

The Honorable Orrin G. Hatch
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

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

September 28, 2004

Dear Chairman Hatch and Senator Leahy,

We write in response to the latest draft of S.2560, the “Inducing Infringements of Copyright Act,” now scheduled for markup by the Judiciary Committee this week. We commend you for tackling the tough problems raised by large-scale copyright infringement and appreciate the hard work of committee staff to include broad input in its deliberations on S.2560. CDT remains supportive of the goal - articulated by you and other bill sponsors - of narrowly targeting bad actors who intentionally cause large-scale copyright infringement, without banning particular technologies or undermining the legal precedents so important for innovation.

Unfortunately, the latest draft of S.2560 still does not meet this goal, and would chill new technologies valuable to consumers and to communication in the digital age. **Much work remains to be done and we urge you not to pass S.2560 out of Committee at this time.**

As an organization that cares deeply about the success of the Internet as a medium for creative expression and the exchange of ideas, CDT is sympathetic to the concerns that gave rise to S.2560. We believe that authors and creators must be adequately protected to ensure that they are willing to place their content in digital form. We support the PIRATE Act and other targeted efforts to improve copyright law. We also support private actions under way to enforce copyright laws, and we remain encouraged by the efforts of the content community to create new digital distribution channels essential to provide good lawful alternatives to file sharing.

At the same time, copyright protection should not come at the cost of important new technologies that enable the lawful free flow of ideas, political discourse, and other valuable communications in the information age. The current draft of S.2560 creates significant risks that those who simply create or distribute these new technologies will face tremendous liability if their tools are also used to infringe copyright. Among the major concerns raised:

- **S.2560 would chill a broad range of valuable technologies-** While the bill creates liability based on intent, it defines that intent as “acts which a reasonable person would expect to result in widespread [infringement].” This broad standard, based on the expected impact of a technology, would sweep in those merely “manufacturing” or “providing” a huge array of valuable consumer technologies. Among the products implicated by this standard and not exempted from the bill:
 - **iTunes** – the cutting-edge digital music software allows millions of people to

- “rip” their CD’s into unprotected MP3 files, burn songs onto CDs, and stream them over a local network – clearly resulting in widespread infringement.
- **Instant Messaging** – the popular communications tool, with its simple file transfer capabilities and buddy lists, allows people to easily share music or other works and clearly results in widespread infringement.
 - **Email** – new email products or services, allowing people to easily attach and send copyrighted works, would clearly result in widespread infringement.

Providers of ISP services, DVD recorders, Internet search tools, home media centers, or even computers could face liability if just a small percentage of people use their products unlawfully, resulting in “widespread infringement.” They face huge monetary damages or injunctions, and could even be forced by courts to redesign their products.

- **The exceptions in S.2560 do not sufficiently protect legitimate activities** – While attempting to be responsive to concerns raised, the exceptions to liability are too narrowly worded to exempt developers and providers of valuable products and services. For example, providers may not be liable “solely” because of technology that results in private non-commercial copying (see (g)(2)(b)). But providers would be liable if bad actors can use the technologies to infringe for financial gain or copying outside the family – as products like iTunes, email, or IM allow, even though they are widely used for non-infringing purposes.
- **S.2560 undermines the *Sony* standard that has been so important to consumers** - Consumers and Internet users have benefited greatly from the innovation made possibly by the legal standard, set forth in the Sony Betamax case, limiting secondary liability for technology that has substantial non-infringing uses. While the bill does say that it preserves the *Sony* standard for other forms of secondary liability, *Sony* does not apply to the new inducement cause of action. *Sony*’s defenses will thus be of little relevance when aggrieved copyright owners sue under the broad new inducement action.

Our understanding is that S.2560 was intended to narrowly target bad behavior by a small set of actors. A number of suggestions have been made that are more likely to meet that goal without unduly chilling valuable technologies: focusing the bill on large-scale public distribution (the problem of greatest concern); defining a pattern or practice of activity needed for liability; punishing those who intend to induce infringement, not simply those who provide products; and clearer exceptions for those whose products are not primarily based on infringement for viability.

CDT remains committed to working with you and with the Committee to take up this very real problem. In the meantime, however, we urge you not to move forward with S.2560 because of the real risks it presents to communication and innovation online.

Sincerely,

Jerry Berman
President
Center for Democracy and Technology

cc: Members of the Committee on the Judiciary