

Testimony of
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STATEMENT OF DEBRA WONG YANG
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DEPARTMENT OF JUSTICE
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COMMITTEE ON THE JUDICIARY

THE IMPACT OF THE SUPREME COURT'S DECISION IN MGM v. GROKSTER

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Chairman Specter, Ranking Member Leahy, and Members of the Committee, thank you for this opportunity to discuss the impact of the Supreme Court's decision in MGM v. Grokster, and, more broadly, to share with you the Justice Department's efforts in protecting intellectual property and prosecuting those who steal or illegally distribute our intellectual resources. The timing of this hearing is particularly appropriate. Although the Department, as I discuss below, has over the past several years invested significant time and resources toward protecting this Nation's intellectual property, Attorney General Alberto Gonzales has renewed the Department's commitment to its Task Force on Intellectual Property. He also recently created an advisory subcommittee consisting of United States Attorneys who will work closely with the Task Force, the Office of the Deputy Attorney General, the Criminal Division, and various other components to implement the Task Force's comprehensive recommendations and increase our effectiveness in prosecuting cyber crime and intellectual property offenses. I am honored that he has asked me to chair this Attorney General's Advisory subcommittee and I am also grateful for this chance to address this Committee and open up what I hope will be a productive dialogue with Congress about how best to combat the misuse of our intellectual property capital.

We have placed special value on intellectual property since our Nation's birth. The Constitution itself expressly grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."² The First Congress wasted no time implementing this

³Act of May 31, 1790, ch. 15, § 1, 1 Stat. 1241 (1790).

4464 U.S. 417 (1984).

⁵Id. at 442.

6125 S. Ct. at 2780.

Constitutional directive, and enacted the first federal law creating copyright protection in 1790.³ Over the ensuing two centuries, Congress has time and again revised intellectual property law with a careful eye toward maintaining a proper balance between providing the incentives to create (through the mechanism of a statutory monopoly for ideas) and ensuring the ability of the public to enjoy and use the fruits of that creativity (by limiting the monopoly's duration and crafting appropriate exceptions).

The Grokster Decision

In fashioning the balance between private incentives and public use, Congress has traditionally extended copyright, trademark, and patent protection by statute, and relied upon private parties to police one another by allowing aggrieved parties to sue one another civilly for damages or other equitable relief. Grokster is one such case. In Grokster, the Court was called upon to determine when a person could be held secondarily liable for a third person's acts in infringing a copyright. The Court encountered the issue in *Sony Corp. of America v. Universal City Studios, Inc.*⁴ Under Sony's Staple-Article Rule, a manufacturer or distributor is not secondarily liable for the design or distribution of a product that is capable of substantial noninfringing use.⁵ In Grokster, the Court clarified that the possibility of such non-infringing use is not by itself sufficient to defeat secondary liability when the device maker intends to facilitate copyright violations: A person is secondarily liable for the infringement of others if he distributes a device with the object of promoting its use to infringe, as shown through a "purposeful, culpable" "expression or other affirmative steps taken to foster infringement."⁶

Of course, Grokster involved civil liability. Accordingly, it is not directly relevant to and does not directly affect the Department's prosecutorial efforts. But Grokster is helpful in understanding the issues that we regularly confront as criminal enforcers of intellectual property law. Grokster highlights one of the perpetual challenges of criminal intellectual property enforcement - namely, keeping up with the new and innovative ways in which technology is used to violate these laws. Grokster emphasizes the importance that a party's intent can play in assessing liability, which is entirely consistent with the invention of intellectual property law as a means of balancing competing incentives.

⁷Act of Jan. 6, 1897, 29 Stat. 481 (1897).

⁸Pub. L. No. 97-180, 96 Stat. 98 (1982).

⁹Electronic Espionage Act, Pub. L. No. 104-294, 110 Stat. 3488 (1996).

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Criminal Enforcement of Intellectual Property Laws

Congress has resorted to criminal sanctions as an additional means of protecting intellectual property. This innovation has been relatively recent. It was not until 1897, more than a hundred years after the first copyright statute, that Congress made it a misdemeanor to willfully infringe a copyright by publicly performing a dramatic or musical work for profit.⁷ It was not for nearly another century that Congress, in 1982, created the first felony offense for willful infringement of a copyright by distributing or reproducing certain types of works (movies,

audio-visual works, and sound recordings) for a profit.⁸ The theft of trade secrets did not become criminal until 1996,⁹ and, to this day, patent infringement is not a crime but remains subject to civil liability.

