Testimony of

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

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Mr. Chairman and Ranking Democratic Senator Leahy, thank you for holding this important hearing today to examine S. 2560, the "Inducing Infringement of Copyrights Act of 2004".

The beginning of the 21st century has been a trying time for intellectual property. The promise of new opportunities in production and distribution has been hijacked by some who would rather use emerging technology to plunder entire creative content industries. We cannot afford to remain complacent as these parties further erode the value of our nation's intellectual property assets.

S. 2560 is designed to provide a remedy against companies whose business models are premised on the wholesale theft of the creative work of others. Technology is not the focus of this bill. Rather, S. 2560 targets behavior, namely specific actions taken by those who have hijacked technology to perpetrate and promote theft on a massive scale of this country's leading export. It's a moral behavioral test that targets the bad guys, not legitimate commercial actors.

As you know, the music industry has been devastated by worldwide piracy. In 2000, the top ten hits sold 60 million units in the U.S. Seven of the ten sold more than 5 million units each; every one of them sold at least 3 million units. But last year, in 2003, the top ten hits were cut almost in half, to 33 million units. Just two of the ten sold more than 5 million units; five of those top ten hits sold less than 3 million units. This slide has been caused predominantly by illicit P2P (peer-to-peer) services, where these top ten hits and other valuable content are offered to users--unauthorized and for free. Some have suggested that these services in fact help us by driving sales. This defies logic and common sense. If one can get something for free, without consequence, buying it becomes less attractive. In any case, given the unfortunate sales figures just stated, we respectfully ask that these illegitimate services do us no more favors.

Record labels are particularly vulnerable because they are dependent upon a single source of revenue - sales of recorded music. Record labels do not have a full performance right and therefore earn no royalties from radio play. They do not make money from artist tours or merchandise. They do not make money from endorsements of other products. Unauthorized file-sharing--especially that of the biggest hits--destroys a label's sole revenue stream.

While the free-for-all nature of illicit P2P services is alluring to users in the short term, it will ultimately drain the well dry--and faster than anyone thinks. Jobs in the music industry are down by about a third over the last several years. Families have suffered. And so has the music. Artist rosters have had to be slashed as cost cuts continue. Fewer dreams are being funded and this creative product is lost forever. Illicit P2P services, the inspiration for S. 2560, are precisely the ones stealing these dreams.

An independent study conducted last summer noted that over 97% of the files "shared" using these P2P networks are illegal. The infringement is remarkably pervasive. A recent academic study estimated that almost a billion illegal downloads take place each and every month. Four of the top ten downloaded applications on the Internet are P2P programs operated by companies who purposefully profit from illegal conduct.

To make their money from advertising and bundled spyware in their applications, these rogue P2P companies must first generate as many eyeballs as they possibly can. They do that by inducing American kids - and others - to break the law by stealing the work of creators. These companies are far from the benign services they claim to be. They are havens for pornographers. They compromise computer security. They facilitate the unintended disclosure of personal documentation - resumes, tax and credit card data, medical returns and more. And their warnings - about privacy abuse, security, pornography and copyright - are anything but conspicuous. No objective review of these services can possibly conclude that they have any pretense of legitimacy.

It is important to note that P2P technology itself is not to blame. Rather, the problem is caused by profiteers who have taken a promising new technology and corrupted it for self-serving interests. Common sense dictates that these operators should be held responsible for their actions, but usage of existing law has veered off course. While the law has not changed, evolution of P2P technology has confused some courts in its application.

Using previous court decisions as a roadmap, new P2P services created a "de-centralized" system intended to avoid the liability imposed upon the original services that were operated by a central server. Claiming a lack of "control" over their users' activities, these services have managed to shift the focus of liability to those users. But regardless of the "centralized" or "de-centralized" structure of these services, their actions are what should dictate their liability. It is their intentional inducement of infringement on their networks that should be the proper focus. Unfortunately, a District Court in California misinterpreted existing law, ruling that these new services were not liable despite their obvious profit-by-infringement business model. Yet even this court recognized the injustice of its own decision and called for "additional legislative guidance."

That additional legislative guidance is available in S. 2560. Setting the concept of secondary liability back on track, it focuses on behavior, not technology. This bill merely targets bad actors--those who have hijacked technology for their own illegitimate purposes--and not on the technology itself. It applies an extremely high standard: intentional inducement. Specifically, intentional inducement to infringe, not simply to use technology which may infringe. This standard is consistent with the 1984 Sony Betamax case, and recognizes that technology can be used for both legitimate and illegitimate purposes. Those who simply produce devices that can be used for either purpose are not covered by this legislation. Providing such technology, regardless of how it is ultimately used, is not enough to find inducement. S. 2560 requires purposeful action, deliberate and intentional conduct to induce others to break the law. It's the premise behind aiding and abetting under the criminal laws. There are people who make illegal archival copies of videos and others who illegally download unauthorized songs onto their iPods. But the companies who offer the technology that makes these activities possible have not intentionally induced such infringement. Sony, Apple, and other legitimate participants in the marketplace, remain untouched under this bill.

Even opponents of S. 2560 have conceded that those who intentionally cause copyright infringement should be punished. We realize that many of these opponents are concerned that the

bill's current language may be misinterpreted to apply to legitimate products, and we stand ready to work together to address valid concerns. We therefore encourage those expressing opposition to work cooperatively and productively so that the principle underlying the bill - that those who intentionally cause copyright infringement should be punished - is fulfilled.

But inaction is simply not acceptable. Legitimate businesses, consumers, and the many people engaged in the creative and technology communities deserve legislation that will ensure a fairer, safer, and more productive future. The music industry has already embraced the Internet and the incredible opportunities for new products and services that benefit consumers. The delivery of digital music online from licensed services, for example, has ushered in an exciting new way for consumers to listen to the music they love. But these new offerings cannot survive in competition with illicit businesses. It is imperative that Congress insist on the rule of law and not accept a business model based on thievery.