Markets, not Mandates, Can Best Protect Copyrights

by James Plummer

With the Supreme Court recently hearing arguments in the *MGM v. Grokster* case—a potential intellectual property (IP) landmark—now is a good time to reexamine the nation's current copyright regime. Is the present copyright system really a "free-market" one? And how does it square with the Constitutional justification for copyright: "To promote the Progress of Science and useful Arts"? Could the content industry be shooting itself in the foot by overreaching on copyright enforcement?

The suit before the Court maintains that manufacturers of software that allows computer users to share files across the Internet should be held liable for its customers sharing copyrighted material such as music or films. Now, the technology surrounding this case may be new, but the argument isn't.

In the early 1980's, longtime Motion Picture Association of America head Jack Valenti, testifying before Congress, warned that the VCR would be like the Boston Strangler to the film industry. However, the Supreme Court disagreed, and held in the *Betamax* case (*Universal et. al. v. Sony et. al.*) that, like copy machines, VCRs have substantial non-infringing uses, and that a technology cannot be banned nor its manufacturers held liable for illegal uses to which it may be put. This simple concept is why lockpicks are legal.

The Bush Administration rightly defended this position during the last Congress, supporting a bill to immunize gun manufacturers from lawsuits over harm caused by illegal use of their products. But the White House has flip-flopped in the *Grokster* case, and is now supporting Hollywood's *jihad* against cutting-edge consumer technology.

Proponents of the current copyright regime argue that prosecuting software manufacturers is necessary to protect an increasingly expansive "right," which they maintain is as important as physical property rights. But intellectual property is different from physical property in many ways. As with physical goods, an important question in the copyright debate is: To what degree should copyright holders—artists, their agents, and the content industries—who choose to use the force of the state to protect their intellectual property pay for this assistance?

Enforcement costs for protection of old IP models are mounting. The Justice Department's budget for copyright prosecutions jumped 150 percent in just the first year of the Bush Administration. And with Congress routinely expanding the length of copyright protection every time that Mickey Mouse is about to enter the public domain, there are more and more copyrighted works that taxpayers must pay to "protect"—both domestically and worldwide.

The content industries' repeated recourse to the state—via law enforcement actions and lawsuits like *Grokster*—is also terribly inefficient. Creative initiative by the content industries and a hands-off approach by regulators would result in more efficient ways to protect profits from copyrighted works. But as long Congress and the courts keep acceding to the entertainment industry's every demand—for example, defining "limited times" as three lifetimes and banning, or threatening to ban, any potentially infringing technology—there is little incentive for such innovation.

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Some copyright holders are grudgingly marching forward with innovation. For example, Apple's iPod service has started selling legal downloads of individual songs to great consumer response—the service is convenient and reliable,

unlike most peer-to-peer programs, and reasonably priced, unlike albums that often feature only two or three songs that the consumer really wants. Further, content producers can use new technologies to offer differentiated products at differentiated prices, like special-edition DVD sets, to consumers showing different levels of interest in the work of particular artists.

Consumers aren't stupid—they know that if artists whose works they enjoy don't get financial support, they are likely to stop producing. They also know that the big studios are asking Congress and the courts to take options away from consumers, by seeking to either extend copyright terms or suppress new technologies. Yet that kind of overreach can ultimately backfire on large copyright holders by encouraging more "pirating" of copyrighted works.

The Constitutional justification for copyright, to "promote the progress of science and useful arts," is best served by real markets, not excessive copyright regulations designed to benefit one set of special interests. Indeed, major technology companies, including those that rely on intellectual property in the form of patents, realize that the content industries' power grab embodied in the *Grokster* case would actually retard the progress of the sciences. And the many independent artists who support file-sharing networks as a way to circumvent the big record companies' often-restrictive policies know very well that giving the entertainment industry a legal veto over new technologies would retard the progress of the arts.

The Supreme Court should follow its precedent in the *Betamax* case and let artists and consumers operating in real free markets—not politicians, judges, and corporate entertainment lawyers—determine which technologies and entertainments will thrive in the digital age.

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CEI's Myron Ebell and Iain Murray Debate at the Oxford Union

CEI Director of International Environmental Policy Myron Ebell addresses the Oxford Union debate club. Sitting on the left is CEI Senior Fellow Iain Murray. Sitting on the right are Oxford Union President Richard Tydeman (Christ Church) and Secretary Sarah Coates (Oriel). Sitting behind Myron is Librarian and newly-elected Oxford Union President Sapana Agrawal (St. Edmund Hall).

On May 19, the world's most prestigious student debating body, the Oxford Union Society, debated the motion "This House Believes that Alarmism has Replaced Science in the Global Warming Debate." The Union, founded in 1823 and a training-ground for future British Prime Ministers, debates issues of the day in a formal style based on the House of Commons, with intellectual argument, repartee, and insults all part of the debater's rhetorical toolbox. In addition to the student speakers, the Union's President invites distinguished guests to bring extra knowledge and perhaps some gravitas to the proceedings. On this occasion, CEI Director of Global Warming and International Environmental Policy Myron Ebell was invited to present the proposition's side, alongside academics Patrick Michaels and Benny Peiser. I also participated in the debate in the capacity of a Life Member of the Society. The proposition outlined a thorough intellectual case before a hostile audience composed largely of Greens. Although the proposition was helped greatly by an outstanding student speaker, Charles Cooke, of Lady Margaret Hall, it met a tirade of witty invective and clever ad hominem attacks—in lieu of an argument—from the opposition, which included prominent British alarmists. The motion was lost, 56 "Ayes" to 219 "Nays." Nevertheless, the Union treated us well, and we received many comments from Union members on the high quality of the debate.

— Iain Murray, CEI Senior Fellow, who was a member of the Union's Standing Committee for 10 minutes in 1988.