IN RE UNITED STATES COPYRIGHT OFFICE DISCUSSION DRAFT OF S.2560 CIRCULATED FOR COMMENTS ON 9/02/04.

COMMENTS OF JOSHUA S. WATTLES AS A PRIVATE CITIZEN AND MEMBER OF THE COPYRIGHT BAR.

September 3, 2004 (Corrected version sent September 4, 2004)

To: Ms. Marybeth Peters, Register of Copyrights

Please accept these comments as part of the process of your investigation on behalf of the United States Senate concerning appropriate legislative responses, if any, to the use of so-called peer-to-peer software applications on the Internet. My comments, below, are interlineated in contrasting type face to the draft of the proposed bill as circulated by the Copyright Office.

Although you have not requested public comment to the draft and have limited participation in your inquiry to a closed, unpublished circle of interested parties suggested to you by the referring Senate committee, I believe you should incorporate the views of other qualified voices to the extent that they come forward to participate.

I am a past president of the Los Angeles Copyright Society; the former acting general counsel of Paramount Pictures Corporation and it's then lead intellectual property counsel; former counsel to certain peer-to-peer services and developers appearing as amici in the MGM v. Grokster litigation; a former in-house lawyer for ASCAP; and, years ago before law school, a co-founder of Bay Area Lawyers For The Arts, the precursor organization to Volunteer Lawyer For The Arts. My first training in copyright law came through Waldo Moore, a distinguished long-time lawyer in the Copyright Office, in his class at the George Washington School of Law in the mid 1970's.

My comments below are made solely as a private citizen and as a concerned member of the copyright bar and do not reflect the views of any client past or present. You are free to make my comments public and to publish them as needed or required.

I intend to send copies of this submission to the appropriate Senate staff and members but with the press of time, the copies will not reach their offices until Tuesday, September 7.

Sincerely,

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SECTION 1. SHORT TITLE.

This Act may be cited as the 'Inducing Infringement of Copyrights Act of 2004'.

SEC. 2. INTENTIONAL INDUCEMENT OF COPYRIGHT INFRINGEMENT.

Section 501 of title 17, United States Code, is amended by adding at the end the following:

(g) (1) Whoever intentionally induces another to infringe any of the exclusive rights in Sections 106(3), 106(4), 106(5) or 106(6) under subsection (a) shall be liable as an infringer. For the purposes of this subsection, 'induces' means to commit one or more affirmative, overt acts that are reasonably expected to cause or persuade another person or persons to commit any infringement under subsection (a) of this section.

While gratefully improving on the initial draft by excluding infringements related to sections 106 (1) [reproducing in copies] and 106(2) [preparing derivative works], in effect this proposal is for new law working on behalf of only certain classes of copyrighted works, largely film and music, raising the prospect of disproportionate remedies for different kinds of works dependant on the type of media which an author chooses for expression. This is a very significant conceptual change in the fabric of the existing law. Sound recordings may have lesser rights than songs and certain compulsory licenses may apply only to public performances of music rather than literary works, but remedies for infringement and the elements of acts of infringement were defined uniformly before this proposal.

A change of this magnitude needs to be thoroughly considered and the Copyright Office or the Committee should obtain serious, considered and objective analysis of this issue by appropriately skilled experts in the field.

(2) For the purposes of this subsection, "overt acts" constituting inducement may include:

(A) distributing any dissemination technology that, when used as intended, automatically causes the user of the technology to infringe copyrighted works without the user making a specific, informed decision, for each copyrighted work at issue, about whether to engage in such infringement;

This very broad definition would impact email applications that automatically permit public distribution of literary and other works including casual documents prepared in business and sent to the public. To avoid liability, email applications, for example, would need to prompt a user that the user's transmission of an email could involve copyright infringement each time a message is sent. This is hardly a "technology neutral" approach. As another example: while popular search engines would not need to warn users that conducting a search and viewing the results could be infringing despite the unauthorized use of copyrighted materials in producing search results

particularly when images are displayed in the search result (because a search engine used in this way would not be a “dissemination technology”), the search engine would nonetheless need to issue a warning to the user if she tried to send the results of the search to others using one of the common forwarding tools available on many search engines (because then the search application would be functioning as a “dissemination technology”).

