UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

MGM V. GROKSTER: BALANCING THE PROTECTION OF COPYRIGHT AND TECHNOLOGICAL INNOVATION

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PREPARED TESTIMONY

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Good afternoon, Chairman Stevens, Co-Chairman Inouye and Members of the Committee. Thank you, and your staffs, for the opportunity to participate in these proceedings.

My name is Adam Eisgrau. I am a Vice President of Flanagan Consulting (established by former Congressman Michael Flanagan), and I appear before you today both as Executive Director of P2P United and on behalf of the Electronic Frontier Foundation ("EFF"), which co-authored this testimony.

P2P United was founded two years ago this month as a resource for legislators, other policy-makers and the media in need of accurate information regarding peer to peer software ("P2P") and its tremendous potential. Our members include the developers of the Grokster and Morpheus software programs at issue in the Supreme Court's recent decision which has brought us together today. Much more about our group and its work is available online at www.p2punited.org. The Electronic Frontier Foundation, as detailed online at www.eff.org, was established 15 years ago this month to defend the public's right to think, speak, and share ideas using all manner of new technologies, particularly the Internet and World Wide Web.

In the four weeks since the Supreme Court's ruling in *MGM v. Grokster*, many pundits, analysts and advocates have concluded that the Court's unanimous opinion obviated any necessity for Congressional action to address the issues before the Court. P2P United and the Electronic Frontier Foundation respectfully disagree for reasons articulated by the Court itself. As a unanimous Court observed at the very outset of its legal analysis in *MGM v. Grokster*: "[t]he more artistic expression is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off." *MGM v. Grokster*, 545 U.S. 125 S.Ct. 2764, 2770 (2005).

The task of striking the right balance, however, is constitutionally delegated to Congress. Congress now has an important opportunity -- indeed an ongoing responsibility -- to examine the balance between copyright law and innovation with an eye toward affirmatively *protecting* and *promoting* the kind of technological innovation in communications that has been responsible for advancing our society and our economy so dramatically in the Internet Age.

Accordingly, as this Committee monitors the import and impact of the Court's ruling – which we applaud it for doing today and hope that it will continue to do regularly for some time to come – our organizations urge the Committee's members to adopt a *de facto* policy of "proactive pragmatism" in the public interest. Specifically, P2P United and EFF urge the Committee to affirmatively embrace two overarching public policy goals:

> 1) proactively protect communications technology innovators from the likely chilling effects of potentially crippling liability in the uncertain legal environment created by the Supreme Court's holding; and
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> 2) pragmatically promote new marketplace solutions that move us toward a world where Internet users can obtain licenses that give them lawful access to the broadest variety of copyrighted material using the most efficient and convenient technologies available.

In particular, we propose that the Committee convene and task all relevant stake-holders with exploring -- merely publicly discussing in good faith -- the potential of a *voluntary* "collective licensing" system for music to fairly compensate all rightsholders for currently unlawful and unpaid downloads. Significantly, such a system would profit not only the four (soon to be three) megalithic overseas corporations that control much of the world's commercial music, but also for the first time would empower and compensate the thousands and thousands of individual musical performers and writers now unaffiliated – and statistically unlikely at any point to become affiliated -- with what Joni Mitchell aptly called the "star maker machinery of the popular song."[1]

[1] J. Mitchell, "Free Man in Paris" released on "Court & Spark" (© 1973; Crazy Crow Music).

I. Given the Uncertainties Left by the Supreme Court's Decision in *MGM v. Grokster*, Disproportionate Statutory Liability for Secondary Copyright Infringement Will Chill Innovation if Not Congressionally Reformed.

A) Clarity about Confusion: The Consequence of the Court's Ruling

In *MGM v. Grokster*, the question asked by the parties and dozens of *amici* was direct and critically important: "When will a technology vendor be held secondarily liable for the direct copyright infringements committed by third parties using its products?" Asked specifically to clarify the reach of copyright law's existing secondary liability doctrines of "contributory" and "vicarious" liability,[2] the Court instead announced a new doctrine called "inducement," holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *MGM v. Grokster*, 545 U.S. 125 S.Ct. 2764, 2771 (2005).

