

Time Warner welcomes the opportunity to respond to the inquiry by the Copyright Office and the National Telecommunications and Information Administration regarding the possible effects of Title I of the DMCA on the first sale doctrine as codified in Section 109 of the Copyright Law.

In order to deal adequately with the issues raised by the Request for Comment, it is necessary to understand the basis for and the limitations of the first sale doctrine. The first sale doctrine, in its origin and in its current statutory existence, has as its underlying purpose the prevention of using the Copyright Law to impose price or other conditions on the ability of the owner of a copy of a work to dispose of that copy. The first sale doctrine does so in very simple and clear terms: it provides an exception to the right of distribution granted in Section 106(3). It provides no other exception to the rights granted by Section 106. In particular, it does not provide any exception to the exclusive right of reproduction. Moreover, the exception with respect to the right of distribution is limited to copies "lawfully made under this title".

Since under the first sale doctrine the copy owner has only the right to transfer possession of the copy and no right to make or distribute additional copies, the first sale doctrine is properly applied only when a particular copy of a work changes hands. Two persons cannot have simultaneous possession of a copy. Transferring possession of a copy means giving up possession. If the giver and receiver both have copies, then the scope of the first sale doctrine has been exceeded.

Thus properly understood, the first sale doctrine applies not only to traditional media in which works are fixed, but also to tangible digital media, the most prominent being optical disks containing software, sound recordings and motion pictures. The purchaser of a DVD copy of a movie or a CD copy of a music album owns the chattel involved and may, under the first sale doctrine, transfer possession of it freely. The purchaser may not, however, make additional copies by virtue of the first sale doctrine. In short, the fact that the tangible medium contains works embodied in digital form does not affect the application of the first sale doctrine. It applies in the same manner digital to DVD and analog, i.e., non-digital VHS copies of a movie.

It is clear that Section 109 does not apply to works distributed by transmission because application of Section 109 to such works would involve both the reproduction of the work (as to which no exception is provided and, accordingly, the copy being transferred is not "lawfully made") as well as its distribution. Secondly, the owner of a copy of the work would not be disposing of the possession of that copy.

Some argue that the first sale doctrine must be expanded to apply to works purveyed by online transmission. They advocate a "digital first sale doctrine". But as discussed above, the first sale doctrine is not a digital or non-digital doctrine. It is a doctrine that distinguishes possessory personal property rights from copyrights. When phrases like "digital first sale doctrine" are used, at least by some, the intent is not an application of the first sale doctrine to digital works, but a wholesale expansion of the first sale doctrine in derogation of the rights of copyright owners. To take a newsworthy example, when the owner of a lawful copy of a CD "rips" a song into a digital MP3 file and then transmits that file to one or more friends, the first sale doctrine cannot be invoked to provide legal justification for the reproduction involved and the multiple resulting copies. And the first sale doctrine is hardly applicable when, in the Napster-type context, an individual makes copies available to the world, thus engaging in public distribution of the works involved.

By keeping the first sale doctrine grounded in the transfer of possession of tangible objects, we keep the first sale doctrine true to its purpose: permitting a single copy of a work to change hands. As noted by William F. Patry in his *Copyright Law and Practice*, Volume II, footnote 37, in discussing what the Europeans call the "exhaustion" doctrine: "The rationale behind the exhaustion of authorized material copies - the expectations of consumers or other possessors of the copies that they be able to dispose of those copies as they wish - does not apply to immaterial distributions by television broadcasts or cable and satellite transmissions." That rationale applies with equal, indeed, greater force to digital transmissions. If not grounded in transfer of tangible objects, the first sale doctrine would no longer be a practical, contained limitation on the distribution right with respect to "a particular copy or phonorecord lawfully made under this title"; it would instead open the door to elimination of the reproduction right as well as of the distribution right by permitting creation and distribution of a potentially unlimited number copies.

The first sale doctrine should not be distorted into a vehicle for permitting unauthorized copying and distribution. As stated above, the first sale doctrine, whether in an analog or a digital world has a particular function, i.e., to prevent restraints of alienation of particular "lawfully made" copies by the owners thereof. That policy can continue in the digital world (see, for example, footnote 1 below). There is no social or economic rationale for altering that policy to permit unlimited reproduction and distribution of protected works by owners of a single copy. Indeed, any such alteration would deal a fatal blow to copyright protection.

Turning to the questions posed in the Request For Public Comment:

- (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?

None. Technical protection measures do not stand in the way of a user becoming "the owner of a particular copy or phonorecord lawfully made under this title." Once having acquired such a "copy or phonorecord", the user may "dispose" of it pursuant to Section 109.

- (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?

No effect has been discerned by us or brought to our attention.

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

As set forth above, application of the first sale doctrine in electronic commerce and/or digital transmissions generally is potentially of huge danger to content owners. Examination of the purpose of the first sale doctrine reveals, as set forth above, that the doctrine is limited to avoiding restraints on alienation of tangible copies "lawfully made".

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

The first sale doctrine was developed with respect and applied to tangible copies which are, of course, the carriers of much of the copyrighted works to which we have become accustomed under the existing technology. That doctrine will continue to be applicable to tangible copies made under authority of the copyright owners whatever the nature of the technology such as CDs and DVDs. To the extent, however, that emerging technology deals not with tangible copies but with streaming and/or downloading of digitized programming, the first sale doctrine neither can nor should have any application.¹

- (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 related to, premised on and requires for its application tangible copies lawfully made and distributed by authority of the copyright owner.

- (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?

For the reasons set forth above, the emergence of new technology does not and should not alter the premises upon which the first sale doctrine is established.

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

For the reasons set forth above, definitely not. Expansion beyond transfer of possession of a particular copy in a tangible medium will seriously threaten the reproduction right and the distribution right. The first sale doctrine should be kept true to its purpose. Exemptions from copyright must not be obtained through distortion of the first sale doctrine.

- (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 absence of a "digital first sale doctrine" has the positive effect of encouraging the growth of markets for works in digital form. Because content owners are not faced with the dangers that would result from application (in our view, misapplication) of the first sale doctrine to digital transmissions (as described above), content owners are encouraged to make their works available in digital form. They can make those works available for downloading, for streaming and for whatever other new technology develops in a variety of pricing and other arrangements so as to meet diverse consumer needs and desires. Misapplying the first sale doctrine to these businesses would quickly discourage them.

Time Warner will not, at this time, respond to the issues raised with respect to Section 117 but respectfully asks to reserve the right to submit Reply Comments with respect to both Section 117 and Section 109 if it believes that it is necessary to do so.

¹ We note that the initial downloading of a copy, from an authorized source to a purchaser's computer, can result in lawful ownership of a copy stored in a tangible medium. If the purchaser does not make and retain a second copy, further transfer of that particular copy on such medium would fall within the scope of the first sale doctrine.

Time Warner does not believe that hearings are necessary with respect to the issues regarding Section 109. With regard to the issues raised concerning Section 117, Time Warner respectfully asks to respond to the question about the usefulness of hearings after it has had an opportunity to review the comments and Reply Comments. As to both Sections, Time Warner respectfully asks for an opportunity to participate if hearings are held.

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