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	)	Docket No. 000522150-0150-01
Digital Millennium Copyright Act	)	

COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

The Digital Media Association ("DiMA"), pursuant to the notice published at 65 Fed. Reg. 35673 (June 5, 2000) ("Notice"), and Section 104 of the Digital Millennium Copyright Act ("DMCA"), is pleased to submit these comments in connection with the study by the Copyright Office and the National Telecommunications and Information Administration of two important issues affecting electronic commerce and copyright policy: the scope of the "first sale" doctrine in the digital environment, and exemption from infringement the making of archival copies and temporary copies of digitally-downloaded works in the course of authorized uses (the "Study").

DiMA (http://www.digmedia.org) was formed on June 2, 1998, by seven (7) companies leading the creation of new ways to deliver and market music and video over digital networks to promote three core principles:

- To promote pro-consumer competitive opportunities in digital distribution, transmission, broadcast, and retail of digital media;
- To encourage the development and use of responsible measures to protect intellectual property rights, including the payment of fair and reasonable royalties associated with such rights; and,
- To oppose technological and legal barriers that inhibit innovation or adoption of new technologies, products and services.

On June 5, 1998, DiMA testified before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection that resolving both of the issues to be addressed in this Study was essential to growing ecommerce and Internet broadcasting. Thus, DiMA was particularly gratified that Congress had the foresight to require in Section 104 of the DMCA that this Study be timely conducted.

Today, just two years after DiMA's formation, our more than 50 members[1] believe that extending the first sale doctrine to cyberspace and exempting temporary buffering during streaming will promote ecommerce in copyrighted works. These last two years have witnessed a dramatic increase in the scope and popularity of Internet webcasting of audio and video programming; and this year promises to be a turning point for the sale of copyrighted sound recordings and video over the Internet. Questions surrounding the legal status of webcasting or consumer rights in digitally-purchased media, if left unanswered, will put a damper on these promising markets and technologies. The time to resolve these issues is now.

In response to the Notice and the questions set forth therein, DiMA's comments below elaborate on the following three key points:

1. Extending existing limitations on the rights of copyright owners into the digital environment is consistent with the policies underlying the Copyright Act and the WIPO treaties implemented by the DMCA. To rapidly promote ecommerce, it would be preferable to enact these limitations into law rather than wait for the courts to sort through the issues.

2. To create a level playing field for ecommerce in digitally-delivered audio, video and other media, the first sale doctrine of 17 U.S.C. § 109(a) must be extended, either by judicial interpretation or amendment, to apply to content lawfully acquired by digital transmission. Unless consumers receive from digital media the same quality, value and convenience they receive from physical media, ecommerce will be left stranded at the starting gate.

3. The exemption in 17 U.S.C. § 117 that legitimizes archiving and usage of computer software should be adapted and applied to digitally-delivered performances and copies. Specifically, temporary copies that enable the performance of digital media, including streaming audio and video, should explicitly be exempted from the exclusive rights of copyright owners, including the rights of reproduction and distribution. Further, consumers should retain the right to make one archival copy of digitally-delivered media to guard against losses from technical errors or equipment failure.

I. Extending Current Limitations Into the Digital Environment is Consistent with Copyright Policy and International Obligations.

Two policies draw the baseline for any discussion of whether or how to adapt the Copyright Act to the digital networked environment. First, copyright exists to promote the public interest. Securing the rights of authors is intended to provide incentives to support the greater public good, not to be an end in itself. See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-350 (1991); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). Hence, statutory changes and interpretations of

[1] A list of DiMA's current members is attached.

copyright law should balance the impact of the law upon the copyright owner against the paramount public interest in the dissemination and proliferation of copyrighted works.

Second, copyright law should respond to technological progress, not hinder it. As the Supreme Court has noted, "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment - the printing press - that gave rise to the original need for copyright protection." Id., 464 U.S. at 430.[2] Courts have the responsibility to flexibly interpret copyright law in light of its implications for the public interest; but the primary responsibility for adapting copyright law resides in Congress. Id., at 430.

Summarizing these principles a quarter-century ago, the Supreme Court wrote:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an `author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ***'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.***

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations and footnotes omitted); emphasis added..

Both of these fundamental principles find further support in the treaties that prompted Congress to adopt the DMCA, namely, the 1996 World Intellectual Property Organization ("WIPO") Copyright Treaty and WIPO Performances and Phonograms Treaty. The Preamble to the WIPO Copyright Treaty recognizes both "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works," and "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention." WIPO Copyright Treaty, CRNR/DC/94 (December 23, 1996).[3]

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[2] "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." Id., 464 U.S. at 430-431 (footnotes omitted.)

[3] Equivalent language is found in the Preamble to WIPO Performances and Phonograms Treaty ("WPPT"), CRNC/DC/95 (December 23, 1996).

Similarly, the Agreed Statements concerning the WIPO Copyright Treaty, with specific reference to the adoption of limitations and exceptions to copyright, provide:

> It is understood that the provisions of Article 10 [regarding limitations and exceptions] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Agreed Statements to WIPO Copyright Treaty, CRNR/DC/96 (December 23, 1996).[4]

Thus, both domestic and international copyright policy embrace the need to extend existing privileges and exemptions under copyright into the digital networked environment.

