Statement of Gigi B. Sohn, President
Public Knowledge

“Piracy of Intellectual Property on Peer-to-Peer Networks”

House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property

Washington, DC
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Chairman Coble, Congressman Berman and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a new nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology.

I want to thank the Subcommittee for holding this important hearing on the great promise of peer-to-peer (P2P) networks and some of the perils associated with their use. I am honored that you have chosen my organization to represent the citizen/consumer perspective at this hearing.1

My hope is that this hearing will further advance the dialogue that Public Knowledge and other public interest organizations have already begun with the various interested industries and with policymakers. That dialogue is intended to find solutions that provide the content industry with a “reasonably secure” digital environment for its content while ensuring that citizens retain their rights under copyright law and continue to have access to an open Internet and the kind of flexible technology that they have come to expect and enjoy.

**P2P Technology is Changing the Face of Computing – For the Better**

In just two years, P2P has become a computing phenomenon. Millions of Internet users are communicating with each other through P2P file sharing software programs that allow a group of computer users to share text, audio and video files stored on each other’s computers. While the P2P applications we know today are just a few years old, the technology underlying P2P is at the heart of the Internet. The Internet was designed to be a distributed system of linked computers in which users could freely share content and data stored on each other’s computers.

Few disagree that P2P networks are already changing the way businesses, educators, artists and ordinary citizens use their computers. In businesses, for example, they offer an alternative to centralized server-based sharing of documents and projects.2 The vast majority of these changes are positive. By linking together individual computers and distributing their power, P2P technology is superior to the centralized server approach because it:

- is more robust and resilient
- is more cost effective
- is faster and more reliable
- harnesses bandwidth and storage resources that would otherwise go unused
- enables real-time collaborative work

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1 Public Knowledge is working in partnership with the Center for Democracy and Technology and Consumers Union on P2P and related digital copyright issues.

2 A recent Gartner Research Note (Technology T-16-2550, September 16, 2002) predicts that “[b]y 2005, 10 percent of business interactions will occur via P2P-enabled technologies (0.7 probability).”
Already, both public and private P2P networks are helping small and large businesses (including content companies), universities, artists and others work collaboratively and more efficiently. Here are some examples:

- **The University of North Carolina at Chapel Hill.** Robert Kirkpatrick, Distinguished Associate Professor of English and Director of the London Summer Honors Program at the University of North Carolina at Chapel Hill, used Groove Network’s P2P tools to manage a class in the composition of poetry. Among other things, Kirkpatrick used P2P technology to encourage collaborative editing and comment on students’ work, adjust the syllabus, archive course materials, and create a list of links to resources of poetic forms and vast archives of complete works of poems and critical writing. The class also uses the Groove tools for a class forum and an announcement board to share information on musical, dramatic and other events on campus. Kirkpatrick said that P2P technology “makes it possible to extend that most expensive form of education – one-on-one tutorial – into a cohesive class experience….It comes very close to being, for me, the ideal academic tool.”³

- **CenterSpan.** CenterSpan is a distributed content delivery network licensed to distribute copyrighted digital content from major media companies. Earlier this year, CenterSpan announced an agreement with Sony Music Entertainment whereby CenterSpan’s secure P2P network provides music from Sony Music artists to a wide variety of online service providers seeking to offer their subscribers streaming and downloadable music.⁴

- **J!VE Media.** J!VE Media is the creator of a suite of digital video packaging, digital rights management and media delivery services which enable content providers to distribute protected digital video content via publicly accessible P2P networks, including the Gnutella Network (which includes users of LimeWire and Morpheus) and the Fastrack Network (which includes users of KaZaA and Grokster). J!VE uses P2P distribution technology because it allows content owners to rely almost entirely on users to provide the most costly computing resources involved in digital distribution: data storage and bandwidth. J!VE distributes only authorized content, and its customers include: 1) the Priority Records division of the EMI Recorded Music Group; 2) Koch International, the world’s third largest independent music label; and 3) The Comedy Network, Canada’s 24 hour comedy cable channel.⁵

