Statement of Senator Orrin G. Hatch
Before the United States Senate on Introduction of the "Inducing Infringement of Copyrights Act of 2004" S. 2560
June 22, 2004

SEN. HATCH. Mr. President, I rise with my esteemed colleague and friend, Senator Leahy, ranking Democrat Member of the Senate Judiciary Committee, to introduce the "Inducing Infringement of Copyrights Act of 2004." This Act will confirm that creative artists can sue corporations that profit by encouraging children, teenagers and others to commit illegal or criminal acts of copyright infringement. Senator Leahy and I are pleased that Majority Leader Frist and Minority Leader Daschle and Senators Graham and Boxer are co-sponsoring this important bi-partisan legislation.

Mr. President, it is illegal and immoral to induce or encourage children to commit crimes. Artists realize that adults who corrupt or exploit the innocence of children are the worst type of villains. In *Oliver Twist*, Fagin and Bill Sikes profited by inducing children to steal. In the film *Chitty-Chitty Bang-Bang*, the leering "Child-Catcher" lured children into danger with false promises of "free lollipops." Tragically, some corporations now seem to think that they can legally profit by inducing children to steal – that they can legally lure children and others with false promises of "free music."

Such beliefs seem common among distributors of so-called peer-to-peer filesharing ("P2P") software. These programs are used mostly by children and college students – about half of their users are children. Users of these programs routinely violate criminal laws relating to copyright infringement and pornography distribution. Criminal law defines "inducement" as "that which leads or tempts to the commission of crime." Some P2P software appears to be the definition of criminal inducement captured in computer code.

Distributors of some P2P software admit this. The distributors of EarthStation 5 state, "While other peer 2 peer networks like Kazaa or Imesh continue to deny building their programs for illegal file sharing, at ES5 we not only admit why we built ES5, we actually promote P2P, endorse file sharing, and join our users in swapping files!"

Recently, in the *Grokster* case, a federal court drew similar conclusions about the intent of other distributors of P2P software. It warned that some P2P distributors "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares." In other words, many P2P distributors may think that they can lawfully profit by inducing children to break the law and commit crimes.

They are dead wrong. America punishes as criminals those who induce others to commit any criminal act, including copyright infringement. The first sentence of our Criminal Code states:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, *induces*, or procures its commission, is punishable as a principal….

Indeed, it is absurd to think that our law might be otherwise. No civilized country could let sophisticated adults profit by tempting its most vulnerable citizens – its children – to break the law.

I think we must understand how some corporations came to confuse child endangerment with a legal business model. Their confusion seems to arise from court cases misinterpreting a well-intended Supreme Court decision that tried to clarify two critical components of federal law: the law of secondary liability and the law of copyright.

The Supreme Court states that secondary liability is "imposed in virtually all areas of the law." Secondary liability is universal because its logic is compelling. It does not absolve lawbreakers of guilt. But it recognizes that we are all human: We are all more likely to break the law if encouraged or ordered to do so. Secondary liability thus discourages lawlessness by punishing people who manipulate others into doing the "dirty work" of breaking the law. Secondary liability usually targets two types of persons: 1) those who *induce* others to break the law, and 2) those who *control* others who break the law.

Though secondary liability is nearly ubiquitous, it has almost always remained as a judge-made, common-law doctrine – and for a good reason. Secondary liability prevents the use of indirect means to achieve illegal ends. Consequently, the scope of secondary liability must be flexible – otherwise, it would just instruct wrong-doers on how to legally encourage or manipulate others into breaking the law. The common-law judicial process is ideally suited to evolve flexible secondary-liability rules from the results of many individual cases.

As a result, Congress rarely codifies secondary liability. It has codified secondary liability to narrow it, as in the Patent Act. Congress has codified secondary liability in the Criminal Code to ensure that the narrow construction given criminal statutes would not foreclose secondary liability. In the Digital Millennium Copyright Act, Congress codified a complex balance between opposed interests that expanded one type of secondary liability and narrowed another.

