Appendix 8

Summaries of Testimony for November 29, 2000 Public Hearing
Filed in Response to 65 FR 63626

No.	Individual Testifying	Organization(s) Represented
1	Keith Kupferschmidt	Software & Information Industry Association
2	Dr. Lee A. Hollaar	Self
3	Steven J. Metalitz	American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America
4	Carol A. Kunze	Red Hat, Inc.
5	Scott Moskowitz	Blue Spike, Inc.
6	David Goldberg	Launch Media, Inc.
7	David Pakman	myplay, inc.
8	Marvin L. Berenson	Broadcast Music, Inc.
9	Bernard R. Sorkin	Time Warner Inc.
10	Emery Simon	Business Software Alliance
11	Alex Alben	RealNetworks, Inc.
12	Susan Mann	National Music Publishers' Association, Inc.
13	Gary Klein	Home Recording Rights Coalition
14	Seth Greenstein	Digital Media Association
15	James G. Neal and Rodney Peterson	American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association
16	Cary Sherman	Recording Industry Association of America, Inc.
17	Charles Jennings	Supertracks, Inc.
18	Fritz E. Attaway	Motion Picture Association of America
19	Professor Peter Jaszi	Digital Future Coalition

20	Daniel C. Duncan	Digital Commerce Coalition
21	Pamela Horovitz	National Association of Recording Merchandisers
22	Crossan Andersen	Video Software Dealers Association
23	Nic Garnett	Intertrust Technologies Corporation
24	David Beal	Sputnik7.com
25	Allan R. Adler	Association of American Publishers
26	Robert F. Ohlweiler	MusicMatch Inc.

Software & Information Industry Association

ONE PAGE SUMMARY OF THE
TESTIMONY OF KEITH KUPFERSCHMID
ON BEHALF OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
ON THE REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DMCA
BEFORE THE U.S. COPYRIGHT OFFICE AND NTIA

November 29, 2000

SIIA is the principal trade association of the software and information industry and represents over 1,000 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA and our members are extremely interested in issues relating to the interplay between new technologies, e-commerce and the copyright law.

With regard to the first sale doctrine, section 109 of the Copyright Act, SIIA strongly believes that no change to the language of section 109 is appropriate. Not only is such a change unwarranted, but even if one were to proffer some good reason for changing the scope of section 109, we assert that it is much too early in the development of e-commerce and business models are evolving much too rapidly to make any changes in section 109 at this time. In particular, the so-called simultaneous destruction proposal suggested by some of the commentators ignores too many evidentiary and practical considerations to warrant any serious consideration.

SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 Report that: (1) the first sale exception does not apply to digital distribution mechanisms such as the Internet; and (2) given the Congressional intent underlying the first sale exception and the ease by which consumers have and will have access to a wider variety of copyrighted works that ever before, it would be inappropriate to expand the first sale exception into the digital distribution environment.

With regard to section 117, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of section 117. All to often, we have become aware of persons engaged in software and content piracy who are attempting to use section 117 as a way of legitimizing their piratical activities. The days of people using section 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public on the "dos and don'ts" of section 117 (as well as other provisions of copyright law) conducted by the Copyright Office and the Administration.

Section 117 was enacted at a time when the need to make a back up copy of your software was essential. Technology and business models have evolved to a point where the need for the provisions in section 117 relating to the making of a back-up copy of your software no longer exist. Moreover, it seems senseless to expand section 117 to other copyrighted works when it is being used so sparingly today for computer software and the justification for the provision no longer exists.

Dr. Lee A. Hollaar

Summary of Intended Testimony
November 29, 2000, Public Hearing
Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

Dr. Lee A. Hollaar
Professor of Computer Science, School of Computing
University of Utah

Currently the archive right in 17 USC 117 provides:

> [I]t is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided ... that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Section 117 assumes that only computer programs need to be backed up to guard against a failure of the disk drive normally holding the computer program or a similar catastrophic failure that will require the restoration of the computer program, and that archival backups are done on a program-by-program basis. In many common backup situations, neither is the case.

Many of today's software packages include not only computer programs (defined in 17 USC 101 as "set[s] of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result") but also data files. One needs only to go to the directory where any software package has been installed to see examples of such non-program files: help files and other documentation for the software package, configuration files that are read by the computer programs to select various options, and clip art files that generally come with word processors. In many instances, the programs cannot function correctly if certain key data files are not present. Clearly, for a backup to serve its intended purpose of being able to restore a system to its state before a disk failure, such non-program files also must be archived.

Backup operations on file servers copy an entire file system or selected directories to the archive medium. Between full backups, incremental backups are made comprising those files that have been changed since the last backup was made. Such backup operations generally do not discriminate between computer programs and other types of files. They make a copy of every file on the particular file system or directory. These backup are generally performed by a system administrator, who can't reasonably be aware of whether a file is a computer program or a data file, whether the limits on backup copies in software licenses have been exceeded, or even whether the user has rightful use of the programs and files. With the advent of CD-ROM drives on personal computers, many users are writing similar backup disks of their personal directories. Although such file backups are done (or should be done) at every computer installation, there is nothing in Section 117 that sanctions them. These backups should be addressed by Section 117, so that people will respect its other limits.

Section 117 is also unrealistic in its requirement of destroying all archive copies when a license to a software package has expired. It would be exceeding difficult to delete such program files from a tape backup, even if it were clear which files to delete. It is impossible to selectively delete files from a CD-ROM, which can't be changed after it has been written. But that inability to delete such files will not result in any hardship for copyright owners, since system administrators or users are unlikely to give their backups to others because of the personal information and other files that they also contain.

Amending Section 117 to permit the creation of archive files containing not only computer programs but any digital information, and removing the requirement that files on the archive must be destroyed, will not provide a loophole for copyright infringement of digital material. It would still be an infringement of copyright to use the backed-up information without authorization, since the archive right only covers the creation of the backup, not any reading of information from the backup. But it will recognize the realities in file backup procedures.

American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America

Summary of Intended Testimony of

Steven J. Metalitz

on behalf of

AMERICAN FILM MARKETING ASSOCIATION
ASSOCIATION OF AMERICAN PUBLISHERS
BUSINESS SOFTWARE ALLIANCE
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION
MOTION PICTURE ASSOCIATION OF AMERICA
NATIONAL MUSIC PUBLISHERS' ASSOCATION
RECORDING INDUSTRY ASSOCIATION OF AMERICA

November 29, 2000

The copyright industry associations listed above do not believe that an amendment to section 109 of the Copyright Act to cover digital transmissions is either necessary or advisable. The first sale doctrine continues to apply with full force in the digital environment, when someone who owns a lawfully made copy or phonorecord wishes to sell or otherwise dispose of the possession of that copy or phonorecord. Proposals modeled on Section 4 of H.R. 3048, 105th Cong., go far beyond simply "updating" or even "extending" the first sale doctrine, which limits only the exclusive right of distribution. These proposals would hyperinflate first sale and impose completely new limitations on other exclusive rights long enjoyed by copyright owners, notably the reproduction right. Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy.

New distribution models offer the potential to increase consumer choice and promote the business viability of dissemination of works of authorship in digital formats. Limitations on the reproduction right like those proposed as amendments to section 109 would make it impossible to implement many of these models. Nor do current or reasonably anticipated future market conditions justify the encroachments on contractual freedom, or on the ability of copyright owners to employ access control technologies, that some commenters advocate (and somehow link to section 109). Finally, all the library activities identified in the questions posed in the October 24 notice may be carried out in the digital environment without the need for any amendments to section 109.

While the Digital Millennium Copyright Act made no changes to section 109, it did amend section 117, with the effect of reaffirming the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right. This recognition takes on added importance in light of the increasing economic significance of such "temporary copies" in the legitimate dissemination of computer programs and other kinds of copyrighted works. Proposals to amend section 117 to overturn this well-settled principle of U.S copyright law should continue to be rejected. There is no evidence that the fundamental exclusive right of copyright owners needs to be weakened in order to promote electronic commerce; indeed, the effect is likely to be to the contrary. Enacting the proposed "incidental copies" exception would undercut the reproduction right in all works, and would raise significant questions about U.S. compliance with its international obligations. The listed copyright organizations do not believe that the recent amendment to section 117 has caused any problems that would justify any expansion of that section.

Red Hat, Inc.

Carol A. Kunze, *Esq.*
901 Cape Cod Ct
Napa, CA 94558
707.966.5211
707.371.1807 (fax)
ckunze@ix.netcom.com

November 19, 2000

Jesse M. Feder
Policy Planning Advisor
Office of Policy and International Affairs
U.S. Copyright Office
Copyright GC/I&R
Washington, D.C. 20024

Jeffrey E.M. Joyner
Senior Counsel
Office of Chief Counsel
National Telecommunications and Information Administration (NTIA), Room 4713
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Sent by electronic mail to:
104study@loc.gov; 104study@ntia.doc.gov

Re: Request to Testify at November 29, 2000 Hearing

Dear Messrs. Feder and Joyner:

This is a request for Carol A. Kunze, independent counsel, to testify on behalf of Red Hat, Inc., a public corporation with headquarters in Durham, North Carolina, at the November 29, 2000 hearing on, among other issues, Section 109 of the Copyright Act.

Summary of Testimony: The testimony will identify policy considerations relating to the application of Section 109 to digital products. It will focus on the importance of not jeopardizing the ability of open source and free software licensors to ensure that third party transferees receive the *entire* product whose distribution was authorized by the licensor, including the license rights granted with the software.

Red Hat distributes the Linux operating system, which is a type of software known as *open source* or *free software*. Both open source and free software licenses grant users the right to;

1) have the source code,
2) freely copy the software,
3) modify and make derivative works of the software, and
4) transfer or distribute the software in its original form or as a derivative work, *without paying copyright license fees*.

Many open source and free software licenses also embody the concept known as *copyleft*. Simply put, this is the requirement that all versions of the product, including derivative works, be distributed along with and subject to the restrictions and rights in the license under which the original work was received. This concept is central to the ability of a licensor to ensure that its product *remains* open source/free software.

Any amendment to Section 109 that purported to create a right to transfer copies of open source and free software *without* the accompanying license rights, would seriously jeopardize licensors' and users' joint interest in maintaining a product's status as open source/free software, and would deprive transferees of important copyright authorizations which the original copyright owner intended them to have.

This issue is of fundamental importance to the continued development and distribution of many open source and free software products. We believe it constitutes a policy consideration that should inform any recommendation to amend Section 109 with respect to its application to digital products.

Sincerely,

Carol A. Kunze

cc: jfed@loc.gov
mpoor@loc.gov
jjoyner@ntia.doc.gov

Blue Spike, Inc.

DRAFT

SCOTT MOSKOWITZ
CHIEF EXECUTIVE OFFICER
BLUE SPIKE , INC.

A. Introduction

1. The company is the leading developer of secure watermarking technology for use in copyright management systems and other applications that can create trust as a means of balancing the interests of copyright owners and information consumers.

2. The growth of the Internet and electronic commerce will not reach their full potential if technologies and laws are developed on the assumption that access restriction is the only credible approach to securing copyrighted works and protecting intellectual property.

B. Section 109 of the Copyright Act should be amended to include digital transmissions, as proposed by Congressmen Rick Boucher and Tom Campbell in section 4 of H.R. 3054.

1. With content migrating from paper to bits, the law--in particular the first sale doctrine--must keep pace with technology for electronic commerce to flourish.

2. Technology can be used to advance the core principle underlying the first sale doctrine.

3. If the law keeps pace with technology, content owners and information consumers will benefit to the greatest extent as new communications media and Internet technologies generate recognition and demand for artists' work.

C. Section 117 of the Copyright Act should be amended to provide that it is not an infringement to make a copy of a work in a digital format if such copying is incidental to the operation of a device in the course of an otherwise lawful use of a work and if it does not conflict with the normal exploitation of the work, as proposed in section 6 of H.R. 3054.

1. The law should recognize that the Internet cannot function without ephemeral copying.

2. It is important to reduce the risk of potential legal liability for ISPs and others to encourage greater use of the Internet to disseminate copyrighted works.

3. Smart use of technology rather than the threat of litigation will better promote the interests of content owners and society in general.

Launch Media, Inc.

Summary of Intended Testimony of David Goldberg:

My name is David Goldberg and I am co-founder and Chief Executive Officer of Launch Media, Inc. ("LAUNCH"), a digital media company dedicated to creating the premier Internet music site, www.launch.com, by providing music fans with a wide selection of streaming audio, one of the Web's largest collections of music videos, exclusive artist features and music news covering substantially all genres of music.

In my testimony, I would focus on the policy justifications for amendment of Section 117 of the Copyright Act, 17 United States Code 117, to provide explicitly that it is not copyright infringement to make temporary digital copies of works that are incidental to the operation of a device in the course of a lawful use of a work (e.g. temporary "buffer" copies created during "streaming" of digital media). I would discuss three policy arguments in particular, namely that the proposed amendment (1) addresses legitimate concerns of content users without depriving copyright owners of any rights which Congress intended for them to have, (2) encourages the creation and broad distribution of content, and (3) would further electronic commerce and Internet growth. In light of my experience as an Internet webcaster, I would emphasize points 2 and 3 above – the impact of such an amendment on content creation and distribution, and on growth of electronic commerce and Internet activity.

We at LAUNCH have come to appreciate the power of the Internet from the content delivery perspective – both in terms of the geographic reach of the Internet for distribution purposes, as well as the sheer volume of content that can be delivered over the Internet. The proposed exemption would ensure that the Internet would remain a highly efficient distribution mechanism for digital content of every description by clarifying that the creation of temporary copies which are inherent to the process of digital distribution do not implicate copyrights. The proposed exemption would not obviate the need for companies like LAUNCH to respect the rights of content owners. Indeed, LAUNCH has already agreed to pay content owners, the record labels in this instance, more than traditional broadcasters pay for public performance rights in connection with streaming of audio and video music content. Rather, the proposed exemption would clarify that webcasting would not be subject to "double dipping" by the content owners in what would essentially amount to an unnecessary tax on Internet streaming activities.

So long as the Internet remains an efficient distribution mechanism for digital content, businesses like ours will continue to expand their online operations to take advantage of the medium. Whether digital content is offered free of charge or otherwise, commercial activity related to such content distribution, e.g. online advertising, merchandise sales, and content syndication, will continue to expand as well.

Absent the proposed amendment, online content distribution and the related commercial activities might shrink considerably due to a number of factors, chief among them uncertainty pending a resolution to the conflict between copyright owners and content distributors. While we at Launch believe that the creation of "buffer" copies of a work during "streaming" of such work does not constitute copyright infringement under current law, we continue to run our business under a cloud of uncertainty as long as copyright owners continue to insist that these temporary copies are, in fact, infringing. This uncertainty – like that created by the charge that our LAUNCHcast service constitutes interactive, rather than non-interactive, radio – is an unnecessary restraint on our business, as well as a deterrent to others who, but for this uncertainty, might choose to enter our industry. It is not in anyone's interest – webcasters or content owners – to resolve any perceived ambiguity in the copyright laws through litigation. Rather, this is a clear example of an instance in which legislative action could effectively resolve any uncertainty.

myplay, inc.

REQUEST TO TESTIFY --- SUMMARY OF TESTIMONY

David Pakman, Founder and President Business Development & Public Policy, **myplay, inc.** Address: 1410 Broadway, 28th Fl. New York, NY 10018	Telephone: (646) 562-0305 Fax: (646) 562-0301 Mobile Tel.: (917) 597 1855 e-mail: pakman@myplay.com

TEMPORARY BUFFER-MEMORY COPIES FOR AUTHORIZED STREAMING SHOULD BE EXPLICITLY PLACED OUTSIDE THE COPYRIGHT OWNER'S MONOPOLY POWERS AND RIGHT TO DEMAND COMPENSATION

1. Evanescent buffer copies in buffer-memory are technically required for the transmission and playback of streams of music on the internet, both during transmission through the internet infrastructure and also at the ultimate destination, the user's personal computer.

2. The copies are not permanent; they bring no value to consumers and consumers will not pay for them. They are mere technical necessities, no different from the buffer copies made by terrestrial CD players, e-book readers, and other electronic players of digital material, as well as by the transmission through the internet infrastructure of online downloads. No copyright owner would dream of trying to collect extra fees for any of these uses.

3. If put to the test, these buffer-memory copies would undoubtedly be deemed a fair use, as mere incidental copies in the exercise of licensed rights of public performance that bear economic benefits to user and copyright owner alike. The same result should apply to fair use. However, the status of buffer-memory copies is currently not explicitly stated in the Copyright Act, and there is no rational basis to force myplay and similarly situated internet service providers to incur the burdens of litigation to establish this principle.

4. This clarification should exempt buffer-memory copies for all authorized transmissions and playback -- not just those that are licensed. This is necessary to embrace fair use which is of great importance to consumers, and integral to the myplay locker service -- *perhaps uniquely among current popular websites*.

5. Absent such clarification, myplay and similarly situated internet service providers would continue to be exposed to threats from owners of copyright, and their representatives, who take the position that those who stream audio files must pay not only public performance fees, but also for evanescent buffer-memory copies as if they were the equivalent of permanent downloads.

6. Myplay has studied customer usage patterns and the economic benefits that can be derived from that usage, and there is no rational business model that allows for payments for mere buffer-memory copies. If an obligation to make such payments were imposed, copyright owners would quickly suffer because legal use and proper compensation to owners would be greatly discouraged.

7. Copyright law should avoid obstructions to commerce and consumer enjoyment that seem to issue from the most trivial of technicalities. This is particularly advisable when clarifications of the law will have virtually no effect on a copyright owner's reasonable and just expectations for compensation. Copyright owners are entitled to -- and should be paid-- fees for public performance, but not for the buffer-memory copies that technically facilitate transmission and playback.

Broadcast Music, Inc.

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
U.S. DEPT. OF COMMERCE
Washington, D.C.

In the Matter of	)	
REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT	)	Docket No. 000522150-0287-02

REQUEST TO TESTIFY

On October 23, 2000, the U.S. Copyright Office ("Office") and the National Telecommunications and Information Administration ("NTIA") issued a Notice of Public Hearing in the above-referenced proceeding to solicit written requests to testify from interested parties. See 65 Fed. Reg. 63626 (October 24, 2000) ("Notice").

In conformity with the Notice, Marvin L. Berenson requests to testify on behalf of BMI. Contact information is set forth in the signature block:

Set forth below is a one-page summary of the intended testimony.

Respectfully yours,

Marvin L. Berenson
Senior Vice President and General Counsel
Broadcast Music, Inc. ("BMI")
320 West 57th Street
New York, New York 10019
212-830-2533 (telephone)
212-397-0789 (fax)
mberenson@bmi.com

BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its 250,000 affiliated songwriters, composers and publishers, as well as thousands of foreign works through BMI's affiliation agreements with over sixty foreign performing right organizations. BMI, through Mr. Berenson's membership on the U.S. delegation, participated in the drafting of the WIPO Treaties in 1998 and BMI also played an important role in the enactment of the Digital Millennium Copyright Act of 1998. BMI's testimony would discuss three points made in its written reply comments already submitted in this proceeding.

I. The First Sale Doctrine Should Not Be Expanded To Digital Transmissions.

If Congress were to extend the exemption in Section 109 of the Copyright Act to the distribution right in Section 106(3) of the Act for digital transmissions of musical works, as was proposed by the Digital Media Association ("DiMA") and the Home Recording Rights Coalition ("HRRC"), and also proposed in Section 4 of H.R. 3048, 105th Cong. 1st Sess. (1997), a serious problem could arise because several exclusive rights in Section 106 are implicated by digital transmissions. BMI is concerned that such an exemption would be claimed by users to cover all other copyright rights in the "exempt" transmissions, including the right of public performance. Because this problem would be averted by leaving the section unchanged, BMI does not support an expansion of the first sale doctrine.

II. Section 117 Should Not Be Amended To Exempt The Reproduction Rights In Streaming Music.

In written comments submitted by one organization (DiMA), it was proposed that Section 117 of the Copyright Act be amended to exempt the reproduction right in streaming media, where a portion of the material is captured in a temporary "buffer" at the user's computer. BMI would testify that no change to Section 117 is warranted at this time.

III. The Record Store Exemption In Section 110(7) Should Not Be Extended To Online Record Stores.

In written comments, at least one party (DiMA) inappropriately exceeded the scope of this inquiry by suggesting that Section 110(7) should be amended to "clarify" that it applies to online music "stores." The NTIA and the Office should not consider this proposal. In the event that testimony on this proposal is permitted (bearing in mind that the Notice asks no questions about it), BMI believes that licensing music rights online is a more appropriate solution to the issue raised by DiMA. For example, BMI currently licenses a music service which provides music clips to online record stores, and this market would be lost if the exemption were to be enacted.

Time Warner Inc.

Summary of Proposed Testimony on Behalf of Time Warner Inc.
In Response to the Notice of Public Hearing
". . . on the effects of the amendments made by Title 1 of the Digital Millennium Copyright Act ('DMCA') and the development of electronic commerce on the operation of Sections 109 and 117 of Title 17, United States Code and the relationship between existing and emerging technology and the operation of such sections"

The policy justification against amending Section 109 to include digital transmissions is predicated on the fact that any such change would lead to unlimited and uncontrollable reproduction and distribution of any copyrighted work that became the subject of such a transmogrified "First Sale Doctrine".

The First Sale Doctrine from its inception as a judicially created principle and throughout its current life codified in Section 109 has been limited to the privilege given to the owner of a tangible copy of a copyrighted work to sell or otherwise dispose of the possession of that particular tangible copy. This principle was born in the book distribution business and was intended to prevent use of the Copyright Law as a tool for fixing the retail sales price of books. Accordingly, the doctrine was applied (i) only to tangible copies and (ii) only to tangible copies lawfully made under the Copyright Law and (iii) only in circumstances in which the transferor of such a copy did not retain a copy of what was transferred. In making such a transfer, the transferor is making a "distribution" but not exercising or infringing any of the other rights granted to the copyright owner by Section 102.

On the other hand, in the case of digital transmissions, the owner of the "copy" being transmitted in order to "sell or otherwise dispose of the possession of that copy," would be exercising at least one of the rights reserved and left undisturbed to the copyright owner, i. e., the right of reproduction. Moreover, because the digital transmitter retains the copyrighted work after making the transmission (unlike what happens under the First Sale Doctrine), that transmitter (or anyone receiving a digital transmission from her or him) can go through the same process over and over, thus making and distributing reproductions of the copyrighted work widely.

Accordingly, the proposed amendment to Section 109 would transform that section from a protection against restraint of alienation of particular copies to a device for allowing the owner of one copy to supply, without authority of the copyright holder, the needs and desires of a vast population.

This would render the reproduction right meaningless for all digitally downloaded works, as well as expanding the Section 109 exception to the distribution right beyond its intended boundary. Such a step would violate the U. S. obligations under Berne and TRIPs, particularly Article 9, paragraph (2) of Berne, which provides that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works <u>in certain special cases</u>, provided that such reproduction <u>does not conflict with a normal exploitation of the work</u> and <u>does not unreasonably prejudice the legitimate interests of the author</u> (emphasis supplied), and Article 9 of TRIPs, which provides that members shall comply with, *inter alia*, Article 9 of Berne.

The proposed legislation, H. R. 3048, would, at least in the present state of technology, not only not solve any of these problems, but would provide legislative underpinning for all of the dangers and damages flowing from the proposed expansion of the First Sale Doctrine.

It might be thought that "an amendment to Section 109 to include digital transmission" would be useful to libraries with respect to the activities referred to in the notice of public hearing. This would be a delusion. At best, content owners would be reluctant to make their works available in digital form. At worst, the creation of "works" would be greatly diminished to the disadvantage not only of libraries, but also of society generally.

Bernard R. Sorkin on behalf of Time Warner Inc.

Business Software Alliance

Pursuant to the Federal Register notice of October 24, 2000 (65 Fed. Reg. 63626), I submit the following request to testify at the public hearing on November 29, 2000:

1. Name: Emery Simon

2. Title and Organization: Counselor to BUSINESS SOFTWARE ALLIANCE

3. Contact information:

Emery Simon
Counselor
Business Software Alliance
1150 18th. Street, NW
Washington, DC 20036
202/530-5137 (ph) 202/293-2707 (fx)
emerys@bsa.org

Attached please find the one-page summary of testimony requested in the Notice. This request is made without prejudice to the ability of any of the member companies of the BSA to testify in their own right pursuant to a separate request. Thank you for your consideration of this request.

Emery Simon

Summary of Intended Testimony of

Emery Simon

on behalf of

The BUSINESS SOFTWARE ALLIANCE

November 22, 2000

The member companies of the Business Software Alliance do not support amending either section 109 or section 117 of the Copyright Act. The first sale doctrine continues to apply with full force in the digital environment. The

backup and archival copying provisions of section 117 were recently amended by the Congress to address one issue: the status of RAM copies made in the course repair or maintenance. We believe that no other changes to this section are justified.

Certain of the written comments advocate extending first sale doctrine and imposing completely new limitations on other exclusive rights long enjoyed by copyright owners, notably the reproduction right. Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy.

Other written comments recommended amending section 117 to enlarge the its scope. We oppose such changes. The Digital Millennium Copyright Act amended section 117, with the effect of reaffirming the long-standing principle that copies, regardless of their temporal duration, of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right.

Copyright protection against unauthorized "temporary copying" is crucial to ensure a healthy environment for the development of the software industry and e-commerce. It is the cornerstone of effective protection against unauthorized exploitation of a work in the digital, networked environment.

The phenomenal growth of the Internet and other digital networks offers tremendous possibilities for the development, enjoyment, use and commercial exploitation of all types of copyrighted works. For well over 100 years, international copyright law has been based on the premise that authors and other copyright holders must be given the ability to control the copying and distribution of their works to establish the necessary incentives to create new works. This bedrock principle is just as applicable in the new digital, networked environment as it has been in the physical world since the 1800's.

The current application of this principle requires recognition of the fact that "reproduction" involves the creation of copies of many forms made through a range of mechanisms. Thirty years ago, copies invariably took a physical form. With the creation of digital technologies and computer networks an individual now has the choice of exploiting a work through the use of physical copies or temporary digital copies. From the user's perspective these formats are indistinguishable, except that the exploitation of a work through the creation of a temporary digital copy may be far more convenient, enjoyable, and even less expensive that the exploitation of the work in physical format. There is no question that the exploitation of works will increasingly be through the creation of digital temporary copies as opposed to the creation of permanent copies.

RealNetworks, Inc.

Summary of Testimony of Alex Alben
Vice President, Government Affairs
RealNetworks, Inc.

RealNetworks, since its founding in 1994, has pioneered streaming technology as the ecommerce and broadcasting platform for audio and video over the Internet. As proof of the power of these technologies, more than 155 million unique users have downloaded the RealPlayer software for receiving streaming audio and video, and more than 45 million unique users have downloaded the RealJukebox application for organizing and personalizing music on their PCs. More than 350,000 hours of streaming content are available weekly over the Internet using RealNetworks technologies. Through partnerships with major recording labels and consumer electronics manufacturers, and participation in SDMI, RealNetworks has been working to facilitate secure commercial sale of music via digital downloading.

Since the release of the first RealAudio 1.0 streaming player in April 1995, legal issues have clouded prospects for new businesses based upon these new revolutionary technologies. One of the first of these issues was the threat that the temporary memory buffer, used to assemble and organize a few seconds of audio or video during the technical process of streaming, could be considered an infringement of copyright. Any attempt to either enjoin or charge for these transmissions, based on the temporary memory buffer, would have an immediate and potentially devastating impact on the developing streaming media business. While the streaming media business has steadily been growing in popularity, recently several prominent streaming content and programming companies have been forced to close or cut back their offerings in light of severe financial difficulties. Current licensing practices already impose substantial costs and administrative burdens upon these companies, and it would be untenable and unfair to require them to shoulder additional costs with respect to these buffer copies.

We strongly advocate explicit amendments to clarify that this temporary memory buffer made in the course of lawful streaming of media does not constitute either an act of copyright infringement or an "incidental digital phonorecord delivery" under 17 U.S.C.§ 115. An appropriate starting point for an amendment could be Section 6 of H.R. 3048, 105th Cong., 1st Sess. (1997). In response to a question posed in the Notice of Hearing, RealNetworks believes the better approach would be to immunize buffers that are incidental to a "lawful" use rather than an "authorized" use. This formulation would ensure that all lawful uses, and not just licensed uses, would be appropriately immunized from any claim of liability.

In addition, RealNetworks supports an express legislative acknowledgement of the first sale doctrine for digitally-downloaded content. Consumers need and deserve the same rights for digitally-acquired content as for physical media. Restrictive license agreements imposed upon today's downloading consumers impede the development of legitimate ecommerce in music, and limit the inherent flexibility and value proposition offered by digitally-delivered content. Digital rights management tools can be employed by content owners that wish to secure retransmissions of downloads and assure that only one usable copy remains. Section 4 of H.R. 3048, cited above, provides a sound legislative basis to address digital first sale.

National Music Publishers' Association, Inc.

Summary

Testimony of the
National Music Publishers' Association

In NMPA's view, parties urging the expansion of the first sale doctrine have failed to demonstrate the need or appropriateness of legislative reform in this area. Supporters of a so-called "digital first sale doctrine" are not merely seeking application of the first sale doctrine to works in digital formats. Rather, they advocate a broad new exemption from rights of the copyright owner, which bears little resemblance, in scope or purpose, to the first sale doctrine as it exists today. The very nature of the electronic transfer of copies implicates not only the exclusive distribution right of the copyright owner – the only exclusive right to which the limited privilege in section 109(a) attaches -- but also many of the other exclusive rights established in section 106 of the Copyright Act. The attempt to shoe-horn activities that involve, at a minimum, the reproduction and distribution of works into the very narrow limitations of section 109(a) flies in the face of both the letter and intent of the first sale doctrine. Moreover, the greatly expanded privileges advocated by some commentors would disrupt ongoing efforts of copyright owners to reach innovative, marketplace solutions that promote consumer access to works via new technologies while assuring that copyright owners and creators receive fair compensation.

Similarly, several commentors have advocated a dramatic weakening of the reproduction right in all works through an amendment of section 117 of the Copyright Act. Virtually identical claims were made by some of the same parties during Congress's consideration of the DMCA. The suggestion that "section 117 of the Copyright Act should exempt archival and temporary copying for digital media" was without justification in 1998 and remains without justification today.

NMPA joins and supports the joint testimony of copyright industry associations.

Home Recording Rights Coalition

SUMMARY OF TESTIMONY
GARY KLEIN, VICE CHAIRMAN
HOME RECORDING RIGHTS COALITION

I. The First Sale Doctrine Should Be Updated for the Digital Era. Representatives Boucher and Campbell introduced H.R. 3048, the Digital Era Copyright Enhancement Act, late in 1997. As proposed, section 109(f) would have read:

> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

As Mr. Boucher noted, this provision "would permit electronic transmission of a lawfully acquired digital copy of a work as long as the person making the transfer eliminates (e.g., erases or destroys) the copy of the work from his or her system at substantially the same time as he or she makes the transfer. To avoid any risk that the mere act of making the transfer would be deemed an infringing act under existing section 116 of the Copyright Act, Section 4 of the proposed bill states that the "reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement."

Copyrighted content can be delivered to consumers with digital rights management (DRM) systems that enable secure electronic transfers of possession or ownership, and that protect against unauthorized retention of the transferred copy. Through technological processes such as encryption, authentication, and password-protection, copyright owners can ensure that digitally downloaded copies and phonorecords are either deleted after being transferred or are disabled (such as by permanently transferring with the content the only copy of the decryption key).

II. Section 117 Should Exempt Archival and Temporary Copying for Digital Media. The exemption set forth in section 117 of the Copyright Act implicates at least three types of copying of digital media today. Consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading. Temporary copies of recorded content made in the course of playback through buffering, caching, or other means also should be exempt from claims of infringement. Because the technical process of Internet webcasting requires that a receiving device temporarily store a few seconds of data transmitted by a webcaster, before playing back the audio or video to the consumer, the law should recognize this process as well. Each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the doctrine of fair use. To eliminate any legal uncertainty that could ultimately hurt the interests of consumers or that could stifle the development of new technology, the legal status of these temporary non-infringing copies should be clarified.

Both H.R. 3048, the Boucher-Campbell bill, and S. 1146, the Digital Copyright Clarification and Technology Education Act of 1997 introduced by Senator John Ashcroft, would have provided for such clarification. The potential growth of electronic commerce--and the vast potential opportunities it creates for copyright owners, technology developers, hardware and software manufacturers, and media companies--demonstrates why section 117 should be expanded to address all forms of digital content, not just computer software.

Digital Media Association

Summary of Testimony for
Seth Greenstein and/or Jonathan Potter
on behalf of the DIGITAL MEDIA ASSOCIATION

The Digital Media Association (DiMA) wishes to testify with respect to the issues raised under both Sections 109 and 117 of the Copyright Act.

Section 109 For more than a century, international intellectual property policy has granted a right to transfer copies or phonorecords of a copyrighted work without further obligation to copyright owners. For ecommerce to flourish, consumers must be assured that digitally-downloaded purchases convey at least the same flexibility and value as physical media, including the right to resell, lend or give away media products. The economic and public policies underlying the first sale doctrine support extending this historical exemption into the digital environment. To the extent that this privilege is not already secured under current law, a legislative clarification to the first sale doctrine should permit the transfer of possession or ownership, via digital transmission, of media lawfully acquired by digital transmission. For media delivered using digital rights management or other technological protection methods, technology can ensure that only one usable copy or phonorecord remains after transfer. For media delivered without effective technological protection, the first sale doctrine should allow the sender to delete or disable access to the copy or phonorecord substantially contemporaneously with the transmission. This clarification would pose no greater risk to copyright owners than the current statute, yet would provide more protection than current law.

Section 117 DiMA strongly supports interpretive or legislative clarifications that, first, temporary buffer copies made in the course of using or performing digital media are not subject to the copyright owners' exclusive rights; and, second, consumers who acquire media via digital transmission are permitted to make an archival copy or phonorecord thereof. Regarding the first issue, temporary buffer copies made during the course of streaming audio or video are mere technological artifacts necessary to allow media transmitted using the IP protocol to be perceived as smoothly as radio or television broadcasts. These buffer copies have no independent commercial value and justly should be protected as fair use. But as the streaming media industry grows, so too does the risk to the industry from extravagant claims of certain copyright owners that such temporary copies infringe their rights under Sections 106 or 115. Therefore, the type of legislative clarification suggested by H.R. 3048, or by the Copyright Office with respect to such buffers used for distance education, should be adapted to cover Internet streaming.

As to the second issue, consumers may wish to make removable archive copies of digitally-acquired media so as to protect their purchases against losses. Despite the convenience of digital downloading, media collections on hard drives are vulnerable because of technical reasons, such as hard disk crashes, virus infection or file corruption; and practical reasons, such as the desire to upgrade to a new computer or the need to add more storage capacity. DiMA therefore supports amending Section 117 to apply to digitally-acquired media the right to make an archival or back-up copy.

All these rights should apply to "lawful" uses and copies, regardless of whether they are "authorized" by a copyright owner. This formulation preserves consumer rights under the fair use privilege, the exemption for private performances and displays (e.g., personal streaming from a locker service) and other exceptions and exemptions under the Copyright Act.

American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association

Summary of Intended Testimony by James G. Neal
on behalf of the American Library Community
November 29, 2000

The Nation's leading library associations (American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association) support the maintenance of a national copyright system characterized by balance and supportive of both proprietor rights and public access under the first sale doctrine. We are very concerned about technological advancements and a legal framework which threaten this public access and we support changes to the first-sale doctrine (currently 17 U.S.C. 109). We believe that with the implementation of the Digital Millennium Copyright Act, the first-sale doctrine is diminished and the ability of libraries to support the legitimate information access needs of their users is undermined while the ability of publishers to control and monitor use of works is expanded.

The first-sale doctrine must be viewed as media-neutral and technology-neutral. The rights and privileges provided in the Copyright Act are intended to operate as part of a system of checks and balances, with doctrines such as first-sale preventing remuneration rights of authors from chilling public access to works. We are concerned that current law may prevent the application of the first-sale doctrine to digital works, because it may apply only to the distribution right, and not the reproduction right; copying is fundamental to the use of electronic information. A first-sale doctrine for the "digital millennium" must embrace these points:

- interlibrary lending: policy should not make a distinction in lending based on the format of the work, and the rules on the interlibrary loans of digital works should be reaffirmed and strengthened
- unchaining works: all works acquired by a library should be available for use in classrooms, and by students and teachers, regardless where they are located
- preservation: libraries must be able to archive lawfully purchased works for future use and historical preservation
- disallowing unreasonable licensing restrictions: a uniform federal policy is needed which sets minimum standards respecting limitations on the exclusive rights of ownership and which sets aside state statutes and contractual terms which unduly restrict access rights
- donations: encourage donations of works to libraries irrespective of format and without threat of litigation to donors

The first-sale doctrine is being undermined by contract and restrictive licensing. The uncertainty faced by libraries about the application of the first-sale doctrine for digital works is having a negative impact on the marketplace for works in electronic form and on the ability of libraries to serve their users. Libraries believe that no review of the first-sale doctrine and computer licensing rules should be completed without the Congress giving favorable consideration to a new federal preemption provision affecting these rules.

Summary of Intended Testimony by Rodney J. Petersen
November 29, 2000

I bring several unique and important perspectives to the current inquiry. First, as a lawyer and educator I have a keen understanding and appreciation for the import of the federal copyright act and the resulting effort to strike an appropriate balance between the rights of copyright owners and users. Second, as a researcher and author I benefit from the access to scholarly works facilitated by research libraries as well as the protections afforded my creations under copyright law. Finally, as a member of the information technology division of one of the nation's premier research universities, my department is on the cutting-edge of teaching and learning with technology initiatives as well as the development of electronic commerce solutions.

The growing use and dependence upon digital materials for teaching, learning, and research is both an exciting and challenging endeavor for colleges and universities. The information age within which we live, work, and learn is predicated upon open access to information resources. "Open access" does not necessarily mean "free" or "unregulated"; however, the legal paradigm that governs information access and use in the digital economy must benefit the "public good." The "public good" is best advanced by policies and laws that provide appropriate incentives to authors and creators while at the same time ensuring appropriate access to information. As the comments of the library associations have reported, faculty and students are increasingly expecting and demanding access to information in digital form. Colleges and universities seeking to participate in the digital economy through experimentation and development of advanced technologies, including reaching remote learners through distance education, are increasingly frustrated by the impediments that result from a complex intellectual property system that benefits only a few.

The trend towards the displacement of the provisions of a uniform federal law (the United States Copyright Act) with licenses (or contracts) for digital information is of great concern. College and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of independent license terms. A typical license agreement will limit if not eliminate the availability of fundamental copyright provisions (such as "fair use" and ability for libraries to "archive and preserve" information) by characterizing the information transaction as a "license" rather than a "sale." It is misleading to contend that "freedom of contract" will prevail and that license negotiations are between entities with equal bargaining power, especially when non-profit educational institutions are usually presented with standard license agreements developed by the information providers. The enforceability of "shrinkwrap" or "clickthrough" licenses also poses the same restrictive use regime on individual students, faculty, and researchers. I am not convinced that copyright protections for authors and creators of digital materials is so much in peril that we must resort to a (non-uniform) system of individual licenses that also opens the floodgates for restrictions on otherwise legitimate uses.

The digital age necessitates that we enforce existing copyright laws and rely upon ethical principles and educational measures to protect the rights of authors and creators of digital works. The introduction of legal and technological measures that in turn diminish if not eliminate otherwise lawful uses is not in the public interest.

Recording Industry Association of America, Inc.

November 22, 2000

VIA ELECTRONIC MAIL

Jesse M. Feder, Policy Planning Adviser
Office of Policy and International Affairs
U.S. Copyright Office
P.O. Box 70400
Southwest Station
Washington, D.C. 20024
email: 104study@loc.gov

Jeffrey E.M. Joyner
Senior Counsel, Office of Chief Counsel
National Telecommunications and Information
Administration
Room 4713
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Washington, D.C. 20230
email: 104study@ntia.doc.gov

Re: Public Hearings on Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act, Docket No. 000522150-0287-02

Dear Mr. Feder and Mr. Joyner:

Pursuant to the Copyright Office's notice at 65 Fed. Reg. 63626 (Oct. 24, 2000), the Recording Industry Association of America, Inc. ("RIAA") hereby requests to testify at the public hearings in the above-referenced proceeding scheduled for Washington, D.C. on November 29, 2000. The testimony will be presented by Cary Sherman, Senior Executive Vice President and General Counsel of RIAA. Attached is a one-page summary of Mr. Sherman's testimony.

Any questions regarding this request can be addressed to the following:

Steven R. Englund
Jule L. Sigall
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
E-mail: Jule_Sigall@aporter.com

Mitch Glazier
Recording Industry Association of
America, Inc.
1330 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20004
(202) 775-0101
E-mail: mglazier@riaa.com

Sincerely,

/s/

Steven R. Englund
Jule L. Sigall

Counsel for the Recording Industry
Association of America, Inc.

cc: Cary Sherman
Mitch Glazier

Attachment

Summary of Proposed Testimony of Cary Sherman,
Senior Executive Vice President and General Counsel,
Recording Industry Association of America, Inc. ("RIAA")

November 29, 2000

RIAA is a trade association whose members are responsible for the creation of over 90 percent of all legitimate sound recordings sold in this country. RIAA's members are actively engaged in the development of new business models for the delivery of music to consumers in digital format, and therefore have a significant interest in the subject of this public hearing and study – the relationship between the development of e-commerce and new technology and Section 109 of the Copyright Act.

RIAA's testimony will be directed towards the first set of questions raised in the Notice for these public hearings, namely, whether any policy justifications exist for amendments to Section 109 to address digital transmissions. RIAA believes that not only are amendments to copyright law not warranted, tampering with Section 109 in the ways suggested by some commenters would harm the developing digital music marketplace.

Some fundamental principles have been overlooked by those advocating changes to Section 109. First, Section 109 and the "first sale doctrine" it embodies simply limit the distribution right afforded to copyright owners as it relates to particular physical copies. It does not, as many have asserted, establish "rights" regarding the use of copyrighted works nor exemptions from any other exclusive rights of copyright owners. While we agree that a copy in digital format is entitled to the privileges in Section 109 like any other physical copy, Section 109 does not and should not permit reproduction or any other activity that would implicate other rights of the copyright owner.

Second, copyright is a form of property, and copyright owners must be able to capture the value of that property through the use of licenses and other contracts. Indeed, rapid development of new digital music business models will require the flexibility of contractual arrangements to meet the expectations of all parties involved, including consumers, distributors, recording artists and record companies, all of which can change quickly in this new environment. Furthermore, the use of technological measures to support the contractual agreements of the parties is also essential to the deployment of new music delivery methods.

Thus, the suggestion that Section 109 should be amended to address speculative concerns about the use of restrictive licenses or technological measures is misplaced. Developments in new digital music delivery systems – which, first and foremost, are being designed to meet the demands of music consumers – would be stifled by blunt legislative action, and the incentive to create these consumer-friendly models would decrease if such action were taken. Moreover, concerns about allegedly restrictive licensing practices can and should be addressed in the context of other areas of law more relevant to the alleged problems. The marketplace should be given an opportunity to resolve these important issues.

Supertracks, Inc.

Summary of Written Testimony for Charles Jennings, CEO of Supertracks, Inc

As founder and CEO of Supertracks, I believe I have a unique perspective regarding the issues of this hearing. Over the years, I have founded many successful technology-related companies focused on Internet privacy and the digital delivery of software, music, and video, including Truste, Preview Systems, and GeoTrust. I have also been successful in the creative side of business having been a former newspaper columnist and the author of six books, The Hundreth Window being the most recent. In addition, I was a film and television producer for Paramount and Warner Brothers, and I am a co-creator of the comic strip Pluggers.

There are several issues concerning the extension of the first sale doctrine to digital goods that I would like to address. First, content owners often fear losing control over their content once it's on the Internet in digital form. However, this fear, regardless of how tangible it may seem, is not justified given current technology. Technology is available that protects and prevents digital goods from unauthorized copying. We did it for music at Supertracks, and we did it for software at Preview Systems. For this reason, there is no longer a valid reason not to extend the same consumer rights to digital goods as those in the physical world. In fact, it is now possible to create greater copy protections for digital goods than those on a physical CD.

Legally, when digital goods are treated differently from physical goods, rules are imposed upon consumers that are not always in the consumer's best interest. In our experience with music at Supertracks, we found that content owners treated digital goods as licenses, not products. As a result, consumers had to contract for these licenses by "click through" agreements, meaning that consumer bargaining power was nonexistent and many restrictions were imposed upon them that would otherwise not be the case. By classifying a digital delivery in terms of a license rather than a sale, content owners can set prices in the market place for those licenses in ways they cannot set for products.

All consumers expect to own the digital product they buy and to have the same rights of ownership they have with physical goods. When their rights are different from or when access to digital goods is difficult due to measures implemented to protect imposed conditions, they are frustrated and far less inclined to make purchases. Since the key to digital commerce is acceptance by consumers, it must be ubiquitous, easy-to-access, and personally satisfying to use. Obviously, there is no market if consumers are not buying due to cumbersome usage rules.

A related issue is the archival copy exception in Section 117. Let me to return to the idea that a digital good bought by a consumer should be a good bought, not a good licensed, leased or sold in some other form of nonpermanent ownership. Consumers should be able to move or store, music they have purchased to other personal, non-commercial devices. They should be able to protect their investment by making archived copies for personal use, whether or not those copies are susceptible to destruction by mechanical or electrical failure. In the physical world, they already have this right. In the digital world, they don't.

This hearing seeks to determine why an exemption should exist permitting the making of temporary digital copies of works incidental to the operation of a device. One of the steps to digital delivery is the necessity of producing multiple copies of the same digital good on a server. Currently, there is no uniform technology for digital goods: often several copies need to be made in different formats to accommodate varying system requirements. These goods are then encrypted and sent to other servers, proxy servers, and routers in the network that make up the Internet. All of these copies are required as the data is passed along the network. Nevertheless, these copies are not the same as reproductions that constitute a product a consumer can access and use. This happens once the data reaches a machine, the PC for example, that can render the copy perceivable by a person. At that point, a potentially revenue generating event happens. Content owners are not losing out on potential revenue by the making of these various copies.

Charles Jennings, CEO Supertraks

Motion Picture Association of America

Summary of Intended Testimony of

Fritz E. Attaway

on behalf of

MOTION PICTURE ASSOCIATION OF AMERICA

Section 104 of the Digital Millennium Copyright Act (DMCA) directs the Register of Copyrights and the Assistant Secretary for Communications and Information to jointly evaluate and report to Congress on:

1. the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United states Code; and
2. the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

This testimony addresses only section 109 of the Copyright Act, commonly referred to as the First Sale Doctrine.

Based on the record assembled in this proceeding, the Register and Assistant Secretary can come to only one clear and simple conclusion. That is, the DMCA and the development of electronic commerce have had no effect on the operation of the First Sale Doctrine, and the relationship between existing and emergent technology and the operation of the First Sale Doctrine is in harmony.

No evidence has been presented in this proceeding that would support any other conclusion. Those who demand that the DMCA be reopened and the First Sale Doctrine be amended offer as support only speculation about what future technology and marketing practices may (or may not) develop, and possible (and often impossible) hypothetical conflicts that could arise. Only time will tell whether any of this speculation is ever proven accurate. In the mean time, the duty of the Register and Assistant Secretary is to report what is known today, and what is known today is that the First Sale Doctrine is operating as it was intended and there is no demonstrated conflict, or even friction, between the implementation of the DMCA in the new electronic commerce environment and the exercise of the First Sale Doctrine.

