

now, for the digital age. In their view, existing policies that have worked well for hard goods should not be permitted (no less adapted or expanded) for any new e-commerce models. The first sale doctrine, they contend, should apply only to physical media – not to content sold via digital transmission. The privileges of archival and temporary copying, they assert, likewise should not extend to digital media – indeed, some contend that even for software these rights should be either repealed or restricted.

The majority of copyright owner comments can be boiled down to two arguments. First, they contend that historical limitations on copyright owner rights should not extend to digital media because of the threat of Internet piracy. In effect, they argue that lawful consumers should be denied their right to exercise well-established economic privileges, simply because some people steal. DiMA members, which provide ecommerce services to law-abiding consumers, are not willing to make that trade-off. Congress enacts laws, such as first sale and temporary copying privileges, to protect the rights of consumers and copyright users, and separate laws to protect copyright owners from piracy. Failure to extend established privileges into the digital environment unfairly treats law-abiding citizens as thieves and customers as enemies. Unless the law grants the public at least the same rights and privileges in their digital purchases as their physical purchases, the law will deter rather than facilitate e-commerce.

Second, they argue, it is "premature" to change copyright limitations and exemptions, and that the law should wait for the markets to develop. What a change in attitude from just two years ago, before the DMCA was enacted. Then, the clarion call from content owners was that "digital is different" and "the market will not develop without new rules of the road." Now that they have their new digital rights, apparently some content owners find that the old, analog-only rules are good enough for everybody else.

As DiMA explained in its Comments, commercial digital delivery of copyrighted works will succeed by providing consumers with at least the same value that they have come to expect from physical commerce. Consumers want and deserve the right to utilize, for their own legitimate purposes, the flexibility inherent in digital technology. To accommodate consumer rights, copyright law must evolve in response to technological change, as it always has done, by balancing private incentives against the paramount public interests.² Any failure of copyright law to meet the challenges of new technology will not forestall change; but the old law and its adherents will surely be left behind. Indeed, if there is any lesson to be drawn from the last two years' experience, it is that inertia poses as great a threat to robust, legitimate ecommerce as piracy.

As an association of companies focused on building these new digital media markets, DiMA demonstrated in its initial Comments that the time for clarification of copyright law is now. Delay benefits only scofflaws and Luddites who, each for their own reasons, oppose legitimate e-commerce. As further explained below in these Reply Comments, other commenters have demonstrated no sound reasons why the first sale doctrine and section 117 should not now be adapted and modernized for the electronic commerce environment.

² DiMA Comments at 2-5.

I. THE COMMENTS DEMONSTRATE THE NEED TO CLARIFY THAT THE FIRST SALE DOCTRINE EXTENDS INTO THE DIGITAL ENVIRONMENT.

As the comments received demonstrate, interested parties disagree as to whether the first sale doctrine applies to digital works. On one end of the spectrum are the comments of organizations such as the National Association of Recording Merchandisers ("NARM") and Video Software Dealers Association ("VSDA"), who "take strong exception to the premise upon which the questions in the Request for Comment appear to be based," because they believe that "the first sale doctrine already applies to digital media." Joint Comments of NARM and VSDA at 2-3 (emphasis in original). On the other end of the spectrum are the comments from groups such as the Software & Information Industry Association ("SIIA"), which urge the Copyright Office and NTIA to "reaffirm the status quo" and make clear that "the first sale exception does not apply to digital distribution mechanisms." SIIA Comments at 3. See also Comments of Time Warner at 1 ("It is clear that Section 109 does not apply to works distributed by transmission."). As suggested by the Comments filed by DiMA, the American Library Association et al. (the "Library Associations"), the Digital Future Coalition ("DFC"), and the Home Recording Rights Coalition ("HRRC"), among others, these disparities highlight the need for legislative clarification of Section 109 so as to ensure its proper application to digital works.

