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## SONY IN THE TRENCHES

*James Burger,<sup>†</sup> Matthew J. Oppenheim<sup>‡</sup> & Michael Petricone<sup>\*</sup>*

PROFESSOR NARD: Let's begin our final panel for this afternoon. I must say, as somebody steeped in patent law, it's a real treat for me to moderate this panel and to be here today. We patent types tend to look at the copyright world with envy, because you have all the sexy stuff: the First Amendment, parody, Grokster, 2 Live Crew. We get by on DNA, better mousetraps, and business methods, but I am learning quite a bit. This final panel is particularly good, with three prominent members and players in the laws and technology in the copyright world.

Let me introduce Jim first and then I'll introduce the other gentlemen as they come up. James Burger is a member of the law firm of Dow Lohnes & Alberston, specializing in the representation of technology companies on matters of intellectual property, communications and government policy. Prior to that, Mr. Burger was a Senior Director in Apple Computer's Law Department. During his nine years at Apple, Mr. Burger had a variety of responsibilities, including representing Apple's Advanced Technology Group, USA Field Sales organizations and World-Wide Operations and Manufacturing as well as being the general counsel for Europe and Latin America. It's a pleasure to have you here with us today.

MR. BURGER: Thank you. Listening to all of these very learned professors who have absolutely fascinating things to say, I feel like we are the three "pros from Dover." I don't know how many of you watched M\*A\*S\*H. I'm just going to try to have fun and give you *Sony* in the trenches from the point of view of the practitioner. So I'm just going to have fun. Maybe you will learn something, maybe you won't, but I'm going to enjoy myself. That is, assuming the slides work. Where's my expert? We're not getting this together.

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It's not an Apple; that's the problem. (PowerPoint presentation started.)

The rest of the panel is really good. I'm just here for comic relief. In this little case before the Supreme Court we are having fun and trying to do something. The first statement I want to make is—and I don't think you'll give me a hard time for using a small audio clip from a movie: (Audio clip replayed from computer.)

“Sorry honey; wrong guess. Would you like to go for Double-Jeopardy where the scores can really change?”

Look, I'm starting out from the position that unauthorized distribution or copying of copyrighted works is wrong. That's very interesting and I don't think any of us who are here today hear anyone debating that. The question really is what to do about it. I won't be troubled if respondents in this case are, ultimately, found guilty of contributory infringement. The problem is that those aren't the facts before the Supreme Court. This is a very limited case in the lower courts.

Let's talk about the district court proceeding. What happened there? The petitioners asked for respective injunctive relief and summary judgment but it was on the then-current-version of the software; all of the then-wonderfully-bad-acts that are alleged to have been done by the respondents are not before the Supreme Court. Indeed, they are still just allegations in the district court. That trial remains to happen. They didn't reach—the district court judge, that is—didn't reach liability for past versions of the software and past acts. Those are still before the district court. Accordingly, the bad acts, which are the cornerstone of the petitioner's case, at least if you read the merits brief, are not before the court. They are background. They are sort of interesting, but really, in my view, what are the petitioners urging? When I read the briefs, and again, everyone's going to read it differently, without those bad acts, they are left arguing that the court overturned their *Sony* ruling, otherwise they don't see what they have as a case because those bad acts aren't there. They do some things that are interesting. I really like the DIMA brief and the DSA brief, but that's still remaining before the district court. They won't admit that they are trying to overturn *Sony*; it doesn't say it anywhere in their merits brief, but here's a key fact and a quote from the trial judge, the petitioner did not dispute the finding that the respondent's technology “is being used and could be used for substantial non-infringing purposes.” So my view of this case, and I know that you are going to get a completely different view—which is great, we can all play Supreme Court judges for a while—but I find it impossible to

square the petitioners' request for relief with the unambiguous *Sony* holding.

Now, you've heard Jessica Litman. Of course, she was not very unambiguous, but we certainly feel it's unambiguous in this case. And you've all seen the quote; this is a paraphrase of the early capable quote. So, I don't see, given the facts that are before the Supreme Court, which is only the current version of the software.

So what about *Sony* and the test? Now, this is the interesting thing. I think you've heard a couple of different tests here today, but if you read all of the briefs, which I have—they are long, there are a lot of them—there are, and this is my count, there are some 28 different tests or variations of tests. Again, this is where Professor Litman and I depart. I understand what she is saying; I just disagree. I think the clear *Sony* rule has served the nation well for over two decades. The cases she points to are good points. There are small companies, who even with the *Sony* rule have been litigated out of business. I guess my answer is, if the small companies were litigated out of business, what if we have some tests that would require an innovator, which all of these tests appear to do, to predict how people will use the product? That was the question I asked earlier. Lots of inventors have no clue—they thought they had a clue—about what their product will be used for. How do you predict how people will use your product? Also, which uses will ultimately be predominant? And there are different words for "dominant." Some sort of measurement? Ten percent? There are a lot of different measurements. All of the briefs on the top side. I don't know how you do that. And when do you measure, because things change over time? In my view, such predictions are impossible in the real world. I've been involved in computer technology since about 1981 and if you had come to me in 1981 and said what was going to happen twenty years later with computers, I would have thrown you out or called for somebody to put you in a straight jacket. It's just amazing. I hadn't read Gordon Moore's paper yet on Moore's Law.

