Title: The Big Steal: Ideology, Interest, and the Undoing of Intellectual Property

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SUMMARY			
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Abstract

This chapter examines the political and economic forces that reshaped copyright law amid the digital revolution. Advocacy from tech firms and legal scholars pushed for weaker protections, benefiting digital intermediaries at the expense of content creators. While courts initially reinforced copyright, it gradually softened over time. The reason for this was the huge influence of anti-copyright movements. For example, file-sharing websites in declining music sales sparked a debate about copyright, piracy and the associated economic harm. Concerningly, some studies downplay piracy's impact, despite evidence to the contrary. Platforms like YouTube thrive on free content, leveraging weak enforcement to drive ad revenue. Ultimately, ideological and commercial interests converged, reshaping copyright law and digital market dynamics.

Chapters in the Book:

Part II – Unmaking Copyright Law

Chapter 3 – The Political Economy of Copyright Law (p.60-80)

Summary

3. The Political Economy of Copyright Law

In this chapter, the rapid shift in content market property rights is discussed. The shift was driven by lobbying, advocacy, and litigation from tech firms and thought leaders arguing for weaker copyright protection. Their policy proposals appealed to consumers and policymakers, leading to a wealth transfer from content creators to digital intermediaries benefiting from unauthorized content distribution.

3.1. The Digital Shock

Legal protections against unauthorized copying matter most when technology cannot effectively prevent infringement at a lower cost. For example, before 1972, physical limitations deterred large-scale bootlegging of vinyl records. Technology, not law, provided a natural barrier against unauthorized copying. However, digital technologies and the internet reversed this dynamic by drastically reducing the cost of copying and distributing content, undermining copyright enforcement. Between 1990-2010, data shows the dramatic fall in sales of sound recordings in content distribution. Especially, the launch of Napster, the first widely adopted online technology for peer-to-peer distribution of digitally stored music, in 1999 marked a turning point. It accelerated the decline of sound recording sales during the digital revolution.

To counter widespread digital copyright infringement, stronger protections and harsher penalties seem necessary, but enforcement remains difficult due to high costs and low detection rates. While U.S. copyright law allows for significant statutory damages, individual infringers face minimal risk, making piracy financially attractive. This reasoning explains why infringement widely persists: the costs are low and deferred, and the benefits are high and immediate. As a result, content owners have instead targeted digital intermediaries that facilitate infringement, but court rulings have often limited their ability to do so. Initially, content owners appeared determined to influence strict copyright enforcement, but key legal and commercial developments shaped the expansion of mass file-sharing despite existing laws. At the time, primary commercial and legal developments supported a strict enforcement of the copyright laws.

In May 1999, Shawn Fanning and Sean Parker launched Napster, an online peer-to-peer file-sharing service, which immediately attracted millions of users. In December 1999, the Recording Industry Association of America filed a lawsuit seeking an injunction to shut down the Napster site. Courts issued an injunction in 2001 requiring Napster to remove infringing content, ultimately leading to its shutdown in 2002. Judges initially condemned digital copyright infringement very strongly, as seen in cases against Napster and mp3.com. However, this type of language would soon virtually disappear from judicial rulings issued in copyright litigation.

Courts initially reinforced strong copyright protections when Napster's shutdown led to successors like Grokster, Kazaa, and Limewire. For example, the 2005 Supreme Court ruling in *MGM v. Grokster* lowered the threshold for holding online intermediaries liable for mass infringement. First, the decision weakened the "Sony safe harbour", which had previously shielded firms from indirect liability if their technology had at least one legal use. This meant Grokster, unlike Napster, could no longer claim immunity just because it lacked direct knowledge of specific infringements. Second, the ruling introduced an "inducement" theory. The theory enables intermediaries to be held liable if they facilitated or failed to prevent infringement. This rightowner-friendly decision was reinforced in *Perfect 10 v. Amazon* in 2007, where Google faced potential liability for enabling access to unauthorized images. In this case, the court found that Google's search function enabled users to locate third-party sites that displayed full-size versions of the images and were offering access at no fee. In general, all these cases initially strengthened content owners' position in legal disputes. However, while *Grokster* was shut down, the broader threat of injunctive relief against similar platforms soon faded.

