

# THE RITE OF RHETORIC: COGNITIVE FRAMING IN TECHNOLOGY LAW

Chris Riley\*

## ABSTRACT

*This Article examines the use of cognitive framing techniques in litigation in technology law. I offer a model to understand and evaluate the strength of a “framing argument”—consisting of a legal argument, a frame, and a connection between the two—and I identify and analyze framing arguments in four recent technology law cases. I contend that framing arguments play a major role in these cases because technology law is particularly susceptible to them. Ambiguities in the statutes and precedents and ambiguities in the technologies create room for judgments of equity to shape the law. Furthermore, genuine doubt concerning the correct social policies creates room for framing arguments to influence judgments of equity—and, thus, to influence the development of new law. By demonstrating the nature and significance of framing arguments, I hope to help increase judges’ awareness of them, to allow judges to gauge equities more objectively, and to help attorneys be more effective in their framing arguments to produce a greater balance in attorney skill.*

## TABLE OF CONTENTS

INTRODUCTION .....	496	R
I. FRAMING AND TECHNOLOGY LAW.....	498	R
A. <i>Framing in Social Science, Political Science, Law, and Economics</i> .....	499	R
B. <i>Framing in this Article</i> .....	502	R
C. <i>“Technology Law” and its Frames</i> .....	503	R
1. <i>Technology Law</i> .....	503	R
2. <i>The Frames</i> .....	505	R
3. <i>Property and Intellectual Property</i> .....	506	R
4. <i>Individual v. Industry</i> .....	507	R
II. OBSERVED FRAMING IN CASE STUDIES .....	508	R
A. <i>Framing is Happening</i> .....	508	R
B. <i>Piracy v. Innovation</i> .....	509	R
1. <i>The Frame(s)</i> .....	509	R
2. <i>Davidson v. Universal Associates</i> .....	512	R
a. <i>Background</i> .....	512	R
b. <i>Appellant’s Brief</i> .....	513	R

\* Ph.D., Computer Science, Johns Hopkins University; J.D., Yale Law School. The opinions expressed in this Article are those of the author alone. Many thanks to Professor Henry Smith, Professor G. Eric Brunstad, Jr., Professor George Lakoff, James Grimmelmann, Joel Knopf, David Orange, Nick Degani, David Goldman, the Harvard/Yale Cyberscholars, and others at the Yale Information Society Project.

c.	<i>Appellee’s Brief</i> .....	516	R
d.	<i>The Eighth Circuit’s Opinion</i> .....	517	R
3.	<i>MGM v. Grokster, Before the Ninth Circuit</i> .....	519	R
a.	<i>Background</i> .....	519	R
b.	<i>Appellant’s Brief</i> .....	520	R
c.	<i>Appellee’s Brief</i> .....	521	R
d.	<i>The Ninth Circuit’s Opinion</i> .....	522	R
4.	<i>Grokster, Before the Supreme Court</i> .....	523	R
a.	<i>Background</i> .....	523	R
b.	<i>Petitioner’s Brief</i> .....	524	R
c.	<i>Respondent’s Brief</i> .....	526	R
d.	<i>The Supreme Court’s Opinion</i> .....	527	R
C.	<i>Privacy</i> .....	529	R
1.	<i>The Frame</i> .....	529	R
2.	<i>Theofel v. Farey-Jones</i> .....	531	R
a.	<i>Background</i> .....	531	R
b.	<i>Appellant’s Brief</i> .....	532	R
c.	<i>Appellee’s Brief</i> .....	533	R
d.	<i>The Ninth Circuit’s Opinion</i> .....	535	R
D.	<i>Observations</i> .....	535	R
III.	<i>WHY FRAMING WORKS (AT LEAST IN TECHNOLOGY LAW)</i> .....	537	R
A.	<i>Davidson in More Detail</i> .....	537	R
B.	<i>The Pattern of Framing Cases—What to Look for in Others</i> .....	541	R
C.	<i>Stepping Back</i> .....	541	R
IV.	<i>CONCLUSION</i> .....	543	R

INTRODUCTION

As legal issues arising from technology innovation grow more and more complex, judges and juries become more and more susceptible to a cognitive trap that can significantly influence their decisions. This cognitive trap is created by the rhetorical device of “framing,” which involves the use of language to trigger existing mental structures (the “frames”), and by arguments that incorporate framing to attempt to influence a decision.<sup>1</sup> Technology law is filled with frames. Many of them have only existed in the public mind for a few years, as they derive from recently passed statutes and recently invented technologies. For example, newspapers and magazines have exploded with both terror stories of the death of the music industry as a result of illegal downloading, and with incredible success stories of companies such as Microsoft and Google. Together, these stories have created a widely known—yet limited—understanding of the equities involved in the frames of piracy, innovation, and privacy. Although popular understanding of these concepts and contexts is rich, the formal legal understanding is poor: most federal

<sup>1</sup> As I use the term, a frame is a concept such as an activity or a value, and the language used can range from explicit metaphor or analogy to more subtle techniques such as emphasis through word repetition and rearrangement. The concept of framing is discussed in more detail in Section I *infra*.

judges have limited experience with piracy, innovation, privacy, and other frames of technology law. This disparity creates fertile ground for framing arguments to have a considerable impact.

At the same time, the structure of legal reasoning leaves room for framing arguments to influence judges and juries in the sense that parties may offer rational and legitimate legal justifications to support any position in a case.<sup>2</sup> Like other forms of rhetoric and argument, framing arguments can influence a decision. Moreover, in many contexts, such as where the decision is based on statutory interpretation, the change brought about by framing arguments can be formally ratified after the fact merely by citing to one justification rather than another.

In this Article, I examine the use of framing in litigation in technology law. I offer a model to understand and evaluate the strength of a framing argument – separating it into a legal argument, a frame (including the inherent strength of the frame and its relevance to the facts of the case), and a connection between the frame and the legal argument—and I analyze the framing arguments in four recent technology law cases against this model. I contend that strong framing arguments greatly increase a party’s chances of winning a case,<sup>3</sup> supporting my position through case studies and a theoretical model of technology litigation that explains why it is both possible, and in some sense rational (or at least understandable), for judges to be influenced by framing arguments.

Framing arguments are powerful in technology law because of the inherent ambiguities therein. Ambiguities in statutes and technologies create room for equitable arguments to shape the law, and ambiguities in the correct social policies of technology create room for framing to influence equity judgments. By demonstrating and explaining this context and the framing arguments that take place within it, I hope to educate judges to be more alert to framing so they may gauge equities more objectively, to educate attorneys to be more effective in their framing arguments, and to educate the news media and the public so they may invest effort into developing a more informed and accurate view of the social policies involved in technology law.<sup>4</sup>

---

<sup>2</sup> See, e.g., STEVEN L. WINTER, A CLEARING IN THE FOREST 142-43 (2001) (“[In one] view, the precedents will always be sufficiently rich in competing arguments and rationales that skillful lawyers should be able to extract a version of the case law favorable to their side.”). Winter notes that this indeterminism may be based on an inaccurate understanding of the nature of reasoning. *Id.* at 143. Note, also, that few supporters of this proposition would go so far as to argue that both sides are equally compelling in their reasoning.

<sup>3</sup> Though framing techniques can be effective at all levels, they are likely far more effective at the appellate level, where judges place more emphasis on the proper interpretation of statutes and precedents, and less emphasis on procedure and evidence and other essential components of successful trial practice.

<sup>4</sup> My intention in this Article is not to malign the abilities of the writers of the briefs I study. I will criticize the briefs in my sample cases, and I will imply, if not say explicitly, that, in many ways, they could be improved. However, I admit that there is a lot more to writing a brief than effective framing. My objective in this Article is merely to argue that framing is one component of the large, complex puzzle that is practical legal argumentation.

## I. FRAMING AND TECHNOLOGY LAW

In the common usage of the concept of “framing” in communication, the speaker uses mildly deceptive techniques, such as weak analogies and artificial emphasis and de-emphasis, to sway the listener’s understanding of a context.<sup>5</sup> Framing is a tool of rhetoric rather than substance. It has a more specific and sophisticated purpose than getting the listener to feel an emotion like anger or pity. One sort of framing happens in ordinary conversation whenever the speaker wants to avoid a likely interpretation that is not favorable to them. People frame to cushion the emotional blow of a loss, for example, by disguising it as a gain, pretending that the good effects are more important than the bad. People also frame to sway others to their side of an argument by creating connections that are not there, or by hiding existing connections. However, framing is not restricted to these simple techniques.

Framing in this Article is more than merely defining the terms of the debate. More sophisticated forms of framing tap into existing cognitive structures, hierarchies of one’s memories and experiences, to create new (or strengthen existing) mental connections between the context of the conversation or argument at hand, and some other significant context.<sup>6</sup> The speaker attempts to transfer the listener’s normative views in a source context to another context which is not *necessarily* (but can be) related to the source. These types of framing techniques are sometimes implemented as simple (but powerful) metaphors,<sup>7</sup> and sometimes as more subtle choices of emphasis.<sup>8</sup> In the courtroom, judges and lawyers try to be above pure rhetoric, insofar as they construct the law. Many seek to achieve a level of almost scientific precision in their reasoning. Despite these lofty ideals, parties in court cases certainly attempt to implement framing arguments. The open questions, which this Article begins to address, are how much framing is attempted, how much it displaces pure, technical legal argument, and, most importantly, how much impact it has on the court’s decision.

Before getting into these questions, I will first discuss the concept of framing in more detail, explaining how my use of the term differs slightly from its use in other scholarship, as I closely tailor my concept of framing to my target legal context. I will also discuss “technology law” as I use the term, along with some existing scholarship that examines specific framing issues in technology law. This section will demonstrate that, although framing plays an important

---

<sup>5</sup> Dictionary definitions of “frame” include “to fit or adjust especially to something or for an end” and to “contrive.” Merriam-Webster Online Dictionary, Frame, <http://merriam-webster.com/dictionary/frame> (last visited May 13, 2009).

<sup>6</sup> For example, George Lakoff discusses the use of the phrase “tax relief” instead of “tax cut,” which connects the context of a tax rate reduction to the old and previously unrelated context of an affliction, thus making people consider taxes more like undue burdens and adding further positive value to tax cuts. GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE 24-26 (2004).

<sup>7</sup> Consider Lakoff’s tax relief metaphor, or, even better, President Bush’s use of the phrase “permission slip” to make opponents seem condescending and childish. *Id.* at 4, 11.

<sup>8</sup> *Id.* at 32 (giving examples of partial birth abortion and school testing in which a debate can be focused on a clearer and less controversial issue to establish the proper context before segueing into a debate over a more controversial issue).

role in litigation in a broader context, its role is much more significant in technology law. Specifically, framing's role is more significant because the law gives it room to work, because important and focused frames exist and have a great deal of weight, and because the institutions involved may be inclined to give the frames even more weight.

A. *Framing in Social Science, Political Science, Law, and Economics*

Erving Goffman introduced the concept of framing in the social sciences in 1974.<sup>9</sup> To Goffman, framing involves a transformation of one context into another, creating an alternative interpretation of what is actually occurring.<sup>10</sup> Goffman gives two primary mechanisms for this manipulation: keyings and fabrications.<sup>11</sup> A keying is a contextual transformation of a literal activity into something—for example, a staging (such as a play), a fantasizing, or an analysis.<sup>12</sup> Knowing the context, the audience can transform statements such as “His bishop is about to threaten my knight” into a statement describing the position of plastic chess pieces on a chessboard, rather than a literal statement about a Catholic priest assaulting a man on a horse.<sup>13</sup> By contrast, a fabrication is a more deliberate manipulation designed to create a false and misleading perception.<sup>14</sup> As opposed to the keying process, which is more of an open and mutual social transformation, a fabrication is a deliberate, one-sided deception, and can be broken when the “contained party” realizes he is being manipulated.<sup>15</sup>

George Lakoff revived and popularized the concept of framing by applying it to political science in his 2004 book, *Don't Think of an Elephant!*<sup>16</sup> In his framing analysis, Lakoff describes two models of the proper organization of the family: the “strict father” model and the “nurturant parent” model.<sup>17</sup> Lakoff uses these two models as lenses to understand the design of legal

<sup>9</sup> See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974).

<sup>10</sup> Goffman begins by discussing the “primary framework” as a context for understanding social activity, *id.* at 21-26, and then discusses how certain social contexts impose a non-literal, primary framework over a literal activity to change people's interpretations of the activity, *id.* at 47. For example, two people passing each other in a hallway may say, “How's it going?” as a way of saying “Hello,” rather than literally inquiring into the other person's status. *See id.* Goffman's fabrication resembles the framing studied in this Article, though his book studies a far more abstract concept based in a far more general social context than my limited treatment of linguistic attachment of factual contexts to certain specific frames.

<sup>11</sup> *Id.* at 45-46, 83-85.

<sup>12</sup> *Id.* at 45.

<sup>13</sup> *Id.* at 46. One could also view this example as a mere word ambiguity or a simple metaphor, but this does not capture the richness of the keying concept. One of Goffman's greatest contributions was his isolation of, and emphasis on, the transformation process, as opposed to the substance of the transformed words (exaggerated further by the framing inherent in the choice of the term “keying”), teasing it out of “the flux of social experience.” Fredric Jameson, *On Goffman's "Frame Analysis"*, 3 *THEORY & SOC'Y* 119, 126-27 (1976).

<sup>14</sup> GOFFMAN, *supra* note 9, at 83 (defining fabrication as “the intentional effort of one or more individuals to manage activity so that a party of one or more others will be induced to have a false belief about what it is that is going on”).

<sup>15</sup> *Id.* at 84-85.

<sup>16</sup> LAKOFF, *supra* note 6.

<sup>17</sup> *Id.* at 6-15.

regimes by Republicans and Democrats.<sup>18</sup> Lakoff centers his concept of framing not on argumentation itself, but on the association between words and mental concepts, and the biological basis for it.<sup>19</sup> Additionally, given the nature of this association, some worldviews fit some frames better than others, creating the distinct possibility of argumentative techniques based on framing.<sup>20</sup> Practical framing activity by political machines is based on the appropriate choice of language—e.g., speakers describe activities using terminology that reinforces their fundamental worldviews.<sup>21</sup> Lakoff uses framing to explain Republican political successes in recent decades, to which he credits, in part, operatives in the Republican Party who have emphasized framing techniques for some time.<sup>22</sup> Arguments based on Lakoff's abstract framing technique are fairly straightforward: connect one context (such as the family) to another, the latter of which is not strictly related to the former (for example, foreign policy), through the use of language.<sup>23</sup> Framing and framing arguments, as I will use them in this Article, are similar, though my contexts tend to be somewhat different and generally less abstract.<sup>24</sup>

The study of framing in the legal context is sparser, but Anthony Amsterdam and Jerome Bruner made one major attempt in their 2000 book, *Minding the Law*.<sup>25</sup> Amsterdam and Bruner examine a category of psychological framing that they call “rhetorics,” which they describe as “various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest . . . .”<sup>26</sup> Rhetorics is one of three major categories of psychological tools, along with “categorization”<sup>27</sup> and “narrative.”<sup>28</sup> After some discussion of the use of language tricks and the meanings that can be derived from context, Amsterdam and Bruner describe how the law creates room for manipulation by rhetoric. For example, in litigation, Amsterdam and Bruner state, “the very name of the game is to contest the meanings of communications and to take apart the . . . adversary's interpretive frame.”<sup>29</sup> This is true, despite the fact that, on the surface, the legal system must appear cooperative and straightforward.<sup>30</sup> This split between form and substance creates a great deal of room for subtle framing, and a great deal of

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 17 (“People think in frames. . . . Neuroscience tells us that each of the concepts we have—the long-term concepts that structure how we think—is instantiated in the synapses of our brains.”).

<sup>20</sup> *See, e.g., id.* at 23-24 (discussing the difference between conservatives, who can use a simple frame of “tax relief,” and liberals, who cannot apply the frame to their proposals and must engage in more complex language).

<sup>21</sup> *Id.* at 21.

<sup>22</sup> *Id.* at 22-23 (giving the example of Frank Luntz).

<sup>23</sup> *See, e.g., id.* at 10 (arguing that, under the strict father model of the family, the United States is the father, the strong moral authority, and should not bend its understandings of what is right).

<sup>24</sup> This will be discussed in Section II.A, *infra*.

<sup>25</sup> ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

<sup>26</sup> *Id.* at 165.

<sup>27</sup> *Id.* at 19-20.

<sup>28</sup> *Id.* at 110-14.

<sup>29</sup> *Id.* at 173.

<sup>30</sup> *Id.* at 172-74.

value for the detection and exposure of the other side's "rhetorical tricks."<sup>31</sup> After establishing the three main concepts, Amsterdam and Bruner apply them to the study of several civil rights cases, essentially finding that those civil rights cases whose holdings can be questioned from a liberal perspective were written with deceptive framing-style techniques, and that the opinions in these cases are motivated by mental connections to abstract concepts, such as the legend of Guinevere and its influence on Justice Antonin Scalia's understanding of adultery.<sup>32</sup> Judge Richard Posner, in reviewing Amsterdam's and Bruner's work, challenged their "radical subjectivism," and claimed their theories could be used to demonstrate bias in any holding of any case.<sup>33</sup> Amsterdam and Bruner ultimately cannot rise above bias in the application of their theory, nor do they even claim to.<sup>34</sup> However, they begin with a solid theory of framing (or rhetoric as they call it), and offer some justifications as to why it might be effective in the field of law.

Steven Winter gives a detailed examination of jurisprudence through the lens of cognitive theory in his book, *A Clearing in the Forest*.<sup>35</sup> Although many legal theorists contend that law is indeterminate,<sup>36</sup> Winter argues that this view is the result of artificially imposing a rationalist model on law, and that alternative models drawn from cognitive science can produce more accurate, and more determinative, interpretations of the legal decision-making process.<sup>37</sup> Winter acknowledges formal legal doctrine does not control legal decision-making,<sup>38</sup> or, perhaps more accurately, to view jurisprudence as if determined entirely by doctrine is inaccurate. In Winter's view, a lawyer's objective is to persuade, and while this persuasion may incorporate legal doctrine, "tacit knowledge," along with "values, beliefs, and understandings of the decisionmakers," ultimately drive a lawyer's decision.<sup>39</sup> Effective persuasion requires an understanding of the "categories and concepts" that drive the people making the decisions—or, as Winter explains: "Legal materials do not decide cases, people do."<sup>40</sup> These "categories and concepts" resemble the frames I use

<sup>31</sup> *Id.* at 176.