Generally, the competitive market should be given time to evolve before making "pre-emptive" changes to copyright law. Over time, DiMA believes that existing exemptions created for the "physical" world likely would be adapted to the digital realm by judicial interpretation, or justified under doctrines such as fair use. Nevertheless, the public interest and the evolution of the marketplace often are better served by laws that clearly address and define the rules for a new technological environment. "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994). Indeed, as the Copyright Office recently noted in a similar context:

> Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods.

Report on Copyright and Digital Distance Education, at 144 (May 1999). Thus, legal certainty in applying copyright to new digital technologies benefits the copyright owner and user alike, and prepares the market for compelling technologies and business models. Indeed, the explosion of webcasting since the enactment of the DMCA statutory performance license provides an object lesson in how a stable legal environment provides the launch pad for new industries.

Given the light-speed innovation of today's digital world -- and even the speed of light isn't all it used to be -- it would be unreasonable to expect legislation to anticipate or even keep

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[4] See Agreed Statement to Article 16 of the WPPT: "The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty." CRNR/DC/97 (December 23, 1996).

pace with all the pushes and pulls upon the copyright envelope. However, several copyright disputes threatening digital media companies are overdue for resolution. Among them are the two issues encompassed within this study:

- The first sale doctrine should be applied to digitally-delivered copies and phonorecords of copyrighted works; and,
- Temporary buffer memory copies made in the ordinary operation of streaming media software, and archival back-up copies of digitally-delivered media, should be explicitly exempted from the right of reproduction.[5]

Clarifying these legal principles will promote the growth and development of electronic commerce and the dissemination of copyrighted works. DiMA suggests below why these privileges neither conflict with the normal exploitation of copyrighted works nor unreasonably prejudice the legitimate interests of copyright owners.

II. The First Sale Doctrine Should Explicitly Extend into the Digital Environment.

A. A Historical Perspective

The first sale doctrine balances the economic rights of the copyright owner and the consumer with respect to copyrighted works. The rationale underlying the first sale doctrine has its roots in the English Common law rule opposing restraints of trade and restraints upon alienation of personal property,[6] and is adopted internationally in copyright and patent law as a principle regarding the exhaustion of the proprietor's rights upon first sale.

Copyright law secures to the copyright owner the exclusive right of first distribution, to provide an incentive for the creation and dissemination of works. However, once the copyright holder has been compensated for the initial distribution of the work, no further incentive is required, so the copyright owner should be unable to extract further profits from that particular copy of the work. After that first sale, as the Supreme Court held nearly a century ago, the "right to vend" has been fully exercised and further limitations cannot be imposed on disposition of

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[5] A third, equally important, issue concerns the extension of the Section 110(7) exemption for in-store performances of music to explicitly encompass online retail. DiMA briefly addresses this issue *infra* at Section IV.

[6] See Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881, 883 (E.D. Pa. 1964). See also H.R. Rep. No. 987, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 2899.

those goods.[7] This doctrine has been embodied in substantially equivalent forms under both Section 27 of the Copyright Act of 1909[8] and Section 109(a) of the current Act.[9]

These rationales apply with equal force in today's digital world. The law should not discriminate against digital embodiments. Once the copyright holder has been justly compensated for the initial sale of the work, the consumer should have the same right to dispose of the copy, regardless of whether it was acquired as a physical or digital copy.

B. First Sale Remains Rational and Necessary in the Digital Environment.

Although a court justifiably could interpret the existing language of Section 109(a) to protect digital retransmissions of digitally-acquired content, some copyright owners have disputed this interpretation. In DiMA's view, an unambiguous statement that the first sale doctrine applies to digitally-acquired content will benefit all parties. DiMA therefore supports legislative clarification of Section 109 so as to firmly establish that the first sale doctrine applies to digital retransmissions of digitally-acquired copies and phonorecords of copyrighted works.

The first legislative initiative to recognize the necessity of the digital first sale doctrine occurred in November 1997. Representatives Rick Boucher and Tom Campbell introduced H.R. 3048 (the "Boucher-Campbell bill"), which would have amended the first sale doctrine to include digitally-acquired media. This bipartisan bill, subsequently co-sponsored by approximately 50 representatives, 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 the work to a single recipient, if the person effectuating the transfer erases or destroys his or her copy or phonorecord at substantially the same time. In its June 8, 1998, testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection, DiMA supported both the extension of the first sale doctrine to digitally-acquired media, and the passage of that provision of H.R. 3048:

> The "first sale" doctrine should be adapted for the digital environment. Just as consumers have the right to resell or give away a book, CD or video purchased in a physical retail store, they should have the right to transfer ownership of copies

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7 Bobbs-Merrill Company v. Straus, 210 U.S. 339, 350-51 (1908).

