the Federal Circuit Court of Appeals have explicitly reaffirmed the viability of the “staple article” defense in the inducement context.\(^\text{174}\) For example, in Warner-Lambert Co. v. Apotex Corp.,\(^\text{175}\) the Federal Circuit stated, “[e]specially where a product has substantial noninfringing uses, intent to induce infringement cannot be inferred even when the defendant has actual knowledge that some users of its product may be infringing the patent.”\(^\text{176}\) Also, in

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\(^{166}\) See Sony-Betamax, 464 U.S. at 456.


\(^{173}\) See 5 CHISUM, supra note 169, at § 17.04 (determining that the mere sale of a staple with knowledge of the buyer’s intended use does not constitute active inducement).

\(^{174}\) See Warner-Lambert, 316 F.3d at 1365.

\(^{175}\) 316 F.3d 1348 (Fed. Cir. 2003).

\(^{176}\) Id. at 1365.
Dynacore Holdings Corp. v. U.S. Phillips Corp.,\textsuperscript{177} the court held that "[a] seller of goods is only liable for active inducement if, in addition to the sale of that product, active steps are taken to encourage direct infringement."\textsuperscript{178} Thus these two cases reiterate the premise from Sony, that no matter how "reasonable" it was for the seller to know how such sales impacted the "commercial viability" of his product or service, the mere sale of a staple article of commerce cannot be the sole basis for secondary liability.\textsuperscript{179}

In terms of what conduct may lead to an inference of intent to induce, patent courts have held that a wide array of behavior\textsuperscript{unrelated to the design of a staple article} can support a finding of intent.\textsuperscript{180} Specifically, courts have found conduct

\textsuperscript{177}Dynacore Holdings Corp. v. U.S. Phillips Corp., 363 F.3d 1263 (Fed. Cir. 2004).

\textsuperscript{178}Id. at 1276. \textit{See also} Giles S. Rich, \textit{Infringement Under Section 271 of The Patent Act of 1952}, 21 GEO. WASH. L. REV. 521, 535-42 (1953). "The supplying of both the means and the instructions is an important aspect of these cases." \textit{Id.} at 538.

The seller should not be liable under paragraph (b) for \textit{merely} selling because merely selling a staple is not what is meant by "active inducement." Everyone is free to sell staples and their first cousins the "commodities of commerce suitable for substantial non-infringing use," if that is all that is done.

\textit{Id.} at 541 (noting this is the clear intent of section 271 if one reads its legislative history). In fact, the initial version of the bill said in section 4 that:

\textit{The} \textit{mere} sale of any staple article or commodity of commerce \textit{not} especially made or especially adapted for use in a patented invention, and suitable for actual, commercial, non-infringing use, shall \textit{not of itself} constitute contributory infringement even though sold with the knowledge or expectation that it will be used in infringement of a patent.

\textit{Id.} at 542. This was combined for efficiency with section 3 and not meant to change the congressional intent at all. \textit{Id.} "To do so otherwise would run counter to fundamental principles of the patent system." \textit{Id.}

\textsuperscript{179}Moreover, to allow control over staple articles violates anti-trust and misuse principles. Rohm & Haas Co. v. Dawson Chem. Co., 599 F.2d 685, 704 n.24 (5th Cir. 1979). Many pre-1952 cases after the Supreme Court's cases Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) and Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) refused to enforce claims of contributory infringement under the misuse theory. Mercoid, 320 U.S. at 668-69; Motion Picture, 243 U.S. at 516. Section 271(d) of the Patent Act shows the Congressional balance that was set between contributory liability and misuse:

Since case law does not presently consider a patentee's \textit{mere} sale of staples used in his invention to be "misuse" (as long as he does not tie use of the invention to the purchase of the staple) ... we view the linkage [of 271(d) to 271(b)] as allowing such an innocent patentee to sue ... a competing seller of staples who is 'actively inducing infringement. The patentee's relief, however, would not be an injunction forbidding the defendants' sale of staples, since mere sale is not wrongful under either (b) or (c). Appropriate relief might extend to injunction against continuing to "actively induce" infringement, conduct forbidden by (b).

\textit{Rohm}, 599 F.2d at 704 n.24.

such as advertising, instructing, licensing, repairing, and maintaining for known infringers indicative of intent to induce. However, courts have never established that a design choice of a product with substantial non-infringing uses is indicative of intent to induce.

Another key difference between active inducement under the Induce Act and § 271(b) is that intent to actively induce patent infringement cannot be inferred from any failure to act without showing the ability to control the direct infringer or that the direct infringer is some kind of alter ego of the inducer. Specifically, the Federal Circuit Court in Tegal Corp. v. Tokyo Electron Co. held that:

facilitating . . . entails some affirmative act; it is not enough to show that [a party] failed to take steps to prevent . . . [i]ts affiliates from servicing [infringing machines]. In the absence of a showing of control over another party, merely permitting that party to commit infringing acts does not constitute infringement, and it likewise cannot constitute “facilitating infringing acts.”

