



# WARREN'S Washington Internet Daily

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## Today's News

**LITIGATION & LEGISLATION** won't end conflict over IP piracy, experts say. Once the Supreme Court weighs in on *MGM v. Grokster*, opposing sides may continue Capitol Hill fight. (P. 1)

**MPPAA AND RIAA** CEOs spar with technology industry critics at IP & Creativity conference. (P. 2)

**E-NOTARIZATION** to be tackled at a Hague Conference forum. (P. 3)

**CAPITOL HILL:** Lawmaker wants to reintroduce VoIP legislation. Hearing focuses on VoIP's relationship with the Universal Service Fund and intercarrier compensation. (P. 5)

**AGENCIES:** GAO found systemic weaknesses in FCC E-rate oversight. (P. 5)

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**PRIVACY:** Online database for attorneys and defendants quadruples profiles of law enforcement and informants. (P. 6)

## Litigation, Legislation Can't Solve the Great IP Debate, Industry Hears

The intellectual property (IP) protection debate mustn't be "a pro-choice, pro-life debate," CEA Pres. Gary Shapiro said Wed. The consumer electronics and content communities -- whose divergent views have swept the storm to Capitol Hill and the Supreme Court -- should talk in "more realistic and normal terms," he said. Shapiro said a day-long IP & Creativity summit could generate collaboration with the content community that ends "a propaganda campaign" against consumers: "Using technology to innovate on top of existing content should not be viewed as a crime. Consumers need the freedom of new technology to further innovate."

Despite studies trying to define file sharing's impact on the entertainment industry's livelihood, it's hard to make a statistical link between popularity of peer-to-peer (P2P) and slumping recorded music sales. "If this dialogue is all about saving CD sales, we've already lost," CEA Industry Analysis Dir. Sean Wargo noted. The industries must see which business models can give customers the content and interactivity they want, panelists agreed (see separate report below).

There's no question IP infringement is occurring, the Electronic Frontier Foundation's Fred von Lohmann said, noting that not all uses of P2P are infringement. In the end, suits won't be the solution; the entertainment industry's best move is to offer a legitimate, well-priced alternative to piracy, he said. Record labels can defend themselves without litigation, he said, suggesting a business model selling consumers a blanket license to download all the music they want would deliver a new revenue stream. However, HDNet Chmn. Mark Cuban said the RIAA should sue those who illegally download and swap music. "If someone steals, throw them in jail. Are there better business models? Of course. But at same time, stealing is stealing. I'm a big believer that software doesn't steal content, people steal content."

Govt. shouldn't legislate at this point, said Committee for Economic Development Pres. Charles Kolb, calling regulation premature. He said both parties to the debate should "step back and give this emerg-

ing dynamic economic factor some room” and find a balance between protecting IP and encouraging creativity: “Let Shania do a couple more albums; then we’ll get a clearer picture of what we should do.” Both camps could create “an amazing user experience” but “we’re not keeping our minds toward making this a home run for the customer in the end,” added Wargo.

The content community has been “clever and absolutely ruthless” in trying to guard creators from IP breaches, Shapiro said, urging the discussion and debate be recast. IP is not the same as “real property” -- the term is largely a content community public relations ploy, he said. Real property is permanent, well-defined, subject to ownership taxes and allows investment: “You can see and feel what you own. The whole concept of fair use is a safety valve. To make copyright the same as real property is a play in language.”

Protecting existing technology is not the point of IP laws, he said. But for the Supreme Court’s Betamax holding, technology and creativity would have been hampered. New technology disrupts business models and causes change -- and the content community is trying to halt progress because it fears that change, Shapiro said.

Despite all this, the content community has done a good job of educating the public on what is moral behavior, which should continue -- but sometimes, just because something is wrong doesn’t make it illegal, Shapiro said. The wave of ballyhooed suits over illegal music and movie downloading has scared consumers away from legally using content in creative and innovative ways, added Wargo, “because now there’s this specter of lawsuit, this hand of God that may come crashing down on them.”