Congress has always assumed that infringers could readily induce consumers to accept infringing copies of works. It thus created "a potent arsenal of remedies against an infringer…." But secondary liability often arises if a third party can be ordered or induced to *make* the infringing copies. Consequently, only after copying devices became available to people who might be induced to infringe did questions about secondary liability for infringement become pressing.

In 1984, these questions reached the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.* *Sony* held that the makers of the Betamax VCR could not be held secondarily liable in a civil suit brought by copyright holders – even though some consumers would use VCRs to make infringing copies of copyrighted TV broadcasts.

Sony also created a broader limitation on secondary liability by importing a limitation that that Congress had codified only in the Patent Act; this was the substantial-noninfringing-use rule, also called the "staple article of commerce" doctrine. *Sony* intended this rule to strike, as between creators of works and copying equipment, the same "balance" that it had struck under the Patent Act between the rights of patent holder and makers of staple products.

Under the Patent Act, the substantial-noninfringing-use rule bars secondary liability for selling a "staple" product that has a "substantial noninfringing use" – even if that staple could also be used as a component in an infringing copy of a patented invention. This rule protects makers of staples *without* changing the nature of secondary liability. In particular, it does not immunize bad actors who *intend* to distribute "patent-infringement kits." Even in the rare case of a novel

invention that consists only of "staple" components, an "infringement kit" must bundle components and include assembly instructions. Neither the bundle nor the instructions will likely have a "substantial noninfringing use."

Sony intended this rule to strike the same admirable "balance" under the Copyright Act. Unfortunately, *Sony* also proposed that if this rule proved problematic, Congress should alter it on a technology-by-technology basis. This proposal was flawed: In 1976, Congress redrafted the Copyright Act to avoid the need to re-adjust copyrights on a technology-by-technology basis because legislation could no longer keep pace with technological change. Returning to this impractical technology-based approach would create an endless procession of "tech-mandate" laws that discriminate between technologies Congress deems "good" or "bad." But technologies are rarely inherently either "good" or "bad." Most can be used for either purpose; the effect depends on details of implementation impossible to capture – or predict – in prospective legislation.

Of course, the dysfunctional corrective mechanism that *Sony* proposed would have become problematic only if the *Sony* limitation was misunderstood or misapplied by lower courts. Unfortunately, that has now happened.

In cases like *Napster* and *Grokster,* lower courts misapplied the substantial-non-infringing-use limitation. These courts forgot about "balance" and held that this limitation radically alters secondary liability. In effect, these cases retained secondary liability's *control* prong but collapsed its *inducement* prong. The results of these cases prove this point: *Napster* imposed liability upon a distributor of copying devices who *controlled* infringing users; *Grokster* did not impose liability upon distributors who appeared to *induce and profit from* users' infringement.

A secondary-liability rule that punishes control and immunizes inducement is a public-policy disaster. It seems to permit the distribution of "piracy machines" *designed* to make infringement easy, tempting, and automatic. Even Harvard's Berkman Center for Internet and Society suggests that this is happening. The Center warns that "it can be extremely difficult for a non-expert computer user to shut down" the viral redistribution that can otherwise automatically make the user an international distributor of infringing works. The Center notes that the "complexity of KaZaA's installation and disabling functions" may leave many users unaware that they have become a contributor to global, for-profit copyright piracy. Unfortunately, "piracy machines" designed to mislead their users are just one of the perverse effects of a secondary-liability rule that punishes control and immunizes inducement.

Perhaps the least perverse of these effects has been years of conflict between the content and technology industries. Content creators sought the tech-mandate "corrections" that *Sony* proposed. Technology industries opposed such laws because they too easily foreclose innocent or unforeseen applications. P2P software illustrates the problem: Today, most P2P software functions like Earthstation 5's "piracy machine." Yet all agree that non-piracy-adapted implementations of P2P could have legitimate and beneficial uses.

A rule that punishes only control also produces absurd results. Secondary liability should focus on intent to use indirect means to achieve illegal ends. A rule that punishes only control degenerates into inane debate about *which* indirect means was used. Thus Napster and Grokster are regulated differently – though they function similarly from the perspective of the user, the distributor, or the copyright holder.

