Testimony of

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Testimony of Gary J. Shapiro on behalf of The Consumer Electronics Association and the Home Recording Rights Coalition "Protecting Copyright and Innovation in a Post-Grokster World" Senate Judiciary Committee September 28, 2005 The balance may have shifted from a pro-consumer revolution to maximum protection for proprietors. We have long referred to the 1984 Betamax decision as the Magna Carta for our industry. The principle that copyright proprietors should not be able to impede the design, development, and sale of staple articles of commerce capable of significant non-infringing uses gave technology companies the incentive and the confidence to invest in research and new technology.

In Grokster the Court recognized a parallel "inducement" principle, based on subjective intent. Technically the only issue before the Court was the right of two "peer to peer" services to continue to distribute their technologies, despite findings that their prior marketing practices encouraged infringement. Remedies for these prior practices were still subject to lower court consideration. The Court emphasized that its inducement doctrine "premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose." Yet examples given by the Court in its opinion could subject creators of new technologies to ruinous litigation. Thus the Court looked back to the Betamax case itself and observed that Sony, despite its urging of customers to make and keep home recordings, would not have been guilty of inducement, because neither "home recording" nor "building a library" was "necessarily infringing."

So Grokster appears to threaten only inducement of clearly unlawful conduct. But, for example, if a single court were now to label as "infringement" consumers' home recording of content they have paid to view or hear, what will be the status of all the product design, research, development, production, marketing, and distribution activity that went into serving these consumers? Scores of products and services are being created and introduced that change how people buy a house, book travel, do research, complete their education, and even run for office. The technologies have improved access to information, education and entertainment and enhanced peoples' lives. All digital technologies involve copying to some degree. The law should not impede or restrict these new and beneficial consumer activities or the digital technology products that make them possible. Yet, all of these commonplace activities implicate conduct - reproduction, distribution, derivative works - that an overbroad interpretation of the Grokster case could prohibit. We are at a crossroads in technology. With new technologies allowing every citizen to be a creator, we must accept that our national creativity can no longer be measured by CD sales.

We understand that the recording industry is approaching another committee of the Senate with a proposal to give the FCC carte blanche to impose copy protection technology and requirements on digital audio broadcasts. This proposal is not aimed, like the controversial video "broadcast flag," at mass, indiscriminate, anonymous distribution of content over the Internet. It is aimed at

private, noncommercial home recording entirely within homes and automobiles. It would change copyright law, yet this proposal has never been examined by your Committee.
Last week the motion picture industry announced that is forming a central laboratory, reporting directly to the CEOs of the major motion picture companies: "MovieLabs." We fear that its purpose is to control technology via licensing, so only "approved" approaches can be tried. Gathering decision-making and licensing in industry consortia owned and controlled only by content proprietors can be, and perhaps is meant to be, a powerful weapon in the wake of Grokster.
Proprietors do not need additional weapons at this time. At a minimum, Congress should do no harm. In the other body, HRRC and CEA continue to support H.R. 1201, a bill that would codify the Betamax doctrine, which the Grokster court left undisturbed.

Before the United States Senate
Committee on the Judiciary
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As the Chief Executive Officer of the principal trade association of the consumer electronics industry, the Consumer Electronics Association,1 I appreciate the opportunity to discuss the state of my industry in the wake of the Supreme Court's Grokster opinion.2 I am also here today as the Chairman of the Home Recording Rights Coalition.3 The HRRC was formed in October, 1981, the day after the Ninth Circuit Court of Appeals ruled that motion picture companies had the right to keep consumer video cassette recorders off the market. The reversal of this judgment by the Supreme Court in 1984, in the Betamax case, 4 was, if not the vanguard, then the safeguard for a technological revolution that has empowered consumers and created new markets for content providers in ways that previous generations could only dream about.
The Betamax decision gave technology companies the confidence to imagine, design and create today's digital revolution in audio, video, text, hypertext and interactive media. In a Post-Grokster World, the balance may have shifted from a pro-consumer revolution to maximum protection for proprietors. I think we have every right to be concerned that the creativity and
1 CEA is the principal trade association of the consumer electronics and information technology industries and the sponsor of the International Consumer Electronics Show. CEA represents more than 2,000 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. Combined, CEA's members account for more than $121 billion in annual sales. CEA's resources are available online at www.CE.org,
2 MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).
3 www.HRRC.org.
4 Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

innovation the public expects and deserves from American industry may be subject to very serious, and unwarranted, constraints.

