Written Statement of Professor Doris Estelle Long
Senate Committee on Governmental Affairs
"Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry"
September 30, 2003

Chairman Coleman and Members of Subcommittee:

Thank you for this opportunity to submit a written statement regarding the crucial questions of the legal and policy issues that should be considered to assure that the commercial and informational opportunities of peer-to-peer file sharing (P2P), as well as future communications technologies, are fully exploited, while maintaining the necessary protection for intellectual property rights to continue to encourage the future production of creative works to enhance the future public domain.

I am a Professor of Law at the John Marshall Law School in Chicago, Illinois, specializing in the areas of intellectual property law, including international and Internet/technology aspects of intellectual property. I am a frequent author and lecturer in the US and internationally in the areas of intellectual property law, e-commerce and the Internet and support a legal system which provides both strong intellectual property protection while encouraging the continued expansion of digital communications technologies, including P2P file sharing. The views submitted in these comments are my own and do not represent the views of The John Marshall Law School or any private or public organization, business, agency or other entity.

Recommendations:
For the reasons set forth in greater detail in the remainder of my statement, the following steps should be undertaken in order to resolve the paradox between intellectual property rights, privacy and technological innovation which appears to be at the heart of P2P file sharing debate:

1. Rights clearance must be made easier for copyrighted works on the Internet so that legitimate digital distribution business models can be expanded to offer competitive services at prices and terms that meet consumer demands for such services.

2. The application of the first sale doctrine under US copyright law (17 U.S.C. § 109) to the distribution of digitally downloaded copyrighted works must be clarified. A change in medium should not alter the long-recognized right to remove from the control of the copyright owner the subsequent distribution of legitimately obtained copies of that work.

3. The parameters of the fair use doctrine in the digital environment, including a "personal use" privilege for copyrighted works, must be clarified to remove the rhetorical confusion that surrounds this issue.

4. The subpoena provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), should be amended to strike the appropriate balance between the privacy rights of end users and the intellectual property rights of content providers. At a minimum, the statute should be amended so that the protections it affords end users track the provisions for the notice and take down of infringing music that was imposed on Internet service providers under the safe harbor provisions of the DMCA (17 U.S.C. § 512). This requires that the subscriber, whose identity is being sought, be given notice and an opportunity to challenge any such request prior to disclosure. Moreover, some level of judicial oversight is required to ensure that the subpoena process is not abused.

5. The "safe harbor" which the Supreme Court's decision in *Sony Corporation of America v. Universal Studios, Inc.*, 464 US 417 (1984), provided those who manufactured video cassette recorders has limited applicability in today's digital environment and should be re-examined to determine if those who provide the facilities for Internet piracy should not also shoulder some of the costs imposed on society in protecting the intellectual property rights that are necessarily adversely impacted by illegal P2P file trading.

6. Education regarding the importance of valuing and protecting the creative act must form a significant portion of any attempt to deal with P2P piracy. Such education should be directed toward educating the public about the value of creativity as a social good and the harm caused to undiscovered musicians, writers, directors, etc, if illicit file trading remains unchecked. Educational activities should be directed primarily to the early elementary and junior high grades where values are being formed and attitudes can be affected. Simply telling people that illegal file trading is bad because it is illegal, without explaining the purposes behind such laws does nothing to affect the ethical values being instilled by such teaching.

Intellectual Property Rights and Internet Growth Are *Not* Enemies

The truth is no one can accurately measure the scope of piracy on the Internet. It is largely incapable of measurement because it is so ubiquitous and clandestine. There is no doubt, however, that the problem is increasing, both in scope and frequency. Industry surveys demonstrate that shipments of recorded music in the United States have dropped 26% since 1999.[1] Last year, about 1.8 billion blank CD's were sold, compared to 800 million recorded CD's.[2] Not even independent companies are immune to the adverse economic effects of illegal file sharing.[3] Whatever the exact figures, it is undeniable that Internet piracy presents a serious challenge to traditional methods for protecting copyrighted works in a digital environment. As technology advances, so does piracy. No category of work is safe. Movies, songs, poems, books, photography, software, quilting patterns, novels … anything that can be digitally reproduced can be illegally traded over the Internet through P2P file sharing.