8 Section 27 of the 1909 Act stated, in pertinent part, "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."

9 Section 109(a) states, *inter alia*, "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a).

> received electronically. ***If Internet commerce is to succeed, consumers must have the assurance that the electronically purchased copy is just as good and valuable as the store-bought copy, and a copy that cannot be resold or given away is a lot less valuable.*** Rep. Boucher's bill, H.R. 3048, would secure this existing right for the digital environment. In the past, the argument has been made that, in the digital environment, if that transfer of ownership is done by computer, then a copy remains on the sender's computer even after the copy has been transmitted. This is a flawed argument. Technology companies like Liquid Audio and a2b music already have developed technologies for secure electronic delivery and copying of music. They, and many others, are capable of developing software that will ensure that the copy on the sender's computer is deleted after transmission. But they will have no incentive to develop these technologies if the first sale doctrine does not apply, since their technology still would be unlawful.

The passage of time has only proved these views correct, but the risks from operating without the digital first sale doctrine are imminent. On July 24, 2000, market analysts at Jupiter Communications released estimates that annual U.S. sales of digitally-downloaded music could reach $1.5 billion by 2005. Without a first sale doctrine, this market may not reach its potential. And as we have already seen in related Internet contexts, failing to capitalize on the inherent flexibility of digital systems delays market development and entices others to illicitly provide the convenience the consumer desires. When law and ecommerce enable the online consumer to receive full value, quality, convenience and service, the business and the market will prosper.

The technology to secure the first sale privilege exists today. As will be explained further below, copyrighted content can be delivered to the consumer 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. Extending the first sale doctrine to the electronic environment will provide the incentive for development of newer, more flexible, and more efficient DRM tools. Thus, by explicitly extending the first sale privilege to digitally-delivered works, DiMA believes that the law will simultaneously promote the interests of consumers, copyright owners, and companies engaged in building the new ecommerce economy.

With this background, DiMA responds below to the questions posed in the Notice.

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

The impact on the first sale doctrine of Section 1201 to date has been limited, in light of the embryonic state of ecommerce. At this stage, DiMA can describe how the anticircumvention provisions have had a positive impact or no impact on ecommerce; yet we also can envision scenarios in which they would diminish or negate the operation of the first sale doctrine.

(i) Technological protection measures can support the first sale privilege.

On the positive side, encryption can facilitate practical implementations of the first sale doctrine. Several companies have implemented technologies to electronically deliver digital copies or phonorecords in encrypted form. Protected files (such as music, motion pictures, photographs or text) can be copied freely, but cannot be accessed without the decryption key. Therefore, maintaining tight technological control over the transmission of the decryption key effectively maintains security over the digital media file. To implement first sale using encrypted content, then, the technology would need merely to limit copying of the decryption key, and to assure transmission of that key along with the transfer of possession of the digital phonorecord or copy. Once the key has been permanently transmitted from the seller's machine, any encrypted data remaining in the seller's storage media is inaccessible and valueless.

Similarly, authentication processes can be implemented so as to assure that digital copies and phonorecords are transferred securely and permanently. For example, a software technology could incorporate means for assuring the deletion of the content from the first owner's computer following successful transfer of the content to the new owner. Then, when initializing the transmission process, software on the seller's and purchaser's computers can authenticate each other through a series of cryptographic challenges and responses, and establish a secure channel for the transmission of the content according to the rules set forth in the software. Once this secure transmission is completed and verified, then the software on the seller's computer can delete or disable access to the work.

Such encryption and authentication systems may constitute access controls subject to the provisions of Section 1201(a). In these respects, Section 1201 may be said both to be compatible with and to enable the operation of the first sale doctrine for digitally-delivered content.

(ii) Technological Protection Measures can be Irrelevant to First Sale.

Not all media is delivered electronically in a secured or encrypted format. In such instances, Section 1201 is irrelevant to the operation of the first sale doctrine for digital media.

Thousands of files in the unprotected MP3 format are distributed with authorization of the copyright owner and without charge over the Internet. Wide dissemination of these tracks without restriction is generally the goal, so as to promote unknown artists or create buzz for forthcoming recordings by current stars.

Some companies sell unprotected music with the authorization of the copyright owner. EMusic.com (http://www.emusic.com), for example, markets and sells sound recordings for downloading by the consumer in the MP3 format without encryption or any form of copy protection. Companies such as EMusic view copy protection as an impediment to consumer convenience and the popularization of electronic media. They rely on the honesty of the paying consumer, and take no steps to enforce the operation of the first sale doctrine. In most respects, this business model closely emulates current practice in which physical analog and digital media

are delivered without technological protections, and there is no assurance that a consumer who resells a commercial compact disc has not made and retained a copy in another format.

(iii) Technological Protection Measures should not Negate First Sale.

DiMA is concerned that Section 1201 could become a blunt instrument by which to impede or negate the first sale doctrine. To be clear, DRM and other measures will play a critical role in promoting ecommerce and first sale. DRM tools will fuel new business models (such as subscription or on-demand listening, "try before you buy," rental or downloading of promotional recordings that will "time-out" after a specified period) in which first sale privileges should not apply. DiMA welcomes these pro-content owner/pro-consumer opportunities as alternatives to the purchasing of content.

