

**Questions for the Gary Shapiro, President and CEO,
Consumer Electronics Association
October 5, 2005**

“Protecting Copyright and Innovation in a Post-Grokster World”

1. Mr. Shapiro, your written testimony expresses support for H.R. 1201, Congressman Boucher’s bill over in the House. Although you state that the bill codifies the *Betamax* doctrine, it does not appear to specifically set forth a legislative definition of what constitutes “substantial non-infringing uses.” Can you clarify for the Committee your organization’s view regarding the correct standard when measuring whether a technology is capable of a substantial non-infringing use?

The essence of the *Betamax* standard, and all of the precedent cited there by the Supreme Court, is to protect and promote innovation and risk-taking – this furthers the constitutional basis of intellectual property itself, which is “[t]o promote the Progress of Science and useful Arts” Therefore, we do not believe that the Court meant to adopt any single or particular definition, or even concept, of “substantial non-infringing uses,” because to do so in terms of today’s technology and business models would be to shortchange tomorrow’s.

As the Court noted, categories of non-infringing use include both authorized uses and “fair use” under Section 107 of the Copyright Act. Fair use originated as an equitable judicial concept, and was not incorporated into the Act until early in the last century. Hence it is meant to be an evolving doctrine, to be developed by courts on a case by case basis, rather than a code of conduct.

One key on which we have focused, since the advent of VCRs, was on products that serve the “reasonable and customary” expectations of consumers. In other words, we do not believe that most consumers, in their use of lawfully acquired content, are “pirates.” They desire to find, render, store, forward, and play back lawfully acquired content in a way that is fair to content providers, as well as one that serves their personal schedules and the needs of their families. Accordingly, it has been our view that devices whose designs enable consumers to meet such varied needs do serve fair uses, and therefore these uses are non-infringing even if not authorized, or objected to, by an owner or distributor of a copyrighted work. Hence, devices serving such uses should be considered within the protection of the *Betamax* standard, even if these devices have other uses – and as the Supreme Court said, even if in fact such uses might be “primary” – that might be held to be infringing. To rule otherwise would be, as the Supreme Court said, to absorb the rights of patentees into the rights of copyright owners (which require no formalities and have longer terms), and hence to “choke the wheels of commerce.”

Even the “reasonable and customary” standard must be viewed with a sense of dynamism. New products also create new possibilities, expectations, and uses. If these are embraced by consumers with respect to lawfully acquired content, they presumptively

also should also be considered “fair uses,” and the innovation via which they are offered should deserve protection under the *Betamax* doctrine.

2. In your testimony, you state that the copyright law’s current “statutory damages” provisions could prove to be ruinous for the technology industry. Do you think that Congress should limit statutory damages to cases of direct copyright infringement as opposed to secondary liability cases?

Yes. As we note above, development of the fair use doctrine is meant to occur on a case by case basis in which equities can be fairly balanced. It is the rarely courageous business, however, that is willing to risk its entire solvency on a court’s resolution of a legal issue that is, by definition, a “grey area.” Failure to address this problem by limiting statutory damages, as posited in this question, will mean that there will be fewer and fewer new products raising such issues, and fewer and fewer courts will be given the opportunity to address the most difficult legal questions.

In addition to depressing American innovation and consumer welfare, this will punt all new issues and uses into the lap of the Congress, which is not well equipped to address them on an ongoing, dynamic basis. This result will be the opposite of what the Founding Fathers and the drafters of the Copyright Act intended.