

Summary of Intended Testimony by James G. Neal  
on behalf of the American Library Community  
November 29, 2000

The Nation's leading library associations (American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association) support the maintenance of a national copyright system characterized by balance and supportive of both proprietor rights and public access under the first sale doctrine. We are very concerned about technological advancements and a legal framework which threaten this public access and we support changes to the first-sale doctrine (currently 17 U.S.C. 109). We believe that with the implementation of the Digital Millennium Copyright Act, the first-sale doctrine is diminished and the ability of libraries to support the legitimate information access needs of their users is undermined while the ability of publishers to control and monitor use of works is expanded.

The first-sale doctrine must be viewed as media-neutral and technology-neutral. The rights and privileges provided in the Copyright Act are intended to operate as part of a system of checks and balances, with doctrines such as first-sale preventing remuneration rights of authors from chilling public access to works. We are concerned that current law may prevent the application of the first-sale doctrine to digital works, because it may apply only to the distribution right, and not the reproduction right; copying is fundamental to the use of electronic information. A first-sale doctrine for the "digital millennium" must embrace these points:

- interlibrary lending: policy should not make a distinction in lending based on the format of the work, and the rules on the interlibrary loans of digital works should be reaffirmed and strengthened
- unchaining works: all works acquired by a library should be available for use in classrooms, and by students and teachers, regardless where they are located
- preservation: libraries must be able to archive lawfully purchased works for future use and historical preservation
- disallowing unreasonable licensing restrictions: a uniform federal policy is needed which sets minimum standards respecting limitations on the exclusive rights of ownership and which sets aside state statutes and contractual terms which unduly restrict access rights
- donations: encourage donations of works to libraries irrespective of format and without threat of litigation to donors

The first-sale doctrine is being undermined by contract and restrictive licensing. The uncertainty faced by libraries about the application of the first-sale doctrine for digital works is having a negative impact on the marketplace for works in electronic form and on the ability of libraries to serve their users. Libraries believe that no review of the first-sale doctrine and computer licensing rules should be completed without the Congress giving favorable consideration to a new federal preemption provision affecting these rules.

Summary of Intended Testimony by Rodney J. Petersen  
November 29, 2000

I bring several unique and important perspectives to the current inquiry. First, as a lawyer and educator I have a keen understanding and appreciation for the import of the federal copyright act and the resulting effort to strike an appropriate balance between the rights of copyright owners and users. Second, as a researcher and author I benefit from the access to scholarly works facilitated by research libraries as well as the protections afforded my creations under copyright law. Finally, as a member of the information technology division of one of the nation's premier research universities, my department is on the cutting-edge of teaching and learning with technology initiatives as well as the development of electronic commerce solutions.

The growing use and dependence upon digital materials for teaching, learning, and research is both an exciting and challenging endeavor for colleges and universities. The information age within which we live, work, and learn is predicated upon open access to information resources. "Open access" does not necessarily mean "free" or "unregulated"; however, the legal paradigm that governs information access and use in the digital economy must benefit the "public good." The "public good" is best advanced by policies and laws that provide appropriate incentives to authors and creators while at the same time ensuring appropriate access to information. As the comments of the library associations have reported, faculty and students are increasingly expecting and demanding access to information in digital form. Colleges and universities seeking to participate in the digital economy through experimentation and development of advanced technologies, including reaching remote learners through distance education, are increasingly frustrated by the impediments that result from a complex intellectual property system that benefits only a few.

The trend towards the displacement of the provisions of a uniform federal law (the United States Copyright Act) with licenses (or contracts) for digital information is of great concern. College and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of independent license terms. A typical license agreement will limit if not eliminate the availability of fundamental copyright provisions (such as "fair use" and ability for libraries to "archive and preserve" information) by characterizing the information transaction as a "license" rather than a "sale." It is misleading to contend that "freedom of contract" will prevail and that license negotiations are between entities with equal bargaining power, especially when non-profit educational institutions are usually presented with standard license agreements developed by the information providers. The enforceability of "shrinkwrap" or "clickthrough" licenses also poses the same restrictive use regime on individual students, faculty, and researchers. I am not convinced that copyright protections for authors and creators of digital materials is so much in peril that we must resort to a (non-uniform) system of individual licenses that also opens the floodgates for restrictions on otherwise legitimate uses.

The digital age necessitates that we enforce existing copyright laws and rely upon ethical principles and educational measures to protect the rights of authors and creators of digital works. The introduction of legal and technological measures that in turn diminish if not eliminate otherwise lawful uses is not in the public interest.