

**Written Statement of the Center for Democracy and Technology
for Senate Judiciary Committee Hearing,
“Protecting Copyright and Innovation in a Post-Grokster World”
September 28, 2005**

The Center for Democracy and Technology (CDT) is pleased to submit this written statement for the record of the September 28, 2005 hearing on “Protecting Copyright and Innovation in a post-Grokster World.”

CDT is a nonprofit public policy organization dedicated to defending and enhancing civil liberties and democratic values on the open, decentralized Internet. CDT believes the ongoing debate about the appropriate legal and technical means to protect copyright in the digital age has significant long-term implications for the future of the Internet. CDT therefore has actively engaged in this debate, with the goal of supporting balanced approaches that can protect against copyright infringement in a manner consistent with innovation and the open architecture of the Internet. We appreciate the Committee’s focus on this important set of issues, and we thank you for the opportunity to submit this statement for the record.

In the wake of the *Grokster* decision, CDT does not believe there is a current need for legislation in this area. Rather, what is called for is a combination of:

- vigorous enforcement of existing law;
- the development of a robust marketplace of legal channels for online content distribution, with appropriate content-protection technologies; and
- better public education.

This statement will discuss (1) why CDT believes it is essential to pursue a balanced approach to the problem of large-scale online copyright infringement; (2) what the basic elements of a balanced approach would be; and (3) how the *Grokster* decision fits into such an approach.

1. The Shared Interest in Developing Balanced Solutions

The Internet and digital technologies promise to greatly expand the “marketplace of ideas.” They enable the delivery of new voice, video, and data content online to millions of Internet users worldwide. They also offer new and transformative uses of that content, which will promote expression, civic discourse, and economic opportunity.

Unfortunately, the technologies that can locate, deliver, and transform content are also being used for massive copyright infringement. While some have questioned the extent of the commercial impact, CDT believes that widespread infringement is a real problem. Moreover, in the absence of any sound strategy to combat piracy, the likely result is responses, including government action, that run counter to the open and decentralized nature of the Internet and could stifle innovation. Thus, while the digital copyright

debate has been contentious and often shrill, CDT believes there is a strong shared interest in finding reasonable solutions to reduce piracy in ways that are consistent with Internet values.

Stakeholders and policymakers risk several adverse outcomes if they fail to pursue balanced approaches to the problem of widespread Internet piracy.

- First, massive infringement may continue undeterred, chilling the development of valuable and expensive-to-create content.
- Second, the government may respond to the piracy problem in ways that are in direct conflict with the innovation and openness that makes the Internet and other digital communications media so valuable. For example, government could seek to fight infringement through the imposition of burdensome technology mandates or by imposing broad liability on intermediaries or equipment makers – any of which could severely chill innovation and limit the choices available to consumers. Another possibility would be the imposition of blocking or filtering mandates on Internet service providers (ISPs) – for the first time turning ISPs into government gatekeepers responsible for what their customers do online.
- Third, copyright holders may seek to limit content delivery to closed networks or consumer electronics boxes that do not connect to the Internet. This would ignore the demand for access to content as part of consumers’ increasingly integrated, multi-media, and creative experience. It also could have the practical effect of actually fueling piracy by leaving peer-to-peer (P2P) networks as the only way for consumers to get valued content on their computers.

Content creators, technology companies, and consumers all have a strong shared interest in avoiding these outcomes.

2. A Balanced Approach To Address the Piracy Problem

CDT believes there is a path towards a balanced set of solutions to the piracy issue. The solutions will not eliminate piracy completely – likely an impossible task. Rather, the goal should be to make infringement unattractive, risky, and rare.

This can be achieved through a carrot-and-stick approach: distributing digital content in ways that will attract paying customers (the carrot), while making infringement unenticing and demonstrating that bad activity will be punished (the stick). The approach should have three prongs.

- *Punishing bad actors*, whether individual infringers or companies that profit by actively encouraging infringement. CDT believes that making infringement a dangerous activity that users recognize as illegal will encourage the vast majority of law-abiding citizens to choose lawful services. Thus, lawsuits against infringers can play a positive role. Similarly, strong but carefully targeted

penalties against companies that *intentionally encourage* infringement can deter bad business behavior without chilling innovation. As discussed below, the Supreme Court's *Grokster* decision should help point the way in this regard.

- *Encouraging a marketplace of content-protective and consumer-friendly digital rights management (DRM) tools* to allow the deployment of new models for digital distribution of content. Apple's iTunes, the Napster subscription service, and other digital media offerings show how new systems can deliver content and win customers without government-imposed technology mandates or regulatory restrictions. The policy goal should be the development of a robust content delivery market in which consumers have multiple choices, sufficient information, and in which issues relating to DRM's impact on public affairs content and privacy are fairly addressed.
- *Better public education* by trusted voices, including industry and consumer groups, speaking out against bad actors to teach the public that infringement is wrong and that illegal file-sharing is dangerous, unethical, and harmful to artists and creators. Reaching young consumers is particularly important. Consumers also will need information about DRM, so they can make informed choices and ensure a well-functioning DRM marketplace.

