

**The Future Digital Economy  
Digital Content – Creation, Distribution and Access**

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**Presentation by Marybeth Peters, Register of Copyrights,  
United States Copyright Office  
31 January 2006**

**Session 9: Policy Roundtable: Identifying priority issues, tools and policy  
challenges: Moving forward**

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**I. Introduction**

Good afternoon. My focus is on the creation and protection of digital content. Yesterday we heard from many speakers that content is king. My emphasis is on the need to protect digital content — including music, motion pictures, software, photographs, literary works, and web pages — in today's digital economy.

In the United States, the foundation for copyright law is in its Constitution. It is based on the belief that authorship and creativity should be encouraged and that the best way to do that is to grant authors exclusive rights in their works for limited times.

Since its inception, copyright law has responded to technological change. Today it is digital technology and digital communication networks. Protecting the output of authors is critical. The challenge is achieving the right balance between the rights of authors and limited exceptions that reflect public policy goals.

**II. International Protection – WIPO Internet Treaties**

In a world where international borders give way to instantaneous dissemination of digital works, international protection, which should be harmonized to the greatest extent possible, is critical. In addition to the Berne Convention and the TRIPS Agreement, acceding to and implementing the 1996 WIPO Internet Treaties mentioned yesterday by WIPO's Deputy Director, Rita Hayes, are necessary.

These treaties require member countries to recognize certain exclusive rights designed for activities that take place over new digital communications networks, e.g., the Internet. Among other things, these treaties require that authors enjoy a right of communication to the public, including the right of making available. This right involves making available to the public works in such a way that members of the public may access them from a place and at a time individually chosen by them. This is frequently accomplished by downloading from Internet Web Sites.

While these treaties leave the existing framework of exclusive rights largely intact, they contain new provisions on technological adjuncts to copyright protection. These adjuncts encourage the development of digital communication networks by ensuring that copyrights can be meaningfully enforced and licensed online.

Countries must put legal remedies in place against the circumvention of technological measures that copyright owners use to safeguard their rights. They must also provide legal remedies against persons who delete or alter rights management information attached to the work.

The United States implemented key provisions of the WIPO Internet Treaties in 1998 in Title I of the Digital Millennium Copyright Act (DMCA) by creating a new form of liability for the making and selling of devices and services whose primary purpose is to circumvent technological

measures that control access to copyrighted works, or that control reproduction, distribution, public performance, or display of these works. Additionally, we put in place a legal prohibition to the act of circumventing access controls.

With respect to the challenges brought about by technological changes, the United States has responded by embracing new forms of expression. In doing this legislators look beyond the particular technology or medium of expression to recognize creative authorship. The United States has also focused on maintaining the framework of exclusive rights that allow an author to preserve his economic and non-economic interests in his creative works.

The challenge in the digital economy is to preserve the incentive to create new works and use new technologies to distribute them to users and consumers in the face of the huge competitive threat from illicit use of technology by infringers. It also involves making sure that beneficial uses of works are not being needlessly stifled.

### **III. Criminal Liability and Secondary Liability**

Recent changes to U.S. law have focused on the area of liability and remedies. Traditionally, infringements are enforced civilly by rightsholders. The Internet and new technologies require the creation of new tools to address digital works protection under criminal law. Under the “No Electronic Theft Act” for example, individuals are prosecuted under misdemeanor or felony provisions in cases involving large-scale illegal reproduction or distribution of copyrighted works where the infringers act willfully but without a discernible profit motive. Other changes to U.S. law provide for criminalizing the making of audiovisual recordings in theatres with intent to distribute; and criminalizing the unauthorized distribution of a work that is being prepared for commercial distribution with intent to disseminate it over the Internet.

With respect to civil remedies, Congress and the courts in the United States have addressed the scope of secondary liability for those who create or maintain peer-to-peer networks which enable direct infringement by the users of such networks. For example, several software companies who distributed software used by direct infringers to locate and transmit copyrighted works over the Internet have recently been subject to copyright infringement suits heard by the United States Supreme Court. Secondary liability for distributors of such “enabling” software has proven an effective means of enforcement, by placing liability on those who are benefiting from the infringement (by deriving advertising revenues) and who are in a position to control or restrain it.

