

1 **09/02/04 DISCUSSION DRAFT**

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3 **A BILL**

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

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7 Be it enacted by the Senate and House of Representatives of the United States of America in  
8 Congress assembled,

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10 **SECTION 1. SHORT TITLE.**

11 This Act may be cited as the ‘Inducing Infringement of Copyrights Act of 2004’.

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13 **SEC. 2. INTENTIONAL INDUCEMENT OF COPYRIGHT INFRINGEMENT.**

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

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

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

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

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

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

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

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

10 (3) For the purposes of this subsection, and absent any other overt act, an “overt act” does  
11 not include:

12 (A) distributing any dissemination technology capable of substantial noninfringing uses  
13 knowing that it can be used for infringing purposes, so long as that technology is not designed to  
14 be used for infringing purposes;

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

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

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

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

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

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

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

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

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

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

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

25 **SEC. 3. LITIGATION RELATED TO INOPERATIVE DISSEMINATION TECHNOLOGIES.**

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

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