September 29, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

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

Dear Senators Hatch and Leahy:

We write to share our views regarding your continuing efforts to address the problems that illicit file sharing services pose to consumers and to copyright owners.

We understand that in S. 2560, the Committee seeks to deter those who unjustly enrich themselves through enterprises that allow them to profit or otherwise benefit from the infringing acts of others while preserving the ability of legitimate companies to develop and provide consumers with innovative technologies and services unencumbered by the threat of litigation. We recognize this task is not easy, and we remain committed to working with the Committee to achieve this objective.

We sincerely appreciate both the opportunity you have provided to us for input regarding this legislation and the substantial efforts that have been made to address some of our members' concerns. The most recent draft of the 'Inducing Infringement of Copyrights Act of 2004' continues, however, to leave key issues unresolved or ambiguous. We believe that to implement your goal that legitimate products and technologies not be threatened, it should be made clear that technology products that can be used for significant legitimate purposes – in the copyright vernacular, substantial non-infringing uses – are not subject to copyright infringement liability. To this end, the bill should state clearly that the Supreme Court's decision in the *Sony Corp. v. Universal City Studios, Inc* case is unaffected and the defenses to infringement in that decision are preserved. That decision has stood for 20 years, and technology companies and the marketplace have come to rely on it.

More broadly, we believe that the draft circulated this week would encourage litigation and ultimately require responsible companies to spend resources defending themselves, even when no illicit aims are present. The draft does not make clear that providing technology products and services per se is not subject to liability, including when they can be used for significant legitimate purposes. Nor does the draft state, without qualification, that mere knowledge of infringing use of a product or service, or advertising and providing support or assistance to users, are not a basis for infringement liability.

To address the goals of this legislation, we believe that a more narrowly tailored approach would be better; one that enables aggrieved parties to target entities that have illicit motives and business models. This would avoid three major problems with the current draft: *first,* the need for courts to make determinations of the subjective intent of a product designer or producer, instead of properly focusing on objective questions of causation and business models; *second,* the need for courts to examine the design, functions and capabilities of particular technologies; and *third,* the inability of courts to dismiss a case before parties have to engage in costly and disruptive discovery.

We look forward to further discussions with the Committee and again reiterate our commitment to work with you as you proceed with this important task.

Sincerely,

Robert W. Holleyman, II
President and CEO
Business Software Alliance (BSA)

Bruce Mehlman
Executive Director
Computer Systems Policy Project (CSPP)

Rhett Dawson
President and CEO
Information Technology Industry Council (ITI)