DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
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DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT

WEDNESDAY, DECEMBER 12, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. Welcome to the hearing.

As the Ranking Member from California knows, we're on a tight leash today. I'm told we're going to have four or five votes at 2:30. That will consume probably 35 to 40 minutes. And there will be a subsequent vote later on, so we're going to pretty inflexibly enforce the 5-minute rule today, both upon the witnesses and upon the Members.

It's good to have all of you with us. Today we will receive testimony regarding the Digital Millennium Copyright Act Section 104 report, submitted by the U.S. Copyright Office.

There's no getting around the fact that the report presents complex and controversial issues. The Ranking Member, the gentleman from California, and I have attempted to organize the hearings in such a way that Members can more easily focus on specific issues.

While all the witnesses are free to comment on any portion of the report in their written testimony, we've asked them to focus their oral testimony and presentations on their primary issue of concern.

Today we'll hear from the Register of Copyrights, a representative from the Recording Industry Association of America, the Business Software Alliance, and the National Music Publishers Association. These witnesses will focus on the Copyright Office conclusion and recommendations regarding the legal status of temporary copies.

The Copyright Office recommended that Congress enact legislation to preclude any liability for infringement of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and the underlying musical work.

In other words, when webcasters stream a sound recording over the Internet, incidental buffer copies would not require a separate license from the songwriter for the use of the musical work, or what we would commonly know or refer to as sheet music. The

stream would implicate only the songwriter's performance right in the musical work.

We look forward to hearing arguments both for and against this recommendation.

I'm now pleased to recognize the distinguished gentleman from California, the Ranking Member, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. And thank you for calling these hearings on the Copyright Office report under section 104 of the Digital Millennium Copyright Act.

The quality of the report demonstrates once again the consummate professionalism and dedication of the Copyright Office and its staff.

At issue in today's hearing is the status of temporary copies of copyrighted material, copies made during either the transmission or use of a digital work. Such copies are often the necessary byproduct of the way in which the Internet, computers, and many playback devices function.

At the same time, however, the temporary copy implicates the copyright holder's exclusive right of reproduction. While opposing general legislation dealing with temporary copies, the report recommends a narrow exemption for temporary buffer copies of musical compositions made during audio streams over the Internet.

This hearing provides us with the first opportunity since enactment of the DMCA in 1998 to evaluate the interplay of copyright law and electronic commerce, along with competing claims about its effect on users of copyrighted works.

On the one hand, certain representatives of user groups claimed that the DMCA would stifle traditional uses of copyrighted works and greatly restrict their access to such works.

On the other hand, representatives of copyright holders claimed that DMCA was necessary to protect against crippling digital infringement, and thus to preserve an incentive to digitally distribute copyrighted works.

I strongly believe consumer privileges and copyright limitations existing in the physical domain, such as fair use and the first sale doctrine, must exist equally in the digital domain.

Furthermore, we must ensure that, in our desire to protect copyrights, we do not over-legislate or create new impediments to accessing the digital world.

We must be equally careful to ensure that the law adequately and appropriately protects copyright holders in the digital environment. Pursuant to careful oversight and debate, Congress should step in where necessary to facilitate the evolution of the copyright system.

It appears that copyright users have not experienced the severe negative effects predicted by their representatives. In fact, the truth seems to be that copyrighted works have become more accessible in more formats and under more varied terms than was the case 3 years ago. Movie DVDs are now widely available at every Blockbuster and Borders Bookstore and have become the fastest-growing consumer electronic platform in history. Downloadable software applications are not only commonplace but are almost automated in their ease of use and access. Multiplayer Internet gaming is now an essential option in most computer games. E-

books have been the product of significant experimentation by major authors and publishers and have spawned new consumer electronic devices and software applications. And last, but certainly not least, Internet music is in the midst of a boom. Legal music is now widely available on the Internet through interactive streams, digital downloads, and a variety of other forms.

While no download or interactive streaming services yet have a license for all major label sound recordings, the recently completed licensing deal between music publishers and record labels should remove the last major obstacle to such services.

The magnificent array of copyrighted content now available online constitutes strong evidence that consumer access to copyrighted works has dramatically increased over the past 3 years.

The fears that the DMCA and electronic commerce would diminish consumer access to copyrighted works have proven unjustified to date. On the other hand, the concerns copyright owners expressed about digital piracy have proven true. Most famously there is Napster, which the Ninth Circuit found to be facilitating infringement on a massive scale.

In all, the experience of the past 3 years demonstrates that the threat of Internet copyright infringement is real and has been realized.

Widespread and growing consumer access to digital copyrighted works, combined with the reality of massive digital copyright infringement indicate, to my way of thinking, that Congress made the right call in enacting the DMCA 3 years ago. And I'm pleased that the Copyright Office implicitly agreed with this conclusion in the reports it conducted pursuant to the DMCA.

Thank you, Mr. Chairman, for indulging my opening statement, and I yield back.

Mr. COBLE. You are indeed welcome.

As you all know, we normally restrict opening statements to the Chairman and the Ranking Member, but I note the presence of the Ranking Member of the full Committee, and if he would like to make a statement, I'll recognize Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Just an observation, I'm thinking about the fallout from the Napster case of a little while ago. While we put the kabash on them, others are still doing it.

So, question: What is the industry doing to make sure that artists will receive their royalties in the digital environment?

I think that's a key question. The creativity writers, composers, songwriters bring to music and computer programs must not be stifled by government regulations that discourage them from sharing their works, unique works, creative works, art, culture.

And it starts with one person, has an idea, puts it down on paper, like Miles Davis used to do. He would bring in creative artists into the studio and pass out little scraps of paper. And he'd say, "OK, let's see what happens from here." And usually what happened became jazz history.

So now we're moving to the computer screen. My view is that we ought to protect creative genius and ensure our artists and creators get financial rewards.

How many people are there in this industry and can it take of people that can't play one note that are making millions of bucks? I mean, what is this? The artists get crap. The businesspeople hustle them and then come to the Congress and say, "Cool out, you guys. Let's let the marketplace do its thing."

As a friend and a comedian used to say, "I think you get my drift."

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

Mr. Boucher and Mr. Cannon, both of this Committee, have introduced legislation relating to these issues. And Mr. Boucher has requested an opening statement, and I would ask the other Members unanimous consent to have their statements included in the record, if that's agreeable.

Mr. Boucher?

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I appreciate your indulgence.

I also want to thank you for scheduling hearings to examine a variety of matters relating to the distribution of digital works and, in particular, the distribution of music over Internet.

I welcome the testimony today from the Copyright Office regarding its recent report on barriers that stand in the way of effective electronic commerce and online music distribution.

I'm pleased to observe that the Copyright Office report confirms the direction that my colleague Chris Cannon and I are taking in legislation that we've introduced, styled the Music Online Competition Act, or MOCA.

Legal uncertainties, which have fueled prolonged licensing disputes, have been the single largest stumbling block holding back the launch of affordable online music distribution services that respect copyrights.

I welcome the report from the Copyright Office that recommends removing a number of these barriers. The Copyright Office report specifically supports three elements of the MOCA legislation that Mr. Con—that Mr. Cannon and I have offered.

We'd welcome Mr. Conyers, too. [Laughter.]

Mr. BOUCHER. First, the Copyright Office report agrees with a provision in MOCA that authorizes temporary copies made during the course of lawful audio streaming. The Copyright Office found that these temporary buffer copies have no independent economic value, are protected by fair use, and should be exempted from copyright liability.

The report is a vindication of fundamental principles that a public performance royalty should be required only when a transmission can be actually performed, and that a reproduction royalty should be required only when the reproduction has economic value that is distinct from the authorized performance it has enabled.

Secondly, the report agrees with principles set forth in MOCA that multiple server copies made to facilitate lawful webcasting activities should also be exempted from copyright liability. These ephemeral copies have no separate value apart from the performance they enable, for which the copyright owner has already been compensated. Although this is a footnote in the Copyright Office re-

port, it also constitutes a firm recommendation for legislative action.

Third, the report supports MOCA's recognition that consumers should have a clear ability to archive lawfully acquired media files. The report confirms that fair use protects backup copies that people in prudence would make of the digital media that they lawfully acquired.

MOCA also provides for streamlined filing procedures to obtain the section 115 compulsory mechanical license. While I understand that some music publishers and the recording industry have now reached an agreement with regard to the clearance of the mechanical license, I'm very interested in hearing from the witnesses today whether this agreement removes, for all parties, the need to resolve through legislation the cumbersome process for clearing the music publisher and songwriter interests. I rather suspect that the answer is that some additional legislation will be necessary in order to achieve that goal fully.

While the Copyright Office report confirms many elements of the Music Online Competition Act, there other issues that I believe are not satisfactorily examined and answered in the report. I'm particularly disappointed that the Copyright Office did not seize this opportunity to recommend that the first sale doctrine be updated to permit users to transfer electronic copies of books and other electronic files without the risk of liability, just as they can do with paper versions of these works.

I'm confident that the day will come when we will all see the need to make a change to bring the law into conformity with practices that will promote the growth of electronic commerce and preserve deeply rooted expectations of consumers, libraries, and other users that they can transfer particular copies of works.

Mr. Chairman, I think we can see from this report that legislation is definitely needed to enable the music-consuming public to enjoy the benefit of a robust competitive offering of music for download over the Internet.

The Copyright Office has suggested some needed elements. Mr. Cannon and I have suggested those and other needed elements. And I look forward to working with the Members of this Committee as we seek to meet these challenges.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

Our first witness this afternoon will be the Honorable Marybeth Peters, who is Register of Copyrights for the United States. She has served as acting general counsel of the Copyright Office and is chief of both Examining and Information and Reference divisions. She has served as a consultant on copyright law to the World Intellectual Property Organization and authored "The General Guide to the Copyright Act of 1976." Ms. Peters received her undergraduate degree from Rhode Island College, and her law degree with honors from the George Washington University Law Center.

And, folks, I apologize for my lengthy introduction, but there may be some of you who are uninformed about our witnesses, and I think it's important that all of you know about their impressive credentials they bring to the table.

Our next witness is Carey Ramos, of the firm Paul, Weiss, Rifkind, Wharton & Garrison. His practice concentrates on intellectual property and technology matters, including litigation transactions and counseling. Mr. Ramos attended the Massachusetts Institute of Technology and Yale College and received a bachelor of arts degree magna cum laude from Yale University in May 1976. In June 1979, he received a doctor of jurisprudence degree from the Stanford School of Law, where he served as a note editor of the "Stanford Law Review."

Our third witness is Mr. Cary Sherman, who is the senior executive vice president and general counsel for the Recording Industry Association of America. Mr. Sherman serves as RIAA's chief legal counsel and coordinates the industry's legal, policy, and business objectives. His responsibilities include technology and licensing enforcement and government affairs issues, among others. Mr. Sherman graduated from the Cornell University and the Harvard School of Law in 1971.

Our final witness is Mr. Emery Simon, who is counselor to the board of directors of the Business Software Alliance. He advises BSA on a broad range of policy issues, including copyright law, electronic commerce, trade, and encryption. Mr. Simon has a law degree from Georgetown University, a master's degree in international affairs from the Johns Hopkins University School of Advanced International Studies, and a bachelor's degree in economics from Queens College.

Good to have all of you with us. We have written statements from each of you, which have been examined. And I ask unanimous consent to submit them into the record in their entirety.

Folks, I hate to put you on short leashes, but in view of the imminent vote that will be forthcoming, I would ask you to keep a sharp lookout upon that red light, because when it illuminates in your eye, that tells you your 5 minutes have elapsed.

Ms. Peters, why don't we start with you?

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Thank you, Mr. Coble.

I'm pleased to present the Copyright Office's views as outlined in its section 104——

Mr. COBLE. Ms. Peters, pull that mike a little closer to you, if you don't mind.