A rule that punishes only control also acts as a "tech-mandate" law: It mandates the use of technologies that avoid "control" – regardless of whether they are suited for a particular task. Napster was punished for processing search requests efficiently on a centralized search index that it controlled. Grokster escaped by processing search requests less efficiently on a decentralized search index that it did not control. Rewarding inefficiency makes little sense.

A secondary-liability rule that punishes only control also punishes consumers: It encourages designers to avoid "control" by shifting risks onto consumers. For example, Napster incurred billion-dollar liability because it controlled computers housing a search index that located infringing files. Programs like Kazaa avoid Napster's "control" by moving their search indices *onto computers owned by unsuspecting consumers*. Consumers were never warned about the risks of housing these indices. As a result, many consumers, universities, and businesses now control computers that house "mini-Napsters" – parts of a search index much like the one that destroyed Napster. These indices could still impose devastating liability upon anyone who "controls" a computer housing them. A secondary-liability rule that punishes only control thus *rewards* Kazaa for shifting huge risks onto unsuspecting consumers, universities and businesses.

And search indices are just one of the risks that designers of P2P software seem to impose upon their young users to avoid control. For example, the designers of most filesharing software *choose* to lack the ability to remove or block access to files known to contain viruses, child pornography or pornography mislabeled to be appealing to children. This ability could create "control" and trigger liability. Aiding distributors of viruses and pornography may be just an unfortunate side effect of avoiding control while inducing infringement.

A secondary-liability rule that immunizes inducement also encourages attempts to conceal risks from consumers: It is easier to induce people to take risks if they are unsure whether they are incurring a risk or its severity. The interfaces of most P2P software provide no warnings about the severe consequences of succumbing to the constant temptation of infringement.

Another risk to users of P2P software arises when pornography combines with the "viral redistribution" that thwarts removal of infringing copies of works. Most filesharing networks are awash in pornography, much of it mislabeled, obscene, illegal child pornography, or harmful to minors. Anyone risks criminal prosecution if they distribute pornography accessible to minors over these child-dominated networks. As a result, one P2P distributor who does distribute "adult" content demands that it be protected by access controls. But every adult who uses this distributor's software as intended to download one of millions of unprotected pornographic files automatically makes that pornography available for re-distribution to millions of children. This distributor has sat silently – knowing that its software exposes millions of its users to risks of criminal prosecution that the distributor cannot be *paid* to endure.

Perhaps the worst effect of punishing control and rewarding inducement is that it achieves precisely what *Sony* sought to avoid: It leaves copyright holders with an enforcement remedy that is "merely symbolic": It seems real, but it is illusory.

In theory, a rule that immunizes inducement still permits enforcement against those induced to infringe. At first, this remedy seems viable because copyrights have traditionally been enforced in lawsuits against direct infringers who actually make infringing copies of works.

But a fallacy lurks here: The "direct infringers" at issue are not the traditional targets for copyright enforcement. In fact, they are children and consumers: They are the hundreds of millions of Americans – toddlers to seniors – who use and enjoy the creative works that copyrights have helped create.

There is no precedent for shifting copyright enforcement toward the end-users of works. For nearly 200 years, copyright law has been nearly invisible to the millions who used and enjoyed creative works. Copyright law was invisible to consumers because the law gave creators and distributors mutual incentives to negotiate the agreements that ensured that works reached consumers in forms that were safe to use in foreseeable ways. Now, those incentives are collapsing. As a result, artists must now waive their rights or sue consumers – their fans.

Worse yet, artists must sue their fans for the sin of misusing devices *designed* to be easy and tempting to misuse. That is unfair: When inducement is the disease, infringement can be seen as just a symptom. Yet artists must ignore inducers who profit by chanting, "Hey, kids, infringement is cool, and we will help you get away with it." Instead, artists can only sue kids who succumb to this temptation. They must leave Fagin to his work – and sue Oliver Twist.

This sue-Oliver "remedy" is a debacle. For example, immunizing inducement ensures that artists will have to sue their fans: Inducers will have both the incentive and the means to thwart less extreme measures, like educational campaigns. For example, RIAA tried to avoid lawsuits against filesharers by sending educational instant messages to infringers. Kazaa, for "privacy" reasons, disabled instant messaging by default in the next version of its software. Lawsuits then followed.