3.2. The Anti-Copyright Movement

The *Napster* and *Grokster* rulings, along with lawsuits against individual users, sparked a backlash from an emerging anti-copyright coalition, including file-sharers, advocacy groups, and legal scholars. Despite judicial support for copyright enforcement, mass infringement remained widespread since users faced minimal penalties and found free file-sharing more convenient and cost-effective than purchasing CDs. As unauthorized digital consumption grew, CD sales declined, weakening copyright protections and diminishing

the commercial value of creative assets. Therefore, alongside user-driven resistance to copyright enforcement, influential commentators, academics, and advocacy groups criticized the strict enforcement of copyright laws. These groups argued copyright primarily served "Big Media" interests. They challenged the notion that strong copyright protections were necessary for creative production and cited the success of open-source software. Some went further, questioning the very foundation of authorial copyright. For example, William Patry from Google argued that creative works are inherently communal and should not be monopolized by individuals. Overall, commentators' proposals to limit copyright protections varied, but all agreed that "digital is different". In general, most called for reduced copyright protections due to lower production and distribution costs. According to their logic, with the digital revolution lowering costs, there was no need any more for high economic returns to incentivize content production. This led to arguments for relaxing copyright protections with minimal impact on artists' incentives. Some even suggested abolishing copyright in digital environments. Proponents of this view believed content production would thrive, distribution would improve, and consumers would benefit from lower prices. Whether this view held up against empirical research and digital market developments will be explored in the following section.

3.3. The Making of the "Piracy is Harmless" Myth

Between 1999 and 2008, U.S. music industry sales dropped from $12.8 billion to $5.5 billion, with file-sharing seen as the main cause (according to the industry). However, some argued that file-sharing had little impact or even promoted sales, suggesting potential "sampling" benefits and other "positive spillover" effects. If these theoretical models of economic and legal academic literature can be demonstrated empirically, these arguments would challenge the conventional business model in the content industry. Furthermore, it would tackle the incentive justification for copyright itself. Some of these arguments appropriately challenged the music industries' exaggerated claims about piracy's economic harm such as assuming every illegal download was a lost sale. However, it is likely that file-sharing significantly contributed to the sales decline. In particular, it seems unlikely that the once-in-a-generation decline in record sales in 2000s was not attributable to the launch of Napster for the most part.

Researchers undertook this task by testing whether piracy has an adverse, positive, or neutral effect on purchases of recorded music. Initial studies supported the idea that file-sharing harmed music sales, though some recognized not all file-sharing equalled lost sales. However, the 2004 study by Oberholzer-Gee and Strumpf ("the OGS study") claimed file-sharing had little impact on album sales in the U.S. If correct, this would imply that the unprecedented decline in recorded music sales following the launch of Napster was almost entirely attributable to other causes. The study used a unique strategy, analysing how increased file-sharing by German high school students during holidays affected U.S. purchases in late 2002. It relied on three assumptions: German students had more leisure time during school holidays, students used that time to upload more albums, and music uploaded by German students increased music availability for U.S. users. The study found no significant effect of this increased file-sharing on album sales in the U.S. during that period. The OGS study gained significant attention, with some interpreting it as proof that the music industry's claims of file-sharing losses were exaggerated. For example, the New York Times covered it, highlighting the "heretical view of file-sharing." However, this interpretation often overlooked the study's narrow period of time and fragile chain of assumptions. The authors further generalized, suggesting file-sharing had little impact on sales. In the 2005 Supreme Court case *Metro-Goldwyn-Mayer v. Grokster*, the authors filed an amicus brief, claiming the sales decline was likely due to other factors. Their study was cited in the dissenting opinion, supporting the defendant file-sharing site.

Today, the OGS study has become an outlier in the empirical literature on file-sharing, with other researchers pointing out its inconsistencies, flawed assumptions, and imprecise data. Except for the OGS study (which has been refuted), all other peer-reviewed studies confirm that file-sharing significantly reduces paid music purchases. While some variation exists in the size of the effect, most studies agree that piracy contributes substantially to the decline in music sales. A 2014 review highlighted the consistent finding that piracy negatively impacts sales across multiple studies. Even the OGS authors have acknowledged that piracy displaces a significant percentage of sales.

Barnett presents a figure with all relevant published empirical studies in the peer- reviewed literature on the effect of unauthorized consumption on sales of recorded music and other forms of content. With one limited exception, the same result is found: free content displaces paid content to some significant extent.