While the new doctrine of inducement presents its own uncertainties for prospective litigants and lower courts to grapple with in the years to come,[3] P2P United and EFF believe that the more significant prospective difficulty for technology innovators and investors now lies in the continued uncertainty surrounding the traditional copyright doctrines of contributory infringement, on which the Court was deeply split,[4] and vicarious liability, on which it was essentially silent.[5]

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[2] Each theory of liability is independent of the other and requires proof of two elements. Contributory infringement may arise when a defendant knows about infringing activity *and* materially contributes to it, while vicarious liability requires proof that a defendant profits directly from the infringement *and* has a right and ability to supervise the direct infringer.

[3] EFF and P2P United believe that the attached Consumer Electronics Association "one-pager" on the *MGM v. Grokster* decision (recently solicited by the Congressional Internet Caucus Advisory Committee) states these concerns very well. We here submit it for the record and wish to underscore CEA's conclusion that: "This new legal ambiguity [as to what constitutes culpable inducement] will not enhance America's competitiveness. Foreign firms will continue to receive funding and ship products free from concern about overreaching IP litigation, while their American counterparts will need to demonstrate compliance with Grokster's ambiguous legal test."

We also concur with the recently reported remarks of Mr. James Burger, outside counsel to Intel, who warned against the potential that the discovery-intensive litigation required by the Court's new inducement standard could give rise to a form of "greenmail" directed at small companies by large plaintiffs who might demand significant settlement fees in exchange for dropping baseless, but potentially ruinous, litigation. N. Graham & A. Mazumdar, "Parsing *Grokster* . . . ," *BNA Patent,Trademark & Copyright Journal*, Vol. 7 No. 1728 at 327 (July 15, 2005).

[4] Concerning contributory liability standards, Justice Breyer, joined by Justices O'Connor and Stevens, adopted and endorsed the views expressed by EFF and many of the other technology sector *amici*, declaring that "Sony's rule is strongly technology protecting…. Sony thereby recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently." *MGM v. Grokster*, 125 S.Ct. at 2791. Justice Ginsburg, joined by Chief Justice Rehnquist and Justice Kennedy, rejected the bright-line interpretation. Unmoved by the argument that *Sony* bars a finding of contributory infringement unless a technology is almost exclusively used for infringement, Justice Ginsburg declared, "Sony, as I read it, contains no clear, near-exclusivity test." *Id* at 2784 n.1.

[5] Having disposed of the case on inducement grounds, the Court did not reach the vicarious liability theories briefed by the parties, merely restating that the doctrine "allows imposition of liability when the defendant profits directly

For many years, technologists and their financial backers relied on what seemed to be a relatively "bright line" test for secondary copyright liability announced in the Supreme Court's landmark "Betamax" ruling in 1984.[6] Unfortunately, the spate of litigation launched against P2P companies since 1999 has muddied the waters, with the rulings in the *Napster*, *Aimster*, and initial *Grokster* cases charting different courses though each of three branches of secondary liability.

The Supreme Court's opinion now leaves technology companies, their attorneys and their backers to pick their way through a dangerous minefield of legal uncertainties profoundly antagonistic to economic progress and deeply hostile to continued innovation. Even if they assiduously avoid so much as the appearance of "inducing" copyright infringement, America's innovators must still guess as to whether or when they might be held liable for distributing a multipurpose electronic device or software program.

Moreover, not only *can* they still be sued under either or both of the doctrines of contributory infringement and vicarious liability, but history tells us that they probably *will* be sued. That's exactly what happened as the first VCR and the first digital audio tape recorder came to market. More recently, ReplayTV was sued in 2001 for their improved digital video recorder because, according to the then-CEO of the Turner Broadcasting System, commercial skipping by consumers constituted "theft."[7]

