

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

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Dear Chairman Hatch and Senator Leahy,

The Center for Democracy and Technology appreciates your efforts to craft a bill, the "Inducing Infringement of Copyrights Act of 2004" (S.2560), that seeks to target bad actors who intentionally cause copyright infringement. At the same time, credible questions have been raised about the potential unintended consequences of S.2560 as drafted, and we write to request that the Senate Judiciary Committee hold hearings to explore these questions before the Committee takes action.

The Center for Democracy and Technology is sympathetic to the concerns that gave rise to this bill. As an organization that cares about the success of the Internet as a medium for the exchange of ideas, we believe that authors and creators must be protected to ensure that they are willing to place their content in digital form. At the same time, those protections should not themselves inhibit important new products and services that enable the free flow of information online.

Our understanding is that S.2560 is intended to narrowly target bad behavior by those who actively and intentionally cause copyright infringement. We support that goal. We too are worried about the rise of applications whose marketing makes clear that they are to be used to facilitate large-scale infringement of valuable copyrighted works and that are designed to avoid contributory copyright liability. We appreciate the efforts you have made to focus on outlawing bad behavior, not potentially valuable technologies. As Sen. Hatch has said, "[A]ll agree that non-piracy-adapted implementations of P2P could have legitimate and beneficial uses." We also appreciate the intent of the authors to preserve the important *Sony Corp. v. Universal City Studios* decision and avoid chilling innovation. We agree with Sen. Leahy's statement that, "By targeting the illegal conduct of those who have hijacked promising technologies, we can hope that consumers in the future have more outlets to purchase creative works in a convenient, portable digital format."

At the same time, however, substantial questions have been raised about whether S.2560 achieves these goals, and the potential effects of S.2560 on legitimate and valuable

products and services. For example, there appears to be a great deal of confusion as to just what activities by a technology developer might give rise to potential inducement liability. Might the makers of high-capacity music players or DVD-burners be liable under the bill? Could Internet service providers or computer manufacturers be potential targets for use of their products and services for illegal infringement? Will this new private right of action, available to millions of copyright holders, create litigation risks that chill innovation in valuable new technologies, undermining the important principles laid out in *Sony*? There appears to be a great deal of uncertainty about whether the bill, as drafted, is sufficiently limited in its impact to the file-sharing applications at which we understand it is aimed.

Given the potentially broad unintended consequences of S.2560, and the uncertainty that appears to exist about its impact, we believe it is essential to have the concerns that have been raised by the bill aired at a hearing. We look forward to working with you on this issue.

Sincerely,

Jerry Berman
President
Center for Democracy and Technology