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³ [www.groove.net/solutions/testimonials/education/unc.html](http://www.groove.net/solutions/testimonials/education/unc.html)
⁴ Statement of Frank G. Hausmann, Chairman and CEO Centerspan Communications Corporation before the House Judiciary Committee Subcommittee on Courts, the Internet and Intellectual Property, June 5, 2002.
⁵ Declaration of Sean Mayers in Support of MusicCity.Com Inc.’s and MusicCity Networks, Inc.’s Motion for Partial Summary Judgment in MGM Studios v. Grokster, [www.eff.org/IP/P2P/MGM_v_Grokster/20020122_mayers_decl.html](http://www.eff.org/IP/P2P/MGM_v_Grokster/20020122_mayers_decl.html)
• **Project Gutenberg.** Project Gutenberg seeks to convert to ebook form, and widely distribute over the Internet, over 4500 works from the King James Bible to Shakespeare to the CIA World Fact Book. These works are either in the public domain or authorized by copyright owners for distribution. One of the chief hurdles facing Project Gutenberg and public domain projects like it has been the expense of hosting and distributing the resulting files. Today, these expenses are being reduced, and valuable public domain works are reaching more people, because these texts are being distributed over P2P networks.6

• **Furthur Network.** The Furthur Network is a non-commercial, open source, P2P network of legal live music. Music lovers download and share music from each other. Musicians that allow the non-commercial taping and trading of their live performances are allowed on this publicly accessible P2P network. This would include bands like the Grateful Dead, the Allman Brothers Band and the Dave Matthews Band. TDK, the consumer electronics and recordable media company has recently recognized the importance of this segment of the music industry by sponsoring the third annual Jammy Awards, which honors musicians who focus their art on live music. In the words of Bruce Youmans, TDK’s Vice President of Marketing, “There are literally hundreds of sources, including directly from some of the artists performing at the Jammys, for legally acquiring today's best music without infringing on artists' copyrights.”7

All indications are that P2P technology will stimulate our economy if it is allowed to flourish. As with any successful new technology, innovators will seek to capitalize by developing new applications for P2P.8 Moreover, since every computer on a P2P network becomes, in effect, a file server for every other computer, it is likely that businesses and individuals will demand faster and more powerful PC’s. Equally as important, many experts predict that increased use of P2P networks will drive up the demand for broadband.9 It is not difficult to see why – using the increased bandwidth capabilities of a P2P network, a homeowner using only a DSL line could send files at a speed and capacity that is eight times faster than a T-1 line!

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7 www.furthurnet.com
8 One exciting P2P application that is in its nascent stages is “P2P signing” for the deaf and hard of hearing. Through this application, an interpreter in one location can use high-speed communications and low-cost video cameras to provide interpreting services to consumers at other locations across the country. Frank G. Bowe, Broadband and Americans with Disabilities at 2 (2002), www.newmillenniumresearch.org/broadband.html.
Like Other Technologies, P2P Can Be Abused

Despite the recognition of Congressman Berman and other legislators of the enormous promise of P2P networks, the focus of this hearing is on their abuses – that is, the illegal sharing of copyrighted material over these networks. Let me be clear – Public Knowledge does not condone the illegal sharing of files on any network – be it P2P or otherwise. We believe in the constitutional and historical purpose of copyright protection, that is, to encourage the creation of new artistic works for the ultimate benefit of the public. That purpose is not well served by individuals who engage in large scale illegal file trading. As discussed below, we think that the content industry has several avenues available to it to curb these abuses that will also preserve the technology and the rights and expectations of consumers and computer users.