An important goal in the Internet age is to discourage businesses from providing unauthorized access to copyrighted works as a draw for customers, thus benefiting the business—albeit indirectly—from the increase in “traffic” on their website or software portal.

Along those lines, in June, 2005, the United States Supreme Court handed down a unanimous decision in *MGM v. Grokster*, in which it held that service or software providers could be held secondarily liable if they “distribute 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.” In effect, the Court created a new cause of action for “active inducement” to infringe copyright. The Court emphasized the factual, case-by-case nature of the determination of whether inducement occurred.

The *Grokster* decision indicates that the decision under the Supreme Court’s 1984 landmark copyright holding in *Sony v. Universal* addressing secondary liability of manufacturers and sellers of devices having a substantial non-infringing use, such as VCRs (i.e., the Betamax videotape

recorder) — will not be an impediment when there is active inducement to infringe. The focus on a supplier's actual encouragement of infringing activity, and profit therefrom, takes an "active inducement" cause of action outside of the protection of *Sony*. *Grokster* is the most important copyright case for us in the United States in the past 20 years.

And internationally, courts in Australia, Korea, Taiwan, and now Hong Kong have reached a similar result. However, the range of national laws addressing these issues generally exhibit little uniformity, whether it be liability for a company that supplies peer-to-peer technology to encourage infringement or, as the United States addressed in Title II of the DMCA, an Internet Service Provider that provides facilities used by others to infringe. This lack of uniformity might suggest a need for international standards.

#### **IV. Marketplace Solutions**

Government action should not displace market-driven solutions to the underlying problems. For example, music licensing has been a real challenge in the United States. I do not believe that compulsory license provisions are the acceptable substitute for effective and efficient licensing mechanisms that are driven by the market place. It is in the best interest of rightsholders to negotiate privately for licensing. This ensures the author's ability to extract the actual value of his or her works from the market—no more, and no less—while a compulsory license regime forces authors to donate a portion of the value of their works to other profit seeking entities.

The reason that a system of exclusive rights is so successful throughout history is that it allows copyright owners to rely on the market place to find financial support for their creative endeavors. Ensuring flexibility in the marketplace is particularly important in a climate of rapid technological change where efficiency is needed to make sure works continue to be created and disseminated to the public.

Collective administration of rights represents a voluntary, non-exclusive response to market forces which preserves the full value of an owner's exclusive rights in his or her works. Those involved in the performance of music include ASCAP, BMI, PRS, SACEM, and GEMA. We, like others, hear the calls for compulsory licensing to "provide access to all." These calls ignore the fundamental incentive to create which is the entire purpose behind copyright law. A regime of "access to all" would probably lead to "value for none."

Such a significant derogation from the norm of exclusive rights could cause significant distortions in the marketplace. It has been observed time and again that government price control leads to imbalance of quantity supplied and demanded. Yet a compulsory license regime is essentially a mechanism by which governments would set the price a copyright owner could charge for the use of his or her works. Assuming the price were set lower than that achievable in a free market, the inevitable effect would be a shortage in quantity of new works supplied to a willing market. Furthermore, if the market distortions weren't enough, compulsory licenses carry a high cost in the administration of the licenses.

The path towards a compulsory license regime carries other real, though less obvious risks. For example, it might be extraordinarily difficult to reverse such a regime, once initiated, due to the "lock-in" effect created by reliance of millions of users on the continued availability of compulsory licenses. The political will to reverse an "access for all" regime might be lost even as the supply of new, creative works continues to fall below the level demanded by the public. Thus, a compulsory license regime is not something that can be lightly regarded as a reversible

experiment. Rather, real and permanent consequences are likely to attach. These are the reasons why I consider compulsory licenses to be a last resort.

Moreover, the “marketplace solution” has proven itself as a working solution to copyright dissemination in the digital economy in several instances. Examples include the recent announcement at MIDEM by EMI publishing of a European digital licensing deal. This megapublisher has joined forces with two rights societies to create a pan-European licensing process for digital tracks. Warner Bros., with Bertelsmann and Arvato, announced that In2Movies will launch March 2006. This service will give you the choice to watch what you want when you want and is planning to go Europe wide with a legal video delivery system using peer-to-peer filesharing.

So let the marketplace and market plan solutions flourish!