VIA ELECTRONIC MAIL

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RE: 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 Interactive Digital Software Association (IDSA) appreciates the opportunity to offer the following comments in response to the above-referenced Federal Register notice.

1. About the IDSA

Formed in April 1994, the IDSA is the only U.S. association exclusively dedicated to serving the business and public affairs interests of companies that publish video and computer games for video game consoles, personal computers, and the Internet. IDSA member companies collectively account for more than 90 percent of the $6.1 billion in entertainment software sold in the U.S. in 1999, and billions more in export sales of U.S.-made entertainment software. IDSA member companies depend upon strong copyright protection and enforcement for their works of authorship and conduct active enforcement campaigns against the worldwide scourge of entertainment software piracy. The IDSA was an active participant in the public policy debate that culminated in enactment of the Digital Millennium Copyright Act (DMCA) in 1998.

2. The Section 104 Study

Section 104 of the DMCA (codified as a note to 17 USC 109) calls for the Copyright Office and NTIA to carry out a joint evaluation and report on the impact of three kinds of legal and technological developments on the operation of two specified sections of the Copyright Act. The sections in question are sections 109 and 117 (17 U.S.C. 109 and 117). The developments to be taken into account in the evaluation and report include (1) the amendments made by Title I of the DMCA; (2) "the development of electronic commerce and associated technology"; and (3) "existing and emergent technology."

The IDSA's comments at this stage of the proceeding will focus primarily on the impact of existing and emergent technology on section 117 of the Copyright Act. Of course, we reserve the right to address additional areas covered by the Section 104 study in any reply comments we may choose to submit, and to seek to testify at any public hearings that may be held.

3. Section 117: Background

The basic provisions of Section 117 were added to the Copyright Act in 1980. They provide a limited exception to the exclusive right of reproduction of a computer program. The exception to allow so-called archival or back-up copying of a computer program, without the permission of the copyright owner, is set forth in section 117(a)(2), which provides in relevant part –

"Notwithstanding the provisions of section 106, it 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 a computer program provided ---

…

(2) 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."

In enacting the new section 117, Congress hewed closely to the recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU), which had been created by the Copyright Act of 1976 and which reported to Congress on July 31, 1978.[1] The CONTU Report succinctly explained the purpose of section 117(a)(2) and how it fit with the other main provision of section 117 as recommended by CONTU:

[1] The House Judiciary Committee report on the 1980 amendments noted that section 117 "embodies the recommendations of [CONTU] with respect to clarifying the law of copyright of computer software." H. Rpt. 96-1307, pt. I, at 23 (1980). Courts have generally treated the CONTU Report as an authoritative reflection of Congressional intent in enacting section 117. See, e.g., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1252 (3rd Cir. 1983); Midway Mfg. Co. v. Strohon, 564 F.Supp. 741, 750 (N.D. Ill. 1983).

"One who rightfully possesses a copy of a program, therefore, should be provided with a legal right to copy it to that extent which will permit its use by that possessor. This would include the right to load it into a computer and to prepare archival copies of it to guard against destruction or damage by mechanical or electrical failure." CONTU Final Report at 13, emphasis added.

It is clear that the intention of CONTU in proposing what became section 117(a)(2), and the intention of Congress in enacting it into law two years later, were greatly influenced by the state of computer technology at that time. In the late 1970's, the personal computer was in its infancy. Computer programs were embodied in media such as punched cards, open reel magnetic tape, and increasingly in the innovative magnetic disk format called a floppy disk. Computer memory capacities were miniscule by today's standards, and it would often be necessary to load a program onto the computer each time the program was intended to be used. Larger programs required many floppy disks for storage, making reloading a program a tedious and time-consuming task. Furthermore, computer systems themselves were much more vulnerable to malfunctions than they are today, and the accidental erasure of a program was a real danger, especially when the computer was being operated by an inexperienced user (and in many businesses and institutions, all users were inexperienced). Just as computer programs needed to be copied in order to be run in the first place (the situation addressed by section 117(a)(1)), so sound information technology practices called for the preparation of a back-up copy in case the original was damaged or destroyed. Hence the need for section 117(a)(2), which enabled the owner of a copy of a program to make an archival copy of his original without having to seek the permission of the copyright owner.