We have long referred to the 1984 Betamax holding as the Magna Carta for our industry. The firm principle that the Court established - that copyright proprietors should not be able to impede the design, development, and sale of staple articles of commerce capable of significant non-infringing uses - gave technology companies the incentive and the confidence to invest in research and new technology. The Betamax Court said that any other result would "block the wheels of commerce," and history has affirmed this judgment.

In Grokster, the Court did not overturn or even disturb its Betamax holding. For this, my colleagues and I in the technology industries are both grateful and relieved. The Court did, however, recognize a parallel "inducement" doctrine, based on subjective intent. The Court said that even though the technologies and the products themselves remain protected by the Betamax doctrine, a company may still be held liable based on conduct aimed at encouraging and facilitating "copyright infringement." I am concerned about the future interpretation of this doctrine in the lower courts, in an environment in which content providers and distributors already have been given and continue to seek an even broader array of tools to constrain the lawful activities of consumers and independent manufacturers and retailers.

Pros and Cons of Grokster

The old adage is that hard cases make bad law, and Grokster was a hard case. Technically, the only issue before the Court was the right of two "peer to peer" services to continue to distribute their technologies, despite findings that their prior marketing practices encouraged infringement. These prior practices were not before the Court, and remedies for them were still subject to lower court consideration. The Circuit Court opinion from which the

plaintiffs appealed was willing to assume, in finding for the defendants, that the conduct encouraged by their previous practices was clear copyright infringement. Under this circumstance, the Supreme Court refused to shelter the defendants' software technology, under the Betamax doctrine, without considering these prior marketing practices.

In its unanimous decision, the Court emphasized that its parallel "inducement" doctrine was meant to apply only to bad actors. The Court, during oral arguments and in its decision, expressed concern that, consistent with the Betamax decision, the law should ensure that the technology community will not be subject to suit simply because new technologies could also be used for infringement.5 Therefore, the Court emphasized that this inducement doctrine "premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose." This doctrine, correctly understood, and particularly in light of facts that the Court found to be egregious and willful, should only reach those who knowingly and unambiguously intend that their conduct will promote copyright infringement. It should not penalize companies from developing and marketing products that are intended to promote commercially significant lawful

5 For example, Justice Breyer asked counsel for the petitioner:

[A]re we sure, if you were the counsel to Mr. Carlson, that you recommend going ahead with the Xerox machine? Are you sure, if you were the counsel to the creator of the VCR, that you could recommend, given the use, copying movies, that we should ever have a VCR? Are you sure that you could recommend to the iPod inventor that he could go ahead and have an iPod, or, for that matter, Gutenberg, the press?

Transcript at 10.
Similarly, Justice Souter asked:
The question is, How do we know in advance ... anything that would give the inventor, or, more exactly, the developer, the confidence to go ahead?
Transcript at 14.

conduct, as well as to promote conduct that these companies could reasonably have believed to be non-infringing.
The examples given by the Court, however, if interpreted too broadly, could subject new technologies, and their creators, to abusive litigation. Our copyright laws, and their potential penalties, make the prospect of this sort of litigation extremely risky and potentially fatal for startups, and even for strongly capitalized, established companies. Therefore, even though the Court had bad actors in mind, a broad interpretation of its holding would raise a clear and present danger to American competitiveness.
The Court, by way of example, cited three inter-related ways in which the Grokster defendants stepped outside of the shelter of the Betamax defense:
? Each of the defendants "aimed to satisfy a known source of demand for copyright infringement...."6
? Each of the defendants failed to attempt to develop a filtering tool to diminish infringing activity. Though not independently actionable, this could be a consideration in the presence of other evidence of intent.
? Each defendant's profitability "relied on" the infringing conduct of the users of the technology. (This, like the second factor, contributed to a finding of malign intent, but was not enough to support such a finding on its own.)
Although the Supreme Court's target was narrow, the subsequent interpretation of these factors, and others perceived by lower courts, could be uncomfortably broad. Perhaps for this reason, the Court felt constrained to look back to the Betamax case itself, and to see whether its new doctrine might have applied there. After all, as the Court noted, it was undisputed in that case that Sony encouraged VCR buyers to "build a library," as well as to "time shift" movies,

6 The reference was to the Napster service, as previously configured, which had been ruled infringing and shut down by the same Court of Appeals that had refused to issue an injunction against the present technologies used by the Grokster defendants.

and the Court had specifically identified only "time shifting" as a fair use.7 Fortunately, the Court in its unanimous opinion said that Sony, despite this knowledge, and its own urging of customers to make and keep home recordings, would not have been guilty of inducement, because neither conduct induced by ads telling consumers to "record favorite shows" nor by ads inviting them to "build a library" was "necessarily infringing."8 Therefore, Sony had not been shown to have a malign intent in designing, building, and selling this product.