3. *Grokster* and Beyond

The Supreme Court's recent decision in *MGM v. Grokster* offers reason to believe that achieving a reasonable balance is possible. The case seemed to pit entertainment industry interests against many in the technology and Internet industries in a polarized, high-stakes battle. Few expected a unanimous ruling, and concurring opinions submitted by two groups of justices made clear that the members of the Court did not agree on everything. But the Court was able to find a core principle around which to build consensus. The result was a 9-0 opinion that many parties on both sides of the debate have praised.

The basic holding of *Grokster* was that P2P services can be held liable for intentionally inducing infringement through "purposeful, culpable expression and conduct." At the same time, the decision preserved the crucial legal principle – much broader than the specific P2P issues raised in the case – that a provider of technology that has lawful uses will not be held responsible simply because people use the technology for unlawful purposes. That legal principle, from the 1984 *Sony Betamax* case, has been essential to the innovation-friendly environment that has fostered the development over the last twenty years of an impressive range of technologies of great value to consumers, from the iPod to the Internet itself.

The full impact of the *Grokster* case will depend on how it is interpreted by the lower courts. Technology companies and innovators have some legitimate concerns that the decision will subject them to significant litigation risk. They fear copyright holders will try to stifle new technologies by bringing – or even just threatening – costly

lawsuits alleging inducement. The *Grokster* opinion cited the P2P companies' failure to modify their products to reduce infringement and an advertising-based business model that profits from infringement as corroborating evidence of their intent to induce infringement. The risk to technology companies could be exacerbated if lower courts give undue weight to this language.

However, the risks to legitimate companies should be limited if lower courts follow the Supreme Court's lead in carefully targeting inducement liability at the bad behavior of bad actors, rather than at technology. The *Grokster* opinion offers plenty of guidance in this regard. For example:

- The opinion makes clear that inducement liability requires an intent to promote inducement. Mere knowledge that a product can or is being used for infringement is not sufficient.
- The opinion states that culpable intent must be demonstrated through clear expression or other affirmative acts taken to foster infringement. Thus, the focus is on the behavior of the defendant, not the capabilities of the defendant's technology.
- The opinion states explicitly that failing to make design changes to reduce infringement is not sufficient to infer culpable intent. Product design, in other words, is not a basis for liability.
- The opinion states explicitly that the fact that a company benefits financially from infringing uses of its product is not sufficient to infer culpable intent.
- The opinion states explicitly that a company's ongoing support (technical support, product updates, and so forth) of a product used to infringe copyright is not a basis for inducement liability, provided the product has lawful uses.

In short, while Congress should remain vigilant in tracking lower court interpretations of *Grokster*, the rule announced by the Court appears to leave substantial room for innovators with clean hands to develop and distribute new technologies that benefit consumers.

By confirming that operators of P2P services can be punished when they intentionally encourage unlawful activity, while preserving the pro-innovation *Sony* principle, the *Grokster* decision appears to make a significant contribution to the enforcement prong of the approach discussed in the previous section above. Enforcement tools also were bolstered by the recent enactment of the Family Entertainment and Copyright Act of 2005, which creates tough new penalties for using camcorders in movie theaters and for piracy of pre-release works.

Neither the *Grokster* decision nor other enforcement efforts, however, will eliminate the availability of infringing material on P2P networks. The specific P2P software at issue in the *Grokster* case has been distributed to millions users, and it is always possible for software developers to distribute new P2P software legally, anonymously, or from overseas. Moreover, the Internet and other digital technologies will continue to make it possible for people to engage in large-scale unlawful copying through other means.

For that reason, it is essential to press ahead with the other two prongs of the approach outlined above: public education and, above all, the development of attractive legal online distribution services. A number of relatively new online content services have launched and proved popular with consumers. The effort to license content to legal online services must continue, and must do so in a manner that responds to the public's reasonable expectations concerning flexible uses. When legal services suffer from limitations in the availability content, or from inflexible restrictions that prevent consumers from taking full advantage of the capabilities of digital technologies, it only serves to increase the draw of illegal downloading.

Making legal content more readily available online should not require wholesale changes to copyright law or other major legislation. Rather, it requires content owners and technologists to work together toward a simple but broad goal: making virtually any content available legally, as quickly as possible, in as many forms and formats as possible, while protecting it against widespread illegal redistribution.

CDT looks forward to participating in the important ongoing policy debates concerning copyright in the digital age. We appreciate the opportunity to submit this statement.

Respectfully submitted,

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