Ms. PETERS. All right.

Mr. COBLE. I guess you're activated, is the mike activated?

Ms. PETERS. I'm getting over a cold.

What I was saying is that we are pleased to present our views on our section 104 of the DMCA report, and I would specifically like to thank you, Mr. Coble, and you, Mr. Berman, as the Ranking Member, for holding this hearing.

In the DMCA, Congress asked us to focus on two provisions of the Copyright Act: section 109, which codified the first sale doctrine; and section 117, which includes, among other provisions, an exception permitting the reproduction of computer programs that are incidental to the use of programs in a machine.

Tomorrow I will have opportunity to testify on the first sale doctrine and on archival copying. Today the focus, of course, is temporary copies.

Obviously, in coming to our conclusions, it was a difficult task. The issues are complex, and we did have the benefit of many written comments and the testimony at a public hearing. And of course, my staff conducted extensive legal research.

With respect to temporary copies, the issue really stemmed from a provision in the Boucher-Campbell bill of 1997, which contained an exemption for incidental copies. Many who participated in our study supported the proposal in the Boucher-Campbell bill; however, we focused the inquiry on what were the real-world problems that were impeding electronic commerce.

The responses to that question uniformly centered on online music services. The issue that was identified was the legal status of buffer copies of portions of a music file that are made in a computer's random access memory to facilitate the streaming of that music file to a listener.

Online music services told us that despite the fact that they were delivering to the public an audio performance through streaming technology, and despite the fact that they had licenses from performing rights organizations to publicly perform the musical compositions delivered through the stream, music publishers were seeking compensation for the incidental buffer copy created temporarily in RAM.

They, not the Copyright Office, characterize this is double dipping because the use—in other words, the stream—was already fully licensed. They saw paying for this incidental, temporary copy as duplicative. They argued that music publishers and composers and lyricists were already paid for the activity; that is, delivering performance.

We also heard the flip side. Performance rights organizations were demanding licenses when the activity was a pure digital download; in other words, a DPD.

In analyzing the issues, we looked at the issue of temporary copies in general and specifically at the issue of the buffer copy. We looked at the copyright law, its legislative histories, and the policies that underlie it.

This led us to conclude that the making of a temporary copy of a work in RAM implicates the reproduction right as long as the reproduction persists long enough to be perceived, copied, or communicated. In other words, the temporary copy made in streaming audio does in fact implicate the reproduction right.

Our conclusion is in keeping with every case that has examined the issue of temporary copies.

The next issue is whether this reproduction was subject to liability under the current law. Or to put it another way, was there any provision in the law—for example, a specific exemption or fair use—that removed liability for the creation of this copy?

Obviously, there are a number of specific exemptions for temporary copies in the law. Sqection 117 has two. Section 512 has some. But there is no specific exemption for this type of activity, so we turn to fair use. And as you already know, based on a detailed analysis of the making of the buffer copy in streaming, we

concluded that, under fair use, there was a strong case that could be made that this activity was a fair use.

But because fair use is determined on a case-by-case basis, we believed that it may be too uncertain to form the basis of a business decision. Because we believe there should be no liability for a buffer copy made in the course of a licensed stream of an audio file, we recommended that a narrow statutory provision be added to the law to solve this real-world problem.

We rejected the broader solution because no one identified any additional problem, and we were concerned about unintended consequences. We also took note of the fact that since 1980 Congress had been dealing with temporary copy issues and had dealt with these narrowly. They identified a problem, and they solve that problem. And while this may result in amending the law more than once, we believe that this is better than legislating broadly where you could have an impact that was negative on e-commerce.

We then turned to the symmetrical problem, the delivery of downloads of audio files and the statement by performance rights organizations that all transmissions, even those that facilitate and are incidental to the delivery of a phonorecord, needed a public performance license. We concluded that in this narrow situation, the equivalent of going to a record store and buying a CD, the transmission has no separate economic significance, apart from the sale of phonorecord. And, therefore, there should be no liability for this transmission.

Finally, as you know, the National Music Publishers Association and RIAA have concluded an agreement; that was concluded on October 5th. This agreement is a positive step, but it does not, in fact, affect our analysis or our recommendation.

Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Congressman Berman, Members of the Subcommittee, thank you for inviting me to appear before the Subcommittee today. It is always a pleasure to testify before this Subcommittee, and I appreciate the opportunity to discuss the Office's Digital Millennium Copyright Act (DMCA) Section 104 Report.

The DMCA was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation's copyright law into the digital age. But as Congress recognized, the only thing that remains constant is change. The enactment of the DMCA was only the beginning of an ongoing evaluation by Congress on the relationship between technological change and U.S. copyright law. The Report we are discussing today was mandated in the DMCA to assist Congress in that continuing process.

Our mandate was to evaluate "the effects of the amendments made by [title I of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title17, United States Code; and the relationship between existing and emergent technology and the operation of sections 109 and 117. . . ." Specifically, this Report focuses on three proposals that were put forward during our consultations with the public: creation of a "digital first sale doctrine;" creation of an exemption for the making of certain temporary incidental copies; and the expansion of the archival copying exemption for computer programs in section 117 of the Act.

Part I of the Report describes the circumstances leading up to the enactment of the DMCA and the genesis of this study. Part I also examines the historical basis of sections 109 and 117 of the Act. Part II discusses the wide range of views expressed in the public comments and testimony. This input from the public, academia, libraries, copyright organizations and copyright owners formed the core information considered by the Office in its evaluation and recommendations. Part III

evaluates the effect of title I of the DMCA and the development of electronic commerce and associated technology on the operations of sections 109 and 117 in light of the information received and states our conclusions and recommendations regarding the advisability of statutory change.

I. BACKGROUND

A. The Digital Millennium Copyright Act

The World Intellectual Property Organization (WIPO) treaties were the impetus for the U.S. legislation. In order to facilitate the development of electronic commerce in the digital age, Congress implemented the WIPO treaties by enacting legislation to address those treaty obligations that were not adequately addressed under existing U.S. law. Legal prohibitions against circumvention of technological protection measures employed by copyright owners to protect their works, and against the removal or alteration of copyright management information, were required in order to implement U.S. treaty obligations.

The congressional determination to promote electronic commerce and the distribution of digital works by providing copyright owners with legal tools to prevent widespread piracy was tempered with concern for maintaining the integrity of the statutory limitations on the exclusive rights of copyright owners. In addition to the provisions adopted by Congress in 1998, there were other proposals—including amendments to sections 109 and 117, that were not adopted, but were the subjects of a number of studies mandated by the DMCA. Section 104 of the DMCA requires the Register of Copyrights and the Assistant Secretary for Communications and Information to report on the effects of the DMCA on the operation of sections 109 and 117 and the relationship between existing and emergent technology on the operation of sections 109 and 117 of title 17 of the United States Code.

The inclusion of section 109 in the study has a clear relationship to the digital first sale proposal contained in a bill introduced in 1997 by Congressmen Rick Boucher and Tom Campbell. The reasons for including section 117 in the study are less obvious. While there is no legislative history explaining why section 117 is included in the study, it appears that the reference was intended to include within the scope of the study a proposed exemption for incidental copies found in the Boucher-Campbell bill, which would have been codified in section 117 of the Copyright Act.

B. Section 109(a) and the First Sale Doctrine

The common-law roots of the first sale doctrine allowed the owner of a particular copy of a work to dispose of that copy. This judicial doctrine was grounded in the common-law principle that restraints on the alienation of tangible property are to be avoided in the absence of clear congressional intent to abrogate this principle. This doctrine appears in section 109 of the Copyright Act of 1976. Section 109(a) specified that this notwithstanding a copyright owner's exclusive distribution right under section 106 the owner of a particular copy or phonorecord that was lawfully made under title 17 is entitled to sell or further dispose of the possession of that copy or phonorecord.

C. Section 117 Computer Program Exemptions

Section 117 of the Copyright Act of 1976 was enacted in the Computer Software Copyright Amendments of 1980 in response to the recommendations of the National Commission on New Technological Uses of Copyrighted Works' (CONTU). Section 117 permits the owner of a copy of a computer program to make an additional copy of the program for purely archival purposes if all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful, or where the making of such a copy is an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.

II. VIEWS OF THE PUBLIC

Section II of the report summarizes the views received from the public through comments, reply comments and hearing testimony. The summaries are grouped into three categories: views concerning section 109, views concerning section 117, and views on other miscellaneous issues.

A. Views Concerning Section 109

Most of the comments dealt with section 109 whether of not they addressed section 117. While there was a broad range of views on the effect of the DMCA on the first sale doctrine, most of the commenters believed that the anticircumvention provisions of 17 U.S.C. section 1201 allowed copyright owners to restrict the operation of section 109. Of particular concern to many commenters was the Content Scram-

bling System (CSS) and the "region coding" used to protect motion pictures on Digital Versatile Disks (DVDs). They argued that use of CSS forces a consumer to make two purchases in order to view a motion picture on DVD: the DVD and the authorized decryption device. In the view of these commenters, this system reduces or eliminates the value of and market for DVDs by interfering with their free alienability on the market. A similar argument was advanced for the region coding on DVDs in that the geographic market for resale is restricted by this technological protection measure.

Another concern expressed by a number of commenters was the growing use of non-negotiable licenses accompanying copyrighted works that are written to restrict or eliminate statutorily permitted uses, including uses permitted under section 109. In some cases, these license restrictions are enforced through technological measures. It was argued that these licensing practices and the prohibition on circumvention frustrate the goals of the first sale doctrine by allowing copyright owners to maintain control on works beyond the first sale of a particular copy. These commenters stated that this interference with the operation of the first sale doctrine has the capacity to inhibit the function of traditional library operations, such as interlibrary loan, preservation, and use of donated copies of works.

Other commenters rebutted these claims, arguing that over-restrictive technological protection measures or licenses would not survive in the marketplace, since competition would be a limiting principle. It was also argued that the effect of licensing terms on the first sale doctrine is beyond the scope of this study.

Commenters generally viewed section 1202 of the DMCA, which prohibits the alteration or removal of copyright management information, as having no impact of the operation of the first sale doctrine.

The greatest area of contention in the comments was the question of whether to expand the first sale doctrine to permit digital transmission of lawfully made copies of works. Although some proponents argued that such transmissions are already permitted by the current language of section 109, most thought that clarification of this conclusion by Congress would be advisable since the absence of express statutory language could lead to uncertainty.

The proponents of revising section 109 argued that the transmission of a work that was subsequently deleted from the sender's computer is the digital equivalent of giving, lending, or selling a book. Allowing consumers to transfer the copy of the work efficiently by means of online transmission would foster the principles of the first sale doctrine. These principles have promoted economic growth and creativity in the analog world and should be extended to the digital environment. Proponents of this argument sought amendment to section 109 to allow a person to forward a work over the Internet and then delete that work from his computer.

Others opposed such an amendment for a number of reasons. Opponents pointed out that the first sale doctrine is a limitation on the distribution right of copyright owners and has never implicated the reproduction right which is, in their view, a "cornerstone" of copyright protection. In addition, the impact of the doctrine on copyright owners was also limited in the off-line world by a number of factors, including geography and the gradual degradation of books and analog works. The absence of such limitations would have an adverse effect on the market for digital works. Opponents also believed that proposals that depend on the user deleting his copy would be unverifiable, leading to virtually undetectable cheating. Given the expanding market for digital works without a digital first sale doctrine, opponents questioned the consumer demand for such a change in the law.

B. Views Concerning Section 117

The comments related to section 117 fell into two main categories: those addressing the status of temporary copies in RAM and those concerning the scope of the archival exemption.

Many commenters advocated a blanket exemption for temporary copies that are incidental to the operation of a device in the course of use of a work when that use is lawful under title 17. Such an exemption was originally proposed in the Boucher-Campbell bill as an amendment to section 117.