Congress' increasing reliance on criminal sanctions has coincided with the onset of the Information Age. Intellectual property is fundamental to our current economy. Every year, we export hundreds of billions of dollars of motion pictures, music, software, new technologies, and

innovations in nearly every field of endeavor. Piracy and theft of that intellectual property has a substantial harmful effect on nearly every industry, from electronics to entertainment to industrial logistics. Moreover, the piracy of our intellectual property is often intimately related to the misuse of trademarks. Consumers rely on those trademarks, especially brand names, as a means of assuring themselves of the quality and safety of the goods attached to them. As a result, misuse of trademarks can endanger public health and safety as well as the economy.

In light of these important concerns, the Department has taken its mandate to enforce these carefully tailored criminal laws very seriously. As with other forms of contraband, the Department has attempted to combat illegal trafficking in intellectual property in several ways. First, we have focused on halting the "supply" of unauthorized intellectual property by deterring the initial theft of the property and its modes of distribution. Second, we have attempted to diminish the "demand" for such product through educational and other outreach programs. Lastly, we have developed a specialized cadre of prosecutors who work hard to keep abreast of the latest technological developments, educate federal agents and the public, and prosecute cases that penalize offenders and, we hope, have a publicly visible deterrent effect. I will share with you some of the specifics of our efforts, and how Congress has been a necessary and welcome ally in these endeavors.

10Pub. L. No. 109-9, Title I, § 102(a), 119 Stat. 210 (2005) (creating 18 U.S.C. § 2319B).

11See Family Entertainment and Copyright Act of 2005, § 103 (amending 17 U.S.C. § 506 and 18 U.S.C. § 2319).

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Stopping the Supply of Illicit Intellectual Property: Theft & Distribution

Attacking the supply of the illicit market in intellectual property involves a two-fold focus: stopping the initial theft of the property and dismantling the distribution chain. With respect to motion picture piracy, for example, we have identified three ways in which movies are initially taken prior to their release for sale in DVD format. First, employees of a postproduction facility hired by the studio will violate the terms of their employment and steal a copy of the movie. Second, a person with an "advance copy" of a movie will either copy or allow the movie to be copied. Persons tapped by the Academy of Motion Picture Arts and Sciences to be "screeners" - that is, to receive a copy of a movie for purposes of screening and voting - fall into this category. Lastly, moviegoers will bring a video camera and other equipment into a movie theater and surreptitiously record a movie as it is being exhibited at a premier or other advance showing.

The Department has aimed its prosecution efforts at precisely these supply sources, and my office has largely adopted a "zero tolerance" policy. The damage done by these criminals is often impossible to calculate, as it has a ripple effect that undermines consumer sales and, beyond that, the health of the various creators and the industry that supports them.

For example, in February 2004, the Department prosecuted several individuals who stole copies of movies including *The Passion of the Christ* and *Kill Bill*, Vol. 1, pre-theatrical release, from a post-production house responsible for putting the finishing touches on the films. The Department has also prosecuted and obtained convictions against many different individuals who coopted movies from screeners, including *The Incredibles*, *Friday Night Lights*, and *Finding Neverland*. Perhaps the most notorious of these screener-distributors was Russell Sprague, who pled guilty to copyright infringement in 2004, admitting to distributing over 100 screener titles that he had obtained from an Academy member who had received the screeners legitimately due to his Academy membership, which has since been revoked.

Very recently, this past June, our Office - which is home to Hollywood - obtained guilty verdicts after a two week trial against Johnny Ray Gasca, a notorious "camcorder." Subsequent to the filing of charges against Gasca, Congress stiffened the penalties for camcorders and created a separate new felony crime to address precisely this type of activity.¹⁰ Moreover, until recently, a person who uploaded a film onto the Internet was treated much the same as a person who simply distributed a copy. This did not accurately reflect the greater degree of harm that a so-called "uploader" causes, and Congress stepped in earlier this year to make the act of uploading itself a felony, at least when the item uploaded is a motion picture not yet available for public purchase.¹¹

1217 U.S.C. §§ 1201-1204.

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Just last month, Department prosecutors in San Jose, California became the first in the Nation to use several provisions of this new law, known as the Family Entertainment and Copyright Act of 2005, to charge a Missouri man with felony crimes for camcording films in movie theaters and distributing the films on computer networks. This is yet another example of Department prosecutors in the field making quick and efficient use of the tools given to them by Congress to continue their fight against piracy more effectively.