Infringement by inducement occurs under this draft in connection with unauthorized distribution of copies to the public under section106 (3) of the existing law. The word “public” is defined in existing law with a backward definition obtained through exhaustive legislative balances reached with copyright owners and users at the time of the1976 Copyright Act. The definition has remained unchanged in the face of radical, transformative developments in the distribution and use of copyrighted works. The existing definition under current law doesn’t conform to the draft Bill at all, particularly as the word “public” is used in section 106(3).

The draft is exceedingly naïve from a technical point of view. Inasmuch as the draft contains glairing conflicts such as these with aspects of exiting technology that the Bill’s proponents claim they have no intention of attacking the draft suggests an incredibly ill-informed approach to the critical fact finding necessary before embarking on dramatic changes in law.

(B) actively interfering with copyright holders' efforts to detect infringing uses of dissemination technology and enforce their copyright against those uses;

This provision in effect would require all technologies used in dissemination to contain affirmative windows through which copyright owners may observe the passage of all contents. This is an extraordinary abdication of privacy rights and has significant First Amendment implications. It also places the copyright industries at the table during the design of every dissemination technology developed in the future. It is the equivalent of a law mandating that all magazines must be transparent to permit inspection of the contents by copyright owners in advance of purchase or a requirement that every book at the moment of its first public transfer is to be made available to any copyright owner for inspection. The provision reflects a profound confusion by its drafters of the appropriate response to new technology and is an example of the danger of jumping too far and too fast. It is highly unlikely that any natural author would want this level of scrutiny applied to any of their future works.

(C) offering an incentive to users of dissemination technology to make infringing use of the technology, such as providing improved performance of the technology in exchange for infringing distribution of copyrighted works;

(D) failing to take reasonably available corrective measures to prevent any continuing acts of infringement resulting from overt acts described in subparagraphs (A)-(C) of this subsection (2) that were committed before the effective date of this subsection; or

This provision allows copyright owners to impose retroactive requirements on subsisting technology already found to be non-infringing under the Sony-Betamax doctrines while elsewhere, in a proposed Section 3, below, the suggestion is made to protect the status quo on any pending litigations over "inoperative dissemination technologies" presumably to preserve for copyright owners a petition for certiorari to the Supreme Court in the Grokster case.

At some point if enough cuts are made around a doctrine, it falls just as dramatically as if it had been stabbed in its core. The draft preserves the Sony-Betamax doctrines in only the most technical sense of failing to state that they are overturned. Congress is free to directly eliminate the Sony-Betamax doctrines from the law but the impression was made by the Senate Committee that it would not do so.

(E) distributing a dissemination technology as part of an enterprise that substantially relies on the infringing acts of others for its commercial viability or the revenues of which are predominantly derived from the infringing acts of others.

Here is the only language needed to clarify the scope of contributory or vicarious liability with respect to inducing mass infringements through peer-to-peer applications. In five minutes any competent draftsperson could produce a single purpose amendment to the Copyright Act instead of a burdensome and convoluted approach that attempts to heal old wounds suffered some 30 years ago from the Supreme Court's Sony-Betamax decision.

(3) For the purposes of this subsection, and absent any other overt act, an "overt act" does not include:
(A) distributing any dissemination technology capable of substantial noninfringing uses knowing that it can be used for infringing purposes, so long as that technology is not designed to be used for infringing purposes;

The clause cannot be logically understood and it needs to be if there is any expectation that members of the copyright bar would be able to advise clients with respect to the law. This subsection genuinely means either nothing (which a court will not allow as a matter of statutory construction but which nonetheless appears to be the case) or it means that one could simply place a memo in the file from an application developer advising that the disseminating technology was not "designed to be used for infringing purposes " and that skipping this idiotic exercise would result in liability.

(B) distributing any dissemination technology that incorporates reasonably effective measures to prevent or halt dissemination that constitutes infringement within the meaning of this subsection;

The clause would put copyright owners directly at the table of every company designing any technology capable of any dissemination of copyrighted works. This is a radical change to the scope of copyright protection and would dramatically chill the development of technology in the future. It would almost certainly send such technologies out of the country and would result in consumers in other developed

countries enjoying substantially different and improved goods and services with respect to copyrighted works. The United States already trails Japan and Europe in these respects and the gap would be become even larger. This provision is likely to be unenforceable under TRIPS and other international trade treaties. Once again, study of that issue should be referred in advance of passage to appropriate objective experts.

