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SPEECHES

TECHNOLOGY AND THE RULE OF LAW IN THE DIGITAL AGE

BOB WRIGHT*

Thank you, Tim [Russert], for those kind words.

This is a critical time for our nation. As a news organization, we are alarmed at the flood of subpoenas that government at all levels is serving on journalists, including some of our own. These are courageous men and women, who are simply doing their jobs. If the current legal climate has a chilling effect on news-gathering, the consequences are serious—and could not come at a worse time.

NBC Universal will join with other major news organizations to highlight this issue. At no time in our history has the work of a free and unencumbered press been more important. We will be working together to make sure the appropriate shield laws are in place at both the state and federal levels, so that journalists can do their jobs without fear of government intrusion.

We are also concerned about the recent movement in Washington toward content regulation. We are facing an extraordinary set of pressures, easily the most alarming in my twenty-four years in this industry. The vast majority of broadcast licensees do an excellent job of knowing where to draw the line when it comes to content. We as a society certainly have much less to fear from obscene, indecent, or profane content than we do from an overzealous government willing to limit First Amendment protections and censor creative expression.

There is another part of the Constitution that applies to creative expression, along with the First Amendment: it is Article 1, Section 8—the Copyright Clause—which authorizes Congress to grant to “authors and inventors the exclusive right to their

* Vice Chairman, General Electric Company, and Chairman and CEO, NBC Universal. This speech was delivered on October 27, 2004, to the Media Institute Friends and Benefactors Awards Banquet in Washington, D.C., upon receipt of the Media Institute Freedom of Speech Award. It has been adapted for publication.

respective writings and discoveries.”¹ Congress has consistently enforced this for more than two hundred years.

It has survived the high-speed printing press, the telegraph, the video recorder, and even the invention of xerography, which represents the ultimate test of Congress’s will to apply the full measure of copyright laws. Think about it: it’s a machine called . . . the copier. And copyright law survived.

This is what enables companies like NBC Universal to invest millions of dollars to transform a creative idea into a movie or television show.

Today, this constitutional protection is under enormous pressure and requires our vigilant attention. I know that the Media Institute will be our ally on this issue, which is a threat not only to media but to a broad cross-section of U.S. industries and export businesses.

Those in the media business are well aware that digital technology is poised to unleash an amazing world of possibility, in which the most compelling entertainment video content will be available to consumers around the globe anytime, anyplace, and on any one of numerous platforms or devices.

The potential of the digital age goes far beyond media, however. Virtually every industry stands on the cusp of a digital transformation, with untold benefits for consumers.

At NBC Universal, we are eager to roll out new digital, on-demand services. Working together with software developers and the consumer electronics industry, we would like nothing more than to make accessing video as easy as Apple’s iPod has made accessing music. But the experience of the recording industry—decimated by illegal downloads—teaches an important lesson: if the technology isn’t managed properly, it has the power to do a lot of damage, by facilitating theft, not commerce.

Despite countless man-hours devoted to this problem, we are far from having in place the necessary industry standards, protection technologies, and legislative protection.

The costs of not getting this right are huge—and not just for media companies. More and more, our nation’s economy is driven by high-value, service-based businesses, with intellectual property becoming an ever-larger part of the total picture. Copyright industries such as television, motion pictures, publishing, and software, whose capital is almost entirely composed of intellectual property, constitute the nation’s largest source of exports, and six percent of our gross national product. If you include

1. U.S. CONST. art. I, § 8, cl. 8.

economic sectors that support these industries or are dependent on them, the figure doubles to twelve percent of GDP, or \$1.25 trillion, with employment of more than 11 million Americans.

And if you added to this the intellectual property components of other commercial activity—in, say, pharmaceuticals, engineering, semiconductors, micro-technologies, and so on—it's entirely likely that more than twenty percent of our national economy could be traced to intellectual property of some sort. This is a very big piece of the national pie to have at risk.

Already, the economic costs of intellectual property theft are staggering. According to the Office of the U.S. Trade Representative, it amounts to \$250 billion a year—more than the combined global revenues of the nation's top twenty-five media companies. This represents thousands of jobs and millions in lost taxes.

The best solutions to intellectual property theft will come from technology. Given what is at stake, why so little progress?

For one thing, we hear repeatedly that intellectual property violations are a fair price to pay for the advent of a new digital age and that technological progress demands a downgrading of the exclusive rights of creators and a weakening of the legal status of copyrights and patents.