Countless factors have contributed to this increasing problem. One of the most significant contributing factors to the growth in digital piracy is the simple ease of

reproduction offered by modern reproductive technologies. Not only can digital copies be created at ever-diminishing costs, these copies, unlike the analog copies of old, are virtually indistinguishable from the original in quality. Worse, the creation of such copies generally does not diminish the quality of the original. Consequently, engaging in P2P file sharing, and providing potentially hundreds of copies of a favorite digital song to strangers, does not adversely affect the ability of the "helpful trader" to continue to enjoy that song. Unlike the old days, an illegal file trader does not even have to relinquish physical possession of his favorite CD (however temporarily) for others to copy the songs they desire. With modern technology, one can literally have one's song and trade it too with no inconvenience whatsoever.

Further fueling Internet piracy is an increasing "disconnect" in end users' and website owners' minds between physical theft and electronic theft. People who would never engage in shoplifting have no compunction in making and distributing illegal downloads of copyrighted songs.[4] There is an ethical chasm between the two activities which cannot be bridged by laws alone.

There is no question that the growth of P2P file sharing opportunities has had a harmful impact on the entertainment industry. Even in a college town such as Evanston, Ill the local music store was forced to close because students (which formed the majority of its customers) were no longer purchasing CD recordings in sufficient quantities to support the store's economic survival. While the focus of much of the popular press has been on the disastrous impact of illegal P2P file trading on the music industry, improving compression technology assures that the film and publishing industr are facing similar challenges in the not-to-distant future.

In discussing the need to resolve the "conflict" between P2P file trading and the protection of copyrighted works, many have suggested that we must chose whether to protect copyright on the one hand or privacy and personal use on the other. The impossible choice between intellectual property rights and technological innovation is a phantasm. There is no such conflict because neither can exist without the other. Copyright serves a critical role in encouraging the creation of new works that enrich the future public domain. As recognized in the US Constitution, copyright protection exists "to promote the progress of science and the useful arts." (US Const. Art. 1, §8. cl.8) Reducing the scope of protection afforded copyrighted works threatens the vitality of the public domain, from which all new creators derive the building blocks for their works. Thus, it is in no one's interest to effectively eliminate copyright protection for works that are traded over the Internet or in other digital formats. Without the building blocks that today's copyrighted works provide for tomorrow's public domain, the scope of future creativity and innovation will undoubtedly suffer.

In addition to encouraging the creation of new creative works, copyright law also encourages their dissemination by providing copyright owners with the exclusive right to control the public distribution of their works. (17 U.S.C. §106(3). As each new medium of communication has evolved, from cameras, to motion pictures, to the Internet, the entertainment industry eventually recognizes that the new medium provides opportunities

for even greater dissemination of its works. Thus, protecting the potential distributive opportunities of P2P and other methods of digital distribution on the Internet is in the interest of society in general and copyright owners in particular.

Despite the potential economic opportunities which digital distribution provides, competitive digital download services have been slow to develop. Part of this delay is due to the entertainment's historic failure to embrace new technologies.[5] The other reason is the complicated nature of copyright clearance for digital environments.

New Business Models Cannot be Effective Without a Streamlined Clearance System.

In order to permit competition among digital distribution service providers, rights clearance must be made easier so that new business models for the public distribution of copyrighted works can be created and offered at prices and terms that make such services desirable.

It is undisputed that the entertainment industry was slow to embrace the potential benefits of digital distribution. While there are many sites now which purport to offer digital download music services, many do not provide the depth of use which most consumers demand for digital music. One of the reasons for the continued popularity of illegal P2P file sharing is that the music obtained through such means is not only inexpensive; it contains none of the limitations most sites still impose.[6]

I have conducted several informal surveys among students regarding potential business models for downloadable works. They all indicate that what these consumers desire is: (1) the availability to preview songs prior to purchase; (2) an unlimited selection of downloadable works, which includes both current hits and old time favorites; (3) the unlimited right to transfer a downloaded work among media, including computer hard drives, MP3 players and CDs; (4) the right to further distribute the downloaded song, including by sale; and (5) an inexpensive price. To a certain extent the failure to provide adequate consumer choice in downloadable works, the high price of legitimate CD's, the absence of affordable CD singles, and the limitations on media transfer of authorized downloadable works fueled the growth of illegal P2P file trading. Some of the reluctance by the entertainment industry to embrace digital distribution is no doubt fueled by a desire to control completely the channels of distribution. Another significant contributor, however, may be the complicated rights clearance system in place for those who want to provide digital download services for copyrighted works.

