

Summary of Intended Testimony of the Digital Future Coalition
Before
The United States Copyright Office, Library of Congress
And
The National Telecommunications and Information Administration,
United States Department of Commerce

The Digital Future Coalition (“DFC”) represents 42 national organizations, which includes both owners and users of copyright materials. Our constituents support a balanced copyright system that protects proprietor’s rights while at the same time permits access to the public under the “first sale” doctrine. The DFC supports modifications to the first-sale doctrine, currently codified at 17 U.S.C. Sec. 109, to address the growing issues resulting from ongoing technological advancements.

In the 105th Congress, for example, the DFC strongly supported H.R.3048 legislation to implement the WIPO Copyright Treaty and Performances and Phonograms Treaty. Unfortunately, the final text of the Digital Millennium Copyright Act of 1998 (“DMCA”) did not address H.R.3048’s suggestion to authorize individuals to perform, display, or distribute a copy or phonorecord. The DMCA did, however, direct the Copyright Office and the NTIA to undertake further study of the “first sale” doctrine in the context of the digital environment. The “first sale” doctrine has allowed research libraries, second-hand bookstores, and video rental stores broad secondary dissemination. The DFC is concerned that if “first sale” is further restricted, progress of knowledge and advancement of ideas will be curtailed.

Comments from the 1995 *White Paper on Intellectual Property and the National Information Infrastructure* suggest the “first sale” doctrine should be inapplicable to electronic transmissions by consumers. The DFC believes that such suggested limitations in the *White Paper* and in the DMCA puts the doctrine at risk and could disrupt the balance of copyright law reform, which supports proprietor’s rights. Under Sec. 1201 of Title 17, legal sanction and support threaten copyright owners’ use of the “anti-circumvention” measures. The copyright industries support “second-level” access controls which restrict how a consumer first acquires a copy of a digital file and its subsequent use.

For example, the purchaser of a downloaded digital text file that is downloaded to a portable storage medium is permitted to transfer ownership of that “copy.” However, new Chapter 12 provisions would make use of a password system or encryption device a violation of anti-circumvention measures that could be subject to penalties. Similarly, Sec. 117, which permits purchasers of software program copies to disseminate the copies, could also be at risk under the new anti-circumvention laws. Software consumer rights have been deemed essential since 1980, when the “final compromise” of the 1976 Copyright Act was adopted. Legal support afforded by the DMCA and recent case law will allow some vendors to limit the effective scope of Sec. 117.

To prevent vendors from taking advantage of these restrictions imposed by the DMCA, the DFC proposes adoption of language contained in both S.1146 and H.R.3048, as introduced in the 105th Congress. In short, the language would provide that a digital copy, notwithstanding Sec. 106, is not an infringement if it is incidental to the operation of a device while using the work and if the copying does not conflict with normal exploitation of the work. Finally, ambiguity remains over the use of “shrink-wrap” and “click-through” licenses to override consumer privileges codified in the Copyright Act. When the DMCA was enacted, the DFC anticipated clarification of the Uniform Computer Information Transactions Act (“UCITA”). The final text of UCITA, now before state legislatures, does not fulfill the DFC’s expectations.

To advance the rights under the “first sale” doctrine, DFC believes that recommendations to Congress should focus on formulating a restatement of the “first sale” doctrine in the context of digital copies. First, Sec. 117 places the burden on the proponents of change to maintain the balance of copyright interests established in 1980 by preserving exemptions. Second, Sec. 1201(k)(2) of the DMCA limits the use of anti-circumvention measures and provides a legislative precedent for such limitations on technological self-help. Lastly, amendments to 17 U.S.C. Sec. 301 would provide guidance to consumer privileges under copyright over state contract rules regarding “shrink-wrap” and “click-through” licenses.