Our Concerns For The Future
In a digital universe, where virtually every device works by first making or storing a digital copy

of material that potentially is protected by copyright, fair use is simply essential to American law. Without fair use, even emails and browsing might have to be explicitly authorized and licensed by several content proprietors every time, or the copyright laws would have to become a code of approved practices. After Grokster, we know that on the one hand, conduct might be considered to be "inducing infringement" unless the copying in question has been licensed or is found to be a fair use. On the other hand, we have the Supreme Court's assurance that the practices seen as reasonable by most Americans are not "necessarily infringing." Can the developer of the next VCR go to the bank on "not necessarily?"

For now, we think we can view the Grokster case as a threat only if the copying that is induced is clearly unlawful. But we can also observe that virtually every technologist is now open to suit, and that the minute any court declares some user activity not to be a fair use, a vast

7 The Betamax court never said whether "building a library" - making a home copy and keeping it - was or was not a fair use, and the question remains controversial to this day. HRRC and CEA believe that home "librarying" for private, noncommercial purposes is a fair use, but leaders of the Motion Picture Association of America and the Recording Industry Association of America have said on many occasions that they believe it is not a fair use.

8 125 S. Ct. 2764 , 2777 (2005, emphasis added)

range of heretofore legal design, manufacturing, marketing, and sales practices is placed into legal and business jeopardy.

Concerns For Consumers And Consumer Electronics

For example, what if some particular activity of consumers - even one recognized by some Members of Congress as reasonable and customary, such as sending a copy of a local radio broadcast to your brother living across the country; or recording The Sopranos from a cable channel - is now held by a single court to be an "infringement?" I doubt that even the most scrupulous consumer would think this type of conduct might somehow impinge anyone's copyright. Think of all the commercial interests, including program distributors, that have supplied hardware, software, and program guides that advertise, encourage, and aid in this behavior, have made it more seamless and interoperable for consumers, and have not "filtered" it out. Are they all suddenly guilty of "inducement?"9

The Grokster case itself was about defendants that the Court viewed as bad actors engaging in egregious conduct, on a massive scale, sending content among millions of people who had no relationship with either the sender or the proprietor of the content. But will the courts now apply the same doctrine to technologies and companies that serve consumers who

9 Just a few years ago, Replay, a company marketing personal video recorders, was driven into bankruptcy defending copyright litigation brought by MPAA members. An entire chapter of the complaint brought by MGM, Orion Pictures, Fox Film Corporation, Universal City Studios Productions, and Fox Broadcasting specifically attacks standard features, found on any PVR product, as "inducements" to copyright violation: "Defendants cause, accomplish, facilitate and induce the unauthorized reproduction of Plaintiffs' copyrighted works in violation of law. *** The ReplayTV 4000 device provides expanded storage, up to (currently) a massive 320 hour hard drive, which allows the unlawful copying and storage of a vast library of material. *** ReplayTV 4000's expanded storage and sorting features organize disparate recordings into coherent collections, and cause, facilitate, induce and encourage the storage or "librarying" of digital copies of the copyrighted material, which harms the sale of DVDs, videocassettes and

other copies, usurps Plaintiffs' right to determine the degree of 'air time' a particular program receives in various cycles of the program's distribution ...." Metro-Goldwyn-Mayer Studios, Inc. et al v. ReplayTV, Inc., U.S. District Court, Central District of California, Case No. 01-09801, Complaint of MGM, Orion Pictures, Twentieth Century Fox, Universal City Studios, and Fox Broadcasting, ¶¶ 24-25, November 14, 2001 (some emphasis supplied). Pleadings in this case can be found at http://www.eff.org/IP/Video/Paramount_v_ReplayTV/.

pay for their content in their cable bills or satellite bills, buy it on a CD or DVD, and listen to advertising on the radio? If a single court were now to declare one of their recordings to be an "infringement," what is the status of all the product design, research, development, production, marketing, and distribution activity that went into serving these consumers? They may all be targets for potential plaintiffs, and their contingent fee lawyers.10

Concerns For American Competitiveness

My concerns go beyond the immediate worries of the hardware and software developers in my own industry - important as they are to me. The potential chilling effect of a broad reading of Grokster goes to any number of similar circumstances and "gray" areas into which developers of digital products, software, and media must venture in a digital age.