<sup>32</sup> *Id.* at 81-91. See also Richard A. Posner, *The Law of the Beholder*, NEW REPUBLIC, Oct. 16, 2000, at 49, 49-51 (reviewing ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000)) (arguing that Amsterdam and Bruner's critiques can be as easily applied to other, liberal friendly, civil rights cases, and perhaps all jurisprudence).

<sup>33</sup> Posner, *supra* note 32, at 50.

<sup>34</sup> AMSTERDAM & BRUNER, *supra* note 25, at 10-11.

<sup>35</sup> WINTER, *supra* note 2.

<sup>36</sup> *Id.* at 10, 310-13 (discussing the arguments of Joseph Singer and Duncan Kennedy, who both contend that legal doctrine is not determinate).

<sup>37</sup> See, e.g., *id.* at 139-40 (examining an older Supreme Court case utilizing the rationalist model, which makes it appear to be somewhat "unpredictable and incoherent," and using a model which incorporates "radial categories" rather than "standard analytic categories"). Ultimately, though, Winter seems to acknowledge some degree of indeterminacy in certain areas of the law. See *id.* at 330 ("Once we recognize that constraint is not an all-or-nothing phenomenon, it becomes easier to see that different areas of law exhibit different degrees of constraint and, thus, of stability.").

<sup>38</sup> *Id.* at 3 ("[I]t is widely recognized that the surface logic of the discipline does not govern the decisionmaking process.").

<sup>39</sup> *Id.* at 3, 319.

<sup>40</sup> *Id.* at 153.

in this Article. They are imbued with considerable social significance and value,<sup>41</sup> and there may be multiple (and even, perhaps, mutually exclusive) categories to apply when interpreting the facts of a case at hand, a decision which may result in a different legal outcome.<sup>42</sup>

Although hard evidence of the effects of framing is rare, Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich surveyed 167 federal magistrate judges to determine the effects of the following five different “cognitive illusions”: framing, anchoring, hindsight bias, the representativeness heuristic, and egocentric biases.<sup>43</sup> The surveyors’ concept of framing differs from others previously discussed in this Article; their perspective focuses on a more economic-based view of the mind’s perceptions of gains and losses.<sup>44</sup> Framing affects the plaintiff’s and the defendant’s perceptions of the value of settlements compared to the probability and value of success on the merits.<sup>45</sup> Guthrie, Rachlinski, and Wistrich examine the reactions of magistrate judges to a hypothetical in which the judges advise plaintiffs and defendants whether to go to trial, or to accept a settlement, which awarded slightly more money to the plaintiff than the expected return of the trial.<sup>46</sup> The judges’ decisions demonstrated a statistically significant difference depending on whether they were advising the plaintiff or the defendant.<sup>47</sup> Although this conception of framing is far narrower than my own, it nevertheless offers some level of empirical support, if only for the statement that judges do not reliably make exact definitions, even when the question can be made in a straightforward and technical manner.

#### B. *Framing in this Article*

The sense of framing I use in this Article is similar, but not identical, to the concepts used by Goffman, Lakoff, and Winter. In the abstract, the framing activity I study follows the general pattern of Lakoff: in litigation, the author of a brief attempts to connect an outside context or cognitive structure to the context of the case through effective language, emphasis, and other techniques.<sup>48</sup> However, as I use the term, the “outside context” is not completely outside; instead, the world of technology becomes the context. Rather than basing my analysis on abstract frames, such as the Arthurian legends or the social construction of the family, I examine (primarily) frames developed by major media in their reporting on the technology industry.<sup>49</sup> The cases I study do not merely evoke frames developed by the media—they *invoke* them, directly. The process of framing is therefore much more observable and open,

<sup>41</sup> See *id.* at 154-55 (describing the distinct meanings and values of the concepts of “prison” and “parent” in the context of two cases).

<sup>42</sup> See, e.g., *id.* at 164 (“Is burning a draft card properly classified as political speech, as destruction of government property, or as obstruction of a lawful state function?”).

<sup>43</sup> Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

<sup>44</sup> *Id.* at 794.

<sup>45</sup> *Id.* at 795.

<sup>46</sup> *Id.* at 796-97.

<sup>47</sup> *Id.* at 797.

<sup>48</sup> See LAKOFF, *supra* note 6, at 9-10 (describing a specific act of framing, the use of language to map the strict father family model to foreign policy).

<sup>49</sup> Specifically, in this Article, I examine the frames of piracy, privacy, and innovation—though this is not intended to be an exclusive set. See *infra* Section I.C.2.

and yet manages to be no less effective because, although it otherwise resembles Goffman's fabrication, it loses the stink of deception that gave the opposing arguer an easy out, and it has a closer connection to the facts of a case at hand.

The distinction between evoking and invoking frames is significant for many reasons. In this Article, I draw my frames from the world of technology and technology law, as opposed to an outside context, which makes it much harder to identify and isolate framing arguments as opposed to more traditional forms of argument on the merits of a case. Given the newness of the field, judges faced with framing laden arguments have few sources of unbiased descriptions of the factual and legal contexts of technology cases; in addition, judges have a limited independent understanding of the contexts. As a result, judges will have even more difficulty separating out the more tightly integrated framing in technology law. Nevertheless, judges have a great deal of experience in working with the law as law and the facts as facts. If they become more familiar with specific problem frames and isolate their analyses and opinions on legal and factual aspects of the cases, while separating the rhetoric and equity associated with these frames, they can make great strides in improving the objectivity of their decisions.

The frames I consider in this Article include a few of the "hot button" issues of technology reporters: piracy, innovation, and privacy. These frames may not reflect as deep or general an understanding of the world and proper social organization as Lakoff's "family values" approach,<sup>50</sup> but they work in the same manner. A plaintiff attorney's legal argument over the proper interpretation of a statute is greatly strengthened if the attorney convinces the judge (and the jury) that the defendant's activities created a strong social harm in the realm of technology law, a harm well understood in the context of the frame invoked, but not yet considered, in the context of the facts of the case at hand. For example, framing through the lens of "piracy" can influence a judge's understanding of the nature of secondary copyright liability,<sup>51</sup> or the scope of a statutory exemption in the Digital Millennium Copyright Act.<sup>52</sup>

### C. "Technology Law" and its Frames

#### 1. Technology Law

The cases and frames I will examine all lie within the context of "technology law." The similar term "cyberlaw"<sup>53</sup> does not exactly describe the sort of

---

<sup>50</sup> See *supra* Section I.A.

<sup>51</sup> I discuss "piracy" framing in the context of secondary copyright liability in greater detail in later sections on the *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913 (2005), decision by the United States Supreme Court. See *infra* Section II.B.4.

<sup>52</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2866 (1998) (codified at 17 U.S.C. § 1201(d) (2006)) ("DMCA"). This is discussed in detail in a later section on the *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005), case. See *infra* Section II.B.2.

<sup>53</sup> There has been considerable debate on the question of whether to study "cyberlaw" as an independent discipline. See, e.g., Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

cases with which I am concerned. I define “technology law” cases as those that involve computer software and hardware products, and deal with regulation of the design or use of the technology because of the nature of the design or use being regulated. For example, I do not consider a patent infringement case concerning a hardware design to be a “technology law” case, at least for the purposes of this Article, because the challenged activity is only illegal because someone else thought of it first. However, framing can influence patent law in the same way as technology law, but the clearest context to see the effects of framing lies in those cases where the technologies at issue are regulated by computer-specific statutes and/or by copyright and related laws.

In technology law, the statutes and the technologies are brand new and filled with ambiguity. Computer scientists develop and name technologies with little regard to the clarity of their chosen terminology, resulting in considerable ambiguity of definition. Statutes regulating these ambiguously-specified technologies are passed by technically inexperienced lawmakers, with technical guidance drawn from biased industry representatives, on the one side, and equally biased public interest groups, on the other. On some level, this is true of all law; one of the major purposes of the judicial system is the refinement and clarification of slightly vague general statutes produced by public choice processes driven by highly varied interests.<sup>54</sup> However, in the context of technology law, given how quickly the statutes and the technologies change, every case of statutory interpretation that reaches a court is reviewed *de novo*.<sup>55</sup> As a result, judges always have room to (and, arguably, must) import equitable judgments into their interpretations, as they apply the (still largely unlitigated) legal doctrine to the (brand new) facts of a case at hand. This increased judicial flexibility does not necessarily create room for framing, if the judges are able to make fully objective and neutral equitable determinations. However, no one can make fully objective and neutral equitable determinations. Judges read *The New York Times* and other major general media, the briefs submitted by the parties for the case at hand, and some of the relevant major precedents.<sup>56</sup> Judges may not have read a single statement by an industry representative, a public interest technology law group, or anyone with a technical background, except presumably those contained within amicus briefs, if any, submitted for the case at hand.<sup>57</sup> As a result, the non-specialist judges are particularly sus-

<sup>54</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-47 (1983) (offering a narrow form of construction to fill gaps in statutes, and stating that public choice theory leads to the proposition “courts cannot reconstruct an original meaning because there is none to find”).

<sup>55</sup> See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005). In *Davidson*, the court interpreted the statutory term “interoperability” which had been interpreted by only one past case; the past case examined the term in the context of computer printer hardware, and *Davidson* examined the term as applied to video game software. *Id.* at 640-41; see *infra* Section II.B.2.

<sup>56</sup> I do not mean to imply that the mass media bias the judge’s decision, merely that non-specialist judges cannot be expected to possess a greater knowledge of technical concepts than that presented in mainstream media. The lack of specialist knowledge opens them to the effects and bias introduced by framing.

<sup>57</sup> Also, consider that most of the work in litigation happens at the district and the appellate court levels, where amicus briefs are typically fewer in number than in cases before the United States Supreme Court.

ceptible to persuasion by framing, efforts to interpret the precedents, and the facts of the case at hand in light of major news stories. Strong framing casts the unresolved ambiguities in the law, and in the technology industry, in a light that exaggerates the social impact of the case, making it seem as if ruling in favor of the other party will destroy an essential social balance in technology law. Successful briefs and arguments emphasize subtle equitable arguments that draw on major news stories and hot-button issues that the judges are familiar with, transforming the process of litigation from a rational weighting of principles and canons of construction and equities, into a contest of illusions.

## 2. *The Frames*

I will focus on three major frames in this Article: piracy, innovation, and privacy. These are not the only frames that appear in technology law cases, although they are among the most important.<sup>58</sup>

The notion of “piracy” originated in a maritime context.<sup>59</sup> For thousands of years, pirates at sea terrorized ships, engaging in unlawful and violent robbery.<sup>60</sup> Pirates operate in waters that lie outside the territorial boundaries of any individual nation, leading to complex questions of legal jurisdiction, and rendering prosecution somewhat more complicated.<sup>61</sup> The context of pirates operating outside the bounds of legal control is analogous to the Internet—a similar international world, one that appears largely beyond the legal control of any individual nation. To call an individual who makes an illegal copy of a music file or software application a “pirate,” therefore, is to import a sense of stealing and uncontrollable lawlessness from the world of the sea into the world of the Internet—even if the legal and factual circumstances are considerably different.<sup>62</sup>

The idea of “innovation” contains three conceptual pieces—a status quo, a new and different world, and the individual innovator who enables the transition.<sup>63</sup> Implicit in this concept is the assessment that the new world is an improvement on the old world in some way. In the context of technology, the improvements may come in the form of lower cost, increased efficiency or ease

---

<sup>58</sup> I call them “important” for two reasons—they have the potential for significant legal implications, and they bring powerful psychological contexts along with them.

<sup>59</sup> See, e.g., Jason Power, Student Article, *Maritime Terrorism: A New Challenge for National and International Security*, 10 BARRY L. REV. 111, 112 (2008).

<sup>60</sup> *Id.*

<sup>61</sup> See generally Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973 (2006) (describing and criticizing the doctrine of universal jurisdiction in response to the problems posed by capturing pirates in international waters).

<sup>62</sup> Although a great deal of music and software piracy is international, the term is used just as freely to characterize the actions of American citizens, acting entirely within the jurisdiction of the laws of the United States. Furthermore, as argued by many theorists, software and music are public goods; thus, the concept of “stealing” is not directly relevant.

<sup>63</sup> See, e.g., JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (3d ed. Harper & Bros. 1950) (1942) (identifying the economic theory of “creative destruction” in which a new, radical innovation upsets the existing market structure and replaces it with a new paradigm).

of use, or additional functionality.<sup>64</sup> Innovation is related to, but distinct from, invention, which lacks the concept of a “status quo,” and is more closely centered around the new “thing”—and which may, as a result, lack the same associations of social improvement, creating allusions to the mad scientist buried in a basement creating new devices that may be useless, or even harmful, to society.<sup>65</sup> The Silicon Valley “dot-com” boom of the late 1990s established the value of technology innovation, and the social and economic benefits affiliated with innovation, a positive feeling that has persisted despite some amount of economic normalization.<sup>66</sup>

“Privacy” is a powerful value in human society and in American culture in particular. From the adoption of the Fourth Amendment, to the decision rendered by the United States Supreme Court in *Griswold v. Connecticut*,<sup>67</sup> to modern constitutional law,<sup>68</sup> the law has long established the basic right of a United States citizen to be secure and free from observation or control in their homes and private lives. The value of privacy is strongly protected outside the United States as well.<sup>69</sup> Privacy is becoming a more sensitive concept in the modern world, where technology permits almost constant surveillance.<sup>70</sup> On the Internet, the problems of surveillance are even more prevalent, as the nature of the network sends every message through the computing equipment of several different companies, each of which is able to make a copy of information passing through without detection by the sender or receiver.<sup>71</sup>

### 3. Property and Intellectual Property

Other scholars have previously studied specific types of framing in technology law. One of the foremost of these studies involved analyzing the phrase “intellectual property” (“IP”), and how inclusion of the word “property” may be (partially) influencing legal development in IP, shifting it toward a greater

<sup>64</sup> See Christopher Riley, *The Need for Software Innovation Policy*, 5 J. ON TELECOMM. & HIGH TECH. L. 589, 598-99 (2007) (discussing the value of software innovation).

<sup>65</sup> See, e.g., Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 330 (2008) (“[T]he language of conception and the stories told about inventors still manifest the solo mad scientists flying kites in lightning-filled skies and whose inventions appear like a cloud of smoke above their heads.”).

<sup>66</sup> See, e.g., Po Bronson, *Life in the Bust Belt*, WIRED, June 2003, [http://www.wired.com/wired/archive/11.06/bust\\_belt.html](http://www.wired.com/wired/archive/11.06/bust_belt.html).

<sup>67</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482, 485-86 (1965) (upholding a basic constitutional right to privacy, though not contained within the literal text of the Bill of Rights).

<sup>68</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas law criminalizing sodomy on the grounds that “‘individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment’”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

<sup>69</sup> See, e.g., Council Directive 2002/58, art. 3, 2002 O.J. (L 201) 37, 37 (EC).

<sup>70</sup> Consider the city of London, which in 2005 had more than 500,000 security cameras, enough to film every person hundreds of times each day. E.g., Steve Stecklow et al., *Watch on the Thames: Surveillance Cameras Monitor Much of Daily Life in London, May Help to Identify Bombers*, WALL ST. J., July 8, 2005, at B1.

<sup>71</sup> See, e.g., Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance* 6-7 (Univ. of Colo. Law School Legal Studies Research Paper Series, Paper No. 08-22), available at <http://srn.com/abstract=1261344>.

exclusionary, more property/rights-based approach, instead of toward earlier American doctrines of more limited rights.<sup>72</sup> As powerful as the frame of “property” in the context of IP can be, scholars have analyzed, discussed, and considered the frame enough to have removed much of its effectiveness as a frame.<sup>73</sup> Therefore, I will not discuss it in detail in this Article.

#### 4. *Individual v. Industry*

Technology law cases often define two worlds of opposing interests: the individual and the industry. Frequently, a technology industry corporation detects an individual doing something harmful to its fiscal bottom line and chooses to invoke the legal system to stop the activity.<sup>74</sup> Frames often align themselves with one side or the other. For example, “piracy” is a pro-industry frame because it casts individuals as wrongdoers; “innovation” is a pro-individual frame in that it pits new innovators against incumbents;<sup>75</sup> and “privacy” is predominantly a pro-individual frame because it aligns with individual interests in privacy more than business. The individual/industry distinction is not, in itself, of particular salience in an analysis of framing because both are too generic to offer much rhetorical weight. Nevertheless, given the centrality of the David and Goliath stories to the technology movement, the distinction bears mentioning. The distinction shapes the public’s interpretation of news media stories, or even the news media as they write their stories, having a powerful (albeit indirect) effect on the strength of the associated frames and thus, on the frames’ usefulness in technology law litigation. To lend a more complete perspective on the issue, among my case studies are cases with holdings on both sides of the individual/industry divide.<sup>76</sup>

<sup>72</sup> See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037-45 (2005) (interpreting the increasing proprietization of copyright as a transition to a state in which copyright owners internalize all of the social value of their intellectual property).

<sup>73</sup> This is a sufficiently subtle point that I want to mention, although I cannot discuss it in detail within the scope of this Article. If judges are completely aware of framing activity in briefs and oral arguments, it is possible that they will be able to filter a frame out of their equitable/legal decision-making process. A well-known and well-discussed frame, such as “property” as a metaphor for IP, will more likely alert the judge that framing is happening, and may raise too many property-related (but not case-related) cognitive structures, and may not have as strong an effect.

<sup>74</sup> See, e.g., *Court Rules Against Song-Swappers*, BBC NEWS, <http://news.bbc.co.uk/2/hi/entertainment/4653662.stm> (last visited May 18, 2009) (describing a successful prosecution of users of file-sharing software in the UK).

<sup>75</sup> At least in the context of copyright law, which usually pits an established industry capitalizing on its entrenched product lines against an individual developing a program that undercuts the existing business models.

