Before the
U.S. Senate Committee on
Commerce, Science and Transportation

Issues related to MGM v. Grokster

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Chairman Stevens, Co-Chairman Inouye and members of the Committee, thank you for inviting me to testify today. My name is Dave Baker and I am Vice President for Law and Public Policy with EarthLink. Headquartered in Atlanta, EarthLink is one of the nation's largest Internet Service Providers (ISPs), serving approximately 5.5 million customers with broadband, dial-up, web hosting, wireless internet and voice services.

We appreciate this Committee's interest in peer-to-peer file sharing and the issues related to the Supreme Court's recent decision in MGM v. Grokster. You will hear from other witnesses today about the importance of protecting copyrights. EarthLink supports the rights of copyright owners to protect their intellectual property and to do so in a manner that does not compromise the ability of Internet providers to deliver broadband and other Internet services to as many Americans as possible. Indeed, if we are to realize the promise of the emerging broadband future, we should all want to develop means to make online music, movies and video more widely available to consumers while reasonably protecting the copyrights of those who create such content.

In studying the issue of peer-to-peer file sharing, I would like to offer the Committee some insights from our experience with federal copyright legislation. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA). The goal of the DMCA is to give copyright owners a mechanism to protect their intellectual property from online infringement while creating safeguards such as counter-notification procedures for website owners and a safe harbor provision for ISPs.

The DMCA affirms the long-standing principle that ISPs are but conduits for information. As such, they are not liable for the content that travels over their networks. Having said that, EarthLink, as other ISPs, does not tolerate activities which violate copyrights. Where ISPs host websites which contain infringing content, they can and do play a part in protecting copyrights.

Under the DMCA's notice and takedown provisions, an ISP will disable or block access to a website it hosts if it receives a notification of a good-faith belief that such website infringes a party's copyright(s). The website owner has a similar opportunity to file a counter-notification to get his website restored.

The DMCA's notice and takedown procedure has worked well for over 6 years now. ISPs like EarthLink handle DMCA notices almost every day. Copyright owners are given reasonable opportunity to protect their intellectual property, website owners are given reasonable opportunity to protect their content, and ISPs are given reasonable opportunity to aid copyright owners without themselves becoming liable for content they host.

However, ISPs faced challenges a few years ago when copyright owners tried to stretch the use of the DMCA beyond notice and takedown of hosted websites to include peer-to-peer file sharing. The RIAA tried to extend the subpoena power of Sec. 512(h) of the DMCA to require ISPs to divulge the identity of Internet users (not necessarily even customers) whom the RIAA alleged to have transmitted copyrighted materials across the ISP's network.

Using the DMCA in this fashion allowed administrative subpoenas to be issued in blank with no judicial oversight. Compounding this problem was the use of "bots", automated programs, which scour the web looking for files which contain names of copyrighted materials. But these bots are indiscriminate in both the breadth and specificity of the information they seek. For instance, a subpoena sent by copyright.net to UUNet on January 2, 2001 sought personally identifying information for 2,635 individual subscribers. And in another example, notices sent by Mediaforce to UUNet on December 3, 2001 sought to cut off internet access to all users who had downloaded files containing "Harry Potter". One of these files was titled harry_potter_book_report.rtf and was 1k in size. Not only was this magnitudes smaller than even the legal clips of the movie, much less the megabytes needed for bootleg copies of the whole film, but closer inspection showed it to be just what it purported to be, a child's book report on Harry Potter. Yet the notice, if enforced, would have cut off all internet access not just for this child, but for his or her entire family.

Unlike websites which ISPs host, and can therefore control access to, peer-to-peer files reside on the computers of individual Internet users. Short of canceling the accounts of all these users, which would work an undue hardship, ISPs can not control this. What's more, attempts to use the ministerial subpoena power of the DMCA to force ISPs to disclose the identity of individuals upon a mere allegation of copyright infringement unnecessarily compromises the privacy of all Internet users.

As EarthLink has stated many times before, we support the rights of RIAA, the MPAA and other copyright owners to protect their intellectual property. But the DMCA must not be used in ways that compromise the privacy of Internet users more than it would protect copyrights.

In sum, we have to balance protecting the intellectual property of copyright owners while protecting the privacy of Internet users, all while not shooting the messenger (ISPs) that provide the very access that makes online communications possible.

In the Grokster case at hand, the Supreme Court unanimously held that Grokster and StreamCast are potentially liable for copyright infringement by their users. The Court focused on the element of intent, 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."

Further, the Supreme Court held that Grokster and StreamCast did not meet the *Sony* standard of "commercially significant non-infringing use" and the overwhelming evidence of intent to induce infringement could not be disregarded. Said the Court, "Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement." The Supreme Court went on to state that the *Sony* standard of "substantial non-infringing use" remains. But it also stated that one cannot use the *Sony* safe harbor if they are clearly inducing others to infringe copyrights.

Peer-to peer is an immensely useful technology. As the Supreme Court noted in Grokster, there are several advantages to peer-to-peer networks. Because they need no central computer server for users to exchange information, they don't need the high bandwidth communications capacity a central server would require. Similarly, the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file retrievals may be faster than on other types of networks. And since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the whole network. Given these benefits in security, cost, and efficiency, peer-to-peer networks are used by universities, government agencies, corporations, and libraries, as well as by millions of individual users.[1] The lesson from the Grokster case is not to limit the technology, but to use it in a way that does not intentionally infringe on copyrights.

[1] MGM v. Grokster, 545 U.S. ____ (2005) at 1-2.

As I noted in my foreword to the Giga Law Guide to Internet Law regarding Grokster and StreamCast's predecessor, Napster:

> Napster provides a great example of a "killer app" killed by its failure to address legal realities. A brilliantly simple application, it took full advantage of the Internet's very nature as an information service to create a means of distributing music far more efficiently than the conventional process of pressing a CD, wrapping it, boxing it, shipping it, unloading it, and displaying it in a store just so a customer could drive to that store, buy the CD, take it home, and put it in a player to decode the CD's digital information in order to finally hear music. But as good as its peer-to-peer file-sharing technology was, Napster failed to address vital legal issues such as copyrights, licenses, and royalty payments. Rock stars, songwriters, and music publishers are entitled to be paid for their work, as the federal courts in the Napster lawsuits repeatedly ruled. Napster will always serve as a reminder that just because you can do something online doesn't mean you can ignore existing laws.[2]

I again thank the Committee for inviting me here today and I look forward to any questions you may have.

[2] The Giga Law Guide to Internet Law by Doug Isenberg. Random House Trade Paperbacks 2002 at xi.