So what are the results of any of these tests? Again, this is just my humble opinion, as we say. You have to remember that by its nature digital technology copies. It's not like taking a piece of paper and handing it out around the room. Every time it moves to a server, copies are being made. When it gets to your computer, you are making a copy. There is no original there. As a result, in my view, any well-intentioned design can be put to infringing use. It is just not possible to prevent all uses. As a consequence, this is limitless liability. Just to take the horror story, if I can do the math right, 80,000 individual

songs were found to have passed through the Grokster security pass server. Assuming you get willful—and remember there are two copy-right holders—that’s 160,000 times 150,000, the max is 24 billion dollars. I don’t even think a large company, let alone a small company, could withstand that.

So as a result, we have these tests and my own view is that venture capitalists and innovators become timid. They fire engineers and hire lawyers. I’m arguing against my own self-interest. These tests could be wonderful. Broadcast flag—I’m happy to talk about that—is somewhat on point if we have time for it. How am I doing time-wise? Who’s keeping time?

Okay. Just briefly, broadcast flag is a wonderful example of getting lawyers involved. This is great for my practice. I represent this little company called TiVo. TiVo has, by far, by any engineer’s standard, the strongest encryption of any of the applicants for FCC approval because you have to have your digital outputs and your recording method approved by the FCC or you can’t sell it. It’s a violation of the FCC rules and there are heavy fines and injunctions and stuff as a result.

So, the problem was that the Motion Picture Association (MPA) said in its pleadings TiVo’s bad because they won’t agree with a content participant agreement. They wanted TiVo to sign a content participant agreement. What did the content participation agreement say? It said if you are going to make any changes to your content protection system you have to give us, the movie industry, thirty-days notice and then we can object and you have another thirty days to come back and tell us whether you accept or reject our rejection. If you reject our rejection then we have the right in another fifteen days to take it to arbitration. The arbitrator will then have 180 days to decide.

What TiVo said was, you know, the reason we have strong protections is because they protect our revenue stream—people won’t hack in and get free services. And you know this little system that is “TV as you like it” or whatever they call it now, I forget, that has personally identifiable information, when people sign up and agree to it, it doesn’t happen if you don’t agree to it. We protect that information with this really great system. If it’s broken, we are going to fix it yesterday and beg the FCC for forgiveness for fixing it yesterday. We are not going to go through this.

The MPA objected to that. Fortunately the FCC overruled them. There’s another point of remote access, very restricted remote access that the FCC also approved, and the MPA filed a petition for recon-

sideration. And so here we are a year later and TiVo's got a cloud over its technology. They can't put it out. If they put it out, there's a peril of finding that what's been done by engineering has been wasted. I think it is a real problem when you are starting to have tests like this that you wind up spending much more time worrying about lawyers and not about engineers.

I love movies, I love music, and they are great industries—but we forget that they are not the only copyright holders. There are many, many, many more copyright holders and many, many, many more copyrighted works that are out there. And of course, as I was discussing with one of the professors, there is the Perfect Ten case. How many of you don't know about the Perfect Ten case? Good. Basically, this was a pornography website, I guess softcore, that sued VISA and MasterCard for contributory copyright infringement. Why? Because the site they allowed to use their credit cards to pay for their services had taken copyrighted pictures from the Perfect Ten site. Fortunately, the judges threw the case out. The point is, Perfect Ten is a plaintiff. There are lots of plaintiffs. Lots of opportunities for lawsuits. Lots of business for me and the rest of the lawyers but I'm not sure it's good for innovation, in fact, I'm sure it's not. And I believe the national economy will suffer. Again, this is something I think we disagree on, but I think that the past twenty years, with the assurance of *Sony*, have led to a lot of innovation online, which, and I now have to agree with Chairman Greenspan, is responsible for a tremendous amount of the building of our economy and the economic benefits and productivity increases. I think that when you get engineers being timid, and you have lawyers on the team, you are going to lose a lot of that.

By the way, remember that most of these goods are going to corporations like our friends at Compaq and Dell, that you think of as the archetypal consumer goods companies. Eighty percent by dollar volume of Dell products go to businesses. So, you are burdening businesses with all this stuff. So my view is that this isn't a case to re-view *Sony*. First of all, the non-music parties—the briefs of the sports parties—said the Court should adopt the *Aimster* test. That's nowhere in the petitioner's brief. And by the way, I believe, and the Ninth Circuit has indicated that, they would have decided the *Aimster* case exactly the way that Judge Posner did without the data. There was no proffer of a substantial amount of proof in the case. Case over; thank you.