Additionally, three studies show significant increases in paid music consumption in jurisdictions that adopted anti-piracy penalties. Despite abundant evidence supporting piracy's negative impact on music sales, some continue to emphasize studies like OGS that found no significant effect. As of March 2022, the OGS study remains the most cited paper, despite its discredited findings. This persistence reflects confirmation bias, where commentators focus on evidence supporting their view that piracy does not harm sales. Ultimately, this selective interpretation reinforces the belief that copyright is unnecessary for content production, and it is an unsound basis for policy analysis. While empirical questions on content production and welfare remain, it is clear that free access to content significantly reduces paid sales.

It is perplexing that so much effort was required to establish the obvious link between piracy and reduced music sales. If file-sharing promoted sales, the music industry would have embraced platforms like Napster and supported their growth. Instead, the industry's efforts to shut down Napster suggest otherwise. An "experts know better than the industry" argument is expressed about the VCR, where the film industry was criticized for resisting it. However, this overlooks two key points. First, the industry's resistance was more about seeking compensation for piracy, not stopping the VCR altogether. Second, the economic success of the market for VHS tapes arose in part from the fact that the industry had technological and legal means to deter piracy for each medium. In the case of VHS tapes, copies could not easily be made on a mass scale and had inferior quality relative to the original. This emphasizes that it was the lack of copy protection on CDs, alongside the rise of digital files and file-sharing services, that contributed to the decline in music sales.

3.4. From Open Source to "Free" Search

Some IP scholars and open-source developers aimed to create non-profit-driven software models that waived copyright protection. While these experiments often failed, the development resulted in the adoption by federal courts of this more relaxed IP policy approach preferred by copyright-skeptics. As these advocates pushed for weaker copyright protections to counter "Big Media," Silicon Valley startups were developing a new business strategy. These startups, unlike early open-source hackers, were profit-driven ventures backed by investors, operating similarly to traditional software and media companies. However, they relied on a business model where IP protections were seen as obstacles. These startups used others' content for free, offering audio, video, and text at no cost to users, unlike conventional businesses that sell content directly to consumers. Instead, the tech startups relied on monetization through ads or complementary services.

3.4.1. The Dilemma of Commercial Search

The two-sided strategy (free content for users, paid ads from businesses) arose as a solution to a business dilemma to which there was no clear solution at the start of the commercial internet. Specifically, it was not clear how to extract value from the search engines that enabled users to feasibly navigate the wealth of information available through the internet. To understand this, it is important to briefly review the development of the search-engine market, both in terms of technology and business models.

Google's origins trace back to Sergey Brin and Larry Page's citation-based PageRank algorithm. Before this, search engines relied on keyword-based methods, ranking pages by how often search terms appeared. Brin and Page improved this by ranking pages not just by relevance to search terms but by how many relevant pages linked to them. This modification considerably improved the relevance of search results to a user's search words. Their algorithm was detailed in academic papers from 1998 and 1999, and a patent application was filed and granted in 2001. The patent was initially assigned to Stanford University, which then licensed it exclusively to Google. In 1998, the Google search service was launched.

For Google's founders and investors, the search-engine method for organizing and enabling access to information on the internet posed not only a technical but an economic challenge. While the search engine required significant development and maintenance costs, it lacked a business model for funding these activities and earning a positive return on investment. Finding a solution to this question was crucial for Google's economic viability and retaining investor interest. Initially, the founders were hesitant about advertising, fearing it could compromise search result quality. Crucially, they contemplated licensing the service or selling customized search solutions to businesses. However, they eventually reconsidered and adopted a hybrid search model. Google's model included organic search results based on relevance and sponsored search results that combined bid fees from advertisers with the relevance of their sites to the keywords. Advertisers paid when users clicked on their ads in a "pay-per-click" model, inspired by GoTo.com. This shift made advertising

Google's primary revenue stream. Google then introduced the AdSense program, allowing website owners to sell display space to Google's advertisers, selected based on bid prices and search relevance. This subsidized the free search services for users and maintained organic search results unaffected by ad bids.

3.4.2. How Commercial Search Commoditized Content

Google's search engine solved the founders' dilemma by creating mutually beneficial relationships between users, websites, and advertisers, generating revenue for funding operations. While successful, this two-sided model threatened content owners' one-sided business model, where they invest in production and earn direct payment from consumers.

