## Reply Comments

Time Warner Inc. appreciates the opportunity to submit these Reply Comments in Docket No. 000522150-0150-01 with respect to Sections 109 and 110(7) in an effort to extirpate the baseless conjectures on which much of the Comments rely. What is fundamentally involved in this inquiry is, on the one hand, a chimera made up of suppositions and predictions about future behavior of content owners and, on the other hand, real and soundly based apprehensions concerning what would happen to digitized works in the absence of adequate technological protection.

This clash between imagination and reality becomes particularly significant in the context of suggestions that the first sale doctrine be expanded to apply to digital transmissions. It is worth noting that, as Time Warner Inc. said in footnote 1 to its comments, a digitized work that is sold in a tangible medium could well be the subject of a first sale. The problem presented by some of the Comments is that they would extend the first sale doctrine to digitally transmitted works. In those situations, retransmission of the work (as is sought in those Comments) would require reproducing it and could, in many if not all cases, lead to distribution of the work to a multitude of recipients. This is because (as Time Warner pointed out in its Comments) the first recipient of the work retains, after the (or many) retransmission(s), the "copy" that was received. This, of course, is precisely the opposite of what the first sale doctrine contemplates and, indeed, requires for its proper functioning.

This possibility of distribution of the work to an unlimited number of recipients is a very real one. When that certainty or near certainty is weighed against the unsupported concerns expressed by some of the Comments, it is clear that any decision must come down on the side of keeping the first sale doctrine to its present office. **A CONTRARY RESULT WOULD MEAN THAT CONTENT OWNERS WOULD NOT DARE TO MAKE THEIR WORKS AVAILABLE FOR TRANSMISSION ON THE INTERNET. THIS WOULD BE A GREAT LOSS TO THE PUBLIC INCLUDING THE ENTITIES AND INDIVIDUALS WHO HAVE SUBMITTED COMMENTS**.

Many of the Comments make the assertion that content owners will encrypt digital works and refuse to allow decryption in order to prevent fair use and/or to impose unreasonable terms on those wanting to make authorized use of the copyrighted work. Quite apart from the irrelevance of that contention to this inquiry, it is without basis. Certainly today, when a work is made available in digital format (and assuming for purposes of discussion that the work is not available in analog format), the distributor of that work is not only willing but eager to have the work decrypted by consumers for viewing and/or listening. To

do otherwise – to refuse to allow decryption or to charge an unreasonable fee – would be a suicidal business practice.

Some of the Comments devote significant time and space to the assertion that the motion picture studios insist on controlling not only the physical embodiment of their copyrighted information, but the player used to transform it into intelligible video and audio information as well. Although it is not clear that this assertion has any relevance to the issue at hand, it might be well to say a few words about it. It is true that the technological protection created, for example, for DVD requires for access to the copyrighted work that it be played on a licensed player. This is a function of the state of today's technology. We are not yet at the point where a "unilateral" technical protection can be inserted in, for example, a DVD that would permit access only with the authority of the copyright owner. For the time being, it is necessary to achieve protection somewhat indirectly by including the technology in both the player and the medium carrying the work. In no way does this disadvantage consumers or any other public interest. The fact is that, because implementation of this technology requires the active agreed participation of manufacturers of consumer electronic devices and personal computers, the interests of consumers, the customers of those manufacturers, are fully taken into account. Furthermore, the studios have no interest in selling players or in what players are used (indeed, there is no restriction on the availability of licenses to manufacture them) as long as the players will not allow reproduction or retransmission without authorization of the copyright owner.

Perhaps the groundlessness and dangers of the arguments seeking expansion of the first sale doctrine is best crystallized on page 3 of the Comments of the Stanford Linear Accelerator Center:

> Like owners of "old technology works" (such as printed books), owners of works in digital forms should be included in the first sale doctrine. It has long been recognized that a consumer that buys a product also has a right to resell that product. Although digital works are easily reproduced, this is not a reason to not extend the first sale doctrine to owners of digital works. The principles of the first sale doctrine must apply equally to all products. The first sale doctrine should not be limited to certain works only because some works are easier to reproduce than others. Other methods must be developed to control reproduction rather than changing the fundamental principles of the first sale doctrine.

The reference to " . . . some works [being] easier to reproduce than others" is a monumental understatement. It is, perhaps, this lack of appreciation of the huge danger faced by content owners if digitized works are not adequately protected that leads to the proposition that digitized transmissions should be

subject to the first sale doctrine just as are tangible copies. The fact is that digitized works and particularly transmissions thereof are not merely a step or two away from tangible copies along some spectrum of change. They are different in kind in dramatic ways that make them subject to easy and inexpensive reproduction, distribution, and modification. It is that difference that was recognized by the international community and led to the enactment of the two WIPO Treaties and of DMCA in implementation thereof. It would be a betrayal of those achievements and a violation of this country's international obligations if it cloaked digital transmissions with the first sale doctrine, thereby weakening if not eliminating copyright protection for them. At bottom, moreover, "ease of reproduction" is not the issue here. The first sale doctrine should not be expanded to allow any reproduction at all.

