



Consumer Federation of America

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

HEARING ON

PROTECTING INNOVATION AND ART WHILE PREVENTING PIRACY

**S. 2560, THE INTENTIONAL INDUCEMENT OF
COPYRIGHT INFRINGEMENTS ACT OF 2004**

WRITTEN STATEMENT OF

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JULY 22, 2004

On behalf of Public Knowledge, Consumers Union, and the Consumer Federation of America, we are pleased to submit this written testimony for the record of the July 22, 2004 hearing on “Protecting Innovation and Art while Preventing Piracy” (An Examination of S. 2560, The Inducing Infringement of Copyrights Act of 2004).

Public Knowledge is nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology. Consumers Union, publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers; its advocacy offices and Consumer Policy Institute address the crucial task of influencing policy that affects consumers. Consumer Federation of America is a nonprofit association of 300 consumer groups, representing more than 50 million Americans, that was established in 1968 to advance the consumer interest through research, education and advocacy.

As representatives of consumer interests, our groups must acknowledge the extent to which consumers have a stake in the balances of rights built into our copyright-law framework. We all benefit when creators create, and so we benefit from our copyright law to the extent that it adequately provides incentives for creators. At the same time, we also benefit from our copyright law to the extent that it allows all of us to make the fullest possible lawful use of copyrighted works.

The consumer electronics revolution and the digital revolution have given consumers immense new opportunities to use copyrighted works lawfully, as well as to create new works of our own. Consumers and society in general have greatly benefited from the rapid pace of technological development, ranging from the VCR and TiVo to

the personal computer and the Internet. So, in addition to having a stake in the proper functioning of copyright law, consumers also have a stake in technology policy that not only allows but also promotes innovation. Because S. 2560 in its current form will chill innovation — and in doing so limit consumer choice — by putting technology makers and vendors at greater risk of expensive litigation, our consumer-advocacy organizations must oppose it.

I. Introduction and Summary

Although we understand that some stakeholders are now insisting on quick Congressional intervention that would amend our copyright law in order to target peer-to-peer services, they have not made the case for new legislation, certainly not for quick legislation, and especially not for the legislative approach outlined in S. 2560.

There is, of course, no particular need for a “rush to judgment” in considering this legislation. The courts are still developing the appropriate legal framework for determining secondary infringement liability on peer-to-peer networks. The prospect of disagreement among the circuits or the current state of the law as to secondary liability does not in itself necessitate immediate legislative action. Our courts, including the Supreme Court, have untangled many a knotty problem in copyright law, including the problem of whether to protect “sweat of the brow” investments in collections of data (*Feist v. Rural Telephone*) and — particularly relevant to this bill — whether technology that can be used for infringement should entail liability for that technology’s maker or provider (*Sony Corp. v. Universal City Studios*).^{*} It would be a mistake for Congress to

^{*} We respectfully disagree with the Registrar of Copyright’s expressed willingness to revisit the *Sony* case. In her testimony before this committee, Marybeth Peters has suggested that “it may

assume the courts will necessarily draw the wrong conclusions about how to respond to peer-to-peer file-sharing and other changes in the technological landscape.

Although there is no compelling reason yet for Congress to intervene on these issues, we believe that, should Congress ultimately decide to intervene, it will find a better starting point for debate in the alternative proposal outlined by IEEE in the appendix to their testimony. As it currently stands, S. 2560 is a profoundly flawed measure that creates more confusion than it resolves, and that imposes a significant risk of litigation that would effectively chill the development and deployment of new technologies generally.

Our substantive testimony consists of two main arguments:

First, S. 2560 assumes that those who provide technologies and tools that can be used for infringement ought to face liability for the technology regardless of their non-infringing uses, and that our copyright law must be amended to protect the content industry from technology that “induces” unlawful conduct. We believe this approach is misconceived.

Second, we believe the legislation as introduced is seriously flawed and sweeps too far in ways that puts reasonable consumer expectations of new consumer-electronics products, new digital-technology products, and innovative products and services in general, at risk.

become necessary to consider whether [*Sony*] is overly protective of manufacturers and marketers of infringement tools, especially in today’s digital environment.” Even apart from Ms. Peters’s disturbing willingness to abandon or alter a legal standard that has resulted in both greater consumer experience of copyrighted works and an astonishing growth in profitable markets for copyrighted works, we note that one man’s “infringement tool” is another man’s iPod.