That being said, my fear is that the emphasis on the abuses of P2P networks may well give rise to actions that could ultimately destroy the promise of this technology. As discussed below, proposed laws like H.R. 5211 could lead to actions by copyright owners that could literally bring these and other networks to a sudden and unfortunate halt. Even where the copyright owner’s motives are the most benign, actions authorized by this bill could seriously tax these valuable networks by making them less efficient, more unstable, and subject to greater private control. That is not good for consumers, the tech industry or the content industry, which believes, as I do, that it will figure out how to harness P2P technology and profit. Thus, it is not just the illegal activity that might be slowed by the kinds of self-help techniques authorized by this bill, but also every legitimate current and yet-to-be-developed business dependent upon the promise of P2P technology.

P2P networks, like other technologies (e.g., cars, telephones) can be used for good, or they can be abused. But we don’t outlaw these technologies or limit their legitimate use because of the possibility (and yes, even the probability) that someone will use them to do harm. Public Knowledge supports targeted mechanisms to limit abuses of these networks. But we cannot support laws or technological measures that harm legitimate uses of the technology in the effort to curtail illegitimate ones.


Over the past several months, my staff and I have had a number of productive conversations with various sectors of the content industry. While we have not agreed on everything, I have appreciated their willingness to be candid and engage in a continuing dialogue. One thing the various sectors of the industry have been willing to admit is that infringement cannot be stopped completely. This is true with regards to physical infringement as well as virtual infringement.

10 Speech by the Honorable Howard L. Berman to the Computer and Communications Industry Association Regarding Solutions to Peer to Peer Piracy (June 25, 2002), www.house.gov/berman/p2p062502.html (“P2P networks represent as much of an opportunity as a threat to copyright creators. P2P represents an efficient method of information transfer, has the potential to greatly reduce the costs associated with server-based distribution systems, and can support a variety of legitimate business models.”)
Thus, the critical question becomes: how can the effect of illegal file trading over the Internet be limited without eroding the legitimate consumer/computer user rights and expectations? I propose a combination of three tools:

*Enforcement of Existing Laws*

Both the Copyright Act and the Digital Millennium Copyright Act provide for remedies for certain unlawful uses of copyrighted material. There is little evidence and indeed, the content industries do not claim, that when the law is enforced it is ineffective. In fact, when the content industries choose to enforce their rights under these laws, like in the Napster, Audiogalaxy and Madster (“Aimster”) cases, they have succeeded.

Despite its claims that billions of songs have been illegally downloaded, we are not aware of a single case in which the recording industry has taken legal action against an individual downloader. The problem is that the recording industry apparently does not want to enforce the rights it claims when it comes to illegal P2P file trading because it looks bad to sue its own customers. Therefore, the industry has decided instead to shift that burden onto other corporations, and in particular, ISPs. As many of you know, the RIAA is seeking to force Verizon to hand over the names of its customers based solely on the RIAA’s allegations that those customers are engaging in infringing activity. Verizon, backed by civil liberties and other public interest organizations such as my own, has argued, among other things, that forcing ISPs simply to give copyright owners the names of their customers without a judicial determination that they may be engaged in any illegal conduct would violate the constitutionally mandated privacy and anonymity rights of their customers, and put ISPs in the untenable position of having to respond to the numerous identification requests that would inevitably result.

Were Verizon and other ISPs to comply with such requests, the RIAA would be empowered to collect sufficient information with which to conduct investigations of potential defendants and engage in surveillance over a period of days or even years, choosing to sue the defendants presenting the worst facts and having profiles least likely to garner public or judicial sympathy. As is often said, bad facts make bad law. The RIAA plan appears to have no other purpose than to find the worst facts before seeking an interpretation of its legal rights.

Verizon’s refusal to succumb to the RIAA’s request does not leave the industry without a remedy. It can bring a “John Doe” lawsuit against anonymous infringers and serve Verizon with a third-party subpoena pursuant to Fed. R. Civ. P. 45. Once the industry has satisfied a judge that its allegations of infringement have evidentiary support, Verizon (and other ISPs) will be required to make available those names. With “robot” technology that allows the industry to pinpoint the most egregious uploaders with some (but by all means not perfect, see discussion below) accuracy, the industry’s complaint that it would have to bring numerous expensive lawsuits rings hollow. Unless the industry wants to sue every person with a handful of infringing files on its hard drive,

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it has the economic and technological means to locate the kind of large scale alleged infringer that it would want to bring to court.