Once a movie, song, software program, or game is stolen, thieves usually opt for one of two ways of distributing the pirated goods. The first, and most widespread, form of distribution is over the Internet. Online piracy involves several steps - the person who "uploads" his or her copy of the movie, program, or other work to a server, the person who removes any copyprotection

devices embedded in that copy, and the person who facilitates its distribution.

The person who removes any copy-protection device, often called a "cracker," faces criminal liability under the Digital Millennium Copyright Act ("DMCA") for circumventing that device.¹² The Department has been careful to exercise its prosecutorial discretion in such a way to charge those DMCA cases against crackers who are part of distribution chains. For example, in early 2003, a Vacaville, California man was sentenced to two years in federal prison for his part in creating more than 4,500 bootlegged video tapes by means of a movie videocassette reproduction lab, with a vast array of equipment hooked up to manufacture counterfeit movie videocassettes and labels. The bootlegger was also charged and convicted under the DMCA for using equipment in the reproduction lab which bypassed the copyright protections built into the videocassettes.

In another example of charges brought under the DMCA, in the fall of 2003, my office obtained the first ever conviction by jury in a DMCA case, related to the circumventing of DirecTV security measures to reprogram DirecTV access cards, also known as "smart-card hacking." A total of 17 defendants were charged in Operation Decrypt, an undercover FBI investigation that targeted high-level computer programmers and hardware manufacturers who distributed software and devices used to steal satellite services from DirecTV and DISH network. Distribution of copyrighted works over the Internet often takes one of two forms - centralized and de-centralized. The most common form of centralized distribution we have encountered is the so-called "warez group." A warez group is a loose confederation of individuals who maintain a massive database, often containing terabytes of data comprised of illegally pirated movies, software, music, and games. Members join the group by contributing pirated works, and then are granted privileges to download other pirated works from the group's central database. The Department has aggressively infiltrated and taken down several of these

warez groups.

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Among our more prominent recent prosecutions of warez groups is "Operation Site Down." In June 2005, the Department and law enforcement from 10 other countries executed over 90 searches worldwide targeting many of the leading criminal warez groups, including RisCISO, Myth, TDA, LND, Goodfellaz, and Hoodlum. The takedown was orchestrated by the Computer Crime and Intellectual Property Section ("CCIPS") at Main Justice, which coordinated the unprecedented international coordination in this global enforcement effort, with assistance from the U.S. Attorney's Offices in various cities around the Nation. The investigation was headed up by FBI Field Offices and the U.S. Attorney's Offices in Charlotte, Chicago, and San Francisco. We estimate, conservatively, that more than \$50 million in intellectual property was recovered.

De-centralized distribution over the Internet involves "peer-to-peer" ("P2P") networks similar to those involved in the Grokster decision. Unlike more centralized networks that house all of their pirated intellectual property in a single location or in a small handful of locations, P2P networks can operate by using space on members' computers; members may obtain pirated items by accessing one another's computers rather than any centralized database. We are aiming our efforts at the organizers of these groups reproducing and distributing copyrighted works. Distribution of intellectual property not only takes place on the Internet, it also takes place in what we sometimes call the "real world." We have seen that this second type of distribution network obtains pirated copies of movies, music, games, and software, then reproduces hard copies of them, for sale at retail stores and swap meets, and on street corners all around the United States. This type of crime often involves both copyright and trademark infringement, at least where the pirated goods are contained in packaging that uses the logos and brand names of software companies, movie studios, game producers, or music distributors. The Department has aggressively prosecuted this type of distribution network as well.

Our recent efforts in both of these areas include:

- * Operation D-Elite. In May 2005, FBI and Immigration and Customs Enforcement ("ICE") agents executed search warrants at 10 locations across the United States targeting leading members of an international P2P network known as the Elite Torrents (due to their use of the program BitTorrent). CCIPS is leading this ongoing investigation and prosecution, the first of its kind to target the misuse of the P2P software platform BitTorrent.

- * Operational Digital Gridlock. In August 2005, the FBI executed six search warrants in three different States aimed at dismantling another misused P2P network. Two of the defendants pled guilty, the first convictions for piracy using a P2P network. The United States Attorney's Office in the District of Columbia and CCIPS have handled this prosecution.

