

Dotan Oliar
U.Va. School of Law

The Authorship-Innovation Tradeoff

Many copyright law doctrines provide authors with incentives to create by imposing liability on inventors of technologies that copy, manipulate and disseminate content, such as mechanical piano players, Xerox machines, VTRs and file-sharing networks. Finding inventors liable for copyright infringement would enhance authors' incentives to create but would discourage innovation. Exempting inventors from liability would promote innovation but discourage authorship. Which should the law favor?

This Article studies the authorship-innovation tradeoff systematically. It views authorship and innovation as conflicting activities, where technological advance may harm copyright owners. It maps the ex-ante incentives that different property rules and liability rules generate for authors and inventors to invest in authorship, innovation and in minimizing technology's harmful effect on copyright owners.

The analysis offers descriptive payoffs: it illuminates the relative costs and benefits that different rules of liability would entail; it explains the existence of a puzzling multitude of views among scholars as to the desirable rule of liability; and it reconciles the Supreme Court's Sony and Grokster decisions that despite similar facts reached opposite results. The analysis also offers normative payoffs. Primarily, it suggests that adopting one fixed, predetermined rule of liability is likely not preferable. Rather, courts should determine during litigation which party should be protected and whether by a property right or a liability rule in light of the value of the technology, the relevant works of authorship, and the magnitude of harm. Additionally, since copyright liability can be imposed on innovators pursuant to many copyright law doctrines, it makes sense to incorporate the prescription above doctrinally as a part of the fair use inquiry, a general defense to all copyright-based causes of action. Indeed, it suggests that the aforementioned policy prescription (i.e. allocating the entitlement on a case-by-case basis in light of findings that the court makes during litigation) is an essential feature of the fair use doctrine as currently used by courts, and provides the best justification for the doctrine. Second, the article suggests when it would make sense, and when it would not, to hold technology companies liable based solely on their choices as to their system's technical design.