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from the infringement and has a right and ability to supervise the direct infringer." *MGM v. Grokster*, 125 S.Ct. at 2776 & n.9. By contrast, the lower courts in *MGM v. Grokster* responded in some detail to the diametrically opposing views of the parties regarding vicarious liability. The entertainment industry had argued that the ability to redesign a product to reduce infringing uses ought to be deemed equivalent to a "right and ability to supervise" the customers who use the technology. The P2P defendants replied that such a "could have designed it differently" test would effectively force technology companies to redesign their products to suit the demands of copyright owners. On this point, the Solicitor General's amicus brief before the Supreme Court sided with the defendant/respondents: "The 'right and ability to supervise' element of vicarious liability…has never, to our knowledge, been held to be satisfied by the mere fact that the defendant could restructure its relations or its product to obtain such an ability." Brief for the United States as Amicus Curiae Supporting Petitioners at 20 n.3, available at: www.eff.org/IP/P2P/MGM_v_Grokster/050124_US_Amicus_Br_04-480.pdf

[6] When two motion picture studios sued Sony in 1976 for selling the first Betamax VCR, they did so under a contributory liability theory. In that case, *Sony v. Universal City Studios*, 464 U.S. 417 (1984), the Supreme Court announced the "Betamax doctrine," holding that a technology vendor could not be held liable for distributing a technology "capable of substantial noninfringing uses." Because the Betamax VCR was plainly capable of noninfringing uses, the Supreme Court did not hold Sony liable. Since the Court's *Sony* ruling, the technology and entertainment industries characterized the scope of the "Betamax defense" very differently. Technologists saw a bright-line rule: so long as a technology is merely capable of noninfringing uses in commerce, it is legal to distribute, regardless of how some (or even most) customers might actually use it. Hollywood movie studios and the music industry, in contrast, read the case much more narrowly, reasoning that Sony was only excused from liability because a principal use of the Betamax device (as they have interpreted the decision) was noninfringing.

[7] See extended interview with Mr. Jamie Kellner entitled "Content's King," *Cableworld* (April 29, 2002) ["JK: It's theft. Your contract with the network when you get the show is you're going to watch the spots. Otherwise you couldn't get the show on an ad-supported basis. Any time you skip a commercial or [press] the [30-second advance] button you're actually stealing the programming." The full text of this sobering interview is available online at: www.2600.com/news/050102-files/jamie-kellner.txt

Even as the Committee meets today, entertainment industry executives are making threatening statements about the latest electronic marvel. Called the Slingbox, the device and its associated software will enable you to watch your TV programming from wherever you are by turning virtually any Internet-connected computer into your personal TV.[8]

B) Remedy Remediation: A Measured and Targeted Solution

P2P United and EFF do not propose that the Commerce Committee undertake to rewrite the doctrines of secondary copyright liability. We do believe, however, that there is one sphere in particular in which Congress can and should act in a targeted fashion to reduce the chilling effect on innovators of ongoing uncertainty in this area of the law.

Almost uniquely in American jurisprudence, our copyright laws permit a plaintiff in an action for infringement to opt out of actually proving the extent to which they were harmed by copyright infringement in favor of receiving so-called "statutory damages." Under Section 504(c) of U.S. Code Title 17, anytime up to the moment that judgment is handed down, the plaintiff may invoke its rights to collect (in the court's discretion) between $750 and $150,000 for every *individual* copyrighted work infringed. This legal regime makes good sense when brought to bear against a commercial pirate making and selling millions of counterfeit music CDs, for example. It may well be dangerously counterproductive, however, if applied in secondary liability cases to a technology company that makes electronic products used by millions of consumers over whom the companies have no control.

This danger is especially sobering when made concrete. Apple initially promoted its phenomenal iPod with an extensive ad campaign exhorting the public to "Rip, Mix & Burn" and 1,000,000 iPods were sold in its first 20 months on the market even though it worked only with Apple's own Macintosh computers! As of the beginning of this month, Apple had reportedly sold over 21 million iPods since the first calendar quarter of 2002.[9] Even the earliest version of the device could store well over 1,000 songs and the largest, with a 60gB drive, now holds upwards of 15,000 songs.

At even the minimum $750 per infringing song, and a now paltry 1,000 songs per device sold to date, it is thus a mathematical fact that -- under contributory infringement, vicarious liability, or "inducement" theories -- Apple still could be sued for statutory damages in excess of $15 *trillion* for its users' allegedly unlawful copying of music! We do not suggest that this result is likely, but the fact that it is even legally possible should be profoundly troubling, to say the least.

