

VIA ELECTRONIC MAIL

mailto: [104study@loc.gov](mailto:104study@loc.gov) and mailto: [104study@ntia.doc.gov](mailto:104study@ntia.doc.gov)

September 5, 2000

Jesse M. Feder, Policy Planning Advisor  
Office of Policy and International Affairs  
U.S. Copyright Office  
Copyright GC/I&R  
P.O. Box 70400, Southwest Station  
Washington, DC 20024

Jeffrey E.M. Joyner  
Senior Counsel, Office of Chief Counsel  
National Telecommunications and Information Administration  
Room 4713  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Ave. NW  
Washington, DC 20230

RE: Joint Reply Comments of Copyright Industry Organizations  
Report to Congress Pursuant to Section 104 of the Digital  
Millennium Copyright Act  
65 Fed. Reg. 35673 (June 5, 2000)

Dear Messrs. Feder and Joyner:

The undersigned copyright industry organizations appreciate this opportunity to submit joint reply comments in this proceeding.

I. Section 109

While many of the initial submissions, such as those of the Software and Information Industry Association (SIIA) (#12) and Time Warner Inc. (#29), support the position taken by our initial comments that section 109 should not be changed, others take a contrary view. The numerical majority of submissions concentrate their fire on the anti-circumvention and copyright management provisions contained in chapter 12 of Title 17, as added by the Digital Millennium Copyright Act (DMCA), and make only passing reference -- or none at all -- to section 109. Since this is a study, not a rulemaking proceeding, it would not be fully accurate to say that these submissions fall outside the scope of this task at hand; but we do think they say little that has not already been said, sometimes by the same commenters, in the pending rulemaking proceeding under 17 USC section 1201(a). Consequently there is no need to respond to the same arguments again in this reply round.

The other comments addressed to section 109 fall into three main categories. First, some submitters, notably the Digital Future Coalition (DFC) (#9), Home Recording Rights Coalition (HRRC) (#22), and (seemingly) the Digital Media Association (DiMA) (#21), urge the Copyright Office and the NTIA to recommend to Congress that it adopt the amendments to section 109 that it repeatedly rejected just two years ago. Second, the submission of the National Association of Recording Merchandisers (NARM) and the Video Software Dealers Association (VSDA)(#27) stresses the extent to which the first sale doctrine already applies to certain kinds of digital distribution of copyrighted materials, and focuses on licensing controls and technological measures that affect the transferability of copies or phonorecords. Finally, the comments of the American Library Association et al (Library Associations) (#18) offer a number of general recommendations about “a first sale doctrine for the ‘digital millennium’.”

Before responding specifically to these comments, it is worth reviewing some of the key characteristics of the first sale doctrine. The Time Warner comments provide the pithiest summary: “it is a doctrine that distinguishes possessory personal property rights from copyrights.” Time Warner at 1. Both under judicial precedent, and as codified in section 109, the first sale doctrine provides an exception to only one of the exclusive rights of copyright owners: the distribution right. It allows the distribution, without the authorization of the copyright owner, of a lawfully made copy or phonorecord that the distributor owns. It does nothing else other than to legitimize this act of distribution of a physical copy, which would otherwise infringe on the copyright owner’s exclusive distribution right. In particular, it does not alter the axiomatic principle codified in section 202 of the Copyright Act: “Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object ... does not in itself convey any rights in the copyrighted work embodied in the object...”. 17 USC 202.

The proposals to amend section 109 that are discussed below do not merely “update” or “reaffirm” the first sale doctrine. Nor do they simply “extend” that doctrine to a new technological environment. The first sale doctrine continues to apply whenever the circumstances in which it operates are present: someone who owns a physical object, lawfully made, in which a copyrighted work is embodied, wishes to “sell or otherwise dispose of the possession of” that object. The proposals discussed below apply in wholly different circumstances, and would do something quite distinct from and more drastic than what the first sale doctrine does. They consist of completely new limitations upon the exclusive rights of copyright owners other than the distribution right (the only right which the first sale doctrine limits). In particular, they undermine the exclusive reproduction right, the fundamental cornerstone of the edifice of copyright protection. We urge the Copyright Office and the NTIA to review these proposals in this light, rather than as mere “updates” or “extensions” of first sale. They are no such thing.