Other commenters vigorously opposed any exemption for incidental copies at this time. They argued that such an exemption would dramatically expand the scope of section 117 in contrast to the carefully calibrated adjustment made to section 117 in the DMCA to address the problems experienced by independent computer service organizations at issue in *MAI Systems Corp.* v. *Peak Computer, Inc.* These commenters stated that Congress' narrow adjustment to section 117 in the DMCA reaffirmed the conclusion that temporary copies in random access memory (RAM) are copies that are subject to the copyright owner's exclusive reproduction right. Further

change would undercut the reproduction right in all works and endanger international treaty obligations.

There was disagreement on the economic value of temporary copies. Proponents of an amendment argued that temporary buffer copies are necessary to carry out streaming of performances of works on the Internet and have no value apart from that performance. They argued that the limitations under other sections of the Copyright Act, including sections 107 and 512, were insufficient to sustain the operation of businesses that stream audio performances to the public.

Opponents, on the other hand, argued that these copies are within the scope of the copyright owner's exclusive rights and do possess value. Particular emphasis was placed on the value of temporary copies of computer programs. It was also argued that as streaming performances become more common, these temporary copies will increase in value because of the adverse effect of the performances on the market for purchases of copies of these works. Opponents believed it would be premature to change the law because of the absence of specific evidence of harm and the high potential for adverse unintended consequences. It was noted that when Congress was presented with concrete evidence of harm to independent service organizations after the *MAI v. Peak* decision, Congress took steps to remedy the situation. Similarly, section 512 of the DMCA created limitations on the remedies available against Internet service providers for incidental copying that is essential to the operation of the Internet.

The other major concern involving section 117 concerned the scope of the archival exemption. Proponents of amending section 117 raised two primary points. First, they argued that the policy behind the archival exemption needs to be updated to encompass all digital works rather than just computer programs. Since computers are vulnerable to crashes, viruses, and other failures, downloaded music, electronic books and other works face the same risks that precipitated the exemption for computer programs. Some argued that all digital media is susceptible to accidental deletion or corruption. Consumers should be permitted to protect their investments in works.

Proponents of expansion of the archival exemption offered another argument—section 117 does not comport with reality. Systematic backup practices do not fit the structure of section 117, which is limited to making a copy of an individual program at the time the consumer obtains it. It was argued that such a discrepancy between the law and commonly accepted practices undermines the integrity of the law. Such a fundamental mismatch creates the perception that the law need not be literally followed, thereby creating a slippery slope.

Opponents of an expansion of the archival exemption countered that the justification behind section 117 no longer exists. Most software is distributed on CD-ROM, which is far more robust than floppy disks. Consumers need merely retain the original CD as a backup, since it is a simple operation to reinstall software that is compromised. In addition, these opponents argued that there is currently an inaccurate public perception of the scope of the backup copy exception. These commenters argue that many invoke the archival exception as a shield to commercial piracy.

Opponents of an amendment to section 117 asserted that even if there is a mismatch between actual backup practices and the current exception, no one has been harmed by it. Commenters noted that no one has been sued as a result of backing up material outside the scope of section 117, and no one has stopped performing backups. It was also argued that if a particular activity does not fall within the terms of section 117, it may nevertheless be privileged under the fair use doctrine.

C. Views Concerning Other Miscellaneous Issues

There were assorted other comments and testimony on a range of issues. There were concerns raised about the potential adverse effects of sections 1201 and 1202 on the traditional concepts of first sale, fair use, and the archival and preservation exemptions. It was argued that these prohibitions are likely to diminish, if not eliminate, otherwise lawful uses. It was asserted that copyright management information may also have the capacity to reveal user information in a manner that would chill legitimate uses of copyrighted works.

Another prevalent concern was that licenses are being used increasingly by copyright owners to undermine the first sale doctrine and restrict other user privileges under the copyright law. These commenters argue that this trend is displacing the uniformity of federal copyright law with a wide variation of contract terms that must be evaluated and interpreted. This poses a particular challenge to large institutions, such as universities and libraries, in determining legal and acceptable use in any given work. A number of commenters argued that federal copyright law should preempt such license terms.

Other commenters argued that Congress did not intend copyright law broadly to preempt contract provisions. They argue that the freedom to contract serves the interests on both copyright owners and the public by allowing greater flexibility in determining pricing, terms and conditions of use, and other options.

III. EVALUATION AND RECOMMENDATIONS

We are not persuaded that title I of the DMCA has had a significant effect on the operation of sections 109 and 117 of title 17. The adverse effects that section 1201, for example, is alleged to have had on these sections cannot accurately be ascribed to section 1201. The causal relationship between the problems identified and section 1201 are currently either minimal or easily attributable to other factors such as the increasing use of license terms. Accordingly, none of our legislative recommendations are based on the effects of section 1201 on the operation of sections 109 and 117.

A. The Effect of Title I of the DMCA on the Operation of Sections 109 and 117

The arguments raised concerning the adverse effects of the CSS technological protection measure on the operation of section 109 are flawed. The first sale doctrine is primarily a limitation on copyright owner's distribution right. Section 109 does not guarantee the existence of secondary markets for works. There are many factors which could affect the resale market for works, none of which could be said to interfere with the operation of section 109. The need for a particular device on which to view the work is not a novel concept and does not constitute an effect on section 109. VHS videocassettes for example, must be played on VHS VCRs.

A plausible argument can be made that section 1201 may have a negative effect on the operation of the first sale doctrine in the context of works tethered to a particular device. In the case of tethered works, even if the work is on removable media, the content cannot be accessed on any device other than the one on which it was originally made. This process effectively prevents disposition of the work. However, the practice of tethering a copy of a work to a particular hardware device does not appear to be widespread at this time, at least outside the context of electronic books. Given the relative infancy of digital rights management, it is premature to consider any legislative change at this time. Should this practice become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers is unclear.

We also find that the use of technological measures that prevent the copying of a work potentially could have a negative effect on the operation of section 117. To the extent that a technological measure prohibits access to a copyrighted work, the prohibition on the circumvention of measures that protect access in section 1201(a)(1) may have an adverse impact on the operation of the archival exception in section 117. Again, however, the current impact of such a concern appears to be minimal, since licenses generally define the scope of permissible archiving of software, and the use of CD-ROM reduces the need to make backup copies.

Given the minimal adverse impact at the present time, we conclude that no legislative change is warranted to mitigate any effect of section 1201 on section 117.

B. The Effect of Electronic Commerce and Technological Change on Sections 109 and 117

There is no dispute that section 109 applies to works in digital form. Physical copies of works in a digital format, such as CDs or DVDs, are subject to section 109 in the same way as physical copies in analog form. Similarly, a lawfully made tangible copy of a digitally downloaded work, such as a work downloaded to a floppy disk, Zip™ disk, or CD-RW, is clearly subject to section 109. The question we address here is whether the transmission of a work to another person falls within—or should fall within—the scope of section 109.

1. The First Sale Doctrine in the Digital World

a. Evaluation of Arguments Concerning First Sale

The first sale doctrine is primarily a limitation on the copyright owner's exclusive right of distribution. It does not limit the exclusive right of reproduction. While disposition of a work downloaded to a floppy disk would only implicate the distribution right, the transmission of a work from one person to another over the Internet results in a reproduction on the recipient's computer, even if the sender subsequently deletes the original copy of the work. This activity therefore entails an exercise of an exclusive right that is not covered by section 109.

Proponents of expansion of the scope of section 109 to include the transmission and deletion of a digital file argue that this activity is essentially identical to the transfer of a physical copy and that the similarities outweigh the differences. While

it is true that there are similarities, we find the analogy to the physical world to be flawed and unconvincing.

Physical copies degrade with time and use; digital information does not. Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost. Digital transmissions can adversely effect the market for the original to a much greater degree than transfers of physical copies. Additionally, unless a "forward-and-delete" technology is employed to automatically delete the sender's copy, the deletion of a work requires an additional affirmative act on the part of the sender subsequent to the transmission. This act is difficult to prove or disprove, as is a person's claim to have transmitted only a single copy, thereby raising complex evidentiary concerns. There were conflicting views on whether effective forward and delete technologies exist today. Even if they do, it is not clear that the market will bear the cost of an expensive technological measure.

The underlying policy of the first sale doctrine as adopted by the courts was to give effect to the common law rule against restraints on the alienation of tangible property. The tangible nature of a copy is a defining element of the first sale doctrine and critical to its rationale. The digital transmission of a work does not implicate the alienability of a physical artifact. When a work is transmitted, the sender is exercising control over the intangible work through its reproduction rather than common law dominion over an item of tangible personal property. Unlike the physical distribution of digital works on a tangible medium, such as a floppy disk, the transmission of works interferes with the copyright owner's control over the intangible work and the exclusive right of reproduction. The benefits to further expansion simply do not outweigh the likelihood of increased harm.

Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers. We are concerned that these proposals for a digital first sale doctrine endeavor to fit the exploitation of works online into a distribution model—the sale of copies—that was developed within the confines of pre-digital technology. If the sale model is to continue as the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.

We also examined how other countries are addressing the applicability of the first sale—or exhaustion—doctrine to digital transmissions. We found that other countries are addressing digital transmissions under the communication to the public right and are not applying the principle of exhaustion, or any other analog thereof, to digital transmissions.

b. Recommendation Concerning the Digital First Sale Doctrine

We recommend no change to section 109 at this time. Although speculative concerns have been raised, there was no convincing evidence of present-day problems. In order to recommend a change in the law, there should be a demonstrated need for the change that outweighs the negative aspects of the proposal. The Copyright Office does not believe that this is the case with the proposal to expand the scope of section 109 to include digital transmissions. The time may come when Congress may wish to address these concerns should they materialize.

The fact that we do not recommend adopting a "digital first sale" provision at this time does not mean that the issues raised by libraries are not potentially valid concerns. Similarly, our conclusion that certain issues are beyond the scope of the present study does not reflect our judgment on the merits of those issues.

The library community has raised concerns about how the current marketing of works in digital form affects libraries with regard to five specifically enumerated categories: interlibrary loans, off-site accessibility, archiving/preservation, availability of works, and use of donated copies. Most of these issues arise from terms and conditions of use, and costs of license agreements. One arises because, when the library has only online access to the work, it lacks a physical copy of the copyrighted work that can be transferred. These issues arise from existing business models and are therefore subject to market forces. We are in the early stages of electronic commerce. We hope and expect that the marketplace will respond to the various concerns of customers in the library community. However, these issues may require further consideration at some point in the future. Libraries serve a vital function in society, and we will continue to work with the library and publishing communities on ways to ensure the continuation of library functions that are critical to our national interest.

2. The Legal Status of Temporary Copies

a. RAM Reproductions as "Copies" under the Copyright Act

All of the familiar activities that one performs on a computer, from the execution of a computer program to browsing the World Wide Web, necessarily involve copies stored in integrated circuits known as RAM. This information can remain in memory until the power is switched off or the information is overwritten. These reproductions generally persist only for as long as the particular activity takes place.

The legal status of RAM reproductions has arisen in this study almost exclusively in the context of streaming audio delivery, including webcasting. In order to render the packets of audio information in an audio "stream" smoothly, in spite of inconsistencies in the rate of delivery, packets of audio information are saved in a portion of RAM called a buffer until they are ready to be rendered.

Based on an the text of the Copyright Act—including the definition of "copies" in section 101—and its legislative history, we conclude that the making of temporary copies of a work in RAM implicates the reproduction right so long as the reproduction persists long enough to be perceived, copied, or communicated.