The technology-specific reasons underlying section 117(a)(2) also account for the narrow scope of the exception it creates. Section 117(b) provides that archival copies made pursuant to section 117(a)(2) may only be transferred along with the master copy, and "only as part of the lease, sale or other transfer of all rights in the program." Section 117(a)(2) itself requires that all archival copies be destroyed whenever "continued possession of the [original] computer program should cease to be rightful." Put another way, the existence of a secondary market in so-called "back-up copies," or in equipment or services purportedly intended to be used to make or to use such copies, is completely antithetical to the specific language of section 117(a)(2), and totally alien to the technological assumptions which underpinned its enactment.

4. Section 117: The Current Landscape

If we fast-forward twenty years, however, we encounter a much different reality, with three salient features. First, the technological environment within which section 117(a)(2) was originally enacted has largely disappeared. Second, the courts have generally respected the narrow scope of the provision. Despite these developments, however, section 117(a)(2) is being widely claimed as a shield for copyright piracy, as well as for violations of the new anti-circumvention provisions of the DMCA, especially

in a medium for the dissemination of copyrighted material (in both legitimate and pirate versions) which the drafters of section 117(a)(2) could not have anticipated: the Internet.

a. Technological developments. Technological changes have made section 117(a)(2) largely unnecessary for the purposes for which it was originally enacted. Computer programs for the mass personal computer market (which barely existed in the late 1970's) are commonly distributed in formats such as CD-ROM which are themselves intended to serve as archival copies. The working copy, which is loaded onto the hard drive of the user's PC, does not need to be refreshed or re-created each time the user wishes to run the program. When it is necessary to re-install the program, the CD-ROM or similar copy which the user acquired in the first place remains conveniently available to him or her. Furthermore, while the type of "mechanical or electrical failure" which concerned CONTU in the late 1970's – or its 21st century equivalent, the system crash – still occurs, the user does not need to make an archival copy in order to be ready to recover from it; the originally acquired copy serves that purpose.

Of course, computer programs related to entertainment software are employed today on a wide variety of platforms other than the PC, notably on the console systems that currently support the lion's share of the videogame market, and increasingly over the Internet. In the former case, back-up copies are not needed both because the "mechanical or electrical failure" that would rob the user of access to the program he or she has acquired is a rare occurrence, and because the full program generally does not need to be loaded onto the platform in order to carry out the use intended. (To give a specific example, the Basic Input Output System (BIOS) for console platforms, unlike the operating system for a PC, never needs to be reloaded due to a system failure.) In the case of game playing over the Internet, the technology often does not require that the end-user ever come into possession of a complete copy of the computer program in order to play the game. Thus, since the section 117(a)(2) exception can only validly be exercised by (or at the direction of) the owner of a copy of a computer program, the essential factual predicate for its use is missing, and the exception may never apply at all.[2]

Legal precedents. By and large the courts have interpreted the boundaries of the section 117(a)(2) exception rather strictly. As one commentator has summarized the cases, "courts have generally construed this exemption narrowly and in light of the concern that occasioned its adoption – specifically, 'to guard against destruction or damage by mechanical or electrical failure.'" Goldstein, Copyright (2d ed. 2000) sec. 5.2.1 at page 5:35. Although at least one court has taken a somewhat broader view of the range of risks against which the making of an archival copy may legitimately provide

[2] Of course, even a user who acquires lawful possession of a copy of a computer program may not be the owner of that copy. More and more commonly, the user acquires the copy by license, not sale, and accordingly is a licensee, not an owner. Regardless of how the status of the lawful possessor is characterized, our point is that technological developments and business models increasingly deliver the benefits of use of a computer program – including those embodied in entertainment software products -- to parties who never come into physical possession of a copy of it. These models have also gained currency outside the entertainment software sector.

protection,[3] none seems to have countenanced trafficking in so-called "archival copies" or in the tools for making them.