### **After the Supreme Court, Congress Will Take Up IP Debate**

Regardless of *MGM v. Grokster* plays out in the Supreme Court in 2 weeks, Capitol Hill will be the battle’s next front, Rep. Rick Boucher (D-Va.) said. In 1984, after the Betamax decision put an entire industry’s future at stake, both sides swarmed Congress. The consumer electronics industry was ready then and should be ready now for another legislative fight, probably in the 2nd half of 2005, Boucher said: “Whoever loses in the Supreme Court will only view that as round one.”

If Grokster loses, Congress is likely to flex its muscle and use legislation put America’s technology sector “back on its feet,” von Lohmann said.

Stakeholders shouldn’t “sit back and hope that the Supreme Court once again gets it right,” he said, plugging his own bill HR-1201, which would codify the 20 year-old Betamax decision. The measure, referred to the House Commerce Committee, remains tough on piracy and would uphold the Digital Millennium Copyright Act’s penalties for offenders.

An overly broad statute would stifle new technology, Boucher warned, conjuring images of a day when libraries would house only digital content, with content now available free on library shelves available for pay on the library shelves of the future.

Sen. Norm Coleman (R-Minn.) urged negotiation, saying the camps should spend the coming few months finding common ground before bringing the mêlée to Capitol Hill. He warned: “Don’t come knocking until you’re done talking.” -- *Andrew Noyes*

### **All for Consumers**

## **Betamax Is Sacred, but Other Agreement Scarce at IP Conference**

Content industry executives entered hostile territory Wed. to discuss P2P sharing at the IP & Creativity conference, sponsored by the CEA. RIAA CEO Mitch Bainwol and MPAA CEO Dan Glickman faced critics on the panel and remained steadfast, despite occasional derisive audience laughter.

“There’s no question there’s harm” from illegal file-sharing, Bainwol said, citing a 30% drop in CD sales the first year P2P sharing took off. Only one study has shown no effect on music sales from infringing downloads, Bainwol said. NetCoalition Exec. Dir. Markham Erickson disputed the cause and effect, saying a “complex series of events” led music sales to drop. These include increased video game sales to young consumers with limited funds.

All panelists agreed the Supreme Court’s Betamax standard should remain but differed on its meaning. Glickman said the content industry simply wanted to stop business models depending completely on infringement, and though so far the music industry has suffered more, “the proverbial wolf is at the door” for video and film producers. When Bainwol asked Gary Shapiro, CEO of CEA, why he kept implying the RIAA opposed the Sony Betamax standard, Shapiro retorted, “I read your brief,” tickling the audience into laughter and applause.

Both sides claimed the average consumer as the object of their concern (see separate report above). “Have we gone as far as we can go [with new business models]? Absolutely not,” said Glickman: The legal distribution business needs to provide “a reasonable cost and a hassle-free manner” for consumers to use them. Shapiro said the content industry has no clue how consumers think: “They feel the prices are unfair... they think they’re getting ripped off” when a CD costing as much as a DVD has much less content. Shapiro savaged the RIAA and MPAA for succeeding in widening the legal reach of copyright several times in recent decades. “Consumers are quite confused” about what the law lets them do with their own purchased audio and video content, he said. “You cannot build culture on a lockdown copyright law,” he said. Content industries “are missing an opportunity today” by fighting low-quality MP3s and DVD ripping from P2P networks instead of meeting consumer demand for high-quality audio and video at a better price, Shapiro said. Erickson said the Grokster ruling that Bainwol favors would hurt all information technology companies and their venture capital sources. Shapiro added: “Technology companies [are] in litigation up to their gazongas” because of the content industry and legislation.