I think we had some very learned and interesting indicia but it's never been applied here. None of the proposed tests have ever been

applied. This isn't a case for the Supreme Court to get involved at this point. It's the kind of thing that even Judge Posner writes that when there aren't a lot of decisions employing the proposed remedies, you ought not to go to the Supreme Court in the first case or two. You ought to let some of those courts try and pose remedies to see if it works and then speculate it up to the Supreme Court. I think precedent is important. It is extremely important when industries rely for twenty years on the *Sony* decision. I think society decides this is important. (Cash register sound from Power Point presentation)

Time and markets have usually solved these problems without judicial intervention. There is a famous Fred Von Loman chart, which many of you may have seen, showing all of these inventions that were mightily fought against by our good friends in the content industry; you know, the player piano, which resulted in some interesting compulsory licenses which I think are giving us a struggle today. Then, in addition to that, you have radio. Radio is the devil incarnate. If you go back and read some of the source material, the music industry fought radio tooth and nail. That's what started the good ol' National Association of Broadcasters, to fight them back. Then you got another type of compulsory license.

You know the Sony Betamax story. We know the digital audiotape story, and of course, that worked out really well. You all have at least one or two digital audiotape devices in your home. So, there were all these fascinating devices. Now, the fact of the matter is the market has worked it out. The studios were extraordinarily reluctant to do DVDs. I was involved in that. It took an extraordinary amount of work and a private agreement on copy protection—and we all know that copy protection has been badly broken and isn't very good—but they went from zero dollars in 1997 in DVD sales to 25.4 billion dollars in DVD sales and rentals last year. That's almost three times box office receipts. This is in the early stages of peer-to-peer and online distribution.

You know, iTunes is great. My two daughters have iTunes. I made sure they didn't do any of the bad things like downloading software that would give them peer-to-peer and allow them to have it on their machines. So, I think this will mature on its own. We don't need to change substantial law.

Here is a really interesting slide, which I'm sure people will dispute what it means. It's my last one. I don't know if you can read this but it's from Consumer Electronics Daily and basically it says that Warner Brothers is going to fight piracy in China by having very cheap discs. They won't have all the extras and stuff we have here

and it will only be in Chinese and it won't have all the extras but they are going in trying to see if they can battle the market. Look, none of this stuff is easy. It may sound like I'm trying to make light of it. It's all hard work, but in the past, almost every time, the hard work has resulted in more profit for the content industry and, you know, concomitantly, tools like computers, the Internet, all sorts of things, have worked really, really well.

Do I still have a little more time? Do I want to go on to broadcast flag? Three minutes? My only point about broadcast flag and its fascinating oral arguments before the District of Columbia Circuit Court of Appeals is that it was fascinating because the argument that was being made by the public interest groups was that the FCC had no jurisdiction and it was also arbitrary and capricious, and it never really got to arbitrary and capricious. The problem was one of the judges, Judge Sentelle, couldn't stand the public interest group having standing before him because he didn't want to hear from the Sierra Club and he was arguing that it didn't have standing; and Judge Rogers, one of the other judges, was trying to argue they did. But when they got to the FCC lawyer, the justice lawyer, he was crucified on judge's jurisdiction. It was so obvious. The problem is you are trying to put marketplace decisions in the hands of regulators, which is also sort of what some of these tests imply. I just don't think it will work at the end of the day. I don't think it will work.

You take bit torrent—and I don't have time now to discuss what that means—bit torrent actually passes a number of these tests, maybe not all of them, but a number, yet it is the number one product people are using to, without authorization, to download and upload copyrighted material. So I just don't see that any of these tests, any of these decisions will work to solve the problem as posed. And with that, I yield to the gentleman with the lovely goatee.

PROFESSOR NARD: Thank you, Jim.

Our next speaker is Matthew Oppenheim, a partner in Jenner and Block's Washington, DC office. Matt regularly represents the entertainment industry, Internet copyright enforcement matters including the record industry's current anti-piracy campaign. Prior to joining Jenner and Block, Matt was Senior Vice-President of Business and Legal Affairs for the Recording Industry Association of America.

MR. OPPENHEIM: Thank you.

Good afternoon. I guess I'm the token entertainment industry lawyer here today. I appreciate the balance, fairness, great consideration of copyright.



When I was invited to join this get-together, I was told it was going to be on copyright issues. So, having listened to all of the discussions today, I think, maybe somebody ought to talk about copyright and talk about it in terms of the value it brings. So let me start, if I may, by talking, for a moment, about what this is really all about.

