

July 6, 2004

The Honorable Orrin G. Hatch
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: S. 2560, the "Inducing Infringement of Copyrights Act of 2004"

Dear Chairman Hatch:

The undersigned organizations and companies respectfully request that you hold hearings on S. 2560, the "Inducing Infringement of Copyrights Act of 2004" before your Committee takes any action, in order to fully explore the critical issues raised by this legislation.

We understand your concerns for protecting children and addressing activity that infringes copyright. We share these concerns. As currently conceived, however, S. 2560 would undermine the 20-year old Supreme Court decision in *Sony v. Universal City Studios*, 464 U.S. 417 (1984) ("*Betamax*"). In *Betamax*, the Supreme Court held that the manufacturer of a product could not be held secondarily liable for infringing uses of the product by others so long as the product was capable of substantial noninfringing uses. In other words, technology, in and of itself, could rarely be considered unlawful in the copyright context.

This clear standard has given venture capitalists, engineers, and manufacturers the confidence and certainty that they could invest their resources in developing a wide range of consumer products without facing copyright liability. These products include personal computers, scanners, CD burners, modems, instant messaging products, and the software that enables them to operate.

S. 2560 would eliminate this confidence and certainty. It would provide plaintiffs with a new cause of action to sue a manufacturer based on the technology if the product is merely capable of being used to engage in copyright infringement. The legislation would provide copyright owners with a new legal avenue to attack every new technology about which a copyright owner is concerned. Even a product review that discusses how a product works could be implicated by the bill.

This new threat would chill innovation and drive investment in technology (and accompanying jobs) overseas. By combining (1) a new and separate cause of action for "intentional inducement," (2) a lower civil, rather than higher criminal, standard of

liability, and (3) a circumstantially “reasonable” test, S. 2650 would seem to ensure that massive and intrusive discovery proceedings, and a jury trial, would await any innovator or investor who introduces to the market a product that some copyright owner, someplace, believes will “induce” infringement. (There are many, many more copyright owners than there are patent owners, and the burden of proof to establish at least a *prima facie* case of copyright infringement is minimal rather than significant and specific as in patent cases.)

While we agree with the need to penalize those who intentionally cause copyright infringement, we are concerned that S. 2560 would have the unintended consequence of punishing individuals and companies that create and distribute consumer, business, and professional products that might be used by others for unlawful purposes. For these reasons, we hope you will hold hearings to assure that any unintended consequence can be fully explored and avoided. Congress should not rush to revise fundamentally a well-established Supreme Court doctrine without a process in which the implications for the individuals and the industries that have relied on it for the last two decades are fully and publicly aired and discussed.

Sincerely,

AeA (American Electronics Association)
Alpine Electronics of America, Inc.
American Association of Law Libraries
American Library Association
Association of Research Libraries
California ISP Association
CNET Networks, Inc.
Computer & Communications Industry
Association
Consumer Electronics Association
[Consumer Electronics Retailers
Coalition](#)
DigitalConsumer.org
Digital Future Coalition
eBay, Inc.
Electronic Frontier Foundation
Electronic Industries Alliance
FatCow Hosting, L.L.C.
Google
Home Recording Rights Coalition
Intel Corporation
Matsushita Electric Corporation of
America
MCI

Monster Cable Products, Inc.
NetCoalition
NetStrategies, Inc.
North American Retail Dealers
Association
Novell
Open Source and Industry Alliance
Public Knowledge
Sharp Electronics Corporation
SilverLynx, Inc.
Sun Microsystems, Inc.
Telecommunications Industry
Association
The River
The Technology Network (TechNet)
TiVo Inc.
Uniden America Corporation
Verizon
Virginia ISP Association
Washington ISP Association
WJR Consulting, Inc.
Wyoming ISP Association
Yahoo! Inc.

cc: Majority Leader Bill First
Minority Leader Tom Daschle
Senator Patrick Leahy, Ranking Member
Senator Charles E. Grassley
Senator Arlen Specter
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator Larry E. Craig
Senator Saxby Chambliss
Senator John Cornyn
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herb Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin
Senator John Edwards
Senator Barbara Boxer