

Comments of the DIGITAL FUTURE COALITION

submitted to the U.S. Copyright Office
and National Telecommunications and Information Administration, U.S. Department of Commerce

in response to the Request for Comments published at 65 Fed. Reg. 35673 pursuant to Sec. 104 of the Digital Millennium Copyright Act

The Digital Future Coalition ("DFC") consists of 42 national organizations (a list of which is attached to these comments) representing a wide range of for-profit and non-profit entities. Our membership includes educators, computer and telecommunications industry associations, libraries, artists, software and hardware producers, archivists, and scientists. DFC member organizations represent both owners and users of copyrighted materials.

Over time, our constituents have benefitted -- as have other American individuals, companies and non-profit entities -- from the maintenance of a balanced copyright system in the United States. Such a system is one that provides both strong protection for proprietors' rights and clear recognition of consumers' interests in access to protected materials. Thus, the DFC is strongly committed to the preservation and modernization, in the digital environment, of the limitations and exceptions that have traditionally been part of the fabric of U.S. copyright law.. It is our common conviction that a balanced copyright system is essential to secure the public benefits of both prosperous information commerce, on the one hand, and a robust shared culture, on the other.

In particular, from its inception in 1995, the DFC has advocated the updating of the so-called "first sale" doctrine, currently codified in 17 U.S.C. Sec. 109, as part of any comprehensive effort to bring copyright into the new era of networked digital communications. 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, which specifically provided that:

Section 109 of title 17, United States Code, is amended by adding the following new subsection at the end thereof:

(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.

We were concerned and disappointed that the final text of the Digital Millennium Copyright Act of 1998 ("DMCA") contained no similar provision, and -- by the same token -- pleased that Sec. 104 of that Act directed the Copyright Office and NTIA to undertake further study on the topic of "first sale" in the digital environment, along with that of the Sec. 117 exemptions.

The ultimate Constitutional goal of our copyright system is a public one: "To Promote the Progress of science and Useful Arts." Historically, the "first sale" doctrine has contributed to the achievement of that goal by providing a means for the broad secondary dissemination of works of imagination and information. That the public has reaped a wide range of benefits from the "first sale" doctrine becomes clear from even a cursory examination of the range of various cultural and commercial institutions this rule has supported and enabled -- everything from great research libraries to second-hand bookstores to neighborhood video rental stores. More broadly still, the doctrine has been an engine of free social and cultural discourse, permitting significant texts to be passed from hand to hand within existing or developing reading communities. In the current round of discussions over the future of "first sale," the DFC*s primary concern is that a "default rule" -- restricting possession and use of copies embodying

texts, images and other copyrighted works to the first purchaser or authorized recipient of such materials -- would retard rather than advance the progress of knowledge.

Our immediate concern about the future of the "first sale" doctrine in the new electronic world stems from comments included in the 1995 *White Paper on Intellectual Property and the National Information Infrastructure* (at 93-94) suggesting that the doctrine should be inapplicable, as a matter of conventional copyright doctrine, to electronic retransmissions by consumers of material originally received (by way of gift or purchase) over digital networks. Although this interpretation had not (and, to date, has not) been judicially tested, it is sufficiently plausible to suggest that even before the enactment of the DMCA, "first sale" was a doctrine at risk. The DFC's commitment (already noted) to balance in copyright law reform led us to propose that as proprietors* rights were updated in new legislation, "first sale" should be as well.

After the enactment of the DMCA, however, "first sale" proved to be in greater jeopardy than before. Specifically, whatever aspects of the doctrine might otherwise have survived and flourished in the digital environment now are threatened by the copyright owners' use of the "anti-circumvention" measures for which new Sec. 1201 of Title 17 provides legal sanction and support. The copyright industries are publicly committed to the implementation of what they term "second-level" access controls -- i.e. technological measures that control not only how a consumer first acquires a copy of a digital file, but what subsequent uses he or she may of it, and on what terms. See, e.g., Joint Reply Comments of the American Film Marketing Ass'n et al., U.S. Copyright Office Rulemaking on Exemptions from Prohibitions on Circumvention of Technological Measures that Control Access to Copyrighted Works, Docket No. 99-7 (www.loc.gov/copyright/1201/comments/reply/112metalitz.pdf). Although such controls are in their infancy, they clearly have the potential to erase any remaining vestiges of "first sale" in current law, where the digital environment is concerned.