However, the Induce Act does not specifically limit liability to affirmative acts. This is apparent when one compares the standard of § 271(b) (“active inducement”) with that of the Induce Act (“inducement”). Moreover, Senator Hatch made it abundantly clear in his floor statement that the choice not to include filtering technology would be sufficient to give rise to liability under the Induce Act. Thus, under § 271(b) an omission would not be actionable; however, under the Induce Act an omission would be sufficient to establish liability.

As the above analysis makes clear, the Induce Act differs from § 271(b) in four substantial ways: (1) the Induce Act can be violated by the mere sale of a staple article of commerce; (2) the Induce Act infers intent from design as well
as conduct; (3) the Induce Act is not limited to "active" inducement, thereby potentially covering omissions and failures to act; (4) the Induce Act creates "commercial viability" and "reasonableness" requirements that are not elements of analysis under § 271(b). Thus, the Patent Act's "active inducement" standard is not an origin of the Induce Act's proposed legal regime.

3. The Third False Origin: The Induce Act Is Not Derived from Criminal Law

Finally, in his testimony, Senator Hatch alleged that the Induce Act is merely an importation of criminal law's theory of aiding and abetting to establish liability for copyright infringers. This type of rhetoric derives from the notion that file-sharing is "theft" and that the law should not treat file-sharers any differently from shoplifters. However, when one compares criminal law's doctrine of aiding and abetting with the rules set forth in the Induce Act, one can see serious differences between the two theories for establishing liability.

First and foremost, the Induce Act fails to recognize that the idea of establishing civil liability through the mechanism of aiding and abetting is not a well-established theory of law. Rather, "[a]iding and abetting liability traditionally applies to criminal offenses" and not civil ones. Another key distinction between criminal aiding and abetting and the Induce Act's version of aiding and abetting is that criminal aiding and abetting requires specific intent while the Induce Act's version only appears to require general or circumstantial intent. For example, in Central Bank of Denver v. First Interstate Bank of Denver, the Supreme Court held that in order to be liable for criminal aiding and abetting, prosecutors have to prove not only that the defendant had knowledge that his product would be used in the commission of an offense but also that he had "the purposive attitude of facilitating the offense." Thus, the defendant must "participate in [the venture] as in

192 See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.02 (3d ed. 2001); see also S. 2560, 108th Cong. (2004).
193 DRESSLER, supra note 192, at § 30.02.
194 See Elec. Lab. Supply Co. v. Cullen, 977 F.2d 798, 805 (3d Cir. 1992); see also Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356 (3d Cir. 1987).
195 See supra note 192.
197 See id. at 190.
something that he wishes to bring about, that he seeks by his action to make it succeed.198

In other words, establishing liability through aiding and abetting requires specific intent which is demonstrated by the defendant’s actions or statements directed towards a specific tangible objective, not simply from intent that “reasonable” people could infer from circumstantial evidence such as “commercial viability.”199 Moreover, criminal law’s aiding and abetting intent standard is not the same as the “natural consequences of one’s act” test which is the touchstone for “intent” in the civil tort context; thus, criminal intent required to aid a crime has “nothing whatever to do with the probability that the forbidden result [will] follow upon the accessory’s conduct.”200

Third, establishing liability through aiding and abetting in criminal law requires that there be some direct connection between the aider and the principal who committed the offense.201 In United States v. Superior Growers Supply, Co.,202 the Sixth Circuit dismissed an indictment that alleged the defendants, by occasionally providing various customers with information on how to grow marijuana, were guilty of aiding and abetting.203 Specifically, the Court held that an indictment merely alleging that the defendants provided information did not prove an intent to aid and abet “because it does not state that the publications or information were given with defendants’ knowledge that a particular customer was planning to grow marijuana, and with defendants’ intent to assist that customer in the endeavor.”204 Thus, for secondary criminal liability to attach, an abettor must have specific knowledge that a principal intended to commit a

198 Id. at 190. See also Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).
199 Nye, 336 U.S. at 619. See also DRESSLER, supra note 192, at § 23.04, stating:

A person is an accomplice if he assists “with the purpose of promoting or facilitating the commission of the offense.” Model Penal Code § 2.06(3)(a). This provision conforms with common law precedent. For example, if S drives P to a liquor store where P commits a robbery, S is guilty of robbery if his act of assistance (driving the automobile) was committed with the purpose of facilitating the commission of the offense; however, he is not guilty if he did not know what P intended to do in the store . . . . After considerable debate, the American Law Institute rejected the argument that complicity liability should apply to one who knowingly, but not purposely, facilitates the commission of an offense. See A.L.I., comment to M.P.C. § 206, at 314-19. For example, if S, a merchant, sells dynamite to P, with knowledge that P intends to use the explosives to blow open a safe, S is not an accomplice in the subsequent crime, unless it was his conscious object to facilitate the commission of the offense.

200 See Peoni, 100 F.2d at 402.
203 Id. at 181.
204 Id. at 178 (emphasis added).
particular criminal act prior to offering assistance to that actor. In contrast, the Induce Act allows intent to be inferred in a number of situations without such strict limitations.