Every court that has addressed the issue of reproductions in RAM has expressly or impliedly found such reproductions to be copies within the scope of the reproduction right. The seminal case on this subject, *MAI, Sys. Corp. v. Peak Computer, Inc.*, found that the loading of copyrighted software into RAM creates a "copy" of that software. At least nine other courts have followed *MAI v. Peak* in holding RAM reproductions to be "copies" and several other cases have held that loading a computer program into a computer entails making a copy, without mentioning RAM specifically.

b. Evaluation of Arguments Concerning Temporary Incidental Copy Exceptions

In the course of this study, arguments were advanced in support of a blanket exemption for incidental copies similar to that proposed in the Boucher-Campbell bill. Most of the arguments advanced on such a proposal focused exclusively on the specific issue of buffer copies made in the course of audio streaming, rather than the broader issue of incidental copying generally. This focus suggests that legislation tailored to address the specific problems raised in the context of audio streaming should be examined. This focus is particularly appropriate since there was no compelling evidence presented in support of a blanket exemption for incidental copies and there was evidence that such an exemption could lead to unintended adverse consequences for copyright owners.

There was compelling evidence presented, however, on the uncertainty surrounding temporary buffer copies made in RAM in the course of rendering a digital musical stream. Specifically, webcasters asserted that the unknown legal status of buffer copies exposes webcasters to demands for additional royalty payments from the owner of the sound recording, as well as potential infringement liability.

The buffer copies identified by the webcasting industry exist for only a short period of time and consist of small portions of the work. Webcasters argue that these reproductions are incidental to the licensed performance of the work and should not be subject to an additional license for a reproduction that is only a means to an authorized end. Buffer copies implicate the reproduction right, thus potentially resulting in liability. There is, therefore, a legitimate concern on the part of webcasters and other streaming music services as to their potential liability.

We believe that there is a strong case that the making of a buffer copy in the course of streaming is a fair use. Fair use is a defense that may limit any of the copyright owner's exclusive rights, including the reproduction right implicated in temporary copies. In order to assess whether a particular use of the works at issue is a fair use, section 107 requires the consideration and balancing of four mandatory, but nonexclusive, factors on a case-by-case basis.

In examining the first factor—the purpose and character of the use—it appears that the making of buffer copies is commercial and not transformative. However, the use does not supersede or supplant the market for the original works. Buffer copies are a means to a noninfringing and socially beneficial end—the licensed performance of these works. There is no commercial exploitation intended or made of the buffer copy in itself. The first factor weighs in favor of fair use.

The second factor—the nature of the copyrighted work—weighs against a finding of fair use because musical works are generally creative. The third factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole—would also be likely to weigh against fair use since, in aggregate, an entire musical work is copied in the RAM buffer. Since this is necessary in order to carry out a licensed performance of the work, however, the factor should be of little weight.

In analyzing the fourth factor—the effect of the use on the actual or potential market for the work—the effect appears to be minimal or nonexistent. This factor strongly weighs in favor of fair use.

Two of the four statutory factors weigh in favor of fair use, but fair use is also an "equitable rule of reason." In the case of temporary buffer copies, we believe that the equities unquestionably favor the user. The sole purpose for making the buffer copies is to permit an activity that is licensed by the copyright owner and for which the copyright owner receives a performance royalty. In essence, copyright owners appear to be seeking to be paid twice for the same activity. Additionally, it is technologically necessary to make buffer copies in order to carry out a digital performance of music over the Internet. Finally, the buffer copies exist for too short a period of time to be exploited in any way other than as a narrowly tailored means to enable the authorized performance of the work. On balance, therefore, the equities weigh heavily in favor of fair use.

c. Recommendation Concerning Temporary Incidental Copies

Representatives of the webcasting industry expressed concern that the case-by-case fair use defense is too uncertain a basis for making rational business decisions. We agree. While we recommend against the adoption of a general exemption from the reproduction right to render noninfringing all temporary copies that are incidental to lawful uses, a more carefully tailored approach is desirable.

We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.

The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance of these works. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place—to the detriment of other copyright owners, webcasters and consumers alike—or to extract an additional payment that is not justified by the economic value of the copies at issue. Congressional action is desirable to remove the uncertainty and to allow the activity that Congress sought to encourage through the adoption of the section 114 webcasting compulsory license to take place.

Although we believe that the fair use defense probably does apply to temporary buffer copies, this approach is fraught with uncertain application in the courts. This uncertainty, coupled with the apparent willingness of some copyright owners to assert claims based on the making of buffer copies, argues for statutory change. We believe that the narrowly tailored scope of our recommendation will minimize, if not eliminate, concerns expressed by copyright owners about potential unanticipated consequences.

Given our recommendations concerning temporary copies that are incidental to digital performances of sound recordings and musical works, fairness requires that we acknowledge the symmetrical difficulty that is faced in the online music industry: digital performances that are incidental to digital music downloads. Just as webcasters appear to be facing demands for royalty payments for incidental exercise of the reproduction right in the course of licensed public performances, it appears that companies that sell licensed digital downloads of music are facing demands for public performance royalties for a technical "performance" of the underlying musical work that allegedly occurs in the course of transmitting it from the vendor's server to the consumer's computer.

Although we recognize that it is an unsettled point of law that is subject to debate, we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place. If a court were to find that such a download can be considered a public performance within the language of the Copyright Act, we believe the that arguments concerning fair use and the making of buffer copies are applicable to this performance issue as well. It is our view that no liability should result from a technical "performance" that takes place in the course of a download.

3. Archival Exemption

a. Evaluation of Arguments Concerning the Scope of Section 117(a)(2)

Currently the archival exemption under section 117(a)(2) is limited to computer programs. This section allows the owner of a copy of a computer program to make or authorize the making of an additional copy of the program "for archival purposes," provided that "all archival copies are destroyed in the event that continued

possession of the computer program should cease to be rightful." A number of arguments were advanced in the course of this study for an expansion of this archival exemption in order to cover the kind of routine backups that are performed on computers and to allow consumers to archive material in digital format other than computer programs.

Commenters asserted that consumers need to backup works in digital form because they are vulnerable. That was CONTU's rationale for recommending that Congress create an exemption to permit archival copies of computer programs. In both cases, the vulnerability stems from the digital nature of the works. It would be perfectly consistent with the rationale of CONTU's recommendations and Congress' enactment of section 117 to extend the archival exemption to protect against the vulnerabilities that may afflict all works in digital format.

Evidence was presented to us noting that the archival exemption under section 117 does not permit the prevailing practices and procedures most people and businesses follow for backing up data on a computer hard drive. There is a fundamental mismatch between accepted, prudent practices among most system administrators and other users, on the one hand, and section 117 on the other. As a consequence, few adhere to the law.

While there is no question that this mismatch exists, nobody was able to identify any actual harm to consumers as a result of the limited scope of the archival exemption. Additionally, it was argued that the need to make archival copies of computer programs has diminished, because almost all software sold in the United States is distributed on CD-ROM, which itself serves as an archival copy in the event of hard drive problems or upgrades.

b. Recommendations Concerning the Archival Exemption

Although there has been a complete absence of any demonstrated harm to the prospective beneficiaries of an expanded archival exemption, and although we believe that a strong case could be made that most common archival activities by computer users would qualify as fair use, we have identified a potential concern—the interplay between sections 107 and 109. It appears that the language of the Copyright Act could lead a court to conclude that copies lawfully made under the fair use doctrine may be freely distributed under section 109.

Section 109 permits "the owner of a particular copy or phonorecord lawfully made" under title 17 to distribute that copy without the copyright owner's permission. To the extent that section 107 permits a user to make a backup copy of a work stored on a hard drive, that copy is lawfully made and the user owns it. Section 109, on its face, appears to permit the user to sell or otherwise dispose of the possession of that backup copy. The legislative history can be read to support either view.

We conclude that a statutory change is desirable, and recommend that Congress amend the copyright law in one of two ways.

Given the uncertain state of authority on the issue, we cannot conclude with a satisfactory level of certainty that a court will not, in the future, find a backup copy made by virtue of section 107 to be eligible for distribution under section 109. We believe that such a result is contrary to the intent of Congress and would have the capacity to do serious damage to the copyright owner's market. We therefore recommend that Congress either (1) amend section 109 to ensure that fair use copies are not subject to the first sale doctrine or (2) create a new archival exemption that provides expressly that backup copies may not be distributed. We express no preference as between the two options, and note that they are not mutually exclusive.

The first option would entail amending section 109(a) to state that only copies lawfully made *and lawfully distributed* are subject to the first sale doctrine. This proposed change would not preclude the distribution of copies made pursuant to the fair use doctrine since the exclusive right of distribution is equally subject to the fair use doctrine. It would, however, require that a separate fair use analysis be applied to the distribution of that copy.

The second option entails creating a new exemption for making backups of lawful copies of material in digital form, and amending section 117 to delete references to archival copies. The new exemption should follow the general contours of section 117(a)(2) and (b), and include the following elements: it should permit the making of one or more backup copies of a work. The copy from which the backup copies are made must be in digital form on a medium that is subject to accidental erasure, damage, or destruction in the ordinary course of its use. It should stipulate that the copies may be made and used solely for archival purposes or for use in lieu of the original copy. It should also specify that, notwithstanding the provisions of section 109, the archival copy may not be transferred except as part of a lawful transfer of all rights in the work. Finally, it should specify that the archival copies may not

be used in any manner in the event that continued possession of the work ceases to be rightful.

4. Contract Preemption

The question of contract preemption was raised by a number commenters who argued that the Copyright Act should be amended to insure that contract provisions that override consumer privileges in the copyright law, or are otherwise unreasonable, are not enforceable. Although the general issue of contract preemption is outside the scope of this Report, we do note that this issue is complex and of increasing practical importance, and thus legislative action appears to be premature. On the one hand, copyright law has long coexisted with contract law. On the other hand, the movement at the state level toward resolving questions as to the enforceability of non-negotiated contracts coupled with legally-protected technological measures that give right holders the technological capability of imposing contractual provisions unilaterally, increases the possibility that right holders, rather than Congress, will determine the landscape of consumer privileges in the future. Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change.

Mr. COBLE. Thank you, Ms. Peters. In a sense of fairness and equity, Ms. Peters consumed 6 minutes, so I will allow you all 6 minutes as well.

Mr. Ramos?

STATEMENT OF CAREY RAMOS, ESQ., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ON BEHALF OF THE NATIONAL MUSIC PUBLISHERS ASSOCIATION

Mr. RAMOS. Thank you, Mr. Chairman, and Members of the Subcommittee. My name is Carey Ramos.

I appreciate the opportunity to express the views of the National Music Publishers Association and its licensing affiliate, the Harry Fox Agency, concerning the section 104 report.

There has been a reference to a recent agreement between the NMPA and Harry Fox and the RIAA, and I would like to initially address that, because I think it's directly relevant to the subject of today's hearing.

We worked hard, since the Subcommittee's hearings last spring, to develop marketplace arrangements that will assist the launch of legitimate Internet music services. I am pleased to report that those efforts have borne fruit.

In October, we concluded a breakthrough agreement with the RIAA to provide a mechanism for Internet music businesses to obtain licenses to copyrighted musical works for use in subscription music services. In our negotiations, we were able to reach a compromise under which we have agreed to issue licenses to the RIAA's members, to enable them lawfully to use our works on their subscription music services without having to make royalty payments on a current basis, as the law requires.

We agreed to forego receiving royalty payments today on the understanding that the licensees will pay the full amount of royalties due once the rates are set on a retroactive basis.

For radio-style webcasting—and I want to emphasize this—we have expressly agreed not to seek mechanical licenses. The reason we believe on-demand streaming requires a mechanical license is that it involves the making of copies and it displaces record sales. Common sense says that if consumers are able to hear a song on demand—that is, whenever they want—they are less likely to go

out and buy that record. This displacement will have a direct and substantial effect on songwriters' and music publishers' income.