Proposals to amend the First Sale Doctrine along the lines of section 4 of H.R. 3048, 105th Congress, are completely without justification and, more importantly, would not simply "modify" the First Sale Doctrine in light of the new technological environment. They would totally transform the First Sale Doctrine from a narrow limitation on the distribution right of copyright owners, to a broad constriction of the rights of copyright owners, including both the distribution right and the reproduction right. Such a major slashing of the rights of copyright owners would have a disastrous, adverse impact on the incentive to create copyrighted works, which is a primary purpose of the Copyright Act.

November 22, 2000

Digital Future Coalition

Summary of Intended Testimony of the Digital Future Coalition

Before
The United States Copyright Office, Library of Congress
And
The National Telecommunications and Information Administration,
United States Department of Commerce

The Digital Future Coalition ("DFC") represents 42 national organizations, which includes both owners and users of copyright materials. Our constituents support a balanced copyright system that protects proprietor's rights while at the same time permits access to the public under the "first sale" doctrine. The DFC supports modifications to the first-sale doctrine, currently codified at 17 U.S.C. Sec. 109, to address the growing issues resulting from ongoing technological advancements.

In the 105th Congress, for example, the DFC strongly supported H.R.3048 legislation to implement the WIPO Copyright Treaty and Performances and Phonograms Treaty. Unfortunately, the final text of the Digital Millennium Copyright Act of 1998 ("DMCA") did not address H.R.3048's suggestion to authorize individuals to perform, display, or distribute a copy or phonorecord. The DMCA did, however, direct the Copyright Office and the NTIA to undertake further study of the "first sale" doctrine in the context of the digital environment. The "first sale" doctrine and has allowed research libraries, second-hand bookstores, and video rental stores broad secondary dissemination. The DFC is concerned that if "first sale" is further restricted, progress of knowledge and advancement of ideas will be curtailed.

Comments from the 1995 *White Paper on Intellectual Property and the National Information Infrastructure* suggest the "first sale" doctrine should be inapplicable to electronic transmissions by consumers. The DFC believes that such suggested limitations in the *White Paper* and in the DMCA puts the doctrine at risk and could disrupt the balance of copyright law reform, which supports proprietor's rights. Under Sec. 1201 of Title 17, legal sanction and support threaten copyright owners' use of the "anti-circumvention" measures. The copyright industries support "second-level" access controls which restrict how a consumer first acquires a copy of a digital file and its subsequent use.

For example, the purchaser of a downloaded digital text file that is downloaded to a portable storage medium is permitted to transfer ownership of that "copy." However, new Chapter 12 provisions would make use of a password system or encryption device a violation of anti-circumvention measures that could be subject to penalties. Similarly, Sec. 117, which permits purchasers of software program copies to disseminate the copies, could also be at risk under the new anti-circumvention laws. Software consumer rights have been deemed essential since 1980, when the "final compromise" of the 1976 Copyright Act was adopted. Legal support afforded by the DMCA and recent case law will allow some vendors to limit the effective scope of Sec. 117.

To prevent vendors from taking advantage of these restrictions imposed by the DMCA, the DFC proposes adoption of language contained in both S.1146 and H.R.3048, as introduced in the 105th Congress. In short, the language would provide that a digital copy, notwithstanding Sec. 106, is not an infringement if it is incidental to the operation of a device while using the work and if the copying does not conflict with normal exploitation of the work. Finally, ambiguity remains over the use of "shrink-wrap" and "click-through" licenses to override consumer privileges codified in the Copyright Act. When the DMCA was enacted, the DFC anticipated clarification of the Uniform Computer Information Transactions Act ("UCITA"). The final text of UCITA, now before state legislatures, does not fulfill the DFC's expectations.

To advance the rights under the "first sale" doctrine, DFC believes that recommendations to Congress should focus on formulating a restatement of the "first sale" doctrine in the context of digital copies. First, Sec. 117 places the burden on the proponents of change to maintain the balance of copyright interests established in 1980 by preserving exemptions. Second, Sec. 1201(k)(2) of the DMCA limits the use of anti-circumvention measures and provides a legislative precedent for such limitations on technological self-help. Lastly, amendments to 17 U.S.C. Sec. 301 would provide guidance to consumer privileges under copyright over state contract rules regarding "shrink-wrap" and "click-through" licenses.

Digital Commerce Coalition

Summary Proposed Testimony of the Digital Commerce Coalition
RE: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

As a general matter, Digital Commerce Coalition ("DCC") feels it important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. The Uniform Computer Information Transactions Act ("UCITA") is a new model commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). As with the Uniform Commercial Code, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce.

UCITA is intentionally broad in scope. The intent is to cover all materials and information that may be the subject of electronic commerce. Thus, the Act covers "computer information," and covers transaction for software, electronic information – including copyrighted works – and internet access. As has been traditionally the case with uniform laws in this area, UCITA sets rules governing agreements between private parties in the licensing of computer information. It does not create or alter the property interests that persons may enjoy in respect to these products. Those property interests are determined by relevant state and federal laws, including the federal Copyright Act. This careful balance is one upheld by the courts as necessary to the effective and efficient provision and use of information, and one that both the federal and state governments must strive to maintain.

In this context, DCC is concerned that the comments submitted by Digital Future Coalition ("DFC") and the Libraries go to issues far beyond the scope of the study mandated by Congress. In so doing, they confuse the distinctions between federal copyright law and state contract and licensing statutes. Given the importance of licensing to the information industries and their customers, as well as their reliance upon contracts for flexibility and product variety, this concern is of no small moment.

DFC's and the Libraries' comments would lead an uninformed reader to the conclusion that UCITA ignores the supremacy of federal law. To set the record straight, Section 105 of UCITA does contain specific reference to the supremacy of federal law and does so in the context appropriate to a state-created statute governing contracts and licenses. Both DFC and the Libraries request that the study recommend amendment to 17 U.S.C. 301 that would interfere with states' rights to govern agreements between private parties. It is a long accepted principle of American jurisprudence that parties should be free to form contracts as they see fit. Provided such contracts are not unconscionable, or illegal, UCITA – consistent with long established practice and jurisprudence – sets up rules as to when a contract is formed and lays out the respective parties rights and obligations.

With this in mind, we believe that the requests made in the submissions by DFC and the Libraries are based on anecdotal evidence and unattributed terms from contracts presumably negotiated between licensors and licensees, and that before Congress determines to override state contracting rules, concrete evidence of problems in the marketplace must be presented. To date, DCC is unaware of any such evidence. Rather, the experience of DCC members – particularly those that market to the library and university communities – demonstrates that such licensees are quite skilled in negotiating terms and conditions that allow for special uses beyond those offered in the commercial or consumer marketplace. If there is any area of uncertainty, it lies in the lack of uniformity in the default rules that states must establish to govern transactions in computer information, and UCITA will serve to establish greater certainty, so that licensors and licensees of computer information can be clear on what rights and limitations are granted under private contractual agreements.

UCITA is intended to help facilitate the new electronic commerce that is dependent on licensing of computer information – including software, electronic information and internet access. As has been traditionally the case under U.S. law, UCITA is designed to complement the provisions of federal law. This state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies – including the applicability of the Copyright Act's fair use exceptions and the latest provisions of DMCA. To do otherwise would have risked disturbing, or even destroying, the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. Similarly, for Congress to accede to the requests of DFC and the Libraries would undermine that same balance and introduce unjustified proscriptions that will only stifle the emerging marketplace for electronic commerce.

National Association of Recording Merchandisers

Summary of testimony of Pamela Horovitz, President
National Association of Recording Merchandisers ("NARM")
On behalf of NARM

NARM is the national trade association representing music retailers, rackjobbers and distributors. Some of our members also sell books and audiovisual works. NARM members include single-store businesses, large retail store chains, and mass merchants. Also, its members include businesses retailing exclusively through the Internet, exclusively through a physical store, and a combination of the two. Of those retailing through the Internet, the methods include sales of physical goods and so-called "digital distribution" by downloads, authorized through a license to the consumer to make a phonorecord on the consumer's own tangible medium, or by a license to make a phonorecord in a kiosk located in a retail location and which is then sold by the retail store to the consumer.

In all of these business models, NARM members have enjoyed their right under the first sale doctrine and Section 109 of the Copyright Act to develop their own customers, establish their own competitive prices, and distribute copies and phonorecords without the consent of the copyright owners involved. NARM members also benefit from the first sale doctrine and Section 109 rights of their customers, because the right to transfer lawfully made phonorecords by sale, gift or bequest increases the value of the phonorecord to the consumer (and furthers the constitutional objective in authorizing copyrights).

NARM members are extremely concerned that the anti-circumvention provisions in Section 1201(a)(1) of the DMCA are being used as a sword to nullify Section 109 and other first sale doctrine rights, rather than as a shield to protect copyrights. Similarly, efforts are currently underway among major copyright owners to use contracts of adhesion to purportedly obtain an agreement to waive Section 109 rights as a condition of purchasing or being given access to lawfully made copies and phonorecords. These unilateral terms prohibit uses of a copyrighted work in areas in which the copyright owners own no rights. The terms are being supported by emerging state laws which would enforce them, and by technological controls which make it unnecessary to seek agreement from the other party. Indeed, the new technological controls preventing lawful use, which give copyright owners the ability to either prevent or render worthless the exercise of any Section 109 right of transfer of possession or ownership, are further being protected by the same technological measures intended to control access to the copyrighted work, such that NARM members and their customers will be unable to disable the technological restraint on Section 109 rights without also violating Section 1201(a)(1).

If given the opportunity to testify, Ms. Horovitz' is prepared to explain these concerns, give concrete examples of actual market efforts to so prevent the exercise of Section 109 rights, and explain why it would frustrate the constitutional foundations of copyright law to permit such conduct to continue unabated. NARM believes that Section 109, if properly interpreted and applied, does not need to be amended. If, however, the use of contracts of adhesion protected by novel state laws and/or misuse of technological restrictions protected from circumvention by Section 1201(a) are not restrained by 1201(c), by the courts or by administrative rule, then new legislation will be required to return the careful balance of copyright law to its original state.

Video Software Dealers Association

Summary of testimony of Crossan "Bo" Andersen, President
Video Software Dealers Association ("VSDA")
On behalf of VSDA

VSDA is the national trade association representing home video retailers and distributors. The majority of VSDA's members are companies operating video rental stores, sometimes referred to as "rentailers," who purchase copies of motion pictures and other audiovisual works (including video games) for rental, either in videocassette or digital DVD format. VSDA members are in a unique position to comment on the first sale doctrine, and the implications of Section 109 of the Copyright Act, because home video rental would not exist today but for the first sale doctrine and Section 109.

In 1983 and after the Supreme Court validated the Betamax technology in 1984, some motion picture companies attempted to shut down the home video rental market – or at least gain control over it – by appealing to Congress to create an exception to Section 109 to prohibit the rental of copies of motion pictures and other audiovisual works without the consent of the copyright owner. As a direct result of the vision of thousands of early video rentailers, who were more often seen as opportunists than entrepreneurs, the home video market was born.

The dire warnings of the motion picture copyright owners proved to be hyperbole. Within a short time, studio revenues from the independent home video market exceeded their combined revenues from the theatrical box office and all other sources of licensing revenue. Moreover, this failed attempt to restrict the first sale doctrine resulted in the furtherance of the primary goal of copyright law: "To promote the Progress of Science and the useful Arts" by creating a new and robust economic incentive for creative authors and artists to produce and disseminate their works. More importantly, it brought economical motion picture entertainment into homes in virtually every neighborhood.

As the devices for playing digital works move from simple play-back devices to more sophisticated interactive ones, copyright owners too often have seized upon the opportunity to control through technology what they cannot control by law. The lessons learned over the last twenty years are soon forgotten, as technology allows copyright owners to prevent the very activity specifically reserved to the owners of lawfully made copies under Section 109 without the consent of the copyright owner.

Based upon this history and concrete industry experience, Mr. Andersen's testimony will illustrate how Section 109 has been used in the home video industry to broaden distribution of and consumer access to copies of audiovisual works with full remuneration to the copyright owners, and to posit how consumers' beneficial enjoyment of Section 109 may be harmed under emerging business models designed to circumvent Section 109. He will illustrate that Section 109 has not only created the most lucrative source of revenue for copyright owners in motion pictures, but at the same time has created the most affordable way for American families to enjoy the commercial-free full-length motion picture viewing experience. Mr. Andersen is prepared to give examples of present and past efforts to control, limit or prohibit subsequent distribution through exclusive dealing arrangements, restrictive licenses, notices or warnings, and pricing. He will postulate and query how access control technology righteously may be deployed to protect against piracy and yet give consumers and retailers maximum opportunities to use and market copies which copyright owners have already sold and for which they have been fully compensated.

Intertrust Technologies Corporation

PUBLIC HEARING OF U.S. COPYRIGHT OFFICE AND NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION ON REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT
NOVEMBER 29, 2000

SUMMARY OF TESTIMONY BY NIC GARNETT, VICE PRESIDENT OF TRUST UTILITY, INTERTRUST TECHNOLOGIES CORPORATION

InterTrust Technologies Corporation is a developer and provider of sophisticated Digital Rights Management (DRM) technology and solutions, which have been the subject of comments by a number of organizations participating in this study. As a DRM provider, InterTrust can lend insight into the state of DRM technology and its deployment by our customers – copyright owners and aggregators and disseminators of copyrighted works – in electronic commerce.

Electronic commerce in copyrighted works has noticeably lagged due to the lack of a trusted and consistent environment that neutrally supports the rights of both owners and users of copyrighted works. For the digital economy to continue to grow and flourish, creators, publishers, and distributors of digital content, as well as service providers, governments and other institutions, and users, must have the ability to create digital content secure in the knowledge that their ownership rights can be protected, and to associate rights and rules regarding ownership, access, payment, copying, and other exploitation of the work. By providing the means to do so, DRM is making an essential contribution to the development of electronic commerce.

Effective DRM solutions, such as those provided by InterTrust and its partners, comprise technological measures as well as a trusted neutral third party administrator to protect the integrity of the technology and manage its continual adaptation – including the development of rights and permissions practices - to changing technology and user needs. The purpose of DRM solutions is thus three-fold – (i) to enable copyright owners to manage their exclusive rights effectively throughout the electronic commerce value chain, (ii) to provide flexibility in the arrangements struck between copyright owners and their customers, and (iii) to provide a trusted environment in which technology guarantees these arrangements. The promise of such sophisticated DRM solutions is to instill confidence in electronic commerce among copyright owners and users of copyright works alike.

Thus, sophisticated DRM solutions are entirely consistent with the underlying balance of copyright law – to protect the rights of copyright owners as a means of promoting wider dissemination of and greater access to copyrighted works. Because digital delivery and DRM appear to be improving the dissemination and use of copyrighted works, concerns about their effect on the first sale doctrine – Section 109 of the Copyright Act – appear to be at best premature. Indeed, great caution should be exercised in considering proposals to alter such a fundamental tenet of copyright law because doing so could unsettle long established legal rights, thus making electronic commerce more uncertain. Moreover, such changes could constrain the development and use of sophisticated DRM technologies and solutions, which remain in their formative stages. The unfortunate result would be to discourage the lively experimentation necessary to develop viable, sustainable electronic commerce in copyrighted works.

Sputnik7.com

Dear Honorable Members Of The Committee,

The following is a brief outline of my testimony regarding the 104 hearings;

First Sale Doctrine – I fully support the rights of the consumer to give away or sell their legally purchased copy of a musical recording. As a songwriter and recording artist, I understand the need to protect the Artist and Copyright Holder in regards to these matters. I feel that it is of the utmost importance that the industry finds ways to update and interpret the copyright laws that we have in place and take into consideration the needs of consumers and the new methods of e-commerce and digital distribution

Archival Copying - I fully support the rights of the consumer to protect their legally purchased musical recording, by making archival copies to compact disk and other stable formats that are secure and free from threats of viral destruction and technological malfunctions.

Temporary copying in RAM for streaming - I am fully in support of allowing temporary copying of music and visual files into RAM for the purposes of streaming media performances. Preventing this type of buffering could cripple the future of streaming media and would prevent consumers from the opportunity to have an enjoyable streaming entertainment experience on the Internet.

Additional topics that I am interested in discussing would be extending the compulsory license to cover music videos, and the need for an international solution regarding the topics above.

Thank you in advance for considering my testimony and please feel free to contact me if you need any additional information.

Sincerely,

David Beal
CEO
Sputnik7.com
www.sputnik7.com

Association of American Publishers

Summary of Intended Testimony
Of
Allan R. Adler
Vice President for Legal and Governmental Affairs
Association of American Publishers, Inc.

November 29, 2000

In general, the views of the Association of American Publishers ("AAP") regarding the issues under examination by the Copyright Office and the National Telecommunications and Information Administration ("NTIA") for the Report to Congress mandated by Section 104 of the Digital Millennium Copyright Act have already been provided to these agencies for the record through Initial Comments and Reply Comments that were jointly submitted by AAP, the American Film Marketing Association, the Business Software Alliance, the Motion Picture Association of America, and the Recording Industry Association of America.

My purpose in testifying on behalf of AAP is not to repeat the contents of those joint submissions, but instead to address several issues raised by the hearing notice in the Federal Register of October 24, 2000 insofar as it asked a Specific Question regarding "the impact an amendment to Section 109 to include digital transmissions would have on the following activities of libraries with respect to works in digital form: (1) interlibrary lending; (2) use of works outside the physical confines of a library; (3) preservation and (4) receipt and use of donated materials."

AAP believes that such an amendment to Section 109 would radically transform the traditional role of libraries in our society. More importantly, it would do so at the expense of authors and publishers trying to utilize the same digital network capabilities that are coveted by the library community to legally exploit their copyrights through the introduction of new formats and business models for making literary works available in a competitive global marketplace. Because of its potentially crippling impact on the commercial market for "e-books" and "print-on-demand" services (among others), AAP believes the implications of such a proposed amendment must be determined in the context of the library community's espoused positions regarding contractual licensing and the circumvention of technological measures.

MusicMatch Inc.

MusicMatch Inc.
Bob Ohlweiler, Senior Vice President of Business Development
Summary of Testimony
November 24, 2000

MusicMatch has created products and services that utilize the Internet and other technologies to enhance consumer's enjoyment and discovery of music. 11 million consumers have aggregated their music onto their PC's with MusicMatch Jukebox and have significantly increased their consumption and purchase of music. Several million consumers have opted into MusicMatch personalized music services that enhance consumer benefit even further.

Products like MusicMatch Jukebox and MusicMatch Radio promise to provide consumers with a personalized, effortless and efficient way to fill their lives with music. The ability of a consumer to virtual-access and enjoy their music collection and personalized music services from anywhere in their home, car or office will delight consumers and expand the market for pre-recorded music. Accessing new or forgotten music will be as easy as changing channels on your television.

This consumer music ecosystem depends on further household penetration of broadband internet access, cost reductions in bandwidth and reasonable/equitable copyright law which facilitates technical and business model innovation as well as consumer access to their music.

The rights in play within Section 104 of the DMCA are pivotal issues for the creation of such music services:

- Payment for copyright holders should be equitable across various channels of distribution, and business models. Once a consumer has compensated the copyright holder by purchasing the music or purchasing access to the music, additional restrictions or costs for the transmission (including buffering) of that music to another location where that consumer listens to it are not reasonable.
- Consumers must also be free to make archival copies as well as copies that they can take to devices unable to play the digital music in its electronic format. (i.e. the CD player in their car)

MusicMatch spends a relatively large portion of our research and development budget in developing technologies that protect copyrighted works from being pirated while in transit to the consumer. Such safeguards, like locks on CD delivery trucks or anti-theft devices in retail, should be deployed to prevent the piracy feared by the copyright holders. Adding additional licensing burdens and unwarranted royalty costs will not increase piracy safeguards.

Appendix 9

Transcript of November 29, 2000 Public Hearing
Held Pursuant to 65 FR 63626

UNITED STATES OF AMERICA

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COPYRIGHT OFFICE

AND

NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION

+ + + + +

JOINT STUDY ON 17 U.S.C. SECTIONS 109 AND 117

PUBLIC HEARING

+ + + + +

WEDNESDAY,

NOVEMBER 29, 2000

+ + + + +

The hearing came to order at 9:30 a.m. in room 441, the Madison Building of the Library of Congress, 101 Independence Avenue, S.E., Washington, D.C., Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

Hon. Marybeth Peters, Register of Copyrights

Hon. Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information

Jesse Feder, Policy Planning Advisor

David Carson, Esq., General Counsel

Jeffrey E. M. Joyner, Esq., Senior Counsel, NTIA

Marla Poor, Esq., Attorney Advisor

A-G-E-N-D-A

A-G-E-N-D-A

P-R-O-C-E-E-D-I-N-G-S

(9:30 a.m.)

MS. PETERS: Good morning and welcome. Those of you who do business before the Copyright Arbitration Royalty Panel know that the chairs that you are sitting in are not the usual chairs and they are not quite as comfortable. We really didn't mean to make you uncomfortable. It's just we tried to get seats for more people.

As you know, today's hearing is being conducted in connection with the study that Congress required of the Copyright Office and the National Telecommunications and Information Administration.

It's carried out under Section 104 of the Digital Millennium Copyright Act of 1998. The purpose of today's hearing is to provide our two agencies with additional evidence, information and insights in order to flesh out the views and proposals made to us during the public comment period.

All of the summaries of testimony that have been provided to us are already available on our website, and a transcript of today's hearing will be posted in about two weeks.

On my immediate right is Greg Rohde, the Assistant Secretary of Commerce for Communications and

Information, who will now make a few opening remarks. I will follow with some additional opening remarks when he finishes. Greg.

MR. ROHDE: Thank you so much, Marybeth for holding this hearing. First of all, I wanted to apologize in advance. I'm going to have to leave this hearing early. I have to go travel with a senator from my authorizing committee, Senator Cleland down to Georgia. When senators in your authorizing committee ask you to go, you say yes. I have to leave early and I apologize for that.

I feel ill equipped to be wrestling with these issues. When I was in graduate school I wasn't studying law. I was studying things like St. Thomas Aquinas Summa Theologica. My background is more in the classical and theology.

It strikes me that back in the middle ages monks would painstakingly sit and copy documents, scriptures, and works of Aristotle and Plato and in those days, and like St. Thomas Aquinas, they weren't wrestling a lot with the questions of how do you protect the copyright of the original owner. They had never heard of St. Gerome suing anybody for somebody copying his work.

Then came the invention of the printing

press and as technology developed, it creates new opportunity to spread information and knowledge throughout our society. At the same time, it creates a new challenge.

Now we live in the era of the Internet which I believe is making as profound an effect on our society as the printing press did in its day because of what it's doing to allow people to share information, to share knowledge.

But at the same time this new opportunity poses a very significant challenge for us and how we continue to protect a very important right, and that is the right of those who produce these works, those who produce books, those who produce movies, those who produce music.

In this very building there is one of the earliest recording devices around. I have actually had a chance to see it a few years ago. Down in the basement in the Music Division you have one of the earliest recording devices. It's a steel cylinder. I don't know how it actually works but it's one of the earliest recording devices that we have.

In addition to that, this building houses what I think is one of the great cultural treasures of our American society, and that is the entire music

collection of Duke Ellington.

It really is a wonderful thing that today in our time that not only do we have like original scores of like the music of people like Duke Ellington, but we can also have original recordings. It's wonderful that we can now have this information shared.

But at the same time in a digital era when you have broadband communication networks, when you have the ability with digital technologies to recreate a work perfectly and now have it accessed into this network, it raises very, very significant challenges on how you protect the copyrights which is very important.

It's clear to me in my reading of the legislative history and in the statute that when Congress implemented the Digital Millennium Copyright Act and passed that, Congress truly was wrestling with this balancing that we need to do.

There is no clear easy answer to these questions. In reading through the testimonies and the written comments that we've received so far, it's clear to me that we have a lot of very significant issues to grapple with.

The reason why Congress charged our two

agencies with doing a report is because these issues continue to be looked at and we need to strive to work for that balance.

I'm very appreciative of the opportunity to be here for this hearing. I think this is going to be extremely helpful to us as we conduct and proceed with these recommendations that we provide to Congress.

I'm very grateful for the witnesses of this panel as well as subsequent panels for providing us with your insight and the information is going to be extremely helpful to us. Thank you.

MS. PETERS: Thank you. In 1997 and 1998 when Congress was considering the DMCA, Congressman Boucher and Congressman Campbell introduced a bill that contained a number of proposals, several of which we will hear repeated in testimony today.

At that time, based on the evidence available to it, Congress made a decision not to adopt those proposals and instead asked our two agencies to study the issues and report back.

One of these proposals is to modify Section 109 of the Copyright Act to make the first sale privilege apply expressly to digital transmissions of copyrighted works.

Section 109 is a codification of a judicial limitation on a copyright owner's distribution right that developed early in the 20th century. At that time the issue before the Supreme Court was whether a publisher could maintain control over the resale price of books through its exclusive right to "vend," -- i.e., sale.

In developing the first-sale doctrine the courts focused on two rationales, (1) the common law dislike of restraints on alienation of tangible property, and (2) the national policy against restraints on trade.

It would really be helpful to us in preparing our report and recommendations if participants who are addressing the issue of "digital first sale" would explain how the current proposals relate to the rationales that underpin the existing first-sale doctrine. In other words, if you are recommending a change explain how they would push the reasons for that doctrine forward.

A related issue with regard to Section 109 of title 17 has to do with activities of libraries. It would really help us if participants could provide us with concrete, real-world examples of the effect of current law on the important work of libraries, and

how the legislative proposals that have been suggested to us will change that effect.

Apart from Section 109, we've been asked to look at Section 117. Section 117 permits the owner of a copy of a computer program to copy or adapt that program in order to make a backup copy or as an essential step in using the program in a machine.

In 1980, on the recommendation of CONTU, Congress amended Section 117 to address two problems. One was the fact that you needed an exemption in order to allow you to use the work. That is the essential step. The second one, making copies of a computer program was necessary "to guard against destruction or damage by mechanical or electrical failure."

If you look at the written comments and summaries of proposed testimony, there's different views on whether section 117 should be expanded in some way or whether you can take it away because it's no longer needed.

If you look at the court cases, section 117 has been construed pretty narrowly. What we need to hear in your testimony is how your proposals really relate to the underlying purposes that were embodied in Section 117. What real-world concrete problems are you seeking to address in the proposals that you are

making today?

There are also a number of witnesses who will testify that we need exceptions from the reproduction right to make temporary copies. This is another proposal that was considered in the Boucher/Campbell bill.

Again, of course, that wasn't adopted back in 1998. Anything that you could give us with regard to what's changed in the last two years and why it's appropriate to rethink those issues would be helpful.

Obviously, as the Assistant Secretary said, the proposals that have been made in the comments raise complex and difficult questions. One of the things that we have to be mindful of is unintended consequences. To the extent that anyone who is proposing change -- or even those who oppose change -- can identify possible unintended consequences, that will help us.

I want to thank everybody ahead of time for participating in the hearing. I think we are going to go to our first panel which is seated here. Before we do that, I would like to introduce the rest of the Government panel.

To my immediate left is the Copyright Office's General Counsel David Carson. To his left is

Jesse Feder, Policy Planning Advisor in the Office of Policy and International Affairs. Any of you who have been working in this area know that Jesse is the contact person for the Copyright Office.

To Mr. Rohde's immediate right we have Jeff Joyner who is the Senior Counsel at NTIA. He is the point person for NTIA and some of you may have been working with him already.

To Jeff's immediate right is Marla Poor who is an Attorney Advisor in the Office of Policy and International Affairs.

Our first panel has seated itself and we have Jim Neal and Rodney Petersen representing the Library Associations. For the Association of American Publishers there's Allan Adler. Time Warner, Bernie Sorkin. Motion Picture Association, Fritz Attaway.

I'm going to start with the Library Associations and ask those representing the copyright interest to figure out the order in which you want to speak. You can go down the line. You can go in the order or whatever.

Let's start with Jim.

MR. NEAL: Good morning. My name is Jim Neal and I'm the Dean of University Libraries at Johns

Hopkins University. I speak today on behalf of the American Library Community and I'm joined by my good colleague from the University of Maryland, Rodney Petersen.

This is the third time I am providing testimony before the U.S. Copyright Office, first time with NTIA, on an aspect of the Digital Millennium Copyright Act. My focus has been the need to preserve existing exceptions and limitations in the copyright law under the impact of technological advances and under the impact of new regimes of intellectual protection.

First, I advocated a preemption provision for distance learning activities in libraries and educational institutions. I think this is very relevant to our deliberations today.

Second, I advocated the legal ability of information users to circumvent technological controls for noninfringing purposes. This I agree is relevant to our deliberations today.

Now, third, I ask that you embrace a media neutral, technology neutral application of the first-sale doctrine and an essential extension of the exception limits to the distribution rights of copyright holders for digital works.

I should add that I have also been at these tables in Washington fighting for limited database legislation and at countless tables in Annapolis seeking to neutralize the very burdensome elements of the UCITA legislation, both of which I feel threatens significantly public access to information and the balance that is so essential in our copyright law. I believe these are also very relevant to our deliberations today.

I believe it was an Anglican Bishop who said to an Episcopal Bishop, "Brother, we both serve the Lord, you in your way and I in His." In that spirit -- and this is certainly in the spirit of Greg's education -- you will note a pattern in my participation in these ongoing deliberations and debates. Library users, the public is losing.

I would also maintain that the vitality and productivity of learning, research, personal growth, economic development, creativity are seriously threatened.

As noted in my written testimony, we need a first-sale doctrine for the digital millennium that embraces several points. These relate to real examples and real experiences in the life of libraries and their users.

Policy should not make a distinction in lending based on the format of the work and the rules on interlibrary loan of digital works should be reaffirmed and strengthened.

All works acquired by a library should be available for use in classrooms and by students and teachers regardless of where they are located. This is a reality of the current educational environment in which colleges, universities, and libraries are participating.

Libraries must be able to archive lawfully purchased work for future use and historical preservation. A uniform federal policy is needed which sets minimum standards respecting limitations on the exclusive rights of ownership and which sets aside state statutes and contractual terms which unduly restrict access rights.

Lastly, we must encourage donations of works to libraries irrespective of format and without threat of litigation to those who donate those materials.

These five examples represent real world experiences that we are having in the library community and which align, I think, very much with issues of first-sale doctrine.

The first-sale doctrine is being undermined by contract and restrictive licensing. We face uncertainty in libraries about the application of the first-sale doctrine for digital works. I believe this is having a negative impact on the marketplace for works in electronic form and on the ability of libraries to serve their users.

We believe that no review of the first sale doctrine and computer licensing rules should be completed without the Congress giving favorable consideration to a new federal preemption provision affecting these rules.

One could say that every snowflake -- every snowflake in an avalanche pleads not guilty. Each chip we make in our powerful and hard-earned copyright tradition in this country brings us closer to a collapse in the balance and a burying of user's needs and rights.

MR. PETERSEN: Good morning. My name is Rodney Petersen and I am the Director of Policy and Planning at the University of Maryland's Office of Information Technology. Like Jim I'm here today on behalf of the National Library Associations.

I want to actually supplement some of

Jim's comments by bringing my own unique perspectives to the table and share with you what I think has relevance to this inquiry.

First, as a lawyer and educator and actually someone who teaches an online course on copyright and new media, I have a keen understanding and appreciation for the importance of the Federal Copyright Act and the resulting effort to strike an appropriate balance between the rights of copyright owners and users.

Secondly, as a researcher and author I myself benefit from the protections afforded under the copyright law. As you can imagine, universities are typically in the unique position of being both creators and users of copyrighted materials on a frequent basis.

Finally, and perhaps most importantly for this morning, as a member of the Information Technology Division of one of the nation's premier research universities, my department is on the cutting edge of teaching and learning with technology initiatives, as well as the development of e-commerce solutions.

From that last point of view I would like to offer a few examples and illustrations. The

growing use and dependence upon digital materials for teaching, learning, and research, as was said earlier, is both exciting in terms of opportunities and challenging endeavor for colleges and universities.

The information age within which we live, work, and learn is prevocated upon access to information resources, open access that does not necessarily mean that it's free or that it's unregulated. However, the legal paradigm that governs information access and use in the digital economy must benefit the public good.

The public good is best advanced by policies and laws that provide appropriate incentives to authors, creators, while at the same time insuring appropriate access to the information.

As the written comments of the Library Associations have reported, faculty and students are increasingly expecting and demanding access to information in digital form. In fact, it's offices like my own who are teaching faculty how to incorporate technology into the learning process that are leading that effort.

However, at the same time our faculty and our universities are increasingly frustrated by the impediments that result from a complex intellectual

property system that seems to be, as Jim described, becoming a losing battle for colleges and universities that seemingly only benefits a few.

Let me just give you a few examples of uses that I am concerns about and that I hope will prevail into the future. In fact, a couple of weeks ago I purchased, and I'm happy to say it was a purchase and not a license, an e-book from a notable online retailer. A good example of e-commerce and maybe many of you have engaged in that practice.

Actually through the use of my university procurement card within a matter of minutes I could transact over the Internet the payment of that purchase which, again, with the benefit of e-commerce didn't include shipping and handling fees. Within a matter of seconds that e-book was accessible for download to me.

Now, I would hope that e-book that I purchased would have the same equivalent rights to a hardcopy book I might purchase from that same seller, and that I would be able to hand that e-book down to my successor as Director of Policy and Planning, or to donate it to the library when I no longer needed, it so that it could in turn be available for circulation.

I think as some of the comments suggest,

perhaps that may be permissible under current law, although I think as we look into the future, and as my later comments will suggest, the advent of other kinds of restrictions such as licenses and anti-circumvention measures might make that impossible into the future.

Second illustration that I actually raised before, some members of this panel when I spoke with you previously about anti-circumvention issues is the notion of the library's role in preserving and archiving information.

When I came to the university in the early 1990s there was an unfortunate recession that the state was experiencing and budget impacts were being felt throughout the university including the libraries.

One of the impacts on those budget restraints was the discontinuation of some journal subscriptions. Unfortunately that directly affected me because one of my most widely used journals, The Journal of College and University Law, was discontinued. The subscription was discontinued due to budget restraints.

On the other hand, the back issues were still available to me and I use those back issues on

a regular basis because since it was in print form, the libraries were able to preserve and archive and circulate that information as appropriate.

Again, the concern is that there may be a potential as we encourage faculty to use technology and the demands for access to information in digital form, that there be a difference in treatment between print materials and digital materials does not seem to be in the best interest of the public and certainly not in the best interest of our students and faculty.

A third and final example, and maybe a foresight of an issue for you to think about into the future, is some discussion in the comments, as well as some discussions in other context including the recent Federal Trade Commission's discussion about the application to warranties to high-tech products.

One of the discussions that comes up consistently very applicable to first sale is the distinction between things that are in some kind of tangible or physical form versus things that are not.

I think it's a little ironic that when we think about the premise of copyright law that protects goods, original expression of ideas, I should say, that are expressed and fixed in a tangible medium, that on the other hand arguments are being advanced in

the FTC context that federal consumer laws shouldn't apply because the good isn't tangible or physical.

Primarily in the case of computer software or increasingly first sale might not be applicable because there's not a physical or tangible copy that you can actually hand off, share, distribute, or sell to somebody else. Three examples with the last being more of an issue that I think is only recently coming under discussion.

The second and final kind of major thing that I'll end with is a comment about the trend towards the displacement of provisions of the uniform federal law, the U.S. Copyright Act, with licenses or contracts for digital information is of great concern.

As many of you know, Jim and I being from the state of Maryland are among the only state in the United States to have enacted the UCITA law. I've been very involved in those debates and deliberations.

College and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of licenses.

Those thousands of licenses often will limit, if not eliminate, the availability of

fundamental copyright provisions such as fair use, the ability for libraries to archive to preserve information, or even the availability of first sale by characterizing those information transactions as a license rather than a sale.

It's misleading to contend that the bargaining power, especially when it's nonprofit educational institutions, were usually presented with standard license agreements developed by the information providers that it is about freedom of contract.

The enforceability of shrink-wrap and click-thru licenses also poses the same restrictive use regime on individual students and faculty researchers such as individuals like myself who might be purchasing e-books or transacting for information on line.

In conclusion, the digital age necessitates that we enforce existing copyright laws and at the same time rely upon ethical principles, educational measures to protect the rights of authors and creators of digital works.

The introduction of legal and technological measures that in turn diminish, if not eliminate, otherwise lawful uses I would contend is

not in the public interest. Thank you.

MS. PETERS: Thank you.

MR. ADLER: Thank you. My name is Allan Adler. I'm testifying today on behalf of the Association of American Publishers.

As I stated in the one-page summary I submitted, we filed as part of a joint set of written comments and joint reply comments of the copyright industries. Since our counsel who prepared those, Steven Metalitz, who is going to be on a panel later this afternoon, I'm not going to address the issues that are dealt with in those comments.

I do want to address an issue that was raised in the notice of this hearing which talked explicitly about the impact that an amendment to Section 109 such as proposed by Congressman Boucher would have on the activities of libraries. Particularly the ones that were specified as interlibrary loan, uses of materials outside the physical confines of a library, donations and such.

From the perspective of the publishing community, our overall concern is that such an amendment to Section 109 would radically transform the traditional roles of libraries and archives in our society and do so in a way that was never contemplated

by Congress when special privileges were afforded to these entities in the 1976 Copyright Act Amendments.

More importantly, I think it would transform the roles of these entities at the expense of authors and publishers who are trying to utilize precisely the same digital network capabilities that are coveted by the library community, but are seeking to do so to legally exploit the rights that they hold under copyright through the introduction of new formats and new business models for making literary works available in a competitive global marketplace.

Because of its potentially crippling impact on the commercial market for things like e-books or print-on-demand services among others, AAP believes that the implications of such a proposed amendment must be determined in the context of the library communities' espoused positions regarding certain other issues.

As you know, in the library communities' comments they have asked that this proceeding be used as a “platform,” as one other commentor put it, to address a whole laundry list of issues including things like pricing, contract terms, technological measures, archiving, preservation, the use of passwords, some replay of the discussions of the 1201

rulemaking proceeding, as well as the debate over the DMCA's enactment itself.

Their suggestions about the illegitimacy of uses being made of technological protection measures, of circumvention prohibitions in the law, of contractual licensing, and even of the DMCA's copyright management information provisions, should make us pause, as we examine what the libraries are asking this report to recommend, and ask three very important questions.

What do libraries and archives really want to be able to do with digital interactive network capabilities? And if they are permitted to do what they want to do, would they still be libraries and archives as these entities were understood by Congress at the time the statutory privileges were created in 1976? Indeed, what do we understand libraries and archives to be today when anyone can establish a website, and call themselves a library or an archive.

And since the Copyright Act contains no definition of those terms and refers to them, at least explicitly with respect to libraries, both potentially as nonprofit and for-profit situations, what would it mean to take the privileges that were granted in 1976,

update them as the library community requests for the digital age, and then allow these institutions to do all the various activities that they claim would then be perfectly permissible in a digital environment.

It's particularly disturbing that the library community comes before this body and acknowledges the validity of the use of technical measures when appealing for an amendment to the Copyright Act to promote digital distance education.

But then they turn around and denounce the use of the very type of access control that was discussed as being reasonable for that purpose, the use of passwords by students to access material that is used in distance education courses.

We also see certain self-contradictory arguments being made. They talk about concerns with respect to copyright management information regarding privacy interests of library patrons and users.

Yet, when you look at the recommendation that they make in support of Mr. Boucher's approach to amending the first-sale doctrine, which would depend upon some notion of the practical enforceability of a simultaneous deletion concept which would be extremely intrusive in terms of personal privacy if anyone was

to attempt to try to see if, in fact, it worked on a practical basis, you are left to try to figure out how to deal with privacy issues which were not even the subject of the study as the Congress set it forth in the requirements of the DMCA.

We've heard certain dark threats about civil, even criminal liability, for libraries and their patrons despite the fact that the Copyright Act is riddled with special considerations exempting libraries and these other institutions from this type of liability or making special treatment of these institutions with respect to such liability.

While they do admit to some extent that we are at the embryonic stage of many of these issues and there is an uncertainty or lack of clarity regarding the exact nature and extent of the detrimental effects that they cite, they are still pushing for legislative action on the broadest possible scale just 24 months after the enactment of the Digital Millennium Copyright Act.

Talking about things like “chained” books are clever sound bytes and I'm sure they'll get a lot of attention that way. But this is hardly a documented problem of the type or scope that suggests a need for legislative action.

Certainly problems that arise with particular types of copyrighted works cannot, without evidence, be imputed to all works. For example, journal subscriptions with all other types of copyrighted works because each of them has their own particular set of circumstances determined by their particular business model and the way in which they are treated under the Copyright Act.

Sometimes you'll hear the libraries talk about what has "historically been within the discretion of libraries" when they talk about what they need for amendment under the first-sale doctrine.

Then you'll also hear them beg the question when they claim that certain aspects of the first-sale doctrine are really just matters that "result from publishing history" rather than specific deliberate statements of doctrine by Congress.

In the notice of the hearing, testimony was sought about the impact that a proposed amendment to Section 109, along the lines the library suggests, would have on certain library activities like inter-library loans.

Even if we set aside the context of digital transmissions and the digital environment,

inter-library loan is an often misunderstood concept and one that needs to be reexamined just so we all understand what Congress attempted to do in 1976 and how it has been applied in the years since then.

Even the CONTU report, which was involved in helping to flesh out the meaning of the inter-library loan provisions, basically noted that "inter-library loan" is kind of a misnomer when it repeatedly referred to the concept of inter-library loans "or the use of photocopies in lieu of loans."

That is because interlibrary loan has come to mean something beyond just simply taking the physical copy of a work and lending it to another institution. It has really become a business of photocopying, making copies of works themselves.

In fact, it has become in certain instances somewhat indistinguishable from document delivery services offered by certain institutions on a for-profit basis.

Section 108 in general is very complicated and was drafted in very complex fashion because Congress didn't want to say that there was a general privelege of inter-library loan for all materials in a collection of a library or archive under every set of circumstances.

It divided the various provisions of Section 108 in order to be able to address certain privileges that a library could have with respect to making copies for itself for its own use, as opposed to the situations in which a library could be permitted to make copies of works for its patrons and users. Those very careful distinctions, unfortunately, are not preserved in the way you hear about the need to amend the Copyright Act in order to facilitate services like inter-library loans in the digital environment.

We talk about preservation and the need for security under Section 108. Section 108, in fact, only deals with the issue of preservation as it applies to unpublished works that are currently in a library's possession. It doesn't deal with all manner of copyrighted works across the board. It's important to examine those issues much more closely than they have been discussed thus far.

Similarly, when we talk about the receipt and use of materials donated to libraries, again this is really a licensing issue. It's not a first-sale issue as such, but examine what the law already says with respect to the donation of materials with respect to licensing.

In Section 108(f)(4) it specifically says that despite the privileges otherwise provided to libraries and archives under this section, nothing in the section is to effect any contractual obligations assumed at anytime by the library or archives when it obtained a copy of a work in its collections.

Clearly the Congress did not intend that copyright was going to trump contractual licensing across the board in every situation. Quite the contrary. It managed to write these privileges for libraries and to do so with account of the fact that contractual licensing was going to be the primary way in which copyright owners were, in fact, going to be able to legally exploit the rights provided to them under the law.

Let me make one last point in the time I have about the impact of the proposals made by the library community regarding some of the new business models, new products and services that are coming on line from book publishers.

For that purpose, I would request that two articles from the New York Times be entered into the record of the hearing. Both of them were downloaded from the New York Times service which I subscribe to. I get it for free because they don't charge a fee.

In this case, they make it known to subscribers that they welcome you to print and download copies because they have a special option for printing the article to make it easier to print and copy.

The two articles that I want to introduce into the record deal with the current marketplace developments with respect to e-book services and the competition in the development of those services, as well as new library-like services that are being offered in competition by groups like NetLibrary, E-Brary, and Questia.

This is precisely the type of beneficial development in the marketplace of competitive new business models with new capabilities and new benefits for the users of copyrighted works that are disseminated through these services that we believe would be thwarted if the types of proposed amendments to Section 109 and the Copyright Act in general recommended by the library community are adopted. Thank you.

MS. PETERS: Thank you.

MR. ATTAWAY: My name is Fritz Attaway. I am Executive Vice President and Washington General Counsel of the Motion Picture Association of America.

I thank you very much for this opportunity to appear here this morning.

I would like to start out by pointing out that this very nice room, and the televisions and the carpet and everything else in this room have been paid for by the copyright community, primarily by the people that I represent. It is deducted from our compulsory license royalty fees every year. Sometimes I think we've paid for it over and over and over again. Anyway, it's a very nice room.

MS. PETERS: You only paid for the furniture once.

MR. ATTAWAY: You have a very long day before you and I'm going to be very brief. I would like to associate my comments with those of Mr. Adler and Mr. Sorkin and Mr. Metalitz who will come later.

I would just like to make one very simple point, and that is that there's nothing in the record of this proceeding that supports amendment to Section 109 of the Copyright Act, which I'll refer to as the first-sale doctrine.

The record of this proceeding can support only one conclusion: that the DMCA and the development of electronic commerce has had no effect on the operation of the first-sale doctrine, and the

relationship between existing technology and the emergence of new technology, and the operation of the first-sale doctrine, is in perfect harmony.

The record does include some speculation that this harmony may not exist forever. Indeed, that may or may not be the case. If problems develop, perhaps we should revisit this issue. However, Section 104 of the DMCA does not direct the register and the Assistant Secretary to engage in speculation.

It directs them to evaluate and report on the effects of the DMCA on the operation of the first-sale doctrine and the relationship between emerging technology and the for-sale doctrine.

The record of this proceeding does not support any finding that the DMCA has affected in any negative way the operation of the first-sale doctrine, or that technological developments require changes to the first-sale doctrine. The first-sale doctrine is operating as intended.

Now, some parties contend that the first-sale doctrine should be radically changed into something that it was never intended to be. They would transform the first-sale doctrine from a narrow limitation on the distribution right, as the Register pointed out in her opening remarks, into a broad

contraction of all exclusive rights, including the reproduction right.

In addition, they argue that the first-sale doctrine should be amended to restrict the ability of copyright owners to enter into contracts that these parties find objectionable. That was never the intent of the first-sale doctrine.

The first-sale doctrine was not intended to limit the reproduction right or the right to enter into contracts. Section 104 of the DMCA was not enacted to address these issues.

Section 104 was enacted to address concerns that the first-sale doctrine operate in the digital world as it was intended to operate in the analog world. The record of this proceeding demonstrates that the first-sale doctrine is operating as intended in both worlds.

That finding should be the essence of your report to the Congress. In listening to the testimony of Mr. Neal and Mr. Petersen, I heard Mr. Neal say that the public is losing, but I didn't hear any support for that assertion. I heard Mr. Petersen provide hypotheticals using the words "might" and "could."

I submit to you that your job is not to

speculate about what might be or what could be, but what is, and what is is a copyright law, and particularly Section 109, the first-sale doctrine that is operating as intended and it should be allowed to continue to operate as intended until there is some real evidence that something is amiss. Thank you very much.

MS. PETERS: Thank you.

MR. SORKIN: Thank you. My name is Bernard R. Sorkin and I speak for Time Warner. Fortunately for your schedule and your patience, Mr. Adler and Mr. Attaway have left me with very little to say.

I would like to start, however, by thanking Secretary Rohde for his statement about the necessity for copyright protection for works. Having said that, I can't let the praise go unalloyed.

I would like to differ with a matter of emphasis. That is, I understood you to say, Mr. Secretary, that the development of the printing press was something like what's happening today with digital development.

The development of Herr Gutenberg's machine was, indeed, a bombshell. What we have today, however, is a nuclear bomb, if not worse, by virtue of the ability to reproduce quickly and at negligible

expense copies without end and copies from copies without any degradation of quality; the ability to distribute those copies throughout the world with a click of a mouse and the ability to modify the works with clicks of a mouse.