II. S. 2560 Penalizes Technologies Rather than Unlawful Actions

Most technologies can and will be used by some to harm the legal interests of others. This longstanding principle is true of most digital technologies, and in particular of the Internet and its peer-to-peer functions, which date from the creation of the Internet.

At the heart of S. 2560 is the belief that certain digital technologies, by themselves, “induce” unlawful behavior and, in particular, copyright infringement. Without expressly saying that such technologies should themselves be categorically illegal regardless of their lawful uses, the language of S. 2560 allows courts to interpret “intentional inducement” so that any use of the technologies that copyright holders find troubling can be deemed a predicate for “inducement” liability.

The notion that otherwise useful technologies, rather than the behavior of those who use it unlawfully, should be discouraged is strangely at odds with other approaches to the dynamic that exists in other parts of our law and public policy. Generally our society allows individuals to own and use most products and technologies, so long as they are used lawfully. It is difficult to see why new technological tools, products, and services that may be used for copyright infringement by some individuals should be said to “induce” unlawful behavior in consumers generally.

The presumption should be that consumers are acting lawfully with new digital tools, just as the presumption has always been that consumers with access to photocopiers are not being “induced” to infringe.

III. S. 2560 is Seriously Flawed as Written

Even if we were to accept the premise behind this legislation, and even if we were to accept that the time is right for legislating, we maintain that the bill is so seriously flawed that Congress should not consider it as written.

The most serious flaw with the legislation is that it would erode (and perhaps effectively overturn) the *Sony* decision and, as a result, place in jeopardy the development of any new consumer electronics products for the foreseeable future. In replacing the “substantial non-infringing use” standard from the *Sony* case with a far more vague “reasonable person”-based standard, Congress would put technology makers in the position of trying to guess whether any products they might make could conceivably be deemed to have induced copyright infringement.

The *Sony* standard has for the last 20 years provided the basis not only for the growth of the consumer electronics industry, through the further development of the VCR, CD players and recorders, and DVD media and players, but also for computer peripherals and devices such as the iPod, which is a hybrid of the music and computer worlds. Ironically, the content industry also has been one of the biggest beneficiaries, as the VCR-based segment of the movie audience industry now provides a little more than half of Hollywood’s income. According to *Newsweek*, consumers spent \$60 million more on the DVD for “Finding Nemo” than they spent on seeing the movie in theatres.

That growth in income signifies progress for both the content industry and consumers. But S. 2560 would put all of that progress at risk by establishing new, lower standards of liability that would essentially allow content companies to sue a technology

or electronics company over any new device or service about which it was concerned, so long as it might be said that the device or service “induces” infringement.

This nominal attempt to import the concept of “inducing” copyright violations from patent law into copyright law has resulted in a new concept that does not do justice to either area of law. The “active inducement” concept in patent law requires proof that someone has actively marketed a device or instructed someone on how to infringe a particular patent. That is a concept wholly at odds with the “reasonable person” standard in S. 2560 or with its creation of liability for “inducement” even in the absence of knowledge of a specific copyright that is being infringed.

In short, the downside of S. 2560, as introduced, is that it creates immense financial risks for any innovator who might be deemed to have “induced” infringement merely by introducing a new technology into commerce, knowing that it is possible the technology might be used unlawfully, even though the technology was designed and manufactured to provide consumers with lawful uses. The resulting chilling effect will harm consumers by discouraging innovators from bringing new digital technologies and products to market.

We believe the alternative proposal offered by IEEE is instructive in this regard. While we do not concur with IEEE that legislation is necessary, we believe that the language proposed by IEEE in the appendix to its testimony comes closer than the current bill to defining a balanced starting point for discussion about whether to include a new “inducement” liability in our copyright framework.

IV. Conclusion

We thank the Judiciary Committee for giving Public Knowledge, Consumers Union, and the Consumer Federation of America the opportunity to submit testimony regarding the need for, and likely unwanted consequences of S. 2560. We wish at this point to recommend also the testimony of Gary Shapiro on behalf of CEA and HRRC – testimony that eloquently explores at greater length the legal and conceptual flaws that face the current version of S. 2560. We again note that, while we disagree with IEEE’s prescription for amendment of our copyright law, we nevertheless must commend IEEE for developing an alternative proposal that attempts to address a number of the concerns we raise here. Finally, we stand ready to engage in further constructive dialog with the Judiciary Committee and its staff regarding S. 2560 and any other copyrighted-related proposal that may affect consumers’ and citizens’ rights to lawfully use copyrighted works and benefit from new technologies.

Respectfully Submitted,

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