Statement of

The Honorable Orrin Hatch

United States Senator
Utah
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"Protecting Innovation and Art while Preventing Piracy"

At this hearing, leading experts on the intersection of copyright law and technology will share their views on how this Committee can best restore the ability of copyright holders to challenge the large, for-profit global piracy rings that threaten the future of today's cinema and recording industries. Research now suggests that these piracy rings - which call themselves filesharing networks - will create between 12 and 24 billion infringing copies this year alone. This unprecedented level of piracy fundamentally threatens America's world-leading music, movie and software industries and the future of legitimate Internet commerce.

The architects of this filesharing piracy make millions of dollars while attempting to avoid any personal risk of the severe civil and criminal penalties for copyright infringement. I think all here today would agree that these pernicious schemes to encourage others - and unfortunately these are mostly kids - to break federal law allows these pirates to collect huge revenues while subjecting users to the risk of prison or crippling damage awards.

To implement their schemes, the architects of filesharing piracy must encourage users to infringe copyrights in two different ways. First, they must encourage users to infringe copyrights by downloading infringing copies of works. This is an easy task because downloading users get for free valuable works that they would otherwise have to purchase. Unsurprisingly, the user-interfaces of most filesharing software provide no warnings about the prevalence of infringing files or the severity of the civil and criminal penalties for succumbing to the pervasive temptation to download them.

But infringing downloads cannot occur unless infringing files are available for download. The architects of filesharing piracy must thus encourage users to infringe copyrights again by uploading files for distribution to millions of strangers. This is a difficult task: A user infringing by uploading gets nothing in return for his or her illegal act except a risk of prosecution.

Free-riding downloaders are unlikely to become altruistic uploaders, so most filesharing software automates the decision to upload: When used as intended, this software automatically redistributes every file downloaded. This makes uploading and redistribution automatic and invisible to the average user. This design ensures that while an infringing download requires a conscious choice, the separate and more dangerous infringing act of uploading usually does not.

Automatic uploading ensures that many free-riding downloaders will unwittingly turn their home computers into global piracy distribution centers. Harvard's Berkman Center for the Internet and Society warns that it can be extremely difficult for a non-expert computer user to shut down this

automatic redistribution. The Center further warns that the complexity of Kazaa's installation and disabling functions can leave users unaware that they are distributing infringing files to potentially millions of strangers.

Filesharing software also automates infringing redistribution in other ways. For example, some distributors, like Bearshare, use installation wizards that - by default - cause users to redistribute every media file on their computer. This automatically turns people who have copied music CDs onto their computers for personal use into global redistributors of entire music collections. Such wizards can automatically create high-volume infringers and enforcement targets.

There can be no doubt that automating redistribution induces mass infringement that would otherwise never occur. For example, here is the sworn testimony of one user of filesharing software who lost her life savings in an uploading-related settlement:

I never willingly shared files with other users.... As far as I was concerned, the music I downloaded was for home, personal use.... I downloaded songs I already owned on CD because I didn't want to mix them manually.... I don't know how to "upload" songs on the computer either. As far as I was concerned copyright infringement was what the people in Chinatown hawking bootlegged and fake CDs on the street corner were doing.

This testimony captures the problem: Unwitting consumers can break the law, subjecting themselves to significant liability and lawsuits that no one wants to be forced to bring.

The design of some filesharing software thus enables its distributors to automate, induce, and profit from copyright piracy. We must stop these for-profit commercial piracy operations. They threaten the future of artists, legal commerce, and all but their most cautious and expert users. Indeed, I suspect that this piracy continues today only because its proponents have become adept at playing one branch of the federal government against another.

For example, Sharman Networks, the distributors of Kazaa, recently told the Ninth Circuit that courts must await legislative action on filesharing piracy: Here, legislative action, not judicial law making, is particularly needed because political issues of comity are implicated in the legal subject matter. Yesterday, Sharman told Congress that legislative action on filesharing piracy must await the courts: [I]t has been Congress' long-established practice to prudently refrain from intervening in active litigation. Passage of S. 2560, without awaiting final adjudication of [Grokster], would set the precedent for powerful interests to seek Congressional action challenging the outcomes of civil trials.

In short, Sharman is telling the courts that they must do nothing until Congress acts and then telling Congress that it must not act until the courts finish doing nothing. This tactic of delay and obfuscation is not isolated: In the appeal of Grokster, over 42 parties and amici argued that judges must perpetuate any absurd results flowing from judge-made secondary-liability rules because only Congress has the competence to adjust these judge-made rules.

