

Testimony of
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NETCOALITION
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Good afternoon, Chairman Hatch, Senator Leahy, and Members of the Committee. My name is Kevin McGuinness, and I am the Executive Director of NetCoalition. On behalf of the members of my organization, thank you for the opportunity to testify on S. 2560, the "Inducing Infringement of Copyrights Act of 2004" ("Induce Act" or "IIICA"). NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world.

The members of NetCoalition appreciate the interests of the sponsors of S. 2560 in protecting children by addressing certain types of activities that infringe copyrights. Moreover, we agree that the law must enable copyright owners to seek relief from those who unlawfully download and distribute their work.

As currently drafted, however, S. 2560 is much broader in its scope than described by its proponents and open to multiple interpretations. As a result, it would have severe repercussions on Internet companies, products, and services; jeopardize the introduction of new technologies; and trigger a flood of litigation. This result is not beyond the realm of possibility. If the past is any indication, the entertainment industry has proven its willingness to litigate no matter the cost or consequences.

Therefore, we commend Chairman Hatch and Senator Leahy for convening a hearing to more fully explore the legislation and its consequences. Given the concerns raised by such divergent interests—the Internet community, hardware and software manufacturers, telecommunication services, network providers, chip makers, publishers, consumer electronic manufacturers, wholesalers, retailers, and consumers, libraries and universities, financial service companies, and venture capitalists to name a few—it is imperative that the Committee ensure that the legislation successfully targets the conduct it intends to prohibit without jeopardizing the promise and potential of the Internet.

INTRODUCTION

Today, it is hard to imagine the world without the Internet. This dynamic, relatively new medium provides an open, democratic and international means of communication. Any user can surf or engage in a transaction with literally millions of different web sites that represent everything from large corporations, governments, and

public interest sites to individuals, social organizations and families. The Internet connects people all over the world in a manner, scope, and ease that would be impossible anywhere but online. It provides a voice for even the most modest members of society to disseminate ideas on a scale traditionally reserved only for the most powerful.

Today, any of the Internet's more than 500 million users worldwide can become a publisher, set up an online business, create a web log (or "blog"), organize a chat room, and communicate his or her ideas anywhere in the world instantaneously. Search engines and web portals provide a tremendous opportunity to discover new content. Leading search engines in the United States perform over 625 million searches every day and can link users to literally tens of billions of web pages. Amazingly, this represents only a fraction of what can be found on the Web.

Simply put, there is no other communications medium that permits such diverse activities. And yet, we know that the very qualities that make the Internet an indispensable tool for worldwide commerce and communication also attract those seeking to exploit new technologies to engage in unlawful behavior. So it is not surprising that the Internet, which is used by most people for lawful and constructive activities, is also used improperly.

It is also true that concerns are raised whenever new technologies are developed that empower consumers to generate, share and distribute information in new and more efficient ways. It was true five hundred years ago, when Gutenberg developed the moveable type press. It was true with the advent of radio and television. And it was true two decades ago, when Hollywood called for legislative relief to address copying technologies it condemned with terminology normally associated with serial killers. Fortunately, those demands were ignored, and today, the movie studios have come to embrace digital versatile disks ("DVDs") and videocassette tapes. In fact, profits from the sale of pre-recorded media now exceed those derived from in-theater viewing.¹

Today, the recording industry, among others, is calling for legislative relief to address illegal file sharing over Internet peer-to-peer networks, or P2P networks. While the members of NetCoalition strongly oppose the unlawful downloading and distributing of copyrighted works over P2P networks, we also caution against the summary adoption of what purports to be a simple legislative fix to complex online problems. The Internet is essentially a peer-to-peer network, a tool that allows users to connect with other users. Technologies such as email, instant messaging, search engines, web browsers, and broadband, to name just a few, are basically peer-to-peer platforms. Any proposal designed to eliminate one kind of a P2P platform has the potential of barring comparable communications platforms that are considered by most users to be not only lawful but essential.

In addition, almost everything on the Internet involves, allows, or perhaps more accurately, requires the copying of information or data. Emails and web site content are

¹ "Hollywood Sees the Big Picture with DVDS," Frank Ahrens, Washington Post, October 7,

2002,

Page A01 (?In today?s Hollywood, box office revenue makes up less than a quarter of a film?s total take.

The largest piece of a movie?s money pie comes from sales and rentals of its DVDs.?). routinely copied and stored, at least temporarily, as content moves through the infrastructure of the Internet to reach its ultimate destination. Online communications systems are intentionally designed to permit ?copying and pasting? of content which can then be shared with intended recipients. Therefore, any legislative proposal to regulate or prohibit copying hardware, devices, or software can jeopardize the essential architecture of the Internet.