Under fundamental copyright law principles, for example, the purchaser of downloaded digital text file downloaded to a portable storage medium (such as floppy disk or hand-held "e-book") apparently is permitted to transfer ownership of that "copy." But a simple password system or encryption device could be used to frustrate this consumer privilege, and attempts to override that anti-circumvention measure would potentially trigger severe penalties under the new Chapter 12 provisions.

Of course, the DFC is not privy to the plans and intentions of the content industries in this regard. The current study, however, is in a position to request information from publishing, motion picture, music and other related business about their business plans for the future implementation of "second level" access controls.

In the same connection, we would note that the Sec. 117 privileges of purchasers of copies of software programs, although formally preserved under the DMCA, are equally at risk from the use of technological anti-circumvention measures. The software consumer's right to adapt purchased programs and prepare archival copies of them were deemed essential in 1980, when what amounted to the "final compromise" of the 1976 Copyright Act was adopted at the suggestion of the Congressionally-mandated Commission on New Technological Uses of Copyright Works. Those privileges are as -- if not more -- important to consumers whose software purchases occur by way of on-line downloads rather than through face-to-face or mail-order transactions. However, nothing in the DMCA as enacted in 1998 mandates that consumer privileges be respected in the implementation of anti-circumvention measures. Current software industry practice suggest that at least some vendors will take advantage of new technologies and the legal support that the DMCA affords them to limit the effective scope of Sec. 117. Again, the DFC expects that the current study will take advantage of its unique mandate to inquire closely into the plans and intentions of software providers in the regard.

In addition, recent case law have may deprived the Sec. 117 exemptions of much of their practical force. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), and subsequent decisions hold that every temporary RAM copying of a computer program, incidental to its use on a hardware platform, constitutes a form of "reproduction." Although these holdings are controversial, they suggest

that the use of computer programs by purchasers may now be legally constrained in ways that the Congress did not anticipate in 1980. The DFC believes that the study should consider ways to restore the vitality of the Sec. 117 exemptions in light of these subsequent developments. One such means would be to adopt language contained in both S.1146 and H.R. 3048, as introduced in the 105th Congress::

Notwithstanding the provisions of Section 106, it is not an infringement to make a copy of a work in a digital format if such copying

(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and

(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Finally, we would note that the case law is in disarray concerning the effectiveness of contractual terms contained in so-called "shrink-wrap" and "click-through" licenses to override consumer privileges codified in the Copyright Act, such as the Sec. 109 "first sale" doctrine or the Sec. 117 adaptation and archiving rights. At the time of the enactment of the DMCA, the DFC had hoped that further refinement of the Uniform Computer Information Transactions Act ("UCITA," formerly "UCC 2B") would provide important clarification as to the scope of deference due to federal law in this respect. Unfortunately, the final text of UCITA, which is now before state legislatures for consideration, did not fulfill this expectation.

There are numerous examples of "end-user licenses" in the computer industry which purport to constrain or eliminate purchasers' Sec. 117 privileges. Where "first sale" is concerned, examples of the use of vendor-prescribed, non-negotiable contract terms to override the default settings of the Copyright Act is likewise a possibility. Through the use of such terms, the transfer of permission of authorized print-outs or downloads to portable storage media could be restricted. Clearly, even in the earliest stages of on-line commerce in texts, the continued vitality of the "first sale" doctrine is at risk -- at least in some degree. Assessment of the full extent of that risk is, we believe, an appropriate task for the current study.

