

January 18, 2005

**Comments of Bertelsmann AG
to the Federal Trade Commission in relation to the Workshop,
Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues**

Bertelsmann AG (“Bertelsmann”) thanks the Commission for the opportunity to submit these comments in connection with the FTC’s recent public workshop on Peer-to-Peer File-Sharing Technology (“P2P file-sharing”). Bertelsmann is one of the largest media companies in the world, engaged in the full spectrum of media activities, including book and periodical publication and distribution, television broadcasting, and music recording, publishing, and CD manufacturing. Bertelsmann has a significant U.S. presence through, among other activities, its Random House and Gruner + Jahr publishing operations, as well as its 50% ownership interest in Sony BMG Music Entertainment.

Our nation’s system of copyright protection is a cornerstone of Bertelmann’s business. Bertelsmann invests extensively in the fostering, protection and enforcement of the creative expression of its writers, artists, and producers. It and its creative collaborators are also beneficiaries of the rich store of creative expression on which they, and society at large, regularly draw. Bertelsmann accordingly is keenly interested in legislative, regulatory, and other policy initiatives bearing on the creation, publication and distribution of, as well as access to, original works of authorship, including over digital media.

As an overarching proposition, Bertelsmann believes that the current copyright law generally serves the interests of creators and users in an equitable fashion. Experience under U.S. copyright law has demonstrated that fine-tuning of the law is

periodically warranted, principally to deal with new technological developments.

However, that experience also has shown that a measured approach to addressing the challenges of new technology is generally preferential to efforts at “quick fixes” that can have the undesirable effects of stifling new technology or to precipitous efforts to fix legislatively what market forces themselves may be better at addressing over time.

The developing digital marketplace for the distribution of music exemplifies the need both to examine critically and analytically the adequacy of existing copyright law in addressing, inter alia, P2P file-sharing, as well as to act deliberately so as not to stifle the very technology that can, properly harnessed, bring great societal benefits in enriching and enhancing public access to the widest range of creative expression.

For these reasons, Bertelsmann takes a strong interest in the subject of the Commission’s public workshop and applauds the FTC’s efforts to better understand this technology and the consumer-protection and competition issues implicated by P2P file-sharing technology. The presentations made during the FTC’s workshop richly illustrate the many difficult legal and policy issues implicated by this technology and the diversity of legitimate viewpoints for addressing these issues. The presentations also illustrate the variety of technology and market-based solutions that are being developed to allow consumers and artists to realize the promise of P2P technology, while ensuring that those who invest in the development of content are able to secure a fair return for their work.

For example, there have been recent announcements of cooperation among content providers and providers of P2P file-sharing services to partner to this end, such as “Mashboxx,” a venture recently formed between Sony BMG and Grokster that will seek to employ systems that enable music users to sample and discover new music via file-

sharing, while promoting payment for the music that they decide to retain more permanently. Bertelsmann is encouraged by such partnering and hopeful that the music industry and file-sharing services will be able to resolve their differences by working together. In addition, there are a variety of developing technologies that aim to provide vehicles for the payment of downloaded music, thereby harnessing the force of, and consumer appetite for, P2P file-sharing services, while generating a stream of revenue for composers and recording artists, and their corporate patrons. As another example, various digital rights management technologies are being developed by content owners to address the unauthorized reproduction and distribution of copyrighted material via file-sharing technology. While progress has been significant in some respects, the presentations make clear that development of these solutions is still nascent and requires time to continue to evolve. Bertelsmann appreciates and strongly supports such developments, which will promote the interests of copyright owners and consumers alike.

Moreover, numerous legal issues remain open in a variety of areas, most notably the standard for infringement liability to be imposed on those involved in providing file-sharing technologies. The Supreme Court's decision to hear the *Grokster* case is itself indicative that the law will continue to evolve in the short-term. As discussed throughout the workshop, the *Grokster* litigation raises the important question of the standards of liability to be imposed on providers of file-sharing services and the extent to which the Supreme Court's 1984 decision in the *Sony Betamax* case can continue to provide workable parameters for assessing such issues. The Supreme Court's determination to hear the *Grokster* case underscores the wisdom of caution in any

legislative or regulatory initiatives in this area until such time that the Court has issued a decision.

With regard to standards for infringement liability, Bertelsmann would like to draw the Commission's attention to an issue that, while not directly included in the questions that the Commission is seeking to address, is relevant to the current landscape affecting P2P technology and the incentives for funding entities to invest in technologies that will promote and facilitate the digital distribution of music. That issue involves the standards for liability that may be imposed on various participants in the technology-development process in situations where P2P or similar file-sharing technologies are subject to claims that they enable copyright infringement by the users of the technologies. Bertelsmann is concerned about the possibility that new liability standards -- sought to be imposed primarily via the passage of legislation that would create new causes of action for copyright infringement -- may inhibit the development of new technologies or unfairly impose liability on those who fund enterprises that develop and deploy new technologies, including lenders and venture capital investors, among others, especially where such new standards are proposed to be imposed on funding activities that occurred some time ago and may no longer be on-going. Recent legislative initiatives in the Congress with respect to legislation to impose liability for the "inducement" of copyright infringement could have such adverse and unfair effects, depending, of course, on the precise standards that are put forward to define what actions constitute "inducement" and on whether the new standards are made applicable to pending cases involving activities no longer ongoing.

Bertelsmann believes that the Commission should be cognizant of these concerns and the need for very careful balancing of interests when such new liability standards are considered, in the event that the Commission is asked for its views on these legislative proposals. If the Commission's views on these proposals are sought, or if the Commission on its own decides to evaluate possible liability standards, Bertelsmann requests that the Commission undertake a specific further public inquiry so that it can be informed in detail about the issues involved.

Bertelsmann commends the Commission for its ongoing efforts to understand this technology and for promoting a public dialogue concerning the same. We thank the Commission for the opportunity to set forth these brief comments and look forward to the opportunity to comment with respect to any follow-on activities to be undertaken by the Commission.