As the Committee considers S. 2560, or whether additional legislation is even necessary, we respectfully suggest that it embrace the following five key principles which are critical to a balanced and effective solution:

- o Legislation must be premised on the Supreme Court?s ruling in *Betamax*² that a provider of a technology that is capable of substantial legal uses cannot held liable for copyright infringement simply because the technology can be used by third parties for unlawful purposes.

- o Legislation should target unlawful behavior and uses of technology rather than the technology itself.

- o Legislation must provide a bright line between lawful and unlawful conduct so that litigation cannot be used as an economic weapon against innovators and entrepreneurs.

- o Legislation that attempts to codify concepts of secondary liability for copyright infringement should incorporate current case law relating to contributory infringement, vicarious liability, and the *Betamax* standard.

2 *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

- o Legislation should ensure that entities that advertise and provide product reviews that simply demonstrate how a product can be used are not swept into the scope of possible defendants under any new cause of action.

This Committee has repeatedly worked with NetCoalition and other interested parties to fashion solutions to complex intellectual property issues and the myriad problems associated with legislating in both the online and off-line worlds. This collective approach has proven effective as Congress considered the Digital Millennium Copyright Act, the USA Patriot Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, as well as legislation relating to privacy, spam, and identity theft.

We stand ready to join other interested stakeholders to work with the Committee

to make sure there are adequate online protections against copyright infringement. Chairman Hatch, as you observed a few years ago in a similar context: We need policies that foster innovation and creativity, and that the users of the technology can enjoy. In the field of entertainment, for example, artists can potentially connect more directly with their audience using new digital delivery systems like the Internet. Music fans can more easily enjoy music on wireless devices, taking all of their music with them wherever they go without having to lug cases of CDs with them?. With creative thinking there is substantial synergy to brighten the lives of all of us in the more interconnected future.³

S. 2560 UNDERMINES THE SUPREME COURT'S BETAMAX DECISION

As currently drafted, S. 2560 would undermine the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)(the "Betamax" decision). There, the court ruled that a 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, the 3 Utah's Digital Economy and the Future: Peer-to-peer and other emerging technologies, before the Senate Comm. on the Judiciary, 106th Congress (2000)(Statement of Senator Orrin G. Hatch, Senate Judiciary Committee). production and distribution of technology by itself could rarely be considered unlawful in the copyright context.

This clear standard has been one of the cornerstones of the growth of the Internet, because it strikes a reasonable balance between the interest of copyright holders and the technical realities of the online world. Indeed, the Betamax decision has widely been described as the Magna Carta of the technology industry. As noted before, almost everything on the Internet involves, allows, or perhaps more accurately, requires copying of information or data. As a result, in almost every instance, the investors and manufacturers of a new online technology have realized, at some point prior to marketing, their product may be used by some consumers to infringe certain types of copyrights.

Moreover, once the products have been on the market, they undoubtedly know that their products are being used to infringe copyrights. Because of the Betamax standard, however, they also know they are safe from liability if their product is capable of substantial noninfringing uses. As a result, new technologies such as email, instant messaging, web browsing, and search engines have been developed even though in each instance there is the potential that they could facilitate copyright infringement.

Unfortunately, S. 2560 undermines the bright line in the Betamax decision. The legislation would create a new cause of action for "intentional inducement." It would allow a copyright holder to sue any entity it believed was intentionally inducing infringement of someone's copyrights. The bill also contains additional language that

purports to leave intact current doctrines of vicarious and contributory liability for copyright infringement, yet nothing in the legislation applies the protections in case law surrounding these theories of liability to the new cause of action. Consequently, if S. 2560 is enacted, the manufacturer of a new online technology would have no assurance that it would be free from litigation even if it could prove conclusively that its product was capable of substantial noninfringing uses.

Moreover, it is unclear whether the entertainment industry is willing to acknowledge that the Supreme Court's ruling applies to anything other than Sony Betamax. In fact, in briefs submitted in the Grokster case, the entertainment industry asked the appellate court to replace the bright line of the Betamax case with a cost-benefit analysis. They referenced the following non-binding dicta by Judge Posner: Even when there are noninfringing uses of an Internet file-sharing service?if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses. 4

This cost-benefit analysis, if adopted nationwide, would cripple the Internet industry. In order to avoid copyright liability, a company that marketed a product would have to constantly assess: (1) whether the infringing uses were substantial; and (2) if they were substantial, whether the infringements could be reduced or eliminated in a manner that would not be disproportionately costly. Since virtually all Internet technology products have some infringing uses, manufacturers and service providers would operate in a perpetual state of uncertainty and confront unending litigation as copyright owners and courts second-guessed every engineering decision the manufacturers made.