The moment a technology developer is sued under the copyright law - whether it is a startup or a giant company - its future its placed in jeopardy because of the copyright law's "statutory damages" provisions.11 This could be particularly ruinous for the very cutting edge technologies on which American competitiveness depends.

Scores of products and services are being created and introduced that change how people buy a house, book travel, do research, complete their education, and even run for office. The technologies and products made and sold by the 2000 corporate members of CEA have changed existing business models. In most cases they have improved access to information, education and entertainment and enhanced peoples' lives.

10 In the patent law, from which the inducement doctrine is derived, there is generally only one potential plaintiff, the patentee. In the copyright world, anyone who can write, sing, dance, act, take a picture, or publish is a potential plaintiff.

11 17 U.S.C. § 504(c) allows "the copyright owner [to] elect ... to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work ... in a sum of not less than $750 or more than $30,000 as the court considers just." For instances found to be committed "willfully," the award for each infringement may be as high as $150,000. These amounts were increased by the Congress in 1999.

On any typical day, the wired American family sends news articles to friends and colleagues over the Internet; rips songs from Compact Discs to home computers and portable players; downloads pictures and audio or video clips, or finds quotations and snippets of information from all across the Web, to be used in school and business reports; and copies information from home repair, cooking or shopping websites. Today's teenagers, whose schoolwork relies on access to computers and multimedia, take these images and sounds and text and experiment by mashing them together in endlessly creative and intuitive ways. Digital technology has made us a nation of samplers. The law should not impede or restrict these new and beneficial consumer activities or the digital technology products that make them possible. Yet, all of these commonplace

activities implicate conduct - reproduction, distribution, potentially derivative works - that an overbroad interpretation of the Grokster case could prohibit.

We are at a crossroads in technology. With broadband considered a national priority, with intense competition coming among alternative media providers, and with the Internet and new technologies allowing every citizen to be a creator, we must accept that our national creativity can no longer be measured by CD sales. With photo and video editing and audio studios shifting to American homes, with the Internet, both wired and wirelessly, providing an array of outlets for distribution, with new technologies bursting forward, now is not the time to chill the initiative of American hardware, software, and service developers.

Yet the reaction to Grokster, in many places has already been to feel a chill. We've seen headlines, nationally and internationally, such as -

"Ten Years of Chilled Innovation"12

"Technology Feels the Chill"13

Some might say that these respected business publications are engaging in hyperbole or "fearmongering." But based on the uncertain implications for my own industry, I can't. I'd have to say that a broad lower court interpretation of Grokster would be part of a disturbing trend.

A Disturbing Trend

Over the last decade, copyright law has repeatedly been amended to enhance the rights of copyright owners toward increased protections for the content community against the potential "threat" of digital technology. This has at times come at the expense of the rights of consumers or technology innovators to engage in lawful, non-infringing conduct. Consider that in 1998 Congress added some 20 years to the already lengthy statutory copyright term, thus taking from the public domain, and from the ability of new creators to make new versions and adaptations, billions of dollars worth of content. Every one of these works, which otherwise would have been in the public domain, now can be the subject of an "inducement" charge aimed at some technologist.

Copyright has been the basis for a number of dominos to fall. Individually, they may have been justifiable. Cumulatively, the effect may be stifling, and may be tilting the balance, between copyright proprietors and users, on which new technology depends. Congress restricted the right to rent music CDs in 1984; it made it illegal to create or, arguably, even to discuss, technologies which somehow get around a copyright protection scheme in 1998; it increased statutory copyright damages in 1999; it created separate positions in the Executive branch to

12 http://www.businessweek.com/technology/content/jun2005/tc20050629_2928_tc057.htm

13 http://technology.guardian.co.uk/online/story/0,3605,1555375,00.html

pursue IP violations; it implicitly said that having a large number of songs, plus certain technology, on your computer can be a violation of copyright law. To date the RIAA has sued some 10,000 Americans, mostly teenagers, their parents and grandparents, and ruined some families financially.14 After my friend Jack Valenti retired, the MPAA began suing consumers as well.

And now, even as we speak, we understand that the recording industry is approaching another committee of the Senate with a proposal to give a regulatory agency, the Federal Communications Commission, carte blanche to impose copy protection technology and

requirements on the digital audio broadcasts that local radio stations are just beginning to offer. The RIAA proposal is not aimed, like the controversial video "broadcast flag," at mass, indiscriminate, anonymous distribution of content over the Internet. The video broadcast flag would not prohibit the making of timeshift copies from television broadcasts. But the audio "flag" goes much further. In fact, it specifically is aimed at private, noncommercial home recording entirely within homes and automobiles, essentially by prohibiting consumer electronics companies from incorporating otherwise legitimate features into products that record off the air. It would work an enormous substantive change to copyright law, yet this proposal has never been examined by your Committee.