However, technological protection measures applied indiscriminately to digitally-purchased copies or phonorecords of works could prevent electronic resale or transfer of possession. If so, the DMCA anticircumvention provisions will punish consumers that disable or avoid those technological protection measures in order to facilitate legitimate first sale privileges. As a result, Section 1201 could enforce a gross and discriminatory imbalance between digital and physical media that would stifle ecommerce, to the prejudice of online companies and consumers.

Similarly, technological protections could condition the consumer's right to access upon unilaterally-imposed license terms that force the consumer to forego essential privileges (such as first sale or fair use). Leveraging technological protections (and Section 1201) with unacceptable "take it or leave it" contract clauses could significantly interfere with consumer rights and, hence, the success of online digital distribution. As several unsuccessful Internet enterprises already have learned, you ignore consumer rights and benefits at your peril. If online retailers cannot secure basic consumer privileges such as first sale, then digital downloading may remain a promotional tool rather than a dominant sales force.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

DiMA believes that, at this stage, these prohibitions have had no effect on the operation of the first sale doctrine.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

The potential impact of ecommerce on first sale – positive, negative or neutral – likely will not be fully experienced until it is more widespread. DiMA expects that the next 12 months will be the turning point for ecommerce, when three key elements for ecommerce converge.

(1) Technology. The first element, that is, the technology to deliver music in secured and unsecured formats, already is in place. Secured formats include:

- Liquid Audio (http://www.liquidaudio.com) enables the delivery of encrypted music along with rules of use, such as files that become unplayable after a specified time, files that can play only on a specified computer, files that can be burned to recordable CD only once, or files that can be shared on multiple computers. Liquid Audio also has spearheaded an effort to include a "Genuine Music Mark" on commercially-released MP3 files so that even unsecured content can be authenticated by copyright owners.

- EverAd, Inc. developed and markets the "PlayJ" technology (http://www.playj.com), which delivers encrypted music that, when played, displays advertising that effectively monetizes the free downloaded tracks. The advertisements change periodically, and persist on the screen while the music plays.

- RealNetworks (http://www.real.com) provides tools to content owners who wish to securely deliver their content for playback through software applications such as the RealJukebox.

- Reciprocal, Inc. (http://www.reciprocal.com) provides digital rights management services to content owners and distributors. Among its other services, Reciprocal, using underlying digital distribution platforms of companies such as Microsoft, IBM and InterTrust, issues permits that enable consumers to access secured content. Depending on conditions determined by the distributor of the content, Reciprocal issues a permit after consumers make the necessary payment, provide requested information or without any requirement whatsoever. While the secured content file may be transmitted by the original consumer to others (i.e. "superdistribution"), subsequent recipients of the file must separately obtain a permit to access the content pursuant to the usage rules established by the original distributor of the content.

All these companies participate in the recording industry-led SDMI effort to establish specifications for secure music content. These and other technologies are becoming popularized by content companies and online retailers that offer pay downloads of music files. Thus, this necessary element of the infrastructure already is in place.

2. High-Speed Distribution. Second, the success of digital downloading also relates to the pace of the rollout of broadband technology. DSL and cable modem service to the home will speed the downloading of media, making ecommerce a faster and more enjoyable consumer experience. To some extent, the pervasive penetration of Napster, Gnutella, ScourExchange and other similar file-sharing services suggests that consumers will tolerate a certain level of delay in getting music online. In this connection, a recent Yankelovich survey co-sponsored by DiMA shows that more than 80 percent of consumers age 13-39 download music at home, where connections are likely to be slower, than at work or at school. Beyond

question, however, faster download speeds will make digital delivery more convenient, reliable and desirable for the consumer.

3. Content. The third element, of course, is availability of content. DiMA members are gratified at the initial forays by content companies into online sales through a variety of retail outlets, but this still is no more than a toe in the water. We hope that, as content companies gain comfort with the medium and experience successes, full catalogs of content soon may become available to the consumer through all online retailer outlets.

With the confluence of these developments, we are reaching the end of the "chicken-and-egg" period of ecommerce. As all three elements fall into place, the task turns now to evangelizing online distribution to the consumer. DiMA therefore expects that, over the next 12 months, the anticipated increases in availability of both legitimate music and faster Internet connections will catapult ecommerce into the consumer mainstream.

However, we emphasize that consumer confidence in ecommerce will develop only if consumers receive full value and convenience from their online transactions. Thus, the first sale doctrine remains important and necessary to the digital legal landscape.

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

As noted above, DiMA believes that ecommerce will flourish only if consumers obtain from their purchases at least the same value and flexibility that they enjoy from purchasing physical media. Thus, amending the first sale doctrine will avert the potential for discriminatory legal treatment for ecommerce, to the prejudice of both consumers and online business.

