

**SUMMARY OF TESTIMONY
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I. The First Sale Doctrine Should Be Updated for the Digital Era. Representatives Boucher and Campbell introduced H.R. 3048, the Digital Era Copyright Enhancement Act, late in 1997. As proposed, section 109(f) would have read:

(f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

As Mr. Boucher noted, this provision "would permit electronic transmission of a lawfully acquired digital copy of a work as long as the person making the transfer eliminates (e.g., erases or destroys) the copy of the work from his or her system at substantially the same time as he or she makes the transfer. To avoid any risk that the mere act of making the transfer would be deemed an infringing act under existing section 116 of the Copyright Act, Section 4 of the proposed bill states that the "reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement."

Copyrighted content can be delivered to consumers with digital rights management (DRM) systems that enable secure electronic transfers of possession or ownership, and that protect against unauthorized retention of the transferred copy. Through technological processes such as encryption, authentication, and password-protection, copyright owners can ensure that digitally downloaded copies and phonorecords are either deleted after being transferred or are disabled (such as by permanently transferring with the content the only copy of the decryption key).

II. Section 117 Should Exempt Archival and Temporary Copying for Digital Media. The exemption set forth in section 117 of the Copyright Act implicates at least three types of copying of digital media today. Consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading. Temporary copies of recorded content made in the course of playback through buffering, caching, or other means also should be exempt from claims of infringement. Because the technical process of Internet webcasting requires that a receiving device temporarily store a few seconds of data transmitted by a webcaster, before playing back the audio or video to the consumer, the law should recognize this process as well. Each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the doctrine of fair use. To eliminate any legal uncertainty that could ultimately hurt the interests of consumers or that could stifle the development of new technology, the legal status of these temporary non-infringing copies should be clarified.

Both H.R. 3048, the Boucher-Campbell bill, and S. 1146, the Digital Copyright Clarification and Technology Education Act of 1997 introduced by Senator John Ashcroft, would have provided for such clarification. The potential growth of electronic commerce--and the vast potential opportunities it creates for copyright owners, technology developers, hardware and software manufacturers, and media companies--demonstrates why section 117 should be expanded to address all forms of digital content, not just computer software.