Copyright is about creativity; it's about encouraging creativity. It's about harnessing expression and emotion. It's about taking ideas and putting them in a form that we can get them out there for debate. It takes huge work; massive effort; lots of time and the individuals who do it spend their own sweat and put themselves to great pain to do it.

Now many of you may be shrugging your shoulders saying, yeah, yeah, yeah. I deal with the creators regularly and this is what they are thinking. These are the issues they are focused on. They sit there and say, don't these people understand? I may take an entire year to create that one perfect song and giving away that song for free denies me the return on that year's effort. They take all that effort and create all kinds of things. It's not just music and it's not just movies. It's pictures; it's books; it's games; it's software. It's a lot of things. And those things create and define our culture and we shouldn't minimize that.

I'm sure that if all of you think back to certain years of your life you will think about certain songs that helped define that time, or certain movies you went to; certain books you read. They are what root us, in part, in who we are and what we've become. And it takes enormous amounts of money to create those works. Some individuals take all of their savings and invest it to create the work. Others go into debt. Many recording artists will sell their future earnings. Screenwriters will find partners and others will look for investors. And all of this is in the hope of creating some kind of intellectual property that will have some value; financial and emotional. They are prepared. They know that one of two things is likely. They will either face rejection, criticism and ridicule for what they have created, or validation and they'll become stars. And they are prepared to lose the investment if people don't like what they create.

Artists and creators understand that in the end. That is the risk. They are prepared to lose that investment if the marketplace rejects what they create. They are not prepared to lose their investment when the marketplace says, we like what you've created but now we are not going to give you the return. And that's where copyright holders have problems.

The Internet is new, cool. It allows us to create communities in ways we didn't understand they could be created before. It offers great potential and the entertainment industry gets that. They have been slow to the party but they are there now. But they also recognize that P2P is not that great potential. We can talk a lot about hypothetical, substantial, non-infringing uses but truth be told, P2P is people who don't own copyrights, downloading copyrighted works, which they don't pay for, denying the copyright owner the just product of their labor.

I've spent time measuring what's on these P2P networks. And I will tell you measurement after measurement after measurement shows there are not substantial non-infringing uses. People like these networks for what? For the copyrighted works. The best proof of this is to think back to what happened to Napster. After the district court issued an injunction that said that Napster had to filter out the copyrighted works, they built a filter and it took a while. The first few iterations of the filter didn't work so well. And you saw these newspaper articles that said, this filtering doesn't work; Napster is still fine; so on and so forth. Each iteration got better and better. And right before Napster got shut down, they had gotten it right. For about a week you saw these articles everywhere about how horrible Napster was. Nobody wanted to use it. And if you looked at the number of users on Napster, at that point when the filter was working, when the copyrighted works weren't there, the number was pathetically low. Why is that? Because the substantial non-infringing uses were still there. It's because people weren't using the network for those uses. They were using it for the copyrighted works.

Some people have said that we should not call it theft. Some people have said that we should not call it piracy. I don't really care what we call it. Let's have an honest debate about whether it is wrong for others to download, without paying for it, somebody else's copyrighted work. I think my view on that issue is, probably, easily understood.

So let's talk about the *Sony* decision for a minute. The IT and CE industries worship *Sony*. Professor Litman called it the "Magna Carta," I think. Somebody else called it the "Magna Carta." That's pretty good. I've always thought that the IT and CE industries view it as their Bible. In fact, if you went to CES, the Consumer Electronic Show, this winter, CEA, or I guess, it should accurately be the Home Recording Rights Coalition, which really is a branch office of CEA, they handed out this great little two-by-three pocket version of the Sony Betamax decision. It was great. I took lots of copies. The only

problem is it didn't have the dissent. It's as though there was only the majority opinion.

MR. BURGER: They ran out of room.

MR. OPPENHEIM: They tried to get the decision codified in Congress. They regularly advocate against any decision that would overrule it. They claim, as we've just seen—and Jim Burger couldn't have set me up better for this—that it is the basis for the dramatic technological growth in our country. They view it as their Declaration of Independence.

Well, I've decided to do a top-ten list. I'm going to try to do the top ten things the IT and CE industries have forgotten about *Sony*. Number ten. The *Sony* case had nothing to do with the play button. It had everything to do with the record button. Why is this important? Everybody talks about how *Sony* unleashed this great video rental market and that the entertainment industry, who were so worried about *Sony* Betamax, actually reaped these massive gains by the product getting out there. Well, that's not true.

The video rental market would have existed whether or not the Supreme Court had ruled the way it ruled. In fact, there's a great, old *New Yorker* article that was done shortly after the *Sony* decision came down. It was one of those two-part articles. I think it was written in '86 or '87. In talking about where the various industries were leading up through the decision, it talks in great length about how that even before Universal filed the lawsuit, they had been in negotiations for a video disc player with a number of the large Japanese electronics companies. As I understand it, it was a 12-inch optical disc and it would have done exactly what the videocassette did with Blockbuster. You would have gone to the store and you would have rented the videodiscs. So, the huge rental market would have existed, whether or not *Sony* came down the way it came down.

