

August 4, 2000

Jesse Feder  
Office of Policy and International Affairs  
U.S. Copyright Office  
Copyright GC/I&R  
P.O. Box 70400  
Southwest Station  
Washington, D.C. 22024

Jeffrey E.M. Joyner  
Senior Counsel  
Office of Chief Counsel  
National telecommunications and Information Administration  
Room 4713  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Ave., N.W.  
Washington, DC 20230

Re: SIIA Comments Relating to the Joint Study by the Copyright Office and NTIA on Sections 109 and 117 of the Copyright Act

Dear Messrs. Feder and Joyner:

In response to the Federal Register notice of June 5, 2000 entitled "Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act" published by the National Telecommunications and Information Administration ("NTIA") and the Copyright Office, the Software & Information Industry Association ("SIIA") hereby submits the following comments on behalf of its members.

SIIA is the principal trade association of the software and information industry and represents over 1,000 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA and our members are extremely interested in issues relating to the interplay between new technologies, e-commerce and the copyright law.

#### General Comments

As recent as twenty years ago, the Internet did not exist, most consumers had not heard the term "software," digital content was unknown except to a few, and consumer electronics referred to radios, alarm clocks and turntables. But in the last twenty years, the ways that we as a society learn, communicate, conduct business, purchase goods and services, and entertain

ourselves have fundamentally changed – all because of emerging new technologies, such as the Internet.

In fact, it has only been in the last several years that consumers could tap into the vast resources increasingly available on public and private networks. And it is only in that short time frame that businesses, schools and universities, governments and individuals have begun to provide a wide range of products and services to previously unreachable audiences.

Consumers and businesses are learning and growing together. The Internet is perhaps the most competitive marketplace today – one in which consumer demands are clearly and quickly communicated and businesses are able to respond in kind. With the speed of technology, companies are able to address new market needs rapidly and effectively. This is a far cry from the environment that gave birth to the first sale doctrine almost a hundred years ago.

The first sale doctrine first appeared in common law<sup>1</sup> and later was codified in Section 27 of the 1909 Copyright Act. Section 27 of the 1909 Act provided that “nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”<sup>2</sup> Today, the first sale doctrine is found in section 109 of the 1976 Copyright Act. The doctrine provides that once a person comes into possession of a material object embodying the copyright owner’s work that person can (subject to certain exceptions) dispose of possession of that object in any manner without violating the copyright owner’s distribution right.<sup>3</sup>

When this provision was added to the Copyright Act in 1909 and subsequently adopted in the 1976 Act, Congress intended it to be used as a means for balancing the copyright owner’s right to control the distribution of a particular copy of a work against the public interest in the alienation of such copies.<sup>4</sup> It is important to recognize, however, that alienation does not mean *unbridled* alienation. For example, Congress has deemed it appropriate to restrict the public’s ability to transfer a copy of a work under the first sale doctrine by enacting the rental right limitations in section 109(b) because of the widespread piracy caused when businesses were able to rent copies of computer software and sound recordings to the public. Thus, the purpose of the first sale exception is not to give unlimited ability to individuals to distribute their copies of a work, but rather to permit individuals to distribute their particular lawfully-owned copy of

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<sup>1</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908) (holding that the copyright owner's right to "vend" his book did not give the copyright owner the right restrict future retail sales of the book or the right to require that the book be sold at a certain price per copy).

<sup>2</sup> 17 U.S.C. § 27 (1970).