We have publicly stated that is our policy to license not only RIAA members but also other digital musical services that wish to negotiate comparable agreements. We have already concluded our first such agreement with Listen.com last month and are currently negotiating with other prospective licensees that are not affiliated with the RIAA.

Although the agreement does not establish a royalty rate for on-demand streams or limited downloads, it incorporates the framework already established by Congress for doing so. We will engage in good-faith negotiations to agree on industry rates. If negotiations do not result in agreement, the applicable rates will be established through arbitration, as provided by law.

Our agreements with the RIAA and Listen.com show that marketplace solutions work. We have reached a compromise that benefits the creators of music, the distributors of music, and the consumers of music by making a diverse catalog of music available to subscription services offering on-demand streams and limited downloads.

While there is much that we agree with in the Copyright Office report, I do wish to address one part of the report; that is the recommendation that Congress exempt so-called buffer copies of musical works that are made in the streaming process, because they supposedly have no economic value separate from a performance.

The report predates our recent agreements with RIAA and Listen.com and, unlike those agreements, does not distinguish between on-demand and radio-style streaming. This is a critical distinction. To the extent that the report recommends a statutory exemption from mechanical licensing for radio-style streaming, we respectively submit that no exemption is necessary.

Publishers have never required and have now expressly agreed not to require mechanical licenses for such streaming. To the extent, however, that the report may be construed to seek a statutory exemption for on-demand streaming, such legislation would seriously impair the copyright in musical works and deprive songwriters and music publishers of a vital source of licensing income.

The potential for the online delivery of music to displace record sales in fact was Congress' principal concern in enacting the DPRA in 1995. The legislative history of the DPRA makes clear that the act was intended to respond to a concern that "certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work."

An exemption for buffer copies made in on-demand streams would have just such an adverse effect. The resulting loophole in the law, moreover, would create an artificial incentive for the market to favor the streaming model, regardless of whether streaming is the optimal musical delivery technology from an efficiency or consumer standpoint.

It would be as though Congress determined in the 1960's that, in order to promote the nascent 8-track industry, the production of 8-track tapes should be exempt from mechanical royalties.

There is simply no reason to favor one technology over another by creating a particular statutory exemption, whereas here the technology chosen for exemption is one of several alternative technologies that are still evolving.

In closing, I want to thank the Subcommittee for considering the views of the NMPA and HFA. We hope this testimony has demonstrated the effectiveness of the marketplace in meeting the unique challenges faced by copyright owners and users in developing fair licensing and business models for Internet music delivery.

Thank you.

[The prepared statement of Mr. Ramos follows:]

PREPARED STATEMENT OF CAREY RAMOS

INTRODUCTION

Mr. Chairman and members of the Subcommittee, my name is Carey Ramos. I am here on behalf of the National Music Publishers' Association ("NMPA") and its licensing affiliate, The Harry Fox Agency ("HFA").

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For more than eighty years, NMPA has served as the leading voice of the American music publishing industry before Congress and in the courts.

HFA is the licensing affiliate of the NMPA. It provides an information source, clearing house and monitoring service for licensing musical copyrights, and acts as licensing agent for more than 27,000 music publisher principals, which in turn represent the interests of more than 160,000 songwriters.

I will address two subjects in my testimony: first, the deals that we have recently reached with the Recording Industry Association of America ("RIAA") and with Listen.com, an independent Internet music service and, second, the Copyright Office's Section 104 Report.

THE LANDMARK NMPA/HFA/RIAA AGREEMENT

We have worked hard since the Subcommittee's hearings last Spring to develop marketplace arrangements that will assist the launch of legitimate Internet music services. I am pleased to report that those efforts have borne fruit. On October 5, 2001, we concluded a breakthrough agreement with the RIAA for participating songwriters and publishers to provide a mechanism for Internet music businesses to obtain licenses to copyrighted musical works for use in subscription music services.

In our negotiations, we were able to reach a compromise under which we have agreed to issue licenses to the RIAA's members to enable them lawfully to use our works on their subscription music services, in the absence of a rate, without having to make royalty payments on a current basis as the law requires. We agreed to forego receiving royalty payments on a current basis, and to issue licenses nonetheless, on the understanding that the licensees will pay the full amount of royalties due once the rates are finally determined, on a retroactive basis.

We also agreed to settle the issue of rights by agreeing that "on-demand streams" and "limited downloads" are processes that entail the making and distribution of copies of musical works and, accordingly, constitute digital phonorecord deliveries (or "DPDs") within the meaning of Section 115 of the Copyright Act. An "on-demand stream," under the agreement, is a real-time digital transmission of a song using streaming technology (such as Real Audio or Windows Media Player) to a consumer who requests that song. A "limited download" is a download that can be played for a limited period of time or a limited number of plays. We anticipate that on-demand streams and limited downloads will take their place in the digital music marketplace alongside full downloads (for which compulsory licenses are already available at the current statutory mechanical rate). We expect some music service providers will choose to offer several—or all—of these services to their subscribers.

For radio-style webcasting, we have agreed not to seek mechanical licenses.[1]

The reason we believe on demand streaming requires a mechanical license is that it involves the making of copies and it displaces record sales. Common sense says that, if consumers are able to hear a song on-demand—that is, whenever they want, and as many times as they want—they are less likely to go out and buy that record. This displacement will have a direct and substantial impact on songwriters' and music publishers' income.

By settling the question of rights, the agreement will make licenses immediately available to new services and thus promote competition in the delivery of music over the Internet. To encourage such services to enter the on-line music marketplace, we have publicly stated that it is our policy to license not only RIAA members but also other digital music services that wish to negotiate comparable agreements. We have already concluded our first such agreement, with Listen.com, last month, and are currently negotiating with other prospective licensees.[2]

Under the agreement, we also have agreed to simplify and expedite the mechanical rights licensing process. The agreement provides for electronic "bulk" licensing to allow companies to obtain mechanical licenses quickly. The procedures will allow a potential licensee to request licenses for multiple titles at the same time. In order to facilitate the launch of services, licenses issued will be retroactive to the date of request. Moreover, for musical works owned by multiple copyright owners, HFA will issue a license if it represents any one of those owners. As a further undertaking, HFA also will attempt to arrange licenses of songs even when it does not represent any of the copyright owners. HFA's ability to serve as an information clearinghouse and as licensing agent for thousands of publishers will provide substantial benefits for licensees.

The agreement is non-exclusive—record companies and Internet music services are free to obtain compulsory licenses other than through HFA, and, while record companies that take licenses under the agreement may exercise their statutory authority to authorize Internet music services to distribute digital recordings of musical works, HFA and individual music publishers are also free to grant licenses directly to Internet music services.

Although the agreement does not establish a royalty rate for on-demand streams or limited downloads, it incorporates the framework already established by Congress for doing so.[3] We will engage in good faith negotiations with the record companies aimed at establishing such a rate, or rates. If negotiations fail, the applicable rate or rates will be established by a Copyright Arbitration Royalty Panel (or "CARP") convened by the Copyright Office. In the interim, however, the agreement allows licensees to launch their services now and pay the royalties due once rates are established.

Our agreements with the RIAA and Listen.com show that marketplace solutions work. We have reached a compromise that benefits the creators of music, by confirming their rights in on-demand streams and limited downloads and guaranteeing that royalties will be paid to them for the use of their works on a retroactive basis when rates are finally set. That compromise also benefits the licensees of the music by allowing them to launch and operate new businesses immediately with the comfort that they are fully licensed and will not be subject to claims of copyright infringement by participating music publishers. Consumers benefit, because the agreement makes a diverse catalogue of music available to subscription services offering on-demand streams and limited downloads.

THE SECTION 104 REPORT

In August 2001, the Copyright Office published a report (the "Report") in which it recommended that Congress exempt so-called "buffer" copies of musical works that are made in the streaming process from the compulsory license provisions of the Copyright Act, because such copies have "no economic value independent of the performance that [they] enable[]."[4]

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[1] Specifically, we agreed that "under current law the process of making streams that would qualify for a license under Section 114(d)(2) of the Copyright Act does not involve the making of a DPD, and thus does not require a mechanical license."

[2] Prior to making the agreement with RIAA, HFA entered into agreements with various Internet businesses—including MP3.com, Streamwaves.com, emusic.com, and many others—to issue mechanical licenses for diverse methods of on-line music delivery, including on-demand streaming, digital "locker" services, and downloads.

[3] *See* 17 U.S.C. § 115(c)(3)(B)-(D).

[4] DMCA Section 104 Report of the Copyright Office (August 2001) at 139. Regrettably, this part of the Report was based on an incomplete record. Questions concerning the status of "buffer" copies made during streaming first arose during the comment period. No testimony was taken from economic or technical experts in the field of on-line music delivery.

The Report predates our recent agreements with RIAA and Listen.com and unlike those agreements does not distinguish between on-demand and radio-style streaming. This is a critical distinction. To the extent that the Report recommends a statutory exemption from mechanical licensing for radio-style streaming, we respectfully submit that no exemption is needed. Publishers have never required, and have now expressly agreed not to require, mechanical licenses for such streaming. To the extent that the Report may be construed to seek a statutory exemption for on-demand streaming, however, such legislation would seriously impair the copyright in musical works and deprive songwriters and music publishers of a vital source of licensing income.

The Report correctly concludes that streaming involves the copying of musical works. The "aggregate effect" of streaming, it states, "is the copying of the entire [musical] work."[5]

The Report, however, then proceeds to consider whether so-called "buffer" copies made in the course of streaming are nevertheless a "fair use" of copyrighted music. Applying the factors codified in Section 107 of the Copyright Act, the Report concludes that, because two of the four factors (the transformative nature and economic value of the use) favor the user rather than the copyright owner, a "strong case" could be made that the making of a "buffer" copy in the course of streaming is a fair use not subject to the payment of royalties.[6] The law is crystal-clear, however—and the Report acknowledges—that the doctrine of fair use "is limited to copying by others which does not materially impair the marketability of the work which is copied."[7] In conducting the fair-use analysis, the law requires that consideration be given to whether, "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work."[8] Here, there can be no question that on-demand streams—which allow consumers to choose the songs they want, when they want to hear them—will displace record sales, and therefore directly affect "the marketability of the work that is being copied," or the "potential market for the copyrighted work," so as not to qualify as a fair use. Under these circumstances, it defies economic reality to say that "buffer" copies are fair use. Indeed, it would do violence to the fair use doctrine to do so.

The potential for the on-line delivery of music to displace record sales, in fact, was Congress's principal concern in enacting the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRA"). The legislative history of the DPRA states that the Act was intended to respond to the concern that "certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work."[9] Or, in the words of then-Register of Copyrights Ralph Oman, "[W]ill what you call the 'celestial jukebox' replace Tower Records and the corner outlet stores and their glitzy stock of CD's, tapes, and records?"[10]

Chairman Sensenbrenner put it this way: "[N]ew interactive services are being created which allow consumers to use their TV's and computers to order any recording at any time. These subscriber services threaten sales of CD's, records and tapes."[11]

The Report did not consider on-demand streams in its analysis. It appeared to address only radio-style webcasting (for which, as noted, we do not seek mechanical licenses in our agreements with the RIAA and Listen.com). Given the direct and substantial impact that on-demand streaming will have on record sales, there is no basis for concluding that "buffer" copies made in the course of streaming a song on demand are a fair use of the underlying copyrighted work.

Finally, the fair use doctrine is ill-suited to the inquiry and analysis undertaken by the Report here. It is an equitable doctrine, to be applied in fact-specific circumstances. To apply it broadly, without the benefit of a fully developed factual record, as the Report does, is inconsistent with the terms of Section 107.