#### A. Revival of the Boucher Amendment to Section 109

For several years, dating back at least to the time of the Clinton Administration Green Paper of 1994, some have argued that the first sale doctrine should be used as a launching pad for additional limitations on exclusive rights in the digital environment. The owner of a digital copy, they assert, should have the privilege of making another digital copy, and of transferring that copy, without the permission of the copyright owner, so long as the first digital copy is simultaneously destroyed (the so-called “forward-and-delete” scenario). As we pointed out in our initial comments, this proposal (which was embodied in amendments to section 109 proposed in 1997-98 by Representative Boucher, among others, and in a provision of H.R. 3048 in the 105<sup>th</sup> Congress) has been consistently rejected, both in the White Paper and by Congress.

The DFC, HRRC, and DiMA submissions try to breathe new life into this moribund argument by pointing to the rapid progress in digital rights management (DRM) technology. A fundamental objection to the proposal to extend the mantle of the first sale exception to cover “forward and delete” transactions has been its inherent unenforceability. Determining whether, in each instance, the original has been “erase[d] or destroy[ed] ... at substantially the same time” as the transmission of a copy is a daunting task. According to these submissions, technology has ridden to the rescue. As HRRC puts it, “whatever the situation in 1998, the technology to secure the first sale privilege exists today.” (HRRC, at 5.) DRM systems allow copyright owners to use “encryption, authentication and password protection” to ensure that the original (from which the transferred copy is made) is deleted or at least made inaccessible, “such as by permanently transferring with the content the only copy of the decryption key.” *Id.* NARM/VSDA seems to have similar technology in mind when it argues that first sale “should be expanded to apply to ... ‘move technology’ [or] a ‘check-in/check-out’ process.” NARM/VSDA at 38-39.

While superficially attractive, this argument does not bear close scrutiny as a justification for a broad expansion of section 109 at this time. At least five significant problems come to mind.

First, while it is no doubt true that DRM technology has become both more widespread and more reliable than it was in 1998, it is not yet so ubiquitous and so secure that it can provide the foundation for the substantial diminution of the reproduction right which the H.R. 3048 language represents. Whether this technology ever achieves that status is a decision that will turn on future developments in the marketplace. Today, for example, there are many potential e-commerce applications for the mass market in which the use of robust DRM technology is economically infeasible: it is simply still too expensive. Unless and until that changes, business models based on a “forward and delete” system are not likely to flourish, much less to become so widespread as to justify a fundamental change in copyright law.

Second, while proponents of the H.R. 3048 language now point to DRM technology to justify it, they argue that the first sale exception should be

dramatically expanded even in situations in which such technologies are not in use. Even DiMA, the most articulate and nuanced advocate of the view that DRM technology provides the silver bullet for expanding section 109, refuses in the end to pull the trigger of linking the expanded exception to the use of such technologies: “Any extension of the first sale doctrine cannot apply only to content protected using DRM tools.” DiMA, at 12 (emphasis added). Where these tools are not in place, apparently, DiMA would fall back on the discredited “honor system” for determining whether the original of a forwarded digital copy was, in fact, simultaneously deleted. This approach is no more practical – and from the viewpoint of protecting the legitimate markets for copyrighted materials, no more palatable – today than it was two years ago or five years ago, when it was rejected by Congress and by the Administration in the White Paper, respectively.

Third, even if an expanded section 109 exception were to apply only to copies or phonorecords to which DRM tools had been applied, it is virtually certain that some users would seek to disable those tools in order to carry out broader unauthorized distribution than the “forward and delete” model contemplates. Advocates of reviving the H.R. 3048 approach seem to disagree about how to handle this problem.

As the capsule description of DRM technologies in the HRRC filing suggests, and as the more detailed treatment of them in the DiMA filing makes explicit, the technologies upon which these submitters rely to justify a drastic expansion of the section 109 exception “may constitute access controls subject to the provisions of section 1201(a).” DiMA at 8. It is more than a bit ironic, then, that some of the most vociferous advocates of reviving the H.R. 3048 amendment to section 109 argue, at the same time but in a different proceeding, that the authorized possessors of digital copies or phonorecords ought to remain free to circumvent precisely these same technologies without any legal consequences. See, e.g. Oral Testimony on behalf of DFC by Professor Jaszi in Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, Copyright Office Docket No. RM 99-7, May 2, 2000 (it should remain legal to circumvent access controls applied to “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.”) While the immunity from liability they have advocated in the section 1201(a) rulemaking proceeding would apply only if the uses made of the work after circumvention of DRM technologies is “lawful” or “non-infringing,” this provides little comfort. The ongoing Napster litigation amply demonstrates the apparently widely held (but, we believe, clearly mistaken) view that massive unauthorized distribution of copyrighted material is just such a “lawful” or “non-infringing” use. Indeed, DFC’s own counsel has been quoted in the press as saying “I think it is an open question as to whether one person sending a music file to another person in a noncommercial situation is fair use.” Rodger, “Music-copying laws often shield consumers,” <http://www.usatoday.com/life/cyber/tech/cti351.htm> (posted at USAtoday.com site 8/10/00). Of course, if the correct answer to that question

