

**Comment in Response to the  
Copyright Office Request for Comments  
on Sections 109 and 117 of the Copyright Act (June 5, 2000)**

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LIBRARY OF CONGRESS  
The United States Copyright Office

DEPARTMENT OF COMMERCE  
National Telecommunications and Information Administration

This comment is filed by Bryan W. Taylor, an American citizen, as a private individual.

I would like to express my gratitude to the Copyright Office for affording the public the opportunity to provide input.

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## INTRODUCTION TO FIRST SALE AND THE DMCA

The Digital Millennium Copyright Act (DMCA) creates a new right to authorize access to copyrighted works when technological protection measures (TPM's) are used. The new law, however, is silent on critical questions that are answered for the other rights given to copyright owners. Specifically, there are at least two interpretations of the statute that are consistent with its text regarding the relation of the new right to authorize access to First Sale. One interpretation obliterates the doctrine of First Sale and has serious antitrust implications, while the other strengthens First Sale and preserves the balanced relationship between authors and the public.

In a nutshell, one interpretation of the DMCA finds copyright holders in possession of two distinct rights, which can be sold separately. These are the right to vend copies and the right to authorize access. This interpretation would treat the new right to control access as if it were equivalent of the exclusive rights in 17 U.S.C 106 (though it is not listed there). The sale of the rights in 106 can be transferred separately. If access control is treated this way, then the doctrine of First Sale has been replaced with the doctrine of "First and Second Sale" since both access and copy are needed for use.

Moreover, by design, a dangerous tying arrangement would be created between the two. This tying arrangement is not one of speculation. Indeed, it is being used in the marketplace today by the DVD-CCA to claim rights to a "Third Sale" with the collective market power of the movie studios forcing the product on would be DVD player developers. There simply is no right to control players, which are distinct from encryption keys. The use of the market power of the studios to force player technology to the entire player market is in utter contempt for the DMCA statute, Congressional antitrust legislation, and the public.

An alternate interpretation of the DMCA is that the right to authorize access control is not listed in 106, and therefore must not be treated as such. Rather, like every other aspect of control over use not covered by the exclusive rights of section 106, control is transferred when the just reward is collected in the market place. Under this view, access authority is inherently transferred at First Sale, along with a lot of other rights.

Congress simply failed to put anything textual in the law that decides between these two alternatives. Obviously, studios and publishers, true to their long standing history, seek every bit of control that they can use to milk money out of consumers and prefer the first model. Consumers, academics, scientists, and librarians, true to their long standing history of seeking every bit of knowledge possible to advance the progress of science and arts, obviously prefer the second model.

The question, simply put, is how should the Copyright Office interpret an ambiguous statute that can reasonably be read two mutually incompatible ways. Fortunately, a long line of Supreme Court decisions provide the answer. In fact, direct guidance on the question of how to resolve ambiguity has recently been offered by the Supreme Court in the holding of *Sony v. Universal Studios*:

The protection given to copyrights is wholly statutory, and when Congress has not plainly marked the course to be followed, the judiciary must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests.

Thus the answer to the question of how to pick between different interpretations is clear: circumspection is required if the granting of rights to the copyright holder is not "plainly marked". This result requires that ambiguity be resolved against the copyright holder. The granted monopoly inherent in intellectual property must never be extended beyond the limits of its specific grants. When the limit is fuzzy, we must err on the side of caution. This is settled law.

The holding in *Sony* is no accident. In fact, the connection to prior jurisprudence is provided in footnote 13, which is quite telling:

While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, e. g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156 - 158 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349 -351 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device)."

Thus the *Sony* decision is no accident, but the consistent application of a century of careful consideration.

The legislative history of the DMCA finds much disapproval for the concept of the 'pay per use' society. It is difficult to imagine how this can be reconciled with the "First and Second Sale" model. The right to control access, if it is not transferred at First Sale, will inevitably lead to repeated sales for access. This requires little more than incorporating a counter into the TPM so that different keys are required every time. It will not take long for publishers to realize that if they can collect twice they can collect repeatedly. Thus "First and Second Sale" will be replaced by "First and Second and Third and ... Sale".

The real purpose of the DMCA is not to allow copyright holders to have expanded power to collect repeatedly from hapless consumers. Instead it is merely to create another alternative way to collect that is compatible with e-commerce. By using encryption, the work can be securely transmitted separately from the key. The DMCA creates a way for copyright holders to take their just First Sale reward by selling EITHER the copy or the key.

By allowing this new model, the burden of network based commerce is greatly eased. Encrypted copies can be freely circulated, without concern for endless copying of useless cipher text. Then, when a buyer is found, the minimum amount of data need be exchanged: a credit card number

for a key. An example of the DMCA in action, preventing copyright holders from losing the fruit of their labor without being compensated is provided by *Real Networks v. Streambox*. Unlike the DVD cases, Streambox users have no claim of access because they have not paid First Sale.