Under Section 106 of the 1976 Copyright Act, upon the creation of a copyright protectable work the author (or copyright owner) is entitled to a bundle of six rights. These rights include the exclusive right to do or authorize the following acts:

- The right to reproduce, in whole or in part, the work in copies;
- The right to prepare derivative works based upon the original;

- The right to distribute copies of the work to the public;
- The right to perform the work publicly;
- The right to display the work publicly;
- In the case of sound recordings, the right to perform the work publicly by means of a digital audio transmission. (17 U.S.C.§ 106)

Given these rights, in order to provide the right to download a lawfully copy of a copyrighted sound recording, the service provider must obtain reproduction and distribution rights from the copyright owner of both the musical composition and the lyrics. Because the copy in question will be provided in digital form, the service provider must also obtain the consent of the copyright owner in the sound recording. Thus, there are potentially three different copyright owners whose consent must be obtained before a work can be offered for digital download. Such consent generally takes the form of compensation, complicating the distributor's ability to offer downloads that can compete with the "free" price of illegally file traded copies.

The rights clearance process is further complicated since courts have repeatedly recognized that electronic rights are different from rights in the hard goods world. Recent cases such as the Supreme Court's decision in *New York Times Company, Inc. v. Tasini*, 533 US 483 (2001), demonstrate that digital rights in copyright are often distinct from rights in the hard goods (print) world.[7] Thus, old agreements granting the right to publish or distribute copyrighted works in traditional media may *not* be sufficient to grant publishers the right of digital distribution. New rights require new agreements, and potentially, additional compensation. The practical effect may be to make it more difficult for service providers to clear the necessary rights for digital distribution. The impact of this differing treatment for the digital environment has already been felt in the area of Internet webcasts, where radio stations that provide simultaneous webcasts must pay additional royalties beyond those already paid for public performance over the airways of the work in questions.[8]

The First Sale Doctrine Should Apply to Digitally Distributed Works to Protect the Generally Freely Alienable Nature of Copyrighted Works

Even if rights clearance procedures are simplified, the application of the first sale doctrine under US copyright law to the distribution of digitally downloaded music must be clarified so that a change in medium does not allow copyright owners to exercise greater control over digital copies than hard copy versions of the same works.

One of the greatest threats posed by the differing treatment of access rights for hard goods versus digital goods is the potential for copyright owners to control the public distribution of their works beyond the limits of traditional copyright. The United States has long supported the free alienability of copyrighted works once they have been lawfully placed in the stream of commerce. Under the first sale doctrine, the owner of a legitimate copy of a copyrighted work has the right to re-sell or further dispose of that copy without the authorization of the copyright owner. (17 U.S.C. § 109) Courts have

traditionally distinguished between goods which are "sold" (such as DVD's) and goods which are licensed, such as software. Under the present first sale doctrine, "sold" goods may be freely re-distributed; "licensed" goods may not. The first sale doctrine largely explains why you may resell or give away the DVD you purchased, but cannot similarly give away or resell the computer software program you also own.