were “yes” (and we do not believe it is), then under the DFC approach the DRM tools cannot be relied upon to ensure the integrity of the “forward-and-delete” scenario, since, in their view, it should be perfectly legal to circumvent them.

Advocates of the H.R. 3048 language are fundamentally in conflict with each other in their approach to access control measures (such as DRM tools) that are operative after a user has obtained authorized possession of a copy or phonorecord. DiMA recognizes that “DRM tools will fuel new business models (such as subscription or on-demand listening, ‘try before you buy,’ rental or downloading of promotional recordings that will ‘time-out’ after a specified period) in which first sale privileges should not apply,” and characterizes these models as “pro-content-owner/pro-consumer opportunities.” DiMA at 9. DFC, by contrast, is concerned that exactly the same access control measures “have the potential to erase any remaining vestiges of ‘first sale’ in current law.” DFC, at 2. Additionally, other submitters argue that the protections provided by section 1201 should be completely unavailable for “arbitrary” technological measures that “impair” the ability of owners of lawfully made copies or phonorecords to distribute them as section 109 contemplates. NARM/VSDA at 37-38. Until there is consensus on the legal consequences for circumventing DRM tools (or for trafficking in the means to do so), it is difficult to consider seriously an expansion of the section 109 exception that relies upon the integrity and strength of those tools.

Fourth, the scope of the exception proposed in H.R. 3048 and revived in these comments is actually much broader than the “forward-and delete” model implies. As noted above, the first sale doctrine as we have come to know it over the past century is an exception only to the exclusive right to distribute a copy or phonorecord; it does not provide any exception to the exclusive rights of reproduction, public performance, or public display. Even if it were justified to immunize, under some circumstances, unauthorized reproduction to the extent necessary for a distribution of a copy or phonorecord, that justification would not extend to the rights of public performance or display, which have never been limited by the first sale doctrine. Yet the H.R. 3048 language would deny the copyright owner any control over the reproduction needed to carry out an unauthorized performance or display, even though these activities (unlike an unauthorized distribution) could not plausibly be characterized as ever coming within the first sale doctrine. We must assume as well that the advocates of this approach believe (although the language they support does not explicitly say so) that the public performance or display which is enabled by the (immunized) reproduction should also be free from the control of the copyright owner. Thus, the H.R. 3048 language threatens to undermine not just one, but four, of the five exclusive rights that copyright owners have historically enjoyed.

Finally, perhaps the most cogent argument against reviving the H.R. 3048 expansion of section 109 is DiMA’s candid admission that “the absence of the first sale privilege has not had a chance to affect consumers [and] has not been

felt in the marketplace.” DiMA at 13. DiMA’s prediction that “consumers will become dissatisfied with ecommerce if they cannot trade or sell via transmission the works they acquire digitally,” *id.*, is simply that – a prediction. It ignores the flexibility that licensing arrangements can provide to allow such trading or selling under certain circumstances without tampering with the statutory first sale doctrine. And it certainly does not yet provide a sufficient basis for dramatically altering long-established copyright principles, using the first sale doctrine as a launching pad, as the proposed amendment to section 109 would do.

The copyright industry organizations joining in this submission agree that technological developments, including DRM tools, will significantly affect the environment within which the first sale doctrine – as well as the rest of the Copyright Act – is operative. These tools are at a relatively early stage of development today. We cannot rule out the possibility that the further development of these technologies will, at some point in the future, justify changes to section 109 that can advance the mutually supportive goals of providing adequate incentives for creativity and innovation, and promoting electronic commerce and other digital dissemination of works of authorship. But clearly such changes are not justified at this time.