And imagine the poor parent who tries to tell a teenager that free downloading of copyrighted music is illegal. The teenager, confused because "everyone is doing it," consults a leading technology-news site promising a "trusted source of information for millions of technology consumers." There, the teenager finds a P2P distributor promoting "Morpheus 4.0, the only American filesharing software ruled legal by a U.S. federal court." This statement is false: *Grokster* did not rule Morpheus "legal"; in fact, the case only confirmed that downloading copyrighted works is *illegal*. Below this misinformation, the teenager will find an independent editorial review rating Morpheus 4.0 as a "Recommended" download and "an excellent choice" for those seeking "the latest and greatest." Who will the teenager believe?

Worse yet, if artists must sue only the induced, they just feed the contempt for copyrights that inducers breed. Inducers know that people induced to break a law become that law's enemies: Once you break a law, you must either admit wrongdoing or rationalize your conduct. Rationalization is often so easy. You can blame the law: Copyright is a stupid law needlessly enshrined in the Constitution by naives like James Madison. You can blame the victim: Some rock stars still make money; I do not like the "business model" of the record labels. You can blame the randomness of enforcement: Everyone else was doing it, so why not me? Anyone who has talked to young people about filesharing has heard such rationalizations time and again.

And forcing artists to ignore inducers and sue the induced locks artists into a war of attrition that they are unlikely to win. If you imagine inducement as a bush, this "remedy" forces artists to spend their money to sever each leaf – while the inducer makes money by watering the root. Artists may not be able to sustain this unending battle.

This may let inducers attempt an extortionate form of "outsourcing." Inducers can increase or decrease their devices' propensity to encourage piracy. Inducers can thus tell American artists that if the artists pay the inducers to become licensed distributors of their works, perhaps fewer bad things will happen. Implicitly, if artists do not pay, perhaps more bad things will happen. Were artists to succumb to such tactics, jobs and revenues created by the demand for American creative works would go overseas to some unsavory locales.

Worst of all, inducers will inevitably target children. Children would be easily induced to violate complex laws like the Copyright Act. Any child is a terrible enforcement target. And because most adults never induce children to break laws, children induced to infringe copyrights would not even be "bad kids." Indeed, they would probably be smart, mostly law-abiding young people with bright futures. Innocent, mostly law-abiding children make the worst enforcement targets – and thus the best "human shields" to protect an inducer's business model.

This threat to children is real. Today, artists are suing high-volume filesharers who cannot be identified until late in the process. One filesharer sued for violating federal law over 800 times turned out to be a 12-year-old female honor student. This otherwise law-abiding young girl and her family then faced ruin by the girl's favorite artists. The public knew that something was wrong, and it was outraged. So the people who gave that girl an easily misused toy – and profited from her misuse of it – exploited public outrage with crocodile tears about the tactics of "Big Music." And then, I imagine, they laughed all the way to the bank.

The Supreme Court could not have intended to force artists to sue children in order to reduce the profits that adults can derive by encouraging children to break the law. No one would intend that. Yet it seems to be happening.

These are the inevitable results of a secondary-liability rule that immunizes inducement. This "rule" has created the largest global piracy rings in history. These rings now create billions of infringing copies of works, and reap millions in profits for leaders who insulate themselves from direct involvement in crime by inducing children and students to "do the dirty work" of committing illegal or criminal acts. These rings then thwart deterrence and condemn attempts to enforce the law. These rings may now use profits derived from rampant criminality to extort their way into the legal Internet distribution market – a market critical to the future of our artists and children.

This must stop – and stop now. Artists have tried: They targeted for-profit inducers. But artists were thwarted by a court ruling that held, in effect, that although artists can sue exploited children and families into bankruptcy, courts need "additional legislative guidance" to decide whether artists can, instead, sue the corporations that profit by inducing children to break the law. I find this assertion wholly inconsistent with the intent of both Congress and the Supreme Court. But until this fundamentally flawed ruling is overruled by legislation or higher courts, artists cannot hold inducers liable for their actions.

