

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**

**108<sup>th</sup> 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:

1 Strike all after the enacting clause and insert:

2 **“SECTION 1. SHORT TITLE.**

3 “This Act may be cited as the ‘Discouraging Online

4 Networked Trafficking Inducement Act of 2004’.

5 **“SEC. 2. INDISCRIMINATE, MASS INFRINGING**

6 **DISTRIBUTION OF COPYRIGHTED WORKS.**

7 “Section 501 of title, 17, United States Code, is amended

8 by adding at the end the following:

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

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

16           “(A) the predominant use of the computer  
17 program is the mass, indiscriminate infringing  
18 redistribution to the public of copies or phonorecords  
19 of copyrighted works;

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

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

8           “(3) Limitations on liability.

9           “(A) A service provider as defined in 17 U.S.C.  
10           512(k)(1)(B) whose service is used by a third party  
11           to distribute or that facilitates a third party’s  
12           distribution of a computer program shall not be  
13           liable under paragraph (1) for providing or operating  
14           such service.

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

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

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

3 “(i) venture capital, financial assistance,  
4 payment services, or financial services,

5 “(ii) advertising, advertising services, or  
6 product reviews, or

7 “(iii) information or support to users, including  
8 via manuals and user handbooks pertaining to a  
9 computer program, assistance or directions for using  
10 such a program through a company’s online help  
11 system or telephone help services, and library  
12 services

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

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

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

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

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

3           “(A) an injunction against such intentional  
4 commercial activity; and

5           “(B) actual damages for infringement of a work  
6 for which the defendant had specific and actual  
7 knowledge the work would be infringed.”.

8 **“SEC. 3. REMEDIES FOR BASELESS LAWSUITS.**

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

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

13          “(b) Monetary sanctions under Rule 11, Federal Rules of  
14 Civil Procedure, shall be trebled.”

15 **“SEC. 4. CODIFICATION OF SUPREME COURT**  
16 **PRECEDENT.**

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