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The history of the first sale doctrine, described *supra* at II-A, was premised upon a balance between the incentive for copyright owners and the public interest. At the time the first sale doctrine first was embodied in legislative language, ecommerce was science fiction. Yet the statement of the doctrine in Section 27 of the 1909 Act would have been broad enough to accommodate ecommerce: "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 the 1976 amendments to the Copyright Act, the exposition of the first sale doctrine in Section 109(a) became more specific, so as to encompass phonorecords as well as copies; and to clarify that the first sale doctrine applied only to the specific copy or phonorecord acquired by the consumer, not to any copies that might be made therefrom (e.g., by photocopying or home taping). Yet, the underlying premise – that a copyright owner should not be entitled to multiple remuneration or to restrain transfers of lawfully-acquired property – remains as sound in the digital world as in the physical world.

Thus, nothing in the first sale doctrine itself inherently favors physical media over digital media, or overland distribution over electronic transmission.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The first sale doctrine itself, as noted in our response to (e) above, is not premised upon a particular technology or technological environment. The principles underlying the first sale doctrine are technology-neutral.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

For the reasons articulated above, DiMA believes that the first sale doctrine must be expanded to permit lending and transfer of media acquired digitally by consumers.

During the 1997-98 debates over H.R. 3048 and the DMCA, content owners opposed to a digital first sale privilege contended that a digital first sale doctrine would promote rampant copying and redistribution of works, and that consumers could not be trusted to delete their copies once transferred. DiMA continues to believe these concerns are misplaced, for the following reasons:

(1) As DiMA testified in June 1998, technological protections and DRM systems can facilitate the operation of the first sale doctrine in a manner that respects the rights of both copyright owners and consumers. Through technological processes such as encryption, authentication and password-protection, right holders can assure that digitally-downloaded copies and phonorecords are either deleted after transfer or disabled (such as by permanently transferring with the content the only copy of the decryption key).

(2) DRM tools implement the first sale doctrine more securely for digitally-transmitted content than for today's physical media. CDs and books are resold freely; yet, the consumer/reseller may have copied these physical media using cassette or CD recorders, scanners and photocopy equipment. Denying the first sale doctrine for digitally-delivered media ironically would deprive consumers of traditional privileges in a far more secure environment.

(3) Any extension of the first sale doctrine cannot apply only to content protected using DRM tools. As noted above, several online businesses are successfully marketing digital downloaded media in unprotected or open formats such as MP3. In these circumstances, the copyright owner has consented to the distribution of such media while recognizing that it can be freely copied and redistributed. Having elected to rely on the honesty of the consumer for the initial distribution of the content, denying that consumer's entitlement to the fair use privilege would be prejudicial both to the consumer and to the "open format" business model.

(4) Finally, some may contend that the growing popularity of peer-to-peer file sharing technologies somehow justifies their fear of a digital first sale right. Whatever the impact of these technologies, they are irrelevant to first sale. First, most shared files arrive on the computer ripped from a CD. The digital first sale right favored by DiMA encompasses electronic transfers of possession only for media lawfully acquired by digital transmission. Second, DRM systems can protect against any threat posed by file-sharing technologies. If such files may be shared, they either cannot be accessed by the downloader, or (in the case of DRM systems that promote paid superdistribution models) cannot be accessed without payment of a fee. Third, as noted above, content sold without technological protections effectively contemplated free redistribution. In such cases, the content owner anticipates a reasonable return under that business model. There is no reason to thwart consumers that wish to lawfully resell or permanently part with their purchases, simply because others freely trade them.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

Under present law, DiMA believes that a court correctly could interpret the first sale doctrine to apply to digitally-acquired media. However, no cases have addressed this issue to date. DiMA therefore suggests that copyright owners, ecommerce and consumers would benefit from legislative clarification of Section 109.

As noted above, digital delivery is only now emerging as a means to market sound recordings, books and motion pictures to consumers. The absence of the first sale privilege has not had a chance to affect consumers. So far, the leaders in digitally distributing music online have been those which market the music in unprotected form, or which employ DRM systems that enable permanent transfer of ownership. Thus, the "absence" of a first sale privilege has not been felt in the marketplace.

Notwithstanding, ***DiMA believes that it would be highly detrimental to ecommerce if consumers ever experienced the "absence" of a first sale privilege.*** Technologies with seemingly great market potential can be stunted by adverse press or bad initial marketing. Consumers will become dissatisfied with ecommerce if they cannot trade or sell via transmission the works they acquire digitally. Denying consumers a digital first sale privilege is the equivalent of telling consumers that, if they tire of a CD, they must throw it (and their investment) away. The success of ecommerce depends on giving the consumer the same value, with greater convenience and selection. Without a digital first sale privilege, consumers will not buy in to electronic commerce.

III. Section 117 of the Copyright Act Should Exempt Archival and Temporary Copying for Digital Media.

A. A Historical Perspective

Section 117 of the Copyright Act creates an exemption to copyright infringement for the owner of a copy of a computer program to make a copy of that program, as long as making such a copy is an essential step in the utilization of the program in conjunction with a machine and is used in no other manner, or if such copy is for archival purposes.[10] This exemption ensures the rightful owner of a copy of a particular computer program the ability to 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.[11]

While the legislative history of Section 117 is sparse, Congress did note that Section 117 "embodies the recommendations of the Commission on New Technological Works with respect to clarifying the law of copyright of computer software."[12] Further, courts have noted that "it is fair to conclude, since Congress adopted its recommendations without alteration, that the CONTU Final Report reflects the Congressional Intent."[13]

The CONTU Final Report noted that as a practical matter, computer programs on disks cannot be used without first being loaded into a computer's memory, which by definition involves "copying." The CONTU Report stressed that "one who rightfully possesses a copy of the program…should be provided with a legal right to copy it," *i.e.* "the right to load it into a computer…".[14] But, the Report further stressed that the right exists only to enable use of the

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[10] The text of Section 117 reads, in pertinent part, "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 that computer program, provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (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."