<sup>3</sup> These comments presume a working knowledge of sections 109 (first sale doctrine) and 117 (computer software exceptions) of the Copyright Act. For additional background information on the first sale doctrine, please refer to Keith M. Kupferschmid, *Lost in Cyberspace: The Digital Demise of the First-Sale Doctrine*, *The John Marshall Journal of Computer & Information Law*, Vol. XVI, No.4, at 825 (Summer 1998)

<sup>4</sup> See Craig Joyce, *Copyright Law* 528 (2d ed. 1991) (stating that "the first sale doctrine ... attempts to strike a balance between assuring a sufficient reward to the copyright owner and permitting unimpeded circulation of copies of the work").

a work only when such distribution would not conflict with the normal exploitation of the work or adversely affect the legitimate interests of the copyright owner in that work.<sup>5</sup>

Of particular significance to the study required by section 104 of the Digital Millennium Copyright Act ("DMCA") is the restriction contained in the first sale exception that limits the applicability of the exception to the "particular copy" of the work owned by an individual. Because of the nature of existing technology involved in transmitting a copy of a work from one computer to another, by the terms of the statute, the first sale exception will not apply to any such transmission. When a copy of a work is transmitted from one computer to another, the "particular" copy resides on the transmitting computer and a new "second generation" copy is created on the receiving computer. Accordingly, since transmission of works over the Internet involve the making of a new copy of a work and the first sale exception does not permit the creation of new copies, the transmissions of copyrighted works over the Internet does not fall within the coverage of the first sale exception.

In addition to the legal limitations on the first sale exception found in the Copyright Act and the case law, there are practical limitations inherent in traditional copyright distribution systems that serve to justify, to some extent, the first sale exception. The reduction and, in many cases, elimination, of these practical limitations in the e-commerce environment drastically reduces the need for a first sale exception. The diminished practical barriers associated with a network delivery system has and will continue to encourage content providers to use new licensing mechanisms and new means for delivering works to consumers. These new licensing and delivery mechanisms will enable just about any computer user to obtain a copy of virtually any work easily and quickly. In fact, these new licensing and delivery mechanisms will promote alienation and trade in copyrighted works to such a degree that individuals will have less of a need to avail themselves of the first sale exception because they will easily be able to get a copy of a work online. Accordingly, there is no need for the first sale exception to apply to the Internet and related digital distribution systems.

Therefore, with regard to the first sale exception, SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 Report that: (1) the first sale exception does not apply to digital distribution mechanisms such as the Internet; and (2) given the Congressional intent underlying the first sale exception and the ease by which consumers have and will have access to a wider variety of copyrighted works than ever before, there is no need for the first sale exception to be expanded into the digital distribution environment.

With regard to section 117, our only general comment relates to the public perception and interpretation of the section 117 exception. All too often, we have become aware of persons engaged in software and content piracy who are using section 117 as the justification

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<sup>5</sup> H.R. Rep. 94-1476, 94th Cong., 2d Sess. 80 (1976). *See also* Agreement on Trade-Related Aspects of Intellectual Property ("TRIPs"), Art. 13, which requires the United States to confine its limitations and exceptions, including section 109, "to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

for their actions. For instance, we have come across numerous people who attempt to auction off their so-called back-up copies of their computer software or who make pirate software available on websites, ftp sites or chat rooms under the guise of the section 117 back-up copy exception.<sup>6</sup>

One need look no further than the testimony of Robin Gross of the Electronic Frontier Foundation during the 1201(a)(1) rulemaking as evidence of the misunderstanding of the scope and effect of section 117. In her testimony, she claimed to have the right to make a back-up copy of a DVD for personal use, but when asked for the legal basis for her claim, she stated that she was unfamiliar with section 117.<sup>7</sup> Unfortunately, Ms. Gross' statement are only the tip of the iceberg. There are many others who claim to have the right to make a back-up copy under the law without truly having any understanding of the parameters of section 117.

Consequently, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of section 117. The days of people using section 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public on the “dos and don'ts” of section 117 (as well as other provisions of copyright law) conducted by the Copyright Office and the Administration.<sup>8</sup> SIIA would be pleased to contribute its resources and experience to this much-needed educational program.

## Response to Section 109 Questions

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<sup>6</sup> We will be pleased to provide you with evidence of these examples if requested.

<sup>7</sup> See Hearing On Exemption To Prohibition On Circumvention Of Copyright Protection Systems For Access Control Technologies, 280-81 (May 19, 2000) at <http://www.loc.gov/copyright/1201/hearings/1201-519.rtf>

MR. CARSON: What other fair uses of a DVD can't engage in under the current regime?