<sup>76</sup> I characterize *Theofel v. Farey-Jones*, 341 F.3d 978 (9th Cir. 2003), as an “individual” holding because it upholds the “privacy” frame against a corporate freedom frame, even though both of the parties in the case were, essentially, individuals. The Ninth Circuit holding in *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154 (9th Cir. 2004), vacated and remanded, 545 U.S. 913 (2005), is a pro-individual holding, and *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005), and the Supreme Court holding in *MGM Studios, Inc. v. Grokster Ltd. (Grokster II)*, 545 U.S. 913 (2005), are both pro-industry holdings. See *infra* Section II.B-C.

## II. OBSERVED FRAMING IN CASE STUDIES

A. *Framing is Happening*

In this section, I hope to demonstrate that framing in technology litigation goes beyond serving as a minor component of an argument or a rhetorical gloss. Rather, it is a distinct, but implicit, form of argument, advocating a particular equity balance. Framing heavily influences a judge's interpretations of factual circumstances, statutory terminology, and case law precedent. To show this, I will examine a few recent cases that have dealt with active frames in technology law. For each case, I will analyze the appellate briefs submitted by both parties and the final judicial opinion. I will also identify framing arguments within the briefs, and indications in the opinions that framing played a significant role in the court's decision.

A "framing argument," as I use the term, is, at its heart, a rhetorical tool—a use of language and of emphasis to associate the facts and the law of a case with those of a frame to strengthen and support an argument.<sup>77</sup> I will model a framing argument in three parts. The first part is the legal argument submitted by a party. In the cases examined in this Article, and in many other technology law cases, the legal argument may take the form of advocating one of a set of possible interpretations of ambiguities in statutory or technical terminology (or both).<sup>78</sup> The second part is the frame itself, modeled by the equity factors associated with it (in terms of risks or benefits to some social good), and how the equity factors are related to the facts at hand.<sup>79</sup> Judges may be familiar with some commonly known frames which offer built-in normative biases that go beyond a mere presentation of the benefits and the risks to include a complete balance and resolution.<sup>80</sup> Finally, the third part of a framing argument is the connection between the argument and the frame—the degree to which an attorney can create an analogy between the equity weight of the frame and the

---

<sup>77</sup> A frame, as discussed above, is a mental structure that exists in the mind of the reader and acts as a sort of blueprint or guideline, one that encourages the reader to adopt a consistent understanding of the context of the specific facts and law at hand. *See supra* Section I.A-B.

<sup>78</sup> Consider, for example, the term "interoperability" in the DMCA's reverse engineering exception. *See* 17 U.S.C. § 1201(f) (2006). This particular example involves ambiguities both in the law (what sorts of technologies, and technological relationships, are this legal term intended to encompass) and in the technology itself (do the particular technologies at issue in any particular case fit within this legal categorization).

<sup>79</sup> For example, the "piracy" frame connotes primarily risks—piracy of music or software may severely damage the ability of copyright holders to enforce their exclusionary rights over their creations, and may damage their ability to realize financial rewards, thereby discouraging innovation. The "innovation" frame, on the other hand, indicates benefits—innovation in technology leads to improvements in our ability to produce, organize, and share information. Creating a relation between a frame and the facts at hand essentially involves claiming that permitting the defendants' activity would either worsen the risk, or increase the benefit.

<sup>80</sup> The example of piracy is again useful here, as it can be—and is—contended not just that piracy may be a problem, but that it is, in fact, out of control in some sense, and that we need to do whatever we can to stop it—the same sort of treatment "terrorism" received in the U.S. after September 11, 2001.

legal claim made in the argument.<sup>81</sup> These three parts are independent, in the sense that the legal argument needs to be plausible, the frame needs to be strong and relevant, and the two must be tightly connected for a framing argument to be effective.

In the remainder of this section, I will examine various framing arguments used in real appellate briefs. The cases I discuss concern factual issues that have powerful frames associated with them. In some, David won, and in others, Goliath. My goal is to present a few examples of framing in action, from a few different perspectives, to paint a credible picture of the activity.

## B. Piracy v. Innovation

### 1. The Frame(s)

The concept of piracy in technology is familiar to a very broad audience. The widespread sharing of popular music through peer-to-peer networks came to the attention of the general public around the time of the Ninth Circuit case, *A&M Records, Inc. v. Napster, Inc.*<sup>82</sup> Early major media coverage took a generally neutral tone, but could not avoid suggesting there was a possibility this was the start of a major, industry-wide destructive problem.<sup>83</sup> The general social norm at the time of Napster was that piracy and violations of copyright law were “okay.”<sup>84</sup> As the technology developed and the user base expanded, the file-sharing market incorporated major motion pictures as well.<sup>85</sup> The

---

<sup>81</sup> To adopt the previous two examples: the DMCA regulates some types of activity related to piracy. See, e.g., 17 U.S.C. § 1201(a)(1)(A) (2006) (prohibiting the circumvention of technological protection measures). In order to argue that an activity by one party violates the DMCA, the opposing party can argue that the activity exacerbates the social problems related to piracy. The *Davidson* case is exactly of this form.

<sup>82</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The case concerned the legality of the file-sharing program called Napster, which was the first peer-to-peer file sharing program adopted by the general public. *Id.* at 1011. The Napster program allowed users to make available digital copies of songs for others to download, leading to widespread (and illegal) exchange of copyrighted works. *Id.*

<sup>83</sup> See, e.g., Amy Harmon, *Anarchic E-Commerce: Online Davids vs. Corporate Goliaths*, N.Y. TIMES, Aug. 6, 2000, § 4, at 1. Just mentioning the claims of the music industry introduces the thought of piracy: “The program became so popular so fast that the major record labels claim it has led to widespread music piracy, threatening their ability to turn a profit and the incentive of artists to create music.” *Id.* Harmon also quotes Esther Dyson, an influential journalist, investor, and entrepreneur, as follows: “We’re very much looking at a biological model of an epidemic.” *Id.* Harmon’s article further emphasizes the risk of a loss of control: “[C]ompanies that put information online, from music to books to software, may have to resign themselves to relinquishing control over that material.” *Id.*

<sup>84</sup> As discussed by Harmon, “[b]ased on what has become known as ‘peer-to-peer’ technology, such services have vastly simplified the ability of individuals to trade files of any sort among themselves, and to decide for themselves whether or not to obey copyright law. Most seem to be choosing the latter.” *Id.* at 16.

<sup>85</sup> E.g., John Schwartz, *Is Legal Action Against File Swappers Good Business?*, N.Y. TIMES, Sept. 15, 2003, at C1 (discussing the growing problems with piracy of major Hollywood-produced movies). Schwartz discusses two major differences between pirating music and pirating movies: movie files are much larger and harder to acquire by people with slower Internet connections, and film industry insiders tend to distribute movie files over the Internet to those who can acquire the movie files before their official release dates. *Id.* at C3.

introduction of subscription-based, legal downloading services began adjusting the social norm and increasing the public perception of the illegality of unauthorized online copying.<sup>86</sup> In the modern era, as legal challenges to file-sharing networks advance (and succeed), and as social norms start to gradually change, the recording industry repeats its mantra that, although the situation is improving, there is still a major problem.<sup>87</sup>

Less commonly known or understood is the counter-value or oppositional frame in many piracy cases: innovation. One of the strongest counterarguments to the piracy frame in its early days was that peer-to-peer, file-sharing networks were an innovation—a new way of exchanging files and cultural tastes, a valuable development in their own right, and perhaps a new and more efficient vehicle for the organization of a music industry (or at least its distribution arm).<sup>88</sup> Occasionally, this interpretation of file-sharing networks is

---

<sup>86</sup> Neil Strauss, *Online Fans Start to Pay the Piper: Praise From Some for Subscription Services to Download Music*, N.Y. TIMES, Sept. 25, 2002, at E1 (“These fans once scoffed at the attempts by the record industry and others to create such subscription services, in which users pay monthly fees for access to large online music libraries. Now they are joining them.”). In addition, as set forth by Strauss,

Just six months ago, this sort of talk would have been unthinkable, downright apostasy, among those who consider the giant recording conglomerates the bane of free-wheeling musical access and innovation. Even those who have been won over are usually still skeptical of the power of the big corporations. And there are still plenty of fans who think the subscription sites are inferior, doomed to fail and maybe even intended to do so by their corporate sponsors.

But now, largely because of tough actions by the record companies to combat free music sites through the courts, legislation and even through techno-guerrilla tactics, there is a noticeable change of sentiment in a small segment of the downloading cognoscenti.

*Id.*

<sup>87</sup> For example, in early 2005 the Recording Industry Association of America (“RIAA”) expanded its fight to internal networks on university campuses. RIAA, *New Round of Lawsuits Against 717 Illegal File Sharers Includes Continued Focus On University Network Users Who Illegally Download Music*, Jan. 24, 2005, [http://www.riaa.com/newsitem.php?news\\_month\\_filter=1&news\\_year\\_filter=2005&resultpage=&id=6399292E-251A-E5E0-78A0-D31AABAC6B66](http://www.riaa.com/newsitem.php?news_month_filter=1&news_year_filter=2005&resultpage=&id=6399292E-251A-E5E0-78A0-D31AABAC6B66). The fight remains ongoing today. See RIAA, *Music, Movie Industries Target Theft On Internal Campus Networks*, Apr. 27, 2006, [http://www.riaa.com/newsitem.php?news\\_month\\_filter=4&news\\_year\\_filter=2006&resultpage=&id=AB7479C8-9B38-921B-E724-254B76577CE9](http://www.riaa.com/newsitem.php?news_month_filter=4&news_year_filter=2006&resultpage=&id=AB7479C8-9B38-921B-E724-254B76577CE9) (announcing a systematic program aimed at internal university networks); RIAA, *RIAA Launches New Initiatives Targeting Campus Music Theft*, Feb. 28, 2007, [http://www.riaa.com/newsitem.php?news\\_month\\_filter=2&news\\_year\\_filter=2007&resultpage=&id=0BB7A35D-544B-2DD2-F374-4F680D6BAE9B](http://www.riaa.com/newsitem.php?news_month_filter=2&news_year_filter=2007&resultpage=&id=0BB7A35D-544B-2DD2-F374-4F680D6BAE9B) (announcing new initiatives in February 2007 to continue targeting music sharing within universities). The RIAA continues to keep a fresh list of the latest news on its war on piracy online. See RIAA, *Piracy: Online and On the Street*, <http://www.riaa.com/physicalpiracy.php> (last visited May 18, 2009). The RIAA did acknowledge that its victory at the Supreme Court in *Grokster II* represented a major step forward, calling it a “milestone in the continuing transformation of the online marketplace.” RIAA, *Music Industry Announces Grokster Settlement*, Nov. 7, 2005, [http://www.riaa.com/newsitem.php?news\\_month\\_filter=11&news\\_year\\_filter=2005&resultpage=2&id=81648953-2457-2877-94B4-D28C93625445](http://www.riaa.com/newsitem.php?news_month_filter=11&news_year_filter=2005&resultpage=2&id=81648953-2457-2877-94B4-D28C93625445).

<sup>88</sup> This is essentially the “creative destruction” theory of Joseph Schumpeter, applied to the music industry and piracy by Ku. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 268-69 (2002) (applying Schumpeter’s “creative destruction,” in which capitalism progresses not through minor adjustments in efficiency or variety of production capabilities, but through fundamental changes in economic models underlying the production).

demonstrated in the media, but as part of a larger understanding of the Internet as a source of social value.<sup>89</sup> However, its media presence is much less than that of piracy in the context of peer-to-peer file sharing, and thus, its connection in public opinion is weaker. Modern day efforts to strengthen the public significance of innovation, such as the Electronic Frontier Foundation's website on the social value of innovation<sup>90</sup> or the heavy emphasis on the risks to innovators created by the Supreme Court's decision in *MGM v. Grokster*,<sup>91</sup> fall onto already attentive ears. Stories of an inconvenienced inventor cannot be as compelling to a broad audience as piracy's tales of the destruction of an industry.

Scholars of technology law, copyright law, and the First Amendment have tussled for years over the optimal social balance between piracy and innovation. Most academics tend strongly to favor innovation. Some of the legal and quasi-legal rationales that support the rights of file-sharers include the First Amendment,<sup>92</sup> the notion of "fair use" within copyright law,<sup>93</sup> and the support for democracy and collective cultural control.<sup>94</sup> Some of the equitable rationales in support of the rights of file-sharers include the study of the new production environments made possible by peer-to-peer collaboration.<sup>95</sup> Fewer scholars stand on the other side, and the criticisms generally do not directly support the music industry, but instead, criticize the legal rationales offered by other academics.<sup>96</sup> The level of understanding of the law and the technology of file-sharing possessed by the average technology law scholar far exceeds that of the average writer and reader of *The New York Times* and other major media outlets.<sup>97</sup> Therefore, the scholars' collective opinion (that piracy has been over-inflated as a social problem, and its counter values have been under-sup-

---

<sup>89</sup> See, e.g., Steve Lohr, *The Sharing Society; In the Age of the Internet, Whatever Will Be Will Be Free*, N.Y. TIMES, Sept. 14, 2003, § 4, at 1 ("The Net's free-range design, combined with the global proliferation of personal computing and low-cost communications networks, laid the foundation for the surge of innovation and new uses that became so evident by the late 1990's. The World Wide Web is the overarching example, but others include instant messaging, online gaming and peer-to-peer file sharing.").

<sup>90</sup> Electronic Frontier Foundation, Innovation, <http://www.eff.org/issues/innovation> (last visited May 18, 2009).

<sup>91</sup> *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913 (2005); see, e.g., Fred von Lohmann, *Remedying 'Grokster'*, LAW.COM, July 25, 2005, <http://www.law.com/jsp/article.jsp?id=1122023112436> ("The Court's ruling leaves technology companies and their attorneys to pick their way through a dangerous minefield of legal uncertainties.").

<sup>92</sup> See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358-59 (1999); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 21-23 (2001).

<sup>93</sup> E.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1525 (2004).

<sup>94</sup> Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 1 (2004).

<sup>95</sup> Yochai Benkler is perhaps the foremost academic studying the environment of "peer production." See YOCHAI BENKLER, *Peer Production and Sharing*, in THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM ch. 3 (2006).

<sup>96</sup> E.g., David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 290-91 (2004).

<sup>97</sup> Professors Benkler, Madison, Balkin, and others spend a substantial amount of their time dealing with technology law issues, to which the major media pay scant attention.

ported in the legal system) ought to carry some weight, though accusations of a leftist bias in the legal academy are hardly uncommon.<sup>98</sup>

As intelligent and well read as appellate judges are, they cannot be expected to be knowledgeable of the latest scholarly debates in technology law research, nor should they need to be aware of scholarship in the area, or to trust its line in the equity sand. Recent United States Supreme Court Justices such as John Roberts and William Rehnquist, in particular, are known for their reticence to cite or acknowledge scholarly opinion from any area of the law in their holdings.<sup>99</sup> Their hesitation means that two sources will continue to derive judges' primary understandings of the concepts of "piracy" and "innovation:" law, including case precedents and statutory text, and *The New York Times* and its ilk. As I will discuss later in this Article, one of the defining features of technology litigation is that the law does not have a whole lot to offer to resolve many important and difficult legal questions—statutes and technologies are filled with ambiguities the courts must resolve.<sup>100</sup> Therefore, given the level of major media coverage and the relative poignancy of the associated stories, the piracy frame is much stronger than the innovation frame, and it will likely come to be the driving force in cases which touch upon it.

The remainder of this section discusses, in detail, the use of framing in three cases: *Davidson & Associates v. Jung*<sup>101</sup> before the Eighth Circuit, and *MGM v. Grokster*<sup>102</sup> before both the Ninth Circuit and the United States Supreme Court.<sup>103</sup> The briefs for these cases include varying amounts of framing, based on piracy, innovation, or other frames, and connect with varying success to the legal arguments and the facts at hand. After presenting the briefs submitted by both sides in each case, I will discuss the courts' opinions, reading from the language any indications that framing arguments influenced the judges' decisions.

## 2. Davidson v. Universal Associates

### a. Background

*Davidson & Associates v. Jung*, also known informally as *Blizzard v. BnetD*, concerns the video game company Blizzard and certain of its online services.<sup>104</sup> In conjunction with its video game business, Blizzard offers the "Battle.net" online service, which enables users of Blizzard video games to

<sup>98</sup> See, e.g., Adam Liptak, *If the Law Is a Ass, the Law Professor Is a Donkey*, N.Y. TIMES, Aug. 28, 2005, § 4, at 4.

<sup>99</sup> Posting of Orin Kerr to THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1141777462.shtml> (Mar. 7, 2006, 18:24 EST).

<sup>100</sup> See *infra* Section III.A.

<sup>101</sup> *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

<sup>102</sup> *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 545 U.S. 913 (2005).

<sup>103</sup> *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913 (2005).

<sup>104</sup> *Davidson*, 422 F.3d at 633. Full details on the case, including links to all court documents, are available through the Electronic Frontier Foundation ("EFF"), who served as co-counsel for the case. See EFF: *Blizzard v. BNETD*, [http://www.eff.org/IP/Emulation/Blizzard\\_v\\_bnetd](http://www.eff.org/IP/Emulation/Blizzard_v_bnetd) (last visited May 18, 2009).

play against each other over the Internet.<sup>105</sup> Among other features, the Battle.net service includes an authentication mechanism to prevent users from playing pirated copies of the video games online.<sup>106</sup> Out of frustration over problems with the service, a group of Blizzard video game users developed their own server software, “BnetD,” which replicated much of the functionality of Blizzard’s official servers.<sup>107</sup> As a result, users could play pirated copies of Blizzard games online over a BnetD server.<sup>108</sup> The BnetD designers were unable to replicate the official service’s authentication mechanism, as Blizzard did not make its detection process for illegal games available.<sup>109</sup> Blizzard brought suit against the software developers to enjoin the operation of the BnetD server, alleging violations of the Digital Millennium Copyright Act (“DMCA”) and of the license agreements for use of the Blizzard software.<sup>110</sup> The programmers of BnetD, in response, claimed their actions in creating the BnetD service constituted reverse engineering to produce an interoperable product, and thus, were in compliance with explicit protections for reverse engineering promulgated under the DMCA.<sup>111</sup> The district court ruled in favor of Blizzard on its motion for summary judgment, holding the actions of the BnetD developers constituted copyright infringement and thus did not qualify for the reverse engineering exception.<sup>112</sup> The district court also held the BnetD program constituted an anti-circumvention device under the language of the DMCA.<sup>113</sup>

*b. Appellants’ Brief*

On appeal, the appellants, the BnetD developers, argued as follows: federal copyright law preempted Blizzard’s breach of contract claims;<sup>114</sup> the DMCA’s exception for reverse engineering protected the BnetD developers;<sup>115</sup>

<sup>105</sup> Opening Brief of Defendants-Appellants Internet Gateway, Inc., Tim-Jung, Ross Combs, and Rob Crittenden at 4, *Davidson*, 422 F.3d 630 (No. 04-3654), 2005 WL 1467962 [hereinafter Brief of *Davidson* Defendants-Appellants].