If the same distinction between sold and licensed goods is maintained in the digital environment, ultimately copyright providers will be able to eliminate any resale market whatsoever in digital works. As noted above, currently most legitimate distribution sites only give a license to users to download music for certain specified purposes. This licensing mechanism provides copyright owners with a level of control over alienation that is at direct odds with the distributive purposes of copyright law. Moreover, in the areas of books, movies and music, copies are generally "sold" in the hard goods world,; they are not licensed. If the first sale doctrine is not applied to copyrighted works in a digital environment, the eventual result will be that works which have been traditionally available for rent, loan or donation will no longer be available. Eventually the only copies of works available to the public may well be digital copies whose use is licensed by the copyright owner. Instead of enhancing information access, the Internet will provide a method for reducing the public availability of information. The free flow of legitimate copies among the public will diminish because license terms prohibit re-distribution by the purchaser. The subsequent reduction in the public availability of copyrighted works may have disastrous consequences for the public domain. If the next generation of creators cannot obtain easy access to the latest works, the "cultural commons" may be irreparably diminished, and the "progress of science and the useful arts" inevitably slowed, in contradistinction to the purposes of copyright law.

The Scope of a "Personal Use" Right in a Digital Medium Should be Clarified

The law is clear that the unauthorized file trading in copyrighted songs does *not* presently qualify as a fair use. There is presently no "personal use" right to download songs from the Internet or to trade them *unless the copyright owner has consented to such activities.* No categorical fair uses exists for the creation or distribution of copyrighted works on the Internet under US law. In order to determine whether a particular use is "fair," the same statutory analysis applies, regardless of the nature of the use in question. This statutory analysis requires that four non-exclusive factors be considered to determine whether a particular use qualifies as a "fair" one. These four factors are:

1. The purpose and character of use (whether such use is for profit),

2. The nature of the copyrighted work (fiction versus non-fiction),

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and

4. The effect of the use on the potential market for or value of the copyrighted work. (17 USC § 107)

Just as no particular use is automatically considered "fair," no one factor is determinative, although the market impact of the use in question continues to be given strong consideration.[9]

The undeniable adverse market impact on Internet piracy argues strongly against any recognition of a "personal use" right to engage in unauthorized file trading of copyrighted works. At its most fundamental level, any determination that an otherwise infringing act is excused because it is "fair" is in reality the grant of an uncompensated compulsory license. Compulsory licenses are largely disfavored because they remove the right of a copyright owner to control the use of her work. *Uncompensated* compulsory licenses are even more disfavored. Thus, any statutory "personal use" right should be narrowly circumscribed and should be based on the possession of a *legitimate* copy of the work at issue.

Under any statutory personal right, media transfers from CD's to MP3 players to computer hard drives should be authorized. Permissible transfers without compensation to the copyright owner, however, should be limited to l*egitimately* obtained copies of a copyrighted work. Copies obtained through illegal file trading would *not* qualify. Furthermore, any such transfers should further be limited to those media which are in the direct control or possession of the owner of the original copy. Finally, any such transfers must be made solely for noncommercial purposes. This media transfer right is similar to the right of media transfer recognized in Section 1008 of the Copyright Act. Under section 1008, originally enacted as part of the Audio Home Recording Act, consumers were granted an exemption from copyright infringement for the non-commercial use of a "digital recording device" to make digital or analog musical recordings. [10] (17 U.S.C. §1008) This right was recognized as part of a legislative effort to deal with the challenges to copyrighted works posed by the introduction of digital audio devices, such as DAT. A similar right should be recognized in the digital environment of the Internet.

The Subpoena Provisions of the DMCA Must Protect End Users Privacy Rights

The subpoena provisions of the DMCA should be altered to require that the subscriber whose identity is being disclosed has notice and the ability to challenge effectively the release of subscriber information. The great potential for abuse requires an appropriate level of judicial oversight.

Under Section 512(h), the DMCA grants copyright owners the ability to obtain a subpoena on request of a clerk of any United States District Court for disclosure by a service provider of the identity of a subscriber who has allegedly engaged in copyright infringement. (17 U.S.C. § 512(h)) To obtain the subpoena, the copyright owner is only required to provide a written notice that includes a clear identification of the copyrighted work allegedly being infringed, a clear identification of the alleged infringing material, "reasonably sufficient" information that will allow the ISP to locate the material at issue, a statement of good faith belief the work is being infringed and a declaration that the