These things are not just like a printing press. They place great dangers on content owners,and great dangers on the development of the Internet because if content owners, for whatever reason, feel the danger is sufficient so that they will not make their works available in digital form or on the Internet, there will be no need for the development of an infrastructure and the public thereby will suffer.

I would like to pick up a little on what the Register said about what the first-sale doctrine is and what it provides. Right now I think it's common ground by virtue of the definition. That is to say, it starts with the phrase, "Notwithstanding anything in 106(3) certain limits are placed." It doesn't say “notwithstanding anything in 106.”

As Mr. Attaway pointed out, the kind of request that's being made is not merely for modification. It's what I called in my paper transmogrification which is a transmutation of a grotesque kind.

If that happens, we have to consider what I expect the unintended consequences will be. I hope I'm not being too charitable in talking about unintended consequences.

Consider what happens when somebody who owns a digital work allows it to be downloaded and, by virtue of the suggested change in the first-sale doctrine by virtue of ownership of that digital work is able to transmit that work to somebody else.

The transmitter still retains the original work. The somebody else has a work which he or she can now transmit. Either of them can transmit it not only to somebody else but to many, many somebody elses. Each one has immediately become a publisher of whatever that work is on a worldwide basis.

Whether that consequence is intended or unintended, I'm not sure. I think our friends in the Library Associations and the other proponents of this kind of change can answer to that, but it certainly is a consequence.

That is precisely the reason for the urgent need to oppose any such change because what it does is destroy the need for an infrastructure and the need for an Internet. As a result, we will have, in the phrase that seems to have lost some currency, an

information superhighway with no cars on it because content owners simply will not be able to provide materials subject to this kind of danger.

I underline both in terms of what I heard this morning and in terms of the papers I had seen earlier on that there has been nothing, as Mr. Attaway suggested, other than sheer speculation without any foundation as to how librarians and educators might be inconvenienced but not inhibited in anyway at all by the current operation of the first-sale doctrine or the current operation of any copyright law.

Steps have been taken over the years, and both Mr. Adler and Mr. Attaway refer to them, to provide privileges to educators and librarians to fulfill their needs. Not always their desires perhaps but their needs.

As many of us here know, several years of hard work and maybe even blood, sweat, and tears, were invested in developing guidelines for multimedia production for educational purposes; guidelines which I understand are working successfully.

What we have is a situation where I think the decision that should come out of this office at the end of these hearings is that no change should be made in the first-sale doctrine.

To have further studies is just fine. Content owners are prepared to address the needs of users. Content owners are not in the business of not making their works available to the public.

That ain't no way to make a living. Content owners, in the nature of their business, make their works available as widely as possible, but the works have to be made available subject to adequate and effective -- I didn't make up those words -- adequate and effective protections. Thank you.

MS. PETERS: Thank you. We are going to start the questioning. Obviously there's disagreement among the various members of the panel. What I hope with the questions that come forward is that there can be some dialogue, that it's not just a one-way question.

I'll start but I may come in later. Let me throw in a question that actually Mr. Adler raised with respect to a proposal of the Library Associations. If the proposal that was in the Boucher bill and that you basically put forward again is that with regard to digital material and, in some cases, people have said digital downloads, that there should be the equivalent of first sale by the simultaneous destruction.

Obviously there are practical and evidentiary problems with that. Mr. Adler raised the question about how do you really enforce such a thing and how does that not get in the way of what your stated views are with regard to privacy concerns.

Could you just kind of address how you can put in place an effective simultaneous destruction provision that doesn't run afoul of other laws or other problems?

MR. PETERSEN: A couple things come to mind to me in terms of your specific question. One is that the notion that this is somehow extremely different and radical from the current process I think we should rethink.

I understand the convenience of digital technologies for making copies and transmitting, but I think you might ask the same question if I were to want to give, and this is maybe a little too hefty of a book, but a shorter book to Jim or to the libraries and I decided before I did that I was going to photocopy my own copy to keep, it raises some of the same kind of evidentiary privacy issues in terms of how are you going to know that I actually made a copy illegally before I passed it on to somebody else or didn't destroy it.

In the case of the digital transmission, destroy the electronic version of it. Even though it's not as likely that somebody would photocopy it before they give a book away, I think perhaps some of the same issues might be raised.

I think the other thing that I want to raise in that context is that the concerns about piracy or about infringement, whether it's libraries or individual users might engage in, I would argue it's equally speculative or predictive of the future as our comments about the impact of some of these laws.

Even though I don't want to get in a tic for tac comments here, I think I can point to several places in the comments where the words "could, might, should" were introduced as to why somebody might not destroy that digital copy.

In fact, the comments of Time Warner say transmission of the work would require reproducing it and could lead to distribution of the work to multitudes of recipients. I think there is the same speculation that works the other way, that individuals or libraries and others are going to distribute it in ways illegally and it raises some of the same problems.

MS. PETERS: Okay. Can I just follow one little piece up with what you just said?

MR. PETERSEN: Yes.

MS. PETERS: One of the things that first-sale doctrine did was basically say, and I think it was Mr. Sorkin pointed it out, is that it focuses on that it's an exception to Section 106(3). Under your proposal you are really mandating the right to reproduce the work.

In your scenario where you say it's totally the same, it sort of isn't. If you gave that book away, the first-sale doctrine that allows you to give it away, you make a photocopy separate and apart from it. It's not protected by the first-sale doctrine.

It's protected, if at all, and there is a very strong question about that because you've copied the whole book, under fair use. I think that isn't just a philosophical question. It's a basic principle that the distribution right really doesn't involve the reproduction right. Going down that path is a very different path to go.

Okay. Can I ask one other question? You talked about the fact that you just bought a new book.

MR. PETERSEN: Right.

MS. PETERS: Your question came about -- you're talking about a library and its ability to lend that book, to archive that book or, if you didn't buy it for the library, your ability to donate it.

Under the terms and conditions that you bought that book, what are the problems with having a library lend it, the ability to archive it? Did it come with terms and conditions?

MR. PETERSEN: It did not. In fact, the one that I recently purchased and, of course, the average consumer is not going to pay attention to this, but I looked closely and it contained a copyright notice but not anything that prevented me from giving it or sharing it or the implications of first-sale by essence of the copyright notice. It could just as easily come with terms and conditions or a license arrangement that would have restricted that.

MS. PETERS: But that one didn't?

MR. PETERSEN: It did not.

MS. PETERS: Have you had experience with purchasing things, not online access?

MR. PETERSEN: Can I just add one further thing which is, again, the perspective I bring, I think, in terms of trying to encourage the use of digital materials. If it had come with a license

agreement, I can tell you that I would not have licensed it.

I would have chosen not to, especially if there was a hardcopy or print version that I could have purchased because of some of these very concerns we've talked about here.

MS. PETERS: So had you been given a license --

MR. PETERSEN: Right.

MS. PETERS: Book license, yes or no, you would have looked at it and said this restricts me in ways that my purchasing of the book does not. Therefore, because I'm in a library setting, my choice is to go with the print edition.

MR. PETERSEN: That's right.

MS. PETERS: Okay.

MR. PETERSEN: And I would have made that decision based on some of the very controversies we're talking about here today. I think it's an unfortunate decision given the potential of technology, particularly for teaching and learning and use of digital works, but I might have made that choice.

I guess it goes to the point of the disincentive for authors and creators to develop digital works which I emphasize with. I mean, faculty

and universities are creating intellectual property that we want to digitize as well.

The disincentive also comes on the other side where you're a potential user or purchaser or licensee of digital works as well.

MR. NEAL: Marybeth, let me just add, I think you will hear later today through other testimony about technologies that are being put in place that allow e-loan, e-transfer, e-giving away of materials with the ability to simultaneously destruct other copies without violations of privacy. I do not know those technologies but I know there are other testimonies that will be given today that will speak to those issues.

MR. ADLER: May I just comment?

MS. PETERS: Sure. Absolutely.

MR. ADLER: Mr. Petersen seems to have just presented the paradigm of exactly what the publishing industry is talking about when it talks about competitive choice for consumers and the type of concern that we have that the amendments recommended by the library community would eventually thwart the effort to create as many consumer choices as possible in the marketplace.

For precisely the reason that he

stated, he would have rejected purchasing that subscription from that particular publisher or that particular distributor because he didn't like the licensing terms. That's exactly the reason why another competing distributor or publisher would probably offer different terms with respect to the same types of materials.

One of the things that we are so concerned about here is having the Government by statutory fiat essentially eliminate the ability of competitors in the global marketplace to establish different models that give consumers choice.

What essentially is being asked for here in terms of the proponents of amendments to 109 is a "one size fits all" that's going to prevent these types of different competitive services from being offered on different business models.

The example that Mr. Petersen gave has relevance, for example, if you read about GemStar, which is an e-book distributor that has purchased the Rocket e-book and Softbook versions of e-book, both of which they are looking at a business model involving a closed system.

They believe that this is going to appeal to publishers because they could avoid the necessity

of downloading the books off the Internet. They don't view that as a safe conduit.

They think that publishers would be more encouraged to license works to them for use in their e-book devices because it would avoid the risk of piracy in the process. They think that their e-book devices are going to have appeal to consumers on that basis because more publishers will make more works available to consumers in that format.

Whereas Microsoft, for example, and other companies are looking to shape their e-book offerings with the ability specifically to download text off the Internet, or to be able to take the text from your personal computer, because they believe that's going to offer more convenience and other advantages in the way they can present their product to consumers. Two entirely different business models.

The question that arises is why should the Government step in and impose a statutory strait jacket that's going to say there's only going to be one business model because the digital first-sale doctrine is going to mandate how and when and under what circumstances and terms a copy of this work can be transmitted to another person.

MS. PETERS: Do you --

MR. NEAL: I just want to confirm that overwhelmingly libraries operate in a sole-source, sole-provider environment. The issue of choice is not a realistic option for us for the overwhelming majority of information that we acquire for our users.

Secondly, I think we need to be very cautious as we move down this path, a real slippery slope of aggravating a seriously developing digital problem, and that is creating a situation where the ability to pay, the ability to negotiate effectively, to have the expertise to negotiate effectively, is going to determine the level and quality of information that you can provide.

Libraries in society help break down those barriers. They represent agents of the public to enable effective access and cost effective access to information. I think we need to be careful there.

MS. PETERS: I only have one other question. What is sole source when you say sole source?

MR. NEAL: One place that I can acquire a body of information.

MR. ADLER: Could you explain that further? What does that mean?

MR. NEAL: The publisher publishes a book.

I can buy that book from that publisher.

MS. PETERS: However --

MR. NEAL: The publisher publishes a journal. I can buy that journal from that publisher. If I choose not to buy it from that publisher, I don't have another place to go to buy that journal.

MR. ADLER: Although you have competing journals.

MR. NEAL: But I don't have another place to buy that journal.

MR. ADLER: But that's provided for in the essence of copyright itself.

MS. PETERS: The exclusive right.

With respect to the proposals that libraries made, do you make a distinction between what is in essence the equivalent of a distribution of a physical copy? You order it like your e-book.

You order it, it's transmitted, you get it on your hard drive, versus your -- I won't say the word contract -- to get electronic access to a work so that you are really not contracting to get the equivalent of a copy. Rather, it's the online access.

Do you make distinctions? Do you basically say that your recommendations with regard to first sale really only apply when, in fact, you are

trying to get the equivalent of a book but not certainly with regard to electronic access?

MR. NEAL: As we build our electronic access in our libraries, the predominate model that is in place today is the licensing of access to information. Historically we've had the ability to acquire and load locally content and, therefore, have the ability to own it and manage it at the local level.

Increasingly, that is not the case in most library settings. Therefore, we attempt to negotiate in the contract process a role and responsibility for the library or some other participant in the long-term availability and archiving of that information when the license no longer is in place or has been set aside or we no longer acquire access to that information.

That is a process which I think is in development. I don't think that we have good and effective ground rules in place or standard or model contract language that helps us bridge the differences between acquisition and licensing.

MS. PETERS: But you're not in anyway suggesting that if you have merely a contract for electronic access that the concept of first sale

should apply to that material?

MR. NEAL: No. But what I'm saying to you is that we are in an environment where the predominate means of access that libraries are currently employing is to, in fact, license information. We need to be sure that as that legal contractual framework comes to dominate we not lose the ability, lose the application of the exceptions of limitations that exist within the current law.

MR. ROHDE: Okay. Thank you. I want to begin by asking the question Mr. Attaway raised earlier to Mr. Petersen and Mr. Neal.

In your testimony you point out that -- you make the point that the state of law post-DMCA is actually in the perspective of your Episcopal Bishop taking libraries a step backwards or impeded. Your perspective of the first-sale doctrine.

Can you tell me specifically how that has happened? What I got from your testimony is that when Congress acted a couple of years ago that it actually harmed your ability to access information. Can you give me some specifics about that?

MR. PETERSEN: Well, the two specific areas that I would point to is, one, the inability to extend first sale to digital works would be the

example.

Secondly, the effects of licensing and, in our state, the implementation of a law like UCITA where a license term, you know, with a shrink-wrap click-thru that apply to my e-book where there might not be a choice of another license. It's that license or no license where there might not be another publisher.

I think those two examples in the case of where the license term might prohibit any kind of first-sale rights are the examples I would allude to.

MR. NEAL: I agree with that point. We are fresh off of this UCITA experience so it colors dramatically the way we think because we see parallels as we work on licensing. In contracting language it blurs across into our interpretations and thinking about first sale.

I mean, Allan talked about the relationship between contract law and copyright law and the standard presentation of UCITA as it is -- the point from which we are negotiating UCITA talks about the complementary relationship between those two legal frameworks and the preemption provision and the public policy provision that exist in UCITA.

I think those are relevant to what we're

talking about here today. My ability as a library on behalf of my users to secure and provide inter-library loan copies or inter-library loan delivery of works is something that is not clear in this environment.

My ability to manage my societal responsibility in terms of archiving and long-term access to information is not clear in this environment. The ability of friends that I have developed for my library over many, many years to give me works which they routinely do in the analog world. It's not clear how and whether they can continue to do that in the digital world.

MR. ROHDE: What you're saying is the harm you are experiencing is ambiguity?

MR. NEAL: I think the harm is ambiguity but I think there is a stifling impact as well in terms of how and if we will perform our responsibilities and roles.

MR. PETERSEN: If I can also add, and it goes back to your earlier question about not just first sale but the reproduction right issue, and I think Jim alluded to the fact but I think you'll hear more testimony later today.

I just want to say for the record that I think the position that will be later taken by the

Digital Future Coalition with respect to 106 reproduction right issues and the kind of limited language amendment, if you will, that will accommodate that in the context of digital first sale, I think, was certainly what we had in mind without ignoring reproduction issues all together but in a very limited language as such that I think you'll hear more about later today.

MR. ROHDE: I'd like to turn to Mr. Sorkin. In your testimony you point out that the underlying purpose of the first-sale doctrine is transfer of possession.

MR. SORKIN: A tangible good. The statute uses the word “copy” and “copies” are defined as “material objects.”

MR. ROHDE: And you also point out that--I want to make sure I understand your testimony correctly--that the doctrine of first sale in your perspective not only applies in the "analog" or paper world, but you also say it applies to new media. Correct?

MR. SORKIN: To digitized media?

MR. ROHDE: Digitized media.

MR. SORKIN: It depends on what we're talking about, Mr. Secretary. It would apply to a CD which I can hold in my hand and give you, or a DVD if

you wish. The danger to which we are directing ourselves in this testimony is to digitally transmitted and downloaded programming.

But the fact that something is in digital form, if it's a tangible copy, then the first-sale doctrine would apply.

MR. ROHDE: So it would apply if it's going to either a CD, a floppy disk, something you can hold in your hand?

MR. SORKIN: Yes.

MR. ROHDE: But it would not apply to something electronically transferred?

MR. SORKIN: It couldn't.

MR. ROHDE: Under current law?

MR. SORKIN: Under current law it couldn't and it shouldn't.

MR. ROHDE: In looking at Mr. Boucher's legislation and what Mr. Boucher proposed in amending Section 109. Is he saying that the first-sale doctrine could apply in this new environment provided that whoever is transferring the product, whether it be a book or a piece of music or a movie or whatever, then destroys the copy that he or she has -- I don't want to put words in your mouth but I assume that condition is not enforceable? Your problem with that

is you don't believe that's an enforceable mechanism?

MR. SORKIN: I don't think the technology exists, to say nothing of the good will.

MR. ROHDE: His legislation is not based on technology. It says provided that the person has --

MR. SORKIN: Okay. Then let's talk about good will or enforcement in addition to the privacy aspects that Mr. Adler raised.

MR. ROHDE: One of the things in my job that I get exposed to, I get exposed to a lot of new technologies. I know that the technology currently exist where you can buy a product that--privacy technologies are being developed quite rapidly right now.

There are technologies that you can access now that will allow you to put into your e-mail system where you can send an e-mail to somebody and you can attach on there an encryption code that whenever you send it to cannot then later send it to somebody else to be opened.

There are a variety of means which you can protect information via e-mail. You can send an attachment and you can prevent it from being transferred to somebody else.

You can even put codes in there that once

you transfer it -- once that person transfers it, then it simply disintegrates and cannot be opened by somebody else. If that technology exists in e-mail, it could potentially exist with respect to anything that is traded on the Internet.

Now, if indeed that is effective, maybe it's not there today, but if indeed it is effective and it comes about, in your judgement then is there no need to change the law and first sale then can apply to transmission of information over the Internet?

MR. SORKIN: About all I can say to you in that regard, Mr. Secretary, is that it sounds like something my company and perhaps the others, I can't speak for them, would be willing to consider.

We would have to be assured of its effectiveness on several levels both in terms of whether or not the giver, the transferrer retains a copy, whether or not the transferee can do something further with it and, if so, what and how. What you are describing is something that I think might be well worth thinking about and investigating.

MR. ROHDE: So, in other words, if the technology is available that would assure the destruction of a product once it's transferred, then your requirement that it must be a tangible item would

no longer necessarily apply?

MR. SORKIN: Well, what is it that would be destroyed in that case?

MR. ROHDE: Whoever has the product on their computer and they are transferring it, once they transfer it if you can assure that it is automatically destroyed. It's not up to the discretion of the person who transferred it.

MR. SORKIN: I would have to ask you the second level question, so to speak, and that is to whom or to how many whoms can that transfer be made. We know that in the digital world, as I suggested in my small introduction, a digital transfer can be made worldwide.

MR. ROHDE: I would like Mr. Neal and Mr. Petersen the same question. If, indeed, that technology exist that could assure the destruction of a product once it is transferred, then does your need to have Section 109 changed and amended go away from what you're proposing? Would technology permission take care of this problem from your perspective?

MR. PETERSEN: Well, I would certainly say technology has the potential to resolve some of these issues as long as it doesn't, as I am afraid some of the DMCA provisions might to, interfere with some of

the rights of the library as a user.

I think there could be some limited narrow applications that would actually facilitate the very amendment that we are proposing in terms of verifiability. Again, I think the privacy issue, though, is one that we have to be concerned about with any new introduction.

I've brought this up before as well, but using our UCITA experience, again the very notion of self-help, that was originally part of UCITA for giving content providers, information providers, the ability to remotely disable information was not adopted by our general assembly and ultimately taken out of the national UCITA bill because of privacy concerns.

I think we have to be aware of what the privacy implications might be as well.

MR. ROHDE: Sure.

MR. ADLER: I don't want to put words in the mouths of my friends in the library community, but taking note of the evolving way they have approached the issue of access controls from, at first, sort of endorsing the concept, for example, passwords in the context of distance education, to now very strongly criticizing the concept of access controls in the 1201

rulemaking proceeding, I suspect that sometime after this technology becomes available in the marketplace, we will once again be sitting before you.

They will be then objecting to it on fair use grounds, saying that the need to have to destroy their own copy in order to facilitate what would be considered a digital first-sale concept to transfer the copy to somebody else is going to burden their fair use rights, as they would put it, because they are no longer going to have their own copy to make fair use of.

MR. ROHDE: Just interesting speculation. I think that an issue as we look at the way libraries function under first sale is not only the issue of the ability to destruct, which I think is a relevant and important concept, but also perhaps the issue of disenable, because in some cases what first sale does is enable us to give or transfer temporarily if you look at issues of inter-library loan and issues of distance learning.

That is, I can move a work into another setting for temporary use and then it moves back. I think if there were comparable capabilities for purposes of disabling as well as destruction, then I

think it would integrate well with the way libraries support their communities.

MR. ADLER: Although, I think, that again, I would argue, might be in conflict with the view I understand the library community takes with respect to the electronic self-help provisions of UCITA.

MR. NEAL: Sorry. I don't understand.

MR. ROHDE: I have one final question for Mr. Adler, Mr. Attaway, or Mr. Sorkin, whichever one of you want to respond.

Last Friday in the Washington Post there was a front page article. I don't know if you read it. I'm sure if you read it, it would be very disturbing to you about what's going on on college campuses in the current Napster world.

There were a number of college students who were interviewed for that article who were very, very cavalier and very blunt about how they are making use of this great new digital world and accessing information and copying music for themselves and all kinds of information and transferring it amongst themselves and just didn't give a rip about any kind of law that might be out there.

In fact, I remember a quote from the

article of one student saying, "You know, not only are the horses out of the barn here, but they are multiplying."

My question is I wonder are we in the right battlefield here? I mean, from your perspective of representing content producers, you're fighting to make sure that we can maintain the control.

Mr. Sorkin, you've said several times today, and it's in your testimony and even in your reply comments, that you fear that content owners are not even going to dare to put their information on networks because of what's going on.

Can we really stop this because of what's happening with technology and the very nature of it? I mean, are we really fighting the right battle to protect the interest you're trying to protect by debating these issues dealing with copyright ownership when we could have whatever laws we want enacted and it might be totally circumvented because of the ability that people have with working with networks and digital technology.

MR. ATTAWAY: In response to that question, my question back to you, Mr. Secretary, is what is the alternative if we don't stop it? The people I represent invest on average $80 million per

motion picture. Now, explain to me the financial basis for that business if those movies cannot be protected.

MR. ROHDE: My question is how do you stop it?

MR. ATTAWAY: You stop it by sound copyright laws and the employment of technological self-help like we have tried to do with the DVD, with I must admit has mixed success. But the fact is that DVDs are out there in the marketplace and people are enjoying a movie viewing experience that they didn't have before because modestly successful technological means were used to prevent wholesale copying.

This is the type of thing that we have to do. Otherwise, we're out of business and I don't think that's an alternative that anyone wants to contemplate.

MR. ADLER: While I would agree with what Fritz said, the answer to your question is yes, we try to stop it. Understand, however, that we're not talking about absolutely eliminating it.

We're talking about something that has existed with respect to copyright for years which is the notion that, in different industries, depending

upon the nature of the business model that creates the copyrighted work, there are different levels of acceptable leakage.

We recognize, for example, that under the fair use doctrine there's a lot of copying that goes on that couldn't pass any real test of fair use. The question of whether or not you act upon that through litigation or through any other way is a business judgment that is often made in terms of whether it would be cost effective, whether or not you are really suffering any harm.

What we are really asking for here is not to be able to stop absolutely that type of conduct. We are asking to be able to have an environment that allows us to reshape business models to develop them in a way that takes these new capabilities and new attitudes even of, say, the students with respect to copyrighted works and takes them into account in the way in which people understand what is involved in trying to recoup our investment and some kind of profit in the business of creating and distributing copyrighted works.

The problem is, if Congress steps in right now, barely two years after the DMCA was enacted, very carefully selecting and choosing how the digital world

would be accommodated in the Copyright Act through specific statutory changes, and if we come in now and again do the kind of broad scale changes that are being sought by the library communities, none of these industries will have the time to adapt their marketplace practices to be able to deal with the potential flood of copyright leakage. Not the type of acceptable leakage that goes on in the print environment and in the analog environment.

There are always people who will copy books. There are always people who will copy music and will copy movies. But now they'll have the ability to do so on a mass scale that is more destructive of the commercial rights that copyright gives to authors.

MR. NEAL: I was going to say another strategy available to us is for Congress through public policy to embrace libraries as collaborators in this process. We're not pirates. We're responsible societal agents who acquire information on behalf of our communities, educate our communities in the responsible use of that information, and bend over backwards to follow practices that have been agreed to.

I think there is a collaboration here that can be supported by public policy. I think we see ourselves as very responsible, very responsive, and not pirates in this environment. We've always played that role in society and we will continue to do that.

MR. ROHDE: Thank you.

MR. SORKIN: May I add a footnote to all this which is that I agree with all of them and I agree with you, but we need all of these efforts. We need very effective protective laws which this exercise here seems to be directed to tearing down. We need effective technologies.

We also need desperately education. If I were to take the wallet out of your pocket, surreptitiously of course, I think you would lose some of the respect you might have gained as a result of my testimony today. But you might not think any the less of me if I told you I was copying CDs at home to make cassettes for my car.

We haven't engendered in our children adolescence and adults the kind of respect for intangible property that we have engendered to a large extent for tangible goods. That's part of what we have to do.

Insofar as business models are concerned,

we are all trying that. The book that Mr. Petersen brought with him, The Digital Dilemma, spends a lot of time on that subject. They may or may not work. Technology may or may not work but, as Mr. Attaway says, we are all putting fingers in the holes in the dike to try and stem what is a very destructive tide.

MR. NEAL: Can I make one more comment? It's a little flip and I apologize for it. The wallet that you just took out of your pocket, there are societal agreements that say there are agencies that can go in and take that wallet and take money out of it for societal public goods. It's called Government taxes.

I think in the same way we built the copyright law in a way that says there are societal benefits to extending to the education and library communities certain exceptions or limitations because they benefit the country, the economy, and societal goods. I think we need to look at these things in a balanced way.

MS. PETERS: David.

MR. CARSON: I'd like to follow up on the first question Secretary Rohde asked you, Mr. Sorkin. This question isn't directed necessarily to you but any of the three gentlemen on that side.

As I understood Secretary Rohde's question, it was essentially there are technologies out there which purport to be able to make it so that when you do retransmit something you have received to someone else, at the same time the copy is destroyed.

Whether they really do or don't do that may be a matter of debate. I think I heard some real concern on your part that they don't really effectively do that. I've also heard that we may hear some testimony later today that they really do do that.

Let's put that aside for a moment. Let's put aside for the moment the concern I heard from you, Mr. Sorkin, that perhaps when I retransmit it I can retransmit it to 500 people in one click of the mouse and then my copy is destroyed.

Let's take a hypothetical and let's assume that the technology did exist that could reliably restrict you when you are trying to retransmit the copy you've received. You can transmit it to only one person and at the instance that happens, you have no control over this. The copy on your computer disappears.

I think, and correct me if I'm wrong, that would be the digital equivalent of the analog first-

sale doctrine that we have right now. If you could be assured that technology existed, would you have any objection to the Boucher proposal to amend Section 109?

MR. SORKIN: I might. I hate to be a quibbler about this. The quality of a transfer of a CD or DVD from me to you, Mr. Carson, is different from the quality of a transfer via digital downloading from me to you of the same copyrighted work. Different in terms of speed and in terms of convenience.

I am not likely to put it into Federal Express to send it to you in Washington or California from my home in New York. That wouldn't be a consideration at all if I'm doing it by digital transmission.

That could create, and I underline could because, frankly, I haven't talked about it with technological experts, but I have a sense that doing it by digital transmission because of convenience, because of distance, because of repetivity and so forth, would create problems for us that would not be created in the old days.

MR. CARSON: Anyone else want to --

MR. ADLER: Yes. David, I think that the

testimony and comments of the library communique indicate quite clearly that that would only shift the argument to the question of whether or not the digital first-sale doctrine trumps any kind of contractual licensing arrangement that may be involved with respect to the work.

Again, I think it can't be emphasize too strongly that although you are becoming inured to hearing about contractual licensing in negative terms. At least in the way in which the library and educational community refer to it.

Contractual licensing is one of the ways in which information is now being used in the context of new digital capabilities to provide it where it has never been able to be provided affordably or conveniently before. Also to maximize the uses you can make of it.

For example, if you're talking about, again, looking at the models of the different people offering e-book services or the people who are offering digital archive services like Questia and E-Brary and NetLibrary, one of the things that you're talking about that you have to recognize is that e-text is not the equivalent of a book.

What you are able to do through these

services is to have online search capabilities. You're able to have online annotation capabilities. You're able to make richer uses of the product because of the capabilities that arise when the product is in a digital format rather than a print format.

That is part of what is involved in determining the terms from pricing down to the terms of use under which that product or service is offered to the users.

There is a bargain involved there and that is why I emphasize the importance of giving these industries the time and ability to develop business models that match the new challenges presented to them and new opportunities by the digital network technology.

MR. ATTAWAY: Very quickly, I don't understand -- I understood your question up to the point where you asked then would we support amendment of the law along the lines that Congressman Boucher has suggested. I don't see why that's necessary.

To change your hypothetical just a little bit, if I purchase online a work that is delivered online into my computer and it resides in my hard drive and I decide to give or sell my computer to my nextdoor neighbor, I don't think anyone would argue

that is a violation of the law.

With respect to that work, the copy that I downloaded that resides in my computer has been transferred. Under the first-sale doctrine there's no problem. If technology permits the functional equivalent of that transfer from me to my neighbor, I don't know that anyone would argue that there is a problem and why do you have to change the law.

The present law is working and will work in the digital environment as well as it has worked in the analogy environment, I believe.

MR. CARSON: Well, then let's take the hypothetical that you have this technology and no matter what the recipient of this digital copy does he cannot control the fact that once he transmit it to one person, it's gone. He doesn't have it anymore. Under those circumstances, are you saying that the current Section 109 would permit him to do that?

MR. ATTAWAY: I said if there is a functional equivalent. I don't know how to do this technologically. Maybe it can't be done right now. If there is a functional equivalent of taking my hard drive where this copy resides and transferring it to my neighbor electronically where I don't physically take the hard drive, I don't see a problem there.

MR. CARSON: Mr. Adler and Mr. Sorkin agree that Section 109 would accommodate that as it is currently drafted?

MR. SORKIN: No. I do not. It always humbles me to disagree with either Mr. Adler or Mr. Attaway. I'm humble and uncomfortable. What I tried to suggest--see, Mr. Attaway's first example was, you pick up your computer and you take it to your nextdoor neighbor. I have no problem with that. That is the functional equivalent of transferring a tangible copy.

On the other hand, I think the question that Mr. Carson wound up with was you transmit it to your neighbor and your copy is destroyed. It's not enough to destroy that copy for the reasons I outlined, although parenthetically I said it's worth considering.

For the reasons that I outlined, the transmission digitally of the copy is of a different quality than picking up the machine and taking it nextdoor. A different quality by virtue of speed, of potential distance, that sort of thing.

I'm concerned about that because what that means is that when it's transferred to you, you could transfer it to the Register and suddenly everybody has seen that movie and nobody has gone to a theater.

MR. ROHDE: I'd like to follow up on that. You point out that it's because of the nature of computing networks and you have the ability to transmit that information not just to one person but to many more people.

One of the other things about the new era that we live in is you now have documentation when people communicate with each other. You can't go buy equipment off the shelf to record movies in your basement and go around and hand it off to people and exchange it for cash. That's a violation of the copyrights of MPA's members to do that.

It's actually difficult to enforce, if not impossible to enforce, if there's no paper trail. What we have now in this era of e-mails and the Internet, you now have an ability to trace this. Doesn't that add a level of enforceability to this even though --

MR. ADLER: You'll hear the privacy arguments about that immediately. Privacy advocates will come in and talk about all the ways in which that capability is going to be abused and misused. They may be right.

The question is why is it necessary to try to adjust the law to create that kind of a situation

when you're recognizing that the products you're talking about are inherently different. There are two different types of things we could be talking about with an e-book.

Are we talking about a scanned book where in the simplest form a book is scanned into a digital format so that what you now have in that digital version is what you had in the book?

Or are we talking about an e-text where built into that e-text is additional material that is of interest to the reader because it relates to the author or provides further background on the subject matter of the book? Or, as I said before, it allows a search capability or an ability to store and retrieve annotations.

In the example that David gave, would we be talking about transmission of exactly that same product? If the book came under an arrangement where you paid for it and part of your deal was to get all of these added value types of uses that you could make of it, is that transferable as part of the digital first-sale doctrine or is it just the scanned text of the book?

MR. NEAL: I think we're in a situation where we can no longer define quality as equal to

content. We're in an environment where quality equals content plus functionality and I'm agreeing with you.

MS. PETERS: He had to say that because we wouldn't have gotten --

MR. NEAL: However, I just heard Allan say we are dealing with a media that is fundamentally different and, therefore, is it not appropriate for us to think about and look at the public policy issues that can effectively embrace media and technology which is fundamentally different.

MR. ADLER: And we're not objecting to the examination. We are objecting to adoption of your proposals.

MR. NEAL: I heard you.

MR. CARSON: I'd love to keep chatting with you folks all day but I think we have to get to the schedule.

MS. PETERS: Jeff. No questions? Jesse?

MR. CARSON: I think we need to move to the next panel.

MS. PETERS: Okay. Because of time we're basically -- yes, you have for the record.

I want to thank the panel very much. It was very helpful. I'm sure you'll hear more from us.

Allan, you can give us the articles that

we'll make part of the record.

MR. ROHDE: I have to go.

MS. PETERS: You have to go. I know. Secretary Rhode, thank you so much for being here.

All right. Can I call the second panel.

Okay. Our second panel has come to the table. The way it is listed is Keith Kupferschmid representing the Software and Information Industry Association is listed first. Dr. Lee Hollar, University of Utah listed second. Scott Moskowitz from Blue Spike, Inc., is third. Emery Simon from Business Software Alliance is listed fourth. Nic Garnett for Intertrust Technologies Corporation is listed fifth. I'm going to suggest that we testify in that order. Why don't we start with you, Keith.

MR. KUPFERSCHMID: Thank you very much. Good morning. Keith Kupferschmid, Intellectual Property Counsel for the Software and Information Industry Association. I do appreciate the opportunity to testify here today. In particular I would like to thank the Copyright Office and NTIA and the panelists for conducting these hearings.

By way of background, SIIA is the principal trade association of the Software and Information Industry. We represented over 1,000 high

tech companies that develop and market software and electronic content for business, education, consumers, the Internet and entertainment.

Our membership is quite diverse. We have information companies such as Reed-Elseveir and West and McGraw-Hill. Software companies like Oracle, Sun, and Novell and digital rights management companies such as Aegisoft, Media DNA, and Publish One.

Our members are extremely interested in issues relating to the interplay between new technologies, e-commerce, and the copyright law and in particular, Section 109 and 117 of the Copyright Act which is the focus of this hearing.

In the interest of time I will summarize SIIA's views on Sections 109 and 117 and respond to some of the comments that were previously submitted and stated here today.

As you know, Congress intended the first-sale doctrine to be used as a means for balancing the copyright owner's right to control the distribution of a particular copy of a work against the public interest in the alienation of such copies.

Those who support expansion of Section 109 would like you to believe that alienation means alienation at any cost. They would have you pay

minimal regard to the copyright owner's interest. This simply is not and should not be the case.

The purpose of the first-sale exception is not to give unlimited ability to individuals who distribute their copies of a work. Rather, it is to permit individuals to distribute their particular lawfully owned copy of a work only when the distribution of that copy would not conflict with the normal exploitation of the work or adversely affect the legitimate interest of a copyright owner in that work.

As I am sure you are aware, this is the international standard set forth in TRIPS, the Berne Convention, and the WIPO Copyright Treaty. I submit that amending Sections 109 and 117 as suggested by some of the commentators would run afoul of these international obligations.

Congress, too, has recognized this balancing act. For example, Congress has restricted the public's right to alienate a work by providing owners of certain copyrighted works with a right to control the rental of those works.

Congress clearly saw the first-sale balance tipping against copyright owners and sought to rectify the situation. Interestingly, when Congress

enacted the DMCA they were lobbied by those who believe that the first-sale scale had tipped the other direction.

Congress did not agree, however, and soundly rejected proposals to expand Section 109. The same was true of proposals to expand Section 117.

Much has changed with regard to technology and with regard to business models since Congress considered and rejected proposals to expand Section 109 and 117. The existing scope and the text of Sections 109 and 117 do not appear to have any adverse effects on the public's ability to dispose of their copyrighted works or to make backup copies of their software.

Furthermore, the provisions of the DMCA relating to anti-circumvention technologies and copyright management information have likewise had no adverse effects on the operation of the first-sale doctrine or Section 117.

I know my time is limited but I can't help but notice and highlight the irony here. Our opponents stand before the Copyright Office and NTIA requesting a change in the law in an area where there has been not one -- repeat, not one case that they have pointed to for the proposition that Section 109

or 117 needs to be expanded.

On the other hand, for almost five years SIIA and many others have been supporting database anti-piracy legislation. Over the past nine months alone there have been about seven cases dealing with piracy of databases.

Virtually all of these cases were lost by the database producer because neither contract law, copyright law, misappropriation law, or trespass law would protect them.

Many other instances of database piracy never even make it to the courtroom. Ironically, many of those who propose expansion of Section 109 and 117 also oppose database protection, as you heard here today. They say no need has been shown.

I find this pretty amazing. If according to the libraries and others no need has been shown by database producers where we, in fact, can point to numerous injustices, how can they honestly claim that they have established the requisite need to make the changes they suggest when they can point to no such injustice.

Furthermore, it is also noteworthy that most of the commentators that support expansion of Section 109 and/or Section 117 fail to discuss how the

fair-use doctrine would apply to these situation and why it would not sufficiently address their concerns.

It is not possible to fully consider the merits or lack thereof of proposed amendments to Section 109 and 117 without such a discussion. We, therefore, respectfully request the Copyright Office and NTIA to ask these organizations during the course of these hearings to explain why the fair-use doctrine does not apply or would not protect against the concerns identified in their comments.

Now, to briefly address some additional issues relating to Section 109. As stated in more detail in our written comments, it is SIIA's position that the first-sale doctrine plays no role in present day digital distribution methods because such methods do not involve the transfer of one's particular copy of a work, and because such methods require the making of a second generation copy of a work thereby implicating the copyright owner's reproduction right, a right that is not exempted by Section 109.

In discussing Section 109 the Library Association comments raised several issues that are irrelevant to the Section 104 study. For instance, the Library Associations complained of monetary

constraints and administrative problems such as difficulty keeping track of passwords for off-campus users, inability to make works available to visiting professors, alleged invasions of privacy, and lack of expertise in interpreting contract terms.

While we sympathize with these concerns, truth be told, these concerns are internal administrative problems not unlike the problems that many organizations face. They have nothing whatsoever to do with the first-sale doctrine or Section 117.

Some commentators suggested that Section 109 should be expanded to apply when a person transmits a copy to another person while simultaneously destroying his particular copy at the time of transmission.

Several of those who support a simultaneous destruction proposal suggest amending Section 109 as originally proposed in HR 3048 from the 105th Congress and rejected by that Congress.

As explained more fully in our written comments, this proposal ignores some of the practical impediments inherent in the distribution of copyrighted works that are contained on traditional media that limit the applicability and use of the

first-sale doctrine.

In the digital environment the integrity of a work never becomes relevant. As a result it is possible that even one copy of a copyrighted work could potentially serve the entire market for that work.

In effect, each possessor of a digital copy of a book could become its own bookstore or library. Each possessor of an MP3 file its own record store. Each possessor of a DVD its own blockbuster or movie theater. This holds especially true with recent peer to peer technologies like Gnutella that permit one copy of a work potentially to serve millions.

Clearly no copyright owner could stand to stay in business very long if its market is usurped by a handful of copies transferred among an innumerable amount of consumers.

In the physical world, the redistribution of a particular copy under the first-sale doctrine is restricted by geography, by the circle of people known to the holder of that copy, and by the time and effort necessary to redistribute that copy.

These inherent constraints on the first-sale doctrine limit the potential effect on the market for that work. In the digital world, however,

redistribution is limited neither in geographic scope nor to known people.

Instead, digital content can be transmitted to millions of people both known and unknown at the stroke of a key or click of a mouse. As a result of the dramatic increase and the ease by which digitized work can be made available to others, the number of times a work is transmitted from one party to another would substantially increase which in turn would significantly diminish the copyright owner's ability to obtain a fair return from that work.

Most significantly, the simultaneous destruction proposal also has some significant evidentiary and procedural problems that make it infeasible as mentioned by some of the others who testified.

For instance, it would not be possible or practical for the copyright owner or the courts to verify that the source copy was discarded. Even if it was possible to determine that a source copy had been discarded, it would not be possible to verify that it was done so simultaneously.

It has been suggested that these evidentiary and procedural concerns could be avoided

by the use of technological protections. The problem with this recommendation is that technology is not now available that would effectively perform this function.

SIIA has been an active supporter of digital rights management technologies. We have a whole division dedicated to supporting companies whose business is to develop and market DRM technologies. There is nothing I would like to do more than to stand before you here today and promote one or more of their technologies.

Unfortunately, I am unable to do that. Many of our members have been working tirelessly to develop DRM solutions that would provide at least a partial solution to the first-sale questions raised here today. Regrettably they have been unable to do so in a way that directly mirrors the law.

Therefore, with regard to the first-sale exception, SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 report that the first-sale exception does not apply to digital distribution mechanisms such as the Internet. And given the congressional intent underlying the first-sale doctrine, the ease by which consumers have and will have access to a wider variety

of copyrighted works than ever before, and the potential harm to copyright owners caused by the proposed amendments of Section 109, there is no need for the first-sale exception to be expanded into the digital distribution environment.

With regard to Section 117, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of Section 117. The days of people using 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public.

Several commentators suggest that there is a need to expand the scope of Section 117 beyond computer programs. We respectfully disagree with these suggestions. Section 117 was enacted at a time when software was primarily distributed on floppy disks that could be damaged by inadvertent scratching, bending, or demagnetizing the disk.

As a result, the need to make a backup copy of your software in those days was essential. Unlike when Section 117(a)(2) was first enacted, today it has little, if any, utility. Technology and

business models have evolved considerably. Nowadays software is primarily distributed on CD-ROMS, not floppy disks.

According to statistics from PC Data, 97 percent of all software sold in the United States in 1999 was sold on CD-ROM. In the year 2000 to date 98 percent of all software was sold on CD-ROM. Once a computer program is loaded from a CD-ROM to one's computer, there is no need to make a backup copy because, in effect, the CD-ROM serves as that backup copy.

In addition, the potential of inadvertently damaging a CD-ROM in a way that makes the software contained on that disk inaccessible is an extremely -- extremely rare occurrence. More significant is the advent of the application service provider model, the ASP model or, as we refer to it, software as a service model.

This model provides the potential for software to evolve away from the individual desktop and/or network to a server hosted by a copyright owner or authorized distributor on the Internet. There the software can be accessed anytime and anywhere by the user thereby eliminating the need for individual backup copies.

As a result, in the future the need for the provisions in Section 117 relating to the making of a backup copy will no longer exist. Thus, extending Section 117 to apply to other works when it has little or no use today in our view makes very little sense.

Before closing I would like to mention that I have noticed on the panel here there are several individuals testifying today that have not previously submitted written comments to the Copyright Office or NTIA on these issues.

I respectfully request that those who did submit comments or reply comments be given the opportunity to respond to their statements made here today through post-hearing written comments, after the transcript of this public hearing is released.

We would like once again to thank the Copyright Office and NTIA for providing with us an opportunity to testify and I look forward to answering any questions that you may have. Thank you.

MS. PETERS: Thank you.

DR. HOLLAAR: My name is Lee Hollaar. I'm a Professor of Computer Science at the University of Utah. Looking at the agenda I'm the only person here

not representing any organization or company. I speak only for myself.

I wish I was here as a technologist to say that I have the solution to this, that there is, in fact, going to be something that allows for the destruction of copies when they are passed on to someone else. I don't believe that's going to happen.

I don't believe that we will have the security that the content providers want, coupled with the convenience -- especially the ability to run it on their own PC and their own choice of operating systems -- that the consumers want and that the privacy advocates want. I hope that I'm proven wrong but I don't believe that is going to be the case.

But I'm not really here to speak on that. I'm not really here to speak on the big issues. I'm here to speak on what might be a footnote to your report.

While it would be good to provide education to users about what Section 117 is so they realize that it's not a wholesale right to do anything they want with anything that is digital data, as Section 117 is written it really goes against the experience and procedures that people use for

archiving. I'm going to talk about archiving in particular.

Section 117 prescribes a particular style of archiving, essentially making a copy of an individual program at the time you get it.

I submit that if, in fact, your organization is following that type of regime, you should be firing your system administrator because most organizations, mine in particular and I would guess virtually every other one, does archiving by means of a wholesale backup of everything on their disk whether it's every night, every week, periodically.

I know I do it myself on my personal machine. I bought along something that I'm not going to leave which is an archive of my home directory on my machine and the directory for my wife and for our financial information. It's written on a CD-ROM.

I fully expect that the only thing that will happen with this CD-ROM is it will be thrown away, broken up when I make the next CD-ROM of backup.

This points to a very particular thing for this type of backup.

One is that on this I've not only copied data of mine but I have copied other commercial software that happened to be things that I installed in my home directory. I copied not only the programs but I copied data that came along with the programs, even though 117 doesn't give me any permission to copy that data but it was necessary. It was configuration files and so forth.

I copied other files not related to computer programs that I got from commercial sources, whether it was copies that I made from databases or webpages saved or whatever on there. That's not anything provided by 117.

More importantly, if my use of a partic-ular program no longer becomes rightful, primarily because I've gotten a new version of the program, I've gotten an upgraded version, the version that I had is now obsolete and I no longer have the right to use that. I have the right to use the new one.

I'm certainly not going to go back and find the CD that I wrote and try an attempt in some way to delete that from the CD, much as the people who are your systems administrators aren't going to go

back and on their archive tapes when you send them notes saying, "Well, I've upgraded from MicroSoft Word 97 to MicroSoft Word 2000. Please go back and delete the copy of MicroSoft Word 97 you have in all your archive tapes going back maybe three or four years." If you do that, they will laugh at you.

Anyway, why does this make a difference? Why should we be concerned? Well, if we're going to try to teach people to respect Section 117, it needs to match reality.

If I'm speaking for anyone, I'm speaking for about two dozen students, mainly computer science students, who are taking a course in intellectual property law from me this semester and just by coincidence had as a mid-term short essay question, "Comment on Section 117. Do you think that it matches the reality of the current situation and, if not, how would you change it." No one thought that 117 matched the reality of how file archives are made today.

When you have that and people don't feel that something matches reality, it's going to be very hard for them through an education program to believe in the law, to follow it.

It will be much like the ill-fated 55 mile an hour speed limit where we imposed a speed limit

that people knew didn't match the conditions of the road and was more observed in its breech than in its following. If you drove -- I don't know how it was here but if you drove in Utah where the roads aren't quite as crowded -- at 55 miles an hour, I can guarantee you were consistently being passed by people.

Yet, in Utah when the speed limit was raised to speed limits that matched the road, probably the average speed on the highway went down because they found the law more reasonable.

I'm here arguing for a footnote. If you are going to amend Section 117, and especially if you are going to educate people on the importance of it, at least amend it in such a way that it matches the reality of how archiving is done.

Otherwise, you run a situation where people are not only disrespecting it, but you run a situation where if anyone actually tried to bring me in for copyright infringement for the CD, you would have the judge trying to be as creative in the interpretation of Section 117 as they could because they wouldn't find that an infringement.

In their creativeness they would probably come up with something that would upset any sort of delicate balance you put together. They would

probably find that computer programs, which means something that instructs the machine, includes data because, of course, data changes the behavior of the machine. All the hard-fought compromises could disappear. Thank you.

MS. PETERS: Thank you.

