

September 3, 2004

Jule L. Sigall  
Associate Register for Policy and International Affairs  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20540-6009

1634 I Street, NW Suite 1100  
Washington, DC 20006  
202.637.9800  
fax 202.637.0968  
<http://www.cdt.org>

Dear Mr. Sigall:

CDT very much appreciates the efforts of the Senate Judiciary Committee staff to include the input of a variety of stakeholders in its deliberations on S.2560. We remain supportive of the efforts of Senators Hatch and Leahy to draft a bill that targets particular kinds of bad conduct that have induced large-scale infringement, without targeting valuable technologies or jeopardizing the judicial precedents that have been essential to the development of valuable new products. We also appreciate the Copyright Office's efforts to listen to broad input and to incorporate specific suggestions raised during our meeting last week, such as focusing on overt acts and adding safe harbors.

Unfortunately, we believe the draft circulated by the Copyright Office yesterday falls short of the goals put forward by the Committee and raises serious concerns about chilling valuable new technologies for accessing and communicating information in the digital age.

While we are still reviewing the bill, our major concern is overbreadth. A broad range of technology developers and service providers, who provide consumers with valuable opportunities to speak and to access information, could credibly be the target of costly and harmful litigation under this draft as written. Particular issues include:

- **Broad Definition of Inducement** - For example, where alternative suggested drafts have focused on repeated actions, a pattern of behavior, financial dependence, or large-scale infringement in order to narrowly target bad actors, this bill would penalize even a single act that could be "reasonably expected to cause" infringement—vastly expanding potential liability. Also, while we appreciate the attempt to focus subsection g(1) on specific exclusive rights, we look forward to understanding the rationale for including more than the distribution right that is most directly implicated by the concerns of the IICA's sponsors.
- **"Overt Acts" Not Narrowly Targeted** - The overt acts listed in subsection g(2) do not provide a narrowly targeted set of activities likely to assuage concerns about broad liability. For example:
  - The list of overt acts in subsection 2 is demonstrative only, providing a floor, not a ceiling, on activities triggering liability.

- Despite the express desire of almost all stakeholders to target behavior and not technologies, subsection (2)(A) is squarely aimed at certain “dissemination technologies” themselves. This provision could sweep in a range of important technologies that should be protected.
- It appears that (2)(B) could implicate services or technologies that shield the identity of users, raising major privacy concerns.
- **Safe Harbors Unclear and Excessively Narrow** - For example, the dependence of (3)(A) on whether a technology is “designed to be used for infringing purposes” makes it vague and of uncertain utility.
- **Interference With Technology Design** - For example, as drafted several provisions (2(B), 2(D), and 3(B)) appear to place unnecessary demands on the design of technologies, by creating new liability risks for those who do not accede to demands to detect infringing uses of technology or take specific corrective measures.

Given these concerns, without significant changes we do not believe the Copyright Office draft represents the best starting point for ongoing discussions. Several good drafts have been put forward by other groups that come much closer to meeting the stated goals of the IICA’s sponsors. We look forward to discussing the ideas in those drafts at Tuesday’s meeting, and to working with you and the Senate Judiciary Committee staff to craft a more narrowly targeted bill.

Sincerely,

/s/

Alan Davidson  
Associate Director

Center for Democracy and Technology  
1634 Eye St. NW  
Suite 1100  
(202) 637-9800