Oral Testimony of Pamela Horovitz
President
National Association of Recording Merchandisers
On
17 U.S.C. Section 109, Pursuant to DMCA Section 104
Before the Copyright Office and the NTIA
November 29, 2000

Good afternoon and thank you for this opportunity to testify. I'm Pamela Horovitz, President of the National Association of Recording Merchandisers. Our 1000 member companies are composed of the retailers, wholesalers, and distributors of prerecorded music, a group that somehow frequently gets left off the lists of stakeholders who have an interest in the development of the digital marketplace.

Music retailers must each day balance the interests of copyright holders and consumers in the operation of their businesses. So while we are mindful of the fact that our businesses are also dependent on the firm protection of copyright, (every sale that a record company loses is one which a retailer also loses), we are also mindful of the fact that without the consumer, music will exist as art, but not commerce.

Our members are eagerly embracing the Internet and e-commerce of music. Over 80% already have websites through which consumers can purchase music, including lawful digital downloads which have been made available commercially by content providers.

Retailers are on the front lines of public reaction to new products and services. Already our members know that consumers have serious concerns about digital downloads of music as relates to their privacy, download complexity, product reliability, and product returnability.

Retailers have traditionally added value to the marketplace by offering consumers different combinations of selection, convenience, price, ambiance, service, and information. I am here today to argue that the First Sale doctrine is critical to allowing retailers the ability to differentiate themselves in the digital marketplace and that protecting retailer competition and consumer choice does not equal encouraging piracy.

NARM members are <u>not</u> seeking to expand Section 109. We seek only to

continue to honor the rights retailers and consumers now enjoy with prerecorded CD's and tapes in the newest configuration of music: the digital download.

I'm not a lawyer, but you'll hear from plenty of lawyers today. So, what I'd like to use my time pointing out are some of the practical implications of what we're all debating.

Those who say that Section 109 is alive and well on the Internet, or that retail concerns are speculative are wrong. Let me cite some examples that provide evidence to the contrary. First, I'd like to share language from an eight-page End User License Agreement for digital downloads which is now being offered by a major record company.

This company "grants you a limited, nonexclusive, nontransferable, nonsublicensable right to use the software, as such software has been delivered to you (my reading of this means it says 'don't make your own collection of favorite tracks') on a single computer". So forget upgrading your laptop and too bad if it dies? The company will let you download the content to an SDMI compliant portable device, but "you may not burn content onto CD's, DVD's, flash memory or other storage devices."

There's more: "You may not print the photographic images, lyrics, and other non-music elements" – so Mom, if you can't understand the lyrics that your kid is playing from that download, too bad because it's not OK to print them out. And you can't print the cover either to see if it carried the Parental Advisory. I guess technically you shouldn't even look over Junior's shoulder since you weren't the original authorized user.

Forget moving your tunes to the shore house for the summer because according to this license "you may not transfer or copy content to another computer, even if both are owned by you." In fact the whole definition of a "family" computer becomes 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 and loan it to their roommate. In case you missed the death provision, it's in there twice!

I should mention that this company "may from time-to-time amend, modify, or supplement this license agreement," but it's your job as purchaser of the music to check into their website regularly for these revisions. By the way, the software,

and this is in bold caps, is being sold "As is, and without warranty, including but not limited to the implied warranties of merchantability."

Now you don't get to see this EULA until after you've laid down your money, which brings me to another example.

I think you should be aware of the language from this same company's Affiliate Agreement – the agreement all retailers have to sign if they want to sell this company's downloads. Under this agreement, Company X "will have the right to collect and use the consumer data related to sales from Affiliate site" which we are told elsewhere will include your email address, what you bought and when, and how much you paid for it -even though Company X controls the price. They also "reserve the right to provide to parties related to them (whatever that means) aggregate sales information."

It's reasonable to expect that some retailers may not want to share the identity of their customers with suppliers, or with the competing retailers that those suppliers happen to own an interest in. Some retailers might want to post this EULA on the website before the customer puts his money down. And maybe they'd like to determine what that price is themselves, or run store-wide sales, or sales in the classical music department, or "two-fer" sales.

Finally, I want to make one point very clear. 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 to eliminate Section 109 rights for tangible CDs as well. For example, this CD [show], *The Writing's On the Wall* by Destiny's Child, is a must-carry CD for retailers, 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 from the record company's online store instead of your local store). What you may never know is that the record company purports to bind you to and End User License Agreement you will never even see unless you go looking for it in the readme.txt file. That EULA states that "*By using and installing this disc, 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 7 days from time of purchase to: Sony Music Entertainment* ." The 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 that you can.

Apparently, copyright holders aren't happy with the rights they already have in copyright law: the rights of public performance (which NARM supports), of reproduction (which NARM supports), and distribution (which NARM supports). So they're using licensing language to create and protect a business model designed to use retail until such time as they can get to consumers directly and eliminate retailers from their digital equation. NARM fully supports protecting copyright, but we think copyright law needs to stop at the point it becomes a sword designed to void Section 109 rights, or to reduce or protect anti-competitive conduct. Thank you.