An industry-initiated law suit against a large scale infringer could also have the benefit of serving as a deterrent to other bad actors. As we have seen in other contexts, specifically targeted lawsuits and other legal action can have a deterrent effect, and also educate the public as to what is legal. But if the industry refuses to bring targeted cases, we will only be left with unfounded complaints that the copyright law provides a “right without a remedy.” The remedies exist, but copyright owners must take up the challenge of invoking them.

**Non-Invasive Self-Help**

Public Knowledge does not oppose the use of reasonable non-invasive self-help techniques by the content industry. By non-invasive, we mean techniques that do not entail a third party attacking a file located on a computer hard drive (or denial-of-service attacks on individual users or on providers). Examples of non-invasive self-help include spoofing, flooding, decoy, spoiler files and redirection. Many of these techniques involve the intentional distribution of phony or corrupted files that an individual seeking to make an unlawful reproduction will then download. Others will send downloaders to legitimate sites. What distinguishes these techniques is that they are activated by an individual’s affirmative effort to obtain an unlicensed copy of a file.

On the other hand, Public Knowledge cannot support self-help techniques that permit the copyright owner to block access to an individual’s computer hard drive for the purpose of making an allegedly illegal file unusable or incapable of being downloaded. In the most popular of these techniques, commonly known as Interdiction, a computer program repeatedly requests the same file from a particular P2P network user. As a result, no one else can get to that file, or to any other file on that user’s computer even if the other files to which access is sought are perfectly legal and downloading them is perfectly lawful.

There are several problems with self-help techniques of this kind. The first, of course, is that the program, or robot, could be mistaken in its determination that a file is one that warrants protection. While we have received assurances from the RIAA that the “bots” that its member companies use are extraordinarily accurate, evidence submitted in its pending litigation with Verizon demonstrates otherwise. For example, UUNet, an ISP, was sent a notice by Warner Brothers, owner of the copyright to the motion picture “Harry Potter and the Sorcerer’s Stone.” The notice asked UUNet to disable access to a user, identifying as the single infringing file a 1K file named “harry potter book report.rtf.” The size and type of the file make it clear that the file was nothing more than a child’s school book report on a Harry Potter book. The record includes other examples of similar inaccuracies.12

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12 Motion for Leave to File and Brief Amicus Curiae of United States Internet Service Provider Association in Support of Respondent filed in *Recording Industry Association of America v. Verizon Internet Services*, Case No. 1:02MS003323 at 6-12.
Moreover, it is important to remember that the members of the RIAA will not be the only copyright owners capable of using these techniques, particularly if H.R. 5211 becomes law. The fact that Interdiction not only makes unavailable the allegedly infringing file, but also makes the rest of the user’s files unavailable only exacerbates this problem.

A second concern is that Interdiction and similar self-help techniques punish individuals for “making available” copyrighted content, regardless of whether that content was legally obtained or not. Such punishment would extend copyright protection beyond what the law currently allows. Unlike in the European Union, U.S. copyright law does not give a copyright owner a separate right to “make available” his work. Efforts to include such a right here have been heretofore rejected.

Finally, we are concerned with the worst case scenario – that repeated requests or similar actions could prevent a user from accessing the Internet for any other purpose, resulting in a so-called “denial of service.” Regardless of whether an individual has an infringing file, denial of service caused by self-help will burden ISPs and other network users, both indirectly and directly. This is particularly true where such attacks can be done secretly, such that a user’s first call will be to its own ISP to complain about a malfunction. Even on a network where a loss of service for one may not directly affect other users, every denial of service claim requires ISP time and resources to figure out its cause, causing it to spend less time on other, more serious service problems, which might be caused by cyberterrorism, other security breaches or legitimate technological breakdowns. This has an indirect effect on all the other customers on an ISPs network and also burdens the entire network. Moreover, with some ISP networks (particularly the shared architecture of cable modem service), the service quality of innocent ISP customers could be directly affected if invasive self-help leads to a denial of service for another customer – in other words, innocent ISP customers are harmed by the acts of one suspected infringer.