[11] See the National Commission on New Technological Uses of Copyrighted Works ("CONTU") Final Report, p. 13.

[12] H.R. Rep. No. 96-1307 (Part I), reprinted in 1980 U.S. Code Congressional and Administrative News 6460, 6482.

[13] Atari, Inc. v. JS&A Group, Inc., 597 F. Supp. 5, 9 (N.D. Ill. 1983) quoting Midway Mfg. Co. v. Strohon, 564 F. Supp. 741, 750 (N.D. Ill. 1983).

[14] CONTU Final Report, p. 13.

program by the possessor, and does not extend to other copies of the program.[15] Thus, the rights granted by Section 117 do not include the right to make the copies accessible to others.[16]

Early case law interpreting this section noted that the literal text of the statute required that the copy be created as an "essential step," thus the copy must be "no more permanent than is reasonably necessary."[17] However, latter decisions tend to support a more liberal reading of Section 117, which "is consistent with Congress's stated purpose of providing the copyright protection necessary to encourage the creation and broad distribution of computer programs in a competitive market."[18]

B. The Focus of this Study of the Impact of Section 117

The exemption set forth in Section 117 of the Copyright Act implicates at least three types of copying of digital media.

First, consumers should be able to make a back-up or archival copy or phonorecord of content that they acquire through digital downloading. Anyone who uses computers recognizes that their investments in media, like any software, can be lost in case of damage to a hard disk drive. Similarly, consumers who upgrade their computer systems every few years need some means of transferring their media to their new computer. DiMA believes that the principle is important, but the means for implementation may be as varied as in the case of today's computer software. For example, no archival copy is necessary if (as in the case of some DRM systems) the seller can replenish any media lost or damaged. As another example, for systems such as Liquid Audio, the ability to burn once to CD can serve as an appropriate archival copy.

Second, temporary copies of recorded content made in the course of playback also should be exempt from claims of infringement. This is no different than the case directly contemplated by Section 117(a). The computing device retrieves copyrighted material from a storage medium (such as a hard disk drive or a CD) and then loads the material into random access memory ("RAM") for processing and performance or display. This issue implicates virtually all digital devices and all media forms. Indeed, nearly every device for performing digital media incorporates some memory to process the content so as to make it perceptible, from portable CD players and "e-books" to high definition television sets.

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15 See id.

16 See Apple Computer, Inc. v. Formula International, Inc., 594 F. Supp. 617, 622 (C.D. Cal. 1984).

17 See id.

18 See CONTU Final Report p. 27. See also DSC Communications Corporation v. Pulse Communications, Inc., 976 F. Supp. 359, 362 (E.D. Va. 1997) ("The trend is to read Section 117 broadly").

Third, the technical process of Internet webcasting requires that the receiving device temporarily store a few seconds of data transmitted by the webcaster, before playing back the audio or video to the consumer. Data transmitted over the Internet arrives in small packets that need to be received and assembled by the receiving device. For data that is to be performed concurrent with its reception (such as "streaming media"), that data is collected in a segment of RAM that is allocated as a "buffer" for audio performance or display.

In the case of webcasting, the receiving device, using software such as the RealNetworks RealPlayer, collects in this RAM buffer a few seconds of data to guard against interruptions or delays due to line congestion or slow Internet connections. More particularly, when the user requests transmission of webcast media, the RealPlayer software on the user's receiving device communicates with the transmitting server and determines, given the quality of the media and the speed of the transmission, how many seconds of data should be stored in the receiving device's RAM buffer before beginning playback to the user. Higher quality media (that contains more data) will take longer to transmit, so more data will be accumulated in the buffer; similarly, more data will be accumulated where the user has a slow or congested Internet connection. The data in the RAM buffer cannot be accessed for other purposes within the receiving device; it can only be performed via the streaming media software. Once performed, the transmitted data leaves the buffer permanently and cannot otherwise be stored in a direct digital copy on the receiving device.[19]

Through use of this temporary buffer, the user experience from Internet webcasting approximates the smoothness of performances rendered by radio or television. Effectively, the need for a buffer is a technological accident owing to the design of Internet communications protocols. The buffer has no use to the consumer other than to facilitate those performances. Thus, where the performances are licensed, the use of RAM buffering has no additional impact upon the economic rights of copyright owners.

Each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the fair use doctrine. Notwithstanding, DiMA long has been aware that this view is not shared by certain copyright owners. Therefore, for the reasons set forth *supra* at I, DiMA believes that an explicit amendment to Section 117 could benefit all parties by clarifying the legal status of these temporary noninfringing copies.