<sup>106</sup> *Id.* at 14.

<sup>107</sup> *Id.* at 11-12.

<sup>108</sup> Opposition Brief of Plaintiffs-Appellees at 13, *Davidson*, 422 F.3d 630 (No. 04-3654), 2005 WL 1521191 [hereinafter Brief of *Davidson* Plaintiffs-Appellees] (noting, “the emulator allows users without valid CD Keys to access online play and Battle.net Mode”).

<sup>109</sup> *Id.* at 14-15. Given the weakness of the authentication mechanism, widely publishing this information would have made it easy for users of unauthorized copies of the games to disguise their games as legitimate. This is known, in the computer science community, as “security through obscurity,” and many consider it to be unacceptably weak. See, e.g., Stephanie Forrest et al., *Building Diverse Computer Systems*, in PROCEEDINGS: THE SIXTH WORKSHOP ON HOT TOPICS IN OPERATING SYSTEMS 67, 71 (1997) (“Within computer security there is widespread distrust of ‘security through obscurity’ . . .”).

<sup>110</sup> See *Davidson & Assocs., Inc. v. Internet Gateway, Inc. (Gateway)*, 334 F. Supp. 2d 1164, 1167 (E.D. Mo. 2004) (citing 17 U.S.C. § 1201(a) (2000)).

<sup>111</sup> *Id.* at 1183-84. The DMCA’s protections for reverse engineering are codified at 17 U.S.C. § 1201(f) (2006). The programmers based their argument on a recent case upholding this exception in the context of reverse engineering printer ink cartridges. See Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 55-58 (discussing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004)).

<sup>112</sup> *Gateway*, 334 F. Supp. 2d at 1184-85.

<sup>113</sup> *Id.* at 1186-87.

<sup>114</sup> Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 19-29.

<sup>115</sup> *Id.* at 40-52.

and the plaintiffs failed to demonstrate a *prima facie* case under the DMCA.<sup>116</sup> The first claim does not fit as cleanly within the model of technology litigation as the other two, and thus, I will focus purely on the DMCA claims.<sup>117</sup> On the *prima facie* claim, the appellants examined the requirements of liability as defined by the DMCA—liability results from circumvention of a technological protection measure that “effectively controls access” to a “[copyrighted] work.”<sup>118</sup> The appellants claimed their activities involved “Battle.net mode,” and Battle.net mode was not a copyrighted work;<sup>119</sup> in the alternative, appellants argued that Battle.net mode was insufficiently controlled.<sup>120</sup> On the reverse engineering claim, the appellants argued (in particular) that their activities met the statutory exemption under the DMCA because their activities were for the “sole purpose” of interoperability and did not constitute copyright infringement.<sup>121</sup>

The appellants’ brief involved three distinct frames. The first, “balance,” infused claims that, in enacting the DMCA, Congress intended to create a balance of interests between the software companies and the reverse engineers, and that a strong protection against circumvention is balanced in the statute by a strong protection of fair use rights to reverse engineering.<sup>122</sup> Appellants’ brief also implied that a larger balance, one that runs throughout the entire Copyright Act, protected the actions of the appellants.<sup>123</sup> “Balance” is a somewhat ephemeral frame, without the strong degree of rhetorical support that characterizes piracy.

The second frame in appellants’ brief, “competition,” implied that the motive behind Blizzard’s restrictions and legal activity was suspect, derived from a desire to eliminate competition.<sup>124</sup> Appellants supported this frame not just by explicit reference, but by frequent tone painting, casting the BnetD

<sup>116</sup> *Id.* at 52-58 (identifying two of the elements of establishing a *prima facie* case under the DMCA, the existence of a copyrighted work and its effective protection by the mechanism, and arguing that neither is present).

<sup>117</sup> As will be discussed in detail in Section III, *infra*, my reason for focusing on technology law in particular is that the newness of the statutes and the technologies involve ambiguities that create room for framing to be particularly successful. This particular legal claim is based on much older law and a much different sort of legal construct, one in which framing will not be as successful. Although I am sure it still plays some role, I will focus instead on the other two questions, which are exactly the sort for which I believe framing is a major factor.

<sup>118</sup> Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 52-53 (citing 17 U.S.C. § 1201(a), (a)(2) (2000)).

<sup>119</sup> *Id.* at 53-55.

<sup>120</sup> *Id.* at 58-60.

<sup>121</sup> *Id.* at 41-51 (discussing 17 U.S.C. § 1201(f) (2000)).

<sup>122</sup> The implication is that siding against the appellants would disrupt “Congress’s carefully crafted protections for fair use and especially fair use by reverse engineering[.]” *Id.* at 8.

<sup>123</sup> This is addressed through frequent reference to 17 U.S.C. § 107 (2006), which confers fair use rights in general for copyright infringement. *E.g.*, Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 17 (“Plaintiffs’ absolute ban on fair use completely undermines the explicit protections for fair use set forth in 17 U.S.C. §§ 107 and 1201(f).”).

<sup>124</sup> See Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 5 (“Yet while Plaintiffs cloak their claims in the rhetoric of piracy, this case has nothing to do with embracing or facilitating piracy. It has everything to do with Plaintiffs wanting to stifle competition in the market for Internet game servers that work with its store-bought products . . .”).

developers as something like struggling freedom fighters trapped within an oppressive autocratic regime.<sup>125</sup> Competition is a powerful frame in certain contexts—mergers and analyses of industrial practice at a higher level, and of competition among established businesses—but has little purchase in technology law, lacking the context-specific support of piracy. There was also a battle between the “competitor” label and the “pirate” label for the BnetD developers. The nature of the competitor label (which is associated in the public mind with large enterprises, such as AT&T and Microsoft, and not small companies, such as Blizzard) just does not seem as apt as that of a pirate (which is associated with amateurs, like the BnetD developers, opposing established corporations of any size).

As for the most powerful frame at work in this case, there was little piracy framing in the appellants’ brief. Some anti-piracy framing can be found in the brief’s attempt to argue the BnetD developers were mere victims of an anti-competitive process.<sup>126</sup> Appellants’ brief seemed to rely on “fair use” as its primary conceptual defense against allegations of piracy, given the predominance of such language in the brief.<sup>127</sup> There were some other instances of “good guy” labels being applied to the developers—for example, casting the BnetD project as an honest attempt at individual creation to solve the problems the faceless corporate entity refused to correct.<sup>128</sup> However, significant portions of the brief were devoid of context or rhetoric, focusing instead on the district court’s allegedly erroneous constructions of law or on technical discussions of precedent.<sup>129</sup>

The legal claims offered by the appellants required specific constructions of both the relevant technological activity and that of the DMCA. To demonstrate there was no *prima facie* case under the DMCA, appellants argued, as a technical matter, that Battle.net mode was something different from the copyrighted games, and moreover, copyright law did not protect Battle.net mode or Battle.net mode was not effectively controlled.<sup>130</sup> Appellants’ brief also argued the court ought to have construed the DMCA so as not to protect the sort of external mechanism of Battle.net mode and its anti-piracy features.<sup>131</sup> As a legal matter, these readings are well within the range of plausibility. Blizzard’s games may be played without ever using Battle.net mode, and a court could readily have interpreted that it did not deserve copyright protection. Of

<sup>125</sup> Consider the treatment of the End User License Agreement. “[C]ustomers are forced to accept [it] . . . .” *Id.* at 29. “[I]n order to use any of Plaintiffs’ products or services, the customer must *surrender* all rights to engage in the fair use of those products and services . . . .” *Id.* at 30 (emphasis added). “The purchaser *has no choice* other than to either accept all the contractual terms that have been *dictated* by Plaintiffs or return the product.” *Id.* (emphasis added).

<sup>126</sup> *E.g.*, Brief of Davidson Defendants-Appellants, *supra* note 105, at 5.

<sup>127</sup> The opening of appellants’ brief emphasizes fair use (see Brief of Davidson Defendants-Appellants, *supra* note 105, at 2-3), as does the opening of the summary of the argument, *id.* at 16-17, and the opening of the section of the brief discussing the reverse engineering exception, *id.* at 40-41.

<sup>128</sup> *Id.* at 11-12.

<sup>129</sup> *See, e.g., id.* at 31-37; *id.* at 55-57 (discussing *Lexmark* over a stretch of two and one-half pages, a case with which the judges were certainly familiar).

<sup>130</sup> *E.g., id.* at 55.

<sup>131</sup> *Id.* at 57-58.

the frames advocated by the appellants in support of these constructions, competition framing was not relevant, and balance framing was of only generic application (and appellants failed to really emphasize such framing in their brief, using it primarily for the § 1201(f) exception). Anti-piracy framing might have been effective if it could have persuaded the reader that the replicated features of Battle.net mode did not “pirate” anything—but this ignores the most significant element of the facts of the case, that the BnetD service allowed users to play pirated copies.<sup>132</sup>

To show the § 1201(f) exception, appellants’ brief needed to construct both the activities of the BnetD developers and the term “interoperability” in the statute so that the statute encompassed the activities. The statute’s lack of clarity and the precedent of *Lexmark International v. Static Control Components, Inc.*<sup>133</sup> offered more than enough support for the Eighth Circuit to decide to agree with the appellants on this point—though the Eighth Circuit chose not to.<sup>134</sup> Good “balance” framing supported this argument as well, if the brief had effectively argued that a broad interpretation of the exception best served the overall balance in copyright law and in the DMCA—but the vagueness and arbitrariness of a “best balance” notion may have weakened the practical rhetorical value of such a framing argument.

*c. Appellees’ Brief*

The appellees’ brief, in pertinent part, contended as follows: the BnetD developers circumvented a technological handshake method;<sup>135</sup> the handshake method effectively protected a copyrighted work;<sup>136</sup> and the circumvention was not protected by the DMCA’s exception for reverse engineering for interoperability.<sup>137</sup> To establish the protected work constituted a copyrightable object, appellees’ brief argued the handshake method protected “online play,” a component of the game itself.<sup>138</sup> Their brief defined the terms “sole purpose” and “independently created” to keep the BnetD program out of the § 1201(f) exception;<sup>139</sup> it also alleged the appellants’ activity constituted copyright infringement by incorporating code, files, and images into the appellants’ programs.<sup>140</sup> As with the appellants’ brief, these arguments were, for the most part, plausible as a legal matter—parties had never applied the terms to similar circumstances, and though *Lexmark* seemed relevant, it was distinguishable if the court saw fit.

Beginning in the first paragraph of the Summary of the Argument, appellees’ brief established piracy to be the core context for the case: “[a]ll of [the historic difficulties of widespread copying] changed in the computer age when the availability of digital technology made it possible to make copies with

<sup>132</sup> See, e.g., Brief of Davidson Plaintiffs-Appellees, *supra* note 108, at 13.

<sup>133</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004).

<sup>134</sup> *Davidson & Assocs. v. Jung*, 422 F.3d 630, 640-41 (8th Cir. 2005) (discussing *Lexmark Int’l*, 387 F.3d at 522, 528-29, 546-47).

<sup>135</sup> Brief of Davidson Plaintiffs-Appellees, *supra* note 108, at 7-8.

<sup>136</sup> *Id.* at 27-30.

<sup>137</sup> *Id.* at 30-41.

<sup>138</sup> *Id.* at 7-8.

<sup>139</sup> *Id.* at 32-37.

<sup>140</sup> *Id.* at 37-38.

100% accuracy at virtually no cost.”<sup>141</sup> The brief continued in the next paragraph by implying the existence of a class of criminals, people who do not respect the law, and by placing all those who would circumvent technological protection measures into this class.<sup>142</sup> The brief made explicit accusations later on, alternatively accusing the appellants of piracy<sup>143</sup> and of facilitating piracy by others.<sup>144</sup> The rest of the brief was filled with similar language—noting “its games can be easily copied and distributed over the Internet,”<sup>145</sup> offhandedly referring to “unscrupulous individuals,”<sup>146</sup> and describing the secret handshake as a “digital lock Appellants picked.”<sup>147</sup>

The framing in appellees’ brief was both externally and internally strong, and tightly linked to the arguments at hand. The piracy frame, and its affiliated economic and social problems, had been well established in the media. The brief referenced the piracy frame early and often, in many different contexts and with many different targets and phrasings.<sup>148</sup> The legal arguments connected to the frame for several reasons: the arguments gave the fundamental justifications for the statutes as controlling piracy; they interpreted the statute’s terms in a manner consistent with the description of the activities regulated as piracy (and consistent with the actual activities of the defendants); and the brief, as a whole, argued powerfully (as a policy matter) that siding with the legal arguments would greatly reduce the amount of piracy and the resulting loss.

#### d. *The Eighth Circuit’s Opinion*

As to the DMCA applicability issue, the Eighth Circuit made its decision through direct textual interpretation of 17 U.S.C. § 1201(a).<sup>149</sup> The court cited only one case on the subject of the DMCA, *Lexmark*, the strongest precedent in support of appellants’ position, and a staple of their brief.<sup>150</sup> The court distinguished *Lexmark* on somewhat spurious technical grounds, causing one to suspect that the court did not entirely understand the technical subtleties of the case.<sup>151</sup> Beyond the distinction from *Lexmark*, the court said nothing in its

<sup>141</sup> *Id.* at 15.

<sup>142</sup> *See id.* at 16 (“[A]ll such technological measures are subject to circumvention, and the type of person that circumvents such measures rarely pays attention to contractual restrictions.”) (emphasis omitted).

<sup>143</sup> *See id.* at 22 (“While the DMCA was passed as a tool to prevent piracy, Appellants attempt to use the DMCA to justify it.”).

<sup>144</sup> *See id.* at 18-19 (“Appellants then further violated the DMCA by widely distributing their circumvention device, and through their trafficking enabled rampant piracy of Blizzard games by providing a means for online play of Blizzard games with no check for authenticity.”).

<sup>145</sup> *Id.* at 7.

<sup>146</sup> *Id.* at 8.

<sup>147</sup> *Id.* at 25.

<sup>148</sup> *E.g., id.* at 7-8 (incorporation multiple invocations of “legitimate” and “authorized” copies); *id.* at 11 (“hack value”); *id.* at 19 (“rampant piracy”).

<sup>149</sup> *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639-40 (8th Cir. 2005).

<sup>150</sup> *Id.* at 640-41.

<sup>151</sup> There are several examples of this. First, the opinion refers to “Battle.net mode codes,” *id.* at 641, a phrase that the court does not define and that is used exactly once in one of the briefs. *See* Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 61 (“Just as in

rationale for its holding, other than “we are unpersuaded that summary judgment on the anti-circumvention violations was improperly granted . . . .”<sup>152</sup> The text of the opinion offered little in the way of substantive justification behind the decision—the court had (or chose not to share) no compelling legal reason to side with the appellees.

On the DMCA exception issue, the Eighth Circuit did not address the majority of the complex issues raised by the parties. Adopting a four-factor test similar to that submitted by the appellants, the court discussed only the fourth factor, offering a reiteration of a few of the facts of the case by way of support for the legal conclusions that “[a]ppellants’s circumvention in this case constitute[d] infringement” and “[a]ppellants failed to establish a genuine issue of material fact as to the applicability of the interoperability exception.”<sup>153</sup> As with the DMCA applicability, the court’s opinion gave no real indication why it ruled the way it did, and did not, in any way, refute the arguments submitted by the appellants.

Offering little more than a mere paragraph for each issue when discussing its holdings, the court did not say much about any specific frames. In its discussion of the § 1201(f) exception, the court did not mention piracy or infringement, aside from the statement that the activity constituted copyright infringement—the court merely noted the users could play unauthorized copies of games on the BnetD servers, as if this was reason enough to justify infringement.<sup>154</sup> In discussing whether appellees offered a *prima facie* case of § 1201(f) liability, the court used the same language as in its § 1201(f) discussion, and only further offered a neutral factual statement that the “mode codes” were not freely available.<sup>155</sup>

The court could plausibly have sided with either party, as both sides had colorable legal arguments. The most relevant precedent offered by either side, the Supreme Court’s *Lexmark* decision, provided some inertia on behalf of the

---

*Lexmark*, no security device protects access to the Battle.net mode code in these ways and no security device accordingly must be circumvented to obtain access to that program code.”). Second, the phrase “nor could data from the program be translated into readable source code after which copies were freely available without some type of circumvention,” *Davidson*, 422 F.3d at 641, is technically incorrect. The circumvention did not occur in the translation into readable source code by itself, but in the production of other code that interfaced with features of Battle.net mode that ordinarily cannot be used without inputting a ‘CD Key.’ In addition, the court stated, “Appellants could not have obtained a copy of Battle.net or made use of the literal elements of Battle.net mode without acts of reverse engineering, which allowed for a circumvention of Battle.net and Battle.net mode.” *Id.* The first portion of this sentence could be technically correct, if the first use of “Battle.net” refers to the source code that implements Battle.net mode in the client application, and if “the literal elements of Battle.net mode” also refers to the same source code. Any other interpretation is factually incorrect, as of course Appellants, who owned legal copies of Blizzard games, could access Battle.net mode and the official Battle.net servers without reverse engineering. The second portion of the quoted sentence is both ambiguous (in trying to declare two separate pieces, Battle.net and Battle.net mode) and factually incorrect (the pieces themselves were not circumvented; the technological measures protecting them were circumvented).

<sup>152</sup> *Davidson*, 422 F.3d at 641.