[8] The "crime" Slingbox's developers may have committed is permitting a consumer who has paid for programming at home to "sling" that same programming to a single remote location or portable device so that it may be enjoyed while the consumer is away from home. *See* A. Wallenstein, "Slingbox Could Spark New Lawsuit," *Hollywood Reporter* (July 6, 2005), also at: www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000973572.

[9] *See* generally Apple's online archive of such data at www.apple.com/pr/library

Faced with potentially crippling statutory liability, what will the next generation of garage inventors, like Apple's own founders, or their possible investors choose to do with their as-yet-uninvented breakthrough devices? What price will our economy pay for highly rational risk-aversion on the part of young geniuses, their expert counsel, and savvy investors?

Most critically, is the somewhat extraordinary status quo with respect to available statutory damages really where the balance between protecting intellectual property and encouraging innovation and economic growth should be struck?

EFF and P2P United believe that the answer to this last inquiry should and can be a resounding "no." We respectfully urge you and co-Chairman Inouye to lead a collaborative Committee (and inter-Committee) process designed to produce a meaningful copyright statutory damages clause in the current Congress. Specifically, we request and recommend that statutory damages be limited by law to cases of direct copyright infringement as perpetrated by commercial pirates, and thus made expressly unavailable in cases involving secondary liability (including those brought under the Court's new inducement test). We respectfully submit, that such reform would strike the appropriate balance that today's hearing was expressly designed to illuminate.

On the one hand, it would still permit copyright owners to obtain both injunctive relief and actual damages, thus putting them in the same position as litigants under most other areas of common law. On the other, corporate and individual technology innovators and investors once again would be able to make reasonable business decisions about manageable levels of legal risk, rather than face the all-too-real specter of corporate capital punishment in an unpredictable legal environment. The real beneficiaries of such a balance, of course, will be American consumers, the nation's economy and, ultimately, copyright owners whose fortunes also depend on new technologies (their many attempts to kill them in the cradle notwithstanding) to create new and market-making business opportunities.

II. The Supreme Court's Ruling in *MGM v. Grokster* Will Have Virtually No Practical Effect on the Digital Downloading of Music, but Congress Can and Should Take Rational, Non-Statutory Steps Now to Maximize the Potential of Peer to Peer Technology for all Music Rightsholders.

A) Lawsuits and Traditional Licensing are Poor Instruments of Public Policy

In the past two years, the digital music marketplace has seen significant activity and change. However, it simply cannot be credibly argued that the music industry has *not* experienced -- and continues to face -- an enormous failure of both imagination and the market for licensed digital downloading.

To be sure, the four companies that control 90% of the current music "catalog" have licensed a relative few new services to distribute what mostly amounts to presently popular music online. Apple's iTunes, for example, recently celebrated the 500,000th a la

carte download of a $0.99 song. Moreover, in that same period, the Recording Industry Association of America has brought over 11,000 lawsuits against individuals accused of illegal downloading and, if present trends continue, will collect more than $36 million in settlement of those claims.[10]

The music and movie industries have spent millions more to otherwise educate the public that such downloading is wrong and has serious consequences, both for down-loaders, and for artists and copyright holders, not compensated for their works. Not incidentally, P2P United -- as an organization and through its individual members' websites -- also has done its best to get out that message while our members also affirma-tively promote the work of independent artists who have embraced P2P distribution of their music. Certainly not least of course, the entertainment industries have now obtained a unanimous ruling from the Supreme Court which after further litigation, they hope, will shutter the doors of P2P United's members and dissuade other software developers from inventing even more efficient peer to peer programs.

As the June issue of *Rolling Stone* magazine put it, however, "One thing is clear: The lawsuits have failed to stop, or even slow, illegal file-sharing."[11] Indeed, the unvar-nished fact is that peer to peer usage is much more widespread than it was a year ago and well more than double what it was this time in 2003. According to the most recent independent analysis by Big Champagne (essentially the Nielsen or Arbitron ratings of the Internet) -- and notwithstanding massively publicized litigation against individuals and companies -- P2P usage last month reached nearly 9 million simultaneous users with access to over a *billion* song files. In August of 2003, a month prior to the first round of RIAA consumer lawsuits, there were 3.85 million P2P users.

