August 24, 2004

BRIEF DESCRIPTION
OF
"DON'T INDUCE" ALTERNATIVE

The proposed alternative to S. 2560 would establish a new subsection of the Copyright Act that would impose liability on any person who actively distributes in commerce a computer program that is specifically designed for use by individuals to engage in the indiscriminate, mass infringing distribution to the public of copyrighted works with the intent to reap financial gain by doing so.

To establish the existence of such intent, a plaintiff would have to demonstrate that the predominant use of the computer program is the mass, indiscriminate infringing redistribution of copyrighted works; that the commercial viability of the computer program depends on such widespread redistribution of copyrighted works; and that the defendant had undertaken conscious, recurring, persistent, and deliberate acts that encouraged another person to engage in redistribution of copyrighted works on that massive a scale.

The draft legislation provides complete exemptions from liability for ISPs, venture capitalists, credit card companies, banks, advertising agencies, IT help desks, and others for providing routine services for their customers and librarians for serving their patrons.

To discourage frivolous litigation, the draft alternative allows for recovery of full costs, including reasonable attorney's fees, by the prevailing party and it permits a judge to apply monetary sanctions under Rule 11, Federal Rules of Civil Procedure, at triple the normal level.

Finally, the draft legislation codifies the Supreme Court's *Betamax* decision, confirming that a person or company may--without fear of liability--manufacture or distribute a hardware or software product that is capable of commercially significant non-infringing uses.

August 24, 2004

The Honorable Bill Frist
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Tom Daschle
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senators Frist, Daschle, Hatch, and Leahy:

In response to the invitation to witnesses at the hearing before the Committee on the Judiciary, we are pleased to forward the attached draft alternative to S. 2560, the Induce Act.

In your letter to the Register of Copyrights, you expressed interest in a "technology-neutral law directed at a small set of bad actors while protecting our legitimate technology industries from frivolous litigation." We have developed such an alternative that would address mass, indiscriminate infringing conduct while preserving the Supreme Court's *Betamax* decision, the Magna Carta of the technology industry which is in no small measure responsible for our nation's preeminence in technological innovation and entrepreneurship. We believe that the enclosed draft meets these goals and serves as the best platform for the discussion of the interests of all concerned parties.

We look forward to discussions with your staff and the Register of Copyrights on the basis of the enclosed alternative. Thank you for your consideration.

Sincerely yours,

American Association of Law Libraries
Association of Research Libraries
Computer & Communications Industry Association
Consumer Electronics Retailers Coalition
Digital Future Coalition
MCI
SBC
U.S. Internet Service Provider Association*
Verizon

American Library Association
BellSouth Corporation
Consumer Electronics Association
DigitalConsumer.org
Home Recording Rights Coalition
Public Knowledge
U.S. Internet Industry Association
U.S. Telecomm Association

cc: The Honorable Marybeth Peters
Register of Copyrights

* BellSouth Corporation, Earthlink, MCI, SAVVIS, SBC, and Verizon

DRAFT AMENDMENT NO. _____ Calendar No. ____

Purpose: To discourage individuals from encouraging mass, indiscriminate copyright infringement; to encourage innovation and technological development; and for other purposes.

IN THE SENATE OF THE UNITED STATES **108th Cong. 2nd Sess.**

S. 2560

To amend chapter 5 of title 17, United States Code, relating to inducement of copyright infringement, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

Strike all after the enacting clause and insert:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Discouraging Online Networked Trafficking Inducement Act of 2004'.

"SEC. 2. INDISCRIMINATE, MASS INFRINGING DISTRIBUTION OF COPYRIGHTED WORKS.

"Section 501 of title, 17, United States Code, is amended by adding at the end the following:

"(g)(1) Whoever actively distributes in commerce a computer program that is specifically designed for use by individuals to engage in the indiscriminate, mass infringing distribution to the public of copies or phonorecords of copyrighted works over digital networks, with the specific and actual intent to reap financial gain by encouraging such individuals to engage in such indiscriminate, mass infringing distribution, shall be liable as an infringer.

"(2) For purposes of this subsection and without limiting such other evidence as may be relevant to demonstrating whether a person had the specific and actual intent necessary to violate paragraph (1), a person shall not be deemed to have such specific and actual intent unless--

"(A) the predominant use of the computer program is the mass, indiscriminate infringing redistribution to the public of copies or phonorecords of copyrighted works;

"(B) the commercial viability of the computer program depends on, and the predominant revenues derived by the distributor from the computer program are derived from, its use for such mass, indiscriminate infringing redistribution; and

"(C) the person has undertaken conscious, recurring, persistent, and deliberate acts that encouraged another person to commit such mass, indiscriminate infringing redistribution or absent a legitimate purpose actively interfered with the ability of copyright owners to detect and prosecute such mass, indiscriminate infringing redistribution.

"(3) Limitations on liability.

"(A) A service provider as defined in 17 U.S.C. 512(k)(1)(B) whose service is used by a third party to distribute or that facilitates a third party's distribution of a computer program shall not be liable under paragraph (1) for providing or operating such service.

"(B) Actual or constructive knowledge of the use of a computer program is not sufficient to demonstrate the requisite specific intent under paragraph (1).

"(C) A person who is not a distributor of a computer program that is specifically designed for use by individuals to engage in the indiscriminate, mass infringing distribution to the public of copies or phonorecords of copyrighted works over digital networks shall not be liable under paragraph (1) notwithstanding any contribution to or benefit from

such distribution. By way of example and not limitation, providing—

"(i) venture capital, financial assistance, payment services, or financial services,

"(ii) advertising, advertising services, or product reviews, or

"(iii) information or support to users, including via manuals and user handbooks pertaining to a computer program, assistance or directions for using such a program through a company's online help system or telephone help services, and library services

shall not be a basis for liability under paragraph (1).

"(D) In or as part of a consumer electronics or information technology product or service, providing navigation or access functions, recording functions, storage capacity, electronic program search and indexing functions, or an electronic program guide shall not separately or in combination be a basis for liability under this paragraph.

"(E) An email function does not provide mass, indiscriminate distribution of a work.

"(4) In any action under paragraph (1), the facts supporting such allegation must be pleaded with particularity.

"(5) Remedies for a violation of paragraph (1) shall be limited to—

"(A) an injunction against such intentional commercial activity; and

"(B) actual damages for infringement of a work for which the defendant had specific and actual knowledge the work would be infringed.".

"SEC. 3. REMEDIES FOR BASELESS LAWSUITS.

"In any civil action brought under section 501(g)—

"(a) The court shall allow recovery of full costs, including reasonable attorney's fees, by the prevailing party; and

"(b) Monetary sanctions under Rule 11, Federal Rules of Civil Procedure, shall be trebled."

"SEC. 4. CODIFICATION OF SUPREME COURT PRECEDENT.

"Except as provided under section 501(g)(1), it shall not be a violation of the Copyright Act to manufacture or distribute a hardware or software product that is capable of commercially significant noninfringing use.".