

Statement of

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Executive Vice President and Washington
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**Before the
Committee on Commerce, Science, and
Transportation
United States Senate**

**On
*MGM V. Grokster***

July 28, 2005

Executive Summary

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The unanimous decision of the Supreme Court in *MGM v. Grokster* is good for content owners, good for technology companies, and most importantly, good for consumers. The Court's decision, like the adoption of the Digital Millennium Copyright Act, establishes rational and balanced rules for the evolving digital environment which will remove uncertainty and spur investment in creative content and the technology with which it is created, delivered and displayed. As a result, consumers will have more and better viewing choices.

In its *Grokster* decision the Court declined to revisit its decision in the *Sony* case a decade earlier, but provided important clarification. It said, as it did in *Sony*, that the mere manufacture and distribution of a device with knowledge that it may be used to infringe does not create liability. However, it said that where there is evidence of purposeful, culpable conduct directed at promoting infringement, liability DOES attach.

The Court struck a careful balance between the need to foster creative content and the need to encourage technological innovation. Its rational balance has been recognized by both the content and the technology communities.

In clarifying its *Sony* decision, the *Grokster* Court stressed the importance of secondary liability to meaningful application of the copyright law. The Court said that in the digital environment rights against direct infringers may be impossible to enforce, and that remedies for secondary liability may be the only practical means to protect copyrights against massive infringement.

The Court in *Grokster* sent a resounding message to users of the Internet: theft of intellectual property is wrong, whether it takes place by stealing a physical copy of a movie or by stealing a movie in cyberspace, and that those who encourage such theft will be held liable.

The Internet provides great opportunities, but it is not immune to the rules of a civil society. The copyright law, like laws against child pornography and invasion of privacy, apply on the Internet. Content owners look to the *Grokster* decision to usher in a new age of cooperation among content providers, technology providers and ISPs, aimed at providing consumers with legal, flexible and convenient choices for entertainment and information.

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Chairman Stevens, Co-Chairman Inouye, members of the Committee, thank you for giving me this opportunity to appear before you today on behalf of Dan Glickman and the Motion Picture Association of America.

The decision of the Supreme Court in *MGM v. Grokster*, 125 S. Ct. 2764 (2005)., like Congressional enactment of the Digital Millennium Copyright Act, establishes rational and balanced rules for the evolving digital environment which will encourage creativity and technological innovation, and result in more and better choices for consumers.

The DMCA provided content owners tools to maintain the integrity of technological measures essential for the secure delivery of high value content to consumers. It contributed mightily to the market launch of the DVD, which has been the most successful consumer electronics device in history, providing a vast new market for content creators and for consumer electronics device and computer manufacturers, and providing consumers with a new, technologically superior, more convenient option for viewing movies.

The Supreme Court's landmark decision in *MGM v. Grokster* will have a similar effect by providing incentives for constructive innovation and a more secure environment in which to deliver movies, music and other content to consumers over the Internet. It will spur investment in new,

legitimate delivery services, which in turn will provide a new source of revenue to content creators and encourage the sale of consumer electronics devices and broadband access. And most importantly, it will stimulate new, easy-to-use consumer options for accessing entertainment and information in a variety of formats through a host of new delivery platforms.

In its *Grokster* decision, a unanimous Supreme Court declined invitations to revisit its narrowly decided, five-to-four decision in the *Sony* case a decade earlier. It made clear, however, that the *Sony* decision does not preclude liability where the conduct at issue goes beyond the mere manufacture and distribution of a device with knowledge that it may be used to infringe. The *Grokster* Court said liability DOES attach when there is evidence of purposeful, culpable conduct directed at promoting infringement. In the Court's words, "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." 125 S. Ct. 2764 at 2780 (2005). Such a ruling is neither extraordinary, nor at odds with long-established rules of fault-based liability derived from the common law. And as the Court made explicit, such a rule "does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 2780.

In other words, the Court stated, as it had in its *Sony* decision, that technology capable of substantial non-infringing uses is not inherently bad, but those who traffic in such a technology with the intent of inducing others to infringe are bad actors and subject to remedies for contributory infringement. It found in the case before it that the defendants had intentionally marketed their software to former users of the Napster "file sharing" service which had been found to be in violation of the copyright laws; had made no

effort to limit the infringing activities of their customers;¹ and had established a business model whose success was directly tied to the infringements of their customers. Under these circumstances, the Court said there was a clear basis for a finding of contributory infringement.

In crafting its decision, the Court was sensitive to any possible impact on technological innovation and carefully distinguished between simply knowing that a device could be used to infringe and culpable conduct.² The Court's careful articulation of what is, and what is not, permissible will remove uncertainty in the marketplace and stimulate capital investment in the technology sector as well as the distribution marketplace. Its success in reaching an appropriate balance that protects both creative and technological innovation is evidenced by the fact that its decision has been overwhelmingly praised by the technology community.³

The standard set by the Court is very similar to the standard set by the Congress in the DMCA, where Congress prohibited trafficking in devices with the purpose of enabling the circumvention of technical measures used to prevent copyright infringements. In drafting the DMCA Congress was careful not to discourage technological innovation or the

¹ "[T]here is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files." *Id.* at 2774.

² "We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, ... mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 2780.

³ "This decision strikes a balance between encouraging innovation and discouraging piracy." Statement of Rhett Dawson, President of the Information Technology Industry Council, June 27, 2005. "The application of this new standard should make a real and positive difference in combating online piracy." Statement of Robert Holleyman, President and CEO of The Business Software Alliance, June 27, 2005.

exercise of “fair use” by consumers, while enabling content owners to use technology to protect their rights. And in the period since enactment of the DMCA there has been no evidence that technological innovation has been suppressed, or that consumers have not been able to engage in fair uses of copyrighted works. Indeed, the Copyright Office has undertaken two exhaustive inquiries into the impact of the DMCA on the exercise of fair use, and has twice concluded that the ability of consumers to exercise fair use has not been impinged.

In clarifying its decision in *Sony*, the Court stressed the importance of theories of secondary liability to ensuring meaningful application of the copyright law. Indeed, the Court recognized that in the environment of cyberspace effective enforcement of rights against direct infringers may be impossible, and the application of remedies for secondary liability may be the only practical means to protect copyrights against massive infringement.⁴

The Court in *Grokster* not only clarified its *Sony* decision, it voiced a very clear message to users of the Internet: theft of intellectual property is wrong, whether it takes place by stealing a physical copy of a movie from a video store or by stealing a movie in cyberspace. As Justice Breyer said in his concurring opinion, “deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.” 125 S. Ct. 2764 at 2793 (2005).

The Internet has opened up heretofore unimagined opportunities for consumers to communicate and access

⁴ "The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement." 125 S. Ct. 2764 at 2776 (2005).

information. It has dramatically changed our lives. But the Internet is not, and should not be, an environment immune to the rules of a civil society. The distribution of child pornography is no less vile on the Internet than anywhere else. The invasion of personal privacy is no less objectionable on the Internet than elsewhere. And the theft of property is no more acceptable on the Internet than it is off-line.

In *Grokster* the Court made a clear and forceful statement that theft on the Internet is wrong and the law provides remedies against both those who engage in Internet theft and those who entice others to steal copyrighted works. Content owners hope that *Grokster* will usher in a new age of cooperation among content providers, consumer electronics manufacturers, information technology providers and ISP's, all aimed at providing consumers with legal, flexible and convenient choices for entertainment and information.