Competitive Enterprise Institute
1001 Connecticut Ave NW • Suite 1250 • Washington, DC 20036
202.331.1010 • www.cei.org
Twenty Years of Advancing the Principles of Free Enterprise and Limited Government

July 21, 2004 **No. 91**

Send Me No Files

Senate INDUCEs a Threat to the Future of Information Technology

by George Pieler[*]

Please copy and share this article, download some music files, and photocopy your favorite chapters from Bill Clinton's new book. It's fun: Just do it!

Did I convince you? If so, then Senate Judiciary Committee leaders think I should be held liable for copyright infringement, and owe damages to any copyright holders affected. On June 22, the Committee's chairman and ranking member, Sens. Orrin Hatch (R-UT) and Patrick Leahy (D-Vt.), introduced the "INDUCE Act" (S. 2560, proposed working title: "Inducement Devolves into Unlawful Child Exploitation Act"), which would penalize those found to "induce" a copyright infringement as if they were actual infringers themselves. This is heavyweight legislation, also sponsored by the bipartisan Senate leadership of Daschle and Frist, along with Sens. Barbara Boxer (D-Calif.), Lindsey Graham (R-S.C.), Hillary Clinton (D-N.Y.), and Paul Sarbanes (D-Md.).

The INDUCE Act is the latest in a string of fast-tracked Senate proposals designed to give major media players more "power tools" to attack downloading, duplicating, and exchanging music and video files over the Web. However, this legislation is not confined to person-to-person (P2P) file exchanges: It would affect cable, PC, PDA, satellite TV and radio, photocopying, and other technologies that allow transmission of data—and threaten the emergence of future technologies. Had such a law been in place during the 1970s, we may not have PCs, CDs, and other technologies we now take for granted.

A Bridge too Far. Digitized music, movies, text, and images, coupled with the Internet's powerful dissemination capacity, have created unprecedented challenges for lawmakers and jurists seeking to balance the interests of content generators (the copyright holders) and consumers (the potential infringers), as well as those of the

[*] George Pieler is a freelance writer and attorney based in Falls Church, Virginia. In the 99th Congress he served as Deputy Counsel to Sen. Majority Leader Bob Dole.

computer, electronics, and telecom/transmission industries caught in the middle. Hollywood and the recording industry have been very successful in persuading Congress, and in most cases the courts, to endorse aggressive efforts to locate and prosecute unauthorized downloaders and file swappers. Internet service providers (ISPs) have been compelled to identify downloaders; and the prototype for file sharing, Napster, was shut down (since revived as a pay site).

Yet downloading continues. In response, content creators and providers are figuring out how to make money online—selling files and subscriptions over the Internet, for example. But content owners seek ever more legal weapons in search of copyright nirvana. The INDUCE Act crosses a bridge too far, and may be risking America's technology future—and America's economy.

Why Should We Care? The INDUCE Act's supporters claim they are just aiming at "bad actors"—flagrant facilitators of copyright offenses, mainly in the area of P2P sharing of music and video files. If so, they went to the wrong lawyer to draft the bill. This bill may be directed at infringement P2P file downloads, but it is far more sweeping. S. 2560 creates a new cause of action that would strike at *any* technology—new or old—that might be used in a manner unapproved by the copyright holder.

While the bill requires an actual copyright violation for an "inducer" to be held liable, one cannot prove a copyright violation without going to court. That opens wide the door to legal actions designed to chill technological and economic activities a court *might* construe as inducing a copyright violation. One need not prove a copyright violation to "induce" someone to settle rather than pay for a costly and lengthy court battle.

The bill's definition of a wrongful inducement is limited in the sense that it requires "intent" by the alleged offender. However, that intent is to be discerned from "acts from which a reasonable person would find intent to induce infringement based upon all relevant information." The problems with this legislative approach are many. What a "reasonable person" might think was in the minds of a designer creating, or entrepreneur marketing, a product is anyone's guess. The Act's unspecific language can intimidate: Technology firms and entrepreneurs will be overly cautious, rather than risk finding out the hard way what the Reasonable Man might be persuaded to believe regarding "intent."

Further, since state of mind cannot be proven objectively, invoking it as a standard of liability can only shift preference to content owners. One component of the "relevant information" from which inducement is to be discerned is "whether the activity relies on infringement for its commercial viability." At first glance, this appears to provide a safe harbor for potential inducers. But in fact, "commercial viability" doesn't give any protection at all. If an "inducer" can demonstrate non-infringing commercial viability, the copyright holder can turn to any other "relevant information" to demonstrate ill intent, with litigants and courts free to improvise on the kind of proof needed. For example, people who buy Internet-ready PCs may swap or download copyrighted files, but it would be hard to show how many—if any—PC sales are made *only* for that purpose. Since file-swapping is usually a free exchange, there is no commercial benefit to the PC vendor or manufacturer. But under the INDUCE Act's free-floating "intent" standard,

Hewlett Packard, IBM, BestBuy, Dell, and so on could be held liable for actionable "inducement." That's how ill-defined this bill's parameters are. If the inducer shows "commercial viability," the plaintiff may seek action under other types of evidence.