S. 2560 WOULD TRIGGER A FLOOD OF LITIGATION

As currently drafted, S. 2560 would increase the likelihood of extended litigation and the potential that lawsuits could be used as an economic weapon against technologies the entertainment industry finds threatening. For example, although "intentional inducement" standard in the bill might sound like a difficult standard to meet, it does not require proof that the defendant actually intended to induce infringement. Rather, the defendant's intent can be inferred, culled from literally any document within the defendant's possession.

4 In re Aimster Copyright Litigation, 334 F.3d at 653 (7th Cir. 2003).

Plaintiffs would be allowed to engage in extensive and intrusive discovery, demanding email, market research data, and depositions of anyone affiliated with the development, marketing, or management of a product. Such tactics would prove burdensome for a large corporation. They would be fatal for a start-up company, the very kind of entrepreneurs that have been the pioneers of the Internet.

In addition, unlike current law, where a defendant can move to dismiss a case based on the simple fact that its product is capable of substantial noninfringing uses, it is doubtful that any court would grant a motion to dismiss or summary judgment in cases alleging intentional inducement, even if it appears clear that a plaintiff is engaged in little

more than a fishing expedition. Many courts would feel compelled to allow a plaintiff the opportunity to discover evidence that could convince a jury that the defendant intended to induce infringement, as well as cross-examine a company's chief executive officer at trial to demonstrate that he or she intended to induce infringement when bringing a new technology to market.

Inevitably, copyright owners will be in a very enviable position. They can sue any developer of a new technology they find threatening. Or, they can use this new cause of action to force online companies to incorporate digital rights management (?DRM?) technologies promoted by the copyright owner. Making matters worse, there is no guarantee that different copyright owners will seek inclusion of the same DRM technology. It is not inconceivable that within a short period of time, the entertainment industry will control domestic technologies, and online innovation, until now dominated by American entrepreneurs, will be shipped overseas.

Moreover, the cause of action under the proposed legislation is not limited to manufacturers of technology. Under the bill, anyone who can be considered to be aiding, abetting, procuring, or inducing someone to engage in copyright infringement is subject to liability. Consequently, venture capitalists, credit card companies, common carriers, and even entities providing editorial reviews of products, could find themselves the target of litigation.

S. 2560 COULD UNDERMINE THE SAFE HARBORS CONTAINED IN THE DIGITAL MILLENNIUM COPYRIGHT ACT.

The Digital Millennium Copyright Act (?DMCA?) contains safe harbors that limit the remedies available against Internet service providers (?ISPs?) for infringements that occur on their systems. These safe harbors ensure that ISPs will not be held liable for copyright infringement by third parties when the ISPs provide basic Internet functions such as routing, hosting, and linking.

While these limits would continue to apply with respect to the services offered by ISPs (i.e., routing, hosting, and linking), they would not apply to software provided by the ISPs to consumers to enable these services (e.g., instant messaging or Internet access software). Currently, the provision of the software is protected by the Betamax standard. But, under S. 2560, an ISP could be sued for inducing infringement by distributing software that enables infringement, such as software enabling broadband services.

S. 2560 DOES NOT FULLY INCORPORATE THE STATUTORY FRAMEWORK IN THE PATENT ACT.

The proponents of S. 2560 assert that the inducement standard is taken from the Patent Act. Unfortunately, S. 2560 borrows from the Patent Act in an incomplete and inaccurate manner.

Section 271(b) of the Patent Act provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer." Section 271(c) of the Patent Act

states that any person who sells a component of a patented machine, knowing that the component is especially made for use in infringement of the patent, and "not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

The Patent Act does not explain the relationship between 271(b) and 271(c), but the Federal Circuit in *Dynacore v. Philips*, 363 F.3d 1263, 1276 n.6 (Fed. Cir. 2004), stated that "although a seller of a device that is capable of substantial noninfringing use will not be liable for contributory infringement, liability may still be established under § 271(b) if, in addition to the sale of that product, active steps are taken to encourage direct infringement." (Citations omitted.)

In other words, the manufacturer or seller of a device capable of noninfringing uses can be liable for inducing patent infringement only if he takes active steps beyond the sale or manufacture to encourage direct infringement.

S. 2560 paraphrases Section 271(b) by providing that "whoever intentionally induces" a copyright infringement "shall be liable as an infringer." But it does not codify 271(c), nor the relationship between 271(b) and 271(c) developed by the case law. The sponsors of S. 2560 assert that codification of 271(c) is unnecessary. They argue that the Supreme Court in *Betamax* transposed Section 271(c) to the copyright context when it ruled that the manufacturer of a device capable of a substantial noninfringing use was not a contributory infringer, and the *Betamax* rule is preserved in S. 2560's savings clause. But as discussed above, S. 2560 creates a new form of secondary liability to which *Betamax* is not a defense. If Congress concludes that the Patent Act is an appropriate model for secondary copyright liability, then it should import the entire Patent Act framework: Section 271(b), Section 271(c), and the case law defining the relationship between Sections 271(b) and 271(c).

