Testimony of the

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

Before the
United States Copyright Office
National Telecommunications and
Information Administration

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Washington, D.C.

The National Music Publishers' Association appreciates the opportunity to testify today in connection with the agencies' report to Congress pursuant to section 104 of the Digital Millennium Copyright Act.

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates own or administer the majority of U.S. copyrighted musical works. NMPA's wholly owned subsidiary, The Harry Fox Agency, acts as licensing agent for more than 26,000 music publishers, businesses that in turn represent hundreds of thousands of songwriters. The Harry Fox Agency acts on behalf of its publisher-principals in connection with licensing Internet distribution

of music, as well as other, more traditional uses of music in recordings, motion pictures and other audio visual productions.

NMPA and its members and HFA and its principals have a direct interest in the issues to be addressed in the agencies' report. NMPA has participated in this inquiry through the joint comments and reply comments of trade associations representing various segments of the copyright industries and through additional comments of its own in the reply round. We support the joint testimony of the copyright industry associations presented today, and welcome this opportunity to supplement those views.

Section 104 of the DMCA directs the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to prepare a report for Congress examining the effects of the amendments made by title I of the DMCA and the development of electronic commerce on the operation of sections 109 and 117 of title 17 of the United States Code and the relationship between existing and emerging technology and the operation of those two sections.

In the two years since the DMCA was enacted, electronic commerce has surged in some areas. But progress toward making music available to be

downloaded or otherwise accessed online has, in some instances, been slower than music copyright owners and some who wish to enjoy music online would have hoped.

Our industry has faced challenges in reaching consensus on acceptable technological protection measures and in adopting compatible rights management systems. Considerable progress has been made, but for the delays and frustrations this has caused, industry bears some responsibility. The larger impediment, however, has been the introduction of services that exploit music online without the authorization of the copyright owner or any attempt to compensate the copyright owner or creator. If the past year has taught us anything, it has been that it is nearly impossible to build an e-commerce marketplace for music in competition with commercial entities that give music away -- or enable others to distribute music -- without permission and without compensation to the work's creator and rights owner. We have learned that many consumers – millions of them, in fact -- will not pay even a reasonable license fee if they can obtain a copy of the same music for free.

Companies engaged in the licensed distribution or public performance of music have shared this difficulty. In fact, one member of the Digital Media Association testifying before Congress has emphasized that its business prospects have been damped by unauthorized distributors of music.

The industry is working to deal with these challenges, and recent developments have shown that the music industry can and will respond to new technologies and business models through commercial negotiations and innovative license terms. Licenses issued to firms offering "cyber locker" services will soon enable a consumer legitimately to access a CD she purchases from her computer or a variety of hand-held devices. This type of service may change forever – or at least for a time -- the way in which some consumers enjoy music. At the same time, other consumers may find that their desires are best met by downloading; others may continue to wish to purchase tangible copies, online or from "brick and mortar" retailers. In sum, the digital marketplace is evolving and will continue to evolve, in directions that we can predict to day, and in others that we cannot.

Some commentors – DiMA, the National Association of Recording Merchandisers and others – have singled out the availability of "digital first

sale rights" as somehow essential to the functioning of e-commerce. DiMA, in particular, has argued that a dramatic legislative expansion of section 109 should somehow be made more palatable through the use of technology that "can ensure that the particular digital copy is deleted (or made permanently inaccessible) from the transferor's computer upon digitally transferring the data to the transferee." [DiMA reply comments at 5.] DiMA and its allies have offered little support for the significant legislative change they desire and have failed to explain how widespread deployment of the technology they advocate would benefit consumers, copyright owners, or – for that matter -- DiMA members.

While the music industry is keenly aware of consumer interest in cyber-locker services and Napster-style file propagation, we have heard no hue and cry – not even so much as a suggestion – that consumers are looking for products that will function under the "forward and delete" model DiMA advocates. In fact, the high level of consumer interest in the file propagation technologies that the media calls "file sharing" would lead one to conclude that consumers would find such an approach unacceptable in both the marketplace and in the law.

Advocates of the self-cannibalizing copy claim that the technology, when implemented in conjunction with digital rights management systems, will decrease piracy risks. NMPA believes that effective technological protection measures and effective implementation of rights management systems will – as a general matter – reduce such risks. So will licensing agreements fair to copyright owners and creators, commercial distributors and consumers. Over time, what will best promote electronic commerce and the acceptance of new technologies is the flexibility to respond to consumer demand.

For e-commerce to flourish, the law should foster, rather than dictate consumer choice. For example, a consumer may choose a service that allows him to store music he purchases on a server for remote access; to down load and receive authorization to make an additional, specified number of copies from another service; or to "share" music on yet another. How would "digital first sale doctrine" policed by "forward and delete" technology serve the interests of consumers or copyright owners in these instances? In NMPA's view, there is nothing magic about forward and delete – and certainly nothing to indicate that it should serve as the beacon for future e-commerce in our industry.

In recent hearings, Congress has urged the music industry to help itself out of the piracy and public relations problems it is experiencing by moving forward with voluntary license agreements that enable consumers to experience music online in a variety of ways. NMPA is hard-pressed to see how accepting the recommendations of those advocating a so-called "digital first sale doctrine" would advance this effort and promote e-commerce.