The govt.’s competence to decide intellectual property issues was disputed vigorously by Shapiro and Erickson. After Bainwol noted the govt. filed an amicus brief on MGM’s behalf in Grokster and called it a “well-considered neutral party,” Shapiro shot back: “Clearly they’re wrong in this case” and said several consumer groups, library associations and others sided against the content industries. Glickman said the govt. wasn’t attacking technology itself: “They were looking at this business model,” accenting the last 3 words. Erickson mocked Bainwol’s trust in govt., saying a Grokster brief filed by computer science professors criticized the govt. for not knowing “the entire architecture of the Internet itself is built on peer to peer” technology and the principle of “anytime, anywhere, anything.” Glickman disagreed: When “the architecture [of P2P networks] is so inherently encouraging... to illegal activity,” Congress and the courts must step in. Bainwol and Erickson then argued over whether P2P firms could implement filtering technologies successfully.

Whether intellectual property differs fundamentally from physical property was a source of contention. Shapiro compared file-sharing to water, saying people pay for higher quality water and will pay for higher quality music even with free music easily available via P2P networks. Bainwol ridiculed Shapiro’s analogy, saying water has costs before it reaches the tap and bears no resemblance to intellectual property. “We’re licensing [online content] aggressively” through online distribution service Snocap and other companies, but they can’t hope to draw consumers if Grokster’s business model is viable. He said Shapiro believed a single legitimate use of Grokster, despite 100 million theoretical infringing uses, validated the legality of its business model: “The fact that [intellectual property decisions] are tough does not mean that we should eviscerate property rights.”

Panelists were hopeful they could collaborate eventually and maybe the issues would be obsolete because of better technology. “Hopefully this debate we’re having is a 1-2 year debate,” Erickson said. -- *Greg Piper*

### ‘Cautious Approach’

## **Legality, Technology of Electronic Notarization At Issue**

A May Hague Conference on Private International Law forum will address a potential fight over the seemingly innocuous issue of electronic notarization of public documents. Some say e-notarizations and e-apostils –

which authenticate notary signatures in documents sent abroad -- are legal under various U.S. and model laws. But U.S. notaries say those laws only pave the way for eventual e-notarization. Opinions vary over whether to use a particular technology and whether e-notarizations and e-apostils should come under more stringent requirements than paper counterparts.

The conference will consider whether e-notarizations and e-apostils fall under the Apostille Convention. It also will look at technologies being developed for e-notarization and whether they're relevant to e-apostils.

Four main issues surround e-notarization, said **Conn. lawyer Houston Lowry.** Though not complex, he said, problems arise when people try to exploit them. The first is whether e-notarization is legally doable. Lowry thinks it is under the United Nations Commission on International Trade Law Model Law on Electronic Commerce, the Uniform Electronic Transactions Act (UETA) and the U.S. Electronic Signatures in Global and National Commerce (E-Sign) Act.

Then there's the question of whether there should there be e-apostils under the Hague Legalization Convention. "I would say yes, although there presently is no affirmative legal instrument on point," Lowry said. The Hague Conference will likely issue guidelines on this soon, he said.

The 3rd issue is whether one technology should be favored over another for e-notarizations and e-apostils, Lowry said. "Past experience indicates no, but I expect there will be a fight on this issue." He expects the U.S. govt. to push for use of Adobe's electronic signing feature, which lets digital signatures be verified with free software, making it easier to use than mechanisms with proprietary systems.

The final issue is whether e-notarizations should come under special requirements not imposed on paper counterparts, Lowry said. In the past, the U.S. position has been "no," he said, but each vendor wants its system adopted exclusively. U.S. law bars requirements on electronic matters from being more onerous than those opposed on paper-base systems, he said: "However, the notaries seem to feel to the contrary."

The National Notary Assn. (NNA) says neither UETA nor E-Sign permits electronic notarization, a spokesman said. Their intent is "really to provide electronic signatures the same legal guarantees that pen-and-ink signatures have; therefore, UETA and E-Sign allow for the *eventual* practice of electronic notarization," he said.

