

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION
DEPARTMENT OF COMMERCE
Washington, D.C.**

Report to Congress Pursuant to)
Section 104 of the)
Digital Millennium Copyright Act) Docket No. 000522150-0150-01

**COMMENTS OF THE
HOME RECORDING RIGHTS COALITION**

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I. Introduction

The Home Recording Rights Coalition appreciates the opportunity to offer our perspective on the appropriate scope of the "first sale" doctrine in the digital era and the exemption from copyright infringement of archival copies and ephemeral copies of copyrighted works made in the course of authorized uses. In short, HRRC believes the first sale doctrine should be extended to cyberspace and that temporary caching or buffering of works should not be deemed copyright infringement within the meaning of the Copyright Act. We urge the Copyright Office and NTIA to support legislative and other efforts to update sections 109 and 117 of the Copyright Act for the digital era.

With respect to proposed changes to current law that could affect the interests of consumers in cyberspace, HRRC has offered these Core Principles for consideration by policymakers:

- ◆ Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place shifting, and other private, noncommercial rendering of lawfully obtained music and video content.
- ◆ Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal. Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.
- ◆ Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.

In response to the Federal Register Notice and the questions set forth therein, HRRC's comments below will elaborate on how the Copyright Office and NTIA can advance these core principles through this proceeding.

II. Background

As the Copyright Office's web site home page reminds visitors, the purpose of copyright is "[t]o promote the Progress of Science and useful Arts" As our founding

fathers recognized, the purpose of copyright is not to enrich authors at the expense of consumers, but rather it is to benefit society as a whole. That laudable goal, as embodied in the Constitution, can best be achieved by balancing the interests of copyright owners and information consumers in adapting the law to changes in technology.

The first sale doctrine historically promoted that balancing of interests well, irrespective of changes in technology in the analog era. In our view, the first sale doctrine has not been and should not be premised on any particular media or methods of distribution. The emergence of new technologies should not alter the premises on which the doctrine was established. Thus, as originally proposed by Representatives Rick Boucher and Tom Campbell during the consideration of the precursor to the Digital Millennium Copyright Act, the first sale doctrine should encompass the digital distribution of works.

Similarly, section 117 of the Copyright Act has promoted the balancing of interests between copyright owners and information consumers using a variety of devices to view or listen to a variety of copyrighted works. Section 117 was adopted to deal with a specific known technology then becoming more prevalent in the late 1970s. The basis for the exemption was the fundamental principle that the lawful owner of a copyrighted should be able to use it. When adopting section 117, Congress could not then foresee all the potential applications of the underlying principles to future types of devices and media. Now, however, digital media other than software programs, and computing devices other than computers, have become pervasive. Content other than computer programs is available to consumers, is susceptible to loss, and cannot be used by a purchaser without temporary copying into device memory. Representatives Boucher and Campbell, as well as Senator John Ashcroft, recognized in 1997 the need to update the law to take into account these changes in technology as well.

HRRC recognizes that, in general, it is preferable to let the market evolve before recommending changes to copyright law. We also recognize that exemptions in the Copyright Act for the physical or analog world might be adapted in the digital realm by judicial interpretation or justified under doctrines such as fair use. Nevertheless, the public interest and the evolution of the marketplace may be served best when the law clearly addresses and defines the permissible uses of works in a new technological environment. HRRC believes that legal certainty in applying copyright to new digital technologies will benefit copyright owners and consumers alike, and will open the market to more exciting and compelling technologies and business models. Therefore, HRRC recommends that the Copyright Office and NTIA endorse the provisions of the Ashcroft and Boucher-Campbell bills that would have updated current law for the digital era.

III. The First Sale Doctrine Should Be Updated for the Digital Era¹

The first sale doctrine has always been premised upon a balance between the incentive for copyright owners and the broader public interest in using copyrighted works. Although written in the analog era, the doctrine as embodied first in a statute was broad enough to anticipate future technological developments. Section 27 of the 1909 Act provided that "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained."

In 1976 Congress enacted section 109(a) to revise and expand the first sale doctrine. In recognition of the importance of updating the 1976 Act to eliminate any uncertainty about the proper scope of the provision (and to make other changes to current law), Representatives Boucher and Campbell introduced H.R. 3048, the Digital Era Copyright Enhancement Act, late in 1997. As Mr. Boucher explained in his statement accompanying introduction of the bill, "this legislation best advances the interests of both creators and users of copyrighted works in the digital era by modernizing the Copyright Act in a way that will preserve the fundamental balance built into the act by our predecessors throughout the analog era." Cong. Rec. at E2352 (Nov. 13, 1997) (daily ed.). This bipartisan bill--supported by 50 cosponsors--would have added to Title 17 a new section 109(f) that would have permitted the operation of the first sale doctrine by transmission of a work to a single recipient, if the person effectuating the transfer erased or destroyed his or her copy or phonorecord at substantially the same time. 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.

Taking into account developments throughout the analog era, including the emergence of video rental stores, Mr. Boucher offered the following explanation of the purpose of the provision in his "Section-by-Section Analysis" of the bill:

Section 4 would amend section 109 of the Copyright Act to establish the digital equivalent of the "first sale" doctrine. Under current law, a person

For short-hand reference, in the discussion below, we refer to the digital transmission world as simply "digital" and the physical world as simply "analog," although the physical should be understood to include physical products containing content in digital form.¹

who has legally obtained a book or videocassette may physically transfer it to another person without permission of the copyright owner.

Given the historical importance to libraries, scholars, educators, and consumers of transferring to others lawfully acquired copies of works, Section 4 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.”

Id. at 2353.