Finally, the function of public prosecutors to serve as strong gatekeepers in the criminal law context is not present in civil laws such as the Induce Act. In criminal law, there may be many actors or entities that in some form or manner "assist" in the commission of a crime. However, because prosecutors have limited resources and public mandates, they often will use their discretion to focus only on the most culpable individuals for assisting principal actors. But, under the Induce Act, there is no such discretionary gatekeeper. Rather, the Induce Act gives a private civil right of action to any copyright holder against anyone that allegedly contributes to the infringement of the holder's copyright.

Such unbridled power could tempt copyright plaintiffs to go after parties that are less culpable but have deeper pockets. For example, in Perfect 10 v. Visa, an adult media company sued Visa and Mastercard for providing financial services to adult websites that allegedly reproduced and distributed the plaintiff's copyrighted works without its permission. Although Visa and Mastercard had no direct role in the infringements other than blindly processing payments for the online sites, because Perfect 10 had difficulty locating the oftentimes judgment-proof direct infringers, it turned its attention to the more easily located and well-funded credit card companies. Subsequently, the district court dismissed Perfect 10's suit for the reason that the court could not hold the defendants contributorily liable because it found that the defendants' services did not "directly assist" in any infringement.

Despite the outcome of this case, there is no doubt that to some degree, credit card companies "aid" infringing websites when they help them process sales of infringing content. However, under the Induce Act, there is no "direct assistance" requirement as there is for contributory infringement. Hence, theories such as those advanced in Perfect 10 may well be actionable under the

205 Id. at 180.
207 Id.
208 See supra note 199.
210 Id.
213 Id. at *1.
214 Id. at *3.
215 Id. at *5.
216 Id.
Induce Act depending on what a "reasonable person" would conclude about Visa and Mastercard's intent.\textsuperscript{218}

Prosecutorial discretion serves the purpose of preventing aiding and abetting liability from becoming a profit-driven device. With statutory damages as high as $150,000 per work at risk, there are great incentives for copyright owners to bring suits under the Induce Act like \textit{Perfect 10} and sizable incentives for defendants to settle.\textsuperscript{219} Public prosecutors have no such perverse incentives. Thus, discretion is another key difference between criminal aiding and abetting liability and civil secondary liability. In summary, the Induce Act's secondary liability scheme differs from criminal aiding and abetting liability in three major ways: (1) it lacks a specific intent requirement; (2) it lacks a direct connection requirement; and (3) it lacks the procedural safeguards of prosecutorial discretion.\textsuperscript{220}

C. The True Origin of Induce: \textit{Sony-Betamax}'s Losing Arguments

From the above analysis it is explicit that the Induce Act is not merely, as Senator Hatch suggests, a codification of current copyright law, an importation of the Patent Act's concept of active inducement nor of criminal law's aiding and abetting.\textsuperscript{221} What then are the true origins of the Induce Act's proposed legal regime?\textsuperscript{222} Although some of the Act's language and theories appear to have been pulled from various articles\textsuperscript{223} and Senate memorandum, the true origins of Induce's secondary liability scheme can be found, ironically, in \textit{Sony-Betamax} – not in the majority holding,\textsuperscript{224} but rather in the dissent,\textsuperscript{225} the Ninth Circuit's holding that was reversed,\textsuperscript{226} and in the respondents' arguments that were rejected by the Supreme Court.\textsuperscript{227}

1. The Sony-Betamax Dissent

\textsuperscript{220} See supra note 191.
\textsuperscript{222} \textit{Id.} See also supra text accompanying notes 152-38, 191, 224.
\textsuperscript{225} \textit{Id.} at 457-98 (Blackmun, J., dissenting).
\textsuperscript{226} \textit{See} Sony Corp. v. Universal City Studios, 659 F.2d 963, 963-77 (9th Cir. 1981).
\textsuperscript{227} \textit{See} Sony-Betamax, 464 U.S. at 417-56.
Much of the philosophy behind the Induce Act, if not its actual language, can be found, surprisingly, in Justice Blackmun's dissent in *Sony*.

For example, Blackmun wrote in his opinion that Sony should be held liable because "[i]t is undisputed in the case that Sony had reason to know the Betamax would be used by some owners to tape copyrighted works off the air." He also found particularly damning, the fact that Sony had advertised the Betamax as suitable for off-the-air recordings of "favorite shows," "novels for television," and "classic movies," with no visible warning that such recording could constitute copyright infringement. Blackmun further stated that "[i]n a case of this kind, however, causation can be shown indirectly; it does not depend on evidence that particular Betamax owners relied on particular [Sony] advertisements." Liability, Blackmun wrote, should be imposed on a defendant who "suggest[s], even by implication" that a third party use the defendant's goods to infringe the intellectual property of another.

