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Regarding Docket No. 000522150-0150-01:

This reply comment is written in reply to those submissions which erroneously claim that the first sale doctrine only confers a right to transfer a copy. For example Mr. Sorkin's comments in his capacity as senior counsel for Time Warner, Inc. includes the claim (Page 1, ¶ 2) that,

The first sale doctrine, in its origin and in its current statutory existence, has as its underlying purpose the prevention of using the Copyright Law to impose price or other conditions on the ability of the owner of a copy of a work to dispose of that copy. The first sale doctrine does so in very simple and clear terms: it provides an exception to the right of distribution granted in Section 106(3). It provides no other exception to the rights granted by Section 106.

Mr. Sorkin's comment is incorrect because it ignores the existence of § 109(c) of the Copyright Act,

Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

Clearly the scope and purpose of the first sale doctrine is larger than Mr. Sorkin would have us believe. There has traditionally been a right to *use* a work for which one owns a lawfully-acquired copy. The re-sale of a legitimate copy that Mr. Sorkin mentions clearly depends on a right to view, read or make other ordinary use of a work. The resale value of a DVD disk is not a reflection of a DVD disk's value as a polycarbonate drinks coaster, nor in the case of a paper book is the resale value a reflection of a book's value as a ream of writing

paper. The future *use* of the work embodied in the copy principally accounts for the resale value of the copy. If the first sale doctrine is to survive in any meaningful form, the impact of technological protection measures on the right to make ordinary use of a lawfully-acquired work must be addressed (ordinary use was a right prior to the enactment of § 1201).

Mr. Sorkin's suggestion that there are those who would attach a right to make copies to the first sale doctrine is a mis-direction.¹ The real issue is whether *after* having authorized a copy for display on a computer, the copyright owner has the right to require that the extant copy in the computer's random-access memory (RAM) be *destroyed*.² Mr. Sorkin is conjuring the image of a television or a radio with his mention of "transmission." The issue of whether or not a *persistent* copy is generated by viewing a work is not properly understood as a result of how a work is distributed. Persistence is a property of the device that receives the transmission. "Transmission" is really a synonym for distributing a work without the *transfer* of a copy. It refers to the distribution of a work by the *creation* of a new copy in the receiving device. Mr. Sorkin seeks to reserve to the copyright owner the right to require the destruction of such copies, even if the audience has paid for the transmission of the work.

The central threat posed by technological protection mechanisms and their legal protection by the Digital Millennium Copyright Act is whether or not copyright arising from the Statute of Anne will survive as an instrument for the promotion of learning, or if we will be cast back to the Stationer's Copyright. There can only be progress in the useful arts and science if there is access to works. The question arising from § 1201(a) is whether there will be a guarantee of access to lawfully-acquired works, or not. This larger issues of access to a work, and the consequent use of a work, will eventually be reflected in the resale price of works sold under authority of § 109(a). Hearings would provide a basis to improve Congressional understanding of these issues. It is my sincere hope that Congress will take note of the wildly one-sided nature of its recent actions regarding copyright, and take corrective action insuring that use of copyrighted works outside the scope of § 106 is guaranteed. Hearings are urgently needed to begin this process.

Sincerely,

Paul Fenimore

¹Page 1, ¶ 5: "It is clear that Section 109 does not apply to works distributed by transmission because application of Section 109 to such works would involve both the reproduction of the work (as to which no exception is provided and, accordingly, the copy being transferred is not 'lawfully made') as well as its distribution. Secondly, the owner of a copy of the work would not be disposing of the possession of that copy."

²If on the other hand one were to claim that a copy made into a computer's RAM was not a copy until written to disk, then the existing fair use exemptions in §117 of the Copyright Act would be nonsensical.