

**Before the  
United States Copyright Office and  
National Telecommunications and Information Administration**

Prepared Testimony of

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on behalf of

AMERICAN FILM MARKETING ASSOCIATION  
ASSOCIATION OF AMERICAN PUBLISHERS  
BUSINESS SOFTWARE ALLIANCE  
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION  
MOTION PICTURE ASSOCIATION OF AMERICA  
NATIONAL MUSIC PUBLISHERS' ASSOCIATION  
RECORDING INDUSTRY ASSOCIATION OF AMERICA

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Thank you for the opportunity to present the views of the major trade associations of the copyright industry on the study mandated by Section 104 of the Digital Millennium Copyright Act (DMCA). A brief description of these organizations is appended to this statement.

Congress asked the Copyright Office and the National Telecommunications and Information Administration to study the effects on two provisions of the Copyright Act – sections 109 and 117 – of three types of developments: the amendments made by the DMCA; the development of electronic commerce; and technological developments, both

existing and emergent. The copyright industries believe, in summary, that these effects have been benign, and that they do not justify any changes to either of these provisions. I will briefly summarize our conclusions and then would be glad to try to respond to any questions.

### Section 109

Section 109 of the Copyright Act codifies the first sale doctrine, and thus limits one of the exclusive rights of copyright owners: the distribution right. It allows the distribution, without the authorization of the copyright owner, of a lawfully made copy or phonorecord that the distributor owns. This doctrine continues to apply in the digital environment, whenever someone who owns a lawfully made copy or phonorecord (including one in digital form) wishes to sell or otherwise dispose of the possession of that copy or phonorecord.

A number of parties submitting comments in this proceeding advocate an amendment to section 109, generally modeled on a provision of a bill which the 105<sup>th</sup> Congress declined to enact. Proponents characterize this amendment as a mere “update” or “extension” of the first sale doctrine into the digital sphere. It is no such thing. It would, instead, hyperinflate section 109 to impose completely new limitations, not just on the distribution right, but on other exclusive rights long enjoyed by copyright owners, notably the reproduction right, the fundamental cornerstone of the edifice of copyright protection.

Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy. New distribution models offer the potential to increase consumer choice and promote the business viability of dissemination of works of authorship in digital formats. Limitations on the reproduction right like those proposed as amendments to section 109 would make it impossible to implement many of these models. Nor do current or reasonably anticipated future market conditions justify the encroachments on contractual freedom, or on the ability of copyright owners to

employ access control technologies, that some commenters advocate (and somehow link to section 109). Finally, we do not believe that any amendment to section 109 is justified for the purpose of carrying out the library activities identified in the questions posed in the October 24 notice.

### Section 117

While the Digital Millennium Copyright Act made no changes to section 109, it did amend section 117, with the effect of reaffirming the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right. This recognition takes on added importance in light of the increasing economic significance of such "temporary copies" in the legitimate dissemination of computer programs and other kinds of copyrighted works.

Proposals to amend section 117 (or any other provision of the Copyright Act) to overturn this well-settled principle of U.S. copyright law should continue to be rejected. There is no evidence that the fundamental exclusive right of copyright owners needs to be weakened, through amputation of control over "incidental copies," in order to promote electronic commerce; indeed, the effect is likely to be to the contrary. Enacting the proposed "incidental copies" exception would undercut the reproduction right in all works. Its effect would be most pernicious in the digital networked environment, in which the most prevalent and virulent forms of online piracy may consist of nothing more than making temporary digital copies available, without authorization, to members of the public.

The proposal also ignores the degree to which any exposure to liability for making incidental copies has been ameliorated by the enactment, in the DMCA, of section 512 of the Copyright Act. This section sharply limits such exposure in many of the situations in which incidental copying is unavoidably linked to the smooth functioning of the Internet. In short, the proposed exception would be a drastic and ill-considered solution to a problem that even its proponents concede is largely "theoretical."

## Other Issues

Some submitters have taken this opportunity to express their strongly held views on a plethora of other issues concerning the implementation of copyright law in today's digital environment. They have called, for example, for amendments to section 301, to nullify through federal pre-emption certain provisions in licenses or other contracts entered into between copyright owners and their customers. Others have called for carve-outs to the provisions of section 1201 of title 17, just placed on the statute books by the DMCA.

All these proposals lie outside the congressionally mandated scope of this study, which is intended to focus solely on sections 109 and 117. But if the Copyright Office and the NTIA wish to devote additional resources to reviewing these extraneous proposals, we believe you will find them to be without merit. Participants in electronic commerce in works of authorship should retain the ability to resolve licensing and contractual issues in the marketplace, and to have the terms of their agreements enforced under applicable state law. And the new anti-circumvention provisions of Title 17, some of which have only come into effect within the past month, should be given a chance to fulfill the objectives that led Congress to enact them: to provide legal back-up for key enabling technologies of electronic commerce.

Thank you for your consideration of the views of the U.S. copyright industries in this important proceeding.

## APPENDIX

### **American Film Marketing Association (AFMA)**

AFMA is a trade association whose members produce, distribute and license the international rights to independent English-language films, television programs and home videos. AFMA was founded in 1980 by independent distributors who sought to build and protect their businesses through the creation of a world-class international motion picture trade show.

### **Association of American Publishers (AAP)**

The Association of American Publishers, Inc. is the principal national trade association for the U.S. book publishing industry, representing more than 250 commercial and non-profit member companies, university presses, and scholarly societies that publish books and journals in every field of human interest. In addition to their print publications, many AAP members publish computer programs, databases, and other electronic software for use in online, CD-ROM and other digital formats.

### **Business Software Alliance (BSA)**

Since 1988, the Business Software Alliance (BSA) has been the voice of the world's leading software developers before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy.

### **Interactive Digital Software Association (IDSA)**

The Interactive Digital Software Association is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. IDSA members collectively account for more than 90 percent of the \$6.1 billion in entertainment software sales in the United States in 1999, and billions more in export sales of American-made entertainment software.

### **Motion Picture Association of America (MPAA)**

MPAA is a trade association representing major producers and distributors of theatrical motion pictures, home video material and television programs. MPAA members include: Walt Disney Company; Sony Pictures Entertainment, Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corp.; Universal Studios, Inc.; and Warner Bros.

### **National Music Publishers' Association (NMPA)**

NMPA is a trade association representing over 600 U.S. businesses that own, protect, and administer copyrights in musical works. NMPA is dedicated to the protection of music copyrights across all media and across all national boundaries.

### **Recording Industry Association of America (RIAA)**

RIAA is the principal trade association representing recording companies in the United States. Its members are responsible for the creation of over 90 percent of the legitimate sound recordings sold in this country.