Does Justice Blackmun's rhetoric from 1984 sound familiar? To find almost identical sentiments of it, one need only to look at Senator Hatch's Floor Statement introducing the Induce Act:

"The interfaces of most P2P software provide no warnings about the severe consequences of succumbing to the constant temptation of infringement." Moreover, Blackmun discussed and focused on Sony's "intent" for the Betamax to be used as a means to infringe upon copyrighted materials. Specifically, he stated, that "[o]ff-the-air recording is not only a foreseeable use for the Betamax, but indeed is its intended use. Under the circumstances, I agree with the Court of Appeals that . . . Sony has induced and materially contributed to the infringing conduct of Betamax owners."

Even the "reasonable" standard for inferring intent has an established basis in the Sony dissent. In *Sony-Betamax*, Respondents put forth undisputed evidence that Sony knew that its Betamax machines "would be used to record copyrighted programs." Respondents also utilized survey evidence that indicated with almost certainty that most users were, at one time or another, using the machines to make copies other than to simply "time shift" — though

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228 Id. at 457-98 (Blackmun, J., dissenting).
229 Id. at 489.
230 Id. at 489-90.
231 Id.
232 Id. at 489.
234 Id.
235 See *Sony-Betamax*, 464 U.S. at 465.
236 Id. at 490.
237 Id. at 457-98.
238 Id. at 426.
such time shifting was "the primary use . . . for most owners."²³⁹ In fact, 44% of users had more than 10 tapes in their video libraries, and 42.1% indicated that they planned multiple viewings even of programs taped the previous month.²⁴⁰

In response to this survey data, the dissent noted that the "surveys showed that the average Betamax user owns between 25 and 32 tapes."²⁴¹ Thus, the thrust of most of the dissenters' argument was that a reasonable person could have inferred from all the available circumstances that Sony knew and intended people to use its product for copyright infringement.²⁴²

Blackmun also specifically called out "commercial viability" as the appropriate test for determining whether Sony should be secondarily liable for end-user infringement.²⁴³ This is indicated in his statement, "if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed."²⁴⁴ Note that the Induce Act's commercial viability standard is identical to the one Justice Blackmun set forth.²⁴⁵

Finally, Blackmun's tone matched Senator Hatch's when talking about the affirmative steps "bad" technology companies should take to become "good" technology companies and avoid liability: "Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and 'jam' the unauthorized recording of them."²⁴⁶ By implying that companies who do not build such systems into their devices should be liable, Blackmun foreshadowed the Induce Act's affirmative duty approach to liability.

2. The Ninth Circuit Holding

The standard for secondary liability expressed in the Induce Act is also very similar to the one that the Ninth Circuit espoused in its lower court ruling in Sony-Betamax.²⁴⁷ Specifically, the Ninth Circuit held that Sony could be liable for the infringements of its users on the theory that it knew:

the Betamax will be used to reproduce copyrighted materials. In fact that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's

²³⁹ Id. at 423.
²⁴⁰ Id. at 424 n.4.
²⁴¹ See Sony-Betamax, 464 U.S. at 483 n.35 (Blackmun, J., dissenting); see also Sony Corp. v. Universal City Studios, 480 F. Supp. 429, 438-49 (C.D. Cal. 1979) (stating that Sony's survey showed average of 25 cassettes with off-the-air recordings).
²⁴² Sony-Betamax, 464 U.S. at 460-62.
²⁴³ Id. at 491.
²⁴⁴ Id.
²⁴⁵ Id.
²⁴⁶ Id. at 494.
²⁴⁷ See Sony Corp. v. Universal City Studios, 659 F.2d 963, 976 (9th Cir. 1981).
consumer appeal. The record establishes that appellees knew and expected that Betamax’s major use would be to record copyrighted programs off-the-air. 248

In other words, the Ninth Circuit would have found Sony liable because it intended to cause copyright infringement. 249 To elaborate on the evidence of Sony’s intent, the court pointed to Sony’s knowledge of how the product was to be used, the fact that infringement was the product’s “major use,” and the fact that infringement was the “source of the product’s consumer appeal.” 250 From the Ninth Circuit’s rationale, one can clearly see the connection to the Induce Act’s “reasonable expectation” and “commercial viability” requirements. 251 However, these standards were explicitly rejected by the Supreme Court in the Sony majority. 252

3. The Respondents’ Arguments

The themes of intent, reasonably available information, and commercial viability expressed in the Sony-Betamax case’s Ninth Circuit ruling were also repeated and expanded upon in the Respondents’ arguments before the Supreme Court. 253 For example, in their statement of issues, Respondents asked the Court to decide: “Whether those who manufacture, market, and sell [videotape recorders] with the intention and expectation that they be used primarily for copying entire copyrighted motion pictures are liable for such copying as contributory copyright infringers.” 254

248 Id. at 975 (emphasis added).
249 Id.
250 Id.
253 Id.
254 See Respondent’s Brief in Opposition of Writ of Certiorari at 5, Sony Corp. v. Universal, 464 U.S. 215 (1984) (No. 81-1687) (emphasis added); see also id. at 6, 16 stating:

Petitioners manufacture, advertise and sell to consumers VTRs under the brand name “Betamax” for the primary purpose of making copies of copyrighted television programming, including copyrighted motion pictures owned by respondents ... That use is intended, expected, encouraged, and the source of the product’s consumer appeal.

