

**Summary of Proposed Testimony on Behalf of Time Warner Inc.
In Response to the Notice of Public Hearing**

“ . . . on the effects of the amendments made by Title 1 of the Digital Millennium Copyright Act (‘DMCA’) and the development of electronic commerce on the operation of Sections 109 and 117 of Title 17, United States Code and the relationship between existing and emerging technology and the operation of such sections”

The policy justification against amending Section 109 to include digital transmissions is predicated on the fact that any such change would lead to unlimited and uncontrollable reproduction and distribution of any copyrighted work that became the subject of such a transmogrified “First Sale Doctrine”.

The First Sale Doctrine from its inception as a judicially created principle and throughout its current life codified in Section 109 has been limited to the privilege given to the owner of a tangible copy of a copyrighted work to sell or otherwise dispose of the possession of that particular tangible copy. This principle was born in the book distribution business and was intended to prevent use of the Copyright Law as a tool for fixing the retail sales price of books. Accordingly, the doctrine was applied (i) only to tangible copies and (ii) only to tangible copies lawfully made under the Copyright Law and (iii) only in circumstances in which the transferor of such a copy did not retain a copy of what was transferred. In making such a transfer, the transferor is making a “distribution” but not exercising or infringing any of the other rights granted to the copyright owner by Section 102.

On the other hand, in the case of digital transmissions, the owner of the “copy” being transmitted in order to “sell or otherwise dispose of the possession of that copy,” would be exercising at least one of the rights reserved and left undisturbed to the copyright owner, i. e., the right of reproduction. Moreover, because the digital transmitter retains the copyrighted work after making the transmission (unlike what happens under the First Sale Doctrine), that transmitter (or anyone receiving a digital transmission from her or him) can go through the same process over and over, thus making and distributing reproductions of the copyrighted work widely.

Accordingly, the proposed amendment to Section 109 would transform that section from a protection against restraint of alienation of particular copies to a device for allowing the owner of one copy to supply, without authority of the copyright holder, the needs and desires of a vast population.

This would render the reproduction right meaningless for all digitally downloaded works, as well as expanding the Section 109 exception to the distribution right beyond its intended boundary. Such a step would violate the U. S. obligations under Berne and TRIPs, particularly Article 9, paragraph (2) of Berne, which provides that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (emphasis supplied), and Article 9 of TRIPs, which provides that members shall comply with, *inter alia*, Article 9 of Berne.

The proposed legislation, H. R. 3048, would, at least in the present state of technology, not only not solve any of these problems, but would provide legislative underpinning for all of the dangers and damages flowing from the proposed expansion of the First Sale Doctrine.

It might be thought that “an amendment to Section 109 to include digital transmission” would be useful to libraries with respect to the activities referred to in the notice of public hearing. This would be a delusion. At best, content owners would be reluctant to make their works available in digital form. At worst, the creation of “works” would be greatly diminished to the disadvantage not only of libraries, but also of society generally.

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