Mr. Moskowitz.

MR. MOSKOWITZ: I'm Scott Moskowitz and my company is called Blue Spike.

When Thomas Jefferson said "information wants to be free," he meant freely accessible. Available to the eyes and ears of people who wait to be enriched by new knowledge and experience.

That concept has informed much of our politics, influenced our copyright laws, and not incidentally helped to build robust consumer markets. Threats to all these advances by lock and key systems for securing copyrighted works is something that greatly concerns us.

Restruction systems confront all the good things that open and free access to information has demonstratively engendered. Access restriction technologies threaten the viability of a robust and fluid market for creative works.

Blue Spike is the leading developer of

secure digital watermarking technology for use in copyright management systems and other applications that can create trusted systems as a means of balancing the interest of copyright owners and information consumers.

Digital watermarking when properly implemented enables differentiations to be made between seemingly identical digital copies. As such, digital watermarks act as receipts for the commercial exchange of valuable information.

Blue Spike has taken its place as a dissident proponent of copyright security systems. The company develops technologies that probably secure copyrights of digital assets like music, while at the same time preserving the accessibility of those assets for consumers and users. In this way our technology reflects the principles for first-sale and fair-use doctrines that access restriction schemes jeopardized.

We appear today to make two principal points. First, Congress should be encouraged to amend Section 109 of the Copyright Act to create the digital version of the first-sale doctrine.

Second, Congress should be encouraged to adopt changes to Section 117 that recognize the centrality of ephemeral copying to the operation of

the Internet and more consumer products.

Blue Spike believes that updating copyright law in these ways is necessary for the Internet to mature as a delivery channel for digital information products. Moreover, it speaks to the preservation of copyrights balance of interest.

Blue Spike believes that Section 209 of the Copyright Act should be amended to include digital transmissions as proposed in Section 4 of HR 3054 by representatives Rick Boucher and Tom Campbell. It is a vital and common sense extension of the first-sale doctrine that would bring relief to librarians, information carriers, and consumers.

Today users of digital information work under a cloud of uncertainty as to how the law applies in their handling of digital contacts. The Digital Millennium Copyright Act in addition specifically prohibits certain transformations of digital content, provisions with the potential to impede workaday storage, archival, and retrieval functions.

Blue Spike suggests that Representatives Boucher's and Campbell's amendment would give relief to users and curators of digital information and update copyrights reflect contemporary context.

With respect to the concerns of the

copyright holders, Blue Spike notes the first-sale doctrine would only apply if the underlying work were actually deleted just as it only applies when you physically hand an analog original to someone today.

The consequences of allowing the law to lack digital technology would be felt by educators, librarians, consumers, and, not coincidentally, by technologists.

Content owners and providers understand the marketplace of ideas. They have little interest in the archival requirements of universities and libraries that must be able to make copies of works in different formats in order to ensure continuity of access and to serve their constituents.

Moreover, leaving digital works uncovered by first-sale doctrine gives copyright holders and the technologists who develop copyright security schemes little impetus to develop more nuance and context appropriate means of securing their works against infringement that access restriction systems.

The environment in which certain kinds of copying were protected under first-sale doctrine technologists and content owners would be pressed to explore more innovative means of securing copyrights than digital catalogs.

This modification of first-sale doctrine will preserve a lot of the rights that content users enjoy now. It will not change the kinds of protections that content owners can provide for their digital assets, though we believe expansion of fair-use doctrine will spur further exploration into copyright control schemes beyond lock and key systems.

In the context of marked development, if the law keeps pace with technology, content owners and consumers will benefit the greatest extent as new communications, media, and Internet technologies generate recognition and demand for artists work.

Blue Spike believes that Section 117 of the Copyright Act should be amended to provide that it is not an infringement to make a copy of a work in a digital format if, first, such copying is incidental to the operation of the device in the course of an otherwise lawful use of the work and, second, if it does not conflict with the normal exploitation of the work as proposed in Section 6 of HR 3054.

Adoption of this provision will simply make the law cognizant of the fact of life in the digital age. The Internet and increasing numbers of electronic devices cannot function with ephemeral copying.

The Internet functions by delivering copies of documents through a publicly assessable network. Those copies are further cached on PCs and various terminal devices. Today many consumer electronics products already use some form of caching to deliver content. Tomorrow even ordinary radios and televisions will rely on caching functions to allow quick and convenient review of content. The law must reflect this reality.

Further, the Internet has evolved very rapidly in ways that are historically unprecedented. There is no vail doctrine to synchronize development and regulation for ISPs, or Internet Service Providers, the way there was for the deployment of our national telephone network, the Internet's most successful analog.

Subsequently, ISPs have been placed in jeopardy on a number of different fronts only partially ameliorated by provisions of the DMCA. Section 6 of the amendment would further reduce the risk of potential legal liability for ISPs and others and thus would encourage greater use of the Internet to disseminate copyrighted works.

Here we see the need for greater intelligence on the movement of copyrighted works

rather than on restricting access, a task for which digital watermarking is uniquely qualified.

When watermark registers the responsible parties for production and distribution of a digital content, object copy X issued to distributor Y, those parties can be called to answer for their indiscretions placing incidental ISPs out of the field of contest.

In conclusion, we believe the proposed revisions to the Copyright Act proposed by Representatives Boucher and Campbell and co-sponsored by over 50 of their colleagues would represent more than wise lawmaking. They are necessary to ensure that the digital future is at least as rich as our analog past.

Copyright and the doctrines that have extended from it have provided formidable benefits to markets and societies. They will continue to be our silent benefactors if we work to preserve the balance that defines the new law.

The lock and key systems that are being proposed today to control access to copyrighted digital works upsets that balance and confronts the law. Unfortunately, the DMCA has legitimized their de facto trumping of copyright law and convention.

Intelligent and imaginative use of technology for content distribution and content protection within the bounds of an up-to-date copyright law rather than the threat of litigation will better promote the interest of content owners and society at large.

If there is one man-made structure that does not turn to dust, it is the temple of human knowledge. We are all products of it. We are all beneficiaries of it profiting every day from the culture and commerce which proceed from it.

When a toll gate is being erected at the entrance of that temple, we should interrogate those who would build them and measure the true cost levies they would impose. Thank you very much.

MS. PETERS: Thank you.

MR. SIMON: My name is Emery Simon and I want to thank you for letting me testify today. I'm here on behalf of Business Software Alliance, an association of hardware and software companies.

I should say at the outset that each of the member companies in the BSA is a for-profit corporation. A lot of what we have before you is really not so much whether e-commerce is working or whether files are being distributed but really what we

have is a little bit of a disagreement about what the prices should be and what the business model should be.

Unfortunately a lot of that is being reflected in fights about legal issues and I'll come back to that in a second.

I was also happy to hear Scott's testimony of digital watermarks as a solution to all of our problems. That's a good thing.

It is our understanding that the Congress erected this study because at the time of the enactment of DMCA to determine the changes of Section 109 and 117 were not merited beyond a small change to Section 117 on prepare and maintenance.

Congress erected the study as a judicial measure to ensure that its enactment of the DMCA and intervening developments and technology did not harm the marketplace. The test we are looking at here is has something happened to the marketplace that would justify further changes in law.

Congress found no compelling evidence in 1998 and the changes were merited. It's our conclusion having reviewed the submissions and marketplace developments that intervening development do not justify a different conclusion today.

To the contrary, we find that some of the changes proposed in the submissions to the first-sale doctrine and temporary copies, which is the way that I will colloquially refer to the 117 issues, would harm the marketplace and impede development of important business models now evolving in response to consumer demands.

BSA member companies approach these issues with two considerations of equal importance. I want to really stress that. First, our member companies are determined and committed to making the Internet and e-commerce grow and thrive. BSA member companies make computers, software, servers, switchers, that make e-commerce possible.

Many of these companies are also in the business of providing web design, data management, posting, and other critical services. As importantly, these companies suffer substantial losses due to piracy amounting to billions of dollars each year.

Mr. Petersen earlier this morning said, "Where is the evidence of the loss?" Well, we would be happy to sit down with him and show him the numbers.

Strong copyright protection is the essential tool to rely on to attack theft. Copyright

protection is also what we rely on to write licensing agreements.

Many of these submissions suggest that e-commerce will wither unless changes are made to Section 109 and 117. We see no evidence in the marketplace that would support such conclusions.

Here are some facts. Under current law recent estimates suggest that e-commerce has grown tenfold over the past three years and will continue to explode over the next five years.

By 2005 BSA CEOs anticipate a compelling 66 percent, two-thirds, of all software will be distributed over the Internet compared to only 12 percent today. This will account for about $40 billion in sales we think.

Having set the context, I would like to focus on the issues of amending Section 109 and 117. A number of submissions urge the report to recommend enactment of legislation, those introduced in 1998, the Boucher bill, which failed to pass the Congress. It's important to remember that. It's not that the Congress didn't consider it. They just chose not to enact it.

These proposals and submissions would change the first-sale doctrine to make old copies of

software acquired over the Internet whether by purchase, sale, lease, or license, transferable regardless of the terms on which the copy was acquired.

Let me point out that the matter of digital copies or digital works is not a matter of first impression for first-sale doctrine for Congress considering the issue. The Congress amended the first-sale doctrine to specifically deal with digital products called computer programs and to deal with the sale, lending, and leasing of computer programs.

It created specific rules because it felt that the danger was higher and, therefore, it limited the applicability of the first-sale doctrine with respect to those digital codes with those digital works.

Proposals also propose extending Section 117 to cover not just backup and archival copying of computer programs but, in effect, any temporary copy made in the course of its use.

In particular, they argue that buffer copies should be exempt from liability. While the term buffer suggest something different, this is, in effect, the same as saying that RAM copies should be exempt from liability. We have a fair amount of case

law currently, very little of it disputed, about what copies in RAM mean in respect to the reproduction right.

We believe that such a provision would do enormous harm to the software industry, in effect, depriving software developers the right to choose the business model they used to commercialize their products.

Today most software products are leased or licensed rather than sold. This practice has evolved over the past 20 years largely in response to marketplace forces. This practice from its customers to obtain volume discounts as well as regular updates as products are improved.

In addition, it gives companies the flexibility to add users to the software as the business or user base grows subject to certain fees and conditions contained in the license. I admit it up front we are for-profit companies.

The changes proposed for first sale and temporary copies would create substantial disruption to the marketplace calling into question the viability of these well established business models we believe.

In effect, holders of rights guaranteed by federal law, property interest guaranteed by the

Copyright Act, would be deprived of the right to choose the ways that commercially exploit their works.

This would threaten the copyright law into a marketplace regulation governing licensing and business choices rather than a law on the rights of authorship.

What is being proposed is to deprive both authors and their customers the right to choose the commercial model best suited to their respective needs. I respectfully submit to you that such interference with private rights and the marketplace for software and other works is unwarranted, is unsupported by current developments in the marketplace.

Let me turn briefly to the question of temporary copies. Most popular software programs are very large consisting of millions of lines of code. Computers work by processing data in chunks. These chunks of data are stored, buffered, or cached in RAM waiting for a call from the processor as it becomes ready to assimilate additional information.

This is simply the way all computers work, the way all digital devices work as they process digital data. Proposals before you would put these copies of portions of a program outside the scope of

the reproduction right.

Our member companies which make the devices that perform the buffering and caching functions do not see the logic of creating exemption for the reproduction right for these functions. We have not seen litigation that would raise in our minds serious concerns.

Creating such exceptions could, however, have dire consequences for the industry. If potential software piracy problems consist of unauthorized use of software over local area networks. Piracy results of the number of people using a software program stored on a central computer known as a server exceed the number of licenses that the local area operator has purchased from the copyright holder.

In the LAN environment only one permanent copy needs to be installed on the server. Anyone connected to LAN through a personal computer, handheld organizer, telephone, any other device, can make full use of that software by making temporary copies of all or part of that program in random access memory. There is no need to make a permanent copy of the software on the internal memory of the PC or device to enjoy the full functionality of the software.

Given the ambiguity of LANs denying the

software copyright owner the ability to control temporary visual copies in this environment significantly diminish the value of the software. Using software on the Internet takes place essentially the same way as in the local area network environment but on a vastly larger scale.

As in the case of LANs, Internet basic exploitation takes place through the creation of temporary digital copies of some or all of a computer program in RAM. Other than the single original copy on the host computer or server, no permanent copies need be made.

The hottest development in the software market, Keith mentioned it, is the emergence of application service providers. ASPs permit a company to use a software product without having to buy it or having to install it on a local computer. The software is accessed as needed at a substantially lower cost over the Internet, for example, once a week to write checks for employees or to do basic bookkeeping.

ASPs are popular because developing and maintaining information technology can divert in-house resources away from a company's main line of business. Companies are increasingly out-sourcing their business

software needs to outside vendors such as ASPs.

Companies find out-sourcing attractive because it reduces the burden of maintaining in-house software system reducing the need for information technology staff, allows faster access in your software, and it creates predictable cost structures for software use by substituting standard monthly service charges for up-front payments. The demand for ASP services is expected to go rapidly, by some estimates exceeding $21 billion by next year.

In each of these instances the full commercial value of the work is contained in that temporary copy. I raise this point because some of the submissions argue that a temporary copy has no separate economic value. It should be excused from the copyright law. I think this is a false premise.

The marketplace evidence is clear, our customers are becoming less interested in possessing a copy of our products than having them available to them as they need them.

That's what an ASP model is all about. If you don't buy the product, what you do is you license it. You lease access to it when you need to use it. Because a lot of software works by the computer's RAM it creates a copy that can be perceived, reproduced,

or otherwise communicated as defined by the Copyright Act.

The leading case in the area, MAI v. Peak, held that such loading into RAM is a reproduction and is subject to the reproduction right. This legal conclusion was, in fact, endorsed and affirmed by the Congress in the Digital Millennium Copyright Act, Title 3, which creates an exception for making a copy of a computer program by switching on a computer for the purpose of maintenance or repair.

This exception would have been wholly unnecessary if the Congress had concluded that temporary copies should not be subject to protection, or if Congress had concluded that a different kind of limitation on such protection should be needed.

Moreover, Congress had the ample opportunity at that time to create an exception but it did not. Nothing has changed in the meantime.

In conclusion -- those magic words -- every indication from the marketplace suggest that e-commerce and the Internet continue to grow vigorously. Over the past two years since the enactment of the DMCA that growth has accelerated. Thus, the evidence is simply not apparent that changes in law are needed.

On the contrary, based on the business

models now being utilized by the software industry, we believe that changes in law would be harmful to e-commerce, consumer choice, and the marketplace for computers and software.

I've got one more thing to say. There was a fair amount of criticism this morning about UCITA and its enactment in Maryland. I, too, am a Maryland citizen and I think it's a good thing.

The basic criticism of licensing models, as I understand it, by the library community and others is that it permits the licensor to impose conditions through the license. That's what all licenses do.

When I lease a car the licensor is imposing conditions on what I can do with that car and when I have to return it and what mileage I can put on it. It is not an aberration in a commercial environment for people through contractually agreed terms to agree to perform certain things by contract. They agree to limitations and obligations through a contract.

The common law in Maryland, as in other states, has long affirmed the validity of licensing arrangements for computer programs as well as for other copyrighted works. UCITA is simply a codification of the common law. It has greater

specificity. It creates less ambiguity.

In fact, I was interested to hear this morning that the biggest threat out there is ambiguity. Well, what UCITA cures is ambiguity and inconsistency between the state common laws as they apply to licensing transactions and information.

If you think that ambiguity is a bad thing, which we do, we think clarity through licensing and contracts is a good thing. I guess I'm a little confused by how one kind of ambiguity is good but the other kind is bad.

Thank you.

MS. PETERS: Thank you.

MR. GARNETT: Good morning. My name is Nic Garnett and I work for Intertrust Technologies in Santa Clara, California. On behalf of Intertrust I would like to thank you for this opportunity to testify before you this morning on this important issue, in particular the first-sale doctrine and its relationship to digital transmissions.

Intertrust Technologies Corporation is a developer and provider of digital rights management technology and solutions known in short as DRM. DRM has been the subject of comments by many organizations participating in this study to date.

As a DRM provider Intertrust thinks it can lend some useful insight into the state of DRM technology and its deployment in the marketplace by our customers and partners which include copyright owners as well as aggregators and disseminators of copyrighted works in electronic commerce.

To begin with, Intertrust believes that electronic commerce and copyrighted works has somewhat lagged due to the lack of a trusted and consistent environment that neutrally supports the rights of both owners and users of copyrighted works.

For example, disseminating copyrighted works in digital form often makes such works vulnerable to unlawful reproduction and distribution of such unauthorized copies.

On the other hand, this very character creates new opportunities for copyright owners to disseminate their works, such as the viral adoption of new works and services, and opportunities for consumers to use copyrighted works in ways that are significantly more flexible than those afforded by the mere purchase of a copy.

Intertrust obviously believes that DRM technology and our solutions are essential for electronic commerce in copyrighted works to flourish

and reach its full potential.

In order to manage the risks and the opportunities of digital dissemination, the creators, publishers, and distributors of digital content as well as service providers, governments, institutions, and users must be able to create digital content secure in the knowledge that their ownership rights can be protected.

They must also be able to associate rights and rules regarding ownership, access, payment, copying, and other exploitation of the work. DRM can provide the means to do all that and, thus, to create a trusted digital environment for disseminating and using copyrighted works.

It think it's important to understand that the generic term DRM covers a vast range of technology and enterprises. I think it's also important to understand that term can be used to refer to specific business models and the principles that I'm trying to advance here are that we should look at DRM as a process rather than a specific business model.

Effective DRM solutions such as those provided by Intertrust and its partners comprise technological measures as well as a trusted neutral third-party administrator to protect the integrity of

the technology and manage its continual adaptation, including the development of rights and commission practices, to changing technologies and user's needs.

One of the focuses of the way that InterTrust is deploying its DRM technology is to provide a basis upon which copyright owners and consumers can come together to form arrangements protected by technology implementing any number of different business models on the part of the copyright owner.

For example, apart from the mere sale of downloaded content, one can think in terms of subscription models for the delivery of music, for example. There's a very important dimension of this process as well which we call super distribution: the idea that the protection system can accommodate the downloading of content to consumer A and also permit the transfer by that consumer of the content and the rules for its utilization to consumer B.

In other words, our system would support models which actually encourage the transfer of copyright material on a protected basis from one consumer to another.

So as seen by these examples, the purpose

of DRM solutions is three-fold. First, to enable copyright owners to manage their exclusive rights effectively throughout the electronic commerce value chain. Two, to provide maximum flexibility in the arrangements struck between copyright owners and their customers. Three, to provide a neutral and trusted environment in which technology guarantees these arrangements.

Thus, these sophisticated DRM solutions are entirely consistent with the key objective of copyright law, to protect the rights of copyright owners while promoting wider dissemination and greater access to copyrighted works.

Nonetheless, a number of organizations have expressed concerns that DRM technology and electronic commerce could impair operation of Section 109 of Title 17 and have called for its scope and, thus, its limitation on right holders, to be expanded.

Such concerns appear to be, at best, premature. Digital delivery coupled with DRM will improve the dissemination and use of copyrighted works in new and more convenient ways.

Moreover, it's important to recognize that the first-sale doctrine continues to apply in the digital environment. It's also important to recognize

that the operation of the first-sale doctrine is limited to the exclusive right of distribution of copies and does not limit application of the other rights of the copyright owner: reproduction, adaptation, public display, and public performance.

Therefore, digital delivery of a copyrighted work does not necessarily mean that a copy has been delivered. Technologies such as digital broadcast and audio/video streaming may not deliver a copy at all. This is especially the case of a streaming transmission secured by various DRM technologies that prevent the recipient from making a copy of the transmission.

It is also important to recognize that the operation of a first-sale doctrine is limited to situations in which ownership of the copy is transferred from the copyright owner to another party.

Even in those circumstances in which digital dissemination does, in fact, deliver a copy of the work, that delivery does not necessarily mean that the party has expected that the ownership of a particular copy has changed hands.

For these reasons great caution should be exercised in considering proposals to alter such a fundamental tenet of copyright laws as the first-sale

doctrine.

Doing so could unsettle long-established legal rights, thus making electronic commerce more uncertain. It could also have the effect of favoring one business model over the other.

Moreover, such changes could constrain the development and use of DRM technologies and solutions. The unfortunate result would be to discourage the lively experimentation necessary to develop viable sustainable electronic commerce in copyrighted works.

In conclusion, therefore, there is no single concept or model of DRM technology and, a fortiori, any single or common feature of DRM that is somehow restricted or impeded by the current functioning of Section 109. Thank you.

MS. PETERS: Thank you.

I'm going to start the questioning where we hadn't before.

Jesse.

MR. FEDER: Keith, could you please elaborate a little bit on how international obligations come into play in these issues? You had raised that issue in your testimony.

MR. KUPFERSCHMID: With regard to all the agreements I mentioned, the Berne Convention, TRIPS

Agreement, WIPO Copyright Treaty, all of them set forth a specific standard, that standard being that the legitimate interests of the copyright owner are not adversely affected.

With the proposals that are suggested, I think someone in the earlier panel here today mentioned he didn't know whether some of the language was intended to be so broad because it certainly didn't match the purpose for which some of the proponents of the broadening of Section 109 were going after.

That language can be read very, very broadly. For instance, if Section 109 is broadened out to cover reproduction, which existing Section 109 does not cover right now, aside from the whole simultaneous destruction issue, read reasonably, then I think, would adversely affect the copyright owner's interest to such a degree that it would offset the balance that all these three treaties support and the standards that have been set. That's our views on that.

MR. FEDER: Okay. I believe you were here during the last panel and you heard David's question to Mr. Sorkin and Mr. Attaway concerning a

hypothetical technological system that enforced the simultaneous destruction concept -- that permitted the transfer of only a single copy and automatically destroyed the original. Putting aside the question of whether that's technologically feasible, if such a system existed, would you still have objections to amendment of Section 109?

MR. KUPFERSCHMID: I think that is a very, very large assumption but let me certainly address it. I would not necessarily have an objection to amending 109 if it accounted for such technologies provided the use of those technologies would further promote e-commerce and emerging new technologies and the copyright law, the purposes of the copyright law.

SIIA believes that there are certain basic principles that should be considered in relation to Section 109 and that these principles should take into account the interest of copyright owners, creators, and publishers and the practicality of the technology.

Let me go through some of these principles which represent a minimum standard. It doesn't include all principles certainly. Any technological protection, first of all, must be protected by 1201. It could not be exempted by 1201 of the DMCA.

The use of the technology must be voluntary. Copyright owners shouldn't be required to use the technology. The technology should not impose substantial costs on copyright owners, should not impede the incentives underlying the Copyright Act to create and distribute new works of authorship, and should not burden or adversely affect the copyright owner's interest in exploiting the work itself.

The technology protection that is actually used, or codified if that's what you're proposing, should be developed pursuant to a broad consensus of copyright owners and other relevant industry representatives and should be made available to those copyright owners on reasonable terms.

Perhaps most importantly the technological protection itself must prevent a person from transferring what I call the source copy to more than one person. As Bernie mentioned earlier, you couldn't send it a 1,000 of your closest friends. The technology shouldn't allow that.

Secondly, the technology should attach to any generational copy. In other words, if you had

that technology on a certain content and you are sending that content to someone else, that technology should accompany the content.

The technology also should prevent the source copy from being transferred unless the transferor retains no electronic or nonelectronic copy of the work regardless of the format.

For instance, if you had software that was on a hard drive and software that was on a CD-ROM, I can clearly see, and this is probably the biggest hurdle for the technology to satisfy, is somehow the technology would have to make sure that the owner of that particular copy on CD-ROM when they transferred the hard copy off their hard drive, they did not retain any copy be it on their hard drive or on CD-ROM because that's what the first-sale doctrine right now requires.

Also the source copy obviously would have to be destroyed simultaneously as, I think, pretty much is inherent in the proposal itself. Finally the technological protection must ensure that any generational copy created from the source copy resides in no more than one medium at any time.

I think it is a further consideration because there's definitely a concern that somebody

could play volleyball with certain works. For instance you can lend a book to somebody and then give it back but it's a heck of a lot easier to do in the data world.

You're not limited, as I mentioned before, to geography. You're not limited to the people you know and you can do it a lot easier. That is a certain concern. I think significant consideration ought to be given -- if you're considering changing 109 to account for this hypothetical technology -- a potential rental right for all works in digital form to prevent something like that from happening.

MR. SIMON: There's a corollary consideration to this beyond Professor Hollaar saying that you're never going to come up with that technology so so much for your hypothesis.

An important consideration in our industry, the software industry, is we will license a computer program to a small enterprise at a particular price. That small enterprise may then become acquired by a different kind of enterprise to whom we would sell that product at a different price. Let's say in this instance a higher price.

Other concerns for us is that because our

licensing models work on pricing to the customer's needs, this notion of the distribution right -- sorry, the first-sale right somehow permitting all these transfers once somebody has acquired this copy and somehow eliminating the licensing restrictions that may be imposed on that copy is very troubling.

That is part of the issue that I think libraries have raised and others have raised in complaining about licensing restrictions. We think it's independent of the first-sale doctrine which exist in law which we accept.

We think that it's important for parties voluntarily to write licenses about what can and cannot be done with copies. They can dispose of them, transfer them, lend them. In fact, let's keep going south.

The copyright law already speaks in respect to digital medium with respect to some of those things, that you can restrict for computer programs some of those first-sale kind of concepts.

The point I'm making is whatever you chose to do -- we don't think you should do very much to 109 at all -- whatever you choose to do, it's important to ensure that private parties retain the right to write licenses as they see fit and as they freely agree to

do so.

MR. KUPFERSCHMID: If I could just add to that, I want to make clear that I'm in full agreement with what Emery says. Even though I did not mention licenses themselves, clearly what I said does not mean that I want you to ignore or preempt the license. The license should still continue to have value and effect.

MR. FEDER: One more question for Dr. Hollaar. Are you aware of any evidence of any actual harm resulting from what you describe as this mismatch between Section 117 and the way system administrators actually backup network systems. Has anybody ever been found liable for any of those activities?

DR. HOLLAAR: Not that I know of. It is, of course, always out there. You can get a rogue content provider as we saw in the Netcom case where they have another agenda and they are stretching the limits.

Luckily the court in Netcom didn't find liability, but in a sense had to write law to do that, which the DMCA then picks up. It's always out there. It's always a problem. I think maybe it's more from my position as an educator that it is very hard to teach something that doesn't match reality.

If we are trying to get people to respect things and you present, "Here are the rules for copying," and the first thing that happens is a student in the classroom raises his hand and says, "What about the backups that the university does?" You say, "Well, those are not really allowed but we sort of overlook them." It's very hard to go through and teach that. And it has the potential of someone making the wrong decision.

It's the same thing with the temporary copies where the decision in MAI v. Peak, I think, is right on the money. The RAM copies are copies and it makes sense.

But then we get the difficulty when the No Electronic Theft Act was passed and it was conditioned on making so many copies having a total value on it. Did that mean that every time someone ran the program, the cash register went “cha ching” and we got closer to the $1,500 limit?

We have a statement on the floor from Senator Hatch saying that's not what Congress intended, but there is nothing in the NET Act that really says that's not what the law says.

It's very hard to teach such things. It's very hard to get respect for things where the moment

they ask a sensible question you have to say, "Well, we sort of ignore that," or, "That doesn't fit." That's where the damage is.

MS. PETERS: Jeff.

MR. JOYNER: I only have one question for Mr. Kupferschmid. I hope I pronounced that correctly.

MR. KUPFERSCHMID: Yes. Perfect.

MR. JOYNER: And I will take you up on your offer later, but I'm asking you to explain how the fair-use doctrine might operate with respect to authorized playback of content, rebuffering, streaming, etc., and why did you believe this doctrine will provide more comfort to, I'll call that group, civil society than their proposed changes to Section 117?

MR. KUPFERSCHMID: Well, I can attempt to give you a very general answer but as anyone knows who has any experience with the fair use doctrine, it really is very highly dependent upon the facts of any given situation.

We've heard everything mentioned here from Section 108 to 301 to, I think, 110. For some reason fair use hasn't been mentioned as a possible solution, at least, to some of the concerns of some of those who are proposing amending Section 109 and 117.

I think that in many instances fair use will resolve their concerns. In the areas where it doesn't resolve their concerns, then it probably shouldn't. That means it drastically affects the interests of the copyright owner. That's the balancing act of the fair-use doctrine.

The danger of amending Section 109 or 117 in the ways that they propose, it's so broad it just swallows up and makes the fair-use doctrine irrelevant. You never get to the fair-use doctrine because the language is so broad it would allow acts well above and beyond what any of us would be considered to be reasonable.

MS. PETERS: Marla.

MS. POOR: I have a question for Emery.

You touched upon this somewhat in your comments when you talked about the disruption of business models and the commercialization of products. What is the real harm in temporary copies?

MR. SIMON: We write our licenses based on copyright base rights, the copyright base property interest that we own and the computer program. Those licenses then direct how the product may be used and what terms and conditions.

Now the question is what is the underlying

right that is implicated. Lots of rights. Distribution right, but mostly rely on the reproduction right.

If you take the proposition that entire works must be reproduced in order for the reproduction right to come in effect, in a digital world where what we do is we copy portions of works as the processor processes them, it makes no sense. It has to be that something is commercially significant. Something with commercial value is being copied.

A portion of the entire work may be at issue. It doesn't have to be the whole thing. If somehow there is an exception created that says entire works must be copied for the reproduction right to be implicated, we can't write licenses but we have to redesign the way computers work to no longer do the efficient thing which is reproduce only those portions of huge programs which are needed by the processor, but to process everything simultaneously.

That makes absolutely no sense so it predisrupts the way our licensing factor works. To adjust for that problem we would have to redesign the way the machines work which makes no sense either.

You'll hear, I assume, a lot about this looking at the comments this afternoon about buffer

copies, buffer copies, buffer copies. Buffer copies are RAM copies. It's just a portion of a work. There's nothing magical about a buffer copy. It's just that portion of the work which is next in line for the processor to deal with.

The notion of saying that buffer copies are exempted from the software industry's perspective is the same thing as saying RAM copies are exempted. It's the same thing as saying that unless you copy the entire work, you have no reproduction right liability.

If we go there, we have a huge problem because we don't design our products to copy all 2 million lines of code into memory at once. To do that you would need very different kinds of computers.

Some of our members would be very happy because you would buy a lot more memory and you would buy a lot more processing capability but it would not make for a very efficient or cost effective products.

MS. POOR: What about the piracy aspect to temporary copies?

MR. SIMON: A lot of the problem that we run into from a business software perspective is internal corporate copy where corporation will buy a license for 100 users and we'll have 500 users. There may only be one actual copy, full reproduction of that

computer program that resides on the server.

Each of those now thousands of users will be only making copies of portions of that product and will only do so on a temporary basis in RAM as they are using it.

Unless we have a cause of action against those portions of copies being made, even on a temporary basis we have no reproduction right base cause of action to go against now all those people that have exceeded the licensed authorized use of the work.

MR. KUPFERSCHMID: I'd like to make a comment on that, though. I don't see that there isn't a way that a temporary copy provision, especially one that recognizes the reality of how computers process data, if properly drafted necessarily means that the horrors that Mr. Simon just presented have to occur.

You could write a terrible provision that would allow those loop holes but that doesn't mean that is the only way you have to write such a provision. Temporary copies exist.

For example, the thing he brings up on a limited license where someone has licensed 10 copies, or the simultaneous use of 10 copies. Because they are on a server and there's more than 10 people using

it is a question of whether the person is a rightful user at that time.

It's not a thing about whether it's in RAM at the time. There may be ways to right a provision that matches reality much better than 117 currently does in its wording and yet doesn't release this tale of horrors that we are hearing about.

MR. SIMON: There are lots of ways to skin a cat. As I said, our licenses are based upon the copyright base rights. One of the panelists this morning talked about how there needs to be some federal law preempting certain kinds of licensing and the kinds of licensing they are talking about his limitations on the kinds of uses that can be made.

You know, Professor Hollaar, I agree with you. There's lots of ways to solve this problem. I don't think that the way to solve this problem is to create a larger exception to the reproduction right.

MS. PETERS: Okay.

MR. JOYNER: Let me follow up on Marla's first question and everyone else feel free to jump in. I think you made the case that at least in some cases many temporary copies will prejudice legitimate interest of the copyright owners. I understand your objection to a provision that might say temporary

copies are okay. How about taking the language of the Boucher Campbell Bill which was much more limited. It's very short and I'll read it.

"Notwithstanding the provisions of Section 106 it is not an infringement to make a copy of a work in a digital format if such copy (1) is incidental to the operation of the device in the course of the use of a work otherwise lawful under this title, and (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interest of the author." What is the problem with that kind of a provision?

MR. SIMON: I think it's a null set.

MR. JOYNER: I beg your pardon?

MR. SIMON: I think it's a null set.

MR. JOYNER: You mean it doesn't exist?

MR. SIMON: I think that's a null set because I think what they are talking about -- again, I can speak to computer software. I can't speak to music or movies or the products, as I pointed out in my testimony.

When I take out of 2 million lines of code computer program and I am using a particular applette or subroutine of that, which is the only thing that I have now reproduced, it's the thing that I needed to

perform the function that I want to perform. Clearly it has economic value to me.

The mere fact that I reproduced a portion of it, and provided that you have this test that it has to have economic value, it's always going to have economic value. That's why I think it's a null set.

The second problem there is you are taking us down a path of litigating what is diminimus economic value and somehow assigning the value of reproducing 100 lines of code out of 2 million, because that's what I happen to be using, in a way that says the total value of the work to me, how much is this, and is this like too trivial for us to take cognizance of it under law.

It takes us down a path that says diminimus economic value is not cognizable. That's a terrible place for us to be from a litigation perspective.

I think it's either a null set in which case any economic value satisfies, or the whole thing is swallowed up because unless you copy the entire work, the notion is going to be that these portions are going to have no separate economic value, in which case you are never going to have liability.

MR. MOSKOWITZ: Actually, I'm not sure

that I understand that is actually the case. I think that the language in the Boucher Campbell amendment is very reasonable with regards to copyright.

If you have 2 million lines of code and the issue of copyright is that you share in order to establish value, you certainly don't presuppose that the innovation has any economic value to any users by then saying, "Pay me first or don't allow access to these improvements that were made to the code for which we want feedback and we want to understand whether or not there is value."

You are basically saying just because I developed, that means that there has to be some sort of payment or restriction on access to those improvements.

MR. SIMON: That's a personal choice whether you choose to ask for payment or not.

MR. MOSKOWITZ: Not if you have --

MR. SIMON: But it's not a question for the copyright law to say you can't get paid.

MR. MOSKOWITZ: -- click through and agree to the limiting terms of some sort of new software application for which there was no fair use or any type of determination by some sort of teaser or anything else. Nor would it be for music or video

where you do have teasers. You do have free access in the form of radio or television broadcasts.

I think the example of your ASP model is an exact example that speaks to that language which is basically allow the user to interact with the provider and make sure that the value is being added and as it's being added, you charge. If it's not being added, you don't charge but you don't presuppose that there is value just because someone says that no one should have access to is.

MR. SIMON: I'm sorry. I need to come back to the for-profit point that I started out with. Our companies are in business to make money.

MR. MOSKOWITZ: So are we.

MR. SIMON: So are you. Exactly.

MR. MOSKOWITZ: We are also in the business of assuring that users and librarians and others have access to works where they can determine that work has been serialized or otherwise tagged in such a manner that you know you are being paid for that work.

Not just to say just because I'm a developer I should be paid and I need to have a click-thru agreement that restricts anybody to have some sort of test or some sort of understanding whether the

exploitation of work previous or in the future is appropriate to add value to that work.

MR. SIMON: I have no clear understanding what you mean by adding value and this is my point. Do you want us to ligitate this issue?

MR. CARSON: Well, let me focus on something else. You make a point about the second of the two conditions in that proposal having to do with essentially the economic value that is being used and whether there is any value.

How about the first provision? It must be incidental to the operation of a device in the course of a use of a work otherwise lawful under this title. Why doesn't that solve it?

MR. SIMON: The buried thing there is the otherwise lawful. I would much prefer a term that says authorized because that would say that I have now licensing terms and conditions that are enforceable and the law is enforceable.

The extent to which I have imposed through the license restrictions on what can and cannot be done are fully enforceable. The problem that we run into is that lawful term which sweeps in concepts as intended by Mr. Boucher of fair use which then are intended and interpreted as trumping those licensing

terms and conditions. That's where we run into a problem.

MR. CARSON: As far as you are concerned, if we struck otherwise lawful and said authorized, you would be okay?

MR. SIMON: Much more comfortable.

MR. CARSON: I think the difficulty with striking that is that then you could have a license agreement saying, "We do not authorize you to do this."

MR. SIMON: That is what licensing agreements say.

MR. CARSON: But there are other things in the copyright law, because Congress has set a balance, has indicated certain things are acceptable. That is the difference between otherwise lawful and authorized.

DR. HOLLAAR: I think that language, and I would have to read it precisely, but it is a very good start. I think some of the things that are being pointed out that somehow it speaks to total copying and we may not be totally copying the work.

I don't see that in there. I don't see a judge saying, "No, this isn't a reproduction because you copied everything except the last byte of the

program which is never used anyway." Judges are smarter than that.

In talking about whether this gets into a discussion of whether it's de minimus or not if, in fact, litigation were brought, the court is going to be in that discussion anyway because anyone is going to bring up as a defense of fair use.

They may not be authorized to do this under 117 but they will make a good argument that this was the reasonable expectation of their use of the program and it's going to be under fair use.

I'm very hesitant, and this brings back your fair use comment, to sluff things off on fair use because if 117 may be murky and subject to strange interpretation, fair use is even worse. We have now from an educational point of view a bunch of people who need a great deal of education on what fair use means.

I suspect that the majority of the people out there in the digital world, the high school students, the college students, the people like that, think that fair use is some magic term that if you mumble it and it seems right, then the copyright laws don't apply. We seem ample illustrations of that in the Napster case and so forth.

It's not the thing that you want to hang your hat on from an educational point of view. It's much better to tell people you can make the copies necessary to run your program because there is a specific provision that says you can make the copies necessary to run your program or to exploit a digital work as was intended.

When you say you can do that because it's a fair use, then there's no boundary on what they will assume a fair use is.

MR. KUPFERSCHMID: That's why we have 117 which is more definitive and more detailed on that issue, and which is more narrowly crafted than fair use certainly.

This language here -- “does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interest of the author” -- it's a heck of a lot broader than the fair-use doctrine. It is because the language is from international treaties and has got to be made that way so all the different countries can meet this standard.

The United States meets the standard through the four fair use factors that are used to de-termine when something conflicts with a normal exploi-tation and does not unreasonably prejudice legitimate

interest of the author. Those four factors are what the United States looks to as to when this occurs. The proposed language would make these factors irrelevant.

Along with it all the case law that has developed under the fair-use doctrine would be gone, and we would be left to interpret this very, very, very broad language.

MS. POOR: I want to go back to something that Emery said, your desire for authorized versus lawful to sort of prevent the fair use coming in. How exactly does fair use come into play exactly? I can't get my hands around that exactly.

MR. SIMON: There's only been one principle area where fair use has been litigated in the software area and that's the issue of decompilation. The authorized issue is not exclusively a fair use issue. As I tried to point out to you, the authorized issue is an issue of the enforceability of licensing agreements which is critical to the software industry.

MR. CARSON: I have one more question directed primarily to Emery and Keith. Dr. Hollaar in his testimony described what I think is, in fact, a common and prudent practice of backing up everything on your hard drive. I think he's correct but I would

like your reaction.

That practice, in fact, is not really something that a strict reading of 117 would permit. Do you agree that's the case and, if that is the case, do you agree that maybe there is a problem between the reality of what we would all agree, I assume, someone should be able to do and the reality of what the law says people can do?

MR. KUPFERSCHMID: He talked about several different items that he was backing up in software which I think would fall under 117. He mentioned data and I don't know exactly what he's talking about there but I think there is a question whether that information itself is protected by copyright.

That is certainly one thing to consider. Then you have to ask the further questions who owns it and is this something that he created. Does he own the copyright of the material that he's backing up. I'm not sure I heard everything.

MR. CARSON: Let's take a simple -- I download content all the time on the Internet. I'm authorized to do it. It's on my hard drive and I'm authorized to keep it on my hard drive.

If I'm prudent -- frankly I'm not but if

I were prudent, I would be backing that hard drive up every once in a while so that in case something happened when the hard drive crashed, I would be able to get that stuff back again because otherwise I would never have it.

In addition to backing up my software, I'm backing up that content that is copyrighted content of a number of copyright owners who have given me permission, at least implicitly, to have that on my hard drive. They have not presumably given me permission -- or maybe they have. I don't know. Maybe that's your argument -- to back it up on CD-ROM perhaps in the event of a crash.

Section 117 I don't think gave me permission to do that so I am strictly speaking of violating the law when I do that. (A) Do you agree that I'm violating the law and, (B) do you agree that I shouldn't be allowed to do that?

MR. KUPFERSCHMID: I don't necessarily agree that you are violating the law because, like I said before, you are not just dealing with 117 here. You do have to look at 107 which is this catch all.

The terms of 117 are quite specific and if it doesn't fall within that, then you have an opportunity under the fair use doctrine that you have

to look at is this backup copy affecting the actual or potential market? How much is being copied? Look at all the four fair use factors.

MR. SIMON: I guess I disagree a little bit. Backup copying was proposed by CONTU for a specific reason which is machine scratch. To the extent that logic applies to things that you have the authority to have on your machine and to the extent you can figure out a way that backup copy is not going to be misused, abused, otherwise redistributed, performed, or other things. If you are doing it for a limited purpose because machines crash and protecting yourself, it's worth examining.

MR. MOSKOWITZ: And also the licenses that you specify in the click-thru licenses. Specifically in almost all cases for almost all software and hardware companies they restrict any liability whatsoever from the disappearance of data.

Essentially there's no warranty on any click-thru license on any software that I've ever purchased that has ever said if you accidentally lose this data, we're responsible for it.

MR. SIMON: Does your license contain such a provision?

MR. MOSKOWITZ: Absolutely not.

MS. POOR: To take the example of an Excel document, you open up the program, you insert some data into it, you save that, and then you backup that particular document. I mean, you would agree that's a data file. You back that up and then you come along later and you back up documents or you back up things over that or in addition to that?

DR. HOLLAAR: I'm talking about a different type of -- before I get to that let me make one point about license agreements. If you look at many software license agreements, it says that you have the right to make one backup.

It's a very common term. Again, if we say that license should trump copyright law, then the people who are having the file saves done are incredible infringers at that point.

Going back to your question, the type of backup I'm talking about is one that you don't realize because if it's done properly, it's done out of your sight. If things are being done right, the little backup elves come in during the night and they make a copy of it and they squirrel it away some place never to be seen again until there's a problem.

You may have done something on your spreadsheet and you made a backup because that was

prudent. But there is someone watching out for you in case something goes wrong every night making backups either of the disk completely or anything that changed on the disk.

They are making that backup not necessarily based on whether it's a program or data but they are just copying every file in sight. If you install a new copy of WordPerfect, they make a backup copy of it at the time of installation because they say it's a new file.

They make a copy not only of the programs that got installed with WordPerfect, but also the clip art directory that got installed and the samples and the help files, none of which are computer programs.

Two problems. One is that there is no authorization for that. You can argue fair use, but then we get into the quagmire of what is fair use.

The other thing is that the other provision of 117 as it stands is that when you upgrade, when you are no longer the rightful possessor of a particular version of software, you have an affirmative obligation to go through and delete that.

There is no mechanism in the backup thing for doing that deletion. No one really cares. What I'm saying is simply that this isn't noticed in

general but it conflicts with the provision and makes it very hard to get people to recognize what 117 really provides.

MS. PETERS: Because of the time I'm just going to ask one quick question. It's really to the software industry. With respect to software that's being sold today, or whatever you want to call it, made available today, you mentioned that 12 percent is made available online today and most of it is on CD-ROM.

My understanding, and I'm trying to verify it, is that most all software when made available is made available subject to a license as opposed to an outright sale.

MR. SIMON: Correct.

MS. PETERS: Correct.

MR. SIMON: Actually, I can't speak to software. I can speak to business software.

MS. PETERS: Business software.

MR. KUPFERSCHMID: I agree.

MS. PETERS: Okay. So it's all subject to a license. So, therefore, since it's all subject to a license and it's not an outright sale, the way it exist today for sale doesn't really apply and whether or not you can transfer a copy. The physical object

that you got really is determined by the term that is in the license agreement.

MR. SIMON: That is a correct interpretation. Yes.

MS. PETERS: Okay. All right. Thank you very much. It was extremely helpful. We will resume this afternoon at 1:45 promptly and we would like the third panel to have seated themselves at that time. Thank you.

(Whereupon, at 12:34 p.m. off the record for lunch to reconvene at 1:45 p.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:51 p.m.)

MS. PETERS: Good afternoon. Welcome back to the second half of the hearing on Sections 109 and 117. We are now on Panel 3.

As was noted this morning, the audio system is picking up everything the witnesses and us are saying but it's not projecting the sound that is being said here back. People who can't hear, No. 1, can move up. That's one option. And I'm going to encourage us and the witnesses to speak a little bit louder.

Let's start with Panel 3. We have Susan Mann representing the National Music Publishers' Association. Marvin Berenson representing Broadcast Music, Inc. Gary Klein representing the Home Recording Rights Coalition. Pamela Horovitz representing the National Association of Recording Merchandisers. John Mitchell representing the Video Software Dealers Association. And, I guess, we'll start with the order that we have with Susan.

MS. MANN: Thank you, Marybeth. I have to apologize -- we talked about this a minute ago -- for screaming at members of the panel but it's for the benefit of people in the back of the room. Thank you

for the opportunity to present testimony today.

NMPA is the principal trade association representing the interest of music publishers in the United States. The more than 600 music publisher members of NMPA along with their subsidiaries and affiliates own or administer the majority of U.S. copyrighted musical works.

NMPA's wholly owned subsidiary, the Harry Fox Agency, acts as licensing agent for more than 26,000 music publishers, businesses that in turn represent hundreds of thousands of song writers.

The Harry Fox Agency acts on behalf of its publisher principals in connection with licensing Internet distribution of music, as well as other more traditional uses of music in recordings, motion pictures, and other audiovisual productions.

NMPA and its members and HFA and its principals have a direct interest in the issues to be addressed in the agency's report, the operations of Section 109 and 117 in connection with new technologies and electronic commerce.

In the two years since the DMCA was enacted, electronic commerce has surged in some areas. The progress toward making music available to be downloaded or otherwise accessed online in a manner

that assures that copyright owners are compensated has in some instances been slower than music copyright owners and some who would wish to enjoy music online would have hoped.

The music industry has faced challenges in reaching consensus on acceptable technological protection measures and in adopting compatible rights management systems. Considerable progress has been made but for delays and frustrations this has caused, the music industry bears some responsibility.

The larger impediment to the expansion of electronic commerce, however, has been the introduction of services that exploit music online without the authorization of the copyright owner or any attempt to compensate the copyright owner or the creator.

If the past two years have taught us anything, it has been that it is nearly impossible to build an e-commerce marketplace for music in competition with commercial entities that give music away or enable others to distribute music free.

We have learned that many consumers, millions of them in fact, will not even pay a reasonable license fee if they can obtain a copy of the same music for free.

Companies engaged in the licensed distribution or public performance of music have shared in this difficulty and frustration. In fact, one prominent member of the Digital Media Association testifying before Congress has emphasized that its business prospects have been dampened by unauthorized distribution of music.

The industry is working to deal with these challenges and recent developments have shown that the music industry can and will respond to new technologies and business models through commercial negotiations and innovative license terms.