At the time, this simple proposed change in current law was met with howls of protest. Even though the loaning of books by libraries had not destroyed the publishing industry and video rentals were producing greater financial returns than box office receipts, somehow it was felt that “digital made it all different.” Questions were also raised about whether the technology existed to ensure the proposed law could be implemented as intended. (Notwithstanding evidence to the contrary, this was seen as a mission impossible to achieve.) As a result, the inevitable process of compromise left this provision for consideration at another time. In our view, the Copyright Office and NTIA would do well to recommend that Congress adopt the provision when it next updates the Copyright Act to bring it further into the digital era.

Whatever the situation in 1998, the technology to secure the first sale privilege exists today. 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).

Clearly, as Representatives Boucher and Campbell recognized two years ago, fair use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place shifting, and other private, noncommercial rendering of lawfully obtained music and video content. They also should continue to be able to share lawfully

acquired works with family and friends. Extending the first sale doctrine to the digital era will provide the incentive for development of newer, more flexible, and more efficient DRM tools that will allow consumers to exercise more fully their fair use rights. Products and services with substantial non-infringing uses, including those that enable consumers to electronically transfer works lawfully acquired and then deleted, should be deemed to be legal.

By explicitly extending the first sale privilege to digitally delivered works, HRRC believes that the law will promote the interests of consumers, copyright owners, and companies engaged in building the new digital economy. And it will do so in the way that historically has guided the evolution of copyright policy: by balancing the interests of copyright owners and information consumers.

IV. Section 117 Should Exempt Archival and Temporary Copying for Digital Media

Section 117 of the Copyright Act creates an exemption to copyright infringement for the owner of a computer program to make a copy it, as long as doing so is an essential step in utilizing the program or if the copy is for archival purposes. Reflecting the historical balancing of interests of copyright owners and information consumers, this exemption ensures the rightful owner of a copy of a computer program may use it freely without fear of copyright liability, while at the same time preventing a copyright owner from forcing a lawful owner of a copy to stop using the program.

Although written in the analog era, the exemption set forth in section 117 of the Copyright Act implicates at least three types of copying of digital media today. First, consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading. Second, 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. Finally, 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. HRRC submits that 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. Nonetheless, to eliminate any legal uncertainty that could ultimately hurt the interests of consumers or that could stifle the development of new technology, HRRC recommends that the Copyright Office and NTIA support an explicit amendment to section 117 could benefit all parties by clarifying the legal status of these temporary non-infringing copies.

Fortunately, a legislative model already exists. Two bills introduced during the debate over the WIPO Copyright Treaties would have amended the Copyright Act to include a new section 117 (b). 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:

(b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying—

(1) is incidental to the operation of a 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 the legitimate interests of the author.

As Mr. Boucher explained to his colleagues upon introduction of the measure, putting the provision in historical context:

Given the architecture of computers and data transmission networks, the simple act of viewing a downloaded image or sending an e-mail message creates an incidental or ephemeral reproduction (e.g., in RAM or cache memory). Although such “ephemeral copies” are not stored permanently, content owners last year sought to get the same rights to control ephemeral reproductions as they enjoy regarding analog “hard” copies (or digital ROM copies) today. In fact, as originally drafted, Article 7 of the WIPO Copyright Treaty expressly provided that temporary reproductions should be considered the equivalent of hard copies and thus should be subject to proprietors’ control. In response to strong opposition from both developed and developing countries at the Diplomatic Conference in Geneva in December, Article 7 was dropped from the treaty in its entirety.

Section 6 of the proposed bill would amend section 117 of the Copyright Act to make explicit that it is not an infringement for a person to make a digital copy of a work when such copying is made incidental to the operation of a computer or other device in the course of the use of the work in a way that is otherwise lawful, as long as such copying does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Thus, for example, a person would not be subject to liability for viewing a copyrighted work on the World Wide Web

simply because ephemeral copies of the work would have been made in the normal course of the operation of the Internet.

Id. at E2353. Senator Ashcroft as well pointed out the need for the measure as a means of updating current law to reflect the way in which the Internet functions. See Cong. Rec. S8729 (Sept. 3, 1997) (daily ed.).

In our view, 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. As noted above, virtually all devices that play back content recorded in a digital format must process that content by first loading all or some portion of it into memory. All devices that perform such digital media effectively are "computers," including CD players, DVD players, and HD television receivers. Over the past year, consumers have begun purchasing as well a new generation portable playback devices, such as MP3 players. 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 wristwatches. In this new environment, recorded digital media are in the same position as was software in the 1970s. Like computer software, at least some portion of these media need to be temporarily copied into RAM in order to be performed.

Thus, as proposed by Senator Ashcroft and Representatives Boucher and Campbell, section 117 should be expanded so as to exempt the loading of all types of digital content into memory, as an essential step in accessing the content. Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Ephemeral copies made in the course of viewing or lawfully gaining access to a work have nothing to do with piracy. The law should make clear this distinction. To advance the interests of information consumers, while protecting the legitimate interests of copyright owners, the Copyright Office and NTIA should recommend that Congress adopt the proposed change to section 117.

V. Conclusion

Having urged the adoption of specific legislation, HRRC believes that hearings would be useful for the Copyright Office and NTIA to gain a more detailed understanding of emerging technologies and how they would be affected by proposed changes to sections 109 and 117. In particular, hearings would afford the Copyright Office and NTIA the opportunity to receive additional input regarding new technologies and emerging business

models. HRRC would be interested in participating in hearings to explore legislative options for recommendation to Congress.

We look forward to working with the Copyright Office, NTIA, copyright owners, and information consumers to make recommendations to Congress to bring the Copyright Act into the digital era.