

DRAFT AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_

Purpose: To discourage individuals from encouraging mass, indiscriminate copyright infringement; to encourage innovation and technological development; and for other poses.

**IN THE SENATE OF THE UNITED STATES**

**108<sup>th</sup> Cong. 2nd S**

**S. 2560**

To amend chapter 5 of title 17, United States Code, relating to inducement of copyright infringement, and for other purposes.

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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.**

7 “Section 501 of title, 17, United States Code, is amended

8 by adding at the end the following:

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

10           “(2) For purposes of this subsection and without  
11 limiting such other evidence as may be relevant to dem-  
12 onstrating whether a person had the specific and actual  
13 intent necessary to violate paragraph (1), a person shall  
14 not be deemed to have such specific and actual intent  
15 unless--

16           “(A) the predominant use of the computer pro-  
17 gram is the mass, indiscriminate infringing redistri-  
18 bution to the public of copies or phonorecords of  
19 copyrighted works;

20           “(B) the commercial viability of the computer  
21 program depends on, and the predominant revenues  
22 derived by the distributor from the computer pro-  
23 gram are derived from, its use for such mass, indis-  
24 criminate infringing redistribution; and

1           “(C) the person has undertaken conscious, re-  
2           curring, persistent, and deliberate acts that encour-  
3           aged another person to commit such mass, indis-  
4           criminate infringing redistribution or absent a legiti-  
5           mate purpose actively interfered with the ability of  
6           copyright owners to detect and prosecute such mass,  
7           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 distri-  
12           bution of a computer program shall not be liable un-  
13           der paragraph (1) for providing or operating such  
14           service.

15           “(B) Actual or constructive knowledge of the  
16           use of a computer program is not sufficient to dem-  
17           onstrate the requisite specific intent under paragraph  
18           (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 net-  
24           works shall not be liable under paragraph (1) not-  
25           withstanding any contribution to or benefit from

1           such distribution. By way of example and not limi-  
2           tation, providing—

3                   “(i) venture capital, financial assistance, pay-  
4           ment services, or financial services,

5                   “(ii) advertising, advertising services, or prod-  
6           uct 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 serv-  
12          ices

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 in-  
18          dexing 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 particu-  
25          larity.

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)—

10          “(a) The court shall allow recovery of full costs, includ-  
11 ing reasonable attorney's fees, by the prevailing party; and

12          “(b) Monetary sanctions under Rule 11, Federal Rules of  
13 Civil Procedure, shall be trebled.”

14 **“SEC. 4. CODIFICATION OF SUPREME COURT**  
15 **PRECEDENT.**

16          “Except as provided under section 501(g)(1), it shall not  
17 be a violation of the Copyright Act to manufacture or distrib-  
18 ute a hardware or software product that is capable of com-  
19 mercially significant noninfringing use.”.