Licenses issued to firms offering "cyberlocker" services will soon enable consumers legitimately to access a CD that she has purchased from her computer or on a variety of handheld devices.

At the same time, other consumers may find that their desires are best met by downloading. Others may continue to wish to purchase tangible copies online or from brick and mortar retailers. In sum, the digital marketplace is evolving and will continue to evolve in directions that we can predict today and in others that we cannot.

Some commentors, DiMA and NARM, for example, have singled out the availability of digital

first-sale rights as somehow essential to the functioning of the e-commerce marketplace.

DiMA, in particular, has argued that the dramatic legislative expansion of Section 109 rejected by Congress in 1998 should somehow be made more palatable through the use of a supposed technology that purportedly, and I quote, "Can ensure that the particular digital copy is deleted or made permanently inaccessible from the transferrer's computer upon digitally transferring the data to the transferee."

DiMA and its allies have offered little support for the significant legislative change they desire and have failed to explain how widespread deployment of such technology -- even if available and reliable -- would benefit consumers, copyright owners or, for that matter, DiMA members.

While the music industry is keenly aware of consumer interest in cyberlocker services and Napster-style file propagation, we have heard no hue and cry, not even so much as a suggestion, that consumers are looking for products that will function under the forward-and-delete model DiMA advocates.

In fact, the high level of consumer interest in the file propagation technologies that the media calls “file sharing” would lead one to conclude

that consumers would find such an approach unacceptable in both the marketplace and in the law.

The objective of the DiMA model appears to be to circumvent copyright rather than to meet any genuine consumer demand.

Advocates of self-cannibalizing copies claim that such technology when implemented in conjunction with digital rights management systems will decrease piracy risks. NMPA believes that effective technological protection measures and effective implementation of rights management systems will, as a general matter, reduce such risks. So will licensing agreements fair to copyright owners and creators, commercial distributors and consumers.

Over time, however, we believe what will best promote electronic commerce and the acceptance of new technologies is the flexibility to respond to consumer demand. For e-commerce to flourish the law should foster rather than dictate consumer choice.

For example, a consumer may choose a service that allows him to store music he purchases on a server remote access to download and receive authorization to make an additional specified number of copies from another service or to share music on yet another.

How would a digital first-sale doctrine policed by forward and delete technology serve the interest of consumers or copyright owners in these instances?

In NMPA's view there is nothing magic about forward and delete, even assuming that it can be reliably achieved, and certainly nothing to indicate that it should serve as the beacon for future e-commerce in our industry.

In recent hearings Congress has urged the music industry to help itself out of the piracy and public relations problems it is experiencing by moving forward with voluntary license agreements that enable consumers to experience music online in a variety of ways.

NMPA is hardpressed to see how accepting the recommendations of those advocating a so-called digital first-sale doctrine would advance this effort and promote e-commerce.

In our view, the extension of the first-sale doctrine beyond the distribution right to the rights of reproduction and virtually every other right in Section 106, rights which have never been implicated by first sale, stands to hinder rather than promote electronic commerce.

In carrying through Congress' mandate to assess the impact of new technologies on the operation of Section 109, NMPA urges the Copyright Office and NTIA to consider the disruptive and potentially harmful impact that the legislative expansion advocated by some commentors would have on the ongoing efforts of music and other copyright owners to curb widespread piracy through file propagation services and software, and to deal in constructive commercial terms with the next online distribution technology whatever that may be.

The impossibility of enforcing a mandate to delete one's own copy of a protected work when a copy of that work is forwarded to another would be sure to cause many consumers and some commercial users of works -- some of whom already believe, or at least claim to believe, that consumers have a right to copy protected works -- to believe, or claim to believe, that consumers have a right to distribute those works to the public as well. The sought after legislative change would not, in our view, clarify the law but would confuse it.

Turning briefly to the issue of temporary and archival copying that some commentors have raised in connection with 117, the incidental copy amendment

advocated by some commentors would not promote the growth of electronic commerce.

Rather, it would expand the scope of Section 117 of the Copyright Act and diminish dramatically the scope of the reproduction right in music and all other copyrighted works.

As the Copyright Associations' joint comments discussed in some detail, the suggestion put forward by groups seeking to expand Section 117 limitation on reproduction rights in computer programs was first put forward during Congress' consideration of the DMCA and rejected.

Instead, Congress in Title 3 of the DMCA added a new Section 117(c) that spells out the specific and limited circumstances under which the reproduction of the computer program in memory for the purpose of computer maintenance or repair is not an infringement.

In continuing to press for this failed amendment, advocates seeking to expand Section 117 largely ignore the DMCA amendment and Congress's clear intent to approach the temporary copy issue with considerable caution.

As the Joint Copyright Association comments made clear, digital temporary copies are

becoming an increasingly important means through which copyrighted works are, and will be, made available to the public. Access to works via the Internet or through the use of network-ready devices that enable consumers to use works temporarily exemplify this trend.

At the same time, some forms of piracy consist of little more than making temporary copies available without authorization to members of the public.

Thus, the continued recognition of temporary copies as reproductions under U.S. and international copyright law is crucial both to the development of electronic commerce and the ability to enforce rights in certain circumstances.

Thank you.

MS. PETERS: Thank you.

Marvin.

MR. BERENSON: Good afternoon. I want to thank the panel for giving me the opportunity to testify today.

My name is Marvin Berenson. I'm Senior Vice President, General Counsel of Broadcast Music, Inc., known as BMI. BMI licenses the public performing rights in approximately 4.5 million musical

works on behalf of its 250,000 affiliated songwriters, composers, and music publishers, as well as thousands of foreign works through BMI's affiliation agreements with over 60 foreign performing right organizations.

BMI's repertoire is licensed for use in connection with performances by over 1,000 Internet websites, as well as by broadcast and cable television, radio, concerts, restaurants, stores, background music services, sporting events, trade shows, corporations; basically wherever music is publicly performed.

The first-sale doctrine in Section 109 of the Copyright Act permits the owner of a copyrighted work like a CD to redistribute that property without violating the exclusive rights set forth in Section 106(3) of the Act.

Digital transmissions on the Internet for downloading music are different from distributions of physical media because they implicate several copyright rights including the public performing right, the public display right, the reproduction right in addition to the distribution right.

Digital transmissions by downloading invariably result in a reproduction; that is, a copy retained by the recipient. Moreover, the Internet

permits multiple copies to be sent simultaneously by the sender to different recipients.

Applying the first-sale doctrine to digital transmissions involving downloads would violate the reproduction right which is not covered by the first-sale doctrine.

The first-sale doctrine should not be applied to digital transmissions because doing so could also adversely impact the public performing right in musical works. Digital transmissions on the Internet constitute public performances of the underlying musical work under Section 106(4) of the Act when made to the public.

For example, when Napster enables users to make their music collections available to the public for downloading without authorization from the copyright owners, the copyright owners' public performance right in those songs is implicated.

The first-sale doctrine does not apply to the public performing right. Such transmissions require authorizations which normally take the form of public performing rights licenses granted by BMI, ASCAP, and SESAC.

It should be noted that BMI issued the first commercial Internet copyright license for music

in April of 1995. Since then BMI's licensing has covered both downloading and streaming activities, as I said, for over 1,000 licensed websites.

DiMA and the HRRC are seeking an exemption that would enable not one truck but rather a fleet of trucks to drive through. They base their arguments on the fear that e-commerce in music will be stunted unless the first-sale limitation applies to digital distributions.

However, there is little evidence to support this claim. In fact, in the fast five years there has been a continued explosion in transmissions of music on the Internet. The Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files.

According to Napster, there are as many as 10,000 files transmitted per second on the Napster network. Yet, even in the face of this rampant piracy, digital downloads are expected to result in a $1.5 billion commercial market by the year 2005. In view of this, it is hard to make a factual case that Section 109 is inhibiting digital transmissions.

DiMA claims that new digital rights management tools will soon enable copyright owners to transmit secure, encrypted files that will protect

against unauthorized multiple copying by consumers.

DRM, digital rights management tools, are in the developmental stage and are not yet in widespread use in the marketplace. Moreover, when owners do implement encryption tools, they are suspectable to being hacked.

I don't know if any of you have seen, and I don't know whether this is true or not, but allegedly in the SDMI they have situations where those encryption tools or the secure tools that have supposedly been developed, it has been claimed that they have been hacked already.

Recent experience has shown that licensing is the best solution to deal with unauthorized transmissions of music on the Internet. MP3.com has negotiated agreements for public performing rights, mechanical rights, and sound recording rights. Napster itself has reached an agreement with a major record label and has approached BMI and music publishers about licensing.

Looking at this developing market shows there is a strong demand for music online. It is not yet known, however, which of the several business models will emerge as commercially viable. In these circumstances, it seems premature to consider enacting

a new copyright exemption that would affect online music delivery at this time.

It is important in this environment for the Copyright Office and the NTIA to send a strong signal to the Internet community that copyright law is still alive and well and applies to e-commerce transmissions. Indeed, the Berne Convention and the WIPO Copyright Treaty require that the marketplace for new uses of copyrighted works have the opportunity to develop. These treaties prohibit limitations on copyright that interfere with copyright owners' legitimate business opportunities. Accordingly, the proposal to extend Section 109 to digital transmissions should be rejected.

Now, again, I just want to spend a little bit of time on the Section 117 issue. DiMA's second proposed amendment to Section 117 of the Copyright Act involves exempting the reproduction right and streaming media where a portion of the material is captured in a temporary buffer at the user's computer.

BMI agrees with the joint copyright owner's comments that no change to Section 117 is warranted at this time. Section 117 is a limited exemption aimed at computer software that has nothing to do with broadcasting or music.

There is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music broadcasting related issues on the Internet.

In view of the growth of webcasting since 1998, it is difficult to see how a brand new exemption is necessary to foster webcasting over the next several years.

Now, DiMA went well beyond the scope of this inquiry by suggesting that 110(7) of the Act be amended to apply to online music stores. The Copyright Office and the NTIA should not consider this proposal for a new exemption to the public performing right in this proceeding.

BMI contends that this issue is not properly before this panel and is not contemplated by Section 104 of the DMCA. BMI, through its written statement, has made its position clear on this point.

Basically I want to finish with one overall comment, and that is basically there is no question and everyone has agreed that we have entered into the era of globalization.

One transmission here could go all over the world. Consequently, as a result of this, BMI has entered into agreements with its sister performing

rights organizations for the global licensing of performing rights.

Since transmissions over the Internet are global in nature, whatever we do here in the United States will have an effect on the rest of the world, and obviously on the agreements that we entered into with our sister performing rights organizations.

The U.S. should not become a haven for entities that want to avoid copyright liability. The U.S. should not become the lowest common denominator with respect to the protection of intellectual property.

Thank you.

MS. PETERS: Thank you.

MR. KLEIN: My name is Gary Klein. I'm here on behalf of the Home Recording Rights Coalition, a coalition of consumers, manufacturers, and retailers whose purpose is to protect and promote fair use rights.

I'm also the Vice President of the Consumer Electronics Association, a 650 member association of the manufacturers of the products that deliver content to the ultimate consumer.

First, let me just state the Home

Recording Rights' Coalition position. Put very simply, the first-sale doctrine should be clarified so that it does, in fact, include digital transmissions. The law needs to be crystal clear in order to eliminate any uncertainty and, we think, generate the growth of new products.

Let's understand the underpinnings, first of all, of the first-sale doctrine. It was not, as one of the comments I read seemed to suggest, adopted for the benefit of copyright owners.

It was, in fact, based on a simple economic principle and that is to limit the restrictions on the alienation of property lawfully acquired. You buy something, you own it: you therefore have the right to deal with it as you will. Sell it, give it away, donate it.

There's no compelling reason why the same principle should not be applied to digital. Quite simply, you've bought it, you paid for it. You've heard some of the objections and I'll deal with those in a minute.

The Boucher-Campbell Bill, HR 3048, recognized this principle and proposed language that would serve as a model for this proceeding, and we urge you to look at that and essentially consider

adopting that. It was not, in fact, rejected by Congress. It was simply never considered by Congress.

If you simply take the fact that it never passed, well, the first copyright law was never passed and was never considered either, so if that's your criterion, then there would be no copyright laws.

Now, once you understand the basic underpinnings of the first-sale doctrine, then it seems to me that the burden ought to be on the content industry to come forward and establish clear and convincing reasons why it shouldn't extend to digital.

In reality, I believe, especially some of the arguments I just heard basically boil down to do we want a pay or play world or, as I said once before, take the “L” out of the “play” button and make it the “pay” button?

You've heard that the technology doesn't exist to protect digital transmissions. Well, I believe that is simply not true and you'll probably hear from other people who are a lot more technologically sophisticated than I am to explain that the technology for transmitting and then destroying the original copy does, in fact, exist. That coupled with digital right management systems, we believe, will ultimately decrease piracy risks.

Now, about piracy. It's a word that we feel has been much abused recently. Pirates, as we all knew when we were kids, steal. Unfortunately, it is now applied to anyone who happens to make a copy for which they did not necessarily pay and who are now thought to be stealing.

We disagree that every copy made that was not necessarily paid for is piracy. Consumers are allowed to record at home for noncommercial purposes.

In fact, the first-sale doctrine coupled with the Sony Betamax case created an unanticipated boom for Hollywood, which now makes more revenue out of video sale rentals than they do from the box office.

Once again, we believe that the new technologies will enhance protection for copyright owners while, in fact, guaranteeing consumers' possessive rights.

One other thing to point out. Nothing in our proposal in extending the first-sale doctrine to digital would infringe upon a copyright owners right to employ self-help techniques for protecting their works.

In other words, a copyright owner can allow someone to download copy but, nevertheless, make

it impossible to forward that copy to anyone unless the original is destroyed. (Now, how would consumers react to that if that, in fact, is spelled out before you download?)

Hopefully the FTC would say, "You better make this clear. You will be able to download this but if you try to make a copy or transfer this to anybody, it will destroy your original." That can be done.

Now, we've heard about hacking and about SDMI, but the SDMI technology that was allegedly hacked was, in fact, not encryption. It was a watermark status identification technology which is certainly not the same thing as encryption or in the same context. And, in fact, SDMI has concluded that apparently two of the proposals were not successfully hacked.

So in conclusion to the 109 arguments, I would just like to say the doctrine has worked in analog. It has provided a larger distribution marketplace for content owners. It has been a tremendous boon to Hollywood. We believe it will generate the growth of new products and new revenue for copyright owners.

Now, just on Section 117, again, the HRRC's position is that 117 should be clarified to

expressly permit certain temporary and archival copying of digital works. Consumers certainly should be able to make a backup or archival copy of content lawfully acquired through digital downloading.

It will protect against the loss of files through accidental deletion, through crashes, or through viruses which, we all know and have seen, can destroy files in hard drives. Consumers also upgrade quite a bit and they ought to be able to have the right to make a copy to an upgraded hard drive or an upgraded computer.

As for temporary copies, this is something I conceptually do not understand the objection to. First of all, we do not necessarily believe that this constitutes an infringement but we really believe, because of what I've just heard, the law really needs to clarify this point. The Copyright Office, in fact, has recognized buffering in its distance education study and we can see no valid reason not to extend it.

There will be new products. For example, high definition television and the transition to HDTV, which is a primary congressional objective, in order to get the analog spectrum back so that it can be auctioned.

HDTV will, in fact, rely on buffering and

caching in order to deliver content and to provide interactive experiences. In fact, more devices that make ephemeral copies will undoubtedly come to market in the next year, including a variety of handheld devices such as portable organizers, cellular phones, and even wrist watches.

In this environment recorded digital media are in the same position as software was in the '70s and, like computer software, at least some portion of these media need to be temporarily copied into RAM in order to be performed.

Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of, again, "piracy." Ephemeral copies made in the course of viewing and lawfully gaining access to a work also have nothing to do with piracy and the law should make this clear distinction.

Thank you.

MS. PETERS: Thank you.

Ms. Horovitz.

MS. HOROVITZ: First of all, thank you for accepting my request to testify. I'm happy to be here with all of you.

I'm Pamela Horovitz. I'm President of the

National Association of Recording Merchandisers. Our 1,000 member companies are composed of the retailers and wholesalers and distributors of prerecorded music.

MS. PETERS: Could you speak up a little bit?

MS. HOROVITZ: Okay. We are a group, actually, that somehow frequently gets off the list of the stakeholders of those folks who have an interest in the outcomes of development of the digital marketplace. We are actually there every day quietly selling all of this music and video and entertainment.

Each day music retailers must balance the interest of copyright holders and consumers in the operation of their businesses. We are mindful of the fact that our businesses are also dependent on a firm protection of copyright. Every sale that a content provider loses is one we lose as well.

We are also mindful of the fact that without the consumer, music will exist as art but it doesn't exist as commerce. Our members are already eagerly embracing the Internet and e-commerce's music.

Over 80 percent of my members already have websites through which music consumers can purchase music including lawful digital downloads, authorized digital downloads, which have been made available

commercially by content providers. So we are right in the thick of all the stuff that's going on right now, how's it going to work.

Retailers really are on the front lines of public reaction to any new product and service. Already our members know that consumers have serious concerns about digital downloads of music as relates to their privacy (something we've heard about more than once today). They have concerns about download complexity (we are a long way from plug and play). And about product reliability and about product returnability (something you can do with this if it doesn't work).

Retailers have traditionally added value to the marketplace by offering consumers different combinations of selection, of convenience, of price, of ambience, of service, and information. Even if this CD is the same thing everywhere you go to buy it, all of the rest of those things are different depending on how the retailer niches themself in the marketplace.

I am here today to argue that the first-sale doctrine is critical to allowing retailers the ability to differentiate themselves in a digital marketplace and that protecting retail competition and

consumer choice does not equal encouraging piracy.

NARM members are not seeking to expand Section 109. We seek only to continue to honor the rights that retailers and consumers now enjoy with pre-recorded CDs and tapes in this newest configuration of music, the digital download.

I'm not a lawyer (but I'll guess you're hearing plenty from a lot of lawyers today). I think what I would really like to use my time with you here today pointing out really (and I think you even asked for this, Marybeth) some of the practical implications of where does this all lead, at least in the view of the retailers.

We heard some say this morning that "Section 109 is alive and well on the Internet" and that "retail concerns are speculative." I think they are wrong, so I would like to cite some examples that provide what I believe is some evidence to the contrary.

The first thing that I would like to do is to share some language from an eight-page End-User License Agreement for digital downloads. It is an agreement that is now out in the marketplace and it is being offered by a major record company. I have a copy of the full document if you would like to see the

whole thing. [See appendix.]

This company, Company X, "Grants you a limited nonexclusive, nontransferable, nonsublicensable right to use the software" (no longer music) "as such software has been delivered to you."

That means don't make your own collection of favorite tracks on a single computer. To my way of thinking, that does mean "forget upgrading your laptop and taking the music with you. Too bad if your laptop dies."

This company will let you download the content to an SDMI compliant portable device but, "You may not burn this content onto a CD, DVD, flash memory, or any other storage device." There's more. It was eight pages remember. I'm not going to read all of them.

You may not print the photographic image, the lyrics, or other nonmusic elements. Imagine Mom listening to her kid playing a downloaded piece of music and wondering about these lyrics that she can't quite understand. She is not supposed to print those lyrics out. No. 1, she's not the original person so it can't really be transferred to her.

You see where I'm going with this. She can't even print out the cover to see if it carries

the parental advisory. Neither could her kid even if he's been told or she's been told, "You can only buy stuff that doesn't carry the parental advisory."

You should, (I think, in my reading of some of this) forget about moving your music to your shore house computer for the summer because, "You may not transfer or copy this content to another computer even if both are owned by you."

In fact, in my reading, the whole definition of a family computer becomes very problematic under this license since you can't "transfer your rights to another at death, in divorce, or in bankruptcy." Even buying the kids their own computer doesn't solve the problem since they might take it to college, they might loan it to their roommate and, in case you missed the death provision, it's in there twice.

I think this morning's comment about “you can't donate your collection of music to the library” is expressly prohibited by this EULA.

I should also mention that this company "may from time to time amend, modify, or supplement this license agreement," but it's your job as the music purchaser to check onto their website regularly to find out about these revisions and they just assume

that if you don't do that, you agree to them.

By the way, this software -- and this part is in bold caps in the EULA -- is being sold "as is without warranty including but not limited to implied warranties of merchantability."

Now, you don't get to see this EULA until after you have laid down your money. And that brings me to my second example. I think everyone needs to really be aware of the language from this same company's affiliate agreement which is the agreement that all retailers have to sign if they want to sell this company's downloads.

Under the affiliate agreement Company X will "have the right to collect and use the consumer data related to sales from the affiliate site." Elsewhere we are told that is going to include your e-mail address, what you bought, and when, and how much you paid for it even though elsewhere it says Company X is going to set the price for all retailers everywhere (I guess they just want to make sure you don't change the price).

They also "reserve the right to provide to parties related to them," -- whatever that means -- "aggregate sales information." I think it's reasonable to expect that some retailers may not want

to share the identity of their customers with their suppliers. Or that consumers may want a choice in the marketplace as to how much of their identity they give up in return for being allowed to get access to music.

I think retailers may not want to share this information with competing retailers that those suppliers might happen to own an interest in. I think we can't exclude from this discussion the information that more and more record companies are selling direct online and are bypassing retail.

I think some retailers are going to want to post this EULA on the website before the customer puts his money down. This affiliate agreement is very specific about how and where you can post the information about the products they are going to let you merchandise.

Lastly, of course, maybe the retailers would like to determine what the price is themselves because maybe they would like to have storewide sales. Maybe they would like to continue to have sales on all their classical music.

Maybe they would like to run “two-for” sales. Maybe they would like to do all of the things that distinguish them in the marketplace now even in the online environment for an online consumer.

Maybe people would like to still give music as a gift even if the gift is a digital download. We are hitting the holiday season. I think that is on a lot of retailer's minds at this very moment.

Finally, I want to make one point real clear, and that is that this rapid trend toward copyright owner control of all levels of distribution and even post-sale consumer use is not limited to digitally distributed music.

Companies have already begun to try and eliminate Section 109 rights for tangible CDs as well. For example, this CD: The Writing is on the Wall by Destiny's Child. It's a must-carry CD for retailers right now. It's very hot given the group's popularity.

If you buy this CD at your local record store, it will play in any CD player and it will play in your PC, albeit with an invitation to shop directly next time at the record company's online store. Kind of like putting up a poster for your competition in your own store.

What you may never know is that the record company, Sony Music in this particular case, purports to bind you to an end-user license agreement that you

will never even see unless you go looking for it in the “readme” text file.

That EULA states that, "By using and installing this disk, you hereby agree to be bound by the terms of this agreement." And, "If you do not agree with this licensing agreement, please return the CD in its original packaging with register receipt within seven days from the time of purchase to Sony Music Entertainment." This isn't just about the digital online world. This is about CDs as well.

This EULA states that you may use it on a single computer and you may not transfer it to another person even though Section 109 says you can.

Here's what concerns us. We understand that content providers, that copyright holders, are very nervous about Napster and about widespread digital distribution leading to their demise.

But we, I think, have some equally serious concerns about the business models that are being put into play eliminating retail competition from the marketplace. It feels to us that apparently content providers aren't happy with the rights that they already have in copyright law: the right of public performance (which we totally support); the right of reproduction (which we totally support); and the right

of distribution (which we totally support).

But they are using licensing language to create and to protect a business model that is really designed to use retailers until such time as they can get to the consumers directly and then eliminate retailers from the digital equation. We just don't think that is good for anybody, particularly the consumer but not even the copyright holder really.

While we fully support protecting copyright, we think that copy right law needs to stop at the point that it simply becomes a sword designed to void Section 109 rights, reduce or protect anticompetitive conduct.

Thank you.

MS. PETERS: Thank you very much.

Mr. Mitchell.

MR. MITCHELL: Thank you. Good afternoon. I want to thank you on behalf of the VSDA for accepting our request to be here today. My name is John Mitchell and I am Counsel for Video Software Dealer's Association. I'm with the law firm of Seyfarth Shaw.

I also want to thank you for accommodating our last minute request for this switch due to Mr.

Andersen's health which we hope is just a minor problem. He is unable to exercise, I guess, his performance right due to maybe some viral technological protection measure.

VSDA, Video Software Dealer's Association, is the national trade association for the home video industry. Essentially the home video retail counterpart to NARM.

Our member companies are engaged in retailing and distribution of home video products in practically every neighborhood in the nation, these include primarily audiovisual works in the form of motion pictures as well as computer interactive games.

I would like to first begin by saying VSDA does echo NARM's concerns. We have perhaps enjoyed somewhat of a reprieve given that bandwidth and storage capacity has not permitted the same kinds of behavior to be as widespread in the movie industry as they are in the music industry. But we are concerned that we are seeing the direction this is heading and definitely do not want to see that pattern mimicked in the audiovisual work area.

But if you permit me a brief historical retrospective and a bit of a mixed metaphor, if we ignore history, we should be expected to be fooled

again and again. If we look back to the early days of the next to the last technological breakthrough in packaged home video entertainment, the venerable VCR, we may recall that then we were warned by some extravagant hyperbole that, "The VCR is to the American film producer and the American public what the Boston Strangler is to the woman at home alone."

Video retailers back then were seen as opportunists and perhaps even as copyright thieves and not as entrepreneurs. They were not seen as entrepreneurs who based their concept of bringing economical motion picture entertainment into the home on a cardinal American legal concept that perpetual restrictions on alienability do not fit in the American scheme.

It bears repeating that these entrepreneurs, supported by an important American legal tradition, built the most robust economic distribution system for motion pictures ever. It's one which has greatly enriched the rights holders and enriched consumers with access to these creative works.

We have heard several objections already to the expansion of Section 109 or the first-sale rights or the creation of new first-sale rights. Our

position is really to start with the reality we are looking at. We object to the contraction of Section 109 and the loss of existing first-sale rights.

Let me turn first to points we have in common. In today's controversies we can start with points in which the right holders actually agree with the retailers and we with them. I think this is a fairly uniform agreement.

First, we agree that Section 109 provides rights to purchasers only with respect to "copies lawfully made under the copyright act." Second, we agree that these rights apply to tangible copies in the sense that they apply to fixations which are, in fact, palpable. Third, they apply only when the transferrer does not retain a copy unless it is lawful for the transferrer to do so.

We also agree that, "A copy in a digital format is entitled to the rights and privileges in Section 109 just like any other physical copy." That is quoting from one of the content providers.

And it bears emphasis here that the House report on Section 109, actually Section 27 of the 1909 Act, the House Committee on Patents opined that, "It would be most unwise to permit the copyright proprietor to exercise any control whatever over the

article after the proprietor has made the first sale."

We agree that the first-sale doctrine was established in part to prevent the use of the Copyright Act as a price-fixing tool. I would like to spend a moment on that point because it also relates to another well-established American legal tradition embodied in the first-sale doctrine which relates to antitrust law.

It would be illegal for suppliers, the copyright owners, to require that all retailers have the same price. It would also be illegal to require them to have the same uniform noncompetitive return policies, the same warranties, the same privacy policies, other terms and conditions of sale and level of customer service.

We have to begin by recognizing that retailers are expected to and ought to compete on these terms as well as on price. Thus, it is unlawful for a supplier to add license restrictions which force retailers to offer digitally downloaded copies at a fixed price even when that fixed price is the same at which the supplier may offer the copy directly to consumers.

There was testimony this morning from the Business Software Alliance indicating that they would

like to give authors and copyright owners the right to choose the best distribution model of the best business model for distribution.

But it bears emphasis that there is no exclusive right of selecting your preferred business model under Section 106. The very purpose, in fact, of Section 109 is to see to it that they never have the power to control redistribution of lawfully made copies.

Finally, we do not contend that Section 109 rights may be used to increase the number of lawfully made copies beyond those for which the rights holders have received compensation.

Particularly with respect to audiovisual works we do not contend that the first-sale doctrine creates a right to make a single additional nontemporary copy even if some may be permitted by fair-use doctrines or other legal provisions.

On the flip side we contend that the reproduction right must not be used to destroy the first-sale rights to rent and sell copies lawfully made even if the digital distribution process involves some element of copying.

There's been a lot of use of the word “transmission” of a copy. It's interesting, I think,

to note that the Copyright Act doesn't really give a helpful definition of the word “transmit” in this context.

Perhaps the real focal point isn't whether someone is transmitting a work because there is not really a right of transmission under Section 106 either. The question may be whether the transmission is pursuant to a public performance or whether the transmission is pursuant to a reproduction.

In effect, in the digital downloading process all we really have is copyright owners who instead of sending the order, perhaps digitally transmitted to the factory to press thousands of copies, or sending the order to a kiosk in a record store, have permitted a process in which you send the order to make a single copy on a home PC using essentially the consumer's manufacturing facility, the consumer's own quality control systems.

If the copy doesn't work, perhaps it's unclear who deals with the quality of that particular reproduction.

Where we emphatically disagree with rights holders is concerning their growing use and elevation of licenses, especially end-user license agreements. It is, of course, appropriate for license holders to

license rights that they have, licenses that are provided under copyright.

We don't have any disagreement with the licensing of a right to make a copy, a licensing of the reproduction right. We don't have any concern with granting the right to distribute and they have done that for years.

We also have no concerns with the right to license a public performance. Once a copy is lawfully owned by another, we contend that there is no intellectual or other property right in those copies in the copyright owner.

A copy is personal property, not intellectual property. The copyright act contains no "use" right in Section 106 and there is no basis upon which a copyright owner can license what they don't have -- a license to control the usage or grant certain usage rights which they essentially have not had any right over to begin with.

It essentially really becomes a situation of a copyright owner granting one right they have, not in exchange for a cash payment, but perhaps in exchange for a cash payment and a relinquishment or waiver of rights that the consumer would normally have under law. "I will let you have the reproduction. I

will let you keep your copy provided that you agree to waive your Section 109 or even fair-use rights."

Retailers are particularly concerned about the rights holder's reliance in their comments on the case of Adobe Systems v. One-Stop Micro. The court in Adobe was simply wrong in holding, in essence, that an end-user license agreement can eliminate the first-sale rights and that every owner in the chain of distribution from the copyright owner to the ultimate consumer also loses their first-sale rights simply because the supplier created an end-user license agreement like those we've seen here and affixed it to that particular -- either digital download or physical -- copy.

The Business Software Alliance has indicated, I think quite tellingly, that they claim not to sell software but only to license the software. If that is the case, then logically if they haven't sold it and they still own it, the first-sale doctrine never applies, which begs the question why are they here?

Why they are here is because I think they do recognize that, in fact, they do sell it. They sell the tangible medium. They have not sold their intellectual property rights, and perhaps there are

some licensing issues involved there, particularly since business software often involves changing that very copyrighted work in the process of using that software.

There is room to license what kinds of creative uses one might make that would actually change the software. But the simple reason that they have sold the software is they have sold the tangible medium.

It is a single payment. It's unlimited in terms of time. There is no right for them to ask for the return of the disk on which it was distributed and is essentially a consumer good.

It is a sale, and the copyright owner cannot simply convert the sale of a tangible medium that contains a copy, or that is a copy, because of the contents, convert it into a license simply by saying that it is so, particularly not in a nonnegotiable, "You're stuck with it, we hid it somewhere where you won't see it until it's too late to do anything about it."

The implication from rights holders' reliance on Adobe here is the assertion that they may impose upon retailers licensing agreements which restrict or prohibit the rental of audiovisual works

or limit the use to a single viewing, or perhaps even require registration at the supplier's website in order to obtain the authorization to engage in subsequent use.

Section 109 makes it patently clear that rental of a lawfully owned copy of an audiovisual work is lawful even if it is completely against the will of the copyright owner.

VSDA supported litigation to stop the circumvention of CSS copy protection systems. We support the use of laws and technology to prevent unlawful copying, but we do not support the use of technology to prevent the "unauthorized but perfectly lawful use."

Where the use is one of right, as in the case of Section 109, a right of the owner, not an exception or a defense to an infringement action, we vehemently oppose the use of technology to circumvent that right.

VSDA does not assert that the DMCA must be reopened or revised so long as the basis for a recommendation against change is that the first-sale doctrine and Section 109 apply with full force to copies lawfully made through digital distribution.

If, however, copyright owners insist upon

using their congressionally granted copyright monopolies as leverage to restrict competition among distributors and retailers, to avoid Section 109, and to capture the identities of all the owners or users of lawfully made copies, VSDA will be front and center in support of any legislation necessary to prevent those kinds of abuses.

Thank you very much.

MS. PETERS: Thank you.

I'll start the questioning at the other end. Marla, do you have a question?

MS. POOR: No.

MS. PETERS: Okay. How about Jesse. While you're thinking of a question, Marvin, my understanding of what you're adding to the issue of the reproduction right is the performance right, that if I basically have "purchased a digital download" and somehow this Boucher legislation were enacted and I were going to basically forward and destroy, it's not just the reproduction right that's implicated but because I'm basically transmitting that work to a member of the public, it's also the public performance right.

MR. BERENSON: Our contention is that

download or not, if there's a transmission, the public performance right is implicated along with other rights.

It would be my concern that if one were to somehow interpret Section 109, or basically change Section 109, to eliminate this right with respect to digital transmissions, then somehow the public performing right would be implicated by that.

We maintain that it should not be but we don't want any interpretation in any way, shape, or form that it would be. That is basically our position.

To answer your question directly, basically “yes.” Using the example that John gave before, if you buy that CD, in whatever form it takes, you say you have the right to do whatever you want with it. Well, not really. You cannot take that CD, or whatever form it takes, and perform it in a restaurant. That is a different right that is implicated. You don't get all the rights with the purchase. Okay?

Again, all I'm saying is from BMI's perspective of this is we don't want any interpretation of Section 109 to say if there is any change, and we don't think there should be a change,

that the public performing right would be implicated in such a change. That's all.

Again, we share basically the comments of the copyright owners who say there is no need for a change right now. I think it would be harmful. I think there's a big difference when one is taking a single copy, a tangible copy, and saying, "Susan, I'm going to give this as a gift to you." Or, "Susan, you want to buy this?" Someone sitting at a computer clicks and one million or a thousand copies go zipping right out. I mean, there's a big distinction that is made between e-commerce and hard copies.

MS. PETERS: But back it up. Take the Boucher bill and basically you are going to have to erase. Let's assume that no matter what there is technology that basically says only one goes forward and as it goes forward, it wipes out what's on your computer.

You are still arguing, though, that in doing this the performance right is implicated. In other words, it's diminished in some way.

MR. BERENSON: Yes, if that would be permitted. In other words, if that transmission would be exempt from performing rights, yes, it certainly

would have an adverse effect.

MR. CARSON: Explain to us how that transmission constitutes a public performance.

MR. BERENSON: Okay. This is step by step. Okay? I'll try. When you look at the copyright law itself, you have the definition of what a “performance” is: in other words, a performance to the public, not the normal circle of family and friends.

Then you have a “transmission.” When you look at the definition of transmit, basically the Copyright Act provides that to transmit a performance is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

Once you have this transmission, that includes a public performance, if it is to the public, if it is not truly a private transmission -- such as if I send Susan an e-mail, that's a private transmission. If I could give it to anyone, if I could sell it, there's a commercial aspect to it and it becomes public in and of itself.

I'll just take it one step further, if I may, with respect to the WIPO copyright treaty. The mere making it available constitutes a communication

to the public. When the United States basically altered or modified its copyright law so it could adhere to the WIPO copyright treaty, we said our laws are in conformity.

Well, the communication to the public right equals, in our mind, a public performance right. The mere making it available to someone constitutes a public performance – a communication to the public -- whether it's pull technology or push technology. If it's there, the WCT says it is made available and that equals communication to the public. I don't know if I've helped you in this or not.

MR. CARSON: So I may download the file from some website but I may never actually play it and hear it. That's still a public performance?

MR. BERENSON: Yes.

MR. CARSON: You realize how intuitively that seems to be absolutely wrong?

MR. BERENSON: You want to know something? It may be intuitively wrong to someone but there's case law on it. You have a transmission as an example. There's a public performance when, let's assume, a network, or let's say ABC, transmits its signal up to a satellite, down to a station. That station then takes that signal and transmits it out

locally. No question, two separate public performances. Although effectively it's one, they are two separate public performances: one to the station and a second to the audience.

Additionally there is nothing anywhere to require that the transmission be heard. In theory if someone never listens to ABC, it is still a public performance. There's a public performance that takes place.

You don't have to hear it. It could be in compressed time, real time. It doesn't make a difference. It may be intuitive in your mind to say, "Hey, something's not right there."

Realistically there's a public performance. What the value is, that's a separate issue. We're not discussing value here. We are discussing that there is a public performance.

MS. PETERS: Why don't I start it. I was just going to ask you a question, Ms. Horovitz. Do you sell digital downloads? Do you make digital downloads available to your customers?

MS. HOROVITZ: The retailers, yes, are actively engaged with record companies who are making their content available as a digital download.

MS. PETERS: Okay. When you are doing

that and you are making it available, it's not of perfect quality if it's not acceptable. You mentioned the word "returns." How does that play out?

MS. HOROVITZ: We don't know yet and it's a real concern that that language in the EULA about no warrantability. We have real concerns that you as a customer are going to go back to me as the retailer and say, "Hey, I tried to download this thing." Believe me, we're spending a lot of time. Everybody is.

I mean, I don't want to characterize the record companies as not being concerned about this or the DRM companies or any of them yet because everybody is spending an enormous amount of time and energy in trying to make this stuff plug and play and work well and seamlessly every single time for the consumer, but it doesn't yet.

The retailers have a lot of concern that you think you've bought it from me. You're going to come back to me and say it didn't work. I need the flexibility. I need to be able to make it right for you.

MS. PETERS: But nobody to date has had a problem so they haven't come.

MS. HOROVITZ: Oh, that's not correct. There's a lot of e-mails flying back and forth online

about, "I can't get this to work." I have a committee of people at the stores whose companies are, in fact, offering this stuff. I would submit to you that a hefty percentage of the actual purchases going on right now are inside the industry trying to see if, in fact, we can all get them to work on our different computers.

MS. PETERS: I'll ask the record company something similar later.

Jesse.

MR. FEDER: Mr. Klein, you indicated concern that the copyright industries are moving towards a pay-per-play world. Clearly that is a new business model that some content companies are trying out. If there is acceptance of this in the marketplace, what's the problem?

MR. KLEIN: Well, the problem is how it's accomplished, I think. As Pamela was indicating, if you have to buy this every time you have lost the file in your computer or a tape, whatever, you have a right to make those copies. I mean, in your home. That's what Betamax said, for noncommercial purposes.

MS. PETERS: For time-shifting purposes.

MR. FEDER: For time-shifting purposes.

MR. KLEIN: Well, time-shifting was a noncommercial purpose. It wasn't the only noncommercial purpose that the court pointed to. It said any significant non-infringing use for noncommercial purposes, one of which was time shifting.

MR. FEDER: Does it identify any others?

MR. KLEIN: It said you can't identify them now because we don't know where the technology is going. If you look at the court opinion, it does anticipate there may be others that we don't know now. Remember, that case is 15 years old.

MR. FEDER: In the intervening 15 years have the courts found any other instance other than time shifting?

MR. KLEIN: I can't answer that. I don't know. I don't recall any. I'm not saying there aren't any. I just off the top of my head have not followed it up recently. I should have probably been able to answer that question but I'm a recovering lawyer in the “12-step program” so I don't keep up with it.

MR. MITCHELL: If I could, I would like to take a stab at that particular angle. Maybe by a sort of segue into it, Mr. Berenson had been making the distinction between a private one-on-one communication as not being a public performance, if I understand that correctly.

MR. BERENSON: I didn't go that far.

MR. MITCHELL: Okay.

MR. BERENSON: I was just using the example that there are private performances. Okay? I didn't define exactly what a private performance is. Again, you take the normal circle of family and friends. If someone is distributing commercial copies, that's not going to be normal circle of family and friends.

I mean, again, if you're going to take that one copy that everyone is pointing there and you want to make a gift of it, you can make a gift of that one. You can't make 100 gifts of that one.

MR. MITCHELL: Not according to EULA.

MR. BERENSON: No, but you can't make 100 gifts of that even in the physical world. You can only give that one to someone. You can't press a button and, poof, there's 100 of them. You're going

to have to go buy them to give as gifts.

MR. MITCHELL: Where I was going with that is that if there are circumstances in which the transmission from one person to one person is not a public performance, if it is simply that one transmission from one person to one person, if that's the case, then I think there's a question as to whether there is a Section 106 right and a private performance if that's where we're heading. I'm not sure.

MR. BERENSON: I don't think I'm heading there. Let me say, I know I'm not heading there.

MR. MITCHELL: Coming back to the question of interesting cases, I don't have the site but we had it in our written comments, a case of a court recognizing that actually using a chemical process to lift an image from one medium and place it on another tangible medium was not an infringement of the reproduction right.

Leaving aside where we stand on the issue here, I think most lawyers would agree that there is probably some judge out there somewhere who would take that and say isn't a forward and delete actually is accomplished simultaneously not by a system of trust

me, I did it, but actually employing a forward and delete technology that does this automatically.

It's not a very big leap to say if you can use a chemical process to lift a copyrighted image and put it on something else, that you can use a technological method to essentially lift the bits in a virtual sense and place them on another tangible medium.

From the retailer's standpoint, the forward and delete concept, while we haven't taken a real position on the Boucher approach, looking at it from a pure efficiency standpoint, if we think of a local library lending or a rental transaction, perhaps there's a concern on the one hand that we heard this morning that one library can essentially have the one virtual copy and millions of people access that.

But if in reality we have one library that may have several copies that are virtual copies and only one real one but there's a check in and check out type of process so that no more than the ones they paid for are loaned out in the virtual world or checked back in.

Or in the situation of video rental where a

video retailer could pay for 20 copies of that video

and move those around with a rental transaction as they do today but, in effect, they are checking in and checking out or in a strictly download forward and delete type situation.

Time Warner, for example, indicated that if the system were perfected, they might consider this. It makes logical business sense that if you were going to allow a retailer to download copies that they can implement a forward and delete technology with, that instead of having to download 100 copies for your store, you download one and have a counter in which you've paid for 100 countdowns or however that situation is resolved.

The beauty of it is we gain some efficiency, less clutter in hard drives, a lot more efficient distribution system. Again, that is a business model aspect. One of the concerns we come back to, though, when we talk about business models, when the one business model is selected at the copyright monopoly level, there is no real opportunity for the market to figure this out.

I think it was Mr. Adler this morning who was indicating the desire to have numerous business models out there competing. If we take the music or video industries, and we have five, four, six,

depending on what day of the week it is, I guess, companies that control about 85 percent or more of the market, yet we have thousands of retailers among NARM and VSDA members controlling about 85 percent or more of their respective markets, a lot more opportunity for more business models to actually get out there and compete.

The lease model that was given is, What's wrong with a lease? We do that every time." The lease is typically from the retailer, the auto sales person, who is using that as a creative way of competing with the manufacturer's model of selling and query how much would you pay for a new car if you were prohibited from reselling it.

If there is no resell value in that car, there are probably going to be fewer new automobiles made and they are going to be a lot cheaper. Again, it's not a copyright issue but to use that model, as long as there's choice, NARM and VSDA members -- I should confess I'm counsel for NARM so I'm under that water a little bit -- we don't have too much of a problem with pay for a play if that is a real option where the person can buy the CD or if they want a limited playtime that might be an option at a lower price. When that is selected by a copyright owner as

the only way, we see that as a direct circumvention of Section 109 rights.

MS. PETERS: Susan, you wanted to jump in?

MR. KLEIN: I have been informed and if, in fact, you look at the 9th Circuit's decision in the Rio MP3 case, that held place shifting was a noninfringing use, not just time shifting. That was fairly recent.

MS. PETERS: That's right.

MR. KLEIN: The other thing is I just want to get back to Mr. Berenson's comment. When you rent a video and you watch it, does that not somehow implicate a performance right? No.

MR. BERENSON: Not at all.

MR. CARSON: Public performance.

MR. KLEIN: Public performance.

MS. MANN: May I? Because I think there are a number of things that have come up here that I think I would like to respond to. I want to make clear, though, for the benefit of the panel and for any press that are in the room that neither Marvin nor I represent record companies. People less familiar with the industry may not recognize that.

There have been a number of issues raised that are grievances between retailers and recording companies. A lot of stuff has been put out there. In my view, virtually none of it has anything to do with Section 109.

For example, the example that Mr. Mitchell gave of an opportunity that might arise for a retailer to download one copy of a work under license to distribute 100 copies is a business relationship that you can conceive of happening but that doesn't have anything to do with the first-sale doctrine as such.

It is exactly the kind of thing that the industry is going to struggle with as we try to find new and innovative ways to make technology work for commercial users of our works which is what some NARM and VSDA members are becoming as we deal with downloads and end-users of our works.

I would also like to kind of focus the discussion as our esteemed colleague, Professor Southwick, always tells me when the discussion goes awry.

Let's take a look at the statute. In this case, let's not look at the statue but let's look at the text of the Boucher amendment. We have been talking about the Boucher amendment today as though

this forward-and-delete technology was part of the proposal. It is not.

The Boucher amendment was not enacted by Congress. I think everyone will agree with me -- however you want to say it, it was defeated or it wasn't taken up -- it was not approved, we can agree that there's a world of difference between a bill introduced and one enacted.

This was a bill that was introduced. It got some airing. It was not enacted. The language of the Boucher amendment as it was described at the time of that venting was defended on the grounds that we could use the honor system to do this.

I will say there were many members of Congress, in fact most, who said that doesn't really pass the red face test. Now we're coming in here and we're hearing about forward-and-delete technologies.

I'll say again you guys on the retail end, you think you've got problems with people who can't effectuate downloads. What are your customers going to do when they forward something to Grandma and the copy on their hard drive disappears?

We don't see that the -- I mean, look at Napster. People want to share. People want to propagate. That's the reality that we've got to deal

with in the market place. That's the e-commerce thing.

I asked around and consumers are not asking for forward and delete. I think what that does is get us the excuse for the Boucher language. I'll say, okay, let's talk about putting forward/delete in here and having the folks who want it implemented pay for it.

That's another issue. How much does this forward and delete technology cost? When we as music publishers, and these are the guys I represent, our royalty on a download is a little more than seven cents.

We went to folks and we said, "How do we protect this stuff if we are going to do it ourselves. How would we do it?" They came to us with technologies. Not forward and delete because we weren't interested in that. We were looking at something that would inhibit copying. An access trigger that would also have a copy protection. We were told it would cost 25 cents a transaction.

Well, what economic sense does that make when your payment is seven cents? The mandate here is to look at electronic commerce and the interplay with new technologies.

Let's not just say that this is good as a matter of law and good for electronic commerce if we don't have a clue really what it is we're talking about. That's before you get to the issues of whether this technology would work or not.

You know, Gary, we're not talking about piracy. I didn't use the word piracy once in my statement. We're talking about electronic commerce. I don't think your guys are pirates. We're not talking about piracy. We really want to make this work. We are struggling with making this work. I guess I've ranted enough.

MR. MITCHELL: If I could just jump in here. In terms of clarifying the retailer position, retailers, I think, are affected as much, and many retailers would say more than the copyright owners when there is piracy. Any part of copy is a potential lost sale to the retailer.

It was curious that NMPA had indicated that it was impossible to do business with entities who give music away free. My note here, I'll indicate attorney/client communication, disclosure is like record companies who give away thousands of --

MS. MANN: It's their property.

MR. MITCHELL: Royalty free, I might add.

MS. HOROVITZ: I think John is just making the point that retailers live with a lot of free music in the environment around them. That's all.

MR. MITCHELL: That's the point.

MS. MANN: We don't always get payment on free goods either. That's something we deal with. But the point is that is part of our own promotion in our industry that we as rights owners control.

That's not Napster where somebody else is creating a "business model" that derives -- let's hope from my lips to God's ears -- that we find a way to make that work because consumers want it.