Legitimizing and harboring invasive self-help has startling implications. Again, whether the large content companies use techniques that are more accurate and often unrecognized by the computer user is nice, but is largely beside the point. If expressly permitted or protected, self-help of various shapes and sizes will be available to all copyright owners, some of whom may believe that it is perfectly within their rights to launch denial of service attacks. Some of these attacks may affect actual infringers, while some almost certainly will affect innocent parties, who will have no idea why they (or others) cannot access their files or why their Internet service is not working. These attacks will likely provoke retaliatory attacks by some users, and the acquisition of defensive software by others. Soon, the Internet will look like the Wild West, with self help bots and bot blockers replacing guns as the weapon of choice.

The collective impact of all these self help efforts, particularly if they are sanctioned by law, might be to reduce or eliminate the effectiveness of the Internet as a communications medium in a number of ways, from consuming bandwidth to forcing
ISPs into imposing crippling terms-of-service agreements. The final victim of this Internet free-for-all, of course, would be rollout of broadband, for which P2P is the “killer app.”

Promoting Competition to Build a New Business Model

Last June, at the request of USA Today, I spent several hours discussing digital media issues with a number of top executives from the content and consumer electronics industries. What struck me was that the New York representatives of the content industries all agreed on one thing: that they had to create new business models that take advantage of the low cost, ubiquity and speed of the Internet. In answering the question of whether the recording industry had responded to the Internet needs of its customers, John Rose, Executive Vice President of the EMI Group stated:

There’s no question that this industry, like every other industry that went through this, didn’t deal with it in as forward-thinking a manner as it could have. The real question is: here’s where we are, what do we do about it? There’s no way you’re going to constrain the Internet,…The question is, can you come up with economic models to empower guys like Alan [McGlade of MusicNet, an industry-backed online music service]?13

These content industry executives believe, as I do, that if they can provide easy access to a wide range of high quality content at a fair price, most consumers looking for content over the Internet will choose their services.14 In other words, they believe that they can, in fact, “compete with free.”15 Rob Reid of Listen.com, an online subscription music service that licenses music from the recording industry, said as much in a recent Department of Commerce Forum:

The way I compete [with free] is I have to create a service that’s better than free, which is hard to do. I mean, that’s hard to do. I mean, that’s a tough proposition, but the good news is people do opt for things that are better than free all the time. If they didn’t, you know, we’d be eating at soup kitchens every night, and not going to restaurants. And just looking around this table, I see a bottle of Poland Springs…that tells us

13 “Digital Technology, Reshaping industries, lifestyles,” USA Today, June 25, 2002 at 4E.
14 The Office of Technology Policy at the U.S. Department of Commerce apparently agrees, Understanding Broadband Demand, A Review of Critical Issues, Office of Technology Policy, U.S. Department of Commerce at 17 (September 23, 2002), www.ta.doc.gov/reports/TechPolicy/Broadband_020921.pdf (“There is considerable belief that creative, legal, for-profit sites can out-compete “free” alternatives. Industry will need to develop technologies that can protect digital content, ensure that legal services have the resources…to out-compete illegal exchanges, educate consumers about the need to respect intellectual property on the Internet, cooperate across sectors and deliver content in ways and on platforms that consumers want….”)
that designer water is a multi-billion dollar industry, and that comes out of the faucet for free. So better than free does exist…  

Despite the fact that industry efforts to bring content online have been going on for years, a successful business model has not emerged. One of the reasons this is so is that creating such a model is not a simple task – it takes time, resources and sometimes plain dumb luck. But I believe that there are two other reasons a business solution has been slow in coming: 1) the same industry minds have been attacking the same problem for all that time, and 2) the industry has refused to permit others to try and figure out how best to deliver content over the Internet.