A Licensed Universe

There has been an equally disturbing trend, which I fear that the Grokster decision may accelerate and aggravate: Content owners and service providers controlling and channeling hardware and software development only along approved lines.

14 With an average settlement of $3000 per lawsuit, the RIAA has made some $30 million on this venture.

Already, content providers and distributors have been moving to announce in advance that they will "license" only technologies and techniques that are satisfactory to them, and will not license, or will challenge, others. Already, the ability of competitive manufacturers to implement a law passed by the Congress in 1996 to assure that competitive products can work directly on digital cable and satellite systems has been slowed by the exertion of centralized control over product licensing, in response to movie industry contracts, by a technology consortium owned by the cable industry, "CableLabs."

Last week, the motion picture industry announced that is forming a similar central laboratory, reporting directly to the CEOs of the major motion picture companies: "MovieLabs." The purpose of MovieLabs, according to statements attributed to a senior studio executive, is to fill "gaps in research on content protection left by consumer electronics companies and Silicon Valley."15 In reality, though, the market for such new "DRM" technologies has been highly competitive and more than robust. Something more seems to be going on, and it seems to me to be tied to Grokster.

At present, DRM technologies are licensed by the technology companies that developed them. Often, these companies are also developers of consumer products, and are reluctant to impose, by license, limitations on the usefulness of the these products in the hands of consumers. This has led to negotiation about the nature and level of "protections" to be applied, with at least some of the parties sticking up for product innovation and consumers' expectations.

Gathering decision-making and licensing in industry consortia owned and controlled only by content proprietors can be a powerful weapon in the wake of Grokster. If, for example, common and accepted consumer practices with respect to home video and audio recording are

15 See, http://www.nytimes.com/2005/09/19/business/19film.html?ex=1127793600&en=fb357f94a7634723&ei=5070&emc=eta1

further refined into "acceptable" and "not acceptable" elements according to the content industry owners of MovieLabs, they can exert formidable licensing power in order to get their way.16 They might use Grokster to insist on the use of "filtering" technologies and thereby to label

undesired outcomes as "infringement." They can threaten, in the wake of Grokster, to file suit, and go back through an entrepreneur's research, design, and marketing history seeking evidence that such "infringement" has been actively "encouraged" or "induced" by the hardware or software developer. With "enhanced" statutory damages available under U.S. copyright law, only the bravest or wealthiest manufacturer or software developer could stand up to such pressure. Each week since the Grokster decision, one reads of technology companies "signing on" to proprietary schemes, and relinquishing independent design of their own new products. The Congress and the courts need to be alert to the prospect that copyright interests may combine their licensing leverage and their new legal tools to chill any U.S. technological innovation that is not in a direction of which they approve. Such a development would go directly in the opposite direction set by the Supreme Court in Betamax and left undisturbed in Grokster. In Betamax, the Court repeated its observation, in cases ranging back almost a century, that such prior control of technology by other proprietors "would block the wheels of commerce." 17 Unfortunately, today, with changes in the law shifting the balance away from technology to copyright owner rights, some companies are engaging in "self-censorship" of innovative new and lawful products solely in hopes of avoiding the expense and risk of copyright litigation.

16 The sheer market power gained by melding all six Hollywood studios into a single licensing consortium may be an object of interest to this Committee.

17 464 U.S. at 441-42, citing Henry v. A. B. Dick Co., 224 U.S. 1, 48 (1912), overruled on other grounds, Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517 (1917).

New Legislation

As I indicated above, in the wake of Grokster this is not time to be handing even more potential weapons to copyright proprietors to use against technologists - at least, unless the Congress were also to enact firm, meaningful, and reliable safeguards for the consumers who would use these products, and (in the era of "inducement") for the technologists who develop them.

At a minimum, Congress should do no harm. In the other body, HRRC and CEA continue to support H.R. 1201, a bill that would codify the Betamax doctrine, which the Grokster court left undisturbed. We are not asking for a reversal or revision of the Grokster decision, but if the content community insists that they need further protections under the law, then we ask at a minimum that clear protection for manufacturer and consumer rights and expectations be part of the equation.

Thank you again for the opportunity to have come here today to discuss this extraordinarily important subject.