You know, I hear you but we can't conflate all this into a discussion of Section 109 and first sale. Some of these issues are just out there.

MR. MITCHELL: I do want to clarify that retailers or not for that reason calling for a "trust me. I really did delete it when I forwarded it" type of permission which we believe because of the difficulty on policing, that really makes it a nonstarter, although as has been noted --

MS. PETERS: Stephen King found that out.

MR. MITCHELL: Yeah. It's the kind of thing that can already be done in terms of copying. Who is out there really policing the copies that you

may make.

I do think one of the things we retailers do want to make clear is that if forward and delete technology is implemented, even if it's by permission of whoever has to give those permissions, that copy then becomes a lawfully made copy.

First-sale doctrine rights still apply to that copy and if they downloaded it onto their CD and want to sell it on the street corner, they have a perfect right to do that. That is, I guess, essentially the point we want to clarify.

MS. PETERS: Marvin and then I'll let Jeff ask a question.

MR. BERENSON: I just wanted to call attention to everyone in the room. I don't know if anyone has seen Dilbert.

MS. PETERS: Actually, I got it from BMI.

MR. BERENSON: I have a funny feeling. Okay. Really, I think it's pertinent to our discussion here. Three employees are sitting around the lunch room and one says, "All music on the Internet should be free. Artists could make money from digital tips." Next cell. Someone walks in. "Great idea. We'll do the same thing here with the engineers." Next cell. "Have you ever noticed that my ideas are

only brilliant when applied to other people?"

This is what it's all about. I mean, give it away and let everyone -- in any event, I just wanted to call it to your attention. That's all. I'm sorry you already knew about it.

MS. PETERS: This morning when I came in.

MS. MANN: If Jeff doesn't have a question, I have one more thing on my rant list and it will be very, very brief.

MR. JOYNER: You answered my question during your --

MS. MANN: Just a little point.

MS. PETERS: Go right ahead, Susan.

MS. MANN: I'll be very brief. Just back to my Professor Southwick example about reading the statute. We all need to take a look at Section 109 because one thing that has not been mentioned, to my personal astonishment, in this entire discussion is that Congress has looked in essence at “digital first-sale doctrine” three times. Three times.

Each time it has said, "Digital is different and we've got to look at putting some brakes on the first-sale doctrine." It did so in restricting the commercial rental of computer programs once, a permanent feature of the statute, and in sound

recordings and music twice.

The features of the debate each time were the particular vulnerabilities of these works to abuse in the marketplace if the first-sale doctrine were allowed to apply in force.

Maybe some folks should be a little bit circumspect about what they ask for. I mean, Congress was very, very concerned with the advent of the compact disk. This is when sound recording rental rights came in. That provision was sunsetted. Congress decided to remove the sunset provision because it was convinced that rental of digital copies would be a persistent problem.

MR. MITCHELL: I feel compelled to respond. I'm sorry, Susan. You say things that are stimulating. Retailers are very much involved in both of those decisions by Congress. Very closely affected.

On the sound recording end, I think it's really important to note here that the initial exception had nothing to do with digital rights. We were talking about cheap old cassette tape players. We wanted to prevent people from renting an LP or maybe another cassette to make a copy. That was a concern there.

I think it's critical to note here if we're going to talk about digital, it has nothing against digital per se. With the software there was a clear distinction. Kids can still rent Nintendo games and other cartridges and things where the possibilities of really -- the idea that you are going to rent a $500 WordPerfect program or something for a night and copy it and return it is simply not really existent in the video game department.

Can copies be made illegally? Yes, they can, but Congress made the decision there that little bit of leakage wasn't enough to put the skids on the broader distribution that we now have through our sell-through stores as well as through video rental stores.

The rental right is alive and well in all kinds of digital media. And in other countries even where the copyright owner has that rental right, they have actually allowed retailers to rent CDs, music CDs without really any adverse affect. It's not really so much a digital issue as to how do we make sure that we simply don't allow the illegal copies to proliferate.

MS. PETERS: Okay. We need to move on. I want to thank this panel. It was very lively. You woke us all up. If we could bring up the next panel.

Thank you very much.

MR. MITCHELL: May I ask that the two EULA agreements you referenced be entered into the record.

MS. PETERS: Let's start with our fourth panel. We have Professor Peter Jaszi representing the Digital Future Coalition. We have Seth Greenstein representing the Digital Media Association.

We have Steve Metalitz representing a wider range of copyright owners; American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America, many of whom are also appearing on their own behalf.

We have Dan Duncan with the Digital Commerce Coalition and Carol Kunze with Red Hat, Inc.

Let's start with you, Professor Jaszi.

PROFESSOR JASZI: Thank you. Thank you very much.

As you mentioned, I'm testifying today on behalf of the Digital Future Coalition which consist of 42 national organizations representing a wide range of for-profit and nonprofit entities.

Our constituents include educators,

telecommunication industries, libraries, artists, software and hardware producers, archivists, scientists. DFC constituent organizations represent both owners and users of copyrighted materials.

Thus, the DFC is strongly committed to the preservation and modernization in the digital environment of the limitations and exceptions that have traditionally been part of the fabric of the United States copyright law.

It's our common conviction that a balanced copyright system is essential to secure the public benefits of both prosperous information commerce on the one hand and a robust shared culture on the other.

In particular, from its inception in 1995 the DFC has advocated the updating of the so-called first-sale doctrine as part of any comprehensive efforts to bring copyright into the new era of networks digital communications.

In the 105th Congress the DFC strongly supported HR 3048 introduced by Congressman Rick Boucher to implement the WIPO treaties. As I know you have been discussing it already, HR 3048 would have applied first sale, and I quote, "Where the owner of a particular copy or phonorecord in a digital format lawfully made under this title performs, displays, or

distributes the work by means of transmission to a single recipient if that person erases or destroys his or her copy or phonorecord at substantially the same time."

This proposal, like the underlying issue addresses, remains highly relevant today. First sale is a venerable doctrine that has long played an important role in balancing the private monopoly interest in information with the public interest in the circulation of knowledge.

Historically the first-sale doctrine has fostered a wide range of public benefits from great research libraries to secondhand book stores to neighborhood video outlets.

More broadly still the doctrine has been an engine of social and cultural discourse permitting significant text to be passed from hand to hand within existing or developing reading communities.

Today at the beginning of the digital era the cultural work of the first-sale privilege is by no means complete. Important as private noncommercial information sharing has been in the analog information environment, it has the potential to become an even more powerful force for progress in years to come.

In this respect, as in others, we should

strive to harness the capabilities of the new technology rather than to deny them. If we wish to promote public respect for copyright law's restrictions on piratical and other wrongful reproduction of protected works, we should take care to avoid over extending that law's reach.

Nothing breeds disrespect for law more surely than prohibitions that unnecessarily penalize information practices in which consumers routinely and innocently engage.

The amendment to Section 109 proposed in HR 3048 was designed to accomplish this result, that of updating the first-sale doctrine, without compromising the control over distribution of copyrighted works that rights holders traditionally have enjoyed and should continue to enjoy.

Specifically, we note that the proposal would apply only where there has been an initial distribution authorized by the copyright owner. Thus, it would provide no shelter to those who traffic in unauthorized digital copies.

It would apply only where the rights holder has chosen to make a distribution of copies or phonorecords rather than to make a work available exclusively by means of performance or display.

Thus, proprietors wishing to make material accessible to consumers over the Internet while retaining maximum control over it could achieve that end by employing, for example, streaming technology.

Finally, it would apply only if the person invoking the privilege deletes the copy of the work from the memory of his or her computer system. Thus, the proposal would not immunize individuals making use of various peer-to-peer sharing technologies from whatever liability they might otherwise incur.

Nor would the proposed amendment create significant new enforcement problems for copyright owners, this being an objection that was repeatedly voiced during the deliberations that led up to the Digital Millennium Copyright Act.

Detecting unauthorized transmissions of copyrighted works is an inevitable and necessary first step in any enforcement effort involving the Internet and such detection would be no more difficult if some of those transmissions were, in fact, potentially privileged by virtue of an amended Section 109.

If copyright owners object to being required to show the absence of first sale in connection with proving a claim for Internet based infringement, the burden of demonstrating that the

copy previously acquired by the person making the transmission was, in fact, erased or destroyed might fairly be assigned to whoever is claiming the benefit of the privilege.

Now, the legislative proposal just outlined aims to clarify the applicability of the first-sale privilege to digital transmissions. In addition, however, the DMCA itself as enacted puts at risk the traditional first-sale privilege as it applies to the redistribution of physical copies and phonorecords.

In the analog environment, first sale has flourished because transferred copies have been as accessible to the person receiving them as they were to the person passing them along. Now first sale is threatened by copyright owner's use of the technological measures which new Section 1201 provides legal and legal sanction and support for.

Thus, for example, the copyright industries appear committed to the implementation of second level access controls. That is, technological measures that control not only how a consumer first acquires a copy of the digital file but also what subsequent uses he or she may make of it and on what terms.

If a simple password system or encryption device were used to frustrate the exercise of the first-sale privilege by consumers, any attempt to override that technological measure could be severely penalized under the DMCA.

If the potential threat that technological measures posed to first sale is as great as the DFC believes, we would advocate at a minimum an amendment to Title 17 stating that no relief shall be available under Chapter 12 in connection with the subsequent use of a particular copy or phonorecord that has been lawfully sold or otherwise disposed of pursuant to Section 109(a) hereof.

That would make clear that the general policy of Section 1201(c), which preserves rights, remedies, limitations, and defenses to copyright infringement, applies with full force to first sale.

In the same connection we note that the Section 117 privileges of purchasers of copies of software programs, although formerly preserved under the DMCA, are equally at risk from the use of technological protection measures.

The software consumer's rights to adapt purchase programs and prepare archival copies of them were deemed essential in 1980 when what amounted to

the final compromise of the 1976 Copyright Act was adopted at the suggestion of the CONTU commission.

Current software industry practice suggest that at least some vendors will take advantage of new technologies and the legal support that the DMC affords them to limit the effective scope of Section 117.

In addition, recent case law may have deprived the Section 117 exemptions of much of their practical force. Recent controversial court decisions involving so-called RAM copying suggest the use of computer programs by purchasers may now be legally constrained in ways that Congress did not anticipate in 1980.

The DFC believes that the current study should consider ways to restore the vitality of the Section 117 exemptions in light of these subsequent developments.

One such means would be to adopt language contained in both S 1146 and HR 3048 as introduced in the 105th Congress stating that it's not an infringement to make a copy of a work in a digital format if such copying is incidental to the operation of a device in the course of the use of the work otherwise lawful under this title.

Finally, we are concerned about the use of terms incorporated in so-called shrink wrap and click-thru licenses to override consumer privileges codified in the Copyright Act such as the Section 109 first-sale doctrine or the Section 117 adaptation and archiving rights.

The report on this study forwarded to Congress pursuant to Section 104 of the DMCA should address additional measures that may be necessary to update first sale, to make existing and updated first-sale principles meaningful, and to preserve the Section 117 exemptions.

Likewise, we hope that the report will recommend new legislation, perhaps in the form of amendments to Section 301 of Title 17 that would provide a clear statement as to the supremacy of federal law providing for consumer privileges under copyright over state contract rules which might be employed to enforce overriding terms and shrink wrap and click-thru licenses.

The DFC strongly believes that the issues to be addressed in this study are critical ones to the future of U.S. copyright law. The Copyright Office and NTIA have a rare opportunity to shape the development of intellectual property in the new

information environment. The members of the DFC look forward to benefitting from your leadership.

MS. PETERS: Okay. Thank you.

MR. GREENSTEIN: My name is Seth Greenstein and on behalf of the more than 70 members of the Digital Media Association, or DiMA, I would like to thank you for the privilege of testifying in support of adapting existing copyright laws and principles to accommodate the needs of e-commerce and digital media.

DiMA is a trade association that advocates the interests of companies that build new technologies and business models for webcasting and marketing audio and audiovisual content over the Internet. Our members include prominent Internet music and video retailers, webcasters, and developers of Internet media delivery technology.

Among our core principles, we support reasonable compensation to the creators for their work, but we also support fairness to consumers.

Another of our core principles is that we like to see the law applied in a way that is technology neutral and media neutral. In other words, looking more at the idea of the law, and how it should be applied to the digital context equally with the

current expressions of the law that have been enacted with respect to the physical world.

Someone mischaracterized DiMA's goal in this proceeding as being the creation of broad new rights for online companies but, in fact, the opposite is true. What we seek is to preserve and extend historical doctrines that apply to physical media also to digitally-delivered media.

Failing to evolve these existing doctrines into the digital environment would, in fact, unfairly expand the rights of copyright owners beyond the borders of copyright that have been recognized for more than a century.

What DiMA is seeking here was expressly contemplated by the December 1996 WIPO treaties. They explicitly state that it is appropriate to extend and expand into the digital world the existing exemptions and limitations in copyright law.

In the Digital Millennium Copyright Act Congress enacted major new protections for copyright owners in the digital environment, but by taking care of copyright owners they did only half the job. Now it's time for Congress to extend into the digital world the existing copyright law protections for the benefit of copyright users and consumers.

We first made these points in a June 1998 hearing on the DMCA before the House Commerce Subcommittee on Telecommunications, Trade, and Consumer Protection.

We, therefore, were grateful to Congress for mandating the Section 104 study and for appointing as co-equal authors of the study both the Copyright Office and the NTIA, the agencies that are devoted to preserving copyright law and promoting electronic commerce.

Our comments and reply comments explored these issues at great length, specifically the issues of first sale, temporary buffer copying, and archival copying for digitally delivered media. What I would like to do here is to explode some of the myths that have been spun by commenters who contend that no change to the law is appropriate or necessary.

First, the first-sale statute should permit the transfer of possession or ownership via digital transmission of media that have lawfully been acquired by digital transmission.

This common sense result is clearly in keeping with the first-sale doctrine itself whose purpose, as Register Peters reminded us this morning, is in part to prevent copyright owners from

restricting alienation or transfer of copyrighted works for which the copyright owners have once been compensated.

Some commenters appear to contend that consumers who lawfully acquire electronic books or music via digital downloading should not have a first-sale privilege. This, in my view, constitutes a radical expansion of copyright principles.

When I buy a book or CD currently if I no longer want it or need it, I can sell it or give it away without any further interference by the copyright owner. For electronic commerce to succeed, consumers require and deserve at least the same value and flexibility that they have come to expect when they have purchased physical media.

As a matter of economic and public policy the first-sale doctrine should continue to exist regardless of whether I acquire that book or CD in a physical form or I download it as bytes to my hard drive.

Some commenters object that implementation of first sale for digitally-delivered media necessarily implies that for some period of time more than one copy or phonorecord will be in existence.

This argument really begs the question,

doesn't it? The issue is not whether the first-sale statute as it is written today literally permits the making of a second copy in order to facilitate the transfer, loan, or resale.

The issue is whether the law should adapt to accommodate the doctrine to apply to digitally-delivered media. Unless the law evolves to allow some copying in furtherance of first sale, consumers who no longer want media that they have acquired would have no choice. The choice that is left to them is basically that they would have to sell their hard drives in order to sell the works themselves. It's a ridiculous result.

Without making a copy there is no way to transfer ownership of a copy they have lawfully acquired. If you want to copy it from your hard drive onto a CD or some other media and then give it away or resell it, well, you've made a copy. The reproduction right is implied.

If you want to transfer it digitally to someone else and then delete it from your own hard drive, you still have to make the copy. Consumers are left with no choice unless we recognize that, yes, the reproduction right is implied but, no, it makes no difference as long as there is only at the end one

copy in existence.

There is no reason why a consumer who electronically transmits a track to a friend and then deletes it from his hard drive should be branded an infringer. Why should a consumer that copies a track from the hard drive to a CD-R disk, sells it, and deletes it, be treated as a law breaker?

Perhaps this is really the basic difference between DiMA and opposing commenters. We think the consumers should have the right to act responsibly in disposing of unwanted music or media without being branded as law breakers, thieves, criminals, or pirates.

Now, some of our opponents believe consumers can't be trusted under the first-sale doctrine to delete music that they transfer. Well, this in my view is doubly ironic. Today when I sell a CD, video, or book that I have already purchased, nobody checks first to find out whether I have retained a copy for myself. A first-sale statute would at worst be no different than the status quo.

The second irony is that, through the use of digital rights management or other technological protection methods, technology can ensure in the future that only one usable copy or phonorecord

remains after the transfer is complete. Thus, DiMA's proposal and the Boucher proposal, in fact, would put copyright owners in a more advantageous position in the future than they are in today.

Implementation of “forward and delete” technology is not a requirement. I would like to clarify that. It is merely one means of implementing first sale securely. There is no reason why a consumer that voluntarily deletes it from his or her hard drive after transferring it to someone else should be branded as a law breaker.

Furthermore, because it was raised on the prior panel, I would like to briefly address the issue of whether the public performance right also is implicated in the situation where you transfer bytes to someone else and then delete them from your hard drive.

In our view when you read the definition of what it means “to perform or display a work publicly” in the Copyright Act, it states, "To transmit or otherwise communicate a performance or display of the work." When you are transmitting bytes to a hard drive for recording and subsequent playback, that is not transmitting a performance or display. That is transmitting a copy or a phonorecord.

If Congress had meant to say, "To transmit or otherwise communicate a performance or display including a copy or phonorecord of the work," they would have said so. They did not. Clearly the common sense understanding that Mr. Carson was referring to earlier is the one that was intended by Congress.

It is, of course, possible that a real time transmission could be listened to or perceived as well as recorded and, in that case, yes, both the performance and a reproduction right have been implicated. It is also possible for those to be implicated separately.

Finally, I do want to address the timeliness issue as to first sale. It's not premature to address these issues now. In truth, these changes are overdue. Let me give you an example of how uncertainty as to the legal status of first sale will impede adoption of new features in business models.

Go to the Amazon.com site today. You can buy e-books and you can download them. You can buy music and you can download music there. Look around the Amazon.com site a little more and you will notice that for most books, music, and movies Amazon allows its customers to sell their own preowned CDs, books, music, and movies right there on the Amazon.com site.

If Amazon wanted to extend this customer facility to the resale of digitally-downloaded copies, construction of the first-sale statute might prevent them from doing so. It would, in effect, be a perversion of the first-sale doctrine if the first-sale statute were to enable copyright owners to gain more control over the subsequent resale or transfer of the copies of their works.

With respect to the two changes proposed to Section 117, DiMA strongly supports clarifications on both of these points. Regarding the first, temporary buffer copies that are made during the course of streaming audio or video are mere technological artifacts that are necessary to allow media transmitted using the Internet Protocol to be perceived as smoothly as radio or television broadcasts are.

By the way, to clarify, we are not talking about uses of software which are already covered under Section 117. We are talking specifically, as to DiMA, with respect to audio and video.

These buffer copies that are made during the course of streaming have no significance or value apart from the performance itself. Of course, we would argue that these copies justifiably should be protected under the fair-use doctrine. But as the

streaming media industry grows, so too does the risk from extravagant claims of copyright owners that temporary buffer copies infringe their rights.

The risk becomes even greater because any legal precedent that would be set concerning the fair-use statute of these temporary copies likely would be set in a case in which publishers or record labels are suing a rather blatant infringer who could not take advantage of a fair-use defense, not in the close case where a solid fair-use defense could be mounted.

Therefore, we would propose that the type of legislative clarification suggested by HR 3048, or by the Copyright Office with respect to memory buffers used in the course of distance education, should be considered more generally for Internet streaming.

As to the second issue, consumers may wish to make removable archive copies of downloaded music and video to protect their downloads against losses. Despite the convenience of digital downloading, media collections on hard drives are vulnerable. Without the right to archive, technical failure such as hard disk crashes, virus infection, or file corruption could render a purchaser's collection valueless.

Similarly when consumers want to upgrade to a new computer or a more capacious hard disk drive,

they need some means to transfer their collections onto their new equipment. There needs to be a legal means to make archival copies of this data for such legitimate purposes. Therefore, DiMA would also support amending Section 117 to allow for digitally-acquired media the right to make an archival or backup copy.

Finally, all of these rights should apply to "lawful" uses and copies regardless of whether they are authorized by a specific copyright owner. This formulation is the best way to preserve consumer rights under fair use or consumer rights under exemptions with respect to private performances, i.e., nonpublic performances such as personal streaming from a locker service, and other exceptions and exemptions under the Copyright Act.

Moreover, we also think that Congress ought to consider whether particular mass market "click wrap" license terms should be preempted by federal law so as to secure consumer's rights of first sale and archival copying.

Thank you again for your attention and for this opportunity to testify. I would be pleased to answer any questions you may have.

MS. PETERS: Thank you. Steve.

MR. METALITZ: Thank you very much. I appreciate the opportunity to present the views of the major trade associations of the copyright industry and the 1,500 companies that they represent on the study that's mandated by Section 104 of the DMCA.

I have a prepared statement and I'm going to refer to it but there have been a number of points raised that I would like to respond to so if you'll indulge me in a few verbal hyperlinks from my text, I would appreciate it.

Perhaps the best thing to do at this point in the late afternoon is to step back and ask the question that Admiral Stockdale made so famous. Why are we here? We are here because Congress asked the Copyright Office and the NTIA to study. To study what? To study the effects on two provisions of the Copyright Act of three types of developments.

Those two provisions are Section 109 and Section 117. The three developments are the amendments made by the DMCA, the developments of electronic commerce, and technological developments both in existence and emergent.

They didn't ask you to conduct a platonic survey of the idea of the laws, as Seth has just suggested you do. They gave you a very aristotelian

task instead: to look at what has happened. What is the reality on the ground, not what might theoretically happen at some point in the future.

We believe that if you follow this mandate that Congress has given you, you'll find that the effects on the two provisions of the three developments that Congress asked you to look at have been benign and that they don't justify any changes to either of those provisions.

Now, many of the witnesses and submitters have viewed this proceeding as providing a target of opportunity in which they can promote other aspects of their agenda. Some of these have something to do with Sections 109 and 117. Some don't. None of these questions are illegitimate.

If the Copyright Office and NTIA have a lot of extra resources to devote to this study, I think it would make perfect sense to look at them. I think in terms in what Congress asked you to do, it's a rather narrower task.

Turning to Section 109, which codified the first-sale doctrine, it limits one of the exclusive rights of copyright owners, the distribution right. The first-sale doctrine continues to apply in the digital environment whenever someone who owns a lawfully

made copy or phonorecord wishes to sell or otherwise dispose of the possession of that copy or that phonorecord.

I appreciate our retail colleagues reminding us that this does apply whether it's analog or digital. If it's a digital copy, it doesn't really matter whether it was the result of a download or it was produced in the factory in Charlottesville that turns out CDs. The first-sale doctrine does apply in those circumstances and retail sale is the paradigmatic first-sale transaction.

In fact, I've heard that the new nondenominational name for the upcoming holiday season would be the festival of first sale because millions of people will go to retail outlets, purchase these digital copies, and give them to other people thus exercising their rights under first sale.

Now, regarding the proposal that Professor Jaszi and other witnesses talked about. Many of them have characterized it as an update or an adaptation or an extension of the first-sale doctrine into the digital sphere. It is no such thing.

It is, in fact, a hyperinflation of Section 109 to impose completely new limitations not just on the distribution right, but on other exclusive

rights long enjoyed by copyright owners and notably, of course, the reproduction right, the fundamental cornerstone of the edifice of copyright protection.

These amendments, we think, would distort the development of electronic commerce and copyrighted materials. Remember, that's one of the developments that Congress asked you to pay particular attention to.

There are new distribution models that are competing, or that will be competing in the marketplace. They offer the potential to increase consumer choice, to promote the business viability of the dissemination of works of authorship in digital formats.

As we heard this morning from Nic Garnett and from others, limitations on the reproduction right, like those that are proposed in this amendment to Section 109, would make it impossible to implement many of these models.

Let me just say a word about the forward and delete technological legal solution because, as the witnesses have pointed out, under the Boucher bill it would apply even when no technology was in place. That's one of our problems with it, of course. In our reply comments we give five or six other reasons why

we think this is not a wise step to take.

I really can't present them as eloquently as Susan Mann just did in the previous panel but I do want to respond to David Carson's hypothetical, the one that Professor Hollaar told us was impossible.

If this technology somehow did exist and was ubiquitous and worked perfectly and was not circumvented, and if there were circumvention, it would be subject to Section 1201 and so forth, would we still have a problem with it?

I think we might. There are two reasons why. At least we'd have a problem with it as a justification for amending Section 109. One reason is, even I can think of illegitimate business models that would depend upon this technology.

It would not take another Sean Fanning to adapt the Napster model to a delete and forward situation. Instead of simply getting the file from somebody else, that transaction would be accompanied by the deletion of the file on the source hard drive and the accompanying download of that file from another hard drive.

Most files on Napster don't exist in a single copy. There are many of them and you could certainly pass them around quite effectively without

going beyond this delete and forward paradigm.

In fact, the witnesses this morning told you that one of their concerns is they want to have a method for temporarily parting with control over the copy of the work and they want to be able to get it back afterwards. That's exactly what this type of business model could allow, and ultimately it could be very harmful to the legitimate interests of copyright owners.

The second and probably more important reason is that, again, if this technology were ubiquitous, perfect, and met all the other assumptions, why would we need to change Section 109?

If copyright owners and everybody else used this technology, I think the best way to look at it would be as either an implied or explicit license to make copies of the material that had been transmitted, on the condition that the technology was also employed to delete the original copy.

Again, this may be a model to which the marketplace will move. It certainly makes a lot of sense in some ways for some applications. The marketplace should be allowed to do so without being placed, as I think Allan Adler said this morning, in a statutory strait jacket of requiring a particular

technology to be used.

Let me turn briefly in my remaining moments to Section 117. The DMCA made no changes to 109 but it did change Section 117 and it's interesting that we've heard very little about that amendment. That amendment reaffirmed the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right.

This recognition takes on added importance in light of the increasing economic significance of temporary copies in the legitimate dissemination of computer programs and other kinds of copyrighted works. We heard a little bit about that this morning.

There's no evidence that in order to promote electronic commerce--again, this is one of the touch stones that Congress asked you to look at--there's no evidence that to promote electronic commerce we need to amputate part of the reproduction right to the extent it applies to incidental copies or temporary copies.

In fact, the effect of such an amputation is likely to be exactly the opposite. It would undercut in this proposal that has been put forward, the reproduction right in all works.

Its effect could be the most pernicious in the digital network environment because the most prevalent and virulent forms of online piracy can consist of nothing more than making temporary digital copies available without authorization to members of the public.

The proposal also ignores the degree to which any exposure to liability for making incidental copies has been ameliorated by the enactment in the DMCA of Section 512 of the Copyright Act, which limits that exposure in those cases where incidental copying is unavoidably linked to the smooth functioning of the Internet.

In short, this strikes us as a solution in search of a problem or, at least, in search of a problem that is more than, as even its proponents have said, a theoretical illegality.

This brings me finally to Professor Hollaar's concern about the mismatch between Section 117 and what people already do as far as backing up material on their computers.

I agree with him, there is kind of a mismatch there, but what has been the real life practical effect of this? I think the answer he gave was that there hasn't been any. No one has been sued

for backing up material that may fall outside the scope of Section 117.

I think this really gets back to the point of what your mission is in this study. Is it to tidy up the loose ends of the Copyright Act and make sure that there aren't mismatches between its exact contours and what people are doing? Or is it to respond to real problems?

I think it is instructive that when Congress has dealt with this question of temporary copies, it has done so in response to real problems. It did so in 1998 in response to real problems that were presented to it by independent service organizations that had been sued and were being held liable for creating temporary copies in RAM. Congress dealt with that problem and spelled out the circumstances under which no liability would apply there.

Congress approached the same problem when it was presented with evidence that there was a threat, at least, of liability for online service providers, for temporary copies that they made in the course of functions that are at the core of the Internet.

Again, Congress responded by reducing the exposure to liability that those service providers would face.

I agree with Professor Hollaar's question that we have an education problem here, the huge task of educating the public about piracy. I'm concerned with how this matches up with reality and with the fact that there is now an alternate reality out there in which Section 117 is synonymous online with unauthorized copies.

I think this issue was pointed up by the submission of the Interactive Digital Software Association in the first round. I would encourage you to look at that submission and to reflect on the fact that today one of the easiest ways to find pirate video games online is to use the search term "Section 117."

The Copyright Act is being used to justify piracy and, to be frank, that is not right. That is the type of problem that I think the report ought to focus on rather than the theoretical illegalities that have been proposed to you.

Thank you.

MS. PETERS: Thank you.

Dan.

MR. DUNCAN: Thank you. Thank you for the opportunity to testify today. If Steve and the good Admiral are confused as to why we are here, I'm

certainly confused as to why I am here today but I think there is a very simple answer and it has to do with the comments filed originally by both the libraries and Digital Future Coalition urging that the study recommend amendments to Section 301 to preempt state licensing laws and practices.

I represent the Digital Commerce Coalition which was formed in March of this year by business entities whose primary focus is to establish workable rules for transactions involving the production provision and use of computer information. Computer information under that uniform law refers to digital information and software products and services.

DCC members include companies and trade associations representing the leading U.S. producers of online information and Internet services, computer software, and computer hardware. Together they represent many of the firms that have led the way to the creation of new jobs and new economic opportunities that are at the heart of our new electronic commerce.

Our common goal is to facilitate the growth of electronic commerce. We believe that the enactment of the Uniform Computer Information Transactions Act, better known as UCITA which has been

referenced many times today, and passage of that law in every state would best advance the goal.

UCITA is a well-considered statute. It balances the interest of all parties in forming workable contracts and licenses for computer information. By adapting and modernizing traditional tenants of U.S. commercial law for the digital age, UCITA will bring uniformity, certainty, and clarity to the electronic commerce across the 50 states. I think these are goals that we all share.

As a general matter DCC feels it is important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties including contracts and licenses.

For over 50 years the Uniform Commercial Code, the UCC, has governed the relationships between sellers and leasers of hard goods on the one hand, and buyers and lessees of those goods on the other.

In many instances this includes the hard copies of informational products and services. The various articles the UCC have worked well in fostering commerce across the various states which have, in turn, adopted these articles largely in a uniform

manner.

UCITA is a new uniform commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws.

As with the UCC, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce. It is intentionally broad in scope. The act covers computer information and covers transactions for software, electronic information including copyrighted works, and Internet access.

As has been traditionally the case with uniform laws in this area, UCITA rules govern agreements private parties and the licensing of computer information. It does not create or alter the property interest that persons may enjoy in respect to these products.

Those property interests are determined by relevant state and federal laws including the federal Copyright Act. The careful balance is upheld by the courts as necessary and effective to the efficient provision and use of information, as we note in our reply comments by citing Pro-CD, and one that both the federal and state governments must strive to maintain.

As I mentioned, UCITA is a new uniform state commercial code developed almost over a decade and approved by NCCUSL, the same body that wrote the UCC. They wrote UCITA for the same reason as they needed the UCC.

The problem is that in the UCC it covers only hard goods, tangible goods. We needed a law and NCCUSL recognized this based on a recommendation by the American Bar Association over 10 years ago for a law to cover transactions in tangible information.

The existing legal infrastructure provided by UCC Article 2 does not work well in facilitating electronic commerce. NCCUSL recognized that, drafted and approved UCITA which is now awaiting passage in the 50 states.

One of the things that we've learned in terms of electronic commerce is that it is useful to have uniformity and that is the primary goal of UCITA and one that we think it would accomplish well.

Part of the irony in the comments filed by both the DFC and the libraries is that they are seeking to preempt a law which is yet to even go into effect in more than one state.

We believe at the very least the study should reject that recommendation and give the states

a chance to fully debate. I can guarantee you as one who has been involved in those debates that fair use issues are very much at the forefront of what state legislatures are considering when they consider passage of this law. But allow the states to do their jobs. Do not confuse the need for a licensing and contracting law with reform suggested for the copyright law.

Indeed, UCITA makes very clear that federal copyright law will be preeminent. It states, for example, that a provision of this act which is preempted by federal law is unenforceable to the extent that that particular provision is preempted.

It also states that if a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term or limit the application of the impermissible term so as to avoid a result contrary to public policy.

It notes particularly in the legislative history accompanying the act that fair use, innovation competition, fair comment, and copyright law are among fundamental public policies that courts must make note of. In short, UCITA does not say whether a contract

can be made under federal law but how it may be made if it can be made.

In Subsection 105(b) there is an emphasis that fundamental public policies regarding fair use, reverse engineering, free speech, may not be blindly trumped by contract. Courts are directed specifically to weigh all the competing policies including freedom to contract.

While these UCITA provisions may not meet the over zealous demands of the DFC and the libraries for new statutory creation of rights for users of computer information, it is clear that state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies including the applicability of the Copyright Act's fair-use exceptions and the latest provisions of the DMCA.

To do otherwise would have risked disturbing or even destroying the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties including contracts and licenses.

In conclusion, the Digital Commerce Coalition has as its primary purpose and goal the enactment of UCITA in the 50 states in order to

facilitate effective electronic commerce.

Nevertheless, DCC and its members are also concerned that other activities including this current study at the federal level not go forward without a clear understanding of the nature of UCITA and its intended effects. Contract law should remain contract law. Copyright law should remain copyright law.

Thank you.

MS. PETERS: Thank you.

Ms. Kunze.

MS. KUNZE: I'm Carol Kunze. I'm here on behalf of Red Hat. Red Hat, Inc., is a public corporation that has headquarters in North Carolina. Red Hat distributes a product called Linux. Linux is an open-source operating system.

You should have a hardcopy of my testimony in front of you. If possible, I would like that made part of the record. I encourage anyone else who wants a copy to give me a business card and I will e-mail you a copy.

I have a very narrow focus today. I want to explain what open source and free software is and to ask that you not recommend amendments to Section 109 which would jeopardize the ability of open source and free software licensor to define a product as

software plus license rights.

Let me just clarify that I don't think anyone today intends to impact our licensing practices. I haven't seen anything in the comments, nor have I heard anything today that makes me think someone does have that intention. What we're concerned about are unintended consequences of any amendments to Section 109.

The primary difference between digital and nondigital products with respect to Section 109 is that the former are frequently licensed. When the license includes the authorization to exercise some of the copyright owners exclusive rights you have a fundamentally different product.

Open source and free software represents a different paradigm both in terms of how the software is developed and in terms of how the software is distributed.

With respect to the development, it's created by a collaborative process and can be reached by any number of programmers basically who volunteer their services.

Open source and free software is accompanied by the grant of an authorization to (1) have the source code, (2) freely copy the software,

(3) modify the software or, in copyright terms, to make derivative works, and (4) to distribute the software either in the original form or as a derivative work.

My final point is that open source and free software does not involve the payment of copyright license fees. Basically it's free. When you see a box version for sale on the shelf, essentially what you're paying for is you're paying for a very nice package, you're paying for printed documentation, and you're paying for installation service. But that product is also available for free downloaded from the Internet without the printed documentation, without the box, and without the installation service.

Many open source and free software products also embody the concept of copyleft. Let me explain that. Copyleft is the requirement that all copies must be distributed with the license authorization. That allows the person who has that software to make a copy of it, to have the source code, to modify it, and themselves to redistribute it.

So, use of an open source free software product is generally unrestricted. You can use it for personal purposes. You can use it for commercial

purposes. There are not restrictions on that.

Copying is unrestricted. You can make a copy if you want. You can make 1,000 copies if you want. You can run it on a network. I haven't seen anything called an open source site license. I think because you don't need one. If you want to make a copy, you can go ahead and do it.

Simply modification is unrestricted so if you want to tailor the software to some particular needs that you have in your company or to some particular personal needs that you have, you can go ahead and do that. Not only are you authorized to make that modification, but you also have the source code that you need in order to make those changes.

But distribution is conditioned on passing along the same license authorization under which the work was received. This means that anytime a copy is transferred it has to be accompanied with the right to have the source code, to copy the product, to modify the product, and to distribute the product.

What this means is that any single copy of the product can basically be the source of thousands of new copies. Actually, I think that is what a lot of people here are concerned about today.

What's more, it can also be the source of

thousands of improvements to the program. Now, the condition for being able to make and distribute a derivative work is that it be licensed under the same terms. What this means is that if you make improvements in the product.

For instance, when Red Hat makes improvements to Linux, it has to make that source code available to anyone who wants it. It basically has to publish that source code so other people have the opportunity to adopt those improvements into their program.

In effect, the principle is that you take free software from the open source and software community that created it, but in exchange you give back to them on the same principle any improvements that you have made in the product. Basically it's a quid pro quo.

One of the reasons that people engage in this activity is they put an open source product out there on the market and what they get back is their own product with some improvements to it that they can then adopt into their program.

This concept of copyleft that the software must be distributed with the license rights to copy, etc., is needed in order to ensure that the product

stays free. If you transfer the product without those license authorizations and without the right to have the source code, you have essentially changed that into a proprietary product.

That is not the product that the licensor authorized be distributed. The product that the licensor authorized was the software plus the license rights. Open source and free software allows users to study the software, to change it, to improve it, to make derivative works, to build upon the ideas, to incorporate these ideas into a new product and to redistribute that derivative work.

We believe that it clearly furthers the goals of the Copyright Act to disseminate information and ideas throughout society and to allow others to build upon those ideas. We are asking that amendments not be recommended that would jeopardize the ability of open source and free software licensor to require that the entire product be transferred. That is, the software and the accompanying license rights.

Thank you.

MS. PETERS: Thank you.

Now for questions. Do you want to start?

MS. POOR: Sure.

Professor Jaszi, you stated in your

testimony summary that if first-sale is further restricted progress of knowledge and advancement of ideas will be curtailed. Firstly, why do you sort of take the view that it's a restrictive approach rather than a possible expansion? Could you give us reasons why you're advocating for a change now?

PROFESSOR JASZI: On the first point, I think that it's very much whether one views what is proposed as maintaining or updating, on the one hand, or an expansion on the other. It's pretty much a function of perspective.

The DFC starts in thinking about the exceptional doctrines of copyright law, whether it's first sale or fair use or others, and in terms of functionality, in terms of what those doctrines do, what they have historically permitted to occur.

In the case of the first-sale doctrine, that is the transfer of copies from individual to individual so that knowledge circulates within whatever community those individuals represent.

I think if you take that view, if you begin with a functional description of how the exceptional doctrine, in this case first sale, works, it's very difficult to characterize what is being proposed as an expansion or hyperextension of the

doctrine in that it is a proposal that is designed merely to reinstate that historic functionality in a new environment.

I think if we could all agree that we want a functionality like first sale in the digital environment and that we are just disagreeing about how to achieve that, we could probably wrap this up very quickly.

My sense is that is not really what we disagree about. What we really disagree about is whether there should be such a functionality in the digital environment. The DFC obviously feels strongly that there should.

On the question of why now rather than, I suppose, why later, the answer I think is that -- here I think I disagree a little bit with something that Steve said -- I don't think that the charge of this study is formally limited to considering only evidence as to harms that have already occurred and can be concretely documented in the current information environment.

That may well have been the charge with respect to the 1201(a)(1) rulemaking. I think with respect to this study, you have an opportunity and that is an opportunity to look forward and to

anticipate the reasonably likely directions in which the rollout of all of the different new technologies of use and of control is likely to go.

My answer to why now, I think, is because later it's likely to be too later. Later the argument will be all of this has already happened. It's in place. It's a given and we wouldn't now want to upset the new status quo.

My little proration about how you have an opportunity to led here was not just a kind of rhetorical flourish. It was really my view of what you have the chance to do if you take your mandate as I believe it was given.

MS. POOR: Why would it be better than to -- why would it be better to mandate or to ask Congress to mandate something and not let the marketplace further development it?

PROFESSOR JASZI: I think the answer is that first sale has never been a creation or function of the marketplace. First sale has always been a condition of the functioning of the market. First sale has always been a legal limitation on what the marketplace could achieve.

I'm sure that if we had not had first sale over time, other business models would have developed

in which additional rents would have been extracted for the downstream circulation of intellectual content in which multiple payments, in effect, would be extracted for the use of one copy.

To say that the market ought to control on the question of whether we should have the functional equivalent of first sale in the digital environment seems to me to perhaps wrongly characterize what that first sale functionality has always been; that is, as a limitation on market function. This is essentially a cultural as well as a commercial issue, in other words.

MS. POOR: Are you aware of any consumer cries for the first sale in the digital world?

PROFESSOR JASZI: Well, I think I represent one.

MR. GREENSTEIN: If I could answer that, I think the reason there have been no consumer cries is because there's been no lawsuit to date. That's not to say the consumers don't believe that's a reasonable thing to do. The companies that are building the technologies to digitally sell music and audio and video by downloading run into this problem because when they are trying to build their systems, when they are trying to build their services.

When Amazon thinks about how they are going to build their consumer-resale system into the future, they have to take into account the advice they are getting from conservative lawyers who say, "If I read Section 109 literally, you have a problem on your hands and you can't really go there."

Now, that's not to say again that the problem does not exist in theoretical terms because it does. It does not exist in practical terms because nobody has taken action to prevent it.

Now, that is also not to say that anything that has been suggested in either HR 3048 or by DiMA would have any impact one way or the other on the kinds of things that Mr. Metalitz is afraid of with respect to Napster and such technologies.

A law to allow transfer of a lawfully-acquired copy to a single user and then deleting it afterwards has no impact on whether Napster is any more legal or illegal the day before it passes or the day after such a bill would pass. It merely legit-imizes conduct that I think anybody would consider to be fairly responsible conduct under copyright law.

MS. PETERS: Can I just ask a follow-up on what Marla was asking? People who just basically pay to get a digital download, is there an expectation on

their part that they think that they can transfer this intangible thing?

I mean, it's not like I have a physical object and I think I have a right to do something with it. I now have something on my hard drive that I didn't have before. Certainly with the stuff that I download, it's just the stuff that's free but I certainly don't feel that I have a right even if I pay for it to exercise what I would consider a first-sale right.

MR. GREENSTEIN: I think that a consumer, thinking practically in terms of what their current abilities are when they buy a particular product, would think that they have that right. I think consumers do it now. Again, this just hasn't been brought up in a lawsuit and the restrictions have not yet been enforced against them.

MS. PETERS: If it's between like transfer as opposed to sharing where I got it and you got it.

MR. GREENSTEIN: Yes. I think that's very likely to happen. I can certainly foresee a circumstance where I download a song by a particular artist. I don't like that song but, you know, I know a friend who really likes it so I'm going to send it over to him and delete it from my hard drive because

I don't really want it and I don't like it anymore. Why should that be a problem for anyone?

MR. CARSON: Do you think in the real world people actually are deleting and sending to other people?

MR. GREENSTEIN: Oh, yes. Absolutely. I'm sure when people find that they don't, like a song -- you know, music takes up a lot of space on hard drives. People don't --

MR. CARSON: You think they're sending it to someone else before they delete it?

MR. GREENSTEIN: Possibly they are and possibly they aren't. Again, there the issue is we're trying to build a robust and logical e-commerce system where consumers have certain expectations.

They have for decades bought physical CDs, bought physical books, and have been able to do with them as they wish. When a time comes, and we hope the time never comes that a consumer bumps smack up against a restriction imposed on them because the first sale doctrine was not updated, there is going to be a tremendous hue and cry and the hue and cry is not necessarily going to be first to Congress.

It's going to be a backlash against e-commerce companies that are selling them something

that they think is insufficient, inadequate, and does not deliver to them the full value and flexibility that they expect from CDs, from books, and from hard copies of goods, as well as from digital media which inherently people view as being more flexible and capable.

MR. METALITZ: Could I jump in on this? It's always difficult to see clearly in the crystal ball. I'm 180 degrees different from what people characterized my position as.

I think it was perfectly appropriate in the rulemaking proceeding for you to look at the likely effects. Congress said look at the likely effects. Here Congress said look at the effects, which suggests to me they didn't want you to look in the crystal ball.

You are certainly free to do that. You have a lot of flexibility. This is a study, not a rulemaking. The problem is it's very hard to see in that crystal ball. We don't know what consumers are doing now and we certainly may have very different views about what consumers will do or will want in the future.

One mechanism we can use to clarify what's in the crystal ball is called the marketplace. There

are many different models out there and many of the copyright owner models include some ability to transfer the digital downloads, to make copies of the digital downloads.

These models come with digital rights management technologies which, as we heard this morning, are still a work in progress. I think we could expect that to be the case for sometime to come.

We should give the marketplace some opportunity to help us see a little more clearly what it is that consumers want and what is most important to them. What are they willing to pay for, because we are talking about electronic commerce here.

Let's not put them in the statutory strait jacket of saying no matter what the marketplace will develop, if you follow this technological model or if you do a delete and forward, that's fine and there's no control over it at all. Let the marketplace educate us a little bit about what consumers really want here.

PROFESSOR JASZI: If I could just respond, I think the question about what consumer's expectations are is a very interesting one. And also, in fact, a very difficult one to know. I would enter the analysis at a different point.

Although there is certainly an extent to which consumer expectations ought to shape law, I think there is a very, very important way in which law shapes, or should shape, consumer expectations and consumer behavior.

Mr. Carson earlier said, well, people are probably not deleting and forwarding. They are probably blasting out copies in all directions. I don't know to what extent that is true of general conduct but I think the law has a very appropriate role to play in saying what is and what isn't permissible activity.

I think that when we maintain a legal framework in which everything is impermissible unless licensed in the digital environment, we are, as I tried to say before, inviting significant new levels of disrespect for law.

MS. POOR: I guess I would just want to say that consumers in this -- you know, one of the benefits to the Internet is that consumers' voices have been heard more clearly than ever before. They have certainly sent the message that digitally downloaded music is what they want.

They have certainly sent the message that they want to share the music. But have we heard that

they want to have the music and then be able to transfer the music digitally?

PROFESSOR JASZI: It depends a little, I think, on how one defines the universe of consumers. I think that there are many individuals who, as Seth described, would very much like to have the legal functionality of being able to use whether, in fact, they liked it while they were using it or didn't like it while they were using it, digital material and then transmit it.

I think that many of us who read material on line, clip it, and pass it along to another individual whether it's a text or a Dilbert cartoon, and then to avoid jumble on our own systems do, in fact, go through the routine of deletion nearly simultaneously, if not always perfectly simultaneously, are enacting that.

There are also consumers. There are schools and there are libraries. There are institutional consumers of information whose very functioning depends on the functionality of fair use. They are being heard from. They were heard from this morning. In a sense through Digital Future Coalition they are being heard from again now.

Consumer preference is not only the

preference of the music consumer but really the preferences of a much larger and more diverse, and I must say sometimes I think more responsible, group of other consumers as well.

MS. PETERS: Jeff.

MR. JOYNER: You've answered the 30,000 foot question dealing with the marketplace. I think I need to bring it back down to a nuts and bolts issue. I only have one question directed primarily to the Digital Futures Coalition and DiMA. It stems from something that Mr. Metalitz talked about today involving Section 512 of the Copyright Act.

Does that section which fashions some limitations on the remedies that apply to infringement including all the incidental copying that may occur in the course of activities that are essential to the functioning of the Internet, does that provide you sufficient, I use the word, coverage so that no change to Section 117 would be needed?

PROFESSOR JASZI: My answer would be no. The 512 provisions on incidental copying are certainly very helpful and they are particularly helpful for those who qualify as Internet service providers within the meaning of Section 512.

There are many of us who do not claim to

be Internet service providers for whom Section 512 really doesn't provide any particular relief. It is to them, and to others who don't clearly have the benefit of the Section 512 safe harbor for incidental copying, that I think the proposed amendments to Section 117 go in particular.

MR. GREENSTEIN: I absolutely agree. I think while 512 certainly is extremely helpful for the intermediaries, it doesn't solve the particular problem for Internet webcasters and Internet broadcasters. Because at the end of the process after you get through the ISPs, when you get to the end-users' personal computers, they are making a buffer copy for some period of time that is used in order to facilitate the performance.