<sup>153</sup> *Id.* at 642.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 641.

appellants, but it was certainly distinguishable. The terms of the statute offered very little guidance in their proper legal interpretation and application. There was no clear right side, and, as mentioned earlier, the opinion did not offer a compelling legal rationale for why it chose one side over the other. One possible explanation is that the judges were in fact motivated primarily by their concerns about policy issues (notably, the fear of piracy), and structured their opinion on sparse textualist legal rationale as an after-the-fact justification, rather than a decisional process.

If policy concerns motivated the court's decision, one difference in the parties' briefs that may explain why the judges decided in favor of the appellees is that the framing in the appellants' brief was demonstrably worse than the framing in the appellees' brief. The appellants' brief emphasized the weaker frames of "balance" and "competition," and it began with its most technical legal argument (preemption), which left little to no room for effective framing, leaving it far behind the powerful framing of the appellees' brief. Appellants could have greatly improved the framing in their brief by focusing on a single frame, such as "balance," and by emphasizing the legal arguments that are most amenable to framing, notably the claim of § 1201(f) exception. Although such a presentation in appellants' brief would not have guaranteed them a victory, the legal issues in the case were flexible enough that concentrating on one strong frame may have made a considerable difference.

### 3. MGM v. Grokster, *Before the Ninth Circuit*

#### a. Background

The well-known case of *MGM v. Grokster* concerns the issue of secondary liability for copyright infringement as applied to developers of software for peer-to-peer networking.<sup>156</sup> The defendants were (primarily) two companies, Grokster Ltd. and Streamcast Networks, Inc., who produce and distribute (or rather, produced and distributed) the Grokster and Morpheus software programs, without charge, which enabled users to send and receive files from other users.<sup>157</sup> The plaintiffs, owners of a large share of the copyrighted material exchanged over the networks, brought suit against the software distributors to hold them liable for vicarious and contributory copyright infringement, seeking an injunction and damages.<sup>158</sup> The plaintiffs alleged (without strong opposition) the online exchange of their material constituted copyright violation, and the defendants knew a portion of the use of their software was for illegal activity.<sup>159</sup> In effect, plaintiffs argued the knowing distribution of software that facilitated illegal activity was sufficient to trigger secondary liability on behalf of the defendants.<sup>160</sup> The district court disagreed, granting summary judgment in favor of the defendants on the grounds that neither contributory nor vicarious liability applied to the activities of the software companies.<sup>161</sup> The plaintiffs

<sup>156</sup> *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 545 U.S. 913 (2005).

<sup>157</sup> *Id.* at 1159-60.

<sup>158</sup> *Id.* at 1158.

<sup>159</sup> *Id.* at 1160.

<sup>160</sup> *See id.*

<sup>161</sup> *Id.*

appealed and brought the question of the scope of secondary liability as applied to the defendants before the Ninth Circuit.<sup>162</sup>

*b. Appellants' Brief*

On appeal, the appellants argued the district court erred and the defendants met the legal requirements of both contributory liability (knowledge and contribution) and vicarious liability (financial benefit and control).<sup>163</sup> The brief challenged, as a matter of law, the district court's construction of the specific requirements of knowledge, material contribution, and control.<sup>164</sup> The case law in this area is far from clear about what level of knowledge, contribution, and control are necessary to trigger liability, and the technology comparisons to past determinations of secondary liability (see, e.g., *A&M Records v. Napster*)<sup>165</sup> are not sufficiently close to permit a direct application. The formal legal arguments, by themselves, are not convincing, the supporting case law is unclear, and the inertia was in favor of the appellees. The court would need to import considerations of equity into its decision to interpret the law in favor of the appellants.

To supplement the legal arguments submitted by the appellants, some framing language can be found in their brief—but not much. The primary frame at work in appellants' brief was piracy. The acts of the users of the software clearly constituted piracy in its modern day sense, and imputing that to the software developers (at least on a rhetorical level) might have been very helpful. The brief contained some accusations of this sort. It compared the activities of Grokster and Morpheus users to those of Napster users.<sup>166</sup> Appellants' brief contained significant technical description of the defendants' activities, in an attempt to support appellants' claims of contribution and control.<sup>167</sup> Moreover, their brief hinted (though in only a few places) that the fate of the music industry required a determination that the defendants' activities were illegal.<sup>168</sup>

Overall, however, the level of the use and implementation of framing arguments in appellants' brief was low. Their brief did not often use loaded terms such as "pirate" or "piracy;" the first instance of either of these terms comes at the very end of a lengthy statement of facts (without any mention in the introduction, for example).<sup>169</sup> The brief engaged in far more detailed technical description than it did baseless name-calling.<sup>170</sup> Moreover, when appellants used framing, they tended to focus more on the activities of the users of

<sup>162</sup> *Id.* at 1157.

<sup>163</sup> MGM Plaintiffs-Appellants' Opening Brief at 23-25, *Grokster I*, 380 F.3d 1154 (Nos. 03-55894, 03-56236, 03-55901), 2003 WL 22794496 [hereinafter Brief of *Grokster I* Plaintiffs-Appellants].

<sup>164</sup> *Id.*

<sup>165</sup> See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

<sup>166</sup> See, e.g., Brief of *Grokster I* Plaintiffs-Appellants, *supra* note 163, at 5, 8-10.

<sup>167</sup> *Id.* at 44-48, 56-58.

<sup>168</sup> *Id.* at 2 ("All of that is at risk in this lawsuit."); *id.* at 6 ("[Affirming the decision below] will gravely threaten any possibility for meaningful copyright protection in the digital era.")

<sup>169</sup> *Id.* at 22 ("It is easy to find any type of pirated media on Defendants' systems.")

<sup>170</sup> See, e.g., *id.* at 11-15, 27-29.

the software instead of the developers,<sup>171</sup> weakening its relevance to the legal question at hand. The brief, overall, was very “clean”—it stuck to the law, to the legal precedents, and to the facts at hand. In this Article, I hope to raise at least a suspicion that this may be why the appellants lost.

*c. Appellee’s Brief*

Appellee Grokster argued that neither theory of secondary liability applied to them, and the *Sony* exception protected the activities of the defendants.<sup>172</sup> Although scholars debate its exact interpretation, the early precedent of *Sony Corporation v. Universal City Studios*<sup>173</sup> established that, at a minimum, contributory copyright liability does not hold liable the creators of a device, which can be used for copyright infringement if a “substantial” portion of the actual use of the device is for non-infringing purposes.<sup>174</sup> Appellee’s brief centered around the argument that the defendants’ activities were protected under *Sony* and were generally legitimate innovations completely removed from the infringing activities of the users.<sup>175</sup>

The framing in appellee’s brief was tricky, and one must proceed on multiple levels to analyze the framing. Piracy was obviously a strong frame, but the appellee had to advocate a sort of “anti-piracy” frame and argue that piracy was *not* an accurate analogue of the facts of the case at hand. For example, the brief discussed the legitimate, and socially valuable, uses of the software.<sup>176</sup> It mocked the paranoia and world ending claims of the industry.<sup>177</sup> Even further, the brief emphasized the legitimate and compliant activities of the defendants to make them seem as blameless as possible.<sup>178</sup> Less common frames used in appellee’s brief included “innovation”<sup>179</sup> and “balance.”<sup>180</sup> The brief compared the Grokster software to other historic music technologies, each of which people first saw as potentially harmful, yet permitted to flourish, and ultimately, the technologies turned out to be beneficial.<sup>181</sup> Appellee also introduced balance explicitly late in their brief as a description of the then current state of the law of secondary copyright liability after the *Sony* decision.<sup>182</sup> Moreover, as balance is only a good thing if one’s interpretation of the law is

<sup>171</sup> See, e.g., *id.* at 3-4.

<sup>172</sup> See, e.g., Appellee Grokster, Ltd.’s Brief at 25-26, *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154 (9th Cir. 2004) (Nos. 03-55894, 03-55901), 2003 WL 22753806 [hereinafter Brief of *Grokster I* Appellee].

<sup>173</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

<sup>174</sup> *Id.* at 442.

<sup>175</sup> See, e.g., Brief of *Grokster I* Appellee, *supra* note 172, at 37, 50.

<sup>176</sup> See *id.* at 3-5, 19-22.

<sup>177</sup> *Id.* at 28-29.

<sup>178</sup> *Id.* at 13.

<sup>179</sup> *Id.* at 7, 50.

<sup>180</sup> *Id.* at 46-47.

<sup>181</sup> *Id.* at 28-29. Innovation framing is also present later in appellee’s brief, where the appellee argued the appellants were trying to redesign Grokster’s software, effectively allowing copyright owner control over the shape of technological innovation. *Id.* at 49-50.

<sup>182</sup> *Id.* at 46 (“Drawing that line [between legal and illegal activity] preserves the careful balance inherent in the Copyright Act: to reward creative effort only as a means to encourage the development of the ‘useful arts and sciences.’”) (quoting U.S. CONST. art. I, § 8).

seen as a better balance than the other side's, the brief contended the appellants were engaging in frivolous litigation,<sup>183</sup> and were trying "to legislate the shape of technological innovation" by changing the settled structure of liability.<sup>184</sup>

Compared to the appellants' brief, the framing in the appellee's brief, as a general matter, was more closely connected to the activity of the defendants and not the users of the network, which strengthened the connection of the frame to the appellee's legal arguments. The appellee's brief managed to establish a close factual analogy between the facts of the case at hand and the facts of *Sony* because the brief focused on the analogy rather than technical legal details. The appellants' brief, by contrast, attacked the illegal activities of the users through some amount of framing, but imputed this activity to the defendants through a dry legal analysis of the doctrinal details of knowledge, contribution, and control. In general, the appellee's brief was less technical and more emotional than the appellants' brief, and a better picture that the other side was more disruptive of the existing social balance. In short, appellee did a far better job of framing.

*d. The Ninth Circuit's Opinion*

The Ninth Circuit's (very technical) opinion gave sparse overt mention to piracy or balance or any other frame, focusing instead on the *Sony* precedent and the elements of contributory and vicarious copyright liability<sup>185</sup>—almost mirroring the form of the appellants' brief. The case might have been as simple as the opinion made it out to be. For example, when considering vicarious liability, the court held the legal requirement of control was not met because, as a technological matter, Grokster could not effectively block access to users (as there was no centralized login process) and could not filter traffic (because files did not pass through central servers where they could be observed).<sup>186</sup> This holding seemed straightforward, and it was defensible—it took a narrow reading of the secondary liability standard, one that upheld the spirit of *Sony*, and one that affirmed the finding of the district court. However, the opinion did not adequately address the arguments in appellants' brief, which noted that users could easily modify the software to include filters for common copyrighted files,<sup>187</sup> made easier by the already existing capacity to force users to upgrade software to the newest version to continue using the network.<sup>188</sup> Though this feature was not the same as central filtering, it was arguably equivalent in function. Given the ambiguities in the terminology and technology, there is some reason to believe the legal merits of the case were not the sole factor behind the court's decision. There must have been more to the story than is told by a mere recitation of the court's interpretations of the legal factors.

Some of the case's hidden story is evident in the court's opinion and in the frames the court referenced. The court opened by criticizing a long history of

<sup>183</sup> See, e.g., *id.* at 36-37.

<sup>184</sup> *Id.* at 7.

<sup>185</sup> See, e.g., *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154, 1160 (9th Cir. 2004).

<sup>186</sup> *Id.* at 1165.

<sup>187</sup> Brief of *Grokster I* Plaintiffs-Appellants, *supra* note 163, at 16-19.

<sup>188</sup> *Id.*

copyright owner resentment of (and legal challenges to) any fundamental change in the technology of the music business.<sup>189</sup> The court returned to this theme at the very end of the opinion when it adopted the appellees' contention that the appellants sought to change the established state of the law of secondary liability.<sup>190</sup> The opinion recited the story of the band Wilco's use of file-sharing networks to beat the system by creating a commercial demand for an album that its recording studio had refused to produce (thinking the album would have no commercial demand).<sup>191</sup> If nothing else, the court clearly acknowledged the software permitted legitimate use.<sup>192</sup>

It is not a certainty that the Ninth Circuit sided with the appellees because of their stronger framing, as opposed to the merits of the pure legal arguments, or any predilection on the part of the individual judges toward the parties or the industries from experience, or any other factor or combination of factors.<sup>193</sup> Notwithstanding, I hope I have raised a little suspicion, and that, viewed alongside the Supreme Court's resolution of the same case, discussed below, the importance of framing is made clear.

#### 4. *Grokster, Before the Supreme Court*

##### a. *Background*

The recording industry and motion picture studio companies petitioned for a writ of certiorari in late 2004, alleging that the Ninth Circuit's interpretation

---

<sup>189</sup> *Grokster I*, 380 F.3d at 1158 ("From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation. This appeal is the latest reprise of that recurring conflict . . .").

<sup>190</sup> *Id.* at 1166 ("The Copyright Owners urge a re-examination of the law in the light of what they believe to be proper public policy . . . . [I]t would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context.").

<sup>191</sup> *Id.* at 1161.

<sup>192</sup> *Id.* at 1162 ("In this case, the Software Distributors have not only shown that their products are capable of substantial non-infringing uses, but that the uses have commercial viability.") (footnote omitted).

<sup>193</sup> Jeffrey Segal and Harold Spaeth's "attitudinal model" is one of the more recent comprehensive behavioral theories that purports to explain the Supreme Court and other judicial decisions on the basis of non-legal criteria. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). See generally Pratibha A. Dabholkar, *Incorporating Choice into an Attitudinal Framework: Analyzing Models of Mental Comparison Processes*, 21 J. CONSUMER RES. 100, 100-18 (1994) (examining the attitudinal model outside the scope of judicial decision making); Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 470-71 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999)) (referencing and briefly summarizing many older behavioral theories). As applied to judicial decision making, Segal and Spaeth's attitudinal model holds that the Supreme Court made some decisions in large part because of the ideological views of the justices. SEGAL & SPAETH, *supra*, at 86. It is well recognized that Ninth Circuit decisions are overturned more often than those of other appellate courts, with explanations including its large size, see Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 718-19 (2000), its recent ideological leanings, and some of its procedural rules, see Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 169 (2006).

of *Sony* involved a severe misreading of secondary liability law, and the decision created a split with the Seventh Circuit's ruling in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2005).<sup>194</sup> Apparently, many members of the general public also felt the decision ought to be reviewed, as briefs in support of certiorari were filed by law professors, the attorneys' general of forty states, other entertainment organizations, including major sports and software associations, and a small collection of high profile (though mostly older) music artists.<sup>195</sup> In addition, the entirety of the Supreme Court agreed, unanimously voting to vacate and remand the Ninth Circuit's decision.<sup>196</sup>

*b. Petitioners' Brief*

At a broad level, the petitioners argued that secondary liability applied to the activities of the defendants regardless of the *Sony* safe harbor.<sup>197</sup> More specifically, the brief contended the Ninth Circuit's construction of the *Sony* safe harbor introduced an erroneous requirement of specific knowledge into the standard for contributory liability,<sup>198</sup> and the non-infringing uses of the Grokster program were not sufficient to excuse liability.<sup>199</sup> By digging a little deeper into the Ninth Circuit's rationale for *Sony*, the brief also found support for the claim that the Supreme Court could make a legal distinction between the mere offering of software for download and the active encouraging of the use of the software for infringing activity.<sup>200</sup> This last theory found the most support in the eventual opinion rendered by the Supreme Court. The brief's arguments were very defensible, though, of course, even if the Ninth Circuit's construction of *Sony* was erroneous, and even if the Supreme Court could make a distinction for active infringement, these do not resolve what was an ambiguous legal standard, and could not support a formal legal verdict absent any considerations of equity.

As with the other cases I have discussed, the use of framing heavily swayed the equity considerations in *Grokster*. The volume of framing on dis-

<sup>194</sup> See Petition for a Writ of Certiorari at 2-3, *MGM Studios, Inc. v. Grokster Ltd. (Grokster I)*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 543 U.S. 1032 (2004) (No. 04-480).

<sup>195</sup> All these briefs are available from the EFF's case archive. EFF: *MGM v. Grokster*, [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/) (last visited May 18, 2009).

<sup>196</sup> *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913, 916 (2005). I am not claiming that the Supreme Court's nine-to-zero verdict was a result of framing; there was, in fact, plausible concern over the Ninth Circuit's construction of *Sony*. Certainly, however, I suspect the more effective use of framing played a role in the nature of the Supreme Court's response, particularly in its decision to create a new theory of liability based on the intent of the developers, to focus on the real pirates.

<sup>197</sup> See, e.g., Brief for Motion Picture Studio and Recording Company Petitioners at 18, *Grokster II*, 545 U.S. 913 (No. 04-480), 2005 WL 166587 [hereinafter Brief for *Grokster II* Petitioners] ("*Sony-Betamax* provides no safe harbor where, as here, a defendant engages in conduct that encourages or assists infringement, or intends to facilitate it."). The *Sony* safe harbor protects from contributory liability the developers of devices that are capable of substantial non-infringing use. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); *supra* notes 173-75 and accompanying text.

<sup>198</sup> See, e.g., Brief for *Grokster II* Petitioners, *supra* note 197, at 38-42.

<sup>199</sup> *Id.* at 30-38.

<sup>200</sup> *Id.* at 27-29.

play in petitioners' brief was staggering. The vast majority of it dealt with the piracy frame, which was central to the discussions of peer-to-peer networks. The brief used powerful rhetoric, aimed at the software developers directly, instead of the users, to make its accusations—"perpetual free pass to inflict these harms because a tiny fraction of the material available on their services may not be infringing"<sup>201</sup> and "[c]opyright infringement is the lifeblood of these businesses"<sup>202</sup> being two of the stronger examples.<sup>203</sup> Although petitioners did not often use the specific terms "pirate" and "piracy," petitioners did implement the terms "infringement" and "infringing" enough to compensate—sixteen times in the first five paragraphs of the brief's Statement of the Case.<sup>204</sup> The pattern continued in later sections; for example, one single paragraph in the Summary of the Argument used the terms "infringement" and "infringing" ten times.<sup>205</sup> Although petitioners reduced the vehemence of the rhetoric in the more detailed Argument section, the framing remained evident.<sup>206</sup>

Piracy framing was not the only type of framing petitioners used in their brief. Petitioners also twisted the frames of innovation and balance introduced by the respondents' brief to the Ninth Circuit. Where the respondents advocated for the innovation of their software, the petitioners advocated for the value of "innovation in legitimate copyright commerce"<sup>207</sup> and argued the innovation of peer-to-peer networking was "innovation of a most unwelcome kind."<sup>208</sup> Petitioners argued the respondents were the ones actually attempting to twist the legal status quo by trying to create a "distortion of traditional principles of copyright law"<sup>209</sup> and claimed the Ninth Circuit set balance aside and "denied petitioners any possibility of 'effective protection' of their copyrighted works in the digital era."<sup>210</sup> This glorified version of the elementary school child's "I know you are but what am I" argument is in fact a potentially valuable psychological argument given the underlying, unresolved normative questions involved in legal determinations concerning the scope of secondary liability.