See also Respondent’s Brief on the Merits at 20, Sony Corp. v. Universal, 464 U.S. 215 (1984) (No. 81-1687), stating:

Given the district court’s findings and petitioners’ admissions that petitioners manufacture, advertise and sell Betamax for the primary purpose of reproducing programming from television, especially copyrighted motion pictures, that Betamax sales contribute to such copying, that petitioners know and intend that Betamax will be used to copy copyrighted works owned by
Respondents went on to note that "[b]ehind this assertion – at the heart of the case – is petitioners’ desire to reap tremendous profits from the sale of a device whose primary consumer appeal lies in its ability to reproduce copyrighted works without compensation to copyright owners." Primary consumer appeal, of course, is simply another way of stating commercial viability.

As noted above, the Sony-Betamax dissent pointed out that "Sony may be able . . . to build a [video recorder] that enables broadcasters to scramble the signal of individual programs and 'jam' the unauthorized recording of them." This point specifically came from the studios who repeatedly informed the Court about the possibility of "technological modification" for that very purpose. The Respondents also presented evidence that Sony, upon learning that broadcasters could deploy a jamming mechanism, engineered a system to circumvent the broadcaster's ability to use such techniques. Furthermore, the Respondents contended that Sony’s refusal to countenance a filtering mechanism showed that "there would be little, if any, market for [video recorders] if they could not be used for infringing purposes." Again, both Senator Hatch’s floor statements on the Induce Act and the “commercial viability” requirement in the Induce Act itself, echo the Respondents’ argument in Sony-Betamax.

Finally, the modern Copyright Owner’s Lament – whether or not to sue end-users directly – also contains echoes of ideas expressed in the Respondents’ Sony brief.
Thus, the true origins of the Induce Act are not well-established principles of law but rather arguments that have already been presented to the Supreme Court and rejected. Nonetheless, The RIAA and MPAA lobbyists and Senator Hatch took the Grokster court’s suggestion to pursue legislation not as an opportunity to explore new theories of liability but rather as an opportunity to resurrect old rejected theories of liability.

IV. IMPLICATIONS FOR THE INDUCE ACT

As the above analysis establishes, the Induce Act sought an unprecedented expansion of secondary liability for copyright infringement. Thus, it is critical that Congress study its implications closely before considering whether or not to adopt it into law. Among these important implications is not only the effect on current products but those on future products as well. Furthermore, the standard from Sony-Betamax has been the law of the land in technology policy for the last twenty years and to unearth it now will have vast implications for U.S. technology and the information economies.

It is often difficult, however, to assess the potential impact that proposed legislation will have on both the marketplace and innovation if it is ultimately enacted. To help simulate the potential impact that the Induce Act would have on the technology sector if enacted, the Electronic Frontier Foundation decided to draft a mock complaint under the Induce Act. The hypothetical complaint demonstrates how the recording industry could use the Induce Act to file suits against companies like Apple Computer, Toshiba, and C-Net Networks for inducing the infringement of musical copyrights via the iPod music player.


See supra notes 152-38 and accompanying text.

See Sony-Betamax, 464 U.S. at 417-56.

The complaint presents a case against Apple for designing and marketing the iPod, a product that allows consumers to store massive amounts of songs; against Toshiba for supplying the Apple with a special hard drive that enhances the iPod’s storage capacity, and against C-Net for explaining to its readers how to upload songs from iPods to unprotected computer hard drives. The case against Apple is grounded in the facts that (1) Apple has run an entire ad campaign on the theme of “Rip, Mix, Burn”; (2) iPods can store upwards of 10,000 songs, which is a far greater number of songs than the vast majority of consumers have legally purchased, and (3) that Apple has chosen not to restrict the iPod’s ability to play music solely to copy-protected formats, thereby allowing hundreds and thousands of file-sharers to “reap the benefits” of downloading unauthorized and unprotected songs via playback options on Apple’s portable music device.

The purpose of the complaint was not to indict Apple or even to argue that it would inevitably be held liable under the Induce Act. Rather, the purpose of the mock complaint was to show how radically the Induce Act could potentially alter the landscape of secondary copyright liability and to illustrate how easy it would be for copyright plaintiffs to file suits against digital technology producers that would survive both a motion to dismiss and even a motion for summary judgment. Because fact-intensive inquiries such as “commercial viability” and “reasonableness” would be at the heart of every cause of action under the Induce Act and because no bright-line Sony defense would be available, very few judges would ever allow a case to go anywhere but to a jury.

In addition, the complaint also demonstrates the vast amount of leverage that copyright plaintiffs would have over a company like Apple after filing such a suit. Because the Induce Act classifies every inducer as an actual infringer, Apple would potentially face liability for every single copyrighted work users illegally copied to use with its technology. Thus, even when calculating damages using the minimum statutory amount of $750, a single iPod user could potentially expose Apple to more than $75,000,000 in penalties. Given the fact that Apple has sold well over 7.3 million iPods, one can easily see that the risk of going to trial, even for a company like Apple, would be far too great to...

