ACE American Council on Education
AAU Association of American Universities
NASULGC National Association of State Universities and Land-Grant Colleges

July 22, 2004

The Honorable Orrin Hatch, Chairman
Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

I write on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges to express the concerns of our member colleges and universities with S. 2560, the Inducing Infringement of Copyright Act of 2004. In particular, we are concerned that the broad concepts of "aiding," "abetting," or "inducing," and the uncertain standard of imputed intent, will increase the risk that colleges and universities will face claims of infringement when they develop and provide to students and faculties high-speed computer networks and beneficial new applications that will dramatically enrich educational programs, open new possibilities in the conduct of research, facilitate research collaboration, and enhance communication of research results. These new risks threaten to chill educational innovation and the advancement of knowledge. Indeed, some of the opportunities in distance education made possible by the TEACH Act, which owes its existence in large measure to your support, could be constrained by S. 2560 as currently constructed.

We support your objective of targeting companies whose commercial viability depends upon profiting from the infringing conduct of others by explicitly marketing peer-to-peer (P2P) file sharing software for the purpose of undeniable infringement. Higher education institutions are undertaking comprehensive efforts to eliminate or reduce infringing P2P use. Working in cooperation with the entertainment industry through the Joint Committee of the Higher Education and Entertainment Communities, we are sharing information with our institutions about effective ways to reduce unauthorized P2P file sharing through network management technologies, educational efforts, campus policy development and enforcement, and are working with legitimate companies to develop options for the legal delivery of music, movies, and other digital content through programs shaped to the campus environment.

S. 2560 has been described targeting such companies as Grokster without narrowing or overturning the Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, without creating any technology mandates, and without affecting the safe harbors provided to service providers in the Digital Millennium Copyright Act. Unfortunately, we are unable to conclude that the bill effectively targets bad behavior without also sweeping in lawful activities that should be encouraged. Instead, the bill appears to us to create a new form of liability that, while not directly affecting the *Sony* decision, can make it irrelevant. The definition of "intentionally induces," and the "reasonable person" standard for finding intent appear so broad as to have the effect of serving as a negative technology mandate—specifying technologies too risky to develop and distribute, and of placing service providers and software providers like colleges and universities at considerable risk for providing products and services that could lead to infringement.

We are gratified that you have scheduled a hearing to examine S. 2560. We very much hope that, after the airing of the views of both supporters of the bill and those with strong reservations about it, you will embark on a systematic process to re-examine the concept of intentional inducement and seek ways to target such conduct in ways that do not place at risk technologies, products, and services that are not only legitimate but strongly to be encouraged.

As a sector that shares your goals, we would be pleased to work with you in the achievement of them.

Thank you for your consideration of our views.

Sincerely,

Nils Hasselmo

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