Number nine. *Sony* was a 5-4 decision which took two years to decide. I'm not going to spend a lot of time on this, but it was a very close decision. It was very difficult for the Court to get where they are. Professor Litman, I think, did a very good job talking about how there were really a variety of different issues that different justices were interested in and they, kind of, tried to find ways to mash them together to come up with a decision. But it is not as though you had a 9-0 decision with a clear, coherent, pro-technology policy articulated by the Supreme Court.

Number eight. *Sony* was about the Betamax machine. Reminder: Betamax doesn't exist. Does anybody here have a Betamax they are still using?

MR. BURGER: It's the best professional recorder and there are not a lot out there. It's very successful.

MR. OPPENHEIM: It's a very successful device that nobody owns. In fact, the reason it's not successful is because the CE industry could not agree on how to create interoperability. Now unfortunately, this is a problem that I think we are doomed to see happen again. You look at people who buy iPod and go on Napster—the legitimate Napster. You want to be able to download recordings from Napster or Music Match or Microsoft and put them onto your iPod, but you can't. So I would suggest, for just a moment, the IT and CE industries would spend less time worrying about the entertainment industry and worry about themselves, and we might be able to solve that problem.

Number seven. The *Sony* decision played absolutely no role in facilitating the development of one of the most successful products in CE history—the DVD player. It is a fully-licensed product where the copyright industry sat down and reached an agreement with the CE and IT industries. Is it perfect? No. Has the protection been broken? Yes. Does that mean it should be thrown away? No. The average user still abides by the protection. So, that is worth something.

Number six. Everybody wants to portray the entertainment industry as technological dinosaurs. And maybe one day, a long time ago, they were, but you can't say that anymore because it is just simply not true. Whether it's because you look at the movie industries because they license DVDs or they are licensing high def or they are reformatting their contents so they can send it to cell phones or they're developing new ways of sending content to new places, they are past that. That accusation is old.

Number five. The *Sony* decision does not, in any way, suggest that one should be permitted to engage in librarying in their home. The fair-use decision in *Sony* is a fair-use decision about time-shifting, over the air, free television. And I think there are a lot of interesting issues out there. I'm not suggesting one way or the other where that would come out, but I think, all too often, people assume *Sony* provides a defense for engaging in librarying.

Number four. The mantra that we've heard all day is that *Sony* stands for the proposition that if you've got a substantial non-infringing use to your product, then you are safe. That's really not what the Court says. Yes, that sentence is there but in the sentence right before it, the Court says, the question is whether the product is widely used for legitimate, unobjectionable purposes. So, I would ask you, which is it? There are two very different tests there. The Court

didn't make clear whether the test was whether the product is widely used for legitimate, unobjectionable purposes, or whether it's a substantial non-infringing use test. But I don't think that based on anything the Court has said subsequently, that we can assume it's one or the other.

Number three. There is this language in *Sony*—and I apologize because it's a long quote, but it's an important quote—"Contributory Infringement Doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond the actual duplication of a device or publication to the products or activities that make the duplication possible. The Staple Article of Commerce Doctrine must strike a balance between the copyright holder's legitimate demands for effective, not merely symbolic, protection from the statutory monopoly and the rights of others freely to engage in substantially unrelated areas of commerce." I stand here acknowledging that it's a balance. It doesn't mean copyright holders get their way, but it's a balance and we should not view *Sony* as standing for the proposition that just because your device can be used as a paperweight that it can also be allowed to copy everything without any consideration of copyright issues.

Number two. There are three significant carve-outs in *Sony* that are often overlooked. The Supreme Court went out of its way in the majority opinion to acknowledge that there was no evidence that Sony, the company, was inducing its individual users to infringe. Why is this important? This is important because contributory infringement law says that if you know or should have known that you have induced, assisted or contributed to infringement, you can be held liable. Inducement is part of contributory infringement law. Leave aside what Congress may have done in the Inducement Act, it's already there. It's in *Shapiro*; it's in a long line of cases. And what the Supreme Court was saying is there is no evidence of inducement here but if there were evidence of inducement, they might have decided it differently and, in fact, one of the issues that will be before the Supreme Court in *Grokster* is whether or not there is adequate evidence of inducement.

Let me take a slight detour here to respond to something Jim Burger said. Jim said that the prior versions of the software in *Grokster*, in the bad acts, are not before the court. Jim, with all respect, I'm going to disagree. As counsel in the case, what was briefed in the district court was all of the bad acts, all of the versions. The district court chose to decide on a very narrow basis but the record includes everything and the entire record goes up.

MR. BURGER: It's allegations. It's not findings of fact. They are allegations.