Additionally, S. 2560's definition of "intentionally induces" is far broader than the courts' interpretation of "actively induces" under Section 271(b). If Congress decides to proceed in the direction of the Patent Act, it should look to the definition of "actively induces" in the patent case law.

S. 2560 MAY NOT PROVIDE A REMEDY FOR GROKSTER

The proponents of the legislation assert that S. 2560 was introduced in response to the District Court's decision in *MGM v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003). Based on our review of the District Court's decision, however, we believe there is a significant question whether the entertainment industry would prevail in an inducement action under S. 2560 against Grokster and the other P2P defendants.

In *Grokster*, the court stated that the defendant P2P software providers "are not significantly different from companies that sell home video recorders or copy machines, both of which can and are used to infringe copyrights." The court did not find that "Grokster or StreamCast do anything, aside from distributing software, to actively facilitate ... their users' infringing activity." Consequently, the court found that "[a]bsent evidence of active and substantial contribution to the infringement itself, Defendants cannot be liable."

In briefs to the Ninth Circuit, in the press, and in communications to Senators, the entertainment industry contends that Grokster and other P2P companies not only induce

infringement, but actually "seduce" children into engaging in infringing acts. However, the Grokster court found no evidence of such seduction. It did not find a single advertisement encouraging users to engage in the unauthorized trading of copyrighted works. It did not find a single email instructing users how to break the copyright laws. Accordingly, if the entertainment industry were to bring an inducement action under S. 2560 against Grokster, the suit would probably survive motions to dismiss and for summary judgment, because the industry could argue that Grokster intended to induce infringement; but the suit would probably fail at trial unless the industry could produce more solid evidence of intent to induce infringement.

Unfortunately, balanced against this serious question of whether S. 2560 would provide plaintiffs with an ability to take down Grokster, we know that S. 2560 would impose tremendous collateral damages on large sectors of the U.S. economy for reasons articulated in this testimony. Any legislation should narrowly target bad behavior while not imposing these kinds of collateral damages on "good actors."

Ultimately, we believe that the Ninth Circuit employed the proper analysis in the Napster case by making a distinction between behavior and technology. It stated in that case, "We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system." Napster, 239 F.3d at 1020. This distinction between architecture and conduct is the key to Napster and to contributory copyright infringement analysis in the digital era.

Unfortunately, the entertainment industry is urging this Committee and has urged the courts to blur the bright line between behavior and technology. This Committee should not be lured into penalizing technologies that can be used for unlawful purposes, but rather should focus on illegal behavior. Recently, Howard Beales, the Director of the Bureau of Competition at the Federal Trade Commission provided testimony before a Senate committee, which underscored the importance separating behavior from platforms and technologies that allow unlawful behavior to occur. He stated:

[C]onsumers can use e-mail to send or receive copyrighted materials, pornography, viruses, and spyware. Similarly, search engine technology may expose consumers inadvertently to child pornography, viruses, and spyware. Videotape recorders and compact disk recorders may be used in violation of copyright laws by individuals who are unaware that they are doing so. Many risks associated with P2P file-sharing seem to result largely from the actions of individual users, rather than from the operation of the P2P file-sharing software itself.⁵

CONCLUSION

Unlawful peer-to-peer file sharing of copyrighted materials is wrong. Users and companies who engage in these activities should not be allowed to operate beyond the reach of the law. The Committee should recognize, however, that bad actors—and not

⁵ The Future of Peer-to-Peer (P2P) Technology, before the Senate Comm. On Commerce, Science and Transportation, 108th Cong. (2004)(Statement of Mr. Howard

Beales, Director, Bureau of Consumer Protection, Federal Trade Commission).

technology?are responsible for the illegal activities. If the Committee determines that a legislative response is appropriate, we urge Members to ensure that legislation be narrowly focused to target behavior and not put at risk the companies and innovators that allow most consumers to lawfully enjoy new and exciting technologies.

In addition, the recording industry must recognize that the real solution to the problem of unlawful file sharing cannot be achieved exclusively through legislation. Even a complete ban on file sharing in the United States will not prevent consumers from accessing overseas sites to download music. Any comprehensive solution must involve a combination of effective legal relief, consumer education, and a reasonably priced, convenient, and portable distribution system that makes it as possible to download music legally as can be done today illegally. In the long run, the recording industry will be no more able to prevent online file sharing than Hollywood could stop the VCR or the DVD.

Thank you for the opportunity to testify, and I would be happy to answer any questions from the Committee.