In our view, the extension of the first sale doctrine beyond the distribution right to the right of reproduction – a right, which has never been implicated by first sale -- stands to hinder rather than promote electronic commerce. In carrying through Congress's mandate to assess the impact of new technologies on the operation of section 109, NMPA urges the Copyright Office and NTIA to consider the disruptive and potentially harmful impact the legislative expansion advocated by DiMA and others would have on the ongoing efforts of music and other copyright owners to curb widespread piracy through file propagation services and software, and to deal in constructive commercial terms with the next online distribution technology, whatever that may be.

The impossibility of enforcing a mandate to delete one's own copy of a protected work when a copy of that work is forwarded to another would be sure to cause many consumers and some commercial users of works – some of whom already believe (or at least claim to believe) that consumers a "right" to copy protected works – to believe (or claim to believe) that consumers have a right to distribute those works to the public as well. The sought-after legislative change would not, in our view, "clarify" the law, but would confuse it.

For these reasons, we urge the Copyright Office and NTIA to reject the suggestion that the first sale doctrine in section 109 of the Copyright Act be expanded to include the privilege of reproducing the work and the online distribution of any such copy.

We wish to turn briefly to the issues of "temporary" and "archival" copying some commentors have raised in connection with section 117 of the Copyright Act. The "incidental copying" amendment advocated by some commentors would not promote the growth of electronic commerce. Rather, it would expand the scope of section 117 of the Copyright Act and diminish

dramatically the scope of the reproduction right in music and all other copyrighted works.

As the copyright associations' joint comments discuss in some detail, the suggestion put forth by groups seeking to expand the section 117 limitation on reproduction rights in computer programs was put forward during Congress's consideration of the DMCA and rejected. Instead, Congress, in Title III of the DMCA, added a new section 117[c] that spells out the specific and limited circumstances under which the reproduction of a computer program in memory for the purpose of computer maintenance or repair is not an infringement. In continuing to press for this failed amendment, advocates seeking to expand section 117 largely ignore the DMCA amendment and Congress's clear intent to approach the temporary copies issue with considerable caution.

As the joint copyright association comments make clear, digital temporary copies are becoming an increasingly important means through which copyrighted works are and will be made available to the public. Access to works via the Internet or through the use of "network-ready devices" that enable consumers to use works temporarily online exemplify

this trend. At the same time, some forms of piracy consist of little more than making temporary copies available, without authorization, to members of the public. Thus, the continued recognition of temporary copies as "reproductions" under U.S. and international copyright law is crucial both to the development of electronic commerce and the ability to enforce rights in certain circumstances.

We see no evidence that the clear legal status of temporary copies as reproductions is hindering electronic commerce, impeding the Internet or limiting the introduction of new electronic products. And those that would change that status have presented none, beyond their own unsubstantiated claims – the same claims they raised two years and scores of new Internet services and hundreds of new electronic products ago. Today, the proposed "incidental copying" exemption remains a solution searching for a problem.

The Digital Media Association takes a slightly different tack. While it supports the general expansion of section 117, it notes that "the exemption from the reproduction right is all the more warranted for webcasting, where the same copyright owners of the music composition, audiovisual work or the sound recording already will have authorized, and been compensated for,

the performance of their works." Perhaps, or perhaps not. As DiMA knows well, not every entity offering music over the Internet has taken a license of any kind. But even if the public performance right has been properly licensed, it does not follow that the copyright owner should be precluded from exercising the reproduction right.

DiMA seems to suggest that respect for the public performance right granted in section 106(4) of the Copyright Act should exempt a party from responsibility or any liability in connection with other rights granted under section 106, including section 106(1) – the reproduction right – and section 106(3) the distribution right. Decades of well-settle law establish that each of these rights is separate and distinct. Reflecting this -- and wholly consistent with it – decades of practice in the music business has seen these rights separately licensed. Where each right is implicated, those rights continue to be separately licensed today, in general by "mechanical rights" agencies and organizations and by performing rights organizations.

The existence of these organizations, which function in territories around the world, facilitates the licensing needs of users of music. Rather than searching out hundreds and even thousands of copyright owners,

commercial users can seek licenses from the appropriate licensing agent. In the United States, these organizations, which include The Harry Fox Agency, ASCAP and BMI, are few in number and easy to locate.

DiMA's chief complaint appears to be that it does not wish to pay license fees to multiple entities. One must question how its members will operate, or what changes in the law they will seek, when they move from the transmission of music to other protected works. In the motion picture industry, for example, licenses will have to be obtained from individual copyright owners. In fact, this will be the case for many, if not most, copyrighted works. It is part of the responsibility of doing business.

As DiMA observed in its comments in connection with the first sale doctrine, digital rights management systems will greatly facilitate online licensing and related uses. It is NMPA's goal to work with licensing entities here and abroad to achieve efficiency and ease of use in connection with online licensing transactions. We trust that these efforts will benefit DiMA members and other online users of music.

Again, NMPA appreciates the opportunity to testify today. I would be pleased to respond to the panel's questions.