identity is being sought and will only be used for the purpose of protecting the owner's copyright. (17 U.S.C. §512(h)). Unlike the notice and take down provisions of Section 512(c), which requires Internet service providers who seek a safe harbor from copyright liability to remove infringing materials upon notice, there is no requirement that the subscribers whose identity is being sought be notified of the subpoena or given an opportunity to challenge its propriety prior to disclosure of their identity. Moreover, such subpoenas are issued as a ministerial act of the clerk of the court, without the need for judicial oversight. The appropriate balance between the potentially conflicting interests of copyright and privacy requires, at a minimum, that those whose privacy is about to be abrogated be guaranteed the opportunity to challenge the propriety of any such subpoena in the appropriate judicial forum, with judicial scrutiny and appropriate penalties to penalties to prevent abuse.

The Costs of Internet Piracy Should be Borne by Those Who Have Benefited the Most from Such Acts.

The 20 year-old *Sony* doctrine should be re-examined to determine if those who provide the facilities for Internet piracy should not also shoulder some of the costs imposed on society in protecting the intellectual property rights that are necessarily adversely impacted by P2P piracy.

Briefly, under the seminal Supreme Court decision *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), a party is not liable for contributory copyright infringement if such liability is based on the distribution of a staple article of commerce, such as a video cassette recorder, which has substantial non-infringing uses. Such non-infringing uses include the ability to engage in the reproduction of public domain materials, and the fair use reproduction of copyrighted works. Developed in the days of analog recording, the application of the *Sony* doctrine to those who facilitate unauthorized P2P file trading of copyrighted works is presently unclear.

Some courts have refused to use the *Sony* doctrine to excuse those who provide P2P software from contributory liability for the massive infringement that results from the easy and unsupervised availability of P2P file trading. Thus, for example, in *A&M Records, Inc. v. Napster, Inc*., 284 F.2d 1091 (9th Cir. 2002), the court ultimately held that Napster's actual knowledge of the infringing nature of its end users acts vitiated any defense under *Sony*.[11] By contrast, in *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd*., 289 F. Supp.2d 1029 (C.D. Cal. 2003), the court found that the providers of P2P software could *not* be held liable for contributory infringement because they lacked 'actual knowledge" of the infringing uses at the time that the end users downloaded the software in question. The ultimate impact of this decision, which is presently on appeal, is to remove from the chain of liability those facilitators who have benefited the most from the illicit file trading their software has encouraged.

Although Kazaa, Grokster and others who provide P2P software do not generally charge to download the software, each earns substantial income from the advertising fees

generated by the large number of users of their software. Moreover, such providers generally maintain the technical ability to revise the software (and potentially bar infringers from continued use through encoded technological measures). Yet if the court's decision in *Grokster* is widely adopted, and the inequities of the application of the *Sony* doctrine to the digital environment are not corrected, the only persons who will be called to task are the end users, many of whom have been mislead into believing their actions are lawful.[12] While any measure that inhibits the continued development of P2P file sharing should be carefully circumscribed, it is at least appropriate that those who have benefited most from the massive illicit file trading bear some accountability for the harm caused. At a minimum, requiring such facilitators to remove infringers' access to the software, and to provide mandatory disclosures to end users of the restrictions imposed by copyright on the types of materials that may be lawfully file traded would impose relatively slight burdens while helping to at least control some of the harm caused.

Law Without Education Will Not Alter Ethical Values.

Education regarding the importance of valuing and protecting the creative act must form a significant portion of any attempt to deal with P2P piracy. Such education should be directed to educating the public about the value of creativity as a social good and the harm caused to undiscovered musicians, writers, directors, etc, if illegal P2P file trading remains unchecked.

There is no question that legal actions serve an educational purpose. The recent legal actions taken by the record industry against file traders has certainly served to increase the public debate over the role of copyright in the Digital Age. The reported drop in illegal file trading activity as a result of such actions[13] demonstrates that such activity has at least educated some as to the legal limits of file trading. Yet such actions may have only a transient effect and have come at a great cost to copyright owners, Internet service providers and the end users themselves. Simply telling people that illegal file trading is bad because it is illegal, without teaching the public about the purposes behind such laws does nothing to affect the ethical values being instilled by such teaching.