However, the piracy framing served as the petitioners' greatest weapon in their brief. Unlike their brief before the Ninth Circuit, framing language was present and strong throughout their brief submitted to the Supreme Court. The petitioners' Supreme Court brief directed accusations of improper activity at

<sup>201</sup> *Id.* at 1.

<sup>202</sup> *Id.* at 3.

<sup>203</sup> Other standouts included "contribute to copyright infringement on a 'mind-boggling' scale," *id.* at 1; "exploit this massive infringement for profit," *id.*; and "breeding grounds for copyright infringement of unprecedented magnitude," *id.* at 3.

<sup>204</sup> *Id.* at 1-4. Naturally, some amount of discussion of infringement was necessary, as it was the legal issue at hand; a few uses of the term "infringement" would not have indicated significant framing. However, I contend the petitioners intended to invoke the frame of piracy through the blatant overuse of these words.

<sup>205</sup> *Id.* at 17-18.

<sup>206</sup> Consider, for example, the accusation that the software produced by the defendants was "principally used for infringement, and it is this infringement—not legitimate activity—that makes them money." *Id.* at 23.

<sup>207</sup> *Id.* at 41.

<sup>208</sup> *Id.* at 49.

<sup>209</sup> *Id.* at 50.

<sup>210</sup> *Id.* at 2.

the respondents and the developers, not at the third party users. The brief contained less technical discussion of both the law and the technology, focusing more on the framing. In addition, petitioners more closely aligned their legal argument to framing by arguing the trigger for liability was developer encouragement instead of the proportion of illegitimate activity by the users, or anything as neutral as “knowledge” of the infringing activity.

*c. Respondents’ Brief*

Respondents’ legal argument tracked, in part, the Ninth Circuit’s decision, and in part, the arguments of the petitioners’ brief. It began by arguing that *Sony* did in fact protect the activities of the respondents.<sup>211</sup> It then decried the petitioners’ interpretation of *Sony* on both legal and equitable grounds.<sup>212</sup> Respondents also challenged the attachment of encouragement to secondary liability on procedural grounds.<sup>213</sup> Finally, their brief argued the petitioners were attempting to change the law, and any change could and must come from Congress, not the courts.<sup>214</sup> These are fully rational arguments, though they relied on both equity and on one particular philosophy of jurisprudence, in that change to this area of law ought to come from Congress and not the courts. As a formal matter, respondents’ brief remained stronger than petitioners’ brief, as it advocated upholding district and appellate constructions of precedent or, in the alternative, recognized the law was unclear and deferred to Congress to declare illegality.

The respondents’ brief included less framing than their earlier brief before the Ninth Circuit, or than the petitioners’ brief to the Supreme Court. Nonetheless, it still displayed a wealth of balance, innovation, and piracy frames. The balance and innovation framing occurred predominantly at the middle and latter portions of the brief, after the introductory sections. For example, at the end of Section I of the Argument, respondents included a detailed discussion of the harm to innovation if the Supreme Court found the defenders liable;<sup>215</sup> respondents implemented the first reference to the notion of balance in the beginning of their Argument.<sup>216</sup> As with the petitioners’ brief, the majority of the framing in the respondents’ brief concerned piracy. Some of this framing took the form of emphasizing the valid uses of the software to weaken the piracy label;<sup>217</sup> some involved claiming the petitioners’ arguments were inflated and para-

<sup>211</sup> Brief for Respondents at 21-26, *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508120 [hereinafter Brief for *Grokster II* Respondents].

<sup>212</sup> *Id.* at 26-30.

<sup>213</sup> See the title of the relevant section: “Claims Of Contributory Infringement Liability For Urging Infringement Or Assisting Specific Known Acts Of Infringement Are Not Before This Court.” *Id.* at 34-37.

<sup>214</sup> *Id.* at 40-50.

<sup>215</sup> *Id.* at 31-33. There is a shorter discussion of innovation early in the brief, however, in the “Statement” section. *Id.* at 2 (“The suggested changes in the general law of secondary liability would profoundly impair *Sony*’s essential protection of product innovation, to the detriment of future creators among others.”).

<sup>216</sup> *Id.* at 16-17.

<sup>217</sup> *Id.* at 6-8.

noid;<sup>218</sup> and some attempted to separate the illegitimate activities of the users from the activities of the developers.<sup>219</sup> At one point, the respondents' brief appeared to argue piracy was not the right view and, instead, the entire situation should be viewed as the re-forming of a market, citing Joseph Schumpeter for support.<sup>220</sup>

Though framing was present in the respondents' brief, it was not as vehement, nor as frequent, as the framing in the petitioners' brief. The framing largely occurred in the latter parts of the brief instead of the earlier parts (whereas earlier framing better shapes the judge's interpretation of later, more technical, legal arguments). Respondents' did not closely connect their legal arguments to the framing, as the arguments were (at least in part) procedural and jurisprudential, instead of fact-based. There were also small details within many uses of framing that weakened the arguments. Consider the discussion of innovation at the end of the respondents' brief—it examined the cost of innovation, not the value, implying the Supreme Court's decision would not really cause any major harm, but would simply provide a minor disincentive for innovators.<sup>221</sup> Much worse was the fact there were two possible, though contradictory, interpretations of the attempts in the brief at anti-piracy framing. In theory, a piracy frame might be weakened by indicating that the users who wished to commit copyright infringement had many options, lessening the culpability of developers.<sup>222</sup> However, this argument reinforces the magnitude of the underlying problem (piracy), and makes the claims of disaster submitted by the petitioners seem more realistic. The respondents' arguments of judicial deference could then be applied here—when in doubt, let the courts fix the immediate harm (the damage caused to the movie and music industries by piracy), and if major change (such as a change in the market structure of the entertainment industry) was to be made, let it be made by Congress.

#### d. *The Supreme Court's Opinion*

The Supreme Court's opinion adopted, in its entirety, the inducement theory advocated by the petitioners. The inducement theory attaches secondary liability to individuals who both distribute a device and induce the use of the device to infringe copyright.<sup>223</sup> The Court acknowledged it was making a deliberate change to the common law of secondary liability by adopting this rule.<sup>224</sup> The Court refused to clarify the proper scope of *Sony's* exemption,

---

<sup>218</sup> Note the use of the phrase, "sky-is-falling pleas," to characterize the recording industry's concerns. *Id.* at 15.

<sup>219</sup> *Id.* at 2-6.

<sup>220</sup> *Id.* at 24-25 & n.12 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (Harper-Perennial ed. 1976) (1942)).

<sup>221</sup> *Id.* at 31-33.

<sup>222</sup> The brief attempts to do this in its opening sections. *See id.* at 2-4.

<sup>223</sup> *MGM Studios Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913, 936-37 (2005).

<sup>224</sup> *Id.* ("We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

simply stating the Ninth Circuit's construction was incorrect.<sup>225</sup> The opinion demonstrated a striking amount of technical commentary, including discussions of Grokster's functionality and its beneficial uses.<sup>226</sup> A considerable portion of the opinion was devoted to factual matters—the activities of the respondents, including the development of the software, marketing activities, and the design of respondents' business models.<sup>227</sup> After the Court finished reciting the facts at hand, the remainder of the opinion followed standard forms, mixing discussion of various legal precedents with commentary on the parties' arguments.<sup>228</sup>

The Supreme Court's opinion contained signs of warm receptions of both piracy and balance-centered framing. The piracy framing argument by the petitioners was on display early in the factual discussion of the opinion, when the Court noted, "each [of the respondents] took active steps to encourage infringement;"<sup>229</sup> using the respondents' advertising to Napster users as support for this claim reinforced the Court's connection.<sup>230</sup> Although both parties argued their side represented the more balanced view of the equities, the Court reflected the conception offered by the petitioners, emphasizing there was a great deal of infringing uses and it may have been impossible to catch the infringers directly, necessitating the restrictions on innovation that concerned the respondents.<sup>231</sup> The Court claimed to place a great deal of value on preserving this balance.<sup>232</sup>

For whatever reason, the Supreme Court and the Ninth Circuit differed on their legal interpretations of *Sony* and their understandings of what secondary liability for copyright infringement should look like. Though this type of judicial disagreement is not exactly rare,<sup>233</sup> the framing in the parties' briefs provided a clear distinction between the cases, offering one reason why the two courts may have reached such different interpretations on the same legal ques-

---

<sup>225</sup> *Id.* at 934 ("[W]e do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.").

<sup>226</sup> *Id.* at 919-22.

<sup>227</sup> *Id.* at 921-25.

<sup>228</sup> *See, e.g., id.* at 932-33.

<sup>229</sup> *Id.* at 924.

<sup>230</sup> *Id.* at 925 ("The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for 'Napster' or '[f]ree file sharing' would be directed to the Grokster Web site . . .").

<sup>231</sup> *Id.* at 929-30 ("When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.") (citing *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003)).

<sup>232</sup> *Id.* at 928 ("The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.").

<sup>233</sup> Ninth Circuit decisions are reversed far more than decisions rendered from sister Circuits. *See* Scott, *supra* note 193.

tion.<sup>234</sup> Although the petitioners' legal arguments were not inherently convincing, the Supreme Court's rationale in its opinion seemed to track, in form and substance, the petitioners' framing.

### C. Privacy

#### 1. The Frame

Privacy in the digital era has engendered even more major media attention than piracy.<sup>235</sup> Privacy reaches a broader audience than concerns over piracy. Although many Americans listen to music produced by the recording industry, the potential financial damage to the industry from piracy affects individuals only indirectly, whereas the fear of a corporation collecting and studying purchasing behavior<sup>236</sup> or reading personal email<sup>237</sup> strikes closer to heart. Federal statutes, such as the Stored Communications Act ("SCA"),<sup>238</sup> the Wiretap Act,<sup>239</sup> and the Computer Fraud and Abuse Act ("CFAA"),<sup>240</sup> protect specific and willful acts of improper use of information. However, other issues, including the use of data mining for quasi-legal collection and the use of personal information for business purposes,<sup>241</sup> remain ungoverned, and lead to continued development of the privacy frame. Additional state and federal statutes protect the specific personal information of greatest concern, such as credit card information<sup>242</sup> and medical records,<sup>243</sup> though advocates for the public interest in privacy policy claim that these laws still fail to adequately address

<sup>234</sup> Naturally, this is not the only possible reason. Different courts are predisposed toward different equity balances and judicial philosophies. A successful framing argument before a "liberal" court, such as the Ninth Circuit, may not be as successful before another Circuit Court. However, this does not obviate my theory, as it merely affects the selection of frames and legal arguments available to adopt.

<sup>235</sup> Although this is perhaps a subjective statement, some trite objective evidence can nonetheless demonstrate my point. For example, a Lexis-Nexis search through *The New York Times* archives for "privacy w/10 digital," conducted on November 22, 2008 returned 153 results, whereas a search for "piracy" and "peer" returned only 121 results.

<sup>236</sup> See, e.g., Steve Lohr & John Markoff, *Computing Centers Become the Keeper of Web's Future*, N.Y. TIMES, May 19, 1999, at A1.

<sup>237</sup> See, e.g., Saul Hansell, *The Internet Ad You Are About to See Has Already Read Your E-Mail*, N.Y. TIMES, June 21, 2004, at C1.

<sup>238</sup> Stored Communications Act, Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1860-68 (1986) (codified as amended at 18 U.S.C. §§ 2701-2711 (2006)).

<sup>239</sup> Wiretap Act, Pub. L. No. 90-351, §§ 801-804, 82 Stat. 197, 211-25 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522 (2006)).

<sup>240</sup> Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, § 2, 100 Stat. 1213, 1213-16 (1986) (codified as amended at 18 U.S.C. § 1030 (2006)).

<sup>241</sup> See generally MICHAEL J.A. BARRY & GORDON S. LINOFF, *DATA MINING TECHNIQUES: FOR MARKETING, SALES, AND CUSTOMER RELATIONSHIP MANAGEMENT* (2d. ed. 2004).

<sup>242</sup> For example, California Senate Bill 1386 (made active on July 1, 2003) targeted "personal information" stored on a computer server. The California Legislature incorporated the bill into California Civil Code, sections 1798.29, 1798.82, and 1798.84. See CAL. CIV. CODE §§ 1798.29, .82, .84 (West 2008).

<sup>243</sup> The most significant law in this context is the federal Health Insurance Portability and Accountability Act ("HIPAA") and its "Privacy Rule." See HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of Titles 18, 26, 29, and 42 of the United States Code); 45 C.F.R. §§ 160, 164 (2008). See also *The Privacy Rule*, <http://www.hhs.gov/ocr/hipaa/finalreg.html> (last visited May 22, 2009).

major problems plaguing the data mining industry.<sup>244</sup> Our every online activity may be subject to public scrutiny—even such neutral and “anonymous” activities as web searches may be subject to outside inspection.<sup>245</sup> Furthermore, the government’s increasing role in the monitoring of Internet activity<sup>246</sup> triggers deep anxieties of history and literature.<sup>247</sup>

The law of information privacy in the United States, such as it is, is a scattershot of individual regulations of different types of information—a mix of federal laws, governing a few sensitive topics,<sup>248</sup> and state laws, which vary widely in their coverage.<sup>249</sup> By contrast, the European Union provides more general coverage through two affirmative Directives that construct legal norms for both privacy and information protection.<sup>250</sup>

In light of the limited and meager legal backdrop surrounding privacy regulation in the United States, legal scholars have offered their own layer of study on the issues involved in privacy in the information age. Julie Cohen, for example, has written about multiple topics in this area over many years, ranging from an early article on anonymity over the Internet,<sup>251</sup> to recent articles about the conflicts and balances between privacy and Digital Rights Management technologies.<sup>252</sup> In addition, Marc Rotenberg and others from the Electronic Privacy Information Center have made careers out of policy papers and speaking engagements dedicated to information related to privacy issues.<sup>253</sup> One of the foremost academics in the area of privacy, Dan Solove, has written a book on the subject matter suitable for a broad audience.<sup>254</sup> These scholars and others offer considerable guidance in understanding the law and policy of privacy.

<sup>244</sup> E.g., Tom Zeller, Jr., *Breach Points Up Flaws in Privacy Laws*, N.Y. TIMES, Feb. 24, 2005, at C1.

<sup>245</sup> This already happened in a well-known, recent leak of search records by America Online. Dawn Kawamoto & Elinor Mills, *AOL Apologizes for Release of User Search Data*, CNET NEWS, Aug. 7, 2006, [http://news.com.com/2100-1030\\_3-6102793.html](http://news.com.com/2100-1030_3-6102793.html).

<sup>246</sup> See, e.g., Robert Pear, *Panel Urges New Protection on Federal ‘Data Mining’*, N.Y. TIMES, May 17, 2004, at A12; *EFF Sues AT&T to Stop Illegal Surveillance*, EFF, Jan. 31, 2006, [http://w2.eff.org/news/archives/2006\\_01.php#004369](http://w2.eff.org/news/archives/2006_01.php#004369).

<sup>247</sup> Consider, for example, J. Edgar Hoover’s illustrious history of spying on American citizens in pursuit of President Roosevelt’s political agenda. See, e.g., DOUGLAS M. CHARLES, *J. EDGAR HOOVER AND THE ANTI-INTERVENTIONISTS: FBI POLITICAL SURVEILLANCE AND THE RISE OF THE DOMESTIC SECURITY STATE, 1939-1945* (2007). Alternatively, consider George Orwell’s dystopian future, in which Big Brother is always watching. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

<sup>248</sup> The most notable example is HIPAA’s “privacy rule.” See *supra* note 243.

<sup>249</sup> A table summarizing the substantive coverage of state privacy laws is available through the Electronic Privacy Information Center. Elec. Privacy Info. Ctr., *Privacy Laws by State*, <http://www.epic.org/privacy/consumer/states.html> (last visited May 18, 2009).

<sup>250</sup> Council Directive 2002/58, art. 251, 2002 O.J. (L 201) 37 (EC); Council Directive 95/46, art. 189b, 1995 O.J. (L 281) 31 (EC).

<sup>251</sup> See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996).

<sup>252</sup> See, e.g., Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003).

<sup>253</sup> See the extensive list of presentations, testimony, and interviews in Marc Rotenberg’s online biography, available at Marc Rotenberg, <http://www.epic.org/epic/staff/rotenberg/> (last visited May 18, 2009).

<sup>254</sup> DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004).

However, as with piracy, judges will not, and for that matter, should not, follow the recommendations provided by academic discussion on information and privacy issues. The frame, for judges as well as for the lay reader, is centered on the norms established by topic-specific laws, and (possibly, in part) by the range of major media articles. The frame conceptualizes privacy as a choice between business practices and some ephemeral value of individual privacy. Many businesses have improved customer experiences and generated a substantial amount of wealth through data mining practices, such as Amazon.com's recommendations of "similar items" to those in a user's history.<sup>255</sup> However, other practices, such as Facebook's "Beacon" system, violate expectations of privacy to a higher degree, and generate a great deal of social unrest.<sup>256</sup> Much of the media coverage of privacy issues is focused on "gray areas" of social policy such as these, resulting in the construction of a nebulous privacy frame characterized by only a moderate fear of serious repercussions for violations of individual privacy.

The case I examine in the following section involved a much more important privacy interest than in typical "gray area" circumstances, such as Amazon.com's recommendations. The case involved deliberate and willful privacy violations prohibited by general-purpose federal laws (e.g., the SCA, the Wiretap Act, and the CFAA). In *Theofel v. Farey-Jones*<sup>257</sup> and other cases centering around such significant privacy interests, framing arguments have considerable persuasive power, and the full weight of the privacy frame, such as it is, can be brought to bear in support of a legal argument.