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270 Id.
271 Id.
274 Id.
275 Id.
277 Id.
Moreover, the mere cost of litigating these claims at trial would be almost unbearable. For example, SonicBlue, who was sued by several entertainment companies for allowing the users of its Replay TV Digital Video Recorder (similar to TiVo) to skip over commercials during playback, incurred legal fees close to $1,000,000 per month before finally deciding to close its doors and to file for bankruptcy. Thus, the mere risk of an Induce Act suit would be enough of a threat to cause companies to remove any potentially offending feature from its product or to submit to any copyright holder’s licensing demand.

Not only would technology manufacturers experience the consequences of this type of legislation, but the chilling effects would also be felt by those outside of the manufacturing industry. For example, venture capitalists who merely attempt to assess the risks of new digital technologies before investing would be flummoxed by the Induce Act: How could they calculate the likelihood that a product will be used for infringement before it is built? Furthermore, how could they calculate what a reasonable jury would infer based upon “all available circumstances?” These questions and calculations are especially troubling for startup companies who often struggle to secure long-term funding before they even have a prototype product to promote. Therefore, these questions and issues demonstrate the Induce Act’s ability to threaten and inhibit the funding of technology and other sectors that were the primary engines for US economic expansion in the late 1990s.

V. Solution

During the Induce Act debate, many who opposed the Act were asked, well, if this is not the solution, then what is? How should we address the difficulties presented by P2P? The answer to these questions is that no simple solution to the problem exists. However, if one looks back to Congress’ efforts over the years to address the problems when there is a conflict between technology and copyright exploitation, one can see a pattern – compulsory and voluntary

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279 Id.
280 http://www.eff.org/IP/Video/Newmark_v_Turner/ (last visited Apr. 12, 2005).
281 Id.
licenses. These licenses have allowed new technologies to disseminate copyrighted works widely while still compensating the copyright owners. For example, these licenses have been implemented and worked for piano players, radio, cable, satellite, web-casting, and even MP3s in both Europe and Canada. Therefore, they can also solve the problems associated with file-sharing and the P2P without invoking drastic measures like the Induce Act.

Also, such an approach is consistent with Congress’ past legislative acts and Copyright policy in general. For example, in the House Judiciary Report for the 1909 Copyright Act, Congress wrote:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

Thus, the House Report stated that:

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

Accordingly, every legislative approach to solving the copyright problems must be balanced. Even with the onslaught of file-sharing and the claims that such activities are reducing compact disc sales, there has been no evidence that less music has actually been produced or that the public has received less benefit from a lack of copyright incentives. Although it may be true that music producers are receiving less profit, this fact alone does not demonstrate that they

284 Id.
285 Id.
287 Id.
289 Id.
will produce less music. Moreover, the second question is key: How much will the monopoly granted be detrimental to the public? How detrimental would the Induce Act be to the public’s desire for new innovative technologies like the iPod? This question as well must be assessed fully and carefully by Congress before any legislation like the Induce Act is passed.

VI. CONCLUSION

Although some aspects of the Induce Act contain merit, it is a radical and unprecedented departure from the traditional standard for establishing secondary liability. Because it is such an extreme departure from the traditional standard, its pros and cons must be debated carefully and not swept under the rug of congressional procedure. Before a major change is enacted in copyright law and the settled expectations of the industry are overturned, the provisions of the act as well as its consequences must be studied and debated. Following legislative procedural precedent, this aforementioned process should be undertaken with respect to the Induce Act. In closing, Congress should proceed carefully and cautiously with regard to the Induce Act and not allow the rhetoric around file-sharing and P2P to blind it in pursuing appropriate solutions to the problems we currently face in modern-day copyright law.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MAJOR RECORD LABELS

Plaintiffs,

v.

APPLE COMPUTER, INC., TOSHIBA CORP.,
and CNET NETWORKS, INC.

Defendants.

NATURE OF THE ACTION

1. Plaintiffs, who together own the copyrights in more than 80% of all commercially
available sound recordings, bring this action under the Inducing Infringement of Copyrights Act of
2004 to stop Defendants Apple Computer, Inc. ("Apple"), Toshiba Corp. ("Toshiba"), and CNET
Networks ("CNET") from continuing to intentionally induce, aid, abet, and profit from the massive
infringements of Plaintiffs' copyrighted works by owners of Apple iPod music players ("iPods").

THE INDUCE ACT

2. The Inducing Infringement of Copyrights Act ("Induce Act") was recently signed
into law. The Act provides that "[w]hoever intentionally induces any [copyright infringement] shall
be liable as an infringer."
3. The Induce Act further defines the term “intentionally induces” to mean “intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.” Under this law, the Defendants are liable for up to $150,000 for each song illegally copied by iPod users and all iPods must be declared illegal.