C. Legislative and Regulatory Background of this Study

S. 1146, introduced by Senator John Ashcroft on September 3, 1997, would have amended Section 117 by providing explicitly in Section 117 that it is not copyright infringement

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[19] In this regard, where the streaming technology features this capacity, the disabling of direct digital copying of the data streamed during webcasting is a condition of the statutory webcasting license. See 17 U.S.C. § 114(d)(2)(C)(vi).

to make a digital copy that is "incidental to the operation of a device in the course of the use of a work otherwise lawful" under Title 17.[20]

The scope of the temporary copying exemption, as relevant to Internet webcasting, reappeared on the radar screen in December 1997. Three Internet webcasters – AudioNet, Inc. (now Yahoo!/broadcast.com), RealNetworks, Inc. and Terraflex Data Systems, Inc. (now Spinner.com, which is owned by America Online, Inc.) – opposed the adoption of a broadly-worded rule, jointly proposed to the Copyright Office by the National Music Publishers Association and the Recording Industry Association of America, that could have applied the reproduction right (and a mechanical royalty at the statutory rate) to these temporary RAM buffer copies. Eventually, that language was withdrawn from the proposed regulation and the issue was deferred until the next arbitration period.

DiMA directly raised this issue in its June 8, 1998, testimony before the House Commerce Committee Subcommittee Telecommunications, Trade and Consumer Protection:

> Temporary copies made on a user's PC during Internet transmission, for a transitory period and to facilitate performance of the audio or video, should not be considered copyright infringement. Hundreds of thousands of hours of audio and video material now are available over the Internet. "Streaming media" technology is essential to making these Internet transmissions sound as smooth as over the radio. . . .
>
> ***If temporary RAM copies of those few seconds of material are deemed to be copyright infringement, and streaming media performances and technology could therefore be deemed unlawful, audio and video over the Internet will come to a grinding halt.*** H.R. 3048 addresses this problem by stating that temporary copying incidental to an otherwise authorized performance is not copyright infringement. We strongly support this measure as an absolutely integral part of this bill, and as essential for the future of the Internet.

Following that testimony, DiMA engaged with copyright owners in a series of discussions under the auspices of then-chair of the House Internet Caucus, Rep. Rick White, in

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[20] The Ashcroft bill proposed a new subsection (b) to section 117:

> (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.

The 1997 Boucher-Campbell bill proposed the same language to address this issue.

an effort to craft a mutually-acceptable legislative exemption for these RAM buffers. When time ran out for those discussions, Congress incorporated into the DMCA Section 104, to study this issue as part of the overall interaction between Section 117 and new technological uses.

With this background, DiMA responds below to the questions posed in the Notice, as relevant to each of the three types of temporary copying identified above.

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

Technological protection measures, such as the DRM tools provided by Liquid Audio and Reciprocal, can provide consumers the means to make a "back-up" copy of their digitally-downloaded content, in a secure manner that also protects the rights of copyright owners. However, technological protection measures could be applied so as to thwart the consumer's right to make such archival copies. Thus, Section 117 should provide consumers with the assurance that, in the ordinary course of purchasing content in a manner analogous to today's purchases in record shops, the law will not preclude them from making their archival copy.[21]

Technological protection measures should not affect the consumer's ability to playback media that the consumer has lawfully acquired. Devices licensed to perform the content will be equipped with the technologies to decrypt or otherwise access the content for playback.

Similarly, today's protection measures do not interfere with consumers' ability to enjoy webcast performances. Certain webcasting technologies (e.g., streaming in the MP3 format) use no protection measures, and so are unaffected by the provisions of Section 1201. For streaming systems that do implement protection, those protection measures have facilitated the growth of webcasting by assuring copyright owners that their works are secure against direct digital copying. The importance of such technological protection measures was acknowledged in RealNetworks v. Streambox, Inc.[22] There, the court issued a preliminary injunction against the distribution of the "Streambox VCR," a software product that circumvented authentication and copy protection measures implemented in the RealPlayer software so as to permit a Streambox user to record the streamed RealMedia files, against a copyright holder's wishes. The court's findings of fact specifically noted that a large number of copyright owners rely on RealNetworks' software to protect their content against duplication, and that the ability to circumvent this protection "would likely reduce the willingness of copyright owners to make their audio and video works accessible to the public over the Internet." Id. ¶ 26. Thus, DiMA believes that

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[21] DiMA would not suggest that archiving be applied to downloads that are not equivalent to a sale. For example, music acquired on a "try before you buy" basis or on a "pay per listen" service would not be subject to such provisions. But, as in the case of the current section 117(a), the *owner* of a digitally-downloaded copy should be able to make a back-up copy without being deemed an infringer.

[22] 2000 U.S. Dist. LEXIS 1889 (W.D. Wa. Jan. 18, 2000).

Section 1201 to date has not impeded webcasting, and that systems that implement technological protection measures have helped make more copyrighted works available to the public.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

DiMA believes that, at this stage, these prohibitions have had no effect on the operation of Section 117.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

DiMA believes that the growth of ecommerce -- and the vast potential opportunities it creates for copyright owners, technology developers and media companies -- demonstrates why Section 117 needs to be expanded to address all forms of digital content, and not just software.