By contrast, it has recently been estimated that the total number of songs now available for download through the iTunes and Rhapsody subscription services total fewer than 2.75 million tracks. Even if only a far-too-conservative one in five music files available through peer to peer software each day are taken to be unique songs, at least 6*0 times* more music files are available *each day* through P2P technology than are presently available to consumers through the two primary licensed channels.

More lawsuits are not going to change that reality. Writing the day before the Supreme Court's ruling in *MGM v. Grokster*, Ms. Hillary Rosen, former head of the RIAA, made a forceful case for new thinking and a new view of P2P software developers by her former colleagues in the music industry:

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[10] As of early last month, the RIAA reportedly had brought 11,456 lawsuits and collected an average of $3,600 from each of almost 2,500 defendants. *See* S. Knopper, "RIAA Will Keep On Suing," *Rolling Stone* (June 9, 2005) at: www.rollingstone.com/news/story/_/id/7380412/?pageid=rs.Home&pageregion=single1&rnd=1122320285908&has-player=true&version=6.0.12.872

[11] *See* S. Knopper, "RIAA Will Keep On Suing," *Rolling Stone* (June 9, 2005), cited above at n.10.

> "It is said that the Supreme Court's decision will be one of the most important copyright cases ever on the books. I think it has all the makings of being famous for another reason. Because while the victory of whoever wins maybe important psychologically, it just won't really matter in the marketplace. . . .
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> "So why won't this case matter now in the marketplace? Because by now SEVERAL HUNDRED MILLION copies of this software that the entertainment industry would like to vanquish have been downloaded to individual computers around the world. . . . And now, a majority of them are hosted outside the United States. There is no court ruling whose enforcement can keep up with this. Sure, it might affect some venture capitalist deciding where to put money for a product. But none of these services since Napster have required venture money. They grow organically, because they are serving a still unserved desire. Do people like free content, sure, but they also like content. All the stuff - when they want it - to feel like free even if it might not be free. . . . And the entertainment industry is still far too often spending time comparing the profit margins and risk of new ideas to an earlier time when the world was less digital. . . .
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> "So here is the crux of the problem. [P2P] services have traffic at a rate 40 to 50 times the traffic of legitimate sites. Yet, the amount of time and money wasted on besting the game by the entertainment and technology industries is huge. <u>This volume needs to be embraced and managed because it cannot be vanquished. And a tone must be set that allows future innovation to stimulate negotiation and not just confrontation</u> (emphasis added)."[12]

Ms. Rosen was equally emphatic in her appeal for a pragmatic view of the marketplace after the Court's opinion was handed down the following day:

> ". . . knowing we were right legally really still isn't the same thing as being right in the real world. We had that euphoria with the first Napster decision. I hope my former colleagues remember that. The result was lots of back and forth and leverage hunting on both sides and continued litigation and then a great service shut down to make room for less great services. And more legal victories didn't bring more market control no matter how many times it was hoped it would.
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> "The euphoria of this decision does not and should not change the need for the entertainment industry to push forward and embrace these new distribution systems. . . .[13] For today, I hope all sides will take a deep breath and realize that

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[12] *See* H. Rosen, "The Supreme Wisdom of Not Relying on the Court," *The Huffington Post* (June 26, 2005) at: www.huffingtonpost.com/theblog/archive/hilary-rosen/the-supreme-wisdom-of-not_3221.html

[13] The absence in the current market of P2P software providers licensed to promote the labels' own online music downloading services, or to make licensed music available directly to the public, is not due to a lack of effort by P2P developers to obtain such contracts. As early as 2001, the original Napster pleaded with the major labels for such a license, reportedly offering a billion dollars in royalties. More recently, as Chairman Smith's Competition Subcommittee heard in direct testimony in June of last year, P2P United member Streamcast (the makers of the Morpheus

this Supreme Court decision doesn't change one bit their responsibility to move forward together on behalf of their consumer."[14]

P2P United and EFF share Ms. Rosen's clear (and clear-eyed) view that P2P technology will only become more available with time, that demand for its convenience and content will continue to increase, and that the current battles surrounding P2P file sharing thus are a losing proposition for all parties concerned, including consumers. We believe that the path forward lies in aligning the incentives of the entertainment industry with those of new Internet technologies in pursuit of a marketplace in which all musical artists and copyright holders are fairly compensated and such compensation is maximized because consumer demand in all its present and future forms is truly met.