Property Uber Alles? Media industry coalitions have made sweeping arguments that extraordinary remedies are needed to protect the sanctity of intellectual property rights as embodied in copyright. This has been a particularly compelling argument for some economic conservatives, who understand the importance of safeguarding private property in a free society. Some industry groups appear to seek not just copyright protection, but an unconstrained definition of those rights as a legal bludgeon against consumers and technology providers. A bludgeon may be warranted in some cases, but the INDUCE Act draws no fine distinctions—it covers anything that can be copyrighted, and it threatens fair and legal use alongside illegal infringement.

In particular, this legislation could obliterate the "fair use" doctrine, the established principle that consumers who purchase a work have legal, legitimate rights to copy or share that work within parameters. Fair use is challenging enough legally. Its limits are unclear, since fair use determinations must be made on a case-by-case basis. Thus, exposure to contributory liability charges would make technology providers wary of "inducing" even copying that might fall under the fair use exception or that is no threat to a copyright holder's commercial exploitation. Potential "inducers" don't want to be sued, they want to create and sell products and services.

Elevating copyright above every other legal and policy consideration misunderstands property rights, and indicates a reluctance to balance legitimate competing interests. In common law, real property has always been sacrosanct, but it has also been limited and conditional in important ways. You can prohibit trespass, but you may be subject to an easement or a right of way. You can use your property as you wish, but you may not be able to build a rendering plant next to a tuberculosis clinic. Further, *intellectual* property, as vital as it is to the advancement of society, is different in kind from *physical* property. Its boundaries must be defined by positive law, not physical characteristics. Nervous content owners seem reluctant to accept limits, regardless of new market opportunities for creators, performers, and technology.

Music companies have every right to put technological clamps on fair use, such as by marketing copy-protected CDs, or other limiting measures. But consumers also have a right not to buy them, and to turn to alternatives. Consumers have also been eager to buy just the songs they like, rather than a CD package of two hits and 10 throwaways. File sharing now makes that possible, and the legal market for single-track downloads has only just begun to be tapped. In the digital age, technology increasingly permits copyright holders to regulate and constrain the consumer's use of property legitimately purchased in ways not envisioned 10 or 20 years ago. In the battle over illegal downloads, all parties to the dispute have powerful technological weapons at their disposal. Drastic contributory liability is out of proportion to the problem.

The Big Picture. Still, to focus the INDUCE Act debate on downloads and file swapping alone concedes too much to the proponents. The bill is in no way confined to

file sharing, and could impact every use of technology to exchange information that could be copyright-protected. For example, on July 14, 2004, a federal judge allowed the music industry to proceed with its case against major Napster investors on the theory that those investments cost the music industry big bucks. The INDUCE Act would expand the number of individuals and businesses exposed to such lawsuits. Investors, designers, and entrepreneurs would have to weigh the potential for astronomical legal costs before backing any company or technology that might be found to induce infringement.

Aggressive legislation on contributory liability would harm the cause of promoting free speech and democratic values abroad. As writers Nir Boms & Erick Stakelbeck reported recently in *National Review Online*, "Since 9/11, over a dozen privately owned, pro-democracy radio stations have emerged in freedom-starved countries like North Korea, Syria, Iran, and Cuba." Will support for these efforts, which clearly may use copyrighted material, have to stop for fear of prosecution for inducement?

Indeed, the sweeping new legal concept behind INDUCE would establish a *de facto* permitting process for any business or technology that enables transmission or copying of copyrightable material. The potential for inducement would have to be weighed before the introduction of a new technology or device. Government standards would likely define "inducement" and require a sort of "inducement impact statement." In essence this constitutes a "precautionary principle" for technology, such that no new technology or product can be marketed until it can be proven, in advance, that it will never do harm to anyone anywhere (a virtual impossibility since one cannot prove a negative). The chilling effect on the American economy would be substantial.

A Note on Process. Caution is warranted in the copyright debate. It should trouble any student of the democratic process that the leap in contributory liability represented by the INDUCE Act is getting so little legislative review. There has already been one (barely thwarted) attempt to ram S. 2560 through the Senate by calling the bill directly on the floor**,** with no debate. An issue of this magnitude deserves more INDUCED debate.