Fortunately, Congress has charged the Department of Justice to enforce the Criminal Code. In the Criminal Code, Congress made it a federal crime to willfully infringe copyrights or to distribute obscene pornography or child pornography. Congress also made it a crime to induce anyone – child or adult – to commit any federal crime.

Indeed, Congress codified many forms of criminal secondary liability in the Criminal Code. I have already quoted its first sentence. Here is its second: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." One court has said that this ensures that "[a] crime may be performed through an innocent dupe, with the essential element of criminal intent residing in another person." Not coincidentally, some federal prosecutors worry that P2P software makes infringement so tempting, easy and automatic that many of its users will lack criminal intent. Perhaps – but their relative innocence will not protect their inducers.

The Criminal Code also codifies other forms of secondary liability, like this one:

> If two or more persons conspire to injure, oppress, threaten any person in any State … in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, …. [t]hey shall be fined under this title or imprisoned not more than ten years, or both….

These examples of laws imposing secondary criminal liability have something in common: Congress codified no exceptions for "substantial non-criminal uses." The message is clear: Those who induce others to commit crimes cannot avoid prison by showing that some of them resisted. I will work with my colleagues in Congress to ensure that the Department of Justice enforces the federal laws that prevent anyone from inducing violations of any federal law by our citizens, our students, or our children.

Congress, too, must do its part by enacting the Inducing Infringement of Copyrights Act, S. 2560. This bill will protect American artists, children and taxpayers by restoring the privately funded civil remedy crippled by the *Grokster* ruling. Congress must act: A federal court has held that artists can only enforce their rights by suing exploited children and students pending "additional legislative guidance" about whether artists can, instead, sue the corporations that profit by inducing children to break laws and commit crimes. Silence could be misinterpreted as support for those who profit by corrupting and endangering others. This bill will restore the tried, privately funded civil enforcement actions long used to enforce copyrights.

This bill will also preserve the S*ony* ruling without reversing, abrogating or limiting it. The Inducement Act will simply import and adapt the Patent Act's concept of "active inducement" in order to cover cases of intentional inducement that were explicitly not at issue in *Sony*. The Inducement Act also preserves the Section 512 safe harbors for Internet service providers.

The bill also contains a savings clause to ensure that it provides the "guidance" courts have requested – not an iron-clad rule of decision for all possible future cases. This flexibility is critical because just as infringement cases are fact specific, so should inducement cases center on the facts of a given case, with courts endowed with the flexibility to impose just results. This bill does not purport to resolve or affect existing disagreements about when copies made and used within an individual's home environment are permissible and when they are infringing.

Rather, this bill is about is the intentional inducement of global distribution of billions of infringing copies of works at the prodding and instigation of sophisticated corporations that appear to want to profit from piracy, know better than to break the law themselves, and try to shield

themselves from secondary liability by inducing others to infringe and then disclaiming control over those individuals.

I also want to thank everyone who has worked with us to craft a bill that addresses this serious threat to children and copyrights without unduly burdening companies that engage in lawful commerce in the wide range of devices and programs that can copy digital files. As *Sony* illustrates, clear knowledge that a copying device can be used to infringe does not provide evidence of intent to induce infringement. It was critical to find a way to narrowly identify the rare bad actors without implicating the vast majority of companies that serve both consumers and copyright-holders by providing digital copying devices – even though these devices, like all devices, can be misused for unlawful purposes. In particular, I would like to thank the Business Software Alliance for its invaluable assistance in crafting a bill that protects existing legitimate technologies and future innovation in all technologies – including peer-to-peer networking.

Senator Leahy and I look forward to working with all affected parties to enact this bill and restore the balance and private enforcement that *Sony* envisioned. But until Congress can enact the Inducing Infringement of Copyrights Act, the duty and authority to stop inducement that targets children and students resides in the Department of Justice that Congress has charged to protect artists, commerce, citizens and children. The Department must act now to clarify some simple facts: American has never legalized the "business model" of Fagin and Bill Sykes. Modern Child-Catchers cannot lawfully profit by luring children into crime with false promises of "free music."

Mr. President, I urge all of my colleagues to support S. 2560, the Inducing Infringement of Copyrights Act.