

September 28, 2004

The Honorable Bill Frist
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Tom Daschle
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

cc: Members of the Committee on the Judiciary

Re: Markup of S. 2560, the Inducing Infringement of Copyrights Act of 2004

Dear Senators Frist, Daschle, Hatch, and Leahy:

The undersigned companies and organizations write to express our amplified concerns over both the process and the substance pertaining to what we understand to be the current draft of “inducement” legislation. Although a fourth good-faith attempt, this version appears no closer to meeting what we understood to be S. 2560’s original objectives: (1) to differentiate between objectionable and legitimate conduct; (2) to preserve the essence of the *Betamax* holding; and (3) to avoid an unmanageable flood of litigation that would tie up innovators and chill investment.

The new draft, like the original S. 2560, relies on a vague and indeterminate “totality of circumstances” standard of intent. Like the first Copyright Office draft, it predicates liability on undefined “affirmative acts” – but unlike that draft, is not limited to the “dissemination” of works. Rather, the draft is addressed to the very introduction of products and services into commerce, and equates “inducement” with the foreseeability of *any* significant infringement, no matter how positive the potential economic and social contribution of the product or service may be. This extends well beyond any concept that the Copyright Act or the Supreme Court has yet embraced; it would effectively expand copyright monopolies and, correspondingly, devalue patent grants. It thus implies a fundamental realignment of our intellectual property system.

The draft contains a number of apparent exceptions, but all are easily avoided by a plaintiff who divides his allegations into a number of separate “acts.” The “affirmative acts” creating liability under the bill could simply be the (1) design and (2) making available of a multiuse product. In sum, there seems no clear rationale by which it can be interpreted as applying only to the bad actors cited by Senator Hatch, upon introduction of S. 2560, and not to legitimate businesses, individuals, and institutions.

The standard for potential liability – action one could “expect to result in widespread violations” – is entirely novel in the copyright law, and seems considerably easier for a plaintiff

to satisfy than that of the *Betamax* case – or even the standard suggested in the *dissent* in the *Betamax* case. It would seem to subject all who invest, manufacture, or “traffic” in legitimate home, personal recording, and Internet products to a new and unquantifiable risk of litigation. There seems a substantial likelihood that staple hardware and software products that are considered legal today would be found illegal tomorrow. Moreover, the provision mentioning the *Betamax* holding explicitly invites judges to “evolve” its doctrine – a concept that met with universal dismay when advanced on July 22 by the Register of Copyrights.

That these vulnerabilities and uncertainties remain, even though the drafters have recognized and attempted to address many of our concerns, underscores the fact that adding *any* new cause of action to the Copyright Act is a daunting undertaking that requires carefully nuanced drafting to prevent adverse impacts on the many sectors of the economy that copyright law reaches. The present “induce” attempt, like those previous, requires reflection and comment, via hearings, so that the many new terms and concepts may be discussed and vetted publicly. We hope you will respect our concern, as entities participating constructively in this process, that the present draft is not ready for passage out of the Judiciary Committee.

Respectfully submitted,

American Association of Law Libraries
American Conservative Union
AeA (American Electronics Association)
American Library Association
Association of American Universities
Association of Research Libraries
BellSouth Corporation
CNET Networks, Inc.
Computer & Communications Industry
Association
Consumer Electronics Association
Consumer Electronics Retailers Coalition
Consumer Project on Technology
Digital Future Coalition
EarthLink, Inc.
Electronic Frontier Foundation
Electronic Industries Alliance
Foresight Institute
Google
Home Recording Rights Coalition
Ibiquity Digital Corporation
Information Technology Association of
America
Institute of Electrical and Electronics
Engineers-United States of America
IP Justice
MCI
MySQL AB

National Association of State Universities
and Land-Grant Colleges
National Taxpayers Union
NetCoalition
Open Source and Industry Alliance
RadioShack
Panasonic (Matsushita Electric Corp. of
America)
Philips Electronics
Public Knowledge
Red Hat, Inc.
Samsung Electronics America
SBC
Sun Microsystems, Inc.
TechNet
Telecommunications Industry Association
Tennessee Digital Freedom Network
Texas Instruments
Uniden
USACM-US Public Policy Committee of
the Association of Computing Machinery
US Internet Industry Association
US Internet Service Provider Association
(does not include America Online, Inc.)
US Telecomm Association
Verizon
WJR Consulting Inc.
Yahoo!