A. Certain Comments Ignore or Misstate the Public Policies Underlying the First Sale Doctrine.

Some comments received pursuant to the June 5 Federal Register Notice mischaracterize or misperceive the historical and policy reasons underlying the first sale doctrine. As DiMA noted in its Comments, the first sale doctrine is a specific application of the general economic and public policy against restraints on the alienation of property or trade in lawfully-acquired copyrighted works. In copyright law as in patent law, Congress and the courts determined that the economic incentive to create copyrighted works is satisfied by the first sale of the copy; hence, any restraint on alienation was unnecessary to provide that incentive.³

SIIA ignores that the policy against restraints on alienation of property underlies the first sale doctrine. Instead, SIIA asserts that the first sale doctrine is unnecessary because ecommerce will enable anyone to buy a copy of works online. In effect, SIIA suggests that the focus of the first sale doctrine is to facilitate copyright owners' ability to sell copyrighted works -- as if the first sale doctrine exists as a means to satisfy consumer demand.⁴ However, as DiMA noted in

³ DiMA Comments at 5-6. See also Joint Comments of NARM and VSDA at 9, noting that "one of the ordinary incidents of ownership in personal property is the right of alienation of that property, which is attached to the ownership," quoting Harrison v. Maynard, 61 F. 689, 691 (2d Cir. 1894).

⁴ SIIA suggests, for example, that "new licensing and delivery systems will enable just about any computer user to obtain a copy of virtually any work easily and quickly. Accordingly, there is no need for the first sale exception to apply to the Internet and related digital distribution systems." SIIA Comments at 3. Similarly, they contend, since "e-commerce provides opportunities for unprecedented choice, convenience and access to creative

its Comments, copyright policy exists primarily to serve the public good, not only to establish economic rights for copyright owners.⁵ Under the existing first sale doctrine, when consumers purchase a copyrighted book or phonorecord from a traditional "brick and mortar" establishment, those consumers' investment includes the right to dispose of that copy as they wish. In order to promote e-commerce, consumers that purchase copyrighted works via digital delivery should be ensured that they receive the same value for their investment as when they buy a book, compact disc, or video game from a traditional retail outlet, which necessarily includes the right to resell, lend or give away that particular item.

To the extent that the first sale doctrine does foster dissemination of copyrighted works, this argument also favors the exercise of that privilege via digital transmissions. For example, as discussed in the Comments of the Library Associations, the absence of a digital first sale doctrine will impede the free flow of information, including the ability of libraries and others to provide access to digital works to those elements of the public that lack the resources and opportunities that SIIA touts as diminishing the need for a first-sale doctrine. See Library Associations Comments at 2. Applying the first sale doctrine to digital works will enable consumers to donate digitally-acquired works to libraries or sell them at reduced prices to less affluent members of the public, and thereby narrow the divide between the digital "haves" and "have nots."

Finally, even though our member companies are dedicated to building legitimate ecommerce in copyrighted works, DiMA members nevertheless recognize and believe that Internet commerce cannot be the exclusive province of corporate vendors. The Internet already has become a consumer market for auctioning, selling and otherwise recycling used goods, and we fully expect this trend to continue. Several Internet entrepreneurs have built successful businesses around consumer trading, and one can readily foresee how technology and the Internet can construct a secure resale market using digital transmissions. This enhanced ability to meaningfully exercise the first sale privilege should not be denied to consumers. Thus, sound economic and public policies demand that consumers should be able to transfer possession of their digitally-acquired content using digital technologies.

B. Several Comments Demonstrate a Misunderstanding of How A Digital First Sale Doctrine Would Operate.

As explained in DiMA's Comments, as well as the joint comments of NARM and VSDA, a digital copy authorized by the copyright owner that is downloaded by a consumer is conceptually no different than a copy made by the copyright owner and then sold to the consumer. In both instances, it is a copy that was "lawfully made" with the copyright holder's permission.⁶ Time Warner apparently agrees with this assertion,⁷ and other commenters give no

content...the development of e-commerce has resulted in a reduced need for the first sale doctrine." SIIA Comments at 5.

⁵ DiMA Comments at 2-5. See also Comments of the Library Associations at 3 ("the public benefit derived from the alienability of creative works outweighs the increased incentive to create that would step from granting authors perpetual control over copies of a work.").

⁶ See DiMA Comments at 6-13; Comments of NARM and VSDA at 13.

rationale as to why consumers should not have full possessory rights in a digital file that was created on their computer with the permission of the copyright holder.

Yet, some commenters erroneously assume that extending the first sale doctrine to digitally-delivered works necessarily would distort the doctrine into a license for unlimited unauthorized copying.⁸ Indeed, a recurring theme among those opposed to clarification and/or extension of Section 109 is that a digital first sale doctrine would lead to widespread piracy and circumvention of copyright owners' rights.⁹ To be charitable, any argument that the first sale privilege will promote piracy is a fallacy.