With this goal and these realities in mind, P2P United and EFF urge the Committee to begin considering ways in which Congress might clear the path for solutions based on voluntary collective licensing.

B) Voluntary Collective Licensing for Downloaded Music Merits Serious, Congressionally-Convened Discussion by All Relevant Stakeholders

What we propose is not unusual, unknown in the marketplace or conceptually complex. Indeed, the concept is familiar and simple.

First, the music industry (labels and music publishers) with representatives of artists and songwriters would form one or more voluntary collecting societies. These societies then would offer music consumers the opportunity to download music lawfully in exchange for a modest regular payment, perhaps $5 - $10 per month.[15]

So long as they pay into the collective, consumers would be free to keep doing what they now do by the millions every day . . . and are clearly going to do anyway: download and share the music they love using whatever software they like on whatever computer platform they prefer. Under this system, however, they would be able to do so without fear of litigation. Moreover, the money collected would be divided among all rightsholders -- whether signed to a major record label or not -- based upon the professionally measured popularity of their music.

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software also at issue in the Supreme Court's opinion) was poised to finalize a contract with RealNetworks to promote the major labels' own "Rhapsody" subscription service to millions of Morpheus' P2P software users. With only a signature between Streamcast and such a license, the Streamcast business development executive who sought the deal was told *twice* in a voice mail recording previously provided to the Commerce Committee that Streamcast had been "blacklisted" by "the labels" and that RealNetworks thus could not consummate the otherwise fully negotiated deal. A transcript of that voice mail recording is again submitted for the record and the full Committee's consideration.

[14] *See* H. Rosen, "The Wisdom of the Court, Part II," *The Huffington Post* (June 27, 2005) online at: www.huffingtonpost.com/theblog/archive/hilary-rosen/the-wisdom-of-the-court-_3259.html

[15] This hypothetical price is based upon Yahoo's Y! Music Unlimited, which offers consumers unlimited access to more than 1 million songs for as little as $4.99 per month. *See* http://music.yahoo.com/unlimited/

The more people who share, the more money will be available to rightsholders. The more competition in competing file-sharing products, the more rapid technological innovation and improvement will be. The more freedom for music aficionados to share what they care about, the deeper the available catalog to the benefit of all parties' in the system.

If this system of voluntary collective licensing seems familiar, that's because it has been in use to excellent effect for decades. In the face of a seemingly intractable impasse between a then-new technology and copyright owners, ASCAP, BMI and SESAC were brought into existence by songwriters to bring broadcast radio in from the copyright cold in the first half of the twentieth century. Songwriters originally viewed radio exactly the way the music industry today views P2P users -- as "pirates." After trying to sue radio out of existence, songwriters ultimately formed ASCAP (and later BMI and SESAC). Radio stations interested in broadcasting music stepped up, paid a fee, and in return got to play whatever music they liked, using whatever equipment worked best.

Today, the performing rights societies pay out hundreds of millions of dollars annually to their artists. Although these societies also have received some criticism, there can be no question that the system that has evolved for radio is preferable to one based on fruitlessly trying to sue radio into extinction one broadcaster at a time.

Beginning in this respected Committee, P2P United and EFF believe that Congress can and should encourage detailed and serious evaluation of the potential of voluntary collective licensing in at least two important ways:

First, the Register of Copyrights, Marybeth Peters, recently proposed reforms to copyright law that would make it easier for existing collecting rights societies like ASCAP, BMI and SESAC to grant blanket licenses for digital downloads.[16] We believe that her proposal is sound and, if adopted, would have the added benefit of establishing marketplace prerequisites for testing the full-range of collective licensing possibilities.