MS. GROSS: If I want to make a back-up copy for my own personal use.

MR. CARSON: Okay. Let's stop with that. What case law tells you that you have a fair use right to make a back-up copy of the DVD for your own personal use?

MS. GROSS: I think that Sony v. Universal Cities says that.

MR. CARSON: Really? That's an interesting proposition.

MR. MARKS: I don't think Sony says that.

MS. GROSS: Software law specifically allows you to do that, and DVDs certainly fall under software.

MR. CARSON: DVDs fall within Section 117, is that what you're saying?

MS. GROSS: DVDs are software.

MR. CARSON: Okay. Are you saying that they're covered by Section 117?

MS. GROSS: I'm not really sure what 117 is.

MR. CARSON: Okay. You might want to take a look at it, and let us know in your post-hearing comments.

<sup>8</sup> We understand that the Copyright Office and the Patent and Trademark Office have educational programs in place, but given the misunderstanding and lack of knowledge that the public has with regard to the copyright law, we believe that further steps need to be taken to educate the public on certain aspects of copyright law.

*(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?*

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on circumvention of technological protection measures has had on the operation of the first sale doctrine.

*(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?*

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on falsification, alteration or removal of copyright management information has had 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?*

Electronic commerce (“e-commerce”) has many different meanings.<sup>9</sup> From a business perspective, e-commerce provides the opportunity to market goods and services to a global audience at relatively low cost. For many companies, e-commerce is an increasingly important business strategy. Whether a company offers subscriptions for information services, electronic delivery of software, video or other entertainment or combines Web sales with traditional delivery, no industry can afford to ignore this emerging paradigm.

For consumers, e-commerce provides opportunities for unprecedented choice, convenience and access to creative content. Users can conveniently browse goods at online stores from their homes. No longer limited by geography, consumers can visit stores around the world, comparing prices, quality and service from several vendors. As a result, and as stated in more detail above, SIIA believes that the development of e-commerce has resulted in a reduced need for the first sale doctrine.

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

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<sup>9</sup> See SIIA, Building the Net: Trends Report 2000 (2000) (an online report analyzing six key trends shaping the digital economy. The Trends Report 2000 provides a concise overview of the rapidly changing software and information industry. The report examines areas of rapid and dramatic change by considering market demographics, consumer behavior, evolving business models, relevant policy initiatives and emerging technologies. The Trends Report 2000 is accessible online at <http://www.trendsreport.net>. Titles of the six trends include: Software as a Service, The Value of Information, The Digitization of Business, Customer Empowerment, The Business of Policy, and Education Anytime, Anywhere.

Perhaps the greatest challenge to policymaking in the high-tech era is adapting to the time difference. Not from Eastern to Pacific, or even Washington to Brussels, but rather from “policy time” to “Internet time.” Today’s time challenge is much more complex: requiring the adapting (where appropriate) and application of laws to a constantly evolving technology driven universe. Innovation and flexibility are the essence of the Internet and new information technologies. With business models evolving around technology so rapidly, it is difficult to craft an adequate public policy framework for right now. Because policy crafted for today could very well be outdated and restrictive tomorrow, the importance of not creating a new set of laws and maintaining an industry, competition driven universe is that much more essential.

Achieving a balance between moving fast enough to meet immediate needs and demands, while not responding too quickly as to stifle growth, poses a very real challenge. It is not realistic to expect policymakers to live-up to that challenge without the guidance from industry. Therefore, before taking any position on the effects of technology on the first sale doctrine, we urge the Copyright Office and NTIA to fully consider the industry comments filed pursuant to this study, as well as the actions taken by SIIA member companies and other industry representatives to get their products and services into the hands of consumers through the use of new emerging technologies and new distribution mechanisms incorporating digital rights management.

As stated throughout these comments, SIIA strongly believes that no change to the language of section 109 is appropriate. Not only is such a change unwarranted, but even if one were to proffer some good reason for changing the scope of section 109, we assert that it is much too early in the development of e-commerce and that business models are evolving much too rapidly to make any changes in section 109 at this time.