Extending to consumers the right to resell the digitally-delivered works that they have lawfully acquired will neither encourage nor lead to unlimited reproduction and distribution of copyrighted works. The policy reasons underlying the first sale doctrine, coupled with the policies advocating the promotion of e-commerce, dictate that the first sale doctrine can and should be extended beyond the mere chattel found in a tangible medium, and should apply to digital copies as well. Technological developments clearly exist which make the coexistence of these goals possible. As discussed thoroughly in DiMA's Comments, and explained in its June 8, 1998 testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection, technology 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. This, along with digital rights management systems, will foster new innovations that will actually decrease the piracy risks that concern these commenters.¹⁰

⁷ Comments of Time Warner at 2 n.1.

⁸ See Comments of Time Warner at 2. Time Warner exemplifies its arguments against the "digital first sale doctrine" by stating "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." Id.

⁹ For example, the Comments of Copyright Industry Organizations state that "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." Id. at 4.

¹⁰ Time Warner further confuses the issue by attempting to equate the delivery of digital material to "immaterial" distributions by television broadcasts or cable and satellite transmissions. This argument completely overlooks the differences between ecommerce and digital delivery, and broadcast or cable or satellite transmissions. These transmissions, like the streaming of content for virtually simultaneous viewing, are not the same as the purchase of a digital file containing a copyrighted work -- which is the subject of DiMA's Comments.

Ultimately, the comments opposed to a digital first sale privilege arguments misstate the policy that DiMA and others are advocating. DiMA and others do not seek the extension of the first sale doctrine in order to promote piracy and copyright infringement; indeed, piracy equally harms DiMA members who wish to establish the legitimate Internet market for copyrighted works. We advocate extension and/or clarification of the first sale doctrine to promote e-commerce through lawful means and to minimize the opportunities and impact of piracy. As pointed out by the Comments of DiMA, technology exists to secure the first sale privileges in a digital environment, including digital rights management systems, encryption, authentication, and password-protection.¹¹ These technologies will make it much easier for the rights of copyright owners to be protected while at the same time ensuring consumers of their possessory rights. Explicitly extending the first sale doctrine will encourage the development of even more efficient digital rights management systems that will even further minimize the impact of piracy. Thus, the result of the clarifications advocated by DiMA are far-removed from the dire scenarios hypothesized by the Copyright Industry Organizations.

C. The Absence of a Digital First Sale Doctrine May Encourage Abuse of Copyrighted Works.

Although new licensing and delivery mechanisms may enable more consumers to access the works via electronic means, as pointed out in several of the submitted comments, the absence of a first sale doctrine may increase the likelihood of abuse of copyrighted works. First, the experience of the last two years shows that, with respect to digital downloading, if you build it, consumers will come; but if copyright owners won't build it, someone else will. If digital delivery satisfies consumer needs, including a means to transfer ownership, then ecommerce will succeed. But if there is no first sale right for digitally-delivered media, consumers will find some other way to exercise these privileges. Without a first sale right, DiMA fears that circumvention technologies like DeCSS, DivX and others, will gain popularity among otherwise law-abiding consumers who understandably cannot abide overly-restrictive and hypertechnical copyright laws.

Already such restrictive terms are finding their way into licenses for digitally-delivered content. Just imagine what the last 20 years of CD sales would have been like if every purchased CD came with enforceable contractual conditions such as these:

1. You may play this compact disc only on one compact disc player.
2. You may not copy any song from this compact disc onto a cassette, personal computer hard drive or any other device, regardless of whether that copy is being made for personal or fair use.
3. You may not resell, lend or otherwise transfer ownership of this compact disc to any other person under any circumstances, including bankruptcy and divorce.
4. Your compact disc collection will self-destruct upon your death.

¹¹ See DiMA Comments at 7-10. See also HRRC Comments at 5.

No rational person could argue that the compact disc market would be as robust today as it has been over the last two decades -- assuming that it even would exist at all -- if such unreasonably restrictive conditions were imposed against typical consumer usage of recorded music. Yet, these are the types of actual, binding restrictions that accompany today's ecommerce transactions in digitally-delivered media.¹² Unless copyright law adapts essential consumer privileges such as first sale to the new ecommerce environment, such restrictions may be merely the harbinger of more invasive conditions to come.

As outlined by the Joint Comments of NARM and VSDA at 18, there is a growing concern that copyright owners are attempting to use their copyright monopoly in conjunction with technological measures to circumvent the first sale doctrine and to restrain competition, through the purported licensing of "rights" not recognized by copyright. Other commenters, such as the Library Associations and the DFC, suggest that the Report should address this problem by recommending both the adoption of the digital first sale doctrine and an amendment to Section 301 of the Copyright Act confirming the supremacy over state laws of these federal law exemptions and privileges.

DiMA agrees that there is a compelling public interest in preventing the over-exertion of control on the part of copyright holders once they have received a fair return on their creativity and have exhausted their rights. This interest is served by clearly and consistently applying the first sale doctrine to digitally delivered works.

II. SECTION 117 SHOULD BE CLARIFIED TO EXPRESSLY PERMIT CERTAIN TEMPORARY AND ARCHIVAL COPYING OF OTHER DIGITAL WORKS.

As DiMA explained in its Comments, the Section 117 exemption should be clarified to explicitly extend to at least three types of typical copying of digital media:

- First, consumers should be able to make a back-up or archival copy or phonorecord of content that they acquire through digital downloading. Archival copying can protect consumers against loss of files due to accidental deletion, hard disk damage or corruption, or virus infection. Likewise, consumers upgrade their systems every few years, and need some means of transferring their media collections to their new computer. DiMA believes that this principle should be explicit in the law, although varied technological means (such as restoring content from offsite agents) may be used to securely implement this right.
- Second, temporary copies of recorded content made in the course of playback also should be exempt from claims of infringement. This is no different than the case directly contemplated by Section 117(a), in which copyrighted software is loaded into random access memory ("RAM") for processing and performance or display.

¹² See, e.g., Comments of Computer Professionals for Social Responsibility at 6; <http://www.bluematter.com/privacy/license.html>.

- Third, the few seconds of buffered content recorded in RAM, as required for playback of Internet webcasting, should be deemed not to be copyright infringement.

See DiMA Comments at 14-20. DiMA's Comments further explained why these views should not be controversial, yet certain copyright owners expressed contrary views in their submitted comments. DiMA demonstrates below why these opposing views do not justify further limitations on consumer rights, and suggests that an explicit amendment to Section 117 could benefit all parties by clarifying the legal status of these noninfringing copies.

A. Public Misperceptions about 117 and Threats of Piracy Should Not Preclude the Extension of Section 117 for Legitimate Purposes.

Another recurring theme in several comments is that there is widespread public misperception and misapplication of Section 117 of the Copyright Act, and as such, it should not be extended to cover digitally transmitted media.¹³ While DiMA agrees with the need for greater clarity and education concerning copyright law, ignorance of current law should not be used as an excuse to impede the development of ecommerce or the rights of law-abiding consumers.¹⁴ Miseducation about the law cannot justify limiting the ownership rights of legitimate consumers – particularly when case law has upheld laws such as 17 U.S.C. § 1201 against the types of fallacious arguments of concern to these commenters.¹⁵ Extending Section 117 to other digital works can and should coexist with "a systematic and sweeping process of educating the public on the 'dos and don'ts' of section 117" as advocated by SIIA. See Comments of SIIA at 4.

B. The Policy and Technological Justifications for Section 117 Still Exist Today.

Several of the comments suggest that technological changes have made the archival copy exemption in Section 117 largely unnecessary for the purposes for which it was originally enacted, and accordingly the archival exception is not needed in the current technological environment. See Comments of IDSA at 4; Comments of SIIA at 8. This argument conspicuously overlooks that circumstances do still exist which necessitate the creation of an archival copy to protect one's investment in a copyrighted work, especially when that work is obtained via digital delivery.

¹³ See, e.g., Comments of the Interactive Digital Software Association ("IDSA") at 5 (discussing web sites that allegedly engage in piracy who "refer to Section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction...might in fact somehow be lawful. They exploit the statute, in other words, not as a legitimate defense to infringement, but as an enticement to engage in piracy."); Comments of SIIA at 4 ("The days of people using section 117 as an excuse for software and content piracy must come to an end.").

¹⁴ In this regard, DiMA concurs with the HRRC that, "[temporary] copies made in the course of viewing or lawfully gaining access to a work have nothing to do with piracy. The law should make clear this distinction." Comments of HRRC at 8.

¹⁵ See DiMA Comments at 18-19.

Other comments observe that CD-ROMs serve as archival copies, and that the potential for inadvertently damaging a CD-ROM is extremely rare. For example, IDSA argues that "while the type of 'mechanical or electrical failure'...or it's 21st century equivalent, the system crash still occurs, the user does not need to make an archival copy [because] the originally acquired copy serves that purpose." Although admittedly true, such an emphasis does not apply to digital rights in downloaded media. Digital delivery and other new methods of distributing software still necessitate, and actually may increase the need for, an archival backup.¹⁶

Similarly, several comments detract from the focus on Section 117 by arguing that "business models" and other strategies eliminate the need for Section 117. For example, SIIA argues that selling software over networks and making software available through Application Service Providers makes Section 117 obsolete since the user can access the software "any time and anywhere." Comments of SIIA at 8. Whether such licensing and business applications gain market acceptance remains to be seen, but the argument is irrelevant to digital downloaded content. Section 117 addresses the case where a copy must permanently reside with the user in order for the user to use the product. That may not be necessary for networked or thin client computing, but most definitely is required for the digitally-downloaded content addressed in DiMA's Comments.

Consumers have a right to secure their investment in their collections of copyrighted works. Digitally-acquired content can be lost through error or damage; or may be rendered useless if consumers are unable to transfer their content to another computer when they upgrade their system. The rationales underlying the archival exception of Section 117 apply with equal force to content lawfully acquired through digital download, whether it is music, text, graphics or motion pictures.

C. Temporary Copies of Recorded Content Made for Playback Should Be Exempt from Claims of Infringement, as Should the Technical Process of "Buffering" that Occurs During Internet Webcasting.

DiMA and others advocate that Section 117(a)(1) should be extended and clarified to apply to other digital devices and media forms beyond merely software.¹⁷ Although the World Wide Web and digital distribution may not have been foreseeable when Section 117 was originally promulgated, the technical functionality of the Internet makes it logical and reasonable to extend the principles underlying Section 117 to the "statements and instructions" in new digital media. The transmission of all digital data, whether software or copyrighted works sold or webcast via the Internet, necessarily involves the moving of packets of information from the RAM of one server to the RAM of the next, making at each stage certain "reproductions"

¹⁶ DiMA Comments at 15, 19. Accord, Comments of the HRRC at 6, "consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading."

¹⁷ See Comments of DFC at 3-4; Comments of HRRC at 6-8; Comments of CCIA at 2.

necessary for the system to function. See Comments of CCIA at 3. Thus, as CCIA noted, "temporary copying is inherent to digital technology". Id. at 3.

Particularly in the case of Internet webcasting, streaming audio or video requires the temporary storage of data before it is reassembled and played for the consumer. As DiMA explained in its Comments at 16-20, the temporary buffer storage of a few seconds of content during webcasting is merely a technological means of facilitating smooth performance of real-time transmissions. The data are not recorded or accessed for other purposes, and have no economic value apart from the performances themselves. If the performances themselves are lawful, it would be a travesty of copyright and economic policy to deem them unlawful simply because of this short buffer. The Copyright Office recognized this principle in the course of the Distance Education study, and we urge that the Copyright Office and NTIA reaffirm and apply that principle more generally to webcasting.

In sum, for both downloading and webcasting to become viable modes of e-commerce, the law should be clarified to assure web businesses and consumers that these actions will not expose them to potential copyright liability. To that end, DiMA echoes the sentiments of HRRC, CCIA, and DFC, in requesting that the Copyright Office and NTIA support clarification and extension of Section 117.

III. CONCLUSION

As is evident from DiMA's Comments and Reply Comments, there is a pressing need for both Section 109 and Section 117 to apply to new digital ecommerce in copyrighted works. These existing limitations and exceptions to the rights of copyright owners have served the public well, and have not in the least harmed the interests of copyright owners. Indeed, by acknowledging privileges and granting reasonable latitude in consumers' personal uses of copyrighted works, copyright law has enhanced the value of purchasing copyrighted works over watching and listening to performed programming.

Ecommerce promises to revolutionize the market for copyrighted works, and to give consumers even greater flexibility and control over their own acquired content. Yet, the promises of ecommerce are not guarantees. Indeed, some have argued, not entirely without justification, that copyright owners' first shots fired in the ecommerce revolution have caught them squarely in the foot. Ecommerce will gain acceptance only if and when consumers obtain from lawfully-acquired digital downloads the same full value that they receive from physical media – including first sale rights and archival and temporary copying. This only can occur in a legal environment that supports and facilitates ecommerce, and that adapts reasonably and timely to new technological and economic models.

Unfortunately, certain comments resist even these modest copyright law changes needed to accommodate ecommerce. The uncertainty created by these conflicts deters investment and commitment to new business models, benefiting no one. DiMA therefore respectfully renews its request that the Report of the Section 104 Study recommend the prompt clarification and, as necessary, the adaptation and expansion of the first sale doctrine and Section 117 exemptions, to promote the digital distribution of copyrighted media and electronic commerce.

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