

Summary of testimony of Pamela Horovitz, President
National Association of Recording Merchandisers (“NARM”)
On behalf of NARM

NARM is the national trade association representing music retailers, rackjobbers and distributors. Some of our members also sell books and audiovisual works. NARM members include single-store businesses, large retail store chains, and mass merchants. Also, its members include businesses retailing exclusively through the Internet, exclusively through a physical store, and a combination of the two. Of those retailing through the Internet, the methods include sales of physical goods and so-called “digital distribution” by downloads, authorized through a license to the consumer to make a phonorecord on the consumer’s own tangible medium, or by a license to make a phonorecord in a kiosk located in a retail location and which is then sold by the retail store to the consumer.

In all of these business models, NARM members have enjoyed their right under the first sale doctrine and Section 109 of the Copyright Act to develop their own customers, establish their own competitive prices, and distribute copies and phonorecords without the consent of the copyright owners involved. NARM members also benefit from the first sale doctrine and Section 109 rights of their customers, because the right to transfer lawfully made phonorecords by sale, gift or bequest increases the value of the phonorecord to the consumer (and furthers the constitutional objective in authorizing copyrights).

NARM members are extremely concerned that the anti-circumvention provisions in Section 1201(a)(1) of the DMCA are being used as a sword to nullify Section 109 and other first sale doctrine rights, rather than as a shield to protect copyrights. Similarly, efforts are currently underway among major copyright owners to use contracts of adhesion to purportedly obtain an agreement to waive Section 109 rights as a condition of purchasing or being given access to lawfully made copies and phonorecords. These unilateral terms prohibit uses of a copyrighted work in areas in which the copyright owners own no rights. The terms are being supported by emerging state laws which would enforce them, and by technological controls which make it unnecessary to seek agreement from the other party. Indeed, the new technological controls preventing lawful use, which give copyright owners the ability to either prevent or render worthless the exercise of any Section 109 right of transfer of possession or ownership, are further being protected by the same technological measures intended to control access to the copyrighted work, such that NARM members and their customers will be unable to disable the technological restraint on Section 109 rights without also violating Section 1201(a)(1).

If given the opportunity to testify, Ms. Horovitz’ is prepared to explain these concerns, give concrete examples of actual market efforts to so prevent the exercise of Section 109 rights, and explain why it would frustrate the constitutional foundations of copyright law to permit such conduct to continue unabated. NARM believes that Section 109, if properly interpreted and applied, does not need to be amended. If, however, the use of contracts of adhesion protected by novel state laws and/or misuse of technological restrictions protected from circumvention by Section 1201(a) are not restrained by 1201(c), by the courts or by administrative rule, then new legislation will be required to return the careful balance of copyright law to its original state.