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.

- <sup>7</sup> "Section 501 of title, 17, United States Code, is amended
- <sup>8</sup> by adding at the end the following:

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

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--

"(A) the predominant use of the computer
 program is the mass, indiscriminate infringing
 redistribution to the public of copies or phonorecords
 of copyrighted works;

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

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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)—

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

"(b) Monetary sanctions under Rule 11, Federal Rules ofCivil Procedure, shall be trebled."

# 15 "SEC. 4. CODIFICATION OF SUPREME COURT 16 PRECEDENT.

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