Also groundless is the argument (Comment number 16) to the effect that the prohibitions on circumvention alter the intended effect of the first sale doctrine by allowing the copyright holder to insist that each subsequent "owner" obtain a new authorization. This argument seems to assume that there is something invidious or at least unusual in requiring separate payments for separate uses. Distributors of pay-per-view programming, operators of movie theaters, and trolley car conductors, among others, would be startled by that notion. What one can anticipate is that the market, driven by the respective interests of content owners and consumers, will produce a variety of pricing choices. More fundamentally, this Comment ignores the requirements of Section 109 that the first sale doctrine applies to "a particular copy . . . lawfully made under this title." [This limitation, its rationale and its significance were discussed in Time Warner's Comments.]

The argument (see, for example, Comment number 17) that the DMCA is being interpreted to create a "dangerous tying arrangement" between the right to vend copies and the right to authorize access is not only groundless but, very importantly, it ignores the critical necessity as described above for the technological protections and for not extending the first sale doctrine to digital transmissions. As to the groundlessness of the argument, there is no requirement that one right be "bought" in order to be able to "buy" the other. Using DVD as an example, a consumer can "buy" access and view the picture. To speak of a "right to vend copies", however, begs the fundamental question of whether one who receives a digital transmission may "vend copies" thereof. Clearly, "vending copies" would infringe the reproduction right and involve distribution of a large number of reproductions, all while leaving the "vendor of the copies" with the "original" – something neither contemplated by the first sale doctrine nor consistent with its goal but, rather, destructive of copyright protection.

Comment Number 18 encouragingly recognizes that the first sale doctrine distinguishes between ownership of a copyright and ownership of a copy and speaks of a "copy" as "the tangible material in which a work is fixed." It also appears (see p. 6 particularly) that, at least to a large degree, the concerns of the libraries are to a significant degree focused on developments that they believe to create inconveniences or budgetary problems; none of these complaints justifies making the disruptive change suggested for the first sale doctrine. Moreover, some of the complaints appear to have little if anything to do with the first sale doctrine, for example, a complaint that many databases are available on only one computer in a library, so that only one user can dial in at any given time. This appears to be more a complaint about the inclusion of a number of works on one medium rather than anything having to do with first sale.

The Comments assert that licensing terms routinely affect uses that were traditionally lawful under the first sale doctrine. I am not aware of any such restrictions imposed by Time Warner but, be that as it may, we are once again faced with an assertion that is irrelevant to the issue in this inquiry. Contractual restrictions may be imposed whether or not the first sale doctrine is involved.

Comment Number 18 does at one point (p. 20) touch on the issue involved here. The paper expresses disagreement with the view that, because the first sale doctrine limits only the distribution right and not the reproduction right, it may not be applied to digital transmissions. According to the Comment, a proper application of Section 109 takes into account necessary activities incidental to application of the doctrine, such as reproduction. "Reproduction," of course, has never been a "necessary activity incidental to application of the doctrine." Quite the contrary. Both in its common law origin and its current statutory formulation, the first sale doctrine dealt and deals with only "a particular copy . . . lawfully made under this title." **THE CENTRAL POINT THAT MUST BE RECOGNIZED IN THIS INQUIRY IS THAT IMPORTING A LIMITATION ON THE RIGHT OF REPRODUCTION AS A NEW AND ADDITIONAL ELEMENT OF THE FIRST SALE DOCTRINE WILL DESTROY COPYRIGHT PROTECTION FOR DIGITALLY TRANSMITTED WORKS.** The only authority the paper cites for its assertion is Section 117, "Confirming that an owner of a copy of a computer program does not infringe the reproduction right by copying that program as an essential step in use." That statutory limitation intended to meet the particular needs of computer program owners provides no support for applying such a limitation to digitally transmitted works generally.

A number of the Comments express approval of the approach taken by proposed legislation (H. R. 3048) introduced in 1997, which would have amended the first sale doctrine to include digitally-acquired media. That proposal was not

accepted by the Congress apparently because it appreciated the grave dangers to copyright that it would engender. In Time Warner's view, until such time as one can feel comfortable that technology has been developed and widely deployed that can provide the security necessary to protect against the making of more than one "copy" and the retention of the original "copy" by the transmitter, it would be premature to give that approach serious consideration. In the current state of technology, extension of the first sale doctrine to digitally transmitted works would destroy copyright protection for such works and cause content owners to have serious second thoughts about making their works available on the Internet.

One of the Commenters, The Digital Media Association (No.21), raises an "additional issue," the suggestion that Section 110(7) should be amended to provide that (i) "online record sites are the equivalent of 'physical establishments' and that the transmission between the e-tailer and the consumer is equivalent to the 'immediate area where the sale is occurring' and (ii) the 'retailer exemption' should be extended to digital public performances of sound recordings in both physical and ecommerce record retail establishments."

The limitation of the "retailer exemption" in Section 110(7) to performances that are not transmitted "beyond the place where the establishment is located and [are] within the immediate area where the sale is occurring" was included for an obvious and good reason. Without such a limitation, the performance at a "vending establishment" would be widespread and constrained only by the technical limitations of the performing equipment. That is what would happen if this proposal were adopted. Online performances would be worldwide and be destructive of rather than, as the Comments suggest, helpful to sales of copyrighted music. Indeed, the proposal, if enacted, would result in doing for music retailing exactly what the Comments decry, "slowing the growth of ecommerce, diminishing consumer welfare and potentially stifling the online consumer market."

Time Warner respectfully asks for an opportunity to present its views with respect to Sections 109, 110(7), and 117 if there should be hearings and/or if further Comments should be called for by the Copyright Office or the National Telecommunications and Information Administration.

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