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- * Operation FastLink. In April 2004, the Department, in conjunction with the authorities in Belgium, Denmark, France, Germany, Hungary, Israel, the Netherlands, Singapore, Sweden, and Great Britain and Northern Ireland, executed 120 search warrants simultaneously against a criminal operation that manufactured pirated copies of movies, software, games, and music. Thus far, we have obtained 15 felony convictions and are continuing to press forward against other possible targets. This investigation was orchestrated and led by CCIPS and

used the network of U.S. Attorney's Offices around the Nation.

* Operation Digital Marauder. Last year, U.S. Attorney's Offices in California and Washington State concluded an undercover operation for more than a year and executed several search warrants aimed at an organization that was engaged in mass production and subsequent distribution of pirated and counterfeit software in Los Angeles, San Francisco, Vancouver, and Texas. A total of 12 individuals were charged with copyright and trademark violations in one of the largest counterfeit software cases ever charged.

As is evidenced from these cases, the theft and distribution of intellectual property almost always has an interstate - and often an international - dimension. In October 2004, USTR and the Departments of Commerce, Homeland Security, and Justice announced the Administration initiative called the Strategic Targeting Organized Piracy ("STOP") to combat trade in pirated and counterfeit goods. Other participants include the Department of State and the Department of Health and Human Service's Food and Drug Administration. This White House-driven, interagency initiative targets cross-border trade in physical/tangible goods and has five general components:

- * Stopping infringing and counterfeit goods at the U.S. border by improving identification and seizure capabilities;
- * Dismantling criminal enterprises that steal intellectual property;
- * Keeping counterfeit and infringing goods out of the global supply chain;
- * Empowering U.S. businesses to secure and enforce their intellectual property rights at home and abroad; and
- * Reaching out to U.S. trading partners and building international coalitions to block trade in infringing and counterfeit goods.

As part of its contributions to the STOP initiative, the Department has continued to target international, large-scale criminal organizations that steal and trade in pirated and counterfeit goods. One example was the global enforcement action known as Operation Site Down, which I referenced earlier. In addition, in April and June of this year, the Department accompanied other

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STOP agencies on foreign trips to Hong Kong, Korea, Singapore, France, Belgium, Germany, and the United Kingdom to heighten awareness of IP enforcement concerns and build effective coalitions with like-minded trading partners to block trade in pirated and counterfeit goods.

Also in the international arena, the Department has enhanced and improved its delivery of intellectual property training programs for foreign prosecutors and investigators by developing key relationships with foreign officials directly responsible for intellectual property enforcement. For example, the Department has worked closely with Mexican authorities, particularly intellectual property prosecutors and customs officials, to enhance intellectual property enforcement efforts in the hopes of stemming the flow of pirated goods between the two neighboring nations. Similar efforts are underway in Panama and are planned in several Eastern European and Southeast Asian countries known for producing pirated and counterfeit goods.

The Department has also taken an active role in seeking greater criminal enforcement of intellectual property violations in China. U.S. and Chinese law enforcement officials had extensive discussions on criminal enforcement of intellectual property rights and areas for potential cooperation during the U.S.-China Joint Liaison Group meeting held in February 2005. The Joint Liaison Group has provided a productive forum for U.S.- China law enforcement cooperation in a number of areas of criminal enforcement, and we are hopeful that we will be

able to make progress on intellectual property protection in China through this specialized law enforcement forum.

Diminishing the Demand for Pirated Goods

In the digital age, pirated movies, music, games and software are tempting to those more interested in obtaining entertainment than obeying the law. Usually, pirated intellectual property is available for free and, in the digital age, is often identical in quality to the original. Persons inclined to pay for such intellectual property may decide to take the expedient route instead and download a pirated copy or buy a copy on a street corner for a small fraction of the retail cost of the authentic version.

The Department has taken an active role in educating the public, and especially the younger consumers who are often associated with accepting the fruits of piracy, about the costs of piracy to the copyright holder and to the economy. Last fall, the Department, working in conjunction with the Motion Picture Association of America and others, hosted the first "Activate Your Mind" conference in Washington, DC. High school students from the surrounding area were invited to Main Justice to hear from songwriters, a convicted felon, and others about why they should not engage in piracy; the day-long event concluded with the students preparing public service announcements denouncing music piracy. This spring, we hosted a similar event for high school students in the Los Angeles area, and focused the presentation on movie and television piracy.