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

As stated above, the first sale doctrine is premised on traditional methods of distribution and traditional media. The first sale doctrine plays no role in present-day digital distribution methods because such methods (i) do not involve the transfer of one’s “particular copy” of a work, and (ii) require the making of a second generation copy of a work, thereby implicating the copyright owner’s reproduction right – a right not at issue in section 109.

*(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 emergence of new technologies makes copyrighted works more accessible than ever before. As a result, (as stated in more detail above) there is less need for an individual to transfer his or her particular copy of a work to another, because that other person can easily and effortlessly obtain their own copy of that work from the copyright owner or the copyright owner’s authorized distributor. In fact, in many cases it is or will be actually easier to obtain a

copy from the copyright owner. Therefore, the rationale for the first sale doctrine – the alienation of copyrighted works – is significantly reduced by emerging new technologies.

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

No. The first sale doctrine should not be expanded to apply to digital transmissions. As stated above, SIIA believes that the development of e-commerce and digital distribution systems that make copyrighted works more accessible than ever before have resulted in a reduced need for the first sale doctrine. It should also be noted that the Administration considered this issue in 1995 when it published its White Paper on “Intellectual Property and the National Information Infrastructure” and concluded that no legislative action was needed to revise the rule for digital content.<sup>10</sup> Moreover, only a few years later Congress too considered proposed legislation to revise the first sale exception during its consideration of the DMCA, but ultimately rejected the concept. There has been no significant change since the Administration and Congress considered the issue to warrant reconsideration or a change in policy by the Copyright Office or NTIA.

*(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?*

No. We are not aware of any evidence indicating or establishing that the absence of a digital first sale doctrine under present law has had any measurable effect (positive or negative) on the marketplace for works in digital form. As stated above, SIIA believes that the development of e-commerce and digital distribution systems that make copyrighted works more accessible than ever before have resulted in a reduced need for the first sale doctrine.

#### Response to Section 117 Questions

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

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on circumvention of technological protection measures has had on the operation of section 117.

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<sup>10</sup> See Bruce A. Lehman, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 90-95 (Sept. 1995).

*(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?*

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on falsification, alteration or removal of copyright management information has had 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?*

We are not aware of any effects, adverse or otherwise, that the development of electronic commerce and associated technology has had on the operation of section 117.

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

See response to question (d) under the heading "Response to section 109 Questions" above.

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

Section 117 was enacted at a time when software was primarily distributed on floppy discs that could be damaged by inadvertently scratching, bending or demagnetizing the disc. The need to make a back up copy of your software in those days was therefore essential.

Technology and business models have evolved considerably since then. Nowadays, software is primarily distributed on CD-ROM and the potential of inadvertently damaging a CD-ROM in a way that makes the software contained on the disc inaccessible is an extremely rare occurrence. In the not-to-distant future (and to some extent at the present time), software will be sold as a service over networks, making inadvertent software damage as extinct as a Tyrannosaurus Rex. The Application Service Provider ("ASP") model provides the potential for software to evolve away from the individual desktop and/or network to a server hosted by the copyright owner or authorized distributor on the Internet. There, the software can be accessed any time and anywhere by the user, thereby eliminating the need for individual back-up copies. As a result, in the future, the need for the provisions in section 117 relating to the making of a back-up copy will no longer exist.

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

See response to question (e) above.

## Response to General Questions

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

At this time, we can think of no additional issues that should be considered.

*(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?*

At this time, we do not believe that hearings would be useful in preparing the required report to Congress. We reserve the right to change this response depending on the content of other comments filed on or before August 4<sup>th</sup>. If hearings are held, however, SIIA would like to participate in such hearings.

In closing, we would like to once again thank the Copyright Office and NTIA for providing us an opportunity to express our views on these very important issues. If we can prove any supplemental information or clarify any of our comments please do not hesitate to contact us.

Sincerely,

Ken Wasch  
President