MR. OPPENHEIM: It's part of the record. Whether—

MR. BURGER: It's allegations. It's not findings of fact.

MR. OPPENHEIM: It's part of the record the Supreme Court can consider. The Supreme Court is not bound by just the findings of fact. They can look at the underlying record. So, that is before the Court and—

MR. PETRICONE: Only the narrow issue is, in fact, certified.

MR. BURGER: Right.

MR. OPPENHEIM: No, no. The entire motion for summary judgment—both motions, because there were cross-motions for summary judgment that went up, and both motions included everything. So, the entire record is before the Court. We can ask the civil procedure professors to find out.

The second carve-out—an important carve-out—in *Sony* is that the Court went out of its way to say there was no ongoing relationship between Sony and the customer after the initial sale. In fact, we now have a case where there is ongoing contact, in fact, that's how they make their money because they are constantly feeding you pop-up ads and getting information from you through spyware.

And three, the Court was very troubled in *Sony*, that there was no evidence of harm from the copying and, obviously, we have a very different case now with the record industry having suffered substantially, as a result of the peer-to-peer culture.

Last, but not least, is that the CE and IT industries often forget that they don't have Judge Rogers this year. So who knows what the court will do.

Let me just conclude with this remark. As much as I may come across as a rabid copyright supporter, I really do take a very realistic view that technology and content are very much reliant on each other. The iPod without music is a pretty dull device. And music without CDs, CD players, iPods, computers and all the other devices is pretty limited. These two industries are very reliant on each other. There is a good history that when they are forced to work with each other they come up with some pretty cool products and they find great ways of delivering content to consumers. And I think that we need to be pushing all of those industries to be doing that all the time. I don't suggest it's just the IT and CE industries that need to be pushed. It's the content companies as well. We're getting there, but that is the challenge we face. Thank you.

PROFESSOR NARD: Thank you, Matt.

Michael Petricone is our final speaker. Michael is vice-president of technology policy for the Consumer Electronics Association, also known as CEA, where he manages the government affairs and technology and standards departments and represents CEA's position before Congress.

In 2003, as you've read, Michael was featured by Dealerscope Magazine as one of the technology industry's "Top 40 Under 40." MR. PETRICONE: I've heard both presentations; thought about them deeply. I guess it's up to me to break the tie. It's tough.

I work with the Consumer Electronics Association in Washington, DC. We manufacture what many would call piracy devices. What the rest of you, I think, would call the coolest, most fun and innovative stuff in your house. We are also the owner of the Consumer Electronics Show which goes on every January in Las Vegas and I can't let this go by without giving a CES plug. If you really want to see how the industry works, in one place, I invite you to CES. Please come; it's tremendous.

You know, we're an intellectual property industry. We are technologists. We invent stuff. That's what we do. So, we believe in strong intellectual property protection, but we also believe in the right to innovate and in consumer's rights to use these devices.

Now, I differ with Matt Oppenheim a little bit. He was talking about unauthorized downloading and set the question up as: is this right or is this wrong? Frankly, I don't think that's really the issue for, at least, the vast majority of people. I think the issue is: This is going on; what do you do about it? What do you do about it in a way that preserves the rights of copyright holders and technologists and innovators, and promotes the public good? And I think the question here, rather than whether downloading from Kazaa, or what have you, of unauthorized music is a good thing, is what do you do? In this room are some of the brightest academic minds in intellectual property law. I'm not one of them, but I do know about technology and the innovation business and what it takes to succeed. And I cannot overstate the importance of *Betamax* to this industry.

In 1984, the Supreme Court rebuffed Hollywood's attempts to outlaw the VCR and I'm not going to go through every point of the top-ten but there are a couple of interesting facts. Actually, somebody did, in the 1980s, put out a device, like a Betamax, but it had only the play button. And it was the Consumer Electronic Manufacturers working with some of the students. It was a play only device. It didn't work; the marketplace rejected it. People didn't want it. People wanted the record function; it was important.

The other thing is Matt saying that the video rental market would have developed no matter what the Supreme Court did with Beta. They were looking for an injunction in the Betamax case and had they succeeded I don't know how the marketplace would have developed because the devices wouldn't have been there. You wouldn't have had anything to play with. Because of the Supreme Court, those devices came to the market.

What Betamax did was provide, for the first time, innovators with a bright line movement that deterred litigation and permitted quick summary judgment. And for the first time, tech companies didn't have to fear the subjective termination of their intent for their design would lead to ruinous damages and they could innovate and go forward without securing prior permission—prior advanced permission of the technology. I'm not going to get into a debate about whether it's appropriate to call *Sony Betamax* the "Magna Carta" or what have you. But I will say it is the legal foundation, and has been for 20 years, for everybody who enjoys their iPods and their TiVos and all the products you see at Circuit City.