2. Application of current section 109 to licensing and technological controls

The NARM/VSDA submission stresses a valid point that is sometimes overlooked or misunderstood: the first sale doctrine, as codified in section 109, continues to play an important role, including in the distribution of copyrighted materials in digital formats. We agree with NARM/VSDA, for example, 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 a license to make a copy,” NARM/VSDA at 12. The owner of such a copy or phonorecord, which could include someone who makes it via an authorized digital download to his home or to a retail location, remains free (by virtue of the first sale doctrine) “to sell it to the highest bidder, loan it, trade it, or give it away, and the copyright owner is not authorized – under the Copyright Act – to prevent it,” *id.* at 14, although contractual or other non-copyright restrictions may apply.

These statements, which we read as applying only to the transfer of the physical copy that was lawfully made in the first place, and in the absence of licensing or technological restrictions to the contrary, offer a healthy corrective to those who assert that digital technology has reduced the first sale doctrine to mere “vestiges” of its former self. See DFC at 2. See also Time Warner at 1 (“Thus properly understood, the first sale doctrine applies not only to traditional media in which works are fixed, but also to tangible digital media.”) We part company with NARM and VSDA, however, when they argue that the transferees of copies or phonorecords in digital formats should be free to ignore contractual or licensing

restrictions on further redistribution of these materials, or that technological measures employed by copyright owners should be stripped of all legal protections if they have an impact on such redistribution.

The voluminous NARM/VSDA submission offers no cogent reason why a contract or license should not be enforced simply because it restricts the redistribution right that the transferee would otherwise enjoy under section 109. Indeed, to the extent that the terms of a transfer include redistribution restrictions, it may well be that the transfer does not constitute a sale, the transferee is not the owner of the copy in question, and the first sale doctrine is completely inapplicable. See, e.g., Adobe Systems Inc. v. One Stop Micro Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000). NARM and VSDA apparently believe that business models that include redistribution restrictions are unconstitutional. See NARM/VSDA at 26-28. However, their analysis, which inflates the right of further distribution in accordance with section 109 to the exalted status of a First Amendment absolute, cannot withstand serious scrutiny. (With their attempt to equate this widespread business model with racial or religious restrictive covenants, these submitters step from the implausible to the offensive. See *id.* at 27 n.12.). It is hard to understand how the interests of consumers could possibly be served by shutting down particular e-commerce business models because of the particular status and perquisites they offer to the recipients of digital copyrighted products.

Our disagreement with the NARM/VSDA recommendations concerning technological protection measures stems from what we referred to in our initial comments as the crucial distinction between (1) the physical possession and ownership of a tangible object embodying a copy of a copyrighted work, and (2) the authorization to access or make specified uses of that work. The first sale doctrine addresses the former, not the latter; but generally it is only the latter which is the subject matter of technological measures protected by section 1201(a). The NARM/VSDA submission does not ignore this distinction; instead, it attacks and seeks to obliterate it. See *id.* at 35-36. Its unrelieved hostility to allowing the copyright owner to set “any limit on how many times or for how many days a song may be listened to or a movie watched, or to limit the number of people to whom it may be lent or to whom it may be given,” *id.* at 28, extends to the use of technological measures to implement such limits. Yet, as the copyright industry organizations have argued in other contexts (see, e.g., *Joint Reply Comments of AFMA et al in Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works*, Copyright Office Docket No. RM 99-7, March 31, 2000, at 22), and as other submitters in this proceeding acknowledge, such measures “fuel new business models,” DiMA at 9, and promote increased dissemination of copyrighted materials. Thus, NARM/VSDA’s proposal -- to exclude from protection under section 1201 all access control technologies that “impair the rights of the owner of a copy or phonorecord lawfully made under this title as set forth in section 109”, NARM/VSDA at 38 – would be both misdirected (virtually no such technologies impair those rights as they are properly understood) and counter-productive to the healthy development of electronic commerce.