A few states have passed laws purporting to permit e-notarization, the NNA spokesman said, but in fact these laws merely let people use digital certificate technology to sign an e-document instead of appearing before a notary. Because those laws violated core principles of notarization -- in particular, the signer's physical presence before the notary -- and because digital certificate technology never took off in the U.S., the laws didn't trigger long-term programs, he said.

Since adopting UETA and E-Sign, most states have reserved the right to impose more specific laws and rules to govern notaries performing e-notarization, the NNA spokesman said. "Because the public must trust notaries, states have wisely, in our opinion, taken time to review and consider both the benefits and security concerns surrounding electronic signatures to support electronic notarization," he said. The NNA "supports this cautious approach."

Notaries believe industry and govt. will come up with multiple technologies for performing secure e-notarizations, the NNA spokesman said. However, he said, because notaries are criminally and civilly liable for the acts they perform, "we encourage notaries to care very much about the technologies they choose to use." The NNA wants consistent, state-sponsored e-notarization rules that reflect emerging and existing standards while keeping the important safeguards of traditional notarial customs and practice in mind, the spokesman said.

Digital signatures are sound technology when used properly, the NNA spokesman said. But the group is concerned that digital signatures not be issued haphazardly. While they can "be an excellent fraud-detering instrument in the hands of a bona fide notary public," he said, the same technology can foster fraud in the hands of a criminal.

E-notarization isn't as advanced in Europe as in the U.S., said Tomasz Kozlowski, secy.-gen. of AVRIO-Advocati, a European-based legal network. European notaries public have much greater responsibilities than their U.S. counterparts, he said. U.S. notaries certify only that a particular person has signed a document; European notaries also are responsible for document content, Kozlowski said. E-notarization isn't likely to happen soon in Europe, he said, because there's no agreement on a specific technology.

The Hague Conference forum is May 30-31 in Las Vegas. It's hosted by NNA and the International Union of Latin Notaries. -- *Dugie Standeford*

## Capitol Hill

Wed.'s House Telecom Subcommittee hearing on VoIP focused mostly on how the new telecom service fits in with the Universal Service Fund (USF) and intercarrier compensation. House Commerce Committee Vice Chmn. Pickering (R-Miss.) used the hearing to announce he would reintroduce VoIP legislation. The bill will have similarities to the legislation he introduced last year. It was designed to preempt state regulation of VoIP, an issue apparently resolved by the FCC's ruling in the Vonage petition. But Pickering said that it was also "critical" to address intercarrier compensation in VoIP legislation. His bill would establish a deadline for the FCC to finish its review of intercarrier compensation regulations. Pickering suggested a deadline, and all witness at the hearing agreed. But Mark Shlanta, CEO of S.D. Network Communications, said the review period should be 12-18 months instead of the 180 days Pickering proposed. Pickering said a compromise of 9 months would be acceptable. House Commerce Committee Chmn. Barton (R-Tex.) asked the witnesses if they would support reducing or eliminating USF. "Reform it, don't repeal it," Carl Grivner, CEO of XO Communications, said of USF. Grivner said it should be equally applicable to all carriers, including cable VoIP providers. Barton asked if anyone on the panel would vote to repeal USF. When none replied, Barton said: "Now that we've determined that you're for USF, are you willing to pay into it?" Thomas Rutledge, COO of Cablevision Systems and representing NCTA, said cable is willing to support USF. However, he said the definition of USF needed to be updated to clarify exactly what services could be provided with USF funds. House Telecom Subcommittee Chmn. Upton (R-Mich.) asked the witnesses if USF should be financed with a flat fee for each phone line. Most opposed such a system. Paul Erickson, SunRocket chmn., said assessing USF as a percentage of revenue would be the easiest system. CenturyTel Pres. and COO Karen Puckett and Grivner said they also would support a revenue percentage formula. Barton said he thought VoIP was a poor acronym for Internet phone service and suggested his own: BITS, for Broadband Internet telephone service. He said it was "food for thought" and he would consider other acronyms. -- *TL*