Before this, I was out in the hall watching some of the law students go by. I don't know when they started admitting 12 year-olds to law school. It seemed like everybody was hooked-up to their iPod, or using their PC. This is taken, now, as a gift, a constitutional right, someplace, to have access to these devices. You can time-shift and play-shift and do these things for non-commercial use and that's not true. That happened by one vote. And that was directly responsible for this explosion of technology and innovation you've seen over the last 20 years.

The hyperbole aside, it's probably the greatest explosion in innovations since the Renaissance and it is contributing billions of dollars to the economy and providing enormous, enormous benefits to society. It has worked. It has worked for the technology industry and it has worked for Matt's industry; they've made a lot of money, and it has worked for the public and it is not a vile thing from our standpoint.

So, now, it's up again. We have copyright holders urging the court to overturn Betamax and adopt vast and novel theories of secondary liability. This scares us. If this is successful they will extend the copyright monopoly to entirely new levels and they will be imposing unsustainable obligations on manufacturers to restrict their design. They will be chilling development of new technologies. Most important, I think, you've got to go back to the Constitution. I think that, certainly, Matt's recording artists work hard, they sweat and they take



risks in the market, but the purpose of copyright law is not to protect anybody's business model. It is not to protect anybody's industry even if it's a cool, glamorous industry. The purpose of copyright law is to promote the progress of science and these works. That's what it says in the Constitution.

The question is: What was happening, currently is not happening, and if Betamax is cut-back or eliminated, how would it affect the progress of science? And we are quite sure that it would be chilling. As Jim Burger said, all digital machines are copy machines. They copy bits; that's what they do. Innovation is inherently risky. You take away these protections and the risk of litigation becomes incredibly high. And I've got to tell you again, as someone who is close to the ground in the technology industry, we already exist in an environment where if you come out with a new product, even a lawful product, that allows you to use content in a new and flexible way, you are going to get sued. That is a guarantee. And that's the environment that our businesses exist under.

If you are a big company, if you are an Intel or what have you, well, that's the cost of doing business. If you're small, garage inventor or a small company, it's potentially lethal. And what you are seeing are innovations and functions and features that aren't coming along; that aren't being financed by venture capitalists because even under the current dealerships, under the Betamax ruling, there is already that threat of litigation.

Matt was saying it's wrong to call the content industry technology dinosaurs. That's great, but I hope it's true as of this afternoon, but there's a long history and the history is that every time a new invention or a new product has come to market to allow people to use content in new, more flexible ways the content industry has always gotten to the courts and always sought expansion of the copyright regime. You know, it was true with the player piano. It's true with television. It's true with radio. It was true with the VCR. It was true with the first MP3 players.

Has anybody heard of a technology called "clear play"? All right. This is an interesting case. There were a couple guys, again, a couple of guys in a garage in Utah. They were very concerned about what they considered to be improper and obscene things on DVDs. So they invented this box. It's a box that hooks up to your DVD player and in it there is a database of all the recently released movies. That database will tell your DVD player that somebody says a dirty-word in minute six and it will skip it automatically or there's a nude scene in minute 25; it automatically skips it. Which is, again, something I

could probably live without but for millions of Americans, this is something they are going to want. The copyright industry brought suit, a massive lawsuit on the basis of copyright infringement against this company, Clear Play. No copies are being made and people are watching DVDs that they have lawfully acquired in the privacy of their own homes. And this company is still facing massive litigation. That's a key issue we face as technology people. This is kind of like if you are reading the New York Times and the New York Times sues you because you skipped the business sections.

It sounds absurd but these are small, entrepreneurial companies that are getting killed. This is the environment we are living in today, under *Betamax*. So you can see why I'm nervous if *Betamax* goes away. Essentially, the other tests that the copyright holders advance under the *Betamax* case are dangerous for a number of reasons. You talk about primary use and tests like that, you are inviting massive judicial legislation. If you really want courts doing analyses of commercial violations, do you really want courts doing complex analyses of costs, revenues, return on investments, because that is what it would mean for these companies.

And as far as the principal use of these devices infringing, the interesting thing about technology is that it changes. If you think about who uses technology, first, it is usually kids. Kids pick-up on new technology. Kids have something in common. Kids don't have a lot of money. Kids have a little bit of contempt for old people's rules. They use it for one thing, but then you find there are a lot of these technologies that are kind of delinquent when they first come out, kind of grow into these respecting, contributing citizens. They contribute a lot of money to our industry and to their industry.

You look at cable TV. In the 1960s the broadcasters were saying these cable companies are pirates and they pirate our signals. So they went to Congress and got compulsory licensing and now we are at a place where the broadcasters are begging cable to let them on and to be carried.

The best example, of course, is the VCR. Jack Lundt said the VCR is to the American film industry what Jack the Ripper is to women at home. Right? I'm not saying that to suggest Jack's dumb. Jack's brilliant; he's a brilliant, brilliant guy, but the point is you don't know where technology is going to go and he doesn't know where technology is going to go. The VCR, in fact, changed from a device that people used primarily to record, to a device that people used primarily to play prerecorded media, which generated immense revenues for the copyright industry. You've got to bear that in mind.