This exercise in self-contradiction may produce paralysis, but at a high price. Congress has always given courts flexibility to adapt secondary liability rules. Courts exercised that power most famously in the Sony-Betamax case. In Sony, a 5-to-4 majority of the Supreme Court

altered the balance between copyrights and copying technologies by narrowing the prevailing secondary-liability rule. Sony narrowed that rule as to a small class of defendants by importing the substantial-noninfringing-use rule that Congress had codified only in the Patent Act. Consequently, anyone who argues that judges lack the competence to adjust secondary liability rules to balance the interests of copyrights and technology argues that Sony-Betamax is illegitimate and wrongly decided. I do not agree with that argument - and I doubt that its apparent proponents do either.

To address this problem, Senator Leahy and I introduced S. 2560, the Inducing Infringement of Copyrights Act. The Act provides that the courts can impose secondary liability upon those who intend to induce copyright infringement. We developed this approach with the help and support of leading technology companies. We want to continue to work with interested parties to make refinements that will help us achieve the bill's intent.

The approach taken in S. 2560 is intended to have three key attributes.

First, S. 2560 is technology neutral: It does not single out peer-to-peer networking technology for punitive regulation just because a few bad actors have misused it. This technology has intriguing, legitimate uses: Pioneering companies like Wurld Media, Snowcap, and UniConnect Software in Utah are developing innovative and legitimate new peer-to-peer services for consumers. S. 2560 thus targets only bad behavior - and only intentional behavior that is bad enough to trigger criminal liability under existing law. This type of behavior-based, technology-neutral approach has been long advocated by technology interests.

Second, S. 2560 uses a proven model for structuring secondary liability. The substantial-noninfringing-use rule that Sony imported from the Patent Act coexists there alongside liability for intent to induce infringement - a concept that the Patent Act calls active inducement. This proven model can address cases of intent to induce infringement that were explicitly not covered or addressed by the Supreme Court in Sony.

And third, it is our intent that S. 2560 change the law of contributory liability only for a very narrow class of defendants. It is our expectation that most defendants will never be affected by S. 2560 because they already face broader liability for inducing copyright infringement. In 1976, Congress codified its intent to continue imposing liability upon contributory infringers. Both then and now, the prevailing rule for contributory infringement imposes liability upon anyone who knows or has reason to know of infringing activity and induces, causes or materially contributes to the infringing conduct of another. For the overwhelming majority of defendants governed by this rule of liability for knowing inducement, no additional liability results from liability for intentional inducement.

Nor do we intend to affect defendants for whom Congress or courts have narrowed the general rule of secondary liability for knowing inducement. In the Digital Millennium Copyright Act, Congress created safe harbors for certain internet service providers. Their requirements substitute for other forms of secondary liability, so ISPs operating within a safe harbor are not subject to liability under S. 2560.

It is also not our intent to affect distributors of copying devices who merely know that their devices can be or are being used by others to make infringing copies. In Sony, the Supreme Court narrowed the scope of secondary liability as to these defendants. Sony also held that evidence showing that a distributor of copying devices knew that its devices could be used to infringe provides no evidence of intent to induce infringement. This ruling checks potential abuse of an intentional-inducement claim, and S. 2560 preserves it.

By preserving the general rule of liability for knowing inducement and its DMCA and Sony limitations, S. 2560 thus affects only of distributors of copying devices who intend to induce infringing uses of their devices. In the Napster and Grokster cases, such distributors distracted courts by raising issues of non-infringing uses that should have been as irrelevant as they were to the defendants' business plans. S. 2560 will end the confusion caused by these flawed analyses.

As our hearing today will show, some technology companies have expressed concerns that claims for intentional inducement might be misused against companies that merely sell copying devices. We do not believe this to be the case, but are willing to enter into a constructive dialogue to ensure that the language is drawn as tightly as possible.

This bill is intended to preserve intact the protections that Sony provides to distributors of copying devices whose businesses are substantially unrelated to copyright infringement. It is my hope that an objective study of Sony and the rest of the inducement caselaw upon which S. 2560 operates will help further our study.

For example, there is a mock complaint circulating that alleges that the Apple iPod violates S. 2560 because mp3 players would never have been commercially viable but for the preceding, massive wave of for-profit filesharing piracy that was defended by groups like the Electronic Frontier Foundation.

A real court would respond to that mock complaint in two words: Complaint dismissed. The caselaw states that no one can "induce" unlawful acts that have already occurred. Neither Apple nor the iPod violate S.2560 - even if portable mp3 players became commercially viable only because filesharing piracy created mp3 collections too large to be explained by legal purchase.

I want to continue working with our technology industries to resolve any concerns about possible abuse of liability for intentional inducement. If there are alternative ideas, let us discuss them.

Just as the Sony Court never intended to allow the substantial-noninfringing-use rule to be misused as a license to enter the copyright piracy business, I do not intend to allow S. 2560 to be misused against legitimate distributors of copying devices. On its face, the Sony decision precludes claims that S. 2560 would have imposed liability on distributors of Betamax VCRs, and it should not impose liability upon distributors of computers, software media players, Tivos, iPods, instant messaging systems, or email systems.