## Agencies

The General Accountability Office (GAO) found systemic weaknesses in the FCC's oversight of the E-rate program. House Commerce Committee Chmn. Barton (R-Tex.) vowed to move legislation that would apply "common sense to the E-rate program." At a hearing Wed. of the House Commerce Oversight & Investigations Subcommittee, the GAO said the FCC has been slow to respond to audits of E-rate recipients and has not developed useful goals and measurements for assessing the program. The GAO found that the FCC couldn't evaluate how much E-rate contributed to improved Internet connectivity of public schools because E-rate funding isn't separated from other state and local funding. FCC oversight of E-rate is flawed, GAO said, because the Commission mainly uses rulemakings, audits and appeals to oversee the program. FCC rulemakings often lack specificity and have resulted in distinctions between FCC's rules and procedures put in place by the Universal Service Administration Co. GAO also noted there was an extensive backlog of audits. In a written statement, Barton said: "Unscrupulous vendors have fleeced the program while underserved communities and

telephone customers are paying the price. The FCC, these merchants and certain schools all must share in the blame for this disgrace. Now, seven years and billions of dollars later, those in charge can't tell us how rampant the fraud is or how they intend to stop it. Enough is enough." Barton said E-rate reform could be part of an overall Telecom Act reform bill.

## Courts

The Klafter & Olsen law firm filed a class-action complaint against Viisage Technology for securities fraud in the U.S. District Court, Boston. The suit alleges Viisage, an identity verification provider, inflated its revenues and its internal accounting controls violated Sarbanes-Oxley provisions. The firm said its suit involves allegations starting July 22, 2004; other suits against Viisage date from Oct. 25, 2004.

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Research in Motion (RIM) and NTP signed a binding term sheet to resolve litigation between them. NTP will grant RIM an "unfettered right" to continue its BlackBerry service without objections from NTP over patent rights. RIM will pay \$450 million to NTP for all claims to date and a perpetual license.

## Privacy

An online database of informants and law enforcement agents for use by attorneys and defendants has quadrupled to 800 records in 6 months, WhosARat.com said Wed. Criticism by law enforcement led the site to disable its photo-posting feature for agents but not informants.

## Industry Notes

As part of their "continuing comprehensive evaluation" of BPL technology, the National Rural Electric Cooperative Assn. (NRECA) and the National Rural Telecom Coop (NRTC) are collaborating in 2 BPL pilots in rural communities. The pilots will involve the Southern Md. Electric Cooperative in Hughesville and West Fla. Electric Cooperative in Graceville. The groups said the 2 cooperatives were chosen to see how the technology performed in Gulf coast weather, high temperatures, humidity, frequent lightning storms and dense distribution of customers. "We're looking for just the facts about BPL performance," said NRECA's Martin Gordon. Owning 1/2 the country's distribution lines, electric cooperatives are in a "unique" position, he said. The pilots will help the groups' members make informed decisions on deploying BPL by measuring performance standards such as bandwidth, latency and reliability vs. distance, subscriber density and usage levels.

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Harris Corp., which worked with NPR on HD Radio multichannel testing, said it would begin marketing "exporters" in April that will let stations multiplex their main digital channel audio feed. The company said it was encouraged by the FCC's recent clarification that the Commission would continue to provide experimental authorization for stations for HD Radio multicasting. NPR pioneered the digital secondary audio channel through its Tomorrow Radio project. Harris said once FCC gives approval for multicasting, the company expects commercial radio stations to adopt the technology to "create new business models." Multichannel broadcasting is the "most exciting" aspect of HD Radio adoption because beyond merely improved radio quality it offers new revenue streams for stations, said Harris Vp Debra Huttenberg.

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Yahoo is beta testing a personal website tool, Yahoo 360, that integrates blogging with existing company services such as photo-posting, instant messaging, local reviews and streaming radio. A Yahoo ID is required to use the tool. Last year, Microsoft launched a similar service called MSN Spaces.

