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