DEFENDANT APPLE COMPUTER’S INFRINGING CONDUCT

4. The iPod is the most popular and successful portable digital music device in the world. As of April 2004, nearly three million iPods had been sold, driven by an international marketing campaign that has vaulted the “mp3 player” from a small, obscure market into a must-have item for every music fan.

The Commercial Viability of Apple’s iPod Relies on Copyright Infringement

5. A substantial element of the iPod’s commercial viability can be traced to its ability to play infringing music files, whether downloaded over the Internet from peer-to-peer (“P2P”) networks or the result of promiscuous hand-to-hand copying of sound recordings among friends and acquaintances.

6. Apple has been fully aware, as has most of the world, that for the past several years, millions of computer users have been engaging in unauthorized reproduction and distribution of music files using P2P software such as Napster, Audiogalaxy, Aimster, KaZaA, Morpheus, Grokster, Limewire, Bearshare, and eDonkey. These networks have been described by some as the biggest piratical bazaar in world history.

7. In addition, computer users illegally reproduce and distribute music files in person using the iPod. As detailed further in the report of Professor Joe Expert, attached hereto as Exhibit A, many iPod owners copy CDs from, and use their iPods to “share” their music with, their friends and acquaintances. Plaintiffs maintain that this promiscuous “hand-to-hand” reproduction also constitutes copyright infringement.

8. Before the introduction of portable digital music players, the value of the music files derived from infringing sources was limited by the fact that computer users generally had to be
sitting at their computers in order to play and enjoy them. Defendant Apple knew this and hence
made the calculated decision to intentionally induce and enhance the attractiveness of infringement
by providing these infringers with a device to enhance the rewards of their illegal labors – the iPod.

9. As detailed further in Professor Expert’s report, the iPod would have been much less
attractive to consumers had it been incompatible with the music files downloaded from P2P
networks and had it not allowed consumer-to-consumer transfers. Professor Expert’s report also
makes it clear that the iPod, in turn, enhanced the attractiveness of P2P networks by offering iPod
owners expansive storage capability and lightning-fast data transfer, allowing them to listen to any
number of infringing music files when away from the computer.

10. Surveys conducted by Professor Expert establish that a majority of iPod owners
have used at least some significant portion of their iPods to store and play infringing music files,
whether derived from P2P networks or promiscuous hand-to-hand copying. Upon information and
belief, Apple was certainly aware of this fact from its own internal marketing research.

Apple’s “Rip, Mix, Burn” Campaign Demonstrates Its Intent To Induce Infringement

11. Apple has directly encouraged music piracy through its “Rip, Mix, and Burn”
campaign used to sell both its Macintosh computers and iPod player. There can be no better
evidence of inducing infringement than to literally spell out the steps to one’s customers.

The Apple iPod’s Storage Capacity Demonstrates Apple’s Intent to Induce Infringement

12. The iPod’s remarkable storage capacity also demonstrates Apple’s intent to induce,
aid, and abet infringers. For example, Apple itself advertises that its 40 GB iPod can hold “up to
10,000 songs.” This amount, over 500 albums, far exceeds the capacity necessary to hold the total
CD collection owned by the vast majority of Americans. This suggests that Apple knew and
intended that iPod owners would be getting their music from elsewhere, including P2P networks
and promiscuous hand-to-hand copying.

13. Apple does sell authorized music that is specifically licensed for use with iTunes
and its iPod from its iTunes music store. However, the number of songs sold comes nowhere close
to the number of songs that Apple knows or reasonably should know are on its customers’ iPods.
To fill up a 40 GB iPod with authorized songs from the iTunes music store would cost the average
user $9,999. It is inconceivable that any iPod user would spend almost $10,000 in order to fill a $499 iPod. In contrast, there is no question that the iPod’s $499 price is made more palatable to buyers by the availability of the infringing no-cost music available on P2P networks or via friends.

Thus there can be no doubt that Apple materially relies on illegal infringement by its customers to support the commercial viability of its iPod and to maintain its high price in the marketplace.

Apple’s Design Choices Demonstrate its Intent to Induce Infringement

Moreover, Apple has also demonstrated its intent to induce copyright infringement through the decisions it made when designing the iPod and related iTunes software. For example, Apple chose to allow the iPod to reproduce, store, and perform copyrighted works in “MP3” file format, knowing full well that this is the most popular unprotected format used by pirates on P2P networks. Because this format includes no content protection or digital rights management features, it also encourages promiscuous hand-to-hand copying by iPod owners. This decision cannot be seen as anything but an invitation to infringe.

Apple could have, at a minimum, designed its iPod to play only music files with content protection and further, could have designed its iTunes software to only rip CDs into a protected format that would not allow further promiscuous hand-to-hand copying. Of course, an iPod that only played authorized and protected files such as Apple’s own AAC format would be far less popular in the marketplace, and thus, less commercially viable. The iPod’s ability to play unprotected MP3 files not only enhances its own value to infringer users but also encourages such users to increase the amount of infringement they perpetrate.