### 3. The first sale doctrine for the digital millennium

The list of recommendations which conclude the submission by the library associations raise a number of interesting points, but their relationship with section 109 is not always clear. For example, the asserted problems with interlibrary loan (ILL) of materials in digital formats, Library Associations at 11-13, appear to be licensing issues, as are the concerns about receipt of donations (see *id.* at 18-19) and limitations on the number or location of authorized users (*id.* at 17-18). If in each of these instances the library (or in the case of donations, the would-be donor) is a licensee of the copy in question, not an “owner,” then section 109 by its terms does not apply. Furthermore, to return to the ILL comments, it is not clear whether what the libraries are seeking is the ability to loan a tangible copy (e.g., an optical disk) in which the copyrighted material is embodied, or whether they seek to make digital transmissions of material to other libraries. Only the first scenario implicates the first sale doctrine as it currently exists; the second involves the making of a copy in the course of transmission, evidently without any simultaneous erasure of the original, and thus would not be accommodated even by the expanded section 109 advocated in H.R. 3048. Similarly, concerns about archiving and preservation, see *id.* at 14-17, while undoubtedly important, do not appear to raise issues under the first sale doctrine. The pre-emption issue raised by the Library Associations, see *id.* at 23, will be discussed below.

In summary, our review of these comments does not change our view that section 109 of the Copyright Act should not be amended. To do so would neither facilitate the growth of electronic commerce, nor promote the development of new technologies for creating, disseminating and using copyrighted materials.

## II. Section 117

### A. Incidental copying

As with section 109, a number of submitters (including CCIA, HRRC and DFC) took a “back to the future” approach to section 117, calling for enactment of an amendment proposed during the 105th Congress but not accepted as part of the DMCA. (Another submitter (DiMA) advocates a similar amendment but with somewhat different phrasing [“to exempt the loading of all types of digital content into memory, as an essential step in accessing the content”]. DiMA at 19.) The “incidental copying” amendment advocated by these submitters is not justified by technological developments and would not promote the healthy growth of electronic commerce. Instead, it would dramatically expand the scope of section 117 and drastically cut back on the exclusive reproduction right in all works.

Most of these submissions proceed from the premise that existing section 117 has been “in essence ... repealed,” CCIA at 2, by decisions such as MAI Systems Corp. v.

Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994). See DFC at 3 (Congress needs to “restore the vitality” of section 117 after MAI). In our view, this premise is false. The MAI decision stands for two propositions relevant to section 117, both of which buttress, rather than weaken or “repeal,” that statutory provision and the objectives for which it was enacted.

The central holding of MAI is its reaffirmation that copies of computer programs made in the memory of a computer – in that case, temporary copies made in Random Access Memory (RAM) -- are reproductions that fall within the scope of the exclusive reproduction right of the Copyright Act. MAI, 991 F.2d at 518-19. This holding is consistent with the White Paper’s statement, made in 1995, that “it has long been clear under U.S. law that the placement of copyrighted material into a computer’s memory is a reproduction of that material.” White Paper, at 64. It also echoes the conclusion of CONTU in 1978: “the introduction of a work into a computer memory would, consistent with the [current] law, be a reproduction of the work, one of the exclusive rights of the copyright proprietor.” CONTU Final Report, at 40. (As we noted in our initial comments, CONTU’s report formed the basis for section 117.) The same holding has since been reaffirmed in a number of other federal court decisions. See, e.g., Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995), *cert.denied*, 116 S. Ct 1015 (1996); Stenograph L.L.C. v. Bossard Associates, Inc., 144 F.3d 96 (D.C. Cir. 1998).

Thus, there is no merit to the suggestion that this aspect of the MAI decision “is on questionable footing,” CCIA at 2, or that it “suggest[s] that the use of computer programs by purchasers may now be legally constrained in ways that the Congress did not anticipate in 1980,” DFC at 3, when section 117 was enacted. The opposite is true: if, *contra* the holding in MAI, such copying of a computer program into memory were not a reproduction falling within the scope of the reproduction right, enactment of what is now section 117(a)(1) would hardly have been necessary.

A second holding in MAI simply restricted the benefit of the section 117 exceptions to the sole party designated by Congress to enjoy it: “the owner of a copy of a computer program,” as distinguished from a licensee. MAI, 991 F.2d at 519 n. 5. This holding, too, buttressed section 117 as Congress passed it.

Two years ago, the proponents of H.R. 3048 called upon Congress to overturn these holdings of MAI v. Peak by adopting the “incidental copying” exception which HRRC and DFC now seek to revive. Congress not only spurned this suggestion; it drew the opposite conclusion, and passed legislation endorsing and reaffirming the principles consistently espoused by CONTU, by the White Paper, and by the courts in MAI and its progeny.

