

**IP & Creativity – Redefining the Issue**  
**March 16, 2005**

We are hosting this one-day conference to bring together the leaders in the intellectual property debate and examine the critical issues behind intellectual property, creativity and content protection. We hope by working together we will all develop a better understanding of the overall impact the current climate has on the advancement of creativity and innovation in the United States.

This conference was prompted by an idea – the idea that we need to re-examine the language and assumptions in the debate over IP and technology. We began by looking at the current landscape, where we have been and where we are going. This quick video highlights some of our “favorite” headlines as well as a brief history of copyright. Since we are so close to these issues, we interviewed a few random people on the street to gauge how they view the copyright situation. The music featured is from the *Wired* CD that was shipped with the November edition of the magazine. All of the content was licensed with a Creative Commons license which allows us to use it here. Enjoy!

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Everybody: the technology industry, the media and policymakers, have given the content community a free hand in defining the issues of how technology affects creativity. The content industry has been flexible, clever and ruthless in defining the terms of the debate.

I submit it is time we recast the discussion and change the language of the debate: here are some simple facts to consider:

- 1. Digital technology has created a Renaissance in creativity. Digital technology threatens distribution patterns but it has spurred rather than discouraged creativity** – The amount of creativity is determined by a few major content companies. The fact is that the 990 Recording Industry Association of America

(RIAA) members and seven Motion Picture Association of America (MPAA) companies produce and distribute phenomenal music and movies. But in 2004 alone, well over 400 independent films were made plus tens of thousands more by consumers with camcorders and computers. More, the Internet has allowed more than 100,000 new artists to distribute original music without using RIAA companies as distributors.

- 2. Intellectual property is not real property** – The content community used the language of real property to describe intellectual property. That means you “steal” music if you download a song into your home for non-commercial purposes. It means that the civil and criminal penalties for copyright infringement are equal to, or in most cases, exceed the penalties for real property. It means they use analogies about stealing cars, shoplifting clothes and other products. These are wrong – both as a matter of law and of public policy.

First, the comparison to real “tangible” property fails for several other reasons. Real property is subject to ownership taxes. Real property lasts forever and can be owned forever. A copyright can be owned only for a limited period of time. Indeed, the United States Constitution declares this. More, copyright law must bow to the First Amendment that expressly allows people to use a copyrighted product without the permission of the copyright owner. This concern contributes to the statutory and judicial concept of “fair use”. The First Amendment includes not only the right to send, but also the right to receive. Indeed, in 1984, the U.S. Supreme Court in declaring the VCR a legal product said that it was okay to copy an entire copyrighted product. So if the Supreme Court expressly held that VCR copying in the home for non-commercial purposes is a legal activity, how is it suddenly labeled as “piracy” because the device is a computer?

- 3. Non-Commercial Home Recording is not “Piracy”** – The content community has corrupted the phrase “piracy” and made consumers downloading in their homes

“pirates”. For centuries, pirates were those who plundered and stole real property. In the 20<sup>th</sup> century, piracy copyright involved extensive duplication for sale. A few years ago, with a wink from friendly policymakers, the content community labeled downloader’s as pirates – even though there was no commercial motive present. Even the Betamax case holding non-commercial home recording is not copyright infringement, could not stop the widespread branding of millions of Internet users as “pirates”

4. **Protecting existing business models is not the primary purpose of IP laws** – For more than 20 years, I have battled the content industry and other industries. Why? The fact is that new technology, by definition, affects existing ways of doing business.

Look at a different context: cable hurt broadcasting, satellite hurt cable, the new flavors of broadband, wireless, fiber, telephone and power line threaten all the other pipes into the home.

History is replete with technology disrupting existing businesses. It’s called progress.

Digital technology is changing things quicker than prior technology shifts.

I am sympathetic to the content industry – I am only unsympathetic if they insist on handcuffing new technologies as they have with the Hollings bill, the Induce Act and now before the Supreme Court in the Grokster case, with numerous efforts to poison and undermine the Sony Betamax holding.

We can do much together.

We can work together to help define what is moral behavior.

We can work together to promote new formats like DVD-A, SACD, Blu-Ray, DualDisc, ENAV, HD DVD and EVD.

We can ensure consumers know how movie and music is copy protected and what they can do with it.

This conference can be the beginning of a dialogue, but I hope it also is the end of a propaganda campaign against consumers' of content.

If we can agree on the language and principle, that is a beginning.

More, it is a start that I am happy to participate in.