(C) advertising, marketing or promoting a dissemination technology that does not specifically encourage the use of that technology for infringing purposes;

Stop a moment and consider that the definitional language, above, describes obviously non-infringing conduct as not falling within the definition of an "overt act" for the purposes of inducement to infringe. What other obviously non-infringing conduct should be acknowledged in order to avoid the well used rule of statutory construction that *expressio unius est exclusio alterius* - - the expression of one thing marks the intent to effect the exclusion of all other similar things? At best this kind of drafting error is naïve and at worst it suggests an intentional seeding of traps into the law.

(D) the providing of information on the use of a dissemination technology by the creator or distributor of that dissemination technology when the information does not specifically encourage the use of that technology for infringing purposes, including through instruction manuals, handbooks, user guides or customer support services;

In other words, it would be acceptable to talk about an infringing technology in an article or technical journal so long as the creator or distributor when quoted in that article "does not specifically encourage the use of technology for infringing purposes." Such an outrageous prior restraint on speech is worthy of the kind of mogul-think that dominates large entertainment company board rooms but it is completely inappropriate to the freedoms citizens are to enjoy when not taking a paycheck. It is particularly ironic to see a constraint on mere expression in a body of law, the copyright law, which affords intricate protection to the expression of ideas.

Is a court is to enjoin such conduct on a definition of "infringing purposes" that requires a years-long process of individualized litigation to determine? The proposed definition permits the language of an instruction manual to contribute to infringement and may suggest that the author of such a manual could be liable and further inserts the copyright law into the very drafting process of such a manual. This provision borders on the simply silly. The following clause (E), below, does nothing to fix its problems because it only speaks to providing "information" not to providing encouragement for infringing conduct. By indirection, clause (E) permits a critic or magazine author to become liable as an inducer of infringing conduct. Add to the mix that this draft defines infringing conduct that, if "willful," would be criminal under section 506, and the First Amendment issues become seriously magnified.

(E) the providing of information on the use of a dissemination technology by a person not affiliated with the creator or distributor of that dissemination technology in the context of commentary, criticism, or reviews of the dissemination technology; or

Please see the comment immediately above.

(F) providing products or services to a distributor of dissemination technology in the same manner that such products or services are provided to other members of the public, including but not limited to financial services, delivery services, advertising services, product reviews or evaluations, library services, real estate services, customer-support services for users of computer software or hardware, utilities and telecommunications services.

(4) For the purpose of this subsection, "dissemination technology" means any product, service, device, component, or part thereof, that enables or facilitates the distribution of copies of a work to the public, performance of a work publicly, display of a work publicly, or the performance of a work publicly by means of a digital audio transmission.

This definition and the entire draft leave completely undefined who can be found liable for inducement. In some places the draft speaks of “distributors” or “creators” and elsewhere it attempts to absolve some acts of an author of “commentary, criticism, or reviews” while presumably still leaving such a person potentially liable as an inducer. The draft leaves totally unclear whether a developer or just a code writer, as opposed to a distributor, could be found liable as a general matter but presumably only the developer or code writer could be found directly to engage in some of the overt conduct giving rise to a claim, such as “failing to take reasonably available corrective measures to prevent any continuing acts of infringement” [in section g(2)(D)] or “actively interfering with copyright holders' efforts to detect infringing uses” [in section g(2)(B)]. This raises the specter of a whole new level of legal advice necessary for software and hardware developers and confuses the copyright law with a set of behavioral rules of invention of a kind more typical to preserve public safety or to regulate the fitness of particular goods for sale to the public. Moreover, the failure to more accurately define the “who” of liability suggests a French farce of the law in which the liability provisions with respect to inducement are meshed to those imposing contributory and vicarious liability for inducement qua infringement and then laid on top of those imposing contributory and vicarious liability for the actual infringing conduct.

