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## JUSTICE BREYER, *GROKSTER*, AND THE FOUR CHORDS SONG

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File sharing is both a blessing and a curse. It is a social good for there to be more information in the world and for more people to have access to it. It is indeed a blessing to share access to knowledge and beauty and joy. But it is a social bad if property is stolen or if information is shared in a way that deters people from working to create new information or music or art or techniques for finding and disseminating these things. Information, culture, and markets are complicated social practices; so too is the institution of private property. It is simply not the case that the more property rights we have, the better off we are; nor is it the case that greater legal protection for property always leads to more of it being created or enhanced in value. Property rights can promote value and enhance its distribution, but they can also destroy property and prevent it from being enjoyed, shared, or transferred. Figuring out the right legal framework for a private property system is delicate, hard work. Justice Breyer understands this, and his concurring opinion in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*<sup>1</sup> is a mini-seminar in the complexity of property law.

*Grokster* held that a file-sharing distributor violates copyright law if it distributes the software with the intent to induce others to infringe on the rights of copyright owners.<sup>2</sup> Justice Souter's opinion for the unanimous Court distinguished the *Sony*<sup>3</sup> decision, which had held that it is not a violation of the copyright law to sell a device like the VCR, which is capable of substantial noninfringing uses.<sup>4</sup> Because Justice Souter found that *Grokster* had subjective intent to market its product for the purpose of enabling and encouraging others to share copyrighted music illegally, he did not reach the question of whether the *Grokster* software was capable of noninfringing uses.

Justices Ginsburg and Breyer wrote concurring opinions on precisely this question. Justice Ginsburg (along with Chief Justice Rehnquist and Justice Kennedy) thought it unlikely that an impartial factfinder could determine that *Grokster* had substantial noninfringing uses.<sup>5</sup> Justice Breyer (along with Justices Stevens and O'Connor) disagreed,

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<sup>1</sup> 545 U.S. 913 (2005).

<sup>2</sup> *Id.* at 919.

<sup>3</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>4</sup> *Id.* at 456.

<sup>5</sup> *Grokster*, 545 U.S. at 945–46 (Ginsburg, J., concurring).

concluding that it was not only possible but more likely than not that the *Grokster* software might be found to have substantial noninfringing uses.<sup>6</sup> But the difference between the opinions was more than a dispute about the facts; it was a conflict of approaches and frames of reference. That difference is highly instructive.

Justice Ginsburg emphasized that there was “little beyond anecdotal evidence of noninfringing uses”<sup>7</sup> while “there was evidence that *Grokster*’s . . . products were, and had been for some time, overwhelmingly used to infringe, and that this infringement was the overwhelming source of revenue from the products.”<sup>8</sup> This evidence was “insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time.”<sup>9</sup> Because the evidence of noninfringing uses was so slight and because the existence of those uses could not be determined without a full trial, summary judgment for *Grokster* was inappropriate.

Justice Breyer approached the issue differently. While concluding that the *Grokster* software did have substantial noninfringing uses,<sup>10</sup> he argued that that was the wrong question. He began by emphasizing that the issue involved *contributory* rather than direct liability.<sup>11</sup> The *Sony* test applied only when there was a conflict between the rights of copyright owners to protection of their property and the freedom of others to engage in “substantially unrelated areas of commerce.”<sup>12</sup> He worried that the careful weighing of evidence proposed by Justice Ginsburg would discourage the creation of new technologies, inventions, and products.<sup>13</sup> To avoid this possibility, Justice Breyer explained, *Sony* had created a protective shield for such technologies; they could not be blamed for the way they were used if they were “merely . . . capable of substantial noninfringing uses.”<sup>14</sup>

Justice Ginsburg’s opinion focused on the rights of copyright owners and viewed the case from their perspective. She saw owners with rights and she wanted to protect them. To immunize a contributory actor from copyright liability when they provide the means to steal is like immunizing the person who gives a gun to his friend knowing that he is intending to use it to kill another person. In contrast, Justice Breyer took the vantage point of an institutional designer looking at

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<sup>6</sup> *Id.* at 952 (Breyer, J., concurring).

<sup>7</sup> *Id.* at 945 (Ginsburg, J., concurring).

<sup>8</sup> *Id.* at 948 (citation omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 955 (Breyer, J., concurring).

<sup>11</sup> *Id.* at 950.

<sup>12</sup> *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)).

<sup>13</sup> *Id.* at 959–60.

<sup>14</sup> *Id.* at 950 (quoting *Sony*, 464 U.S. at 442 (emphasis added)).