At the heart of today's debate over P2P file sharing is a deeper ethical dilemma – the diminution of respect for the creative act. In an era when technology makes us all potential creators of new digitally manipulated works, the creative act, and the need to protect it, has been devalued. Those who happily trade in illegal music files because the price is right have no sense of the harm they may be causing to future generations of creators. As the protection for creativity is eroded, some of our future creative artists may well make choices *not* to pursue creativity as a career because there is no economic possibility of earning a livelihood from their works. Increasingly, students claim artists can still make money by giving concerts so illegal P2P file trading doesn't really matter. Behind that is apparently widely-held belief is an assumption that all artists want to be concert artists and endure the continual costs (both financial and personal) of "on the road." They are unaware of the elimination of creative choice that their actions promote.

If we are to treat the problem of illegal P2P file sharing, education is needed that addresses the under lying misconceptions about copyright and the value of creativity. Any attempt to change ethical values regarding copyright should be directed initially at those whose values have not already been adversely affected by peer pressure and a Net culture that seems to encourage theft over respect. Students in the early elementary and junior high grades where values are still being formed and attitudes can be affected would seem the most likely focus for any such educational activities. I firmly believe that until respect for creators is taught as an ethical value, legal "solutions" to the problem of illegal P2P file trading are, at best, mere band-aids designed to cover a gaping wound.

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[1] *See, e.g.*, Not-so-Jolly Rogers, The Economist (September 10, 2003).

[2] *See, e.g.*, Mark Landler, "US is Only the Tip of Pirated Music Iceberg," New York Times (September 25, 2003).

[3] *See, e.g.*, Chris Nelson, "Upstart Labels See File Sharing as an Ally, Not Foe," New York Times (September 22, 2003)(reporting that in 2002 album sales dropped 17.3% with file sharing and illegal CD burning contributing to the drop).

[4] *See, e.g*, Katie Hafner, "Is it Wrong to Share Your Music?," New York Times (September 18, 2003)(reporting on diverse views among junior high students regarding their right or intention to continue downloading illegal music); Laura M. Holson, "Studios Moving to Block Piracy of Films Online," New York Times (September 24, 2003)(reporting on focus group meeting with college and high school students where participants indicated an intent to continue illegally downloading films regardless of legal prohibitions).

[5] *See, e.g*,, Lisa Napoli, "Think Debate on Music Property Rights Began with Napster? Hardly", New York Times (September 24, 2003 (detailing industry's initial failure to embrace such diverse communication media as cassette recorders and MP3 players); John Schwartz, "Music's Struggle with Technology," New York Times (September 22, 2003)

(detailing industry's initial failure to embrace such diverse communication media as video cassettes and FM Radio).

[6] iTunes.com is a notable exception and according to its website offers users the ability to "purchase" the song. iTunes Music Store, www.apple.com/music/store.

[7] *See also Random House, Inc. v. Rosetta Books LLC* , 283 F.3d 490 (2d Cir. 2002)(court upholds denial of preliminary relief regarding plaintiff's claim that the publication of books was covered by print agreement, noting the need to examine "the evolving technical processes and uses of an e-book" before adopting any such analogy).

[8] Public Performance of Sound Recordings: Definition of a Service

37 CFR Part 201 (providing that FCC licensed radio broadcasts engaged in webcasting are not exempt from copyright liability under the digital performance right and are subject to the payment of license fees for such webcasts).

[9] *See, e.g, Harper & Row Publishers, Inc. v. The Nation Enterprises*, 471 U.S. 539 (1985); *Campbell v. Acuff-Rose Music Inc*., 510 U.S. 569 (1994).

[10] A digital recording device under the statute by definition includes MP3 players, but not computer hard drives. Thus, the limited media transfer fair use right of the Audio Home Recording Act has no application to the issue of P2P file trading. *See, e.g., A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004 (9th Cir. 2001).

[11] *See* also *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

[12] *See, e.g,* Katie Hafner, "Is it Wrong to Share Your Music?," New York Times (September 18, 2003).

[13] Lawsuits Damp Down P2P Audience, Wired.news (September 30, 2003).