As an example, suppose a user searches for "Madonna's Greatest Hits." Excluding, for simplicity, sponsored search results, the search engine displays relevant sites, including unauthorized content, while Google profits from ads on both licensed and pirated sites. Similarly, a search for "free new movie releases" would lead users mainly to pirated movies. In this case, Google would earn revenue from ads placed on these infringing websites through its AdSense program. Magnified many times over, the Google search engine could link millions of users to millions of items of infringing material. This would make it virtually impossible for a content owner to detect and take action against any meaningful portion of these infringing sites. Importantly, Google generates significant revenue without directly contributing to the production of content. For example, YouTube was acquired by Google in 2006 for $1.65 billion. It became the leading video-sharing site by offering vast amounts of free, user-uploaded, copyrighted material, overshadowing paid alternatives. The abundance of free content likely explains why YouTube rapidly became the leading online site for accessing music, rather than paid-download alternatives. In 2001, Pressplay, a paid-download music website, was launched by Vivendi Universal and Sony, two of the largest record labels, and similarly MusicNet was launched by RealNetworks. In both cases these legal alternatives failed to secure user adoption as unlicensed sites such as Napster were available.

Many reasons are cited for these sites' failures: some say music sites failed due to high prices, limited content or intrusive anti-copy measures. Yet the simplest explanation is price. Napster was free, while Pressplay and MusicNet, which offered the same product, were not. Similarly, YouTube succeeded over MySpace by being more lenient on copyright enforcement, thus offering more content. However, there was one obstacle that stood in the way of YouTube's success: strong copyright protection. Free business models relying on others' intellectual property, thrive in weak copyright environments, as strong copyright increases costs and legal risks. Put simply: strong copyright is bad for business. There are three reasons for this.

First, in an environment of strong copyright enforcement and absent a license, content owners can credibly threaten to withhold a valuable content asset. Thus, the site operator may have to pay fees to acquire a significant content inventory. Second, legal risks may discourage users from uploading content, reducing site activity and harming user growth. Ultimately this makes it harder for platforms to attract advertisers and sustain operations. Third, platforms like YouTube risk shutdown or billion-dollar lawsuits due to indirect liability for copyright infringement, as seen in *Viacom v. YouTube* seeking substantial damages. In this case, YouTube benefited from weak copyright enforcement by minimizing content acquisition costs, reducing legal risks, and maximizing ad revenue through freely available user-uploaded content. It is argued that content aggregators, like YouTube, are simply following the long-standing monetization model developed by terrestrial radio, which distributes content at no cost while extracting revenue through paid ads. However, this analogy fails, in one critical respect. In the U.S., all terrestrial radio stations must pay a royalty to the owners of the composition copyrights. By contrast, YouTube's founders chose to pay nothing to content owners. Furthermore, they made no meaningful effort to prevent copyright infringement and even allowed popular copyrighted content to remain on the site to attract users. For example, internal emails from the *Viacom v. YouTube* case showed YouTube's management knew copyrighted content accounted for most site views in its early years.

Nowadays, some see this as a legitimate business strategy. But that was not the case when Napster, YouTube, and similar services were launched. In the case involving Napster, the district court judge reportedly called the website a "monster" and effectively shut down the site. When Google bought YouTube in 2006, critics questioned its legal risks, with concerns that copyright lawsuits could threaten the company's financial sustainability. Twenty-five years after the launch of Napster and almost 20 years after the *Grokster* decision, judicial attitudes toward content aggregators have shifted significantly. Today fewer judges condemn them,

and YouTube's business model is now widely accepted. For example, in 2012, a district court ruled in YouTube's favour against Viacom, stating that the platform had no duty to proactively locate copyright infringements. Since 2006, Google's legal team successfully established precedents that minimized the risk of widespread copyright lawsuits, securing YouTube's long-term legal and financial stability. As will be discussed later, changes in case law regarding indirect copyright infringement have largely shielded YouTube from liability, provided it meets basic compliance requirements. Since the shutdown of Napster in 2002, the legal landscape and the accompanying norms concerning the unauthorized consumption of copyright-protected content have changed considerably.

3.5. Closing Thoughts

An unexpected alliance has been formed between copyright opponents and profit-driven tech companies that use free content to attract users and generate ad revenue. This alliance influenced courts to stop issuing shutdown injunctions against file-sharing sites, as many users supported weaker copyright enforcement for free access. Academics and policy advocates argued that strong copyright protections harmed user access and creativity, with some claiming piracy caused little economic damage. Although it was later disproven. Tech companies, including search engines and social platforms, built business models that thrived under weak copyright enforcement, inspired partly by open-source software principles. The convergence of ideological and commercial interests created a powerful force that significantly reshaped copyright law, a shift explored in later chapters.