

10/1 Draft

(g)(1) Whoever engages in conscious affirmative acts to encourage covered infringement by the use of a peer-to-peer product or service that the person manufactures, offers to the public, provides, or otherwise traffics in, which product or service is a substantial cause of covered infringement, shall be liable as an infringer if –

(A) the majority of the revenues of the product or service result from covered infringement;

(B) [the person knows] the copies or phonorecords that are made available by covered infringement are the principal reason [the majority of] users use the product or service.

(2) For purposes of this subsection –

(A) the term “covered infringement” shall mean widespread infringement of section 106(3) by means of digital transmissions where such infringement results in one or more copies or phonorecords [that in turn are made widely available by peer-to-peer means, and from which further infringing copies or phonorecords may be made]; and

(B) the term “peer-to-peer” shall mean any generally available product or service that enables individual consumers’ devices or computers, over a publicly available network, to make a copy or phonorecord available to, and locate and obtain a copy or phonorecord from, the computers or devices of other consumers who make such content publicly available by means of the same or an interoperable product or service, where –

(1) such content is made publicly available among individuals whose actual identities [and electronic mail address] are unknown to one another; and

(2) such program is used in a manner in which there is no central operator of a central repository, index or directly who can remove or disable access to allegedly infringing content.

(3) Before the commencement of discovery for any claim of a violation of this subsection, the court shall determine on an expedited basis whether the plaintiff has presented a prima facie case that the product or service is a peer-to-peer product or service and that the product or service results in covered infringement.

(4) Limitations on Remedies.

(A) No award of statutory damages under section 504(c) shall be made for a violation of this subsection unless the copyright owner sustains the burden of proving, and the court finds, that such violation was committed willfully.

(B) In granting injunctive relief under section 502 for a violation of this subsection, the court shall, to the extent practicable, limit the scope of the injunctive relief so as not to prevent or restrain noninfringing uses of the product or service.

(5) No court shall apply a doctrine of secondary liability to the cause of action created by this subsection.

[(6) The manufacture, offering to the public, providing, or otherwise trafficking in a product or service, including general purpose computing equipment and software, analog and digital recording devices, and broadband communication facilities and services, shall not be deemed a violation of this subsection provided such product or service has substantial noninfringing uses.]

(7) Nothing in this subsection shall enlarge or diminish liability for direct infringement or the doctrines of vicarious liability and contributory infringement, including any defenses thereto or any limitations on rights or remedies for infringement.

(8) A service provider, as defined in section 512(k)(1)(B), whose service is used by an unaffiliated third party to violate this subsection shall not be liable under this subsection for such use.