If the content industries are sincere in their desire to create new business models (and I believe that they are), then they should give others the opportunity to help them to do so. Not for free – for example, the recording companies could license their music to various online retailers and ask the licensee for the same statutory rate that the publisher gets ($0.08) for each song the licensee sold online. Retailers who choose to offer them to the public must all pay the same “wholesale” price but can then compete vigorously with each other to find the business proposition most appealing to consumers. This is a win-win situation. The copyright owner gets paid, and a competition ensues to build an online music service that provides a high quality, large catalogue at a reasonable price. In fact, several successful business models could emerge that are entirely different than anything being contemplated today and appeal to different types of consumers, just as retail stores do for pre-packaged goods. There will be failures, no doubt – but until innovators and entrepreneurs are given a chance to fail, the chances that success will be achieved are greatly diminished, and the public benefit from broad and competitive dissemination will surely be lost.

H.R. 5211 is a Well-Intentioned but Flawed Bill

Public Knowledge appreciates the good intentions of Reps. Berman, Coble, Smith and Wexler in sponsoring H.R. 5211. We believe that they are sincere in their desire to encourage P2P technology and to stem the flow of illegal file sharing.

Unfortunately, these good intentions cannot save this flawed bill. Part of the problem is that because P2P technology underlies the entire Internet, it is difficult to draft legislation that addresses specific P2P networks such as Morpheus and KaZaA without also including the entire Internet and World Wide Web in its scope. Also, as discussed

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17 A recent New York Times article details the challenges faced by online music services (including those backed by the recording industry) in getting permission to sell certain songs over the Internet. Amy Harmon, “Copyright Hurdles Confront Selling of Music on the Internet,” NY Times, September 23, 2002 at C1.
18 This week’s announcement by the Warner Music Group that it would begin selling digital singles starting at 99 cents through retailers like Bestbuy.com and MTV.com is a good start. Amy Harmon, “Warner to Sell Digital Signals Online,” NY Times, September 24, 2002 at C9.
above, it is difficult to imagine certain “self-help” techniques that could interfere with specific P2P networks that would not also put the efficient functioning of the larger Internet at risk, impose enormous new tech support burdens on ISPs and impair customer satisfaction with broadband. Finally, as discussed above, while we may accept that some of the techniques now in use by the content industries are somewhat benign, this bill allows for self-help by all copyright owners – some of whom may not have the same concerns about upsetting their customers as do large content companies.

Among the provisions in this bill that are the most troublesome from a consumer perspective are:

- The bill gives copyright owners extraordinary powers to engage in self-help. H.R. 5211 grants copyright owners and their agents the right to break any law, state or federal, civil or criminal, in furtherance of “disabling, interfering with, blocking, diverting or otherwise impairing” the availability of his or her copyrighted works on a public P2P network. This extraordinary power is limited by five vague conditions: 1) the copyright owner may not “alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader” (Subsection (a)); 2) the owner must not impair the availability of files on a targeted computer other than the works the copyright owner owners except as “reasonably necessary” (Subsection (b)(1)(a)); 3) the copyright owner may not cause “economic loss” to any person other than the targeted file trader (Subsection (b)(1)(B)); 4) the copyright owner may not cause “economic loss of more than $50” to the targeted file trader (Subsection (b)(1)(C)); and 5) the copyright owner must notify the Attorney General seven days before engaging in self-help (Subsection (c)).