## 2. *Theofel v. Farey-Jones*

### a. *Background*

In *Theofel v. Farey-Jones*, defendant Farey-Jones, while engaged in a separate legal dispute with plaintiff employees of Integrated Capital Associates, Inc. ("ICA"), issued a subpoena to ICA's Internet Service Provider, NetGate, which requested the disclosure of all of the plaintiffs' email messages.<sup>258</sup> In response, NetGate provided the defendant with many of the plaintiffs' sent and received email messages (still stored on its servers), most of which were unrelated to the legal dispute.<sup>259</sup> The plaintiffs brought a civil suit against the defendants for claims under the SCA (which prohibits unauthorized access to a communications facility that disrupts an electronic communication in electronic storage), the Wiretap Act (which authorizes an injured party to seek redress against someone who intentionally intercepts, for example, electronic communication), and the CFAA (which prohibits unauthorized access to a computer through conduct that involves interstate communication).<sup>260</sup> The Wiretap Act claim was dismissed quickly by both the district and appellate courts.<sup>261</sup> The

<sup>255</sup> See generally Amazon.com, <http://www.amazon.com/> (last visited May 18, 2009).

<sup>256</sup> See, e.g., Caroline McCarthy, *Rough Seas Nearly Sink Facebook's Beacon*, CNET NEWS, Nov. 30, 2007, [http://www.news.com/8301-13577\\_3-9826664-36.html](http://www.news.com/8301-13577_3-9826664-36.html).

<sup>257</sup> *Theofel v. Farey-Jones*, 341 F.3d 978 (9th Cir. 2003).

<sup>258</sup> *Id.* at 981.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 982, 986.

<sup>261</sup> *Id.* at 986.

district court also dismissed the plaintiffs' SCA claim because NetGate authorized the defendant's access,<sup>262</sup> and dismissed the plaintiffs' CFAA claim on the grounds that the federal statute did not apply to third-party computer storage.<sup>263</sup>

*b. Appellants' Brief*

In their brief before the Ninth Circuit, the appellants argued NetGate's implicit authorization and enablement of access did not satisfy the SCA's statutory bar for authorization of the defendants' access to the emails, either in itself, or because the authorization was obtained illegally.<sup>264</sup> Appellants also contended that application of the CFAA to information stored on third-party computers was a question of first impression that the court should have considered and resolved, based, in part, on a reading that the legislative history and social policy supported a finding that the CFAA covered third-party storage.<sup>265</sup>

I will focus my analysis on the SCA claim because appellants offered far more on this claim in their brief, and because it is more appropriate to analyze for the purposes of this Article.<sup>266</sup> To achieve success on the SCA claim, the appellants needed to resolve several ambiguities in the statute's concept of "authorization"—in particular, who could provide sufficient authorization, what indicated the authorization had been provided in a valid manner, and what scope of authorization was required. In order to resolve these ambiguities, the appellants needed to implicitly define the sort of information being accessed, the parties who had rights in and control over the information, and the institutions and devices storing the information.

The amount of framing in appellants' brief is not overwhelming. The framing centered on the descriptions of the defendants' activities and the nature of the information acquired through defendants' initial subpoena. In the district court's opinion, and in the appellees' brief, common labels for the defendant's activities included "unauthorized access"<sup>267</sup> and access to "electronic documents."<sup>268</sup> By contrast, the appellants' brief emphasized, and frequently repeated, that the case involved access to "private e-mail communications" and "confidential emails,"<sup>269</sup> emphasizing both communication (the target of the

<sup>262</sup> *Id.* at 982.

<sup>263</sup> *Id.* at 986.

<sup>264</sup> Plaintiffs-Appellants' Opening Brief at 13-19, *Theofel*, 341 F.3d 978 (No. 02-15742), 2002 WL 32163299 [hereinafter Brief of *Theofel* Plaintiffs-Appellants].

<sup>265</sup> *Id.* at 34-36.

<sup>266</sup> The SCA claim was more focused on traditional statutory interpretation, and was riper for cognitive framing effects. *See infra* Section III (explaining that cognitive framing works in large part because judges are able to import equitable judgments into their choices among multiple valid textualist interpretations of statutes).

<sup>267</sup> Responding Brief of Defendant/Appellee Alwyn V.H. Farey-Jones at 9, *Theofel*, 341 F.3d 978 (No. 02-15742), 2002 WL 32163300 [hereinafter Brief of *Theofel* Defendant/Appellee] ("The District Court concluded that these facts demonstrate that Farey-Jones' access was authorized by NetGate and that Plaintiffs, therefore, failed to state a claim based on unauthorized access.").

<sup>268</sup> *Id.* at 4 ("Within a few days of receiving the subpoena, NetGate produced a 'sampling' of some electronic documents . . .").

<sup>269</sup> Brief of *Theofel* Plaintiffs-Appellant, *supra* note 264, at 1 ("This case presents the cutting edge and important issue of whether federal statutory law prohibits an individual from accessing and disclosing third party private email communications stored on remote serv-

SCA) and privacy, the most powerful frame at work in this case. In so doing, the appellants' brief connected the emails and the information contained in the emails as closely as possible to ICA, and removed the emails as much as possible from NetGate, despite its physical control over the server storing the information.<sup>270</sup> A property metaphor and frame lurked beneath these attempts, evoking trespass and supporting the claim raised by privacy framing that the harm is like breaking into a home and rummaging around through the inside.<sup>271</sup> As discussed below, the Ninth Circuit's opinion incorporated this metaphor directly.

Effective privacy framing occurs at a more abstract level than the specific legal questions of statutory interpretation of the SCA. It affects a judge's interpretation of the context, and attempts to convince a judge that the access intruded into a personal and sensitive area, and that any legal question related to it ought to have provided great protection to that area. Arguing that one party was overreacting cannot effectively counter a privacy claim. Thus, although the framing in the brief was not overwhelming or tightly coupled to the specific interpretations offered by the plaintiffs, it nevertheless may have had a powerful influence on the eventual decision of the Ninth Circuit.

*c. Appellees' Brief*

At an abstract level, the appellees' brief contended the SCA did not give rise to a legal claim against Farey-Jones. To escape liability, the appellees offered a shotgun of legal theories to challenge the statute's applicability. The first and foremost legal challenge involved NetGate's authorization of the access by Farey-Jones (and NetGate's ability to offer valid legal authorization to access the information).<sup>272</sup> Next, appellees' brief contended the statute did not prohibit the use or disclosure of the information at issue, merely access to the information.<sup>273</sup> Later, the appellees argued the SCA did not protect plaintiffs' personal computers,<sup>274</sup> and the statute's definition of "electronic storage" did not encompass NetGate's activity to make the information available to Farey-Jones.<sup>275</sup> The appellees further argued the meanings of several technical

---

ers."); *id.* at 10 ("This action was brought because of the invasion of rights, including the privacy rights of 13 individuals . . . who have had their personal and confidential emails accessed by the defendants . . ."); *id.* at 16 ("Thus, although defendants arguably may have received authorization to access NetGate's server, they exceeded that authorization by accessing plaintiffs' private e-mail communications.").

<sup>270</sup> *See, e.g., id.* at 16 ("There is simply no authority for the district court's leap that NetGate's authorization for access to its server insulates defendants from liability for intentionally accessing the contents of private, third party e-mails that do not belong to NetGate.").

<sup>271</sup> The relationship between personal papers and constitutional privacy dates back to 19th century scholarship, but is still very much alive in the 21st century information age. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886); Andrew J. DeFilippis, Note, *Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence*, 115 *YALE L.J.* 1086 (2006) (arguing increased sharing of personal information engendered by the information age does not weaken the Fourth Amendment's right to privity). *See generally* 68 *AM. JUR. 2D Searches and Seizures* § 5 (2000).

<sup>272</sup> Brief of *Theofel* Defendant/Appellee, *supra* note 267, at 9-10.

<sup>273</sup> *Id.* at 11-13.

<sup>274</sup> *Id.* at 15-20.

<sup>275</sup> *Id.* at 21-24.

and statutory terms to establish their points, including the concept of the storage for the information (implying who controlled it, who had access to it, and how it could be used)<sup>276</sup> and the meaning of authorization in both a technical and legal sense.<sup>277</sup> Appellees' arguments were credible, and the appellees only needed to succeed on one theory to escape liability. To appellees' benefit, when in doubt as to the proper interpretation of a statute, the rule of lenity ought to play a role in favor of the appellees.<sup>278</sup> Farey-Jones, in theory, had a moderately strong case.

Similar to the appellants' brief, the appellees' brief was not heavy on framing language. The best label for their attempts at framing is "anti-privacy"—similar to the attempts at "anti-piracy" in previously discussed cases. The appellees' brief deliberately avoided use of the words "privacy" and "private" in its statement of facts, and instead, referred to the emails as "electronic documents."<sup>279</sup> This term fits better with the original process through which Farey-Jones sought to request the information—a subpoena. Many of appellee's attempts at anti-privacy framing tried to defeat the protection and the sensitivity of the information by implying it was merely information under the control and ownership of NetGate, rather than the plaintiffs.<sup>280</sup> Another angle of anti-privacy framing countered the appellants' analogies of private spaces, such as a personal home, offering instead, a model of a gateway or a door over which passage was protected.<sup>281</sup> The statute, in this model, protected only passage through the gateway (which was performed by NetGate, not Farey-Jones), and not any use of the information.<sup>282</sup> These analogies did not contain any strong positive framing, but merely attempted to defuse appellants' privacy framing.

Without any significant framing beyond its attempts to weaken the connection to privacy, appellees' brief could not add a great deal of argumentative weight through framing. Introduction of the privacy frame generates concern for the sensitivity of the information involved. The appellees did nothing to diffuse this concern, for example, by framing the ISP/client relationship as a consumer-producer one in which the email was under the complete control of the ISP, or by attempting to separate "access" from "use," or by any of their other analogies. In effect, the framing in appellees' brief was largely ineffective.

---

<sup>276</sup> *Id.* at 25-26.

<sup>277</sup> *Id.* at 33-36.

<sup>278</sup> *See, e.g.,* *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . .") (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)).

<sup>279</sup> Brief of *Theofel* Defendant/Appellee, *supra* note 267, at 5 ("Plaintiffs' present suit alleging unlawful access and dissemination of these electronic documents . . .").

<sup>280</sup> *See id.* at 8-9 (emphasizing NetGate's relationship to the documents, implying ownership and control).

<sup>281</sup> *Id.* at 11-12 (going to lengths to distinguish "access" from "use," saying "access" is prohibited but "use," once inside the system legitimately, is not restricted in any way by the statute).

<sup>282</sup> *Id.*

*d. The Ninth Circuit's Opinion*

Citing to the law of trespass, the Ninth Circuit interpreted “authorized” in the SCA to exclude any authorization gained through fundamental deception.<sup>283</sup> The court applied this standard to the facts at hand and found there was a mistake (in the overbroad subpoena) sufficient to constitute deception, and the “[d]efendants had at least constructive knowledge” it was improper.<sup>284</sup> On the issue of the nature of the storage of the emails, the court acknowledged there might have been some contention over the first portion of the statute’s definition of “electronic storage,” but stated the emails were certainly contained within the statute’s second definition.<sup>285</sup>

At the outset, the Ninth Circuit’s opinion took a middle ground between the briefs’ competing terms of “private email communications” and “electronic documents,” referring simply to “email[s].”<sup>286</sup> However, the opinion went on to demonstrate strongly that the court was receptive to the appellants’ framing. The court’s analysis quickly incorporated the concept of “trespass,” receptive toward the metaphor that the emails represented a private space of the plaintiffs rather than an open space where merely the gateway was protected.<sup>287</sup> The court also incorporated some indicative language in the opinion as well, including the phrases “confidentiality of communications in electronic storage”<sup>288</sup> and “private snooping.”<sup>289</sup>

In this case, compared to the piracy cases previously discussed, the briefs offered perhaps the least amount of information to extract clear framing arguments, yet the court’s opinion offered the clearest indication the framing was central to its decision. Perhaps privacy is simply a different sort of frame than piracy, lending itself more toward subtle introduction, though explicit recognition. Perhaps this is just the way the frame was used in the parties’ briefs in this case. Regardless of speculation, however, the appellants used demonstrably more (and convincingly more effective) framing than the appellees, and won both the legal and rhetorical battles.

*D. Observations*

In all of the cases discussed in my sample set, the party who drafted the brief with the stronger framing won. In *Davidson*, Blizzard’s brief centered on the concept of piracy, an inherently strong frame. It made strong arguments as to why the defendants were guilty of piracy, and it made clear that interpreting the law in plaintiffs’ favor would reduce the ills of the frame. The brief for the BnetD developers, on the other hand, began with a complex legal argument

<sup>283</sup> *Theofel v. Farey-Jones*, 341 F.3d 978, 982-83 (9th Cir. 2003).

<sup>284</sup> *Id.* at 983-84.

<sup>285</sup> *Id.* at 985.

<sup>286</sup> *Id.* at 981 (“We consider whether defendants violated federal electronic privacy and computer fraud statutes when they used a ‘patently unlawful’ subpoena to gain access to e-mail stored by plaintiffs’ Internet service provider.”).

<sup>287</sup> *Id.* at 982-83.

<sup>288</sup> *Id.* at 982 (“The Act reflects Congress’s judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility.”).

<sup>289</sup> *Id.* at 983 (“The subpoena’s falsity transformed the access from a bona fide state-sanctioned inspection into private snooping.”).

over preemption (introducing framing much later and sporadically), emphasized the weaker, and more abstract, frames of balance and competition, and failed to establish clearly that siding with the developers would have had a major benefit for balance and competition going forward. In *Theofel*, the brief submitted by the employees did not contain a large amount of framing, but it effectively weaved terms such as “confidential” and “email communications” into the debate, introducing and supporting a privacy frame, giving rise to a property/trespass metaphor later adopted by the Ninth Circuit in its decision. Farey-Jones’s brief did not include any more framing, and its attempts merely weakened the connection between the privacy frame and the facts of the case at hand. Farey-Jones’s brief also failed to offer any counter frame, or any affirmative equitable reason as to why it deserved to win, as it failed effectively to contend that privacy was not a big deal; it simply argued the case was not about privacy, an ultimately weak framing argument.

The contrast in *Grokster* is also enlightening. Before the Ninth Circuit, the industry’s brief emphasized technical discussion of both exact legal tests and technology at the expense of framing, failing to include such direct keys as “pirate” or “piracy” until late in the brief. *Grokster*’s brief (before the Ninth Circuit) implemented more framing, made it more central to the brief, mixed balance, innovation, and anti-piracy framing, and was generally less technical and more emotional. The industry’s brief before the Supreme Court, on the other hand, contained the most overpowering framing rhetoric of any of the briefs discussed in this Article. It not only deluged the reader with accusations of piracy (leveled at the *Grokster* developers, not the users of the software, whose piracy was not a serious issue), but it also twisted the balance and innovation framing of *Grokster*’s earlier brief. *Grokster*’s brief before the Supreme Court included a moderate amount of framing (though far less than the industry’s brief), but it could not closely connect the framing to its arguments, many of which were procedural or jurisprudential (framing has no place in a discussion of whether the courts or Congress is best equipped to resolve an issue). Moreover, some of the framing in *Grokster*’s brief may have backfired, such as the Joseph Schumpeter reference and its attempts to dilute *Grokster*’s personal responsibility for the piracy crisis,<sup>290</sup> which may have perversely served to inflate piracy concerns, supporting the industry.

The judicial opinions in the cases I studied do not establish, with complete certainty, that the parties’ framing was a major factor in the courts’ decisions. However, this remaining uncertainty should not be surprising, nor should one interpret it as an indication that framing arguments fall upon deaf ears. The ambiguities and uncertainties inherent in technology policy prevent judges from making decisions of equity one way or the other with complete confidence. As a result, judges may imbue their opinions with the language of statutes and precedents to lend credibility and viability to their judgments. In addition, the legal context of the cases discussed in this Article—the true ambiguities in the meanings of statutory and technical terms—created an easy window for a judge to state one definition of the statute, claim that it was a better reading than others were, and apply it, without needing to offer any additional

<sup>290</sup> See Brief for *Grokster II* Respondents, *supra* note 211, at 24-25.

justification.<sup>291</sup> The real decisional process behind the judges' selection of one definition over another hides beneath these layers of formality, as it seemed to do, for example, in *Davidson*.

The cases also demonstrate what features of a framing argument cause it to have the most impact, and what structures of framing arguments within parties' briefs cause them to be the most successful. Specifically, an effective framing argument chooses legal arguments to relate the frames to the arguments; it chooses frames that are inherently strong, and that can be strongly connected to the facts of the case; and it weaves the frames into the legal arguments in such a manner that a decision in the arguer's favor will reduce the harm, or increase the benefit, inherent to the frame. An effective brief, from a framing perspective, begins with strong framing to orient the judge's sense of the case's equities before the judge renders any real decision or interpretation of the law. An effective brief de-emphasizes detailed technical descriptions of either the law or technology, and instead, emphasizes emotion and rhetoric.

Framing arguments play a major role in judges' choices of proper interpretation of statutes and of related technologies. The case studies I offer in this Article attempt to show that framing has an impact on the disposition of a case. In the next section, I will provide a theory as to why this is so, and why it is especially salient in the context of technology litigation.

### III. WHY FRAMING WORKS (AT LEAST IN TECHNOLOGY LAW)

#### A. *Davidson in More Detail*

In this section, I look at one of the cases discussed above, *Davidson v. Universal Associates*, in more detail. I emphasize the ambiguities in the law and the technology, consider the questions posed to the judge, and examine how the winning brief addressed these issues through effective framing, how the losing brief did not, and how the opinion failed to provide any adequate rationalization for the decisions it made. I then back down a little bit from the full depths of this extreme legal realist position, and attempt to determine what is evident, what is merely conjecture and speculation, and what should be taken away from the case studies. I will also discuss features to look for in future cases to ascertain the significance of framing, and ways to determine whether the truth matches the view of the skeptics or the cynics.