Title III of the DMCA added a new section 117[c] that spells out the specific and limited circumstances under which the reproduction of a computer program in memory for the purpose of computer maintenance or repair is not an

infringement of the reproduction right. As explained by the House Judiciary Committee (in which this provision originated), this amendment had “the narrow and specific intent of relieving independent service providers ... from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made.” H. Rpt. 105-551 (Pt. I), at 27. In so doing, Congress clearly endorsed both the holdings of MAI summarized above, since otherwise there would have been no need to relieve independent service operators of liability for making unauthorized reproductions of computer programs of which they were not the owners. In the DMCA, Congress embraced the general principle that temporary copies in RAM are copies that are subject to the copyright owner’s exclusive reproduction right, and made only those carefully calibrated adjustments to the principle necessary to address the problems experienced by independent providers of computer maintenance and repair services.

Interestingly, none of the submitters have virtually anything to say about the change to section 117 made by Title III of the DMCA. Instead, these submitters employ section 117 as a convenient starting point for a much more comprehensive attack on the exclusive reproduction right. They resurrect a proposal that, unlike the existing section 117, undercuts the reproduction right in all works, not just computer programs; that applies to copies made in any kind of “device,” not just in a computer; and that purports to solve a “problem” whose seriousness has never been demonstrated and that is, in any case, already adequately addressed by other provisions of the DMCA.

Three years ago, when this proposal was first presented to Congress, its supporters argued that it was necessary in order to prevent an impending collision between copyright law and the growth of the Internet and electronic commerce. Today, these submitters recycle similar arguments. They conjure up supposed impediments to the roll out of a panoply of new consumer electronic products (see DiMA at 19), or claim that current law creates a “theoretical illegality of virtually all Internet transmissions [that] has imposed serious barriers on the growth of the Internet.” CCIA at 3. Based on the experience of the past few years --- including the continued explosive growth of all aspects of the Internet and the coming to market of a wide range of innovative computing and consumer electronics products --- the Copyright Office and NTIA should receive these urgent yet strangely familiar warning cries with a considerable degree of skepticism.

One reason why there has been so little overt legal conflict over incidental copying – the supposedly intractable problem which the H.R. 3048 amendment to section 117 is purportedly intended to solve -- is that Congress, in enacting the DMCA, addressed and dealt with some of the potential flash points. For instance, it did so in Title II of the DMCA (now section 512 of the Copyright Act), not by tearing big new loopholes in exclusive rights, but by carefully fashioning limitations on remedies that apply to infringements – including notably

“incidental copying” –that may occur in the course of activities that are essential to the smooth functioning of the Internet, such as linking, storing, caching, or providing conduit services. While to a considerable extent these provisions simply codify pre-DMCA practice, they also provide a road map that content owners and service providers alike may consult to seek to avoid unnecessary legal conflicts and to continue on a cooperative track.

It is thus somewhat surprising to see CCIA condemning “the lengthy and costly negotiations” leading up to these provisions, and complaining that compliance with them has taken precedence over “deploying the most technologically efficient solutions.” CCIA at 3. (Our surprise is heightened by the fact that just three weeks later, CCIA filed an amicus brief in the Napster case claiming that “section 512 provides a layer of liability protection to service providers *in addition to* copyright infringement defenses applicable prior to the DMCA.” See Amicus Brief of Ad Hoc Copyright Coalition et al in Napster, Inc. v. A&M Records, Inc., Nos. 00-16401 and 00-16403 (9<sup>th</sup> Cir., filed August 25, 2000), at 12 (emphasis in original.) CCIA appears to assume that any steps that service providers take to meet the prerequisites for the remedy limitations in Title II of the DMCA – for instance, to exclude repeat copyright infringers from participation, 17 USC 512(i)(1)(A) -- constitute waste and inefficiency. The basis for that assumption is far from self-evident. In any case, if service providers wish to avoid expending whatever resources may be needed to meet these prerequisites, they are free to do so. Not a single one of these “complex legal requirements” is mandatory on any party doing business over the Internet, and failure to meet them does not even prejudice any defense to infringement that a service provider may wish to offer. 17 USC 512(i).

In short, the proposed “incidental copying” exception remains a drastic (in practical terms) solution in search of something more than a largely theoretical problem. The submissions provide no basis for recommending a weakening of the well-established exclusive reproduction right enjoyed by the owners of copyright in all categories of works, regardless of whether such a weakening provision is put forward as an amendment to section 117. To the contrary, adoption of such an exception would threaten to disrupt the emerging e-commerce marketplace and to leave it significantly more vulnerable to piracy.

