VIA ELECTRONIC MAIL

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RE: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act
65 Fed. Reg. 35673 (June 5, 2000)

Dear Messrs. Feder and Joyner:

The undersigned copyright industry organizations appreciate the opportunity to comment in response to the above-referenced Federal Register notice.

Each of the undersigned organizations has a strong interest in the issues which Congress, in section 104 of the Digital Millennium Copyright Act (DMCA), instructed the Copyright Office and the NTIA to evaluate. The member companies of each organization are actively involved in electronic commerce, in the development and implementation of new "emergent" technology, and in the distribution of copyrighted materials that are subject to the first sale doctrine codified in section 109 of the Copyright Act (17 USC 109). Several of the copyright industry sectors represented by the undersigned organizations are directly affected by the rental right provisions of section 109, and by the exceptions in section 117 of the Copyright Act, 17 USC 117, to the exclusive reproduction right in computer programs.

In our view, no changes to sections 109 or 117 are needed at this time. We believe these statutory provisions are functioning as intended, to promote the efficient distribution of copyrighted materials (section 109) and the creation, development and distribution of computer programs (section 117) while preserving the legitimate rights of

authors and of users of their works. Specifically, we do not believe that either of these provisions needs to be changed at this time in order to facilitate the continued growth of electronic commerce and the advance of technology for conducting electronic transactions in copyrighted materials. We are, of course, interested in reviewing proposed changes that other submitters of comments may offer, and reserve the right to provide further views, either individually or collectively, in the reply round of this proceeding, and in testimony at a public hearing if the agencies decide to hold one.

Background of the Section 104 Study

Some background on the genesis of the section 104 study may provide a useful context for our perspectives.

Section 109

The impact on the first sale doctrine of the emergence of digital networks as a medium for the distribution of copyrighted works has been the subject of analysis and discussion for some time. The issue was addressed briefly in the Green Paper prepared by the Administration's Information Infrastructure Task Force in July 1994, and in greater detail in the White Paper issued under the same auspices in September 1995. The White Paper summed up the situation as follows:

> The first sale doctrine allows the owner of a particular, lawfully-made copy of a work to dispose of it in any manner, with certain exceptions, without infringing the copyright owner's exclusive right of distribution. It seems clear that the first sale model – in which the copyright owner parts company with a tangible copy – should not apply with respect to distribution by transmission, because transmission by means of current technology involves both the reproduction of the work and the distribution of that reproduction. In the case of transmissions, the owner of a particular copy of a work does not "dispose of the possession of *that* copy or phonorecord." A copy of the work remains with the first owner and the recipient of the transmission receives another copy of the work.

White Paper at 95 (emphasis in original; footnote omitted). The White Paper reviewed, and ultimately rejected, the arguments of those who asserted that the first sale doctrine, as codified in section 109, should be either expanded or contracted because of the emergence of digital networks over which copyrighted works could be distributed. It recommended no changes to section 109.

The first sale issue was also extensively debated as Congress considered the legislation which ultimately became the DMCA. Representative Boucher prepared amendments on this topic for consideration both by the House Judiciary Committee in April 1998, and by the House Commerce Committee in June of that year. In both versions, the amendment would have created an exception to the exclusive reproduction

right for reproductions made when an owner (or a person authorized by the owner) of a lawfully made digital copy or phonorecord of any work "performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time." Neither panel adopted such an amendment, and the DMCA ultimately made no change to section 109.

The current study had its genesis in an amendment offered by Representative White and adopted by the House Commerce Committee on July 17, 1998. That amendment, which became section 205 of the DMCA as reported by the Commerce Committee, called for a general review of the copyright law and its relationship with electronic commerce "to ensure that neither copyright law nor electronic commerce inhibits the development of the other." Sec. 205(a), H.R. 2281 as reported. Before the DMCA reached the House floor on August 4, 1998, this review had been scaled back to focus particularly on sections 109 and 117. In the House Manager's Report which provides the authoritative explication of the DMCA as it passed the House, Chairman Hyde explained the revised provision (section 105 of the House-passed bill) as follows:

> The first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or otherwise dispose of the possession of that copy. Rather, "disposition" of a digital copy by its owner normally entails reproduction and transmission of that reproduction to another person. The original copy may then be retained or destroyed. The appropriate application of this doctrine to the digital environment merits further evaluation and this section therefore calls for such an evaluation and report.