First, as noted above, the growing popularity of digital downloading necessitates that the law continue to guarantee consumers the right to secure their investment in digital media. For consumers to embrace digital delivery, they must first be assured that the content they acquire will not be lost due to events such as server or hard disk crashes. Thus, Section 117 should permit the making of an archival or back-up copy of media acquired digitally, without branding consumers as infringers.

Second, virtually all devices that playback 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 new generation portable playback devices, such as MP3 players. By next year, playback of digital media will become pervasive in all handheld devices, including portable organizers, cellular phones and even wristwatches. In this new environment, recorded digital media are in the same position as was computer software in the 1970's -- at least some portion of these media need to be temporarily copied into RAM in order to be performed. Thus, 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.

Third, webcasting technology demonstrates another reason why Section 117 needs to be updated for the digital age. The small temporary buffer memory copies used in today's webcasting technology have no intrinsic or economic value apart from the performance. Where the webcaster makes an authorized performance of copyrighted material, the temporary buffers necessary to enable that performance should be exempt from any claim of copyright infringement. In this regard, DiMA notes that the Copyright Office appears to have reached a similar conclusion in its study of distance education, resulting in the recommendation that the scope of the Section 110(2) exemption should be expanded to encompass "transient copies created as part of the automatic technical process of the digital transmission of an exempted

performance or display." Report on Copyright and Digital Distance Education, supra at 146-7. The exemption from the reproduction right is all the more warranted for webcasting, where the same copyright owners of the musical composition, audiovisual work or the sound recording already will have authorized, and been compensated for, the performance of the works.

(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

Section 117 was adopted to deal with a specific known technology then becoming more prevalent in the late 1970s. The basis for the exemption, as noted above, was the fundamental principle that the lawful owner of a copyrighted work ought to have the right to use it. In the case of computer software, the material objects that contained the computer code potentially could be damaged, and so the need was perceived for an archival exemption. Similarly, using the software required that all or some portion of the code be copied into temporary memory where the code could interact with and process other data, and so the need was perceived to exempt this temporary copying.

The result of CONTU's consideration was a limited provision that applied the principle in the context of a particular known problem. Congress, when adopting Section 117, 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, are pervasive. Content other than computer programs is available to the consumer, is susceptible to loss, and cannot be used by the purchaser without temporary copying into device memory.

DiMA therefore believes that it is time to take cognizance of how the concepts underlying of Section 117 ought to be applied to new technologies and uses. We therefore strongly request that Section 117 be adapted and expanded to encompass the types of digital copying that are necessary and appropriate to the uses of digital media, and to the promotion of electronic commerce.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

As noted above, although the language of Section 117 may have been premised upon a particular technological environment, the conceptual justifications for the exemption were founded on principles that have general application to the digital environment.

IV. DiMA's Views on the "General" Questions Posed by the Study

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

Another issue squarely at the intersection of copyright and ecommerce relates to the application of Section 110(7) of the Copyright Act, the "retailer exemption" to online retailers. Section 110(7) exempts retail record stores from paying music license fees when they perform music in their stores "to promote the retail sale of copies or phonorecords of the work." Thus, when a consumer hears music playing in Barnes and Noble or Tower Records, these retailers are not required to pay performance license fees for such in-store play.

Online music retail businesses that market and sell copyrighted music (in physical form or by digital downloading) also allow the customer to hear the music (or, more commonly, a music sample) before buying. Most of these businesses allow the consumer to hear samples of virtually every song available for purchase. This unique facility of electronic commerce promotes consumer satisfaction and awareness of performing artists, as well as sales of copyrighted music.

However, some copyright owners contend that this exemption, adopted in 1976, should apply only to "brick and mortar" retail establishments, and does not and should not benefit online retailers. Such an interpretation unfairly discriminates against online retailers, encumbering ecommerce with additional license fee payments. Ironically, if it becomes expensive to provide music samples, then electronic retailers will offer fewer samples – slowing the growth of ecommerce, diminishing consumer welfare and potentially stifling the online music market.

To avoid prejudice to online retailers, DiMA believes that Section 110(7) should be amended in two respects to clearly exempt online retailers and retail services for similarly promotional performances, in two ways:

- First, the existing exemption is limited to performances in "establishments" that are not transmitted "beyond the place where the establishment is located . . . [or beyond] the immediate area where the sale is occurring." ***Section 110(7) should clarify that online record retail 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."***

- Second, the exemption was written before Congress created a copyright covering digital public performances of sound recordings. Therefore, ***the exemption should be extended to digital public performances of sound recordings in both physical and ecommerce record retail establishments.***

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

DiMA believes that hearings might be useful for the Copyright Office and NTIA to gain a more detailed understanding of the developing technologies and ecommerce business models and

how they would benefit from the proposed changes to Sections 109 and 117. In particular, hearings would afford the opportunity to receive additional input regarding new technologies and emerging business models. DiMA and several of its members would be interested in participating in these hearings.

Respectfully submitted,

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