For example, as we read the Register's proposal, it would create "music rights organizations" legally empowered to grant blanket licenses directly to music consumers on behalf of songwriters. Because this proposal requires adjustments to both copyright and antitrust law within the purview of the Federal Trade Commission, it would appear to present a productive opportunity for inter-Committee collaboration on these matters.

While adoption of the Register's proposal would be an important first step, it only addresses the music publishing side of the music industry. Any comprehensive solution must also involve major and independent record labels. Presently, no collecting society represents the major labels or can grant a blanket license directly to music consumers. Under current law, the highly concentrated nature of the industry, with just four companies controlling more than 90% of the market, such coordination presents antitrust challenges. Here, too, we see an opportunity for this Committee to begin collaboratively exploring options that might remove this obstacle to an otherwise viable and desirable

[16] Statement of Marybeth Peters, Register of Copyrights, hearing on "Music Licensing Reform" before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, 109th Congress, 1st Session, June 21, 2005. *See* www.copyright.gov/docs/regstat062105.html.
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market-oriented licensing solution for the burgeoning digital music sector of the economy.

The advantages of such a collective licensing approach are potentially legion and mutually reinforcing:

- Artists and rightsholders will get paid for what are now literally *billions* of non-compensable music downloads not likely to cease or slow;
- Government intervention in the market will be minimal (limited to encouragement and oversight), and collecting societies will set their own prices in response to market forces;[17]
- Broadband deployment will get a real boost as the so-called "killer app"-- music file sharing – is legitimized and actively encouraged; [18]
- Investment dollars will pour into the newly legitimized market for digital music file-sharing software and services, prompting an explosion of different service offerings and devices;[19]
- Music fans finally will have completely legal access to the essentially unlimited selection of music that only a network built from the collections of other fans can provide. With the threat of litigation and defensive file "spoofing" eliminated, these networks will rapidly improve and grow, affording millions more consumers access to rare recordings long unavailable in the marketplace;
- The distribution bottleneck that has limited the opportunities of independent artists and placed them at the economic mercy of the major record labels for decades will be eliminated. Artists will be able to choose any road to online popularity—including, but no longer limited to, a major label contract. So long as their songs are being shared among fans, they will be paid;[20] and
- Payment will come only from those who are interested in downloading music, and only so long as they are interested in downloading.

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[17] The $5 per month figure noted above is a suggestion, not a proposed mandate. Because collecting societies will make more money with a palatable price and a larger base of subscribers than with a higher price and expensive enforcement efforts, the market may be relied upon to keep consumer pricing reasonable.

[18] Moreover, such a system will further drive demand for broadband communications services and, with greater broadband delivery of musical content, the more revenue major corporate copyright industries will get paid. Under such circumstances, the entertainment industries' powerful lobby may be expected to begin affirmatively working *for* an expansive and innovation-driven Internet, instead of against it.

[19] Rather than being limited to a handful of "authorized services" like Apple's iTunes and Napster 2.0, the market is likely to give rise to competing file-sharing applications and ancillary services. Moreover, so long as individual consumers are licensed, technology companies need not worry about negotiating the nearly impossible maze of current music licensing requirements and may focus instead on providing the public with the most attractive products and services in a competitive marketplace.

[20] Indeed, the ability of independent artists to negotiate as they may choose with one or more record labels will only be enhanced by their ability to document and quantify their revenue-generating potential and overall popularity with certified download royalty data. For the fist time in history, under a voluntary collective licensing regime, independent artists may well be able to truly bargain at arm's length with major music industry conglomerates.

Conclusion

As sensible as we hope the idea of voluntary collective licensing now seems, the RIAA and the major corporations that it represents have dismissed the idea and have refused to engage in any discussion of the subject with appropriate stakeholders. Accordingly, we respectfully request that this Committee either hold hearings on this issue, or -- at minimum -- formally invite all relevant parties (public and private sector alike) to a series of roundtable discussions of collective licensing's potential to unleash the true market power and potential of peer to peer technology and, with it, the genius of American technological innovation.

P2P United and the Electronic Frontier Foundation thank you again for the opportunity to participate in these proceedings, Mr. Chairman. As proposed, we hope for similar opportunities in the near future.