Mr. Metalitz asked earlier how does this change to 117 promote electronic commerce. This is it. If buffer copies are deemed to be infringing copies, it would have a tremendous economic impact on webcasting which is already, quite frankly, substantially at risk.

If you read the newspapers, trade press, you'll see that there are any number of webcasting entities and music and video companies -- very respectable ones, reputable ones -- that have

unfortunately had to close their doors for lack of funding and because the business model wasn't quite there yet.

The issue for us is that we are willing to pay license fees, but we don't want to pay twice for the same rights. Here we are paying first to make an authorized performance. We are paying for both the music performance rights and the sound recording performance rights.

When it gets to the computer buffer and somebody says, "Wait a minute. Yes, I represent the same copyright owners that you've already paid once for the performance but there's this reproduction going on so you need to pay me again."

This is a real-world problem. You heard earlier today one half of the double-dipping problem that we face. BMI and other performing rights organizations claim that every time you download that's a performance. Well, we're hearing it the other way, too. Every performance is a download because of this streaming buffer that's made.

Frankly, we're happy to pay once. We don't want to pay twice. We can't afford to pay twice. It's hard enough to afford paying once in this current environment when you're trying to establish a

new medium and a new market place.

That's the real-world impact that this change to Section 117 that we've asked for would incur. Again, it's a very narrow change in our view. We're talking about an authorized lawful performance, when a copy is made only in furtherance of that performance and it doesn't have any other economic value other than to facilitate that performance.

MR. METALITZ: Well, with all due respect, this is an old, old story. This is not a webcasting story. This is a story that the broadcasters have used. This is a story that the restaurant owners have been concerned about.

This is a story of whether copyright owners should subsidize certain types of business models by refraining from enforcing, or seeking no compensation for the exercise of, one of their exclusive rights.

That puts the question rather bluntly and the blunt answer is no. This would not be the way. If the business model is not right, I don't think it's up to the copyright owner, to the composer, to the record company or whatever copyright owner is involved, to be forced to forego compensation for exercise of those rights.

Now, there may well be good business reasons to do that and that is why we want negotiation over these fees and whatever other mechanisms are used to set these fees. That's why this is a business decision.

There may well be good business reasons to do that but I don't think it's appropriate to amputate part of the reproduction right because the business model for webcasters isn't working out the way they told their venture capitalist it would.

MR. GREENSTEIN: Steve, you missed my point entirely.

MR. METALITZ: Well, try it again.

MR. GREENSTEIN: I will try it again. The point here is that this copying is purely a technological accident of the way that the Internet Protocol is created. If we were able to do the same kind of transmission via electromagnetic waves that they do with broadcasting, this issue would never arise. We would pay only for the performances.

By the way, we still pay the sound recording right holders for their performances whereas radio stations don't with respect to their electromagnetic wave transmissions. We would still pay them for their rights and we would be paying only

once.

But there is a technological necessity because of the way the Internet is designed to operate efficiently that causes this RAM buffer copy to be made. It is not captured in other ways. It evaporates. It is evanescent once the playback occurs.

It has no independent commercial significance and we consider it ludicrous that we would be asked to pay for it twice. But we obviously feel strongly enough about its importance in resolving this issue that we come to you, as we came to Congress in 1998, and asked that it be resolved.

MS. PETERS: Has anyone suggested suing you or tried to, as you say, act ludicrously and make you pay for it?

MR. GREENSTEIN: Yes and yes.

MS. PETERS: Yes and yes. Okay.

MR. GREENSTEIN: Let me explain that two different ways. I think it's important to understand the context. Yes, in every discussion we've had with certain rights organizations the issue comes up and they insist that payment is due for that.

Secondly, the risk occurs because of litigation against potential infringers. For example,

take a look at the complaint that was filed by the music publishers against MyMP3.com. They talked about payments for downloading and downloading was put in quotation marks and never defined there.

Well, in fact, MyMP3.com never allows downloading. It only allowed streaming. For that reason, it was obvious that they were trying to equate and conflate the two, downloading and streaming. That's why the risk occurs.

In our minds also that the rule may be set in a bad case as a bad precedent against an actor that is considered by the court to be an obvious or wilful infringer.

DiMA would prefer, for the sake of facilitating electronic commerce, that the rules be set by policy by the Congress and with the assistance of NTIA and the Copyright Office.

MS. PETERS: Jesse.

MR. FEDER: I have a question for Professor Jaszi.

If I purchase a book and I have a legal right to transfer it, there are certain inherent limitations to what I can do with it. There are inherent technological limitations on copying it, on transporting it, and there are inherent limitations on

the way books are marketed

Many of those limitations go away when we're talking about digital information. You can parse out the kinds of rights that a consumer buys with respect to that copy. You can more finely define the pricing for that -- that is all inherent in the technological shift.

My question to you is, Is this proposal with respect to Section 109, the first-sale doctrine, essentially trying to shoehorn digital downloading and digital copying into an analog model where you cannot take advantage of what the technology provides? You must treat it like a hardcopy.

PROFESSOR JASZI: I think the answer is no, but the question is a serious one. I think my answer is firmly rooted in what I said earlier in response to Ms. Poor, that my concern and the concern of the Digital Future Coalition isn't to faultlessly or in an ill considered way simply reproduce an outmoded digital doctrine in a new environment.

Our concern is that doctrine, first sale in this case, although the same probably could be said about the Section 117 exemptions as well had a certain functionality which has produced economic and cultural benefits in the analog environment.

It's that functionality with those attended benefits that we would like to preserve. This is why I say your question is such a serious one. Does preserving that functionality potentially limit the availability of information marketers to engage in exquisite price discrimination and to charge separately for every use of any kind or character of any work, I think the answer is yes.

I think that extending this important functionality into the digital environment does, in fact, impose some limitations on the ability to develop a digital information commerce model based on pure price discrimination behavior. I think, my organization things, that is a price worth paying for the generative cultural and economic benefits which that functionality produced.

MR. FEDER: Does anybody else care to comment on that?

MR. METALITZ: Just to say that I don't know how exquisite it is, but price discrimination can be a very favorable thing to many of the groups in the Digital Future Coalition. Educational institutions, libraries, nonprofits have benefited a great deal from price discrimination.

I think Peter is right that does kind of

work if you have a certain amount of control over the distribution practices. I'm not sure that eliminating all control over what's done with digital downloads is necessarily going to be beneficial to many of these groups.

Of course, we were told earlier in the panel we copyright owners would be better off with this amendment and we don't agree with that so I don't expect --

PROFESSOR JASZI: I just have to say that no one is talking about eliminating all control over what is done with digital downloads. That is, I think, the difficulty perhaps with the way in which the question characterized the proposal. It's certainly the difficulty with your response to it.

We are talking about one very particular and very narrow sense in which a traditionally authorized practice would continue to be authorized in a new environment.

As I tried to say in my initial comments, this is a proposal that is specifically designed not to authorize many other kinds of controversial uses of digital downloads. It doesn't apply to peer to peer. It doesn't apply to commercial use, to widespread commercial use. It doesn't apply to streaming.

I want to be very clear. This is not an invitation. Not a throwing open of the doors and a sort of invitation of the bavarian hoards to enter. It's a very, very narrow detailed proposal.

MR. FEDER: Time for one more?

MS. PETERS: Sure.

MR. FEDER: This one is for you, Seth. As you mentioned a short while ago, just two years ago DiMA and DiMA's members were here in Washington lobbying for legislation. A compromise was achieved -- specifically with the record industry -- that was enacted in the DMCA.

That was meant to address what your members seemed to consider to be matters that were absolutely fundamental to their ability to do business in this environment. Why are we here again? What has changed since 1998 that requires further legislation to allow your members to do their business?

MR. GREENSTEIN: I think this is an important question, as DiMA did raise it. In fact, all of the issues that are now on the table were issues that DiMA had discussed back in June of 1998 and were fundamental for us at the time.

With respect to first sale, DiMA was

formed fairly late in the game to be quite frank. At the time the DMCA, I think, had already gone through the Senate process and was on its way to the House and was before the House Commerce Committee.

We testified before the House Commerce Telecommunications Subcommittee and at that time we were told quite frankly that, because of the the absence of germaneness to the pending bill, first sale could not be introduced at that point into the DMCA.

That was an issue that the Subcommittee could not then pursue. However, they did have a strong interest in the temporary buffer copies issue. In fact, we spent a good number of hours negotiating with affected parties with assistance from the Copyright Office and under the aegis and with the assistance of representative Rick White to try to come to a legislative compromise to address the issue.

That would have, I think, taken care of our problems at the time. Unfortunately, a compromise just was not able to be reached before time ran out. That is one of the reasons why Rick White was so supportive of this Section 104 provision, to make sure that the issues were not just cast off of the table but, in fact, were brought back a couple of years hence for reexamination by the Copyright Office.

MS. PETERS: Thank you.

David.

MR. CARSON: Question primarily for Professor Jaszi and Mr. Greenstein.

Proposal to broaden Section 109 to include digital copies, doesn't it ultimately require that we trust the consumer who is transmitting that copy to someone else to delete it?

Isn't it as a practical matter enforcement of that requirement going to be impossible because there really is no way to monitor whether the consumer is in fact deleting that copy or not?

PROFESSOR JASZI: Well, I think that is a critical issue. The answer really is in two parts. First, if, in fact, unauthorized transmissions of copyrighted material should be a problem in the Internet environment, then enforcement action is going to be necessary. Whosever rights are at stake is going to have to initiate that action.

The detecting and identifying the source of the unauthorized transmission is going to be a necessary part of the burden of enforcement whether or not there is any potential defense based on the first-sale privilege.

The other difficulty, I think, has to do

with the issue that I tried to address in my initial remarks. This is really the issue of burden of proof. In the traditional first-sale doctrine there is a good deal of disagreement about the appropriate allocation of the burden of proof on the question of whether or not the copy at issue is indeed a first-sale copy.

I think that it is arguable that in the digital version of a first-sale doctrine, that burden of proof ought to be placed on the person invoking the privilege because it would, in fact, we very difficult for the copyright owner to establish through direct proof the nondeletion of the record from the system in question.

I think that the proposal that I make, that of allocating the burden of proof on the issue of deletion to the person asserting the privilege is, in fact, a direct and, in my view, adequate response to the concern you expressed.

MR. CARSON: How is the copyright owner even to suspect that the person who has transmitted it has, in fact, not deleted it, though? Are copyright owners to check out every single transmission of a work to see whether a deletion really happened? As a practical matter it's unenforceable.

PROFESSOR JASZI: I take it that as a

matter of general enforcement practice, that is precisely what copyright owners, to the extent that they are concerned about digital traffic and unauthorized digital trafficking in their works, do. The first step in any enforcement activity is to detect and identify the source of unauthorized transmissions.

MR. CARSON: The only thing that makes it unauthorized is the fact or nonfact of deletion by the person who transmitted it. How on earth is a copyright owner to engage in that kind of --

PROFESSOR JASZI: It is an unauthorized transmission abonicio. It has that characteristic when it is made. The only question that the existence of some first-sale privilege in the digital environment would give rise to is whether the person making or receiving it may have a basis for defending against a claim of infringement.

There, I think, the assignment of the burden of proof is a device calculated to relieve the copyright owner of whatever extra burden the existence of this digital version of first sale would provide. Any enforcement action in the Internet environment or, for that matter, in the physical environment must begin with the detection of unauthorized activity.

MR. GREENSTEIN: I would echo what Peter has said more eloquently than I could have. Essentially what I was trying to get at in my comments was that very issue, that if you have a situation where a consumer has tried to act responsibly, the law today would still brand them as an infringer. It would not allow them to use first sale as a defense to their conduct, and that simply isn't right.

Today when do copyright owners go after people who have engaged in unlawful conduct? When the conduct becomes so great that it goes onto the radar screen and becomes noticeable and starts to have an impact on their economic rights.

Currently today people sell used books, they sell used CDs, and nobody checks to see whether they have copied some portion or all of them first. Why not? Because it doesn't yet have an economic impact on them.

When it does have an economic impact, as in several cases that have been filed by the recording industry and the motion picture industry, at that point they step in.

The issue at that point is, well, in an appropriate circumstance should an individual consumer or group of consumers be entitled to assert first sale

as a defense. Under the current statute given the crabbed construction that some people are giving to it, they might not.

Under the first-sale doctrine as it was intended to operate and for the restrictions that it was intended to impose against the copyright owners exercising further restraints on transfers, well, we think that the law should allow consumers to raise first sale as a defense.

MS. PETERS: Steve.

MR. METALITZ: I would just say that shifting the burden of proof is really cold comfort here. This is not enforceable and it would be very easy for the end-user to say, "Yes, I deleted it." And then what do you do, conduct discovery about when he deleted it and look at his hard drive?

I keep hearing that maybe the people who are selling used books have copied them first. Well, this is why the problem with focusing on the functionality and trying to bring that forward into a new environment is a little bit too narrow, in my view, because the functionality has baggage with it.

In the analog environment, as Jesse pointed out, there is a lot of difficulty in standing at the photocopy machine and copying the book before

I take it to the used book store. Here it's as easy to copy as it is to transmit.

In fact, you do it at the same time with one touch of a button. To ignore that difference and say, "It's the same function. Let's just bring it forward into the new environment," I think is to only look at half the picture.

PROFESSOR JASZI: You know, earlier we heard about the importance of trusting the market and I believe a good deal on that.

I also think that there is something to be said for trusting the consumer. I think that it is probably not desirable to build our legal structure on the assumption that people if they are given clear direction and good education about what is permissible and what is impermissible will always misbehave.

MS. POOR: Napster has shown that --

MR. GREENSTEIN: But how would the changes we are recommending for the law have any impact whatsoever on Napster?

MS. PETERS: It doesn't.

MR. CARSON: Napster is a case in which we have shown that a substantial portion of at least one generation of our society has no respect for copyright. It doesn't give a damn about copyright.

Why should be trust the consumer in a fairly similar environment to respect the bounds of the law and say, "Oh, no. I'm not going to send that to someone else without deleting it." Why on earth should we expect that in light of experience of the recent past?

MS. PETERS: Or today in The New York Times Stephen King found out that basically 46 percent of the people said, "I'm going to pay for it when I download it," didn't. That's a pretty high percentage.

MR. METALITZ: I think the other connection to Napster here is, again, look at the text of section 109: “The owner of a particular copy or phonorecord lawfully made under this title.” There are many people, there are even many lawyers, and perhaps some sitting at this table, who think that the copies made by Napster users are copies lawfully made under this title.

One of the top lawyers in American made that argument with a straight face to the 9th Circuit. We'll find out how they react to it. If that's the case and then it's okay to transfer that, having made that copy, then we've got a problem.

MS. PETERS: Let me ask in concluding, because we are running behind time, a question that is

a international question. We are looking at first-sale doctrine. We're looking at U.S. law.

A number of you were in Geneva in 1996 when the issue of making a work available, most countries chose to go the equivalent of a performance right and, in fact, specifically rejected a distribution right.

In the exact situation you're talking about that here we say there's a distribution right involved and, yes, we have to worry about first sale. As you say, Peter, it's a very important social doctrine.

The rest of the world hasn't gone there at all. How does this play out in the rest of the world internationally with what you are trying to accomplish through an equivalent for electronic downloads?

PROFESSOR JASZI: Well, a two-stage answer. The first stage is that, you're right, the rest of the world doesn't live under a regime of first sale like our own.

MS. PETERS: In think they maybe do. They just don't say that the distribution of nonphysical copies is a distribution. They do have first sale. They just reject that the distribution right is implicated when the sale is not of a physical object.

Anyway --

MR. GREENSTEIN: At some point it seems to me that the consumers in other countries will also run smack up against this problem. What do they do with the collection that they've paid substantial amounts of money for? What can they do with media when they are through with them or no longer want them?

There should be some means -- legal means to accommodate them. That's what we're asking for here. Certainly to the extent that the problem will exist in other legal systems in the future, it's a problem they will have to face.

How they accommodate it may be different, whether they do it through an exhaustion of the distribution right or whether they have to come up with some other means to allow it to occur, or whether it occurs purely through the marketplace first and they never encounter the problem at all, that remains to be seen.

All we can say here is that we are seeing the problem for Internet companies that are trying to build new e-commerce models and it is a problem that we think needs to be solved.

PROFESSOR JASZI: Even more specifically, as Seth pointed out earlier, the WIPO treaties do give

us flexibility in extending traditional doctrines of limitation into the new environment.

This is a doctrine which although it may not be uniquely specific to the United States or Anglo-American copyright environment, it is clearly one that has flourished here and one that I would argue has been extremely important in supporting and fostering cultural and economic development and information in this specific copyright system.

Regardless in a way of the practices of other countries around these issues, I think we've got a very, very specific obligation to think about bringing that functionality forward.

MS. PETERS: Thank you very much.

The final panel. We need another chair. We need seven. There's a chair that's over here. Can you move down just a little bit? We need just a little bit more room at the end. Oh, the legs of the table. All right. We'll straddle. Okay. Whatever.

We are now in the homerun stretch, the very last panel. Cary Sherman representing the Recording Industry Association of America, David Goldberg, Launch Media, Inc., David Beal, Sputnik7.com, David Pakman, myPlay, Inc., Bob Ohweiler, MusicMatch, Inc., Alex Alben, RealNetworks,

Inc., and Robert Nelson, Supertracks.

I think maybe we'll stick with the order which it is listed there.

Cary, you get to go first.

MR. SHERMAN: Thank you. I'm Cary Sherman, Senior Executive Vice President and General Counsel of the Recording Industry Association of America. I would like to thank the Copyright Office and NTIA for giving me the chance to participate in this study.

I'm going to focus my remarks on Section 109 but I also would like very briefly to address Section 117.

RIAA's position is straightforward. Amendments to Section 109 are not warranted and tampering with Section 109 in the way suggested by some comments would harm the developing digital music marketplace.

We also specifically object to the proposed amendments to Section 109 and Section 4 of the Boucher bill which was rejected by Congress three years ago.

I would like to stress two key principles of copyright law supporting our position which may have been overlooked by the comments in this

proceeding. The first principle concerns the nature of Section 109 and the first-sale doctrine it embodies.

This provision of the Copyright Act simply limits the distribution right afforded to copyright owners as it relates to particular physical copies. It does not, as many have asserted, establish rights regarding the use of copyrighted works.

Section 109 says only that one who owns a particular copy or phonorecord may sell or otherwise dispose of the possession of that copy or phonorecord. It is an exemption from the distribution right related to ownership of a copy and it does not address the use of copyrighted works in any respects.

More importantly, Section 109 poses a limitation on the distribution right and only the distribution right. It does not provide any exemptions from the exclusive right to reproduce sound records and phonorecords and the right to publicly perform sound recordings by means of a digital audio transmission.

This important distinction flows from the bedrock concept in Section 202 that mere ownership of a physical copy does not confer any copyright rights on the owner of that copy. When I buy a CD I do not

also receive the right to reproduce copies from that CD and distribute them to the public. Nor do I receive the right to transmit performances of the recordings on that CD to the public by Internet webcast.

Section 109 cannot and should not be used to impinge on the other important rights of the copyright owner. In fact, when new business models that relied on Section 109 threatened the reproduction right, Congress took steps to narrow the privilege to protect copyright owners.

In the early '80s record rental stores sprang up that allowed customers to rent used albums and purchase blank tapes on which they could be copied. One store advertised that customers would never ever have to buy another record again.

As a result, Congress amended the first-sale privilege to prohibit renting sound recordings for commercial advantage without authority of the copyright owner. In the early '90s Congress placed similar limitations on Section 109 for computer programs.

Finally it is simply not the case that Section 109 is no longer relevant in the digital age as some have suggested. A digital copy of a work is

entitled to the same Section 109 privileges as an analog copy.

In this respect, we agree with the discussion and the comments filed by the National Association of Record Merchandisers and the Video Software Dealers Association.

Specifically we agree that the owner of a lawfully made copy or phonorecord is the owner regardless of whether the copy was purchased or after the purchase of a blank medium lawfully made by exercising the license to make it into a copy.

We also agree that a consumer who legitimately downloads a sound recording onto a recordable CD can resell that CD under Section 109 without infringing the distribution rights of the copyright owner. These statements are correct because they are consistent with the principles of Section 109 and its limitation to particular copies or phonorecords.

What is not consistent with those principles is any suggestion that Section 109 should also privilege reproduction or performance of copyrighted works, particularly in the digital environment where perfect copies can be distributed or performed to anyone throughout the world almost

instantaneously.

The limited nature of Section 109 has a practical significance in the Internet world that is overlooked or avoided by many of the comments. Digital transmissions involve the creation of additional copies, not the transfer of existing copies.

It is a fiction to suggest as HR 3048 does that the existing first-sale rules can be replicated in the digital world simply by allowing a person to create new copies of works so long as the original copies are deleted.

Enforcing such a system would be impossible. No one could determine whether these first-sale copies came from authorized copies, particularly in light of the enormous scale of copying that occurs on the Internet every day.

I just couldn't help but think about how we were going to shift the burden of proof and which of the 40 million Napster users we would choose first to apply that “shifted burden” to.

The expansion of 109 is not only unnecessary and unworkable but it would also do great harm to the developing marketplace for the delivery of digital music.

This leads me to the second principle of copyright law I would like to discuss and that is that copyright is a form of property and copyright owners like other property owners must be able to capture the value of that property through the use of licenses and other contracts.

Indeed, rapid development of new digital music business models will require the flexibility of contractual arrangements to meet the expectations of all the parties involved which--includes consumers, distributors, recording artists and record companies.

This is especially true in this new environment where the needs and desires of these groups can change quickly. Furthermore, the use of technological measures to support the contractual agreements of the parties is also essential to the deployment of new music delivery methods.

For this reason we strongly object to the suggestions of some commentors that Section 109 should be amended to place limits on--copyright owner's ability to contract freely with respect to their intellectual property.

As I said before, Section 109 is a limited exception to the distribution right. It does not address licensing or other agreements related to

copyright.

In fact, the House Report to the 1976 Copyright Act makes clear that parties should be free to contract regarding the further distribution of particular copies.

I quote the House Report, "The outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of future disposition. This does not mean that conditions on future disposition of copies or phonorecords imposed by a contract between their buyer and seller would be made unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright."

Congress has been wary of impeding the freedom of a contract as it relates to copyright and has only done so in the most limited of special circumstances.

Moreover, other areas of law such as contract and anti-trust are available to resolve any concerns about licensing practices. Section 109 simply is not the place to address these matters.

Even more importantly, these legislative

suggestions would stifle innovative delivery methods that consumers expect and demand from sound record copyright owners and other copyright proprietors.

Many consumers would like a try-before-you-buy program where they could download tracks from a CD and listen to them for a short period of time before deciding whether to buy the CD. Those tracks would timeout or otherwise become inoperative should the consumer decide not to buy the CD.

The sound recording copyright owner will not be able to offer such downloads unless it can use contracts or technological measures or both to ensure that the tracks are not further distributed without authorization.

If Section 109 were amended to curtail such agreements and measures, copyright owners could not offer these consumer-friendly alternatives.

For digital delivery of music to succeed, it must provide a much more exciting consumer experience than simply replicating the sale of prepackaged CDs.

Yet, the proposals put forth by NARM and others would mean that sound recordings could only be offered digitally in a manner like physical CDs because a consumer would not be able to trade a

different form of access for a lower price or customized selection.

Simply put, if the Copyright Act is amended to limit the copyright owner's ability to license and protect their copyrights, subscription services, authorized peer-to-peer downloads, internet jukeboxes, and other new delivery systems simply will not happen.

Moreover, the suggestion that Section 109 should be amended to address speculative concerns about the use of restricted licenses or technological measures is misplaced.

Record companies are committed first and foremost to making music available to consumers in a variety of convenient formats. Our companies cannot afford to turn off their customers by implementing burdensome and overbearing protection measures in the enjoyment of digital music.

That is why we have spent a great deal of effort over the past 18 months in the Secure Digital Music Initiative to develop systems that everyone can live with. The power of the consumer and the natural checks and balances of the marketplace will go a long way toward preventing the speculative parade of horribles that many of the comments raise.

Finally, turning to the subject of this panel, I would like to address briefly the suggestion put forth by DiMA and webcasters for an amendment to Section 117 to examine so-called temporary copies of works that are made as part of the operation of the machine or device, such as software that uses RAM buffers to play webcast streams or a portable CD player that caches music to prevent skipping.

There is a fundamental reason why such an amendment is not necessary and would be inappropriate. Neither DiMA nor its members provide any concrete examples of where copyright owners have filed suit or otherwise made inappropriate claims based on such temporary copies or how any webcaster has been hampered by any alleged threats.

I am certainly not aware of any record company that has claimed infringement or threatened litigation based on the making of temporary copies.

Rather, the marketplace is replete with examples of webcasters and other Internet music services being licensed by copyright owners with all the permissions they need to operate their business.

The need for any legislative action on this point has not been demonstrated and none should be taken where the likelihood of unintended

consequences is high. The language in Section 6 of HR 3048 is exceedingly broad and can be applied to a variety of situations that go well beyond the limited examples described by DiMA.

In the current marketplace where every week brings a new technological innovation that no one had thought of before, the risk of unintentionally creating a giant loophole in the copyright law that will undermine its very purpose is far too great. Let's not legislate to fix a problem that remains only theoretical.

Again, thank you for the opportunity to appear before you and I welcome any questions you have.

MS. PETERS: Thank you. Let's go to Launch Media, Inc., David Goldberg.

MR. GOLDBERG: Thank you.

Good afternoon, ladies and gentlemen. Thanks for having me. On behalf of over 250 employees of Launch Media, thanks for inviting us to testify today. I'm David Goldberg, CEO and co-founder of Launch Media.

We are a publicly traded California-based company that for over six years has developed innovative and compelling ways for consumers to

discover new music through interactive media and particularly the Internet where we operate our music destination site at Launch.com.

Since we first launched our website we've attracted over 5 million registered users by providing these music fans with a wide selection of streaming audio and music videos, exclusive artist features, and music news covering substantially all genres of music.

Let me just start by saying at the beginning that notwithstanding some of the public image of certain Internet music content providers in the wake of these high-profile lawsuits, we at Launch have worked very closely with the record companies and the music publishers since we started.

We did our first licensing deal with the major music publishers five and a half years ago. Before we had any product available to the consumer we went proactively and worked with them.

My background is I worked at Capitol Records before I started Launch and we have always believed that copyright owners should get compensated for their works.

As a result of that, we have actually been quite successful in getting licenses from these copyright owners. We actually have the largest

collection of music videos available on the web including licenses from major record companies like EMI Music and Warner Music. We stream over 6 million music videos a month to our consumers which is far more than anyone else on the Internet as a result.

We have also agreed to pay the record companies on the webcasting side more than traditional radio broadcasters pay for public performance rights. I think Seth mentioned that earlier.

I do want to address mostly Section 117. I guess I do take exception with what Cary said. I thought his remarks were very good but it is not a theoretical issue about the RAM buffer. I guess on a counter point to that, Cary's assertion that if it isn't a theoretical issue and it is a practical problem, then maybe we should have legislation.

The answer is many of us, and you'll hear from us today, have been confronted on this issue by music publishers who are asking essentially to be paid twice for the performance and as well for mechanical rights in this RAM buffer.

We have not been sued. Frankly because I think they are unwilling to file a lawsuit that they are not sure they can win. We certainly have been threatened and it certainly has been used against us

in negotiations over legitimate licenses that we are trying to provide to consumers.

So by advocating a legislative solution, we're not trying to circumvent legitimate rights of content owners. We have a business that is built on paying those content owners. We are trying to make sure that the copyright laws aren't unfairly burdening digital transmissions and basically requiring us to double pay the content owners.

We think this is a real issue today. We at Launch like many other people have come to appreciate the power of the Internet from a content delivery perspective both in terms of the geographic reach of the Internet, as well as the sheer volume of content that can be delivered.

The proposed change to Section 117 would ensure that the Internet remains a very efficient distribution mechanism for digital content of every description by clarifying that these valueless temporary copies which are inherent to the process of digital distribution do not implicate copyrights.

Sort of as a practical example, buffers are, as Seth mentioned, a necessary part of the process of streaming. If we could invent a way -- Alex's company is one of the major providers of the

technology. If we could invent a way to deliver a good quality product without creating those buffers, we certainly would. Then this wouldn't be an issue. But today it is an issue.

Maybe in the future it won't be an issue but as long as it is an issue, it is a threat that hangs over our business. Really it's not even -- we don't even need the litigation to happen to already cause us problems in our business.

The threat of litigation, particularly in a growing company like ours, is enough to cause us problems. It is enough to make us agree to licenses that are maybe not as fair as we would like to agree to because we are worried about this litigation.

I think it is also worth noting that modifying Section 117 to take this into account would also help grow other services including some of the subscription services that all our DiMA members would like to provide. We think that this will actually be helpful to everyone in the process to clarify this issue in order to make those services available.

We think that it's in the interest of society as a whole and not just webcasters and content owners that this matter get resolved. All of our society benefits from widespread distribution of

knowledge and information.

Likewise, all of society stands to lose if digital transmission of content is discouraged while the question remains undecided. This is not just a music industry issue.

I'm sure it's not in anyone's interest to resolve this issue through litigation which would inevitably be time consuming and costly for everyone involved.

In our opinion and, again, we're not insiders here in Washington, particularly my company which is based out in California, but there's already been way too much reliance on the courts to clarify these ambiguities in the copyright law.

The issue that we address here has broad ramifications extending beyond the streaming of audio and video music content and touching all transmissions of digital media.

This is a clear example of an instance in which legislation and Congress as a guardian of the public interest can and should act to resolve this uncertainty so as to encourage the dissemination of content and information and grow the payments to the content owners.

We think it benefits both consumers and

content owners to clarify this issue. Yes, we benefit from it but I think everyone in the long-run benefits from this clarification.

Thank you.

MS. PETERS: Thank you.

Let's go to Sputnik7, Mr. Beal. Do you want to switch?

MR. BEAL: He's going to cover the technical issues.

MS. PETERS: Okay. We'll go to RealNetworks.

MR. ALBEN: My name is Alex Alben. I'm the Vice President of Government Relations for RealNetworks and I appreciate the opportunity to come here today. I find it rather amusing that we've been having this hearing for several hours and now I get to describe what the RAM buffer actually is. I've heard many interesting opinions about what it does.

To backtrack, six years ago Rob Glaser founded RealNetworks in Seattle. It really was founded on the premise that the Internet would one day be able to transport audio and video programs to consumers around the world. That was not a given in 1994 or even '95.

In that era we had dial-up modems that

trickled information -- I don't know if you remember -- at 9600 baud we used to call it -- to people's computers. The RealNetworks technology solved the problem of how do you move a big media file over a slow network to create a continuous audio experience similar to broadcast radio.

This is what we did. We did this by perfecting a technology called streaming. Since we like to draw pictures in the software business, if you have a large file, say it's a music file but it could be anything, and let's say this file is 1 MB in size.

MS. PETERS: I note that you've drawn a rectangle.

MR. ALBEN: I've drawn a rectangle. If you push this over a rather thin pipe to a user's computer, it would take an unacceptable amount of time over Internet conditions. What streaming does is it takes this 1 meg file and it slices it into packets.

If you take these small packets, they can be routed around the Internet and its various nodes and then reassembled in sequence to the end-user's computer. You are taking a large file, you slice it into packets, and the technology allows the end-user's computer to assemble those packets in the right order, which is the name of the game. You don't want to

receive the file out of order. Maybe some people do but most consumers don't.

This is what streaming bits over the Internet is in concept. The system that we have to do this is called the RealPlayer and RealServer System. They facilitate both live and on-demand delivery of streaming programming.

Unlike digital downloads, which require storage space on the user's PC and a relatively fast Internet connection, streaming represents a very efficient and inexpensive way for broadcasters, now we call them webcasters, to deliver audiovisual content to their online audience.

We first demonstrated this technology in August of 1995 with a Seattle Mariners baseball game that was broadcast over RealAudio. David Letterman had Bill Gates on his show that week and essentially said, "Well, big deal. Don't we have a product called radio?"

The difference being that our radio broadcast in the RealAudio format was received by people all over the world who had an Internet connection so that fans outside of the terrestrial radio signal of the Seattle Mariners broadcaster could enjoy the broadcast.

From the outset Rob and the founders of our company sensed that streaming promised to create this new platform for millions of users to become content publishers. There are some important public policy implications of this technology.

At the same time that the traditional media markets had been characterized by concentrated ownership and fewer choices, streaming allows thousands of individuals, businesses, and also established media companies to adopt streaming and to reach a new audience.

In the interest of brevity, let me just skip ahead.

We've always made a version of the RealPlayer available for free and that has led to the rapid proliferation of the platform from 500,000 unique registered users in 1995 to 14.4 million in '97, 48 million in '98, 95 million at the beginning of 1999, and over 155 million unique registered users as of this month of technology that employs RAM buffers to do temporary copies.

The consequence to this is that there are over 350,000 hours of programming created each week in the RealAudio and RealVideo formats alone. We are not the only streaming media company. Microsoft and Apple

and some others also have streaming media products that deliver streaming programming.

The revolution that I have been describing is made possible by a technology that is called a RAM buffer and it's an important part of this discussion. Let me take another moment and draw another chart to explain how it works.

In order to ensure the delivery of the continuous and fluid audio or video stream, the RealPlayer stores a portion of each media file in computer memory known as RAM.

I am drawing a user's computer. I will draw with an arrow an incoming file whether it's audio or video. I will make a circle to symbolize a RAM buffer. As you know already, this is not the entire file being received in one shot but that it's packets received individually.

The packets individually live for a period of time in the memory until the computer can render them. Then they are discarded. That is the operation of a RAM buffer which is another, I think, fairly straightforward concept.

The RAM buffer helps straddle short delays in the connection between the streaming computer and the end-user, and the packets in RAM are discarded

after they are received.

This temporary storage enables a continuous listening or viewing experience of a long program, but only stores very small segments of any given media file under the normal operation of the player.

RAM buffers are used in a wide variety of consumer products, the Windows Media Player published by Microsoft, as well as consumer electronics products such as the Sony Discman and a host of imitators. Basically any product that you carry that bounces while you're jogging or doing some other activity uses a RAM buffer in order to make sure that you don't get gaps or skips.

We would venture that millions of hours of music and video are enjoyed each day around the planet by people using RAM buffering technology. It's not a theoretical technology. It's very widely used by companies, including RIAA member companies, that have been using these technologies for years.

Despite the incredible growth of digital media distribution over the Internet, copyright law, we believe, has in some respects lagged behind. Therefore, some limited and technical amendments are required in order to give the new digital markets a level of certainty.

I want to stress that because David said it quite eloquently. It's not that you need to face a lawsuit. It is that if a software company is going to make an investment in the new technology, if you face a threat of a lawsuit or even the uncertainty of what the law is, you might not invest in making that product.

We have many other choices and only limited resources so the issue is, if we're going to make this investment and the tens of millions of dollars that it took to create a RealPlayer, which has been distributed for free, we would like to have greater certainty. That creates greater innovation and, as the spillover suggests, greater jobs and opportunity in this whole Internet economy.

So as with the invention of a piano roll, a phonograph and VCR, all of which were opposed initially by content industries because they said there are great uncertainties and this will lead to terrible damage to our market value, if people spoke that way in those days, copyright law always struggles to keep pace with the widespread adoption of a new technology. I have explained the RAM buffer and how this facilitates the user experience.

The changes that we do support in the law,

and we realize the changes are not made lightly here in Washington or any other jurisdiction, means that new methods of digital media will not be disfavored as a means of distributing content.

That's a core principle for us and other DiMA companies: that we have a level playing field to continue to offer content to consumers. We hope that the Internet will continue to thrive as a medium for distribution of audiovisual content.

The incredible growth and entrepreneurial activity of the last six years will continue so long as wise policymakers try to create this level playing field for digital products.

Thank you.

MS. PETERS: Thank you.

Now, Mr. Beal.

MR. BEAL: Thank you.

My name is David Beal and I'm an active member of ASCAP, NARIS, and the American Federation of Musicians, and currently I'm the CEO of Sputnik7.com and the RES media group.

Sputnik7 is the leading online entertainment company offering consumers music, film, and animation programming through 24/7 interactive streaming video stations and video on demand.

In addition to our entertainment website, Sputnik7 is the exclusive digital representative for all of Chris Blackwell's entertainment companies such as Palm Pictures, Rico Disk, Hannibal, Gramma Vision, Slow River Tradition, and Manga Entertainment.

My interest in being here bridges my current role as CEO of an internet company with my previous career as a songwriter and producer. The first issue that I would like to address is RAM buffer copying.

As Alex has outlined, the allowance of RAM buffer copying is instrumental for us in delivering consumers a compelling entertainment experience.

Users visit Sputnik7 because they are seeking quality programming. To view that programming they must be willing to overcome numerous technical hurdles such as net congestion, the need for software plug-ins, digital medial players, etc.

Our consumers are inspired by the programming and, therefore, willing to tolerate the technical idiosyncracies that are inherent in the media.

We've gone to enormous efforts to remove these barriers and to deliver the best experience possible the time. The technology will continue to

improve and, therefore, we ask that the interpretation of these laws focus on guaranteeing that artists and copyright holders are fairly paid for their work and that consumers are able to access the work rather than focusing on an interpretation that's based on the ever changing technological mediums that are used to deliver the work.

Our interest also extends beyond RAM buffering into first-sale rights and archival copying. The technologies that we deal with may be new but the constitutional basis for the copyright must remain.

If the first-sale doctrine is not updated to apply to digital rights, we'll be enable a paradigm shift taking rights away from consumers and delivering additional power to the copyright holders.

If consumer rights to copy their legally purchased digital media collection into what medium they see fit are not upheld, many of the efforts to expand the distribution opportunities for independent artists will no longer be possible.

The recording industry which we are part of has built a business around encouraging consumers to be responsible, go to the record store, and purchase music so that artists and writers are properly compensated.

As a music fan and a technology buff, I find it personally frustrating that there is still not one place on the Internet that I can visit to purchase all of the music that I want in a legally responsible fashion.

As an industry we must begin to look at how we can give consumers the technological tools necessary to act responsibly and receive the music that they choose in a format suitable for their lifestyle.

At Sputnik7 we regard our users as leading edge customers, not as criminals, and look upon them to guide us in ways that they would wish to enjoy the entertainment in their lives.

The difference in outlook often serves as a barrier between the online and offline entertainment world and has been compounded by recent communication breakdowns in the litigation over the past years.

The debate surrounding digital distribution often focused on the record companies or publishing companies or rights organizations, but rarely does anyone ever consider them as a whole.

The court case and settlements to date seem futile in that not one has led to a solution that enables the industry to move forward in the digital

distribution and deliver consumers all of the music that they want in the formats that they want regardless of the label or publishing company or rights organization to which the artist and writers are signed.

Consumers buy music because they enjoy listening to artists or like a particular song, not because it is written by a BMI writer or released on a particular label.

I read the other day that the music business today is about a $40 billion business and asked myself what is the gross potential of this industry. Is it a $60 billion industry in a $40 billion body? Or is it a $10 billion industry in a $40 billion body?

The Internet and the coming age of wireless offers new opportunities to deliver consumers entertainment in so many places and formats leading me to believe that it is potentially a $60 billion industry.

But for significant growth to occur, there needs to be a future in digital distribution. We need to encourage technology companies to find ways to break down the barriers with consumers and gain their acceptance. We cannot continue to approach

distribution at the pace which we adopted the DVD audio standard. Notice you still don't see any DVD audio players in retail stores.

As we sit here and debate these issues, I ask that you don't forget the artists, filmmakers, and creators. They need to be enabled to drive revenues from as many potential distribution channels as possible and not be limited to only online or offline exploitation.

To be successful we must not look to the artists to support our business but we must find a way to make a business out of supporting these artists. I'm incredibly excited and optimistic that the years ahead are going to bring us an entirely new level of recording artists and film makers.

I remember when Francis Ford Copolla said in his life's documentary, The Hears of Darkness, that a fat girl in Ohio was going to become a Mozart and make a beautiful film with her daddy's video camera and for once the whole professionalism about movies will be destroyed forever."

I have witnessed this shift in the music business. More creators mean more content and, therefore, an increased need for companies like ours to help consumers find the gems and help film makers

and musicians make a living by deriving revenues from their creations in every potential way.

The relationships between many of the online and offline companies are often competitive and hostile. If we work together, we can use the Internet through targeted marketing and direct distribution to enable artists to reach an audience and have a viable and sustainable existence.

I was reading an article the other day about Tracy Bonham. In the article it seemed that she had spent years recording and rerecording her album trying to satisfy the single requirements of her record company. By the time she was finished, her label representatives had moved on to other labels, radio had moved on to new styles, and her album no longer had an audience.

MR. FEDER: A lot of people in the back are having trouble hearing you.

MR. BEAL: Stories like these amplify the opportunity before us to provide artists with an outlet that offers them more immediate access to a potential audience and to provide consumers with a daily digital dose of rigorously selected best of breed programming.

If we marry these with the interactivity

and personalization of the Internet, we can cultivate a culturally immediate experience that was previously unobtainable in any entertainment medium.

I ask that when you are considering the issues before us today that you look beyond the territorial bickering that goes on within the music business and the film business and that you focus on finding an interpretation of the copyright laws that will allow for technological advancements that support artists and copyright holders and help them to derive revenue by expanding upon their traditional revenue streams and making their work available to consumers in every way that is technically possible.

As an industry leader, we ask that you not focus on stopping the replication but on enabling the monetization and continue to support artists and consumers in this burgeoning cultural revolution.

Thank you.

MS. PETERS: Thank you.

Let's go to myPlay and David Pakman.

MR. PAKMAN: Thank you, Register Peters. Thank you to everyone for allowing me to be here today. My name is David Pakman. I'm the Co-founder and President of myPlay, Inc. We are the first digital locker service on the Internet where consumers

can lawfully store and access their music anywhere they happen to be provided an Internet connection exist.

Before founding myPlay I enjoyed five years in the early days of the online music and media business. First at Apple computer where I co-created the first commercial webcasting network.

Then at N2K which was one of the earliest Internet music companies and was the very first provider of commercial digital downloaded music for sale. In both of those examples copyright owners were paid and compensated fairly for our use of their works.

Launched just over a year ago, myPlay is the category creator and leading music locker storage service on the Internet. We have more than four million customers currently registered and more than 20,000 are being added every day.

The myPlay personal locker enables consumers to store, organize, and then stream back their music collections to them over an Internet connection and, therefore, hear it anytime they happen to log on to their own personal account over the Internet.

Unlike many other sites offering music on

the Internet, myPlay has been recognized, in fact, by the RIAA, Artists Against Piracy, and many others for having structured its service in a manner that both complies with the Copyright Act and compensates owners of copyright of musical sound recordings and compositions. We are one of the good guys.

The myPlay service is unique among Internet music services because it offers customers both password protected personalized locker space, as well as the ability to transmit play lists that they have created to the general public of music assembled by customers from their own locker collections.

The myPlay personal locker, the part where just their own music is stored and played back to themselves, enables its customers to organize and stream this music back to them from any location.

The music that they load their lockers with could be provided from their own CDs that they've obtained lawfully or acquired music online. The consumer's use of myPlay as a personalized storage and playback facility is unquestionably a fair use of musical sound recordings and compositions for which myPlay does not pay royalties.

MyPlay does give record labels and publishers the opportunity to offer our customers

downloads of tracks and albums and other promotional mechanisms that can be added directly into user's lockers.

MyPlay will, however, pay substantial royalties pursuant to both voluntary music performance licenses and compulsory sound recording licenses for the streaming transmissions, the public playlist, to other members of the myPlay community.

We consider these payments to be just, fair, and complete compensation to copyright owners for our streaming of licensed musical compositions and sound recordings.

However, the threat of copyright owners assessing further royalties for mere incidental copies that bear no independent value to consumers and are a mere technical requirement for the transmission and playback of streams is not only unfair to those of us who obtain the rights through blanket and compulsory licenses. It is both unjustified and will needlessly impede electronic commerce. This is my principle reason for testifying today.

Temporary buffer memory copies for authorized streaming should be explicitly placed outside the copyright owners monopoly powers and right to demand compensation. These copies in buffer memory

are technically required for the transmission and playback of streams of music on the Internet both during transmission through the Internet infrastructure and also at the ultimate destination, the user's personal computer, as Alex explained.

There is no practical way to transmit and play back streams without them. These buffer memory copies are not permanent. They bring no value to consumers and consumers will not pay for them. They are mere technical necessities no different, as Alex explained, from the buffer copies made every day in CD players, in e-book readers, and other electronic players of digital material.

Manufacturers of every one of these devices today enjoy a de facto exemption from liability for buffer memory copies. No copyright owner would dream of trying to collect extra fees for any of these uses.

Buffer memory copies are also created during the transmission of downloads of music or of text or graphics, for that matter through the Internet infrastructure and during final processing at the customer's PC.

But, to my knowledge, no website has ever been asked to pay extra for mere buffer memory copies

made through the sending and processing of copyrighted material other than musical streams over the Internet. Why should companies like myPlay who offer streams of music and pay blanket license and compulsory license fees for the privilege be treated any differently.

I'm confident that, however, if put to the test these buffer memory copies would be deemed a fair use as mere incidental copies made in the exercise of authorized rights of public performance that do bear economic benefits to the user and copyright owner alike.

However, it would be better for our industry if the status of buffer memory copies were made clear in the Copyright Act. Even if companies like myPlay possessed large war-chests of cash, which we definitely do not, there is no rational basis for us to bear even the threat of lawsuits much less the immense cost of establishing this principle in the courts.

Moreover, the clarification we request should be precise about exempting buffer memory copies for all lawful transmissions and playback, not just those that are licensed. This is necessary to embrace and preserve meaningful fair use which is of great importance to consumers and integral to the myPlay

locker service and our business.

Absent such clarification, myPlay and similarly situated Internet service providers would continue to be exposed to the threats from owners of copyright and their representatives who contend that we who stream audio files online must not only pay public performance fees, but also must pay again for fleeting buffer memory copies as if such copies were the equivalent of permanent downloads.

An amendment clearing up this point will benefit copyright owners, too. MyPlay has studied our 4 million customer usage patterns and the economic benefits that can be derived from that usage. There is no rational business model that allows for payments by consumers or advertisers for mere buffer memory copies.

Royalties and payments due for use of copyrighted works are made possible only when an economically rational business can be built in accordance with the use of such works. We believe strongly that significant profitable businesses can be built from the use of copyrighted works. However, no business can be built or expanded solely by commercializing temporary buffer memory copies.

Conversely, if royalties were due on the

creation of purely transient copies, there is a substantial danger that presently viable business models would be fatally undermined.

Given the significant amount of uncertainty surrounding this and other issues of copyright in the digital domain, myPlay currently retains eight law firms and over 20 lawyers. Many simply to seek clarification, warn of risks, and defend against potential claims arising from the lawful use of copyrighted works by myPlay and our customers.

This unnecessary expense and resource strain would be obviated by further clarification of the Copyright Act allowing ours and other businesses to get on with the work of building a business and serving our customers.

Copyright laws should avoid needlessly placing obstacles in the way of commerce and consumer enjoyment, particularly hurdles on the most trivial of technicalities. This is particularly advisable when clarifications of the law will have virtually no effect on a copyright owner's reasonable and just expectations for compensation.

Copyright owners are entitled to and should be paid fees for public performance but not for

the buffer memory copies that do nothing more than technically facilitate transmission and playback.

For all these reasons I've given, temporary buffer memory copies for lawful streaming should be explicitly placed outside the copyright owner's monopoly powers and right to demand compensation.