The "back-up copy" epidemic. Despite the diminishing need for an archival copy exception to protect any legitimate interest of users of computer programs, and the lack of any judicial precedent for expanding the scope of section 117(a)(2), the World Wide Web is replete with sites purporting to offer "back-up copies" of videogames containing computer programs, or of the means for making them. Many of these sites specifically refer to section 117 as providing a legal basis for their operations. One site, for example, reassures users that "under the copyright laws of the U.S., you are entitled to own a backup of any software you have paid for,"[4] while another proclaims:

"All the games, music cd's, and computer software that you will find on this page for sale are copied. It is perfectly legal by Section 117 of the US Copyright Law, to own these cd's and use them as long as you have the original program, game, or music cd. It is illegal though to own these backups if you do not own the original. I don't care whether you own the original or not, but I am not responsable [sic] for what you do with what I sell you."[5]

Of course, the operators of these sites are not offering copies of which they are the rightful owners, nor are they offering to distribute the "back-up copies" along with the originals in an all-rights transaction, as section 117(b) requires for any transfer of a copy made pursuant to section 117(a)(2). Nor do these sites restrict themselves to the distribution of copies of computer programs, which are the only kind of copyrighted work affected by section 117(a)(2); their inventory extends, for example, to audio-visual works embodied in videogames, to which the archival copying exception clearly has never applied. What these sites are offering, simply, is pirate copies of entertainment software and other products containing copyrighted computer programs. They refer to section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction – a download of pirate product -- might in fact somehow be lawful. They exploit the statute, in other words, not as a legitimate defense to infringement, but as an enticement to engage in piracy.[6]

Even more disturbingly, many web sites are making available tools and services for circumventing protective technologies employed by the owners of copyright in entertainment software products, in order to enable the playing of pirate or unauthorized copies of these games. Although trafficking in such tools is a clear violation of the new anti-circumvention provisions enacted in Title I of the DMCA, 17 USC 1201 et seq.,[7] the

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[3] See Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988).
[4] http://www.roms2000.com/disclaimer.htm (visited August 4, 2000)
[5] http://www.angelfire.com/on/cdrbackups/index.html (visited August 4, 2000).
[6] Pirates could also use their misrepresentations about section 117(a)(2) to complicate the task of criminal enforcement against their activities. Criminal copyright liability requires proof of "willfulness," 17 USC 506(a) and evidence that the operator of a pirate site subjectively believed that her activities fell within the scope of the archival copying exception would tend to undermine such a finding.
[7] See, e.g., Sony Computer Entertainment America Inc. v. Gamemasters, 87 F. Supp. 2d 976 (N.D. Cal. 1999); Nintendo of America Inc. v. Bung Enterprises Ltd., No. 97-8511-GAF (VAPx) (C.D. Cal. Nov. 8,

operators of these sites frequently tout the use of these tools to "play back-up copies," thus seeking to obscure their illegality. This is akin to the argument sometimes made, but uniformly rejected by the courts, that the provision of such tools enables back-up copying under section 117(a)(2), and thus qualifies as a "substantial non-infringing use" that rescues the operator from liability for contributory copyright infringement.[8]

5. Recommendations for the Section 104 study

These developments make it clear that the impact of emergent and existing technology justifies narrowing the language of section 117(a)(2), such as by making it clear that the provision does not allow a free-standing market in so-called "back-up copies," and that it only covers the copying of computer programs to the extent required to prevent loss of use of the program when the original is damaged or destroyed due to electrical or mechanical failures. Such a statutory adjustment would not only accurately reflect the changes wrought by two decades of technological advancement, but would also promote legitimate electronic commerce. Perhaps most importantly, it would eliminate much of the confusion created in the minds of some users by those who justify their piratical activities by reference to a supposed "right" to make "back up copies" of entertainment software products.