There is no question that in this emerging marketplace, digital temporary copies are an increasingly important means through which copyrighted works are legitimately made available to the public. Access to works via local area networks, as well as via the Internet, or through the use of “network-ready devices” that do nothing more than connect to a network and use works temporarily online, all exemplify this trend. By the same token, the most prevalent and virulent forms of piracy in the digital networked environment will also consist of nothing more than making temporary digital copies available, without authorization, to members of the public. If the Copyright Act were amended to amputate from the exclusive reproduction right – the fundamental

right of copyright owners -- the right to control the making of “temporary” or “incidental” copies, the door for pirates to the digital marketplace would be propped wide open, and the ability of copyright owners to combat network-based piracy would be severely impaired.

#### B. Archival/back-up copying

Section 117(a)(2), which allows the owner of a copy of a computer program to make an archival copy of it without the permission of the copyright owner under certain conditions, is a narrow exception to the exclusive reproduction right. Under no circumstances does section 117(a)(2) allow the creation of “back-up copies” of works such as sound recordings, music, audio-visual works, or databases. As at least two initial round submitters have pointed out, many pirates and distributors of pirate software products have actively disseminated misleading statements about this provision in order to give their operations a false air of legitimacy, see Interactive Digital Software Association at 5-6; SIIA at 3-4.

At least two other submitters – HRRC and DiMA – call for the Copyright Office and NTIA to recommend an expansion of the archival copying exception in section 117(a)(2), to cover any “content that [consumers] lawfully acquire through digital downloading,” HRRC at 6, DiMA at 15. While we do not suggest that these two organizations have succumbed to the campaign of disinformation that has may have misled many Internet users into believing that the archival copying exception already applies to all works, their recommendation, if adopted, could certainly have a similarly deleterious effect. We urge the Copyright Office and NTIA not to recommend such a change.

#### III. Other Issues: Pre-Emption and Section 1201

Several submitters suggested additional amendments to Title 17 beyond the two sections which Congress mandated as the focus of this study. We will comment briefly on two of these suggestions.

First, we oppose the proposals by DFC and the Library Associations for federal legislation pre-empting and/or setting “minimum standards” for the terms of licensing agreements governing transactions in copyrighted materials. See DFC at 4, Library Associations at 18, 23. The electronic commerce marketplace in works of authorship, while growing rapidly, is still at an embryonic stage; to subject it to such intrusive federal intervention at this time would be exceptionally imprudent. There is simply no evidence of a real and widespread problem with copyright licensing terms that can only be solved by federal pre-emption. On such a record, the agencies should certainly refrain from recommending any such legislation. Instead, participants in electronic commerce should retain the ability to resolve licensing and contractual issues in the marketplace, and to have the terms of their agreements enforced in conformity with applicable state contract

law, including (as states adopt it) the proposed Uniform Computer Information Transactions Act (UCITA).

Second, we also question the wisdom of the proposals put forward by DFC (at 4) and NARM/VSDA (at 37-38) to carve out new loopholes in 17 USC 1201. The anti-circumvention provisions of the DMCA, which have not even fully taken effect yet, provide essential legal back-up for key enabling technologies for electronic commerce. There is no factual basis upon which to reverse the decision Congress made less than two years ago, and to deny copyright owners the right to choose to deploy such technologies, as DFC calls for. Our disagreement with the NARM/VSDA proposal regarding section 1201 is explained in more detail above (see p. 7 supra).

\* \* \* \*

If any of the undersigned organizations can provide further information or answer any questions concerning these reply comments, please do not hesitate to contact us. Thank you in advance for your consideration of our views.

Respectfully submitted,

AMERICAN FILM MARKETING ASSOCIATION

ASSOCIATION OF AMERICAN PUBLISHERS

BUSINESS SOFTWARE ALLIANCE

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION

MOTION PICTURE ASSOCIATION OF AMERICA

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

RECORDING INDUSTRY ASSOCIATION OF AMERICA

Of Counsel:

Steven J. Metalitz  
Smith & Metalitz LLP  
1747 Pennsylvania Ave., NW, Suite 825  
Washington, DC 20006  
202/833-4198 (ph), 202/872-0546 (fax)  
metalitz@iipa.com