Ambiguities in terminology permeate technology law cases. *Davidson* hinged on the interpretations of many different terms such as "interoperability" and "effectiv[e] contro[l]," most of which had been recently introduced by prior court cases or by statutes, and had not been frequently litigated. These terms ranged from the purely legal to the purely technical, and included many terms that fell somewhere in between. Consider the concept of an "extra element"

---

<sup>291</sup> A major critique of textualism as a judicial philosophy is it simply cannot be complete and leaves room for other factors in a court's decision, especially at the margins. In hard cases, examining a statute's "plain meaning" cannot be dispositive; judges cannot help but refer, on some level, to pure reason, as well as other factors. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 548-49 (1992).

relied upon by the district court in *Davidson*.<sup>292</sup> *National Car Rental* is a well established and frequently cited 1993 case, but is not without ambiguity or criticism.<sup>293</sup> No less ambiguous is the technical term “Battle.net,” which was alternately used to describe a mode of playing a game, a server to host online game playing, and a service offered by Blizzard to its game players, sometimes even in the same sentence.<sup>294</sup> Adding to this complexity, of course, is that copyright law protected “Battle.net” in different ways depending on which of these incarnations was applicable.<sup>295</sup> Even worse, many terms embedded in the DMCA raise complex technical and legal questions of interpretation—consider the terms “access,”<sup>296</sup> “interoperability,”<sup>297</sup> and “reverse engineering,”<sup>298</sup> to name three of the most important. These ambiguous terms create a great deal of flexibility for a court, particularly in the age of textualist-driven opinions that base decisions on the “plain meaning” of the text of a statute, even when that meaning is highly debatable.<sup>299</sup>

The legal and technological ambiguities are also reflected in the underlying dynamism and uncertainty of the social policy context surrounding the technology industry. Scholars and the mass media constantly debate the true

---

<sup>292</sup> *Davidson & Assocs. v. Internet Gateway (Gateway)*, 334 F. Supp. 2d 1164, 1175 (E.D. Mo. 2004) (citing *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.* 991 F.2d 426, 431 (8th Cir. 1993)). One of the major legal issues addressed in the case was federal/state preemption in the context of copyright law. In *National Car Rental*, the Eighth Circuit found that if a state law includes an “extra element” that goes beyond the federal copyright provisions, then there is no preemption. *Nat’l Car Rental*, 991 F.2d at 431.

<sup>293</sup> Appellants’ brief cited a recent Sixth Circuit case that called the extra element test “circular” and said cases citing it are “ad hoc, inconsistent, or wrong.” Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 33 n.7 (citing *Ritchie v. Williams*, 395 F.3d 283, 287 n.3 (6th Cir. 2005)).

<sup>294</sup> See *Gateway*, 334 F. Supp. 2d at 1169 (“To log on to the Battle.net service and access Battle.net mode, the game initiates a[n] authentication sequence or ‘secret handshake’ between the game and Battle.net server.”).

<sup>295</sup> Copyright law protects the source code used by the servers, but not the servers themselves. Whether it protects the mode or service is a matter for debate, but the entanglement of protected source code with both of these tends to incline courts toward protecting them.

<sup>296</sup> The term “access” is found in § 1201(a)(1), and is also a key component of the *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004), opinion. See 17 U.S.C. § 1201(a) (2006); Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 58-59.

<sup>297</sup> The term “interoperability” is part of the text of the § 1201(f) exception. See 17 U.S.C. § 1201(f) (2006). Although its scope is unclear, appellants argued that the legislative history behind this indicated that it intended to cover a broad swath of reverse engineering activity. Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 28.

<sup>298</sup> Note, in particular, the Appellees’ brief’s (erroneous) addition of “reverse engineering” to its first factor of the § 1201(f) exception. See Brief of *Davidson* Plaintiffs-Appellees, *supra* note 108, at 30 (“The key requirements [for the § 1201(f) exception] are: Appellants must have lawfully obtained the right to use Blizzard’s program for reverse engineering; and . . . .”) (emphasis added).

<sup>299</sup> See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (upholding the “plain meaning” rule). In *Ron Pair*, the Supreme Court stated, “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” *Id.* at 242 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). The Court applied this rule despite the fact that it was overturning the appellate court’s construction of the statute.

value and harm of technologies, such as peer-to-peer file sharing.<sup>300</sup> No one can confidently establish a balance of equities in a case like *Davidson* because of the sheer number and significance of the unanswered questions. How much incentive to pirate does the existence of the BnetD server create? How valuable is the competition offered by the BnetD server? Will the server's existence cause Blizzard to improve the official service? These are unanswerable empirical and normative questions, and such questions arise in not only the *Davidson* case, but all of technology law.

Together, the ambiguous terminology and uncertain social policy create, in technology law, a flexibility for judges to import equitable judgments (through selective interpretation of ambiguities) and a great deal of uncertainty regarding the correct equitable judgment to import, especially if one's consideration is limited to the facts of the case at hand, as the judicial process often prefers. Therefore, successful arguments in technology law cases will be more equity-driven than those of general law, to establish a rational and supportable position on the shifting and uncertain territory of social policy in this field, and to take advantage of the ambiguous legal context. In addition, given the difficulty of judges issuing social policy judgments based solely on the facts of the case at hand, judges will be receptive to analogies to outside contexts (e.g., the frames woven into the legal arguments), as judges can then rationalize their decisions as not setting social policy, but merely following the social policy already in place.

The appellees' brief in *Davidson* fits this pattern.<sup>301</sup> It emphasized piracy. It did not draw a new understanding of social policy, but instead, endeavored to show there were previous cases involving similar fact patterns, in which activities like those of the appellants were held to be illegal,<sup>302</sup> and to show the brief was just advocating the social policy balance previously established. By contrast, the appellants' brief in *Davidson* based many of its arguments on a direct application of the statute's text to the facts at hand.<sup>303</sup> It put more effort into describing the technology involved.<sup>304</sup> In addition, appellants' brief put more effort into understanding the original purpose of the statute through references to legislative history.<sup>305</sup> Essentially, it asked the court to make its own social policy judgment, one that went against many similar cases cited by the appel-

<sup>300</sup> See, e.g., Michael Geist, *Piercing the Peer-to-Peer Myths: An Examination of the Canadian Experience*, FIRST MONDAY, Apr. 2005, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1217/1137>. Although the BnetD technology is not the same as file sharing, it is a similar mixed-value technology that presents both harms (creating additional value for pirated video games and thus providing an incentive for piracy) and benefits (creating competition in the market for Blizzard video game servers).

<sup>301</sup> See *supra* Section II.B.2.c.

<sup>302</sup> See Brief of *Davidson* Plaintiffs-Appellees, *supra* note 108, at 22 ("In the short history of the DMCA, the Second Circuit and several district courts have held conduct similar to that of Appellants violative of the DMCA.").

<sup>303</sup> Consider the extended gap, between line four on page forty-three of the Appellants' brief, to footnote thirteen at the end of page forty-seven, which contains no citations outside of the district court's opinion and other case materials. See Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 43-47.

<sup>304</sup> E.g., *id.* at 52-55 (arguing, for pages, that the detailed technical activities compromised only "Battle.net mode" and not the copyrighted individual games).

<sup>305</sup> *Id.* at 59-60.

lees, based on the court's independent evaluation of the technology and the purposes behind the statute. This was a lofty request by the appellants, one that asked too much of a judge, given technology law's inherent ambiguity and dynamic social policy.

Judges will not obviously base their opinions on equitable judgments and susceptibility to framing, even if these are the ultimate reasons behind their decisions. If a lower court judge rules openly based on equity, as demonstrated by the connection between the facts at hand and an external frame, a judge hearing the appeal will likely consider the equities and the relevance of the frame *ex ante* and impose his or her own interpretations. If a judge at the district or appellate court level has any significant individual incentive, it is to avoid higher courts overturning their decisions. However, a judge can reduce the risk of reversal by casting an equitable judgment as a textualist opinion. This is an easy transformation in technology law, given the flexibility in terminology. As a legal matter, a court can simply define the meaning of a term in a way that supports one side or the other, without providing any further explanation, as the *Davidson* court did with its construction of the term "access."<sup>306</sup> By hiding equitable judgment under the cloak of statutory interpretation, a judge retains credibility and is less likely to have his or her decision independently reviewed on appeal.

The Eighth Circuit opinion resolved many difficult questions of law in *Davidson* through simple textualist interpretations. Consider the question of the interpretation of the scope of the § 1201(f) exception. After presenting the text of the exception, the appellants' brief supported its interpretation primarily on the text of the statute, the facts of the case at hand, and criticisms of the district court's opinion.<sup>307</sup> Contrast appellants' position with the appellees' brief, which began with the text of the exception and moved immediately to citations from other cases.<sup>308</sup> The Eighth Circuit sided with the appellees, but did not mention any of the cited precedents, instead basing its opinion directly on the text of the statute.<sup>309</sup> Addressing the fourth factor of the § 1201(f) test, which concerns whether circumvention constitutes infringement, the court simply said, "[a]ppellants's circumvention in this case constitute[d] infringement" because it enabled the online play of unauthorized copies of games.<sup>310</sup> This rationalization allowed the Eighth Circuit and other courts to maintain the appearance of the usual legal order of cases—the predominant reliance on the text of the law—while basing its decisions on less formal judgments based on equities and precedents.

---

<sup>306</sup> The court interpreted the highly ambiguous term "access" with sufficient confidence to distinguish the *Lexmark* precedent. See *Davidson & Assocs. v. Jung*, 422 F.3d 630, 640-41 (8th Cir. 2005).

<sup>307</sup> Brief of *Davidson* Defendants-Appellants, *supra* note 105, at 43-48. Finally, after pages of statutory text-based analysis, the argument cited to precedent, but for a minor point and in a footnote. See *id.* at 47 n.13.

<sup>308</sup> See, e.g., Brief of *Davidson* Plaintiffs-Appellees, *supra* note 108, at 31 (citing *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004), and the district court's citation to *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001)).

<sup>309</sup> See *Davidson*, 422 F.3d at 642.

<sup>310</sup> *Id.*

B. *The Pattern of Framing Cases—What to Look For in Others*

The cases I have examined follow a simple pattern. The successful briefs began with arguments and rhetoric tied to specific, media-friendly, “hot button” issues. They often contended the case at hand was exactly like a prior case that also dealt with the hot button issue, and a decision in their favor would merely extend the legal and social balance of that case to the instant one. The legal arguments for both sides centered on interpretations of ambiguous and vague statutory and factual terms, and the interpretations offered by both sides represented colorable constructions of the relevant statute and the facts in light of prior case precedent and other persuasive legal authorities. Finally, the court’s eventual opinion failed to address, or at least to refute fully, the legal merits of the losing side, and instead, based its decision primarily on simple textual interpretations. If the court’s decision supported the side whose brief (and, presumably, oral argument) constructed the most successful framing argument, there was reason to suspect the framing argument was dispositive in the court’s decision.

Note that no parts of this abstract pattern are confined to the context of technology law. This pattern may be just as prevalent in constitutional law cases touching on abortion, gay marriage, torture, free speech, or other social issues. Application of this pattern to other areas of the law will render inapplicable some of the arguments I have offered to explain why framing is significant and why it cannot simply be ignored or set aside in the context of technology law. However, perhaps others can offer alternative justifications in these areas of the law, or perhaps, even if its effects are attenuated, lawyers and scholars ought to identify and understand framing arguments in all contexts to acquire and provide the court with a full picture of the issues.

C. *Stepping Back*

The above story seems plausible, but not convincing. How certain is it that framing is having a significant effect? Given that judges cannot (or at least are not likely to) directly acknowledge the framing in the text of the opinions, the best evidence I have offered is a small sample size, an empirically meaningless correlation between strong framing and success (where “strong framing” is subject to debate), and a theory of why framing ought to have a significant effect. Better support may come from asking the judges themselves, while they are writing their opinions, assuming they are being completely honest and they know their own minds (and are not just reiterating their own after-the-fact rationalizations).<sup>311</sup> Even without this mind reading, two notable scholars, Anthony Amsterdam and Jerome Bruner, argue cognitive techniques have an impact on the legal process.<sup>312</sup> Their objective is not to show that external framing by the parties influenced a judicial decision, but rather that judges use rhetoric to gloss

<sup>311</sup> Recently, Guthrie and his associates administered a Cognitive Reflection Test to 252 Florida trial judges, and determined through the results of the testing that judges often make decisions intuitively, rather than deliberately. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 27-29 (2007). Of course, intuitive decisions are far more susceptible to influence from framing than deliberative decisions.

<sup>312</sup> See AMSTERDAM & BRUNER, *supra* note 25, at 7.

over opinions they have decided on some non-legal rationale.<sup>313</sup> Amsterdam and Bruner demonstrate the effects of rhetoric by case study, criticizing legal rationales and describing how rhetoric itself covers omissions and weak assumptions behind them.<sup>314</sup> They examine internal conflicts in opinions, such as the contrast between Justice Lewis Powell's use of abstract and general language in *McCleskey v. Kemp*<sup>315</sup> and his supposedly common-sense rationale.<sup>316</sup> Moreover, Amsterdam and Bruner demonstrate that Justice Powell's ostensible rationale is not always convincing, and that the *McCleskey* opinion may be an after-the-fact rationalization of a pre-determined political decision.

In a book review published in *The New Republic*, Judge Richard Posner criticizes Amsterdam and Bruner's methodology, their support, and their conclusion.<sup>317</sup> Judge Posner says they could have subjected *Brown v. Board of Education*<sup>318</sup> to a similar level of deconstruction and found its legal rationale was weak, and that the Justices derived their opinion from cognitive trickery, but they chose not to do so because they agreed with its holding.<sup>319</sup> Judge Posner notes the subtle hypocrisy and contradiction in Amsterdam and Bruner's work, such as their use of poorly chosen statistics right on the heels of their derision for the validity of statistics, and their relentless bias and use of rhetoric to make their arguments.<sup>320</sup> Judge Posner also criticizes Amsterdam and Bruner's claim of causation, even granting correlation, claiming it is just as easy to believe the Justices in *McCleskey* reached their decisions through reason and then wrote their opinions using cognitive techniques, either unconsciously or consciously, to increase their persuasive power as prose.<sup>321</sup>

Several features of framing's influence, as I use the term, allow my arguments to escape Judge Posner's criticisms. First, I am not criticizing the judges for using framing to support an unsupportable legal decision; rather, in technology law, many opposing briefs are almost equally supportable, and a completely implausible argument is hard to construct because the law and technology contain so much ambiguity. Framing influences judges at a more subtle level, by changing their interpretations of ambiguous terms and by adjusting their perceptions of the significance and relevance of precedents—much more cognitive effects with equally potent legal ramifications. These shifts in the minds of the judges convert a situation with two almost perfectly balanced legal constructions into a situation where one side's arguments seem far more legally valid than the other's arguments. In addition, the nature of the judges' decisions and opinions, based on the interpretation of ambiguous terms and precedents, permits them to be influenced by framing, and yet to disclaim completely (or even fail to recognize) that influence.

---

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 208-10 (analyzing the Baldus study in *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

<sup>315</sup> *McCleskey*, 481 U.S. 279.

<sup>316</sup> AMSTERDAM & BRUNER, *supra* note 25, at 215-16.

<sup>317</sup> Posner, *supra* note 32.

<sup>318</sup> *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

<sup>319</sup> Posner, *supra* note 32, at 49-50.

<sup>320</sup> *Id.* at 52.

<sup>321</sup> *Id.* at 55.

Let me offer one more reason to believe judicial decisions are being influenced by framing. In contrast to approaches such as that of Amsterdam and Bruner, the frames I study are internal, not external.<sup>322</sup> Frames, such as piracy, are developed and applied entirely within the context of the technology industry; though outside meanings of piracy may have deeper external connections, such as the historical concept of “piracy” and its relation to theft and unjust enrichment, I do not include these as significant components of the weight and significance of the frame. My frames are closely connected to the facts of the case at hand, and are much harder to “escape” (akin to the fabrications of Goffman)<sup>323</sup> by reason and examination of legal doctrine, which itself reinforces the frames in many ways. Lakoff’s frames, like Goffman’s and Amsterdam and Bruner’s, are external, based on broad psychological contexts with only weak associations to the context at hand. Even if judges and other rational, intelligent decision-makers can set aside psychological manipulation in Lakoff’s context, judges may be nonetheless swayed in mine.

When deciding cases in technology law, judges swim adrift in a sea of ambiguity; technology law does not pose major policy issues like constitutional law decisions, where for decades parties have raised and debated the same issues and fact patterns in courtrooms, houses of the legislatures, and law reviews. Judges will reach for the nearest life raft, find frames (closely linked to the facts at hand both through the news media and through the persuasive and frequent exhortations of the parties’ briefs), and discover they can make everything clear and ordered in the world.

#### IV. CONCLUSION

Followers of the modern technology law movement cannot help but notice the importance of the notion of “piracy” in winning the war, both in the media, and in the courtroom. A closer look at a few cases reinforces my observation, not just for piracy, but also for other concepts, such as innovation and privacy. A simple model of the process of adjudication in technology law provides several reasons to suspect that rhetoric heavily influences the shaping of the law by the courts. The amount of influence is difficult to gauge, but the model and the few cases presented in this Article should create some amount or degree of suspicion. There is no good reason to think framing improves the resulting quality of legal decision-making.

What can we, the legal community, do about it? We must be alert. Judges must be alert to reduce the influence of framing on their decisions, especially when more objective equity balances can be determined. Attorneys must be alert so they can defuse the other side’s framing, and they must be competent to maximize their own framing, reinforcing the traditional zealous advocacy model of effective litigation. Finally, the news media must be alert to the influ-

---

<sup>322</sup> My internal/external distinction differs considerably from Orin Kerr’s. Kerr’s internal perspective views the law of the Internet through the construction of a “cyberspace,” which is to be treated like a place, with real world laws applied analogously; his external perspective examines the Internet as a collection of physical wires. See Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003).

<sup>323</sup> See *supra* notes 9-15 and accompanying text.

ence they have on the judicial process, and must be as honest and as balanced as possible in their reporting, so the public's perceptions of the social benefits and costs of technology are as accurate as possible.