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[5] Report at 132.
[6] Report at xxiv.
[7] Report at 138 (quoting *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 566–67 (1985)).
[8] Report at 139 (quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984)).
[9] S. Rep. No. 104–128 at 362 (1995).
[10] *Performers' and Performance Rights in Sound Recordings*, 103d Cong. 4 (1993) (statement of Ralph Oman, Register of Copyrights, accompanied by Marybeth Peters, Policy Planning Adviser to the Register of Copyrights).
[11] 141 Cong. Rec. H10, 098–108 at 10,103 (1995) (statement of Rep. Sensenbrenner).

The Report Does Not Take Into Account Recent Technical and Business Developments In Internet Music Delivery

Because it was not based on testimony from economists or experts in streaming, the Report also fails to consider the economic impact of new methods of on-line music delivery on the mechanical right. The Report assumes the existence of only two methods of on-line music delivery: radio-style streaming (or "webcasting" in the Report) and full downloads, by which a song is downloaded to the consumer's hard-drive and stored there permanently.

But these are only two methods of on-line distribution in a rapidly-expanding industry. Today, there are services poised to offer on-demand streams as well as radio-style webcasting. In addition, there are technologies that combine aspects of downloading and streaming. Certain media players make and store a complete copy of the streamed song in a file that remains accessible on the consumer's computer for an indefinite period of time. In addition, regardless of whether the consumer's PC automatically creates a stored version of the song, widely available software such as Total Recorder permits even the most unsophisticated consumer to make a perfect digital copy of a streamed song on his hard drive or a CD. (Total Recorder can be downloaded over the Internet for $11.95.[12]

Listen.com—one of the services that we have agreed to license—uses a new technology that downloads approximately 99% of a song to a user's hard drive, then streams the remaining 1% on demand. Other new technology allows consumers to listen to a song while it is downloading, implicating not only a copyright owner's reproduction right, but also his or her right to be compensated for the public performance of the work.

As these examples demonstrate, the line of demarcation between downloads and streams is already far from clear, and is likely to be further blurred as new technologies and business models develop. It would be unwise to codify an exception for a technology that is rapidly changing.

The resulting loophole in the law, moreover, would create an artificial incentive for the market to favor the streaming model, regardless of whether streaming is the optimal music delivery technology from an efficiency or consumer standpoint. It would be as though Congress determined in the 1960s, that, in order to promote the nascent 8-track industry, that production of 8-track tapes would not be subject to mechanical royalty payments. There is no reason to favor one technology over another by creating a particular statutory exemption where, as here, the technology on which the exemption is based is one of several alternative technologies that are still evolving.

THERE IS NO RISK OF "DOUBLE-DIPPING"

Those who would prefer to avoid payment for the on-line use of copyrighted musical works have been heard to assert that songwriters and music publishers are "double dipping" because they seek to be compensated for both the mechanical and the public performance value of their works. This argument ignores the express terms of the Copyright Act, which has long recognized that songwriters and music publishers possess several distinct rights in their works—including the right to reproduce and distribute copies of their songs (the mechanical right) and, separately, the right to perform those songs publicly. The Copyright Act also expressly entitles songwriters and music publishers to receive a royalty—a separate royalty—for the licensing of each of these rights.

In amending section 115 in 1995, Congress was concerned that digital transmissions of music would displace sales of physical phonorecords. Congress correctly determined that, apart from any performance value, consumers' ability to listen to particular songs on demand would be an effective substitute for purchasing those songs for their permanent collections. Thus, section 115 specifically defines a DPD as each individual delivery of a phonorecord, *"regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein."*[13]

The "double dipping" charge, therefore is seriously misleading. The rights to reproduce, distribute and publicly perform a work are separate and distinct rights

[12] See http://www.totalrecorder.com. Although the Report acknowledges the concerns of music publishers that, as a consequence of software such as Total Recorder, "streaming audio renders musical works vulnerable to digital copying" (Report at 146 & n.438), it does not consider those concerns in its fair use analysis or in its recommendation that Congress enact a statutory exemption for "buffer" copies.

[13] 17 U.S.C. § 115(d) (emphasis added).

under section 106 of the Copyright Act and have long been recognized as rights that may be independently owned and exercised. Indeed, the Act expressly provides that

> [a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.[14]

Regardless of whether the rights are held by different owners or the same owner, there are independent income streams flowing from the reproduction and distribution rights licensed under Section 115, on the one hand, and the separately licensed performance right, on the other. Congress did not alter this basic principle of music copyright law in amending Section 115 to cover digital transmissions—in fact, as noted above, it explicitly preserved the distinct income streams by providing that a digital transmission can constitute a DPD regardless of whether it also constitutes a performance. As Congress explained then,

> [t]he intention in [amending Section 115 to cover DPDs] is not to substitute for or duplicate performance rights in musical works, but rather to *maintain mechanical royalty income* and performance rights income for writers and music publishers.[15]

The separate exercise of the rights of reproduction, distribution and public performance is not unique to the music industry. The motion picture industry, for example, provides separate licenses for public display in theater, for pay-per-view and for DVD or video sales and rental. A person who pays to see a public performance of a movie in a theater is not entitled to a DVD or video copy of the movie without additional charge. Moreover, to include music in a motion picture or television program, a synchronization license to record the music on the soundtrack must be obtained; when the movie or the TV show is broadcast, a separate performance license—in addition to the synch license—is required.

The technology of the Internet allows on-line services to render a public performance at the same time that a song is reproduced and distributed to the consumer, in which case the reproduction and distribution rights and the public performance right are all implicated. That each of these rights may be involved in a single transaction should not deprive song owners of the benefits of each right.

CONCLUSION

In closing, I want to thank the Subcommittee for considering the views of the NMPA and HFA. And I am pleased to report the substantial progress that has been made toward launching fully licensed music services on the Internet. That progress is a direct result of the agreements we have reached with RIAA, Listen.com and others. The licenses we grant under the agreements will enable legitimate Internet music services to offer their customers the music that they love best—and will provide customers a legitimate alternative to unlicensed pirate services. At the same time, by confirming that on-demand streaming and limited downloads result in the creation of DPDs, the parties have ensured that songwriters and music publishers will be compensated at a reasonable rate for the value of their creative contributions. Under these agreements, the question of what rates Internet services should pay for the music will be determined through negotiations or, if necessary, in a CARP, under the auspices of the Copyright Office.

We hope this testimony has demonstrated the effectiveness of the marketplace in meeting the unique challenges faced by copyright owners and users in developing fair licensing and business models to provide consumers on-line access to copyrighted music, while ensuring that songwriters and music publishers receive reasonable compensation for the value of that music.

Mr. COBLE. Thank you, Mr. Ramos.

Mr. Sherman?

[14] 17 U.S.C. § 201(d)(2).

[15] 141 Cong. Rec. S11957 (1995) (emphasis added).

STATEMENT OF CARY SHERMAN, SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Mr. SHERMAN. Good afternoon. I am Cary Sherman, senior executive vice president and general counsel of the Recording Industry Association of America. And I'm grateful for the opportunity to present our views on the Copyright Office's study under section 104 of the Digital Millennium Copyright Act.

I would like to begin by congratulating the Copyright Office on the thoughtful and comprehensive report that it prepared. As I will detail in a moment, the careful analysis reflected in the office's report has already been helpful in bringing a measure of clarity to the difficult and challenging issues that the office confronted.

I would also like to thank this Subcommittee, under the leadership of Chairman Coble and Ranking Democratic Member Berman, for its careful and thorough examination and development of the law in this complex area over the past several years. We not only appreciate the expertise you have brought to these issues, but also the balanced manner in which you have considered them.

I'll devote most of my 5 minutes to one of the subjects addressed by the study: copies incidental to the digital performance of a musical work.

One of the most difficult issues we have faced in applying copyright law to the new digital environment has been the licensing requirements for on-demand streams and limited downloads offered as part of new subscription services.

On-demand streaming is the real-time transmission of songs chosen by the listener. Limited downloads refer to music files which are transferred to a user's computer but can only be accessed for a limited period of time.

Uncertainty about the licensing requirements for these services has been an impediment to the launch of digital music services. But since the release of the report, and in part because of the very helpful legal analysis set forth in it, RIAA, NMPA, and HFA have been able to agree on a common interpretation of the relevant provisions of the Copyright Act. And as a result, we agreed on a framework for licensing subscription music services.

That agreement is posted on our website, so that anyone with an interest in these issues can read for themselves every provision of our agreement.

In brief, the core elements of our agreement with the music publishers are that, consistent with the Copyright Office's report, the process of making on-demand streams through a subscription service, as well as the process of making limited downloads, from the making of the server copy to transmission and local storage involves the making of a DPD. Webcasting of the kind covered by the statutory license for sound recording performances does not involve the making of a DPD.

Consistent with the 1995 amendments to section 115, compulsory licenses to make on-demand streams and limited downloads are available under section 115 of the Copyright Act.

HFA will now issue licenses for on-demand streams and limited downloads through subscription services, even though there is pres-

ently no statutory royalty rate for on-demand streams and it has not been clear what royalty rate applies to limit downloads.

Our agreement contemplates that those questions will be answered by voluntary industry negotiations as authorized by section 115 or by arbitration if necessary. But as is the case with other compulsory licenses, services may commence operations in reliance on their licenses while the rate-setting process continues.

This agreement has many benefits. Most importantly, it will facilitate the immediate launch of licensed music services that will offer consumers a broad array of music and diverse methods of electronic music delivery.

Indeed, new licensing deals have been announced between record labels, Internet music services, and music publishers. A number of Internet music services have already launched, and a number of others are scheduled to launch within days or weeks. Legitimate services are finally commencing operations.

The agreement simplifies and expedites the process for licensing mechanical rights for subscription services. It provides for electronic bulk licensing to expedite the process, and licenses issued will be retroactive to the date of request.

Moreover, for musical works owned by multiple copyright owners, HFA will issue a license if it represents any one of those owners.

By resolving the legal uncertainties and providing a streamlined process for obtaining licenses, the agreement fosters competition in the nascent online music marketplace and represents the type of marketplace solution that Congress has urged to resolve these business and legal issues.

Turning briefly to the other major issues in the Copyright Office report, we concur wholeheartedly with the office's conclusion that no change should be made to the first sale doctrine in section 109. That provision is a limitation on the copyright owner's distribution right, not the reproduction right. It was plainly intended to apply to physical copies, where disposing of the copy means that the original is no longer retained. To extend section 109 to distribution by means of digital transmission when there's no meaningful way to ensure that the original has been destroyed would be to create a loophole that would undermine the fundamental objectives of the Copyright Act.

With respect to the issue of archival copying and the interplay between the first sale doctrine and the fair use doctrine, the office's suggestion that a court could conclude that copies lawfully made under the fair use doctrine may be freely distributed under section 109 is troubling, because, as the Copyright Office points out, such an interpretation would clearly do serious damage to the copyright owners market. It would have a significant adverse effect on the market for recorded music if someone could make copies of entire recordings, perhaps a large number of such copies, and distribute them, perhaps for a profit, merely because the copies ostensibly were made for personal or backup use.

This interpretation is so obviously incorrect, and it is so clear that Congress could not have intended such a result, that I think it unlikely that a court would ever adopt this mistaken view of the law.

Thank you again for the opportunity to present our views, and I'd be happy to respond to any questions you may have.

[The prepared statement of Mr. Sherman follows:]

PREPARED STATEMENT OF CARY SHERMAN

Good Afternoon. I am Cary Sherman, Senior Executive Vice President and General Counsel of the Recording Industry Association of America ("RIAA"), and I am grateful for the opportunity to present our views on the Copyright Office's study under Section 104 of the Digital Millennium Copyright Act.

I would like to begin by congratulating the Copyright Office on the thoughtful and comprehensive report that it prepared. The careful analysis reflected in the Office's report has already been helpful in bringing a measure of clarity to the difficult and challenging issues confronted in the report, and will undoubtedly continue to provide insights in the months ahead.