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Specialized Prosecutors, Community Outreach

Since 1991, the Department has recognized that the most effective tool for combating intellectual piracy is a well-trained staff of prosecutors. Toward that end, the Department created CCIPS, a centralized unit of 35 attorneys who work from Main Justice to coordinate and support cybercrime and intellectual property investigations handled by line prosecutors in the field. CCIPS also prosecutes its own cases, and specializes in multi-district, international prosecutions. In 1994, the Department created what is now called the "CHIP" program, short for Computer Hacking and Intellectual Property. Each of the 94 United States Attorney's Offices has at least one prosecutor who receives training and is a point of contact for any cases involving cyber or intellectual property crime. Now, 18 offices have CHIP units - that is, a group of prosecutors who specialize in these types of crimes. In recent years, our focus has shifted more than ever toward intellectual property crimes. These CHIP prosecutors receive regular training, develop important expertise, and focus their efforts on intellectual property and cybercrime prosecutions to form a strong network throughout the country to fight the increasing problem of intellectual property theft in the digital age.

These prosecutors carry their training forward. In Los Angeles, for example, prosecutors in my office hosted a training session on intellectual property law for more than 65 federal agents in February 2005. These prosecutors also engage in outreach aimed at the most likely victims of intellectual property theft, educating them about how to prevent such theft, what sorts of conduct qualifies as criminal, and what sort of evidence to preserve for purposes of criminal investigation.

In addition, last year, then-Attorney General Ashcroft commissioned the Intellectual Property Task Force. The Task Force spent six months conducting a comprehensive review of how the Department protects intellectual property rights. The Task Force consulted prosecutors and agents in the field, met with representatives from the victim industries most affected by piracy, and assessed what has been accomplished, what needs to be accomplished, and how to

meet those needs in the future. The Task Force issued a written report last October, detailing its findings and making dozens of recommendations. Attorney General Gonzales, within a few weeks after taking office, re-commissioned the Task Force to implement all of the recommendations contained in the report. Some of those accomplishments include:

- * Creating five new Computer Hacking and Intellectual Property ("CHIP") Units in the U.S. Attorney's Offices in Nashville, Orlando, Pittsburgh, Sacramento, and Washington D.C., bringing the total number of specialized prosecutorial units to 18.

- * Providing foreign and state-side training programs on intellectual property enforcement for government officials from Brazil, Brunei, Cambodia, Chile, Colombia, Indonesia, Korea, Philippines, Malaysia, Mexico, Myanmar, Singapore, Thailand, and Vietnam.

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- * Executing agreements to implement obligations of US/EU Mutual Legal Assistance and Extradition Agreements that ensure cooperation regarding intellectual property crimes with Belgium, Finland, Spain, Sweden, the United Kingdom, France, the Netherlands, Luxembourg, Lithuania, Denmark, Ireland, Portugal, and Austria; and completing or nearly completing negotiations with Estonia, Germany, Greece, Hungary, Italy, Cyprus, and Slovenia.

- * Working with Congress to achieve the following legislative accomplishments:

- * legislation recognizing passive sharing of copyright works, as enacted in the Family Entertainment and Copyright Act, S. 167, on April 27, 2005;

- * legislation recognizing the premium value of copyrighted works before they are released to the public, as enacted in the Family Entertainment and Copyright Act, S. 167, on April 27, 2005; and

- * legislation allowing law enforcement officials to seize material and equipment used to make counterfeit products and labels, as enacted in the Anti-Counterfeiting Amendments of 2004, H.R. 3632, on December 23, 2004.

Concluding Remarks

As you can see, the Department takes the protection of our Nation's intellectual property very seriously. The Task Force, and the subcommittee which I have recently been asked to coordinate, will continue to grapple with the issues of how best to address both the current and emerging issues in this area. Among others, we are examining whether there are any gaps in the arsenal of criminal enforcement tools, whether the Department's prosecutorial and policy resources are distributed efficiently, and what more we can do to educate the public and potential victims to stave off the problem in the first place. I look forward to working with you on these issues in the coming months, and to sharing with you the results of our efforts as we move forward to protect the intellectual property assets that the Constitution, more than 200 years ago, recognized as a powerful asset of our Nation's heritage.