Ultimately, the DFC believes that the recommendations to Congress in connection with the study should be focused, in particular, on formulating a restatement of "first sale" appropriate for the digital condition. In so doing, we would urge that the language of H.R. 3048, quoted above, receive serious consideration. By stressing the importance of effective simultaneous deletion of transmitted material from the transmitter's system, this language creates the functional equivalent, in the new context of virtual information environment, of a doctrine that has served commerce, culture, and consumers well in the familiar actual one. Where Sec. 117 is concerned, we believe that the burden is on the proponents of change to make out the case that the balance so carefully struck in 1980 should not be maintained.

Moreover, the report to Congress should address additional measures that may be necessary to make existing and updated "first sale" principles meaningful, and to preserve the Sec. 117 exemptions. In addition to taking up the issue of temporary digital reproduction, it should consider the appropriateness of new legislation limiting the circumstances in which "second level" technological access controls can be deployed by content owners to override or frustrate use privileges otherwise conferred on content purchasers by the Copyright Act. The DFC notes that Sec. 1201(k)(2) of the DMCA, limiting the use of anti-circumvention measures in connection with certain audiovisual transmissions, provides a specific legislative precedent for such limitations on technological self-help. Congress explicitly sought to preserve the ability of consumers to make non-commercial copies of movies and other programs on standard analog VCRs when delivered over the air or via basic cable, while giving copyright owners the authority to block copying in situations in which consumers had no reasonable expectation of making copies. As Congress demonstrated, it is possible to achieve balance between the interests of information consumers and content creators. We look forward to presenting specific statutory proposals for other limitations on the implementation of technological protection measures in the months to come.

Likewise, we hope that the report will recommend new legislation, perhaps in the form of amendments to 17 U.S.C. Sec. 301, that would provide a clear statement as to the supremacy of federal law providing for consumer privileges under copyright over state contract rules which might be employed to enforce overriding terms in "shrink-wrap" and "click-through" licenses. Again, the DFC hopes to be able to assist the work of the study by proposing specific amendments on this preemption issue.

The DFC strongly believes that the issues to be addressed in this study are critical ones for the future of U.S. copyright. The tasks of the study are daunting ones, but we believe that given full cooperation on the part of all affected parties, including consumers and content owners, they can be accomplished. The DFC and its member organizations would be pleased to assist in any way. Specifically, we look forward to the opportunity to testify at hearings convened in connection with the study. Because the study has been mandated at such an early point in the development of networked digital communications and information commerce, it is inevitable that * in part * its conclusions will necessarily be based less on the actual experience to date than on informed predictions about future trends and developments. For these reasons, we believe that it is critical that there should be hearings on the issues covered by the study, and that the scope of those hearings address not only the record of the past but also the shape of things to come.

Respectfully submitted,

Peter Jaszi

For the Digital Future Coalition

Membership of the Digital Future Coalition:

Alliance for Public Technology
American Association of Law Libraries
American Association of Legal Publishers
American Association of School Administrators
American Committee for Interoperable Systems
American Council of Learned Societies
American Historical Association
American Library Association
Art Libraries Society of North America
Association for Computers and the Humanities
Association of American Geographers
Association of Research Libraries
Chief Officers of State Library Agencies
College Art Association
Committee of Concerned Intellectual Property Educators
Computer and Communications Industry Association
Computer Professionals for Social Responsibility
Conference on College Composition and Communications
Consortium on School Networking
Consortium of Social Science Associations
Consumer Federation of America
Consumer Project on Technology
Electronic Frontier Foundation
Electronic Privacy Information Center
Home Recording Rights Coalition
International Society for Telecommunications in Education
Medical Library Association
Modern Language Association
Music Library Association

National Association of Independent Schools
National Council of Teachers of English
National Education Association
National Humanities Alliance
National Initiative for a Networked Cultural Heritage
National School Boards Association
National Writers Union
Society for Cinema Studies
Society of America Archivists
Special Liberties Association
United States Catholic Conference
United States Distance Learning Association
Visual Resources Association



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