It is a mistake to think that entering this exciting world means embracing intellectual property theft. Time and again, we see that the inherent power of a technology drives its success, not the theft of protected content. Whether it is a digital camera, a new medical technology, or a novel piece of software, innovations ultimately succeed or fail depending on the capabilities and advantages they offer, not on whether they facilitate theft.

Second, the challenge of protecting intellectual property belongs to the broad sweep of U.S. industries and export businesses, not just the media. Had industrial America, or a military contractor, been on the front lines of this issue instead of music, Congress would have moved decisively on this issue right away. Today, all data and information is reducible to zeroes and ones, is easily replicable, and is able to be distributed at the speed of light around the world. Anyone who has information to transmit or an idea to share has a stake in this issue. Virtually anyone at work in the twenty-first century needs to be aligned with the cause of ensuring the safe management of electronic information and data, whether it is a movie, a military secret, or an e-mail.

Third, the terms of this discussion have unfortunately been cast in a way that fails to resonate with the general public, opin-

ion leaders, or legislators. Research we commissioned recently tells us that the economic argument against digital theft, for example—as compelling as it is to business leaders—is remarkably ineffectual with the public.

We need to recast the debate in the following ways: (1) enlarge the coalition of industries and groups willing to step forward and work together to protect digital property rights; (2) stress our eagerness to use new technology to benefit consumers, not just to criminalize illegal downloaders; and (3) reinforce our commitment to a balanced solution that is based on common sense and the realities of the marketplace. Indeed, the very nature of copyright law is based on balance. Copyright law is, in effect, a social compact in which an individual's ability to use the expression of another is temporarily given up for the greater public good of enabling creators to be compensated and thereby encouraging further artistic expression.

Ultimately, the only tenable position will be one that strikes a balance. We must affirm our commitment to digital property rights and at the same time emphasize our willingness to pursue technologies. Because, the fact is, these values are not in opposition. It is possible to support technological progress yet, at the same time, uphold the property rights that make commerce possible.

Although we can't count on the courts to solve this problem for us, we should all be encouraged that the Supreme Court has agreed to review the Ninth Circuit's decision in the *Grokster*² case. This gives the Court a perfect opportunity to update the *Betamax*³ precedent for the digital age.

We sorely need such an updating. Obviously, digital technology enables people to manipulate protected content in ways that were inconceivable in 1984. Moreover, the *Betamax* precedent has been so stretched out of shape over the last few years that it's hardly recognizable.

If you read the opinion, you can't help but be struck by how careful the Court was to keep the holding very narrow: the Court held that taping for home use for time-shifting purposes of free, over-the-air broadcast television was protected by the fair-use defense, due in large part to the lack of harm to the copyright owners from one home viewing of a time-shifted program.⁴

2. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (2004), *cert granted* 125 S. Ct 686 (2004).

3. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

4. *Id.* at 454–55.

Today, in the wake of the music industry's implosion, it's impossible to argue that digital theft poses no harm to the market. And when ninety percent of the traffic on ad-supported peer-to-peer websites like Grokster consists of illegal file sharing, you can hardly say that such activity is noncommercial in nature.

But our long-term success depends less on the courts than on our fostering a greater degree of international cooperation and cooperation among industries. In the recent past, a host of industry groups have collaborated to create interoperability standards, which enable a variety of different devices to work together.

Only the same degree of commitment will enable us to reach the point where consumers can enjoy the digital access they want and rights holders have the protections they need.

Obviously, a great deal of time and effort has been spent on these issues. It is now time for the leadership of the industries involved to come together to find a collaborative solution, so that the long-awaited marriage of technology and content can finally take place. The solutions are there. What's needed is the will to develop and implement them.

We need a grand coalition of digital property rights owners, from the National Association of Manufacturers to the U.S. Chamber of Commerce to the Business Roundtable and trade organizations from every industry, to all work together on this issue. We need such a group not only to come together but to reach out and enter a productive dialogue with those industry sectors that construct and operate the digital, broadband world—the consumer electronics manufacturers, hardware and software developers, telcos, cable companies, and online businesses—so that we can find solutions that support the wide dissemination of digital technologies and, at the same time, employ technological barriers to the unlimited theft of proprietary information.

Our Founding Fathers knew how important intellectual property rights were to the economic development of a new nation. That's why they granted exclusive rights to creators, to "promote the progress of science and the useful arts,"⁵ in the words of the Constitution.

Congress has been upholding this commitment to progress for more than two hundred years, with the judiciary committees in the House and Senate devoting a good deal of time trying to

5. U.S. CONST. art. I, § 8, cl. 8.

keep these protections up to date. U.S. business needs to do its part because now, more than ever, the health of our economy depends on the effective protection of our intellectual property.