Plaintiffs are pressing a claim under the Induce Act and not a claim of contributory or vicarious infringement. Hence, the Supreme Court ruling in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) has no application to this case, nor is it a defense that Apple has no control over the activities of iPod owners.

DEFENDANT CNET’S INFRINGING CONDUCT

Defendant CNET Networks, Inc. (“CNET”) is a media company that, among other things, reviews digital music players and instructs its readers on how to use the devices they have...
19. As part of this instruction, CNET has intentionally induced, aided, and abetted its
readers to infringe Plaintiffs’ copyrights. Specifically, in posting a review of Apple’s iPod music
player on its website, CNET explicitly suggested not only that users “rip” their entire CD collection
onto their computers and into their iPod device, but even specifically instructed users on how to
make further unauthorized reproductions of these infringing files by copying them between
multiple computers:

You can use the iPod Mini to share music between multiple computers, but it's not
easy, as the player syncs to only one version of iTunes. But there's an alternative.
We were able to copy MP3 files from the Mini to a second computer's hard drive in
Windows by turning on "View hidden files and folders" and browsing the Mini's
internal directories in My Computer until we found the music. Mac OS X users can
do the same thing if they install TinkerTool.[http://www.bresink.de/osx/TinkerTool.html].

The iPod Mini has no compatibility problems transporting data files between
computers (Macs or PCs) when you activate the Enable Disk Use function. In this
approach, the Mini mounts as a data drive, but it hides music files unless you use the
above-described workaround.

20. This so-called “workaround” is nothing less than a set of specific instructions to aid
and abet users in further acts of infringement, including promiscuous hand-to-hand copying among
friends and acquaintances. The link to the “TinkerTool” product in an explicit invitation to
conduct such infringements.

21. The CNET review has been inducing and continues to induce all users of the
Internet through its review at: [http://reviews.cnet.com/Apple_iPod_Mini_4GB_Green_/4505-6490_7-30657036-4.html?tag=top].

DEFENDANT TOSHIBA’S INFRINGING CONDUCT

22. As alleged in previous paragraphs, Apple’s iPod is being used to induce massive
and uncontrolled copyright infringement.

23. Defendant Toshiba supplies the “micro” hard drives that Apple uses in the iPod.
Toshiba ships in excess of 100,000 such hard drives to Apple each month.

24. At all times relevant to this complaint, Defendant Toshiba knew or should have
known that Apple’s iPod would be used to induce infringement. Plaintiffs specifically brought the
facts detailed herein to Toshiba’s attention and asked that Toshiba cease supplying Apple with hard
drives until Apple took steps to address the infringing capabilities of the iPod. Toshiba refused
Plaintiffs’ request.

25. With this knowledge, Toshiba intentionally chose to aid, abet, and induce copyright
infringement by iPod owners by continuing to supply Apple with hard drives intended for use in
iPods.

26. The commercial viability of Toshiba’s “micro” hard drives depends substantially on
consumer demand for the iPod and similar music players that could store thousands of works at a
time and could import them quickly from a variety of sources, including illegal music file-sharing
and promiscuous hand-to-hand infringement. By supplying tiny hard drives for portable music
players not even capable of recording original music, Toshiba clearly knew it was abetting
reproduction of copyrighted works on a massive scale.

27. Thus, Toshiba materially relied on infringement for the commercial viability of its
“micro” hard drives and has clearly demonstrated intent to induce infringement of Plaintiffs’ works
by continuing to supply Apple.

CLAIM FOR RELIEF
(Against All Defendants for Inducing Copyright Infringement Pursuant to 17 U.S.C. § 501(g).)

28. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
through 27 as if fully set forth herein. Based on these facts, each Defendant has intentionally
induced, aided, or abetted the massive copyright infringement committed by iPod owners as
defined under the Induce Act.

29. As a direct and proximate result of Defendants’ infringement of Plaintiffs’
copyrights and exclusive rights under copyright, Plaintiffs are entitled to damages as well as
Defendants’ profits pursuant to 17 U.S.C. § 504(b) for each infringement committed by iPod
owners.

30. Alternatively, Plaintiffs are entitled to the maximum statutory damages, pursuant to
17 U.S.C. § 504(c), in the amount of $150,000 for each work infringed by any iPod owner or, in
the case of CNET from each person who read and acted on information contained in CNET’s iPod
31. Plaintiffs further are entitled to its attorneys’ fees and full costs pursuant to 17 U.S.C. § 505.

32. Defendants’ conduct threatens to cause, and is causing, and unless enjoined and restrained by this Court will continue to cause, Plaintiffs irreparable injury that cannot be fully compensated for or measured in money. Pursuant to 17 U.S.C. § 502, Plaintiffs are entitled to preliminary and permanent injunctions halting all future sales of the iPod and any Toshiba “micro” hard drive, requiring that Apple take steps to update all iPods sold to date, and prohibiting publication of any material on the CNET website discussing use of the iPod in any manner that would induce further infringement by iPod owners.

DATED: June 24, 2004

By

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