House Manager's Report at 24, 46 J. Copyr. Soc. 631, 657 (1999). The conference committee made no substantive changes to this section and it was enacted as section 104 of the DMCA.

Section 117

Although the DMCA left section 109 completely unchanged, Title III of the DMCA amended section 117. This amendment originated in the House Judiciary Committee, which stated that it had "the narrow and specific intent of relieving independent service providers … from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made." H. Rpt. 105-551 (Pt. I), at 27. The House Manager's Report adds that "[t]he impact of the use of encryption and other technologies on [the] limitations [provided by section 117] also merits further evaluation and this section [section 104 as enacted] therefore calls for such an evaluation and report." Id., at 24. This appears to be the only relevant legislative history, and neither the Green Paper nor the White Paper discussed section 117 in any detail.

Discussion

The background summarized above makes evident the intended focus of this study. Congress had heard concerns that the codification of the first sale doctrine in section 109 might need to be modified in order to facilitate the growth of electronic commerce in copyrighted materials. It was aware that the comprehensive study culminating in the White Paper had concluded that no such modifications were needed, and it had itself declined at least two invitations to expand section 109 to provide, for the first time, a new exception to the reproduction right to copies made in the course of electronic transmission of copyrighted works. However, while unpersuaded of the need for any change to the first sale doctrine at the time of enactment of the DMCA, Congress was well aware of the rapid and unpredictable course of change in the digital marketplace. Consequently, it built upon the White amendment, which stressed the need for a complementary relationship between electronic commerce and copyright protection, and adapted the study which it called for, to focus it on a limited menu of issues, including first sale.

Congress called for a report on section 109 because, although concerns had been raised, no dispositive evidence was presented of a specific problem that required a legislative fix. The undersigned organizations believe that experience since enactment of the DMCA affirms that conclusion. Indeed, the analysis of the first sale issue contained in the White Paper five years ago remains essentially valid. While, of course, there have been many technological changes in the past half-decade, it remains true throughout the digital networked environment that distribution of copyrighted material virtually never occurs without a prior reproduction of the material. It is the copy, not the original, which is distributed. The first sale doctrine defines the circumstances under which the distribution may take place without the consent of the copyright owner; but it would be inappropriate and unjustified to expand that doctrine to establish a new category of copies which may be made without that consent. Of course, since the copy in question is a perfect copy, as well as a potential master for the production of an unlimited number of additional perfect copies, all of which can conveniently be redistributed over digital networks to a virtually limitless class of recipients, the consequences of an unjustified expansion of the first sale doctrine could easily overwhelm the incentives for production of creative works provided by the copyright law.

In our view, the enactment of the DMCA, and specifically of the anti-circumvention provisions of 17 USC 1201, do not alter the validity of the conclusions reached in the White Paper. Those who argue to the contrary may be failing to distinguish between the physical possession and ownership of a tangible object embodying a copy of a copyrighted work, and the authorization to access or make specified uses of that work. Section 109 governs only the first; restrictions on the second are a central feature of many familiar business models that comfortably coexisted with section 109 before enactment of the DMCA and that continue to do so. To the extent that copyright owners use effective technological measures to implement these restrictions, section 1201 provides a degree of protection against those who create or traffic in the tools to circumvent those measures. None of this affects the first sale

doctrine, which should remain in place for distribution of tangible copies, but which has only a very limited applicability to online distribution, as explained above.

Similarly, we are unaware of any significant impediments to electronic commerce which have arisen as a result of section 117. This provision was first enacted twenty years ago, upon the recommendation of the National Commission on New Technological Uses of Copyrighted Works (CONTU); it remained essentially unchanged until 1998, when it was amended by the DMCA, as described above. Those amendments appear to be functioning as intended. To the extent that misinterpretations of other aspects of section 117 have been employed by some, not as a legitimate defense to infringement, but as an enticement to engage in online piracy, the report under section 104 of the DMCA should be an appropriate vehicle for dispelling this confusion.

Thank you once again for the opportunity to comment on these important matters. We look forward to reviewing the comments of other interested parties on both section 109 and section 117.

Respectfully submitted,

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ASSOCIATION OF AMERICAN PUBLISHERS

BUSINESS SOFTWARE ALLIANCE

MOTION PICTURE ASSOCIATION OF AMERICA

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