



July 22, 2004

The Honorable Orrin G. Hatch  
Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Hatch:

As the Co-Chairs of USACM, the U.S. Public Policy Committee of the Association for Computing Machinery, we are writing concerning the recent introduction of S. 2560, the Inducing Infringement of Copyrights Act of 2004.

As you are aware, current law (as upheld by the U.S. Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)), does not permit copyright owners the legal right to control technologies that have or are capable of substantial noninfringing uses. The Sony rule is simple, clear, predictable, and objective. To determine contributory infringement, it simply asks courts to determine whether the technology has or is capable of substantial non-infringing uses. In practice, the Sony rule permits technologists and innovators to pursue the development of new computing technologies based on technological promise rather than broadly restricting the development of technologies because of its potential to induce illegal infringement.

We are concerned that S. 2560 could have serious unintended consequences that undermine continued innovations in software and digital computing that are at the core of future U.S. economic growth and general social benefit. The legislation proposes new standards for secondary liability for copyright infringement that are inconsistent with the Sony rule and whose intent and impact are ambiguous. Extending new forms of liability for developing new technologies and building tools that might be misused could open liability for many vendors of software and hardware (including operating system vendors), researchers (whose publications could be cited years after publication), and manufacturers of multi-purpose devices (including many common consumer and business products ranging from general purpose PCs to copier machines).

By bolstering the use of privately funded civil enforcement actions to enforce copyrights, we are concerned that S. 2560 further permits copyright industries to control the evolution or entry into the market of new technologies and likely inhibit progress in the affected fields. Innovators would be wary of developing transformative new technologies because copyright owners might perceive them as disruptive to current business models and pursue privately funded civil enforcement actions. The risk and expense of lengthy trials would drain innovators' resources and deter investments in innovative technologies.

In addition, S. 2560 seems to be based on a false premise or mistaken understanding of the innovation process as it relates to information technology. For example, innovators often fail to anticipate the most significant uses of their technologies as their subjective intents may be irrelevant to the technologies'

actual uses. Indeed, the Internet itself is a great example of a suite of technologies whose current use exceeds in numerous unanticipated ways (e.g., Internet radio, VoIP, telemedicine, etc.) the purposes for which it was developed--even though, at its core, the Internet remains exactly as its developers intended it: a means for exchanging information. S. 2560, however, appears to expose developers to liability if they had generalized knowledge that their design would enable infringement, even though their intent was to design the product for noninfringing purposes.

The ingenuity of the information technology industry, research and education community, and the Federal laboratories has propelled the United States as a leader in developing innovations in software and digital computing that provide jobs, increase productivity, stimulate economic growth, and save lives. Rather than encouraging innovation, we are concerned S. 2560 will place Federal judges and copyright owners as the gatekeepers of the U.S. research, development, and entrepreneurial enterprise.

We look forward to working with you and your colleagues to advance policies that support future innovations in computing. Please contact the ACM Office of Public Policy Office at (202) 659-9711 if we can provide input on any computing-related issue.

Sincerely,

Barbara Simons, Ph.D.  
Eugene H. Spafford, Ph.D

Co-Chairs  
U.S. Public Policy Committee of the ACM  
Association for Computing Machinery