I would also like to thank this Subcommittee, under the leadership of Chairman Howard Coble and Ranking Democratic Member Howard Berman, for its careful and thorough examination and development of the law in the complex area over the past several years. The recording industry realizes and appreciates the expertise that this Subcommittee has brought to these issues, and we are grateful for the manner in which you have considered them.

I will devote most of my time this afternoon to one of the subjects addressed by the study: copies incidental to the digital performance of a musical work. This has been an uncertain area of copyright law, and that uncertainty has been an impediment to the launch of digital music services. It was in an effort to eliminate that uncertainty that we petitioned the Office last November to address in a rulemaking the question of whether streams implicate the reproduction right, as well as other questions concerning the copyright status of certain kinds of transmissions made by digital music services. In its report, the Office discussed some of these questions, although it ultimately concluded that its answers to these questions were not so clear that they could be relied upon to make important business decisions.

But the Office's report *did* provide a very helpful legal analysis and perspective that has facilitated an emerging consensus on some of the vexing legal issues confronting the music industry and its partners in the online music market. Since the release of the report, RIAA, the National Music Publishers Association ("NMPA") and its licensing affiliate The Harry Fox Agency ("HFA") have been able to agree on a common interpretation of the relevant provisions of the Copyright Act, on the basis of which we have reached agreement on a framework for licensing subscription music services. This marketplace agreement became effective on October 5, 2001, and promptly thereafter, we posted it on our web site so that anyone with an interest in these issues could read for themselves every provision of our agreement. Not only is the agreement consistent with the legal analysis set forth in the Copyright Office's report, but it is also a very important step in giving consumers widespread online access to the music they love.

A copy of the agreement and a joint explanatory letter signed by representatives of the Recording Industry Association of America, the National Music Publishers Association, and the Harry Fox Agency is attached for the hearing record.

I will give you some more details of this agreement in a moment, but first, so as to place it in context, I should give you a little background concerning music copyright law. Although the members of this Subcommittee may already be experts in this arcane area of the law, I will review the basics of the copyright law as it applies to music rights for the sake of completeness of the hearing record.

Background

Music involves two distinct copyrighted works: a "musical work" is the notes and lyrics of a song, and a "sound recording" is a particular recorded performance of a song. The copyrights in musical works tend to be owned by music publishers, and the copyrights in sound recordings tend to be owned by record companies. Copyright law gives the owners of both of those copyrights various exclusive rights.

In the case of musical works, one of those rights, the "performance right," allows the copyright owner to control the playing of the work for the public, either live or by transmission (whether a broadcast, Internet transmission or otherwise). Performance licenses typically are obtained from performing rights organizations such as ASCAP and BMI.

Other of those rights are the "reproduction" right and "distribution" right. Since 1909 there has been a compulsory license—called the "mechanical" compulsory license—that has allowed record companies and others to reproduce copies of recorded musical works and distribute them to the public. This compulsory license is codified

in Section 115 of the Copyright Act. The vast majority of music publishers use the services of HFA to administer their mechanical licensing.

In 1995, Congress clarified the application of the mechanical compulsory license to digital music services. To do that, Congress recognized a type of transmission called a "digital phonorecord delivery" or "DPD." A DPD is essentially the distribution of a copy by means of a digital transmission. A compulsory license under Section 115 includes the right to make DPDs.

Subscription digital music services are interested in offering consumers diverse methods of electronic music delivery. "On-demand streams" are one kind of offering that services would like to make available to consumers. These are real-time transmissions of recordings selected by users and delivered when the users want. The legal issue involving on-demand streaming has been that, while streaming creates the user experience of a performance, the operation of a streaming service involves making several different kinds of reproductions. So-called "server copies" reside on the computers used by a service to make transmissions. Other copies, called "buffer copies" in the Office's report, reside briefly on a user's computer. In between, many "transient" reproductions may be made.

Until recently it has not been clear whether any of these reproductions are technically "copies," and hence DPDs, for purposes of copyright law. And if they are DPDs, it has not been clear how the mechanical compulsory license applies. In particular, there has been no royalty rate for these so-called "incidental DPDs."

Services are also likely to offer what we call "limited downloads," which are downloads that can only be played for a limited time, such as the duration of a subscription, or a limited number of times. It likewise has not been clear how the mechanical compulsory license applies to limited downloads.

The Copyright Office's study concluded that streams *do* implicate the reproduction right, implying that they are DPDs. The Office found that when a stream is licensed as a performance, certain reproductions made in connection with that performance probably qualify as a fair use, although it said that conclusion could not be relied upon with confidence in making important business decisions like whether to launch a service. Our agreement with NMPA and HFA will allow licensing of these activities, and those licenses will give companies the assurance they need to launch services.

The Agreement

Let me turn now to the core elements of our agreement with the music publishers:

Consistent with the Copyright Office's report, RIAA, NMPA and HFA have agreed that the process of making on-demand streams through a subscription service, as well as the process of making limited downloads, from the making of a server copy to transmission and local storage, involves the making of a DPD. Conversely, we agreed that webcasting of the kind covered by the statutory license for sound recording performances does not involve the making of a DPD. We also recognized, that consistent with the 1995 amendments to Section 115, compulsory licenses to make on-demand streams and limited downloads are available under Section 115 of the Copyright Act. Just as HFA administers compulsory licensing for physical product configurations, HFA now will issue licenses for on-demand streams and limited downloads through subscription services. To the extent that they have not done so already, we expect that record companies that have licensed their recordings to digital music services together with related mechanical rights will seek and obtain such licenses very shortly.

NMPA and HFA also have announced that it is their policy to license not only RIAA members but also other digital music services that wish to negotiate comparable agreements. Thus, whether a service obtains its licenses through an RIAA member or directly from HFA, the agreement assures that an entity seeking to offer legitimate services will have the opportunity to obtain the appropriate licenses, and avoid the uncertainty that previously impeded the launch of services, promptly and through procedures that are not burdensome. By resolving disagreements over the nature and scope of the licenses needed by services and providing a streamlined process for obtaining the necessary licenses, the agreement also fosters competition in the nascent online music marketplace.

I said that there has been no statutory royalty rate for on-demand streams, and it has not been clear what royalty rate applies to limited downloads. Our agreement contemplates that those questions will be answered by voluntary industry negotiations as authorized by Section 115 of the Copyright Act, or by arbitration if necessary. But, as is the case with other compulsory licenses, services may commence operations in reliance on their licenses while the rate-setting process continues. Although we intend to begin rate negotiations in the near future, the final determination of a statutory rate may take a while, so RIAA agreed to make an advance pay-

ment to HFA as a sign of good faith and to ensure that music publishers and their songwriters did not have to wait until a final rate is determined before receiving payment for the use of their musical works in subscription services.

This agreement has many benefits:

- Most important, the agreement will facilitate the immediate launch of licensed music services that will offer consumers a broad array of the music they love and diverse methods of electronic music delivery. The agreement assures that an entity seeking to offer legitimate services across this range of options will have the opportunity to obtain the appropriate licenses promptly and through procedures that are not burdensome. Indeed, the proof is in the pudding. New licensing deals have been announced between record labels, Internet music services and music publishers; a number of Internet music services have already launched; and a number of others are scheduled to launch within days or weeks. Legitimate services are finally commencing operations.
- The agreement will benefit both record companies and Internet music services in launching subscription services on the Internet. The agreement is nonexclusive, so Internet music services will have the option of obtaining licenses directly from HFA or individual publishers, or seeking authorization from record companies that take licenses under the agreement.
- The agreement resolves legal uncertainties that have impeded the licensing of musical works for subscription services in a manner consistent not only with the law, but also Congress' manifest intent in 1995 when it made clear that the compulsory license for musical works extends to digital delivery. The agreement thus clears the way for more productive negotiations of terms and rates of royalty payments.
- The agreement confirms that the compulsory mechanical license provisions of the Copyright Act are applicable not only to digital download services (i.e. selling recordings online just as they are sold on physical media), but also to the newer subscription service business models. This will enhance the availability of new delivery options and business models from which consumers can choose.
- It is clear that server copies will be licensed under the agreement and that they are covered by the compulsory mechanical license provisions of the Copyright Act. Having ready access to licenses that include the right to make server copies will be particularly reassuring for companies seeking to launch services.
- The agreement simplifies and expedites the process for licensing mechanical rights for subscription services. It provides for electronic "bulk" licensing to allow companies to obtain mechanical licenses very quickly. To facilitate the launch of services, licenses issued will be retroactive to the date of request. Moreover, for musical works owned by multiple copyright owners, HFA will issue a license if it represents any one of those owners, subject to the licensee paying the non-HFA co-owner its share of the royalties directly.
- By resolving uncertainties over the nature and scope of the licenses needed by services and providing a streamlined process for obtaining the necessary licenses, the agreement fosters competition in the nascent online music marketplace.
- The agreement provides a framework to establish fair royalty rates, while ensuring that services can launch and operate in the interim. We have always been willing to pay a fair royalty for the use of musical works. But it has been difficult to agree on what that is in the abstract. In the absence of legitimate music subscription services in the marketplace, offering real consumers real content in exchange for real dollars, we haven't had the marketplace experience that would facilitate the kind of analysis leading to an agreed rate structure. But legitimate music subscription services couldn't launch, and provide us the needed marketplace experience, in the absence of a license. Under the agreement, subscription services can go into business while the royalty rate is being negotiated among the affected industries. Should we fail to agree on a fair royalty rate, we will rely on the arbitration provisions of Section 115 of the Copyright Act. Once a royalty rate is set, whether by negotiation or arbitration, payments will be made retroactive to the date the subscription services went into business.
- The agreement represents the type of marketplace solution that Congress has urged to resolve these business and legal issues.

- Having legitimate digital music services available in the marketplace sooner rather than later is very important to our continuing efforts to stem the tide of online piracy. We recognize that legal enforcement action alone will not put an end to the proliferation and growing use of pirate services. This agreement will allow record companies and their licensees to offer legitimate alternatives.

First Sale Doctrine

I would also like to address briefly the Office's discussion of the first sale doctrine. We concur wholeheartedly with the Office's conclusion that the reproduction of a new copy by means of a digital transmission is so different from the physical distribution of an existing copy that Section 109 should not be changed to address digital transmissions. Section 109 is a limitation on the copyright owner's distribution right, not his or her reproduction right. It was plainly intended to apply to physical copies, where disposing of the copy means that the original is no longer retained. To extend Section 109 to distribution by means of digital transmission, when there is no meaningful way to ensure that the original has been destroyed, would be to create a loophole that would undermine the fundamental objectives of the Copyright Act.

Archival Copies

The other major part of the report concerns archival copying, and focuses on the interplay between the first sale doctrine and the fair use doctrine. The Office's suggestion that a court could conclude that copies lawfully made under the fair use doctrine may be freely distributed under Section 109 is troubling. It is troubling because, as the Copyright Office points out, such an interpretation would clearly do serious damage to the copyright owner's market. We hear constantly that it is a fair use for someone to reproduce our sound recording products in their entirety for personal or backup use. Whether or not that may be true in any particular situation, it should be clear to everyone that it would have a significant adverse effect on the market for recorded music if someone could make copies of entire recordings—perhaps a large number of such copies—and distribute them—perhaps for profit—merely because the copies ostensibly were made for personal or backup use. If a court were to adopt the misguided interpretation referred to by the Office, I have no doubt that every piracy case we pursue would get bogged down in this issue as even street vendors selling counterfeit CDs claimed they were just disposing of copies made for fair use.

This interpretation is so obviously incorrect, and it is so clear that Congress could not have intended such a result, that I think it unlikely that a court would ever adopt this mistaken view of the law.