- The bill shifts the burden of using self-help mechanisms onto the consumer. Currently, the content industries are very careful about the type of self-help techniques they use. This is not only for public relations reasons – the misguided use of these techniques that harms an innocent party could also result in serious legal liability for a copyright owner. By providing a safe harbor for a whole range of non-invasive and invasive self-help techniques, H.R. 5211
removes the incentives and sanctions that currently impel content owners and others to be careful in their self-help. While the damage limitation for bringing a legal action for misguided self-help is only $250, copyright owners know that most victims will never sue because it is not worthwhile to do so; the damage rarely will be large enough to justify the time and cost of litigation.19

Equally as troubling is the fact that the bill creates no obligation for the copyright owner to notify a victim that her Internet access has been impaired. If they are subject to misguided self-help, the vast majority of computer users will have no idea why their computer has broken down or why they can no longer access certain files. Without a notice requirement, even a tech-savvy victim who figures out what has occurred and decides to bring a lawsuit will not likely know whom to sue. Only if the victim can figure out exactly who impaired her system (among millions of copyright owners) can she then ask for the reasons for that action. Subsection (c)(2)(A).

- The bill erects enormous procedural obstacles for a victim of self-help to overcome before she can seek the remedies provided. H.R. 5211 creates a new cause of action for an affected file trader when a copyright owner “knowingly and intentionally impairs…[a] particular computer file…and has no reasonable basis to believe that such [file] constitutes an infringement of copyright,” and also causes over $250 dollars in damages to the file trader. But where H.R. 5211 giveth, it also taketh away. Even though the copyright owner is engaging in egregious and willful activity, the bill erects procedural hurdles to innocent citizens seeking to obtain restitution for wrongful self-help. The innocent file trader cannot get to the courtroom without first getting permission from the Attorney General (Subsection (d)). Whether the victim will ever get to court is left to the sole discretion of the Attorney General, who has four months to make that determination. This creates a supreme irony: the bill erects huge legal barriers for citizens seeking remedies for misguided self-help, while it dismantles them for content companies seeking remedies for infringement. This is not only anti-consumer, it is also likely unconstitutional. It delegates to the Executive Branch the discretion to block civil litigants from access to federal courts, and delegates to private parties the power to do what no government can; namely, to surreptitiously impose a prior restraint upon communications that are presumptively protected by the First Amendment without any judicial determination that the speech being suppressed is unlawful.

- The bill expands protection for copyrighted works beyond that required by the Copyright Act. Subsection (a) of the bill provides a safe harbor for self-help actions that impair the “unauthorized” distribution, display, performance or reproduction of a copyrighted work on a publicly accessible P2P network. But not all “unauthorized” uses of copyrighted works are illegal under the Copyright Act. In addition, as discussed above, by permitting self-help against individuals

19 This is exacerbated by the fact that under the bill, a victim must first ask the Attorney General to decide whether her complaint is a valid one.
who merely make works available (rather than just those who illegally download available works), the bill gives copyright owners an additional “right to make available to the public.” This right is now only recognized by European intellectual property laws, and has heretofore been rejected in the U.S.

H.R. 5211 is well intended to stem the flow of illegal file trading, but it goes way beyond what is necessary to permit the content industries to engage in the type of non-invasive self-help described above. While Public Knowledge might consider supporting a narrowly-crafted proposal that clarifies that non-invasive self help is permissible, H.R. 5211 is not that bill.

**Conclusion**

In conclusion, I want to thank Chairman Coble, Congressman Berman and the other members of the Subcommittee for holding this hearing to discuss P2P networks. As the sole representative of consumer and citizens rights at this hearing, I would respectfully ask that you keep the record open for thirty days to permit other public interest organizations to submit testimony and comments.

Public Knowledge urges the Subcommittee to act cautiously before seeking to alter the nature of a technology that improves the already significant abilities and flexibility of computers and the Internet, benefits artists, educators and businesses, and may very well be the “magic bullet” that drives broadband adoption. Illegal file trading on P2P networks can be limited through a combination of rigorous enforcement of the law, non-invasive self help techniques and promotion of competition to build new business models for online music. H.R. 5211, however, goes far beyond what is necessary or reasonable to limit illegal file trading, and if passed, could lead to actions by copyright owners that could threaten the core capabilities of the Internet.

Thank you.