And just a last point. As the law now stands under principles of fair use, consumers may make backup copies for personal use unless material is encrypted. MyPlay consumers further should have the right to do the same with works that are delivered digitally and do not require encryption.

Computer hard drives crash, new ones replace old ones. Customers need the right to make archival copies for convenience no less than the lawful acquires of computer software who already enjoy this privilege under Section 117 of the current Copyright Act.

The myPlay locker service, for example, is built upon the consumer's ability to upload copies of the works they have bought either as CDs or as digital downloads.

Changes in the consumer's right to do this for digital works would violate principles of fair

use, would be inconsistent with the rights afforded owners of analog physical goods, and would stifle the success of the burgeoning digital download industry.

MyPlay has played by the rules from the beginning. We've designed a service that compensates copyright owners and artists in full compliance with the DMCA and other relevant sections of the Copyright Act. There are many additional changes in the law that myPlay would desire for the sake of fair treatment beyond those under consideration today.

For apparent reasons in addition to the clarification regarding fleeting buffer memory reproductions made during the course of streaming that they not be considered reproductions, myPlay would also wish an explicit statement in the Copyright Act that downloads, that cannot be monitored in realtime are not to be considered public performances.

MyPlay is also a strong proponent of the expansion of compulsory licenses to make music more available in response to consumer demand. Such licenses should require a reasonable payment to copyright owners. MyPlay does not favor any exemption from payment obligations unlike those covered in the proposed MP3.com bill. We are not looking for a free ride. Rather, myPlay wants to ensure fair

compensation.

In the meantime before these additional changes in the law become feasible, myPlay urges that at least one small but significant step be taken immediately, enhance the flow of e-commerce for which consumers, 4 million of them in our case, are now clamoring by legally precluding copyright owners' demands for redundant compensation in instances of authorized streaming that are excessive and unjustified.

Thank you.

MR. ALBEN: David, can I append one second? We are talking here about clarity under U.S. law. Streaming is a global phenomenon. We have customers of 155 million RealPlayer users. About 30 percent are outside the United States. We also face uncertainty about the status of temporary copying and the laws of other countries.

To that end it would be extremely helpful if at least U.S. law was clear so that if we were ever faced with a suit or potential suit, we would be able to point to the U.S. law and I think that would facilitate our business.

MS. PETERS: I don't think it would help you outside the United States.

Let's go to MusicMatch and Mr. Ohlweiler.

MR. OHLWEILER: Thank you very much. I appreciate the opportunity to come and testify. Given the fact that a lot of my colleagues here have talked in detail about some of the issues, one of the things I would like to spend a moment on after hearing a lot today about one of the issues that is being dealt with as a practicality is fear. As music or media is made digital, the fear of piracy.

There's a whole other side to that on the consumer side which is the promise of digital media. I want to spend a little bit of time talking about that. A little bit of time telling you about MusicMatch and how some of the things on your agenda today will impact that promise for consumer consumption and commerce of music.

First of all, MusicMatch is a company in San Diego privately held by 200 employees. About three years ago we invented a software program called the digital jukebox.

This program enables people to take their CDs, tapes, albums, record them onto their PC's hard drive lawfully, as well as take their music that they download lawfully off the Internet and consolidate their music and create an entire database of music

that they own that they can then go consume.

The interesting fact and what's happened with this jukebox model is now people don't have to wade through all their CDs to listen to the exact music they want to hear. They are able to instantly in a moment's notice with a couple clicks create music that is perfect for the moment. This has removed a lot of barrier to people consuming music and it has increased the enjoyment of how people consume music.

In fact, MusicMatch does a lot of customer surveys of our user installed base and we find that people who use MusicMatch consume more music, buy more CDs, and discover more new music since using music match. We think the reason why is because it has eliminated barriers to music consumption.

So far MusicMatch is enjoyed by about 12 million registered users around the world. MusicMatch several weeks ago launched an Internet broadcasting radio service. We are also paying royalties for the composition performance as well as the recording performance. MusicMatch is now a webcaster in addition to a jukebox company.

Interestingly enough, as we've seen out consumers start to enjoy music, we've seen them eliminate barriers to that enjoyment of music. What

has enabled that is this creation of the virtual jukebox or the virtual world that the Internet provides where consumers can actually just call up wherever they want the music.

They can take music along with them on a playlist on a portable device. They can burn their music onto a CD and take it to the car. They can send it or beam it to other parts of the house to consume that music.

One of the things that is very important to us as we extend that music on my PC to music via the Internet, that virtual jukebox similar to what myPlay is doing, a lot of the music now starts coming to the consumer in the form of a stream and that stream could be in a licensed webcast, it could be music that they own that they have uploaded to a myPlay service, or it could be music that comes from a subscription service on demand that they've paid for.

The interesting thing for the consumer is the consumer sees that one little piece of software that they are used to seeing that they can just grab that music wherever they're at and play it and enjoy it and experience it. They don't have to worry about did it come across the wires, is it sitting on their

hard drive, is it sitting on a myPlay locker.

It's all in one simple interface. Essentially what this industry is doing is we're removing barriers to consumers to help them fundamentally enjoy their music.

One of the things that is absolutely essential to us to create this virtual world where people can listen to music through various different business models is we need to have the copyright laws be consistent with the actual transaction that's happening.

A lot of the team up here has talked about the RAM buffer issue. I would second that issue. We need to be able to pay the copyright holders for either a purchase transaction or we need to pay them for the performance. We have policies and contracts and procedures to do all of that.

What we're looking to do is as we've removed these barriers, the other issue that we are very interested in is this first-sale doctrine. The reason this is important to us is one simple reason. We think that digital media offers advantages in certain cases over physical media.

Those advantages are my ability to instantly consume that and instantly purchase it and

instantly have it. That kind of impulse buy or impulse purchase or instant consumption is a very long well-known fact that when you remove barriers for consumers to purchase, commerce expands. Commerce transactions expand. People buy more. People spend more.

Record companies with their cooperative advertising dollars pay retailers to move their CDs out of the rack and put them on the end cap so that people have one less barrier in terms of walking back through the store and finding the music they're looking for in a rack. It's out on the end cap. Just to make it easier for people to access that music they have essentially removed barriers.

Digital media, what we're going to be able to do is while you're listening to a piece of music on a radio station, or while you're listening to a CD, or while you're listening to something that you are streaming, you'll be able to purchase that track instantly with one click.

That's an amazing removal of barriers for consumers to experience and enjoy music. This is why MusicMatch and other companies are so concerned about copyright laws supporting the value of digital media. Having given the consumer the same rights over digital

media that they have over physical media is absolutely critical for that.

We think that, sure, there will be some piracy like there is today with people shoplifting but there will certainly be an expansion of the consumption of music because we have removed barriers to commerce.

Those are the two fundamental reasons why MusicMatch is interested in the work that you're doing. We are very supportive of copyright law. Very supportive of artists and making sure artists get paid.

As several of the other folks have said up here, MusicMatch pays royalties. MusicMatch is in the license content business and it's in our best interest that we protect the revenue streams of the artists as well.

Thank you very much.

MS. PETERS: Thank you.

Now, Mr. Nelson.

MR. NELSON: My name is Bob Nelson. Given some of the discussion I hesitate to add that I'm an attorney with Stoel Rives. Fortunately today you will hear very little about the law. I'm here to present the views of Mr. Charles Jennings, CEO, Supertracks.

I believe you have his five-page testimony before you.

He's a businessman and he's an Internet businessman. I think you see from his testimony that Supertracks has offices in Portland, Oregon and Santa Monica, California. They employ about 75 people. They are a technology company that creates and provides the technology necessary for the delivery of digital commerce using the Internet.

They focused on digital rights management for digital music downloads. They are now addressing additional areas of concern in that market as it relates to digital content delivery.

I also think for the first page of his testimony you'll see that Mr. Jennings has extensive experience with Internet privacy initiatives, authentication initiatives, and premiere content protection systems.

I will primarily briefly discuss some points in Mr. Jennings' testimony, primarily the first-sale issue which has been variously described as a privilege and right. I think that's the attitude Supertracks takes.

It is Supertracks' position and belief that the rights of consumers, which they now enjoy as a result of the first-sale doctrine in the physical

world, should be extended to digital commerce by amending Section 109.

We heard today from content owners who oppose the extension of consumer rights into digital goods. Supertracks does not believe their reasons for opposition stand up against real world experience and current realities.

One of their fears is they will lose control of the content once it is put on the Internet because a digital copy is a perfectly good copy. Since a recopy is essentially an original, they feel they will lose the ability to capture value in that good. This is true if the statement is left at that point.

In reality technology is now available to protect digital goods in such a way to prevent unauthorized copying. Today it is both possible and practical to secure and protect digital goods on the Internet. There is no reason not to extend the same rights to digital goods as those in the physical world.

At Preview Systems we built a secure and robust delivery system for digital software. We proved that commerce can be conducted over the Internet, digital goods, in such a way as to protect

those goods while facilitating distribution.

We are also able to do that at Supertracks where we built a similar secure and robust delivery system for the digital download of music. Digital copies have as much, if not more, copy protection as the same song delivered on a physical medium such as a compact disk.

In fact, it is even possible to provide greater copy protection of the digital world, which if used as a standard could paradoxically lead to an erosion of the rights and protections afforded consumers for physical goods.

Using the analogy we discussed previously of reproducing a book, I think it is our position that it is more difficult if you have the forward and delete methodologies. I noticed Mr. Sherman referenced those.

It is more difficult to reproduce those works in violation of the valid purposes of the copyright law than it would be to reproduce a book via a Xerox machine.

Legally when digital goods are treated differently from physical goods, it allows content owners to apply different rules to those goods, rules that have a direct negative impact on consumers.

These differences are not consumer friendly and the rules imposed by content owners are often hostile to consumers. I think we had extensive discussion this afternoon by Pamela Horovitz on this very point.

Consumers expect to have the same rights of ownership they have with physical goods. We found that they don't understand why they can't do the same thing with the digital goods as they could with the same product in a physical format.

Why can't they lend it, resell it, make a copy to listen to in the car? Especially when the digital product can be designed to allow for those abilities. Why don't they have the same consumer protection rights as they would have with music they bought in some other form.

The key to digital commerce is acceptance by consumers. Consumers won't accept digital commerce until it is ubiquitous, easy to access, and can be used, consumed, in a manner that is satisfying.

They don't have the same rights with digital goods as physical goods markets. I would emphasize here, markets by responsible providers are unlikely to develop. Consumers won't buy digital goods if restrictions put on digital downloads cause the buying experience to be cumbersome.

We've had this experience at Supertracks. We built the software and infrastructure but no one came to buy the music. The reason was simple. Consumers found the experience too restrictive and cumbersome.

This experience is not unique to Supertracks. It is experienced by the industry as a whole. As Mr. Sherman pointed out, we are all struggling with a common goal here, to make it available in a way that is not restrictive and cumbersome. We are finding the same thing in other forms of digital delivery as well.

Current law makes it extremely difficult to give the consumer a rich experience that will encourage purchases. When they purchase a digital good, current law does not extend the kind of protections that make it a worthwhile investment.

As a result, they refuse to buy music under those conditions. If consumers aren't buying, there is no market. Without a market, content owners won't be paid for a product they have a right to sell. Everyone loses.

We would like to briefly turn to the other issues that we've been discussing, the archival copy exemption. Again, we think that consumers should be

able to move or store music they have purchased through other personal non-commercial devices.

They should be able to protect their investment by making archived copies for personal use whether or not these copies are susceptible to destruction by mechanical or electric failure.

In the physical work they already have this right. In the digital world they don't.

I think that summarizes the comments that Mr. Jennings has submitted for the record. I have additional complete copies of the comments and, of course, the summary if anyone wants one. Given the lateness of the hour, I think I'll conclude. Thank you very much for your attention.

MS. PETERS: Thank you.

I thank all the members of the panel.

I'm going to start with you.

MR. CARSON: Cary, let me make sure I understood what you were talking about, what your position was with respect to the buffer copy.

If I understood correctly, you were saying that legislation isn't necessary because it's not really a problem in the real world. Nobody is asserting infringement or no one has been sued for infringement and so on.

I don't think I heard you say -- I'm not sure I heard you take a position on whether in fact the making of those buffer copies incidental to a streaming transmission is or is not an act of infringement. Do you have a view on that?

MR. SHERMAN: I hesitate to take any position that is a one size fits all position on something that is as broad as the phrase “temporary copies,” “buffer copies,” or whatever.

Is a buffer copy accessible? Is it available for a millisecond or is it available for 24 hours? Every time we have some provision in the copyright law, there is some new company that comes along the following week that will take advantage of that exemption and try to squeeze a business model in that avoids payments to copyright owners.

Should copyright owners be paid for nonvaluable things that have no merits? No. But how can you decide that on an all or nothing basis with a phrase like “temporary copies”? I really think you need to look at these things on a case-by-case basis and make a decision that's based on the merits. I think that is the only logical way that we can approach something like this.

We may be a little gun-shy about changes

to the copyright law here. We have seen what happens when well-intentioned and very clear changes to the copyright law in the consumer interest are then taken by lawyers to court and stretched beyond recognition to achieve ends that nobody intended.

The clearest example of that is the recitation about Section 1008 of the Audio Home Recording Act. Napster argued that it wasn't meant to protect personal copying by individuals, but that it was intended to allow world-wide distribution of copyrighted works to strangers.

I mean, it's that kind of stretching that we have to be legitimately concerned about, and trying to come up with a provision that is going to apply to all temporary copies in some logical way--without taking account of the multitude of circumstances that can arise--is very difficult.

I really just don't think we are going to be able to get it right. I don't think we're smart enough to know what's going to come along next month that will make us seem foolish for what we did last month.

Marybeth has made the point that nobody envisioned Napster when we were all talking about the DMCA. That is certainly true. Think of how

differently we might have tried to work on those safe harbor provisions if Napster was the model.

Well, Napster is now not just a model. It's a very potent force. Yet, nobody envisioned it. I think, therefore, we have to be very, very careful about making changes.

I would also like to take the opportunity to respond to David Goldberg on his point that there is a real world issue with temporary copies.

I think what you are referring to is not temporary copies per se, but a specific provision of the copyright law called incidental DPDs. That is really what a lot of the people at this table are talking about, incidental DPDs.

One could look at it, yes, as a form of temporary copy but it would stand regardless of whether we enacted a temporary copy exception because there's a specific provision dealing with incidental DPDs.

I would, therefore, suggest that we have to resolve that issue. As you know, we have filed a petition with the Copyright Office asking for the help of the office in figuring out how that should work. It's a tough issue.

MR. GOLDBERG: Actually, specifically the

temporary buffer in the stream has been -- that specifically what has been used against us.

MS. PETERS: By music publishers?

MR. GOLDBERG: By publishers. By publishers demanding payment for mechanical license for that temporary buffer.

MR. SHERMAN: That's an incidental DPD. That's what we're talking about. That claim comes within the context of incidental DPDs within Section 115. We all know that's an issue that needs to be addressed.

MR. ALBEN: I respectfully disagree because we have seen that described separately and incidental DPDs could cover other kinds of ephemeral copies; copies on servers, copies created in transmission. In fact, I have never seen someone try to apply that section only to the temporary RAM buffer.

MR. SHERMAN: Well, I think David will disagree with you.

MR. CARSON: Just one more question. As I've heard all the testimony about buffer copies and so on, I've asked myself whether this question is properly before us.

I look at Section 109 of the DMCA and what I see it tells us to do is to examine the effect of

the amendments made by the DMCA and the development of electronic commerce and associated technology of the operations of Section 109. That's the first sale-doctrine. I understand that.

And Section 117. Section 117 is not an all purpose copying exemption. Section 117 is a section that deals with computer programs and what one can or can't do with computer programs.

Why are we talking about this today? Is this within the mandate that Congress gave us in conducting this study?

MR. ALBEN: The RealPlayer is a computer program. RealPlayer employs the technology that is RAM buffer. I think the law is unclear right now as to whether any RAM buffer copy is a copy that would be an infringement.

I'm disappointed that Cary would not at least acknowledge that the industry standard that's being used, the RealPlayer, but also the Windows Media Player and Apple Player that use the exact same type of technology. I'm disappointed that he would not go so far as saying that the buffer copy as employed in that specific type of product is not an infringement.

(Whereupon, the lights go out.)

MS. PETERS: Oh. Well, that's

interesting.

MR. ALBEN: So literally we're in the dark and we would like some clarity. Let's face it, you had a gentleman who is someone with an advanced degree in law today in the previous session state to you that a transmission is a performance even though it is never heard.

I think there is a lack of clarity in a lot of these issues that you're going to be grappling with in a number of rulemakings and a number of proceedings. I think it would be very valuable to add some clarity in the law. A download is a download if it's reproduction unless it is simultaneously audible to the user. And a stream is a stream unless a permanent copy results from that stream.

I sort of feel like we've been through the looking glass today because the performance societies will say that a download is a performance and the reproduction societies that collect that royalty will then tell you that a stream is also a reproduction.

Well, these two things can't be true. They are not logically consistent. He said they were not intuitive but I think the proper word is they are not logical and they are not born out by the law.

The only reason why I digress on that

right now is that you are going to face this issue in other rules and proceedings and we should try to get it straight. The more clarity that we can have, the more we can move forward with our businesses in a robust way.

MS. PETERS: Can I add to your question to Cary? We had a witness from NARM who was reading from a contract and she characterized -- it was a record company. She didn't identify the record company but she characterized the product as software.

My question was when record companies in their contracts use the word software, are they referring to what we recognize as software or is there kind of a move to call content software?

MR. SHERMAN: I honestly don't know how it was used in that context. It is conceivable that there would be a distinction drawn between the musical content and the software program that provides the functionality for the replay and any DRMs and so on and so forth. I don't know how it might have been used in that context but I don't think there is generally a move in the industry to call content software.

Unfortunately, Alex, Section 117 refers to computer software not in the broad context but in the

context of a computer program. What you are worried about buffering is other kinds of copyrighted works, other than computer software programs, even though it may be happening inside a computer program.

I think, David, you're right.

MS. PETERS: Jesse.

MR. FEDER: Given the lateness of the hour I want to give Jeff a chance.

MS. PETERS: Jeff.

MS. PETERS: I think we're all burnt out.

Marla, did you have anything?

MS. POOR: No.

MS. PETERS: Let me make sure. I just want to make absolutely sure. I think actually any question that I might have I can pull and get further clarification. It's okay.

I want to thank everybody who participated as a witness. I also want to thank all who were in the audience for your long-staying ability in not necessarily the most pleasant of circumstances and surroundings. We appreciate that. Thank you.

(Whereupon, at 6:04 p.m. the meeting was adjourned.)

Appendix 1

"The Library as the Latest Web Venture"
New York Times, June 15, 2000

June 15, 2000

The Library as the Latest Web Venture

By LISA GUERNSEY

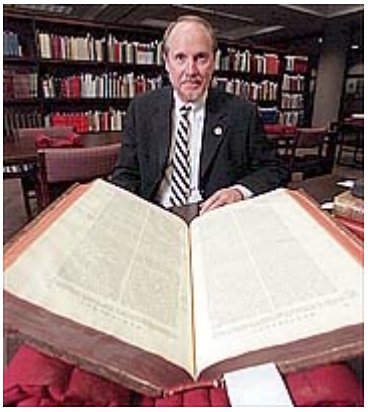
When Carrie Larkworthy, a student at Harvard University, is faced with a research project, getting a book out of the library is the last thing on her mind. Instead she sits in her dormitory room and logs onto the Web, starting with Harvard's online system for searching and retrieving journal articles. "I hate the library, so I try to avoid it," Ms. Larkworthy said. "It's such a big facility that you have to search through."

If Ms. Larkworthy's experience is anything like that of other students, and many librarians acknowledge that it is, the use of books for research is becoming an archaic concept. If scholarly books are not on the Web, they are invisible to anyone using the Internet as a substitute for in-depth investigation.

But new efforts are afoot to change that. Several companies are racing to put the full texts of hundreds of thousands of copyrighted books, old and new, on the Web.

NetLibrary started the contest, with technology that lets people view books online for short periods of time, the digital equivalent of borrowing them from the library.

Now two other companies, Ebrary.com and Questia Media, are taking on the same challenge but using a new strategy. They want to give people the



Jennifer Warburg for The New York Times, top; Andy Manis for The New York Times, bottom

FROM BOOKS TO BYTES - Kate Douglas Torrey, top, is director of the University of North Carolina Press, which is working with Questia Media to put many of its books online. Questia and another service, Ebrary.com, will charge their customers. Kenneth Frazier, bottom, of the University of Wisconsin at Madison wonders how digital libraries will affect actual libraries.

Related Article

• Foreign Shores Provide Cheap Labor to Digitize Books

opportunity to search through reams of pages at no charge, then will charge people a few cents a page for using that information. (Questia users will be asked to pay for viewing, copying and printing the online pages. Ebrary.com users will be able to view pages free but will pay for copying and printing.)

These electronic library projects are not attempts to compete with the budding electronic book industry, which offers books for downloading to handheld devices and is focused on popular fiction, like Stephen King's recent Web-only novella, "Riding the Bullet," and on other newly published trade books. The library projects have very little to do with the debate over the promise or pitfalls of gadgets that let people read novels electronically from the comfort of their beds.

In fact, the new effort to build an electronic library is not about reading at all. It is about the power of electronic searching. With digital scanning, texts of works that may be decades old can be mined for those few morsels of insight that may enhance a research paper or help prove an argument. It could be a way, some publishers say, to move books into the Web's fold and make them more visible to students like Ms. Larkworthy.

"In an ideal world, a person would find a book in the card catalog, pull it off the shelf and use it," said Kate Douglas Torrey, director of the University of North Carolina Press. "But that is just not the world we live in today." The University of North Carolina Press is among more than 80 publishers working with Questia to turn many of their titles into searchable documents available on the Web.

Laziness is not always the excuse for avoiding the traditional library. Even people who do go hunting in the stacks are sometimes thwarted. The books they want might be checked out or misplaced, lost forever among call numbers that have no relation to the sticker on their spines. Or the books might be at other libraries and available only to those researchers who are willing to wait weeks for interlibrary loans.

Such situations can be avoided on the Internet, proponents of digital libraries say. "This will take some of the tedium out of research," Ms. Torrey said, "and make it easy to use an extensive collection of scholarly work."

Of course, people have been hailing the promise of digitized libraries for years, and the reality has not yet measured up. When netLibrary opened in March 1999, for example, it was promoted in press releases as a company that would "revolutionize the library system" by enabling people to tap into a searchable and comprehensible database of reference and scholarly books.

Until this month, netLibrary offered two types of access: holders of library cards from participating libraries could use the service at no charge, and others could subscribe to the service for $29.95 a year. The subscription option is no longer being offered to new users.

Now netLibrary is primarily a service for public, academic and corporate libraries that want to buy electronic titles and make them available to their patrons.

Rob Kaufman, netLibrary's president and chief executive, said the shift away from a consumer service was partly an attempt to appease librarians and publishers. Some librarians said the service was competing with them. Publishers did not like the subscription model for another reason: they said it gave people too much access to electronic texts at too low a price.

Even those who gain access to netLibrary may find the experience less than satisfying. There are just not yet enough books in the site's collection to make serious searching worthwhile. The site now has about 18,000 copyrighted books and 4,000 public-domain works, numbers that are tiny compared with the hundreds of thousands of volumes in most research libraries and the millions of volumes in major ones.

Will companies like Questia Media and Ebrary.com do any better? Ebrary.com already has more than 130,000 volumes in its demonstration database and says that it may include as many as 600,000 by the time it opens in the fall.

Questia, backed by $45 million in venture capital, plans to offer access to 50,000 volumes when it opens next spring and is working toward a goal of 250,000 books in three years.

These numbers are possible, the founders say, because they have appealed to publishers' pocketbooks. When a book is sold to an actual library, the publisher makes a one-time profit. That book might be retrieved and read by hundreds of people, but the publisher never sees another dime. In the models used by Questia and Ebrary.com, however, that book could continue to make the publisher money as more people see it.

Anyone going to Questia's site, for

SITE-SEEING

Although commercial companies are getting into the act, several education Web sites have been offering access to electronic texts for years. The sites are ideal for finding classic texts that are not restricted by copyright, like works of Shakespeare or Robert Frost. Most of them are plain text versions of books and are not integrated into Web-based databases, which means that they do not allow keyword searching across multiple volumes. Here are some of the sites that give people access to texts of literature and reference works:

ALEX CATALOG OF ELECTRONIC TEXTS:
sunsite.berkeley.edu/alex
Includes about 700 books that are in the public domain, which typically means that they have been written by authors who died decades, if not hundreds of years, ago. Titles are drawn from American and British literature and Western philosophy.

BARTLEBY.COM:
www.bartleby.com
Features a searchable database of

Anyone going to Questia's site, for example, will be able to search the entire database of books at no cost, but only subscribers will be able to see the books' pages by clicking on the search results. (Questia has not yet set its subscription price, but Troy Williams, the company's chief executive, said that it would be "affordable for the average college student.")

Ebrary.com has adopted what Christopher Warnock, the chief executive, calls "the photocopier model." Searching will be free, he said, and so will the act of simply reading whatever pages are retrieved from a search. But when a person tries to copy the text of those pages by using copy and paste commands, a dialogue box will appear on the screen. In a recent demonstration, the box said: "This will cost you $0.25. Would you like to continue?"

about 100 books, most of which are multivolume reference books or classics of literature and poetry. Although the site is now commercial, it started as a university project and access remains free. The company is starting to include copyrighted books as well, like The Columbia Encyclopedia, Sixth Edition.

ELECTRONIC TEXT CENTER:
etext.lib.virginia.edu/uvaonline.html
Offers about 5,000 public-domain texts, including English literature, manuscripts and newspapers from 1500 to the present. Also includes texts in more than a dozen other languages.

PROJECT GUTENBERG:
promo.net/pg
One of the first electronic text projects on the Internet, this has about 2,500 public-domain titles.

The same kind of message pops up when a user tries to print the page. If the user decides to pay for copying or printing, the software will automatically generate a citation for the work and place it below the copied or printed text.

Most people will have no problem paying a few cents for what they want, Mr. Warnock said, since they already scrounge up quarters to use photocopy machines. At the site, a user will be able to sign up for a debit account of, say, $10 and will then need to type in a user name and password during each session in which the user prints or copies pages.

These payments, the founders say, can add up to big money when millions of people are spending a few cents at a time. And many publishers are willing to license their copyrighted material in exchange for some of that cash. "It holds the promise of being profitable," said Tim Cooper, vice president for strategic operations at Harcourt Trade Publishers, one of the companies that has signed a letter of intent with Questia.

It is not just those micropayments that interest publishers, said Larry Weissman, director of new business development for Random House, which, he added, has struck no deals with either Questia or Ebrary.com. But the ideas are appealing, Mr. Weissman said, partly because they may introduce readers to new works. "The hope is that they would want to continue that reading experience by buying a book," he said.

If the sites succeed, they will be mixing the qualities of libraries and bookstores. Most people think of the bookstore as a place to buy and the library as a place to borrow or browse at no charge. But on the Internet, where full texts can be searched in seconds and information can be retrieved with a few clicks, convenience is part of the package as well. These companies, including netLibrary, are betting that people will pay for it.

Librarians are intrigued by the concept, said Kenneth L. Frazier, the president of the Association of Research Libraries. And they are eager to see how quickly texts can be digitized when put into the hands of companies, which may find more efficient ways to scan books on a huge scale.

But Mr. Frazier, who is director of the general library system at the University of Wisconsin at Madison, also wonders what that will mean to traditional research libraries, which have always been motivated by public interest, not private profits. Making sure that low-income people have access to expansive new online libraries is one area of concern. Another concerns the selections made by digital libraries. Will databases include only the most popular books, Mr. Frazier asked, "or the stuff that gets the highest return economically?"

At Ebrary.com, books are included for technical reasons. They must already exist on publishers' computers in a format called PDF (for portable document file), which was developed by Adobe Systems and is commonly read online using the Adobe Acrobat Reader. Many publishers, Mr. Warnock said, have been using this format since the early 1990's during the design of their hard-copy books.

Questia is taking a more academic approach. It has hired Dr. Carol Hughes, a research librarian who recently worked at the University of Iowa, to lead a team of librarians in selecting core titles that have been known to be useful to college students. A few of the books that will be included on Questia are "The Industrial Revolution," a 1956 book by Arnold Toynbee, and a 1982 edition of Dante's "Divine Comedy."

Dr. Hughes said she suspected that Questia might drive more students to the actual library instead of away from it. After using the Web to find books that meet their needs, she said, they may want to check them out to read them more closely. "I think it is going to greatly enhance libraries," she said.

Being able to search online books will help students see their value, Dr. Hughes said, particularly when they can easily get access to books that have become classics in particular subject areas.

A nonprofit project called JStor is often offered as proof that digitizing old texts can breathe life into them. For the past five

years, JStor has been creating digital copies of scores of scholarly journals, some of which have issues more than 100 years old. University libraries around the world pay for access to JStor and provide it to their students free. A recent study by JStor showed that students used the online service almost 20 times as much as they dug into the stacks for the paper versions.

Just a few years ago, said Mr. Frazier, of the University of Wisconsin, librarians and publishers scoffed at the idea that a full-scale project like JStor could be adopted for books any time soon. Many people said it would take centuries before the equivalent of a library's bookshelves would ever make it onto the Web.

But now that Mr. Frazier has seen and heard about new efforts, he said, "I'm not so sure about that anymore." "I think this might happen much more quickly than we might have imagined a few years ago," he added. No longer, he said, will books suffer from what he called that "fatal disadvantage": the fact that they are available only in print.

Related Sites
These sites are not part of The New York Times on the Web, and The Times has no control over their content or availability.

- Ebrary.com
- Questia Media
- netLibrary

Appendix 2

"The Library as the Latest Web Venture"
New York Times, November 27, 2000

November 27, 2000

Struggles Over E-Books Abound

By DAVID D. KIRKPATRICK

There is something not entirely rational about the book industry's current love affair with electronic books. Few people have ever read a whole book on a screen. No one knows how many people will ever want to. And book publishers have been burned before: A decade ago, book publishers produced thousands of electronic books on computer discs with game-like interactive features, pictures and sounds, but consumers were not interested.

Christopher Berkey for The New York Times
Cheyenne White inspected a volume at the Ingram Book Group's Lightning Source printing unit in LaVergue, Tenn.

Nevertheless, major book publishers, technology companies, online booksellers and new electronic book middlemen are betting hundreds of millions of dollars this year on the future market for digital books. In the latest twist, the media and technology company

Gemstar-TV Guide International is in talks with the nation's largest bookstore chain, **Barnes & Noble**, about a range of ventures that may include a merger or acquisition, a deal that would make sense only if electronic books became a truly significant business.

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What is the rush? Absent a clear sense of the future, digital publishing has become a Rorschach test for the book business. Authors, publishers and booksellers see in digital books their own fantasies and nightmares, usually shaped by the antagonisms of decades past. Their cherished hope is that electronic books will open new markets and create new sales for their books the way that early paperbacks did in the 1930's. After decades of bruising battles among agents, publishers and booksellers over the stagnant revenue from slow-growing book sales, no one wants to see their rivals get a jump on them.

Already, the battles over the structure of the nascent digital book business are taking shape as industry players race to stake their claims in the new territory, often on overlapping turf. Authors like Stephen King see electronic books as a way to sell books directly to consumers, freeing them from dependence on publishers. Publishers, in turn, see a chance to cut out printers and even bookstores: they are printing books in their warehouses from digital files and selling electronic editions to interested readers on the Internet. In return, online booksellers like **Barnesandnoble.com** are moving into the publishers' business, printing digitized books themselves and selling their own electronic editions. Meanwhile, a handful of fast-growing start-ups are racing to sell the contents of books in an entirely new way, through huge digital archives of thousands of books and periodicals available online, liberated from the confines of their covers.

The industry's ultimate nightmare is that digital books will go the way of digital music: circulating for free over the Internet, at the mercy of pirates and hackers. To ward off publishers' fears, a host of technology companies are jockeying to insert themselves into digital publishing as profitable middlemen, taking the place occupied by distributors of traditional books. They provide protection from

copying along with elaborate software and services to store and transmit digital books, in exchange for a cut of book sales revenue.

In short, everyone at the table has an eye on someone else's plate, even before the food has arrived. Some think it could be a long wait. Daniel O'Brien, an analyst who studies electronic books for Forrester Research, calls electronic books a solution in search of a problem. "Our research with consumers indicates very little interest in reading on a screen," he said."Maybe someday, but not in a five-year time frame. Books are pretty elegant."

Still, many in the industry are more sanguine. "Publishers are by nature optimists," said Jack Romanos, president of Simon & Schuster, one of the first traditional publishers to begin selling electronic books. "The logic of electronic books is pretty hard to refute — we see it as an incremental increase in sales as a new form of books for adults and especially for the next generation of readers. The publisher's ultimate responsibility is to get the work to the greatest possible audience, and this is one more swing at the plate."

Authors vs. PublishersDividing the Take

In a Zero-Sum Game

Whenever two or more authors are in the same room, the conversation eventually turns to the failings of publishers: low advances, stingy marketing, hasty editing and, most of all, rejection letters. On the other hand, publishers complain that authors are unrealistic, squeezing their profit margins to the bone by demanding enormous advances on their royalties.

Their continuing tug of war has turned into one of the pivotal opening skirmishes over the future of electronic books. Authors, and would-be authors, were among the first to seize on digital technology as a way around traditional publishing's onerous printing and production costs. Confounding the expectations of the established houses, a few frustrated authors have even managed to turn a profit by publishing other writers' electronic books — selling other publishers' rejects with almost no marketing.

Hard Shell Word Factory, for example, an electronic book publisher run by a former aspiring romance writer, sells about 6,000 electronic books a month, usually downloaded for about $5 apiece, from an online catalog of roughly 200 romances, mysteries and science fiction novels. **Booklocker.com**, run by another writer, sells about 1,200 books a month for $10 to $15 each, many of them popular novels and how-to books. Stephen King made headlines when he self-published his electronic serial novel "The Plant."

Random House took the potential for new authors to publish online seriously enough that it acquired a stake in **Xlibris**, an author-financed digital publisher that now issues more books in a

year than Random House. But publishers say they are not worried that big-name authors will try to go it alone any time soon. "They will ultimately figure out that many aspects of electronic publishing — the customer service, the transactions, billing, collecting — are not all that interesting, not all that simple and pretty time consuming," said Mr. Romanos of Simon & Schuster, a unit of Viacom that publishes Mr. King.

But the attention to Mr. King's electronic experiments has revived a long-running battle between authors and publishers over how to split the putative proceeds from sales of digital books.

After the success of Mr. King's novella, **Bertelsmann**'s Random House subsidiary, Simon & Schuster and **Time Warner**'s book division fanned out to agents around New York to make deals for digital rights. Only in recent years and only with mixed success have publishers pushed to obtain the rights to digital editions in their initial contracts for authors' books, so most digital rights were retained by authors and agents. To complicate matters, publishers looking for digital rights sometimes poached authors from rival houses, signing deals to publish electronic versions of other publishers' printed books as Time Warner did when it published a digital edition of James Gleick's "Faster," originally by Random House's Pantheon imprint.

But as publishers and agents settled into their tables at industry hubs like Michael's and the Four Seasons, neither side knew where to start. There is no industry standard for compensating authors for the digital versions of their works. Should authors receive 10 percent of the cover price, as they do on the first sales of their hardcover books? Authors' agents pushed for far more, accusing publishers of trying to grab the savings from eliminating printing or distribution costs.

When Random House introduced its first digital book imprint, it initially signed deals paying authors a royalty on electronic books of 15 percent of the retail price. Time Warner used a different formula — a quarter of the publisher's revenue, which comes out to about 12.5 percent of the retail price in the customary arrangements with booksellers. Simon & Schuster signed deals for a variety of rates around the same range. (No one knows how much to charge consumers for an electronic book, either. Some publishers are setting prices for electronic books just below their printed equivalents, but others charge hardcover prices for some electronic editions.)

This month, however, Random House startled the industry by essentially capitulating to its authors' demands. Random House announced that it would split equally with authors the wholesale revenue from selling or licensing their electronic books — effectively raising the author's share of the list price to 25 percent from 15 percent under the current arrangements with booksellers.

Random House executives even hinted that online booksellers might also lower their cut of the retail price for electronic books, which would further increase the author's take.

Other major publishers scoffed in disbelief. As the largest English-language publisher, Random House has a considerable impact on the market for manuscripts. But the major publishers' digital initiatives are deep in the red, spending heavily on technology with few sales to show for it. So far, none of Random House's rivals have matched its 50-50 revenue split. "I don't think that 50 percent to the author gives the publisher a chance to breathe," said Laurence Kirshbaum, chairman of the book division of Time Warner, another major electronic- book publisher.

Random House executives say the company's decision was as much a defense against potential future threats as a response to the current state of affairs. They wanted mainly to be sure that no one else stepped ahead of them in the race to figure out the potential new market. And Random House especially wanted to keep rivals from making deals with its authors. A few small start-ups, without the marketing resources of a major publisher, had offered authors a similar 50- 50 split. More threateningly, Barnesandnoble.com executives have discussed similar arrangements with agents as the company considers its digital publishing plans.

Booksellers vs. PublishersSeeking to Shorten

The Supply Chain

Publishers and bookstore chains have been stuck in a bad marriage for decades. Publishers have privately complained for years about the superstore chains, resentful of the power of their buying and merchandising decisions and bitter about the fees they charge to promote books in their stores and advertisements. Big booksellers, on the other hand, retort that it is publishers who hold the power, since they decide what to publish, control the copyrights to popular books and set cover prices.

After years of feeling captive to bookstore chains, publishers have quietly seized on electronic books as a way to sell directly to consumers. Random House, Time Warner's book division and Simon & Schuster have all taken steps in that direction.

"Digital publishing presents an opportunity for publishers to have a much closer connection to consumers," said Mr. Romanos of Simon & Schuster. "I don't believe we will not have retailers, but certainly the middleman component will be a smaller one."

Some publishers are already selling digital books directly to consumers by offering customized editions with mix-and-match contents, especially in the educational publishing market. This fall, **McGraw-Hill**'s Primis Custom Publishing division created a Web

site to let professors select chapters and excerpts from an archive of books and other texts to build their own personalized electronic volumes — ordering directly and sidestepping campus bookstores. Guidebook publishers have similar plans.

Random House's Modern Library classics division plans to sell electronic editions of its books directly to readers through links to literary Web sites like those devoted to Shakespeare or Jane Austin. Time Warner will begin selling its electronic books through links to its own Web site early next year, although Mr. Kirshbaum, the Time Warner book division chairman, plays down the threat to its biggest customers. "The Barnesandnoble.com's of the world are going to be our meal ticket for some time to come," he said.

Barnesandnoble.com plans to return fire by publishing and printing its own digital books. Beaten to Internet bookselling by **Amazon.com**, Barnesandnoble.com has spent heavily to be ahead in the business of selling and publishing digital books.

Barnes & Noble and its sister company Barnesandnoble.com have invested in several digital publishing and bookselling start- ups, including buying Fatbrain.com and acquiring major stakes in **iUniverse** and **MightyWords.com**. MightyWords, a publisher and online retailer of digital books, has provoked Simon & Schuster's ire by trying to publish works by its authors; Simon & Schuster retaliated by excluding MightyWords from selling copies of Stephen King's popular electronic book, "Riding the Bullet."

Barnesandnoble.com and Barnes & Noble are also becoming digital printers and publishers themselves. The companies have installed print-on-demand equipment in their warehouses so that early next year they can begin printing and binding their own copies of books available from publishers as digital files, cutting out the printer and distributor. Publishers such as the **Perseus Books Group** and distributors, notably the **Ingram Book Group**'s Lightning Source, have also installed print-on-demand equipment, and will compete over where in the supply chain the printing takes place.

Michael Fragnito, a former publisher of Viking Studio Books and senior vice president for production at Viking-Penguin, was hired in May to jump start Barnesandnoble.com's digital publishing program. For years, Barnes & Noble has printed its own list of classics and other books with expired copyrights for sale in its stores, often annoying publishers by undercutting their prices. Now, BarnesandNoble.com is moving aggressively into the unknown terrain of digital books. At the very least, Mr. Fragnito, said the company planned to sell thousands of books with expired copyrights as digital books and might add electronic versions of newer books, too.

Amazon.com, which recently opened its own electronic bookstore, has challenged publishers on other fronts, by offering access to its

customers and its transaction services to authors who want to self-publish either print or electronic editions. The authors M. J. Rose and Seth Godin have both made names for themselves by self-publishing through Amazon.com.

Dueling ArchivesSetting Up Shelves

In Virtual Libraries

At least three start-ups are currently racing to build an alternative way to sell the contents of digital books, as part of large online archives that let readers search through texts as well as browse their titles. Each of the main contenders is pursuing a different strategy, but they are competing fiercely for publishers' digital books because the biggest collection will have the greatest appeal to readers.

NetLibrary, the best-established for-profit digital archive, this summer filed preliminary plans to test the stock market's enthusiasm for electronic books with an initial public offering, which it has not yet made. Its main business is selling electronic books to libraries, with online access to a copy of the book on NetLibrary's computer servers for either an annual or one-time fee. A library's patrons can search through the contents of all the books in that library's online collection from any location, although only one patron can use a title at a time. Users cannot copy or print books, either — a key point with publishers worried that too much access could hurt book sales.

So far, more than 70 public libraries, including New York's, have signed up, along with more than 1,000 university libraries and a few corporations like Sun Microsystems and Disney. NetLibrary's total catalog of books now stands at 32,000 from 250 publishers, including Oxford University Press and John Wiley & Sons. In the third quarter, NetLibrary passed along to publishers about $2.2 million from sales to libraries of their electronic books.

Neither of its competitors, companies called **Questia** and **Ebrary**, are currently operating, but both are frantically striking deals with publishers to enlarge their own collections. Questia, founded two years ago, will open for business in January. It hopes to sell to students access to the contents of an archive of digital books for a subscription fee for $20 to $30 a month. Its service also comes with a variety of research software, like links connecting footnotes in one book with text in another. Its biggest advantage is its collection of 50,000 books from a variety of academic and educational publishers and the pile of over $130 million in cash it has raised. Questia plans to pay 5 to 10 percent of its subscription fees to publishers, divided according to how much their books are used.

Ebrary, the third contender, took a leap forward this fall when it simultaneously sold minority stakes to three of the biggest English-language publishers — Random House, McGraw-Hill, and **Pearson**'s Viking- Penguin. All three now have an incentive to help

Ebrary succeed.

Ebrary plans to be part archive, part showcase for publishers. Aiming for general readers as well as researchers, Ebrary's system lets readers search and browse for free through an online archive of digital books and magazines. But publishers can restrict access to 20 percent at a time of certain books, and they can set prices for consumers to pay to print pages, copy sections or download electronic books. Ebrary says it will pass 60 percent of its revenue to publishers. And Ebrary provides links to several online retailers so customers can buy the old-fashioned printed editions — publishers' main business.

The Software RaceIf They Do Read,

How Will They Do It?

Perhaps the most visible contest over the future of digital publishing is the heated competition among three technology companies hoping to set the standards for publishing and reading books on screens. **Microsoft**, **Adobe Systems** and Gemstar-TV Guide International are all rushing to convince publishers and readers that their format is the most secure from copying, convenient to use and the easy on the eyes. To publishers' delight, they are also spending lavishly to promote their rival systems, often promoting authors and books in the process.

Adobe Systems has by far the largest share of the digital publishing software market. Customers have downloaded over 180 million free copies of its software for reading and printing digital documents. Adobe also recently acquired technology to make digital type easier to read. But Adobe has recently fallen behind in the rush to make deals with book publishers and attract new readers.

Microsoft's greatest strength is its enormous resources as the dominant provider of computer operating systems. It has campaigned aggressively for public attention. But it was just this summer that it released its software for reading electronic books on desktop computers, making it a relatively late entry into the market.

Microsoft and Adobe provide similar systems for seling electronic books. Customers download a digital file over the Internet, and the software maker receives about 3 percent of the book's retail price.

Henry Yuen, founder and chairman of Gemstar, has a different plan. Unlike his rivals, his company holds patents on the technology to read digital books on specialized hand-held devices. Mr. Yuen is betting that these devices, easily portable with lower prices and high-quality screens, will appeal to consumers more than expensive personal computers or small personal digital assistants. But Gemstar's devices are not cheap yet. The latest generation, built under the RCA brand by **Thomson Multimedia**, is appearing in

electronics stores this week at the lofty price of about $300.

Mr. Yuen's pitch to publishers preys on their fears about Internet hackers. "The reality of the matter is that you cannot put things on the Internet — I don't care how strong the encryption scheme, it is going to be broken one way or the other," he said.

Gemstar's system avoids both personal computers and the Internet all together. Online bookstores sell electronic books for Gemstar's format, but to download the digital texts consumers need to plug their hand- held devices into phone lines and dial directly into Gemstar's central computer servers. As exclusive distributor of electronic books for its format, Gemstar will collect a hefty 15 to 20 percent fee on each sale.

Gemstar's system also means that users of the devices will store and retrieve all their books on Gemstar's computer server. Mr. Yuen hopes to sell advertising they will see while they are there, and Gemstar may sell them electronic books directly, too. He plans to enable them to shop through his devices by downloading catalogs, making a commission on each sale.

Eventually, Mr. Yuen envisions devices built with Gemstar's electronic book reading patents to blossom into personal organizers, wireless pagers and phones and generalized portable entertainment devices for text, video and sound. "I would like this particular well-documented habit — reading — to be my entry into the consumer mobile-device arena," Mr. Yuen said.

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Appendix 3

Universal Music Group / Intertrust Technologies Corporation
End User License Agreement

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Appendix 4

Sony Music Entertainment Inc.
License Agreement

(as contained in the file readme.txt on
"The Writing's on the Wall" CD)

[readme.txt]

Using your Sony CDplayer

Windows '95:
After inserting this audio disc in your CD-ROM drive a "destiny.exe" window will appear.
If your computer is not set to "Autorun" the "destiny.exe" dialog box will not appear. Set your computer to Autorun or double-click on "destiny.exe".

Note windows 3.1 users:
The "destiny.exe" isn't supported on win3.1.

Minimum Requirements

* Intel Pentium processor or compatible.
* 16 MB RAM
* Microsoft Windows 95
* 640 x 480, 256-color (8 bit) display
* Double speed or faster multi-session CD-ROM drive*
  with Enhanced CD compatible firmware
* 16 bit sound card

*If you are unsure of your CD-ROM drive's capabilities, please
 contact your hardware manufacturer to verify that your drive
 contains Enhanced CD (Blue Book/Multi-session) compatible
 firmware.

Troubleshooting:

Sound Problems
1. Is your volume turned up? Are your speakers plugged in?
2. Do you have a Sound Blaster compatible sound card that can
   handle 8-bit, 22K sound? Is it installed properly in Windows?
   Try using another piece of software to play sound within
   Windows.
3. If you have a mixing control panel, check that the levels
   are not set to zero.

Video problems
1. Is your monitor set at 256 colors (8 bit color) or above? If not select
   the Windows Control Panel, click on the display tab for Windows 95
   to change the monitor settings.
2. In order to view video you must have the video for windows installed.
   If you do not check in your original Windows installation disc for the
   installer.

Online problems
1. Do you have a direct connection to the Internet via modem, T1,
   ISDN line or other? If not, you will not be able to go online.
2. If you cannot connect within the player try launching your browser
   with using the following url:
   "http://www.destinyschild.com/"

Enhancing the performance of your CD EXTRA
Turn off all other programs while you are running the Enhanced CD.
This includes applications, clocks, screen savers and other software.

For more Sony Music CD EXTRA information:
internet: http://www.cdextra.com
e-mail: CD_EXTRA@sonymusic.com
Recorded Message: (212)833-6564

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