In addition, I think that creating a new exemption would be a real mistake. We already worry about new consumer electronics devices with hard drives capable of storing the equivalent of hundreds of CDs of recorded music, either ripped from CDs, or more often, I fear, downloaded from infringing peer-to-peer systems. If Congress were broadly to sanction "archival" copying of all copyrighted works, such devices would proliferate, and inevitably be equipped with digital outputs and probably direct Internet connections, so that they could serve as engines of piracy that would make Napster and the current generation of peer-to-peer systems look tame by comparison.

The Copyright Office's report addressed a number of important policy issues that should receive thoughtful review. We welcome careful consideration of these issues, and look forward to playing a part in it.

Thank you again for the opportunity to present our views, and I would be happy to respond to any questions you may have.

AGREEMENT

This agreement (the "Agreement"), dated as of October 5, 2001 ("Effective Date"), is made by and between the Recording Industry Association of America, Inc. ("RIAA"), on the one hand, and National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA"), on the other (all of the foregoing collectively referred to as the "Parties").

WHEREAS, record companies desire to offer to consumers, or authorize others to provide to consumers, certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works widely available to consumers by licensing such services;

WHEREAS, while the Parties have differed concerning certain legal and procedural questions implicated by the licensing of musical works for use in such services, record companies have always believed that musical work copyright owners should receive for the use of musical works in digital music services a fair royalty that reasonably reflects the value of the use of those works, irrespective of the particular rights of the copyright owner applicable to that use, and music publishers have always believed that their copyrighted works should be made available through such services for fair compensation;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and certain record companies may prefer to make business decisions concerning the launch of Covered Services (as defined below) with greater assurance concerning the legal status of such services;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to record companies and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of their differences and to facilitate the expeditious and widespread launch of digital music services, the Parties have reached this Agreement with respect to terms pursuant to which RIAA member record companies may obtain licenses to make and authorize On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Covered Services. Any member of RIAA that seeks to use, or authorize the use of, a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of one or more Covered Services may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States (including the territories and possessions thereof), where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any member of RIAA that obtains a License hereunder is referred to herein as a "Participating RIAA Member." Any member of NMPA or HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating NMPA/HFA Publisher." The terms "Participating RIAA Member" and "Participating NMPA/HFA Publisher" are limited to such entities and their majority-owned subsidiaries.

1.5. Any digital music service that is majority owned by one or more RIAA members in the aggregate shall be entitled directly to obtain a License hereunder, and so shall be treated as a "member of RIAA" for purposes of Section 3.1. If such a service either obtains a License directly or is authorized under a License hereunder to make On-Demand Streams and/or Limited Downloads through Covered Services, such service shall be treated as a "Participating RIAA Member" for all purposes of this Agreement.

2. Covered Deliveries.

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that the Participating RIAA Member also obtain a license for such other transmissions made using such server reproductions. It is understood that this Agreement does not address or extend to any performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used for promotional purposes, provided that the applicable Participating RIAA Member shall be deemed likewise to authorize the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work.

3. Licensing Process.

3.1. Commencing on the Effective Date, a member of RIAA may submit License requests in electronic form, either individually or batched, and either for On-Demand Streams and/or Limited Downloads alone or in combination with other configurations, substantially in accordance with Exhibit A. Promptly after the Effective Date, during the opt-out period described in Section 3.2, the Parties shall arrange discussions between appropriate personnel of HFA and of certain RIAA members concerning electronic licensing procedures, with the goal of refining and testing HFA's electronic licensing procedures so that they can be used readily for the issuance of mechanical licenses expeditiously following the completion of such opt-out period, and with the goal of enhancing such procedures so that they later can be used readily by RIAA members to request and obtain mechanical licenses for all configurations for which they desire licenses in a single request. In addition, a member of RIAA may submit License requests by other means generally accepted by HFA, including but not limited to SirNet (for so long as it is available), HFA's new web-based licensing system (when it becomes available), and HFA's standard paper form (but only using paper forms for complex License requests (e.g., requests involving medleys or samples), in limited numbers during times when electronic licensing capabilities are unavailable, or at other times in numbers that are generally consistent with such RIAA member's past use of paper forms, and in any case in numbers that do not exceed what HFA can reasonably be expected to process under the

circumstances). HFA may modify its license request and license forms from time to time, provided that it gives reasonable notice thereof to RIAA and Participating RIAA Members and such modifications do not unreasonably affect the ability of Participating RIAA Members to submit license requests and obtain licenses. License forms may be issued electronically or in paper form, but when a Licensee submits a License request in electronic form in accordance with this Section 3.1, HFA shall, promptly after processing the License request, return to such Licensee an electronic file substantially in accordance with Exhibit A, with (1) the addition of that information indicated in Exhibit A as being "output" fields, (2) the addition of information, other than individual publisher share information, to complete any blank optional fields in the request, to the extent that such information is available in HFA's databases and is matched to the request in the License issuance process, (3) the substitution of information concerning HFA publisher-principal names where such information in HFA's databases is different from that in the request, and (4) the aggregated share of Participating NMPA/HFA Publishers. If an RIAA member submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with such RIAA member to provide the information necessary to enable a License to be issued, and if such RIAA member resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to NMPA, HFA and music publishers of having License requests submitted promptly, and the importance to RIAA and record companies of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher-principals is subject to the approval of the relevant publisher-principal. HFA shall not require its publisher-principals to opt in to this Agreement either before or after commencing to issue Licenses, but HFA may establish an opt-out period before commencing to issue Licenses, provided that such period ends not later than six (6) weeks following the Effective Date. If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. During the opt-out period described in Section 3.2, HFA shall notify RIAA weekly of HFA publisher-principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement. Thereafter, through December 31, 2002, HFA shall notify RIAA quarterly of HFA publisher-principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement.

3.3. HFA shall issue mechanical licenses for DPD configurations (including but not limited to Licenses under this Agreement) with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue mechanical licenses on their behalf, HFA will not issue such licenses. In the case of a mechanical license issued as descibed in this Section 3.3, a Participating RIAA Member shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by the Participating RIAA Member on or after the Effective Date in accordance with Section 3.1. To the extent that the Participating RIAA Member makes or authorizes On-Demand Streams and Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, NMPA and HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Subject to Section 3.3, HFA shall also accept License requests to make On-Demand Streams and Limited Downloads through Covered Services of musical works as to which no HFA publisher-principal has any ownership interest or control, in whole or in part, and for which a License is not otherwise available under this Agreement. In such a case, HFA shall use commercially reasonable efforts to secure the requested Licenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this Agreement. (Non-HFA publisher-principals who grant Licenses through this arrangement shall be re-

ferred to as "Participating Independent Publishers".) In addition to any commission charged to the Participating Independent Publisher, HFA may charge the relevant Participating RIAA Member a one-time administrative fee of ninety-five dollars ($95) for each publisher that agrees to become a Participating Independent Publisher (it being understood that no such administrative fee shall be payable for any subsequent Licenses issued on behalf of that Participating Independent Publisher to any Participating RIAA Member), unless the Participating Independent Publisher also authorizes HFA to grant mechanical licenses other than Licenses under this Agreement, in which case no such fee shall apply. The Advance Payment described in Article 4 may be applied to such administrative fee when payable by a Participating RIAA Member specified by RIAA, and HFA shall provide to RIAA or an independent accounting firm designated by RIAA sufficient information concerning liability for such administrative fee to allow reconciliation of the Advance Payments as described in Section 4.4. When HFA arranges Licenses from Participating Independent Publishers pursuant to this Section 3.5, HFA shall collect and distribute mechanical royalties to such Participating Independent Publisher (or other authorized payees) unless the Participating RIAA Member requests to make such payments directly.

3.6. It is understood that compilations of data supplied by HFA in electronic form pursuant to Section 3.1, except to the extent that they consist of data provided by the relevant Participating RIAA Member pursuant to Section 3.1, are proprietary in nature and shall not be used by the recipient Participating RIAA Member to engage in business activities in competition with HFA or for any purpose other than to request and administer licenses issued by HFA and/or other licenses such Participating RIAA Member acquires with respect to the same works or other works owned or controlled by the same copyright owners, and shall not be disclosed by the recipient Participating RIAA Member to any other party except insofar as it is reasonably necessary to disclose specific data relating to particular works for the purpose of requesting or administering licenses issued by HFA and/or other licenses such Participating RIAA Member acquires with respect to the same works or other works owned or controlled by the same copyright owners.

3.7. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude an RIAA member or digital music service from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude any digital music services from seeking, or HFA or any of its publisher-principals from granting, direct licenses to digital music services, including without limitation Covered Services, on whatever terms might be agreed upon between the relevant parties, and it is the intention of HFA to make such licenses widely available as described more fully in a press release to be issued by HFA. By taking Licenses pursuant to this Agreement, Participating RIAA Members will be able to facilitate on a prompt and widespread basis the availability of music over the Internet through Covered Services.

4. Advance Payment.

4.1. Within thirty (30) days after the Effective Date, RIAA, on behalf of Participating RIAA Members (including their licensees), shall pay to HFA a non-refundable advance royalty payment of one million dollars ($1,000,000) in the aggregate ("Advance Payment"). If, by the second anniversary of the Effective Date, there has then been no final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, RIAA, on behalf of Participating RIAA Members (including their licensees), shall each month pay to HFA a supplementary Advance Payment of sixty-two thousand five-hundred dollars ($62,500) in the aggregate.

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, RIAA may terminate this Agreement upon thirty (30) days advance written notice to NMPA and HFA. In the event RIAA does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Participating RIAA Members thereafter to obtain new licenses under 17 U.S.C. § 115. Effective at the second anniversary of the Effective Date or any time thereafter, any Participating RIAA Member may opt out of this Agreement upon thirty (30) days advance written notice to each of the Parties. In the event a Participating RIAA Member does so, (1) the provisions of this Agreement thereafter shall not apply to such Participating RIAA Member except as provided in Article 7, and (2) all Licenses previously issued to such Participating RIAA Member under this Agreement shall terminate at such time, without prejudice to

the right of such Participating RIAA Member thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by either RIAA or one or more Participating RIAA Members, (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under new licenses for On-Demand Streams and Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination to the Participating RIAA Members whose Licenses were terminated. In addition, in the event a Participating RIAA Member that is one of the five "major record companies" (as that term is commonly understood, including any successors thereto and the subsidiaries thereof) so opts out of this Agreement, RIAA's monthly supplementary Advance Payments under Section 4.1 thereafter shall be reduced proportionately, based on the number of major record companies at such time (e.g., if there are then five major record companies and one opts out, RIAA's monthly supplementary Advance Payments shall be reduced by twenty percent (20%)). In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of RIAA's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of RIAA's monthly supplementary Advance Payments under Section 4.1 shall be restored, and RIAA shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to RIAA), as well as to any Participating Independent Publishers pursuant to Section 3.5. Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Participating RIAA Members under this Agreement. Such Advance Payments shall be applied to the accounts of individual Participating RIAA Members as specified by RIAA, or an independent accounting firm designated by RIAA, by written notice to HFA within 45 days after the date of such final non-appealable determination of royalty rates. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Participating RIAA Members identified by RIAA, under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped, unless RIAA notifies HFA of a different allocation of the Advance Payments among the accounts of Participating RIAA Members from time to time. HFA shall provide to RIAA or an independent accounting firm designated by RIAA sufficient accounting information to allow payments between RIAA and Participating RIAA Members, or vice versa, as necessary for each Participating RIAA Member ultimately to have paid to RIAA a net amount equal to that portion of the Advance Payments recouped by royalties actually owed by such Participating RIAA Member hereunder.

4.5. At the request of HFA, with RIAA's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Participating RIAA Members to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through negotiation or by the CARP, and may comprise separate royalty rate components for distinct uses of the musical work authorized by the License.

The Parties shall meet to negotiate royalty rates in good faith, with the goal of concluding such negotiations promptly after the launch of