Technology is a tough thing to pin down. The same thing happened with peer-to-peer and BitTorrent. The key is not to foreclose it early. I guess I would like—before I say anything else—to try to put things into perspective. Certainly, unauthorized downloading is bad. It's a bad thing, but I think I would question the perspective implicit in Matt's presentation that every download represents a lost sale. If you look at the music industry, their revenues were actually up last year. If you look at Hollywood, its box office revenues set an all-time record last year; up from 4.94 billion dollars to 9.53 billion last year. So these are industries that are not struggling, dying industries in urgent need of congressional or traditional rescue. They're not.

I am always on these panels with people from the recording industry and they say business was down four percent last year. I represent the technology industry. For my people, four percent down is like a great year. They complain to Congress, but nobody can give you the inherent right to protect your business model.

There was a question on the previous panel: Napster is offering subscription services now and what does it mean? It could mean a lot of things but it means something interesting to me. I think the Napster model proves that RIAA's claim of a lost sale for every download is demonstrably false.

Think about this for a second. Under Napster, you can download an unlimited number of songs, an unlimited number of songs to do whatever you want with for \$15.00 a month. Right? No matter how many songs you download. So of course, if the damages were any greater than \$15.00 a month, RIAA, which licenses these services wouldn't let that happen. So let's calculate. Over ten years, total gross losses of \$1,800; \$15.00 a month of which Napster keeps 15 or 20 percent, so a total net loss of \$1,500. That's what you pay for ten years, according to the recording industry, to be able to download all the songs you want. So, you know, I just think that that's an interesting perspective.

It just goes to show that the calculation is complex. It's not a matter of every song that is downloaded is a loss out of somebody's pocket. As far as solutions, first of all, I would suggest the best thing to do is build business models. If you think about it, Shawn Fenn, invented Napster because the recording industry didn't. For ten years, or five years or six years the recording industry's response was, instead of engaging the marketplace and giving people what they wanted, individual songs downloaded in easy format, they fought every step of the way and they said there was no use in doing anything. You've got to take a legal path because you cannot compete

with free. They ignored the fact that there are all kinds of businesses that make billions of dollars every year competing with free, because they provide a better service at a better price. We eat in restaurants; we don't eat in soup kitchens, even though we could. I have free coffee at work, but the guy at Starbucks knows me by name. This is done all the time. Now you are beginning to see the success with iTunes and some of these other services.

As far as suing individual users, yeah, you have the right to do it. We don't dispute that. Whether or not it's a smart business decision is a different thing entirely. You sue some kid who's 18 years old and—what's the average life span now in the U.S., like 80?—so the kid has 60 years to go on hating you and telling everybody else he encounters in his life why he hates you. My sense is it's probably not a great business decision.

You can overrule *Sony*; you can get your Induce Act or whatever, but that ignores the fact that bits don't know national borders. What's the file service that I was talking about, Kazaa? They are located in Vanawatua. I've heard it's a good service. What's the other one? E-dog? Earthstation 5 is located in Jenin Refugee camp in Palestine, which seems to be fairly judgment-proof.

But there's a real point to this. Yeah, if you can get the legislation going with Betamax, you can be as onerous as you want and you can make life miserable for it and increase the litigation expenses for legitimate companies in the U.S. and the alleged bad guys, you don't touch anyway. In my opinion, that's not the way to do it.

I was talking about DVDs and how the DVD copy protection has been broken, but people are still buying them. Why are people still buying DVDs, even though you can go online and download the copy protection system—the breaking system—and record DVDs all you want? DVD sales were up 40 percent last year. How come?

Because it's a good deal at a good price. You buy a DVD for 15 bucks. You get the movie; you get the documentary about the making of the movie; you get the director's narration; you get deleted scenes. That's like six dollars of entertainment. The price still keeps coming down, and you can buy the DVD of this enormously expensive movie often for less than the cost to buy the soundtrack of that movie. The pricing system is out of whack on the CD side. But on the DVD side, even though people can get it for free, even though people can crack, they buy it because it's a good deal. And the whole bit about Warner selling cheap DVDs in Asia, that's great. Instead of trying to dictate market trends, you respond to them. And I predict they will be suc-

cessful. That's how business works to the extent there needs to be some kind of solution; some kind of legal solution.

The one body that is in position to judge and weigh all of the interest here is Congress. That's where this ought to be done as opposed to inviting additional legislation.

We had an active discussion in Congress last year. Frankly, I don't think all the sides are very far apart, but Congress is the body that's fit to weigh the interest here and make a decision. So if anything has to be done, it should be done there and *Sony* should not be overruled. Thank you.