This public education objective is of critical and immediate importance. During whatever time period is needed for the appropriate amendatory language to be crafted, considered, and enacted by Congress, the current statute remains in effect. Pirates will continue to sow public confusion about what the copyright law says concerning "back-up" or archival copies of computer programs; and with the burgeoning growth of the Internet, their sowing will continue to find fertile ground. Many members of the public are understandably ignorant of their responsibilities to respect intellectual property online; and undoubtedly the persistent references by some site operators to a "back-up copies" exception have blurred the line between right and wrong in the minds of some Internet users.

Even as changes to the law are considered, the Copyright Office and the NTIA should take immediate steps to promote public respect for the law by dispelling the pirate-generated fog around section 117(a)(2). The report required by section 104 of the DMCA provides an excellent opportunity to do so. It is already apparent that the activities undertaken by these two agencies to discharge the tasks assigned to them by Congress in the DMCA have attracted an almost unprecedented level of public attention. The Section 104 study will doubtless enjoy the same degree of public exposure.

1999); Sony Computer Entertainment America Inc. v. Digital Stuff, Inc., No. C-99-710-VRW (N.D. Cal. June 9, 2000).

[8] See Goldstein, op cit., at p. 5:36, describing cases in which this "substantial non-infringing use" argument was rejected. Of course, even if section 117(a)(2) were applicable to these circumstances, which it is not, that would not provide any defense to a claimed violation of 17 USC 1201. See Universal City Studios v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (copyright infringement defenses inapplicable to section 1201).

Accordingly, the IDSA recommends that the Copyright Office and the NTIA use the occasion of the report to Congress required by section 104 of the DMCA to spell out clearly and forcefully the proper boundaries of the exception to protection provided by 17 USC 117 (a)(2).[9] Specifically, these agencies should take this opportunity to stress to the American public that:

- The archival copying exception in section 117(a)(2) is a narrow exception, and applies only to the extent that it is necessary to make a back-up copy in order to protect the original copy against damage or destruction by mechanical or electrical failure. Thus it generally does not apply to contemporary PC, videogame console, or online gaming environments, where these threats are minimal and archival copying is not needed to prepare for them.

- Only the legitimate owner of a copy of a computer program can make or authorize the making of an archival copy under section 117(a)(2), and only from a legitimate copy that he or she owns. A web site or other source offering "back-up copies" for distribution to the public falls outside the exception and is committing copyright infringement. If you have a "back-up copy" that was not made from an original that you obtained by purchase or in some other lawful way, the law requires you to destroy that copy.

- The law forbids the transfer of an archival copy except in conjunction with the transfer of an original and the transfer of all rights in that original. Anyone offering to transfer "back up copies" in any other context is in violation of the law.

- The "archival copying" exception applies only to computer programs. There is no exception to copyright protection to allow the creation of "back-up copies" of any other kind of work, including sound recordings, music, audio-visual works, or databases, except by libraries, archives, broadcasters, and other specifically identified institutions under circumstances defined by law. Anyone offering unauthorized copies of works other than computer programs as "back up copies" is in violation of the law.

Incorporating such material into the report would be a valuable and constructive use of the "bully pulpit" Congress has provided to the Copyright Office and the NTIA in section 104 of the DMCA. The IDSA would be pleased to assist these agencies in any way possible.

6. Section 109

While the IDSA does not wish to offer detailed comments regarding section 109 at this point, we continue to believe that the statute contains a significant anomaly that is harmful to the interests of the owners of copyright in works embodied in videogames.

[9] A clear and widely publicized official explication of the statute could also help to negate the claim of lack of willfulness that pirates may now raise to avoid criminal liability. See fn. 4, supra.

Section 109(b) gives copyright owners an exclusive right to control the commercial rental of computer programs, but section 109(b)(1)(B)(ii) specifically withholds this right from the owners of copyright in "a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes." This discriminatory treatment, in our view, was unjustified when it was enacted into law in 1990, and neither the technological changes of the ensuing decade, nor the development of electronic commerce and its related technologies, have made it any more acceptable.

7. Conclusion

The IDSA appreciates this opportunity to provide its perspectives on the subject matter of the section 104 study. We look forward to reviewing the comments received, and stand ready to assist the agencies involved in any way that we can.

Respectfully submitted,

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION