

Summary of Intended Testimony
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Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

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Currently the archive right in 17 USC 117 provides:

[I]t is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided ... that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Section 117 assumes that only computer programs need to be backed up to guard against a failure of the disk drive normally holding the computer program or a similar catastrophic failure that will require the restoration of the computer program, and that archival backups are done on a program-by-program basis. In many common backup situations, neither is the case.

Many of today's software packages include not only computer programs (defined in 17 USC 101 as "set[s] of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result") but also data files. One needs only to go to the directory where any software package has been installed to see examples of such non-program files: help files and other documentation for the software package, configuration files that are read by the computer programs to select various options, and clip art files that generally come with word processors. In many instances, the programs cannot function correctly if certain key data files are not present. Clearly, for a backup to serve its intended purpose of being able to restore a system to its state before a disk failure, such non-program files also must be archived.

Backup operations on file servers copy an entire file system or selected directories to the archive medium. Between full backups, incremental backups are made comprising those files that have been changed since the last backup was made. Such backup operations generally do not discriminate between computer programs and other types of files. They make a copy of every file on the particular file system or directory. These backups are generally performed by a system administrator, who can't reasonably be aware of whether a file is a computer program or a data file, whether the limits on backup copies in software licenses have been exceeded, or even whether the user has rightful use of the programs and files. With the advent of CD-ROM drives on personal computers, many users are writing similar backup disks of their personal directories. Although such file backups are done (or should be done) at every computer installation, there is nothing in Section 117 that sanctions them. These backups should be addressed by Section 117, so that people will respect its other limits.

Section 117 is also unrealistic in its requirement of destroying all archive copies when a license to a software package has expired. It would be exceedingly difficult to delete such program files from a tape backup, even if it were clear which files to delete. It is impossible to selectively delete files from a CD-ROM, which can't be changed after it has been written. But that inability to delete such files will not result in any hardship for copyright owners, since system administrators or users are unlikely to give their backups to others because of the personal information and other files that they also contain.

Amending Section 117 to permit the creation of archive files containing not only computer programs but any digital information, and removing the requirement that files on the archive must be destroyed, will not provide a loophole for copyright infringement of digital material. It would still be an infringement of copyright to use the backed-up information without authorization, since the archive right only covers the creation of the backup, not any reading of information from the backup. But it will recognize the realities in file backup procedures.