(5) Courts adjudicating actions under this subsection should attempt, to the extent practicable, to minimize the potential burdens of such litigation upon the parties by measures including:

(A) allowing discovery and summary judgment on the objective questions of inducement and infringement before permitting discovery and adjudication of the subjective element of intent;

(B) exercising their authority under this Chapter to award fees and costs to the prevailing party.

A Federal District Court Judge would be expected to ask first if Congress planned to provide additional appropriations to permit these cases to go forward on this accelerated basis in advance of other matters far more serious that do not enjoy the special privileges in this draft. Moreover, the draft apparently mis-apprehends the process of litigation. For example, a summary judgment here would require an initial finding that there are no substantial facts in dispute on questions of inducement and/or

infringement. If there is no dispute on the "objective" facts would any "objective questions" remain for summary adjudication? Should such a dispute exist, can the court bifurcate for jury determination only certain facts within the issue of liability for a single act, all as suggested in 5(C), above? The defendant would be entitled to a jury if these objective questions are anything remotely factual in nature. Perhaps the Committee should ask for an opinion on the matter in advance of passage from the Solicitor General.

By including this section, the draft acknowledges that copyright owners (almost invariably not the author of any copyrighted works) will be using these new provisions to attack technologies before they come to market - - a massive, radical change in the status quo and a de facto abolition of the Sony-Betamax doctrines no matter how much the supporters this draft attempt to suggest otherwise.

Here lies the heart of the motivation behind the draft and proof of the draft's intent to allow the threat of litigation to cast its shadow over all future new technologies involved even tangentially in the dissemination of copyrighted works controlled by large aggregators. Big content will do constant battle with technology developers, big or small and with a law such as this big content will invariably win against the small and come to a draw against the big. Authors and consumers will sit far from the field with no voice in the process. It places courts in the unenviable position of trying to gauge the uses of technologies in advance of their introduction (one of the reasons for separate patent courts which might be a more appropriate venue in which to adjudicate these types of claims).

(6) Nothing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement, including any defenses thereto or any limitations on rights or remedies for infringement, or the authority of courts to apply or adapt common-law standards. Nothing in this subsection shall enlarge or diminish liability for infringement of the exclusive rights in Sections 106(1) or 106(2).

(7) The limitations on liability in Section 512 shall apply to actions brought under this subsection.

If the ISP's are given a free ride, a safe harbor and an exclusion from liability for otherwise clear and unequivocal infringing conduct that results, through the sale of broadband accounts (and otherwise), in huge revenues and profits from that conduct, why then impose new liability on a whole new tier of actors? The question is of course as rhetorical as the answer is political. Nonetheless, the draft is far too broad in scope to suggest that it targets just the "bad actors" involved in so-called P2P applications and by this clause makes it clear that it intends to continue to protect ISP's as "good actors" with respect to their profits from P2P broadband use. As noted, the draft ropes in for liability technicians and commentators and intermediaries all along the line in a fashion so universal as to necessitate the specific statutory exclusion of a developer's landlord. Moreover, if the ISPs for some sound reason of social policy or benefit remain entitled

to their privileges, and if the intent here is to impose liability on the "inducers," why then continue to permit the attack on "innocent" infringers at the consumer level?

Armed with the new weapons suggested in the draft and a new set of actors to pursue, there should be no further need to permit consumer lawsuits. These indiscriminate wide ranging and financially abusive lawsuits target run of the mill consumers who have been duped by ISPs, by technology manufactures, by the developers and distributors of dissemination technologies as well as by other legally available software applications into believing that they should "rip, mix and burn."

The design of the copyright clause in the Constitution is to promote the progress of knowledge among the people in the nation - - not to pillory users when profiteers go free. Perhaps a balance of sorts could be struck with an exemption from monetary damages for unintentional consumer level infringement arising from the use of such dissemination technologies as are capable of shut-down as inducements to infringement. The exemption would be consistent with the charge made to the Copyright Office by the Senate Committee to help "resolve this serious threat to artists, consumers, and the development of safe, lawful Internet commerce as soon as possible."

SEC. 3. LITIGATION RELATED TO INOPERATIVE DISSEMINATION TECHNOLOGIES.

[A provision to make clear that this bill has no effect on pending litigation over inoperative dissemination technologies, such as Napster.]