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the case from a systemic or God's-eye point of view. What mattered was not only the property rights of composers but the relation between the property rights of composers and the property rights of software creators. More fundamentally, the question was not just a choice between conflicting property rights but about defining the appropriate framework for a property system. That framework includes a technological and legal infrastructure that enables property to be created, invented, marketed, and transferred.

For private property to exist, many things must remain in the public domain. The Thirteenth Amendment ensures that we own our own labor and the First Amendment protects our right to speak. Those things cannot be owned by others. The fair use doctrine ensures that we have the power to repeat, discuss, criticize, praise, and enjoy the products of culture. This does not mean that we do not have a system of intellectual property with exclusionary rights designed to protect authors. It does mean that if rights regarding intangible property were absolute, then cultural life could not exist at all.

Consider the Four Chords Song composed by the comedy rock band The Axis of Awesome.<sup>15</sup> In a virtuosic display, the band demonstrates that dozens and dozens of pop songs rely on the same chord progression. They demonstrate this by playing the four chords (I, V, vi, IV, or an E major triad, followed by a B major triad, then a C# minor triad, and an A major triad) over and over again while they sing snippets of dozens of melodies on top of the chord progression. That chord progression is expressive; it is beautiful; it is haunting. It fits the physics of our ears and our brains by tracing the harmonics that sound above any fundamental note and by reinforcing the musical relations among the notes that form the major scale. The chord progression starts from the consonant stability of the tonic I chord to the dissonant instability of the later chords; it presses forward to create a sense of movement, of time, of progression, and it frames a poignant search for the return of the tonic chord where dissonance is resolved and tension released. This four-chord progression is expressive, and at some point it was an original work of authorship. But can it be reduced to private property?

If the answer is yes, then we all might be paying the great-great-great-great-granddaughter of Franz Joseph Haydn for the privilege of composing or performing any new piece of pop music. Indeed, because copyright law gives the owner the right to prevent others from using her property (unless the use is "fair"), Haydn's descendant could be empowered to determine what music gets played, sold, and

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<sup>15</sup> The Axis of Awesome, *The Axis of Awesome: 4 Chords Official Music Video*, YOUTUBE (July 20, 2011), <https://www.youtube.com/watch?v=oOIdewpCfZQ>.

performed. She would be a czar of culture. We would have, not a free market in music, but a feudal regime with a lord of culture. For pop music to exist, we must socialize access to basic chord progressions. Those four chords cannot be reduced to private property; they must be in the public domain if we want the cultural practice of music even to exist. The four-chord progression is part of the infrastructure of music, and if we want musical life to exist, this chord progression must be open to all and free to be used by all.

Consider public accommodation laws that require businesses to serve the public without unjust discrimination. The Supreme Court of New Mexico has recently held that the state public accommodation law applies to a photography business that offers its services to the public. Because that law prohibits discrimination based on sexual orientation, the business could not lawfully refuse to take pictures at a same-sex commitment ceremony because of the owner's religious beliefs.<sup>16</sup> The court rejected the claim that the business had the right to choose its customers as it pleased merely because photography is an expressive art. "The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."<sup>17</sup> Nor did the owner's religious beliefs offer a reason to engage in discriminatory conduct when the owner chose to sell services on the open market.<sup>18</sup> The right to exclude is limited in order to create a legal infrastructure for private property that ensures equal access to the marketplace regardless of race or other invidious factors. The free market is an open one; it is not limited to those of particular castes or races or religions. The legal infrastructure of a free and democratic society requires that property rights be shaped and defined so as to avoid apartheid, slavery, and racial caste.<sup>19</sup> If property rights could not be limited, then democratic societies could not exist.

Justice Breyer's *Grokster* opinion showed his acute sensitivity to the legal and technological infrastructure of private property. He understood why property rights cannot have absolute protection; they must be limited to safeguard the rights and freedoms of others. Property rights cannot be defined without attending to the consequences of exercising those rights on others and society as a whole. They must be

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<sup>16</sup> *Elane Photography v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

<sup>17</sup> *Id.* at 66.

<sup>18</sup> "Under established law, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'" *Id.* at 73 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted)).

<sup>19</sup> See generally Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91 (2011).

understood *systemically* in a way that comprehends the connections among property rights and among markets. Nor can property rights be understood without reference to the legal infrastructure that promotes and protects new technologies that allow property to be transferred, shared, stored, and managed. Property rights must be defined so that they are compatible with rules of the game that enable individuals to exercise liberty, to enjoy the fruits of their labor, and to live with others in an environment of mutual respect and dignity. Justice Breyer taught us that the fact that one owns property is not a sufficient reason to create a legal rule protecting that property — at least when the exercise of that property right has externalities on other owners and other markets. Property has a legal infrastructure, and Justice Breyer emphasized that no property rights can be defined in isolation from their social context. For that, we owe him our thanks.