There is a truly frightening claim that is being advanced currently by movie studio plaintiffs, but it is not one that can be reconciled with the statute. It is clear that Congress intended authority to access to be conferred through the application of information with the authority of the copyright holder. This is found in the definitions of 1201(a)(3):

As used in this subsection -

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

The key used for decryption is the quintessential example of such information. A monopoly to profit once from such keys is all that is granted.

The movie studios in the controversial DVD cases claim that beyond just first and second sale, that they have an exclusive right to authorize players, the programs that apply the key. Thus, they believe that in addition to the First Sale of the DVD, and the Second Sale of the player program, that if you want to create a player you must buy authorization through "Third Sale" in the form of \$10,000 to the DVD-CCA.

In order to sustain this claim, one must infer from the statutory prohibition on distributing circumvention devices, that a right to authorize players exists. This simply isn't found in the text. A statutory prohibition is not the creation of a right for a third party. In fact the only authority created is done so in the text of 1201(a)(3) above. Here it is clearly seen that the only authorization given to the copyright holder is over the application of access information and the act of descrambling.

From this, the movie studios would have us believe that they have been given total control of the entire DVD player market. The technology license they sell grants a copyright license to the software it protects and allows appropriation of the certain trade secrets under a confidential relationship, but it certainly cannot create a new form of super-intellectual-property that protects ideas without a patent's disclosure requirement and as a copyright simply cannot do.

The studios are clearly making a play for the "absolute control" decried by footnote 13 in *Sony*. This is not surprising however, since if you include the *Sony* decision itself in the tally, 3 of the 5 decisions describe abuses by movie studios. DVD's are just another episode in a long history

of intellectual property abuse by movie studios. Actually, the Court left out another significant case from its list: *Motion Picture Patents v. Universal Film Mfg. Co.* 243 U.S. 502 (1917). The facts of that case are eerily similar to those of the DVD situation.

It is difficult to identify any idea that the Supreme Court has rebuffed so repeatedly as the movie industry's overly aggressive interpretation of intellectual property rights. Movie industry credibility on copyright should be treated like the tobacco industry on health matters: listen to what they say and believe the opposite.

Normally, one would expect a Federal Judge to identify such clear overreaching. The collective market power of the MPAA studios bears down on the DVD player market, forcing an unwanted license down the throats of any would be competitor. The violation of antitrust laws, and the misuse of intellectual property are so obvious it shocks the conscience.

Sadly, the judge in the New York DVD case refuses to recognize these arguments, but, as he admits, his former law firm was responsible for advising Time Warner on DVD antitrust matters while the Judge practiced there. Despite this, Judge Kaplan refuses to recuse himself. No reasonable person could expect such a judge to repudiate the prophylactic antitrust work of his former firm without suffering a conflict of interest. The recent precedent in *Panama v. American Tobacco Company*, No. 99-30685 (5th Cir. 7/20/2000) on a very similar recusal situation only confirms that the judge should have stepped down. Fortunately, the integrity of the process the Copyright Office has been using is beyond reproach.

For the above reasons, I urge the Copyright Office to use its rule making and influence to advance the progress of science and the arts by rejecting the notion of "First and Second Sale". Moreover, I urge that CSS encrypted DVD movies specifically be defined as a "class of works" for exemption status under 1201(a)(1)(B). Finally I urge the Copyright Office to declare that applying DVD "title keys" obtained from the DVD media constitutes "application of information with the authority of the copyright holder" so that any device that does so is noncircumventing in accordance with the First Sale doctrine.

## **ANSWERS TO SPECIFIC QUESTIONS**

### 1. Section 109

(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?

Depending on the choice of interpretation of the DMCA, First Sale has either been obliterated or it has been strengthened.

(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, combined with encryption technology, afford a new and more efficient model for copyright holders to take their just reward in the market place: easy distribution of digital encrypted works over the internet, with independent payment for access: trading a credit card number for an encryption key.

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

New ways of doing commerce have and will continue to create more efficient ways for copyright holders to trade their intellectual property. The First Sale doctrine should continue to apply to assure that the point when rights are transferred is the point of sale.

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

The first sale doctrine is simply the quid-quo-pro that the public, through Congress has offered to authors for access to their work. Authors are allowed, for limited times, to extract from the public domain and to obtain a one time reward for providing access to the fruits of their intellect. The distribution method or media is totally irrelevant to this.

(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?

New technology does not alter the premise upon which First Sale is based, but it does seem to offer movie studios and other would be copyright abusers a continual supply of new ways to try to abuse the public's generosity in offering copyright protections.

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

There is no need to link First Sale to the ownership of the copy. Using encryption, First Sale can be tied to the transmission of an encryption key. The resulting efficiency improves advancement of science and arts by making it easier for the public to provide authors with a one time reward.

(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?

The digital First Sale doctrine is the same as it was prior to the DMCA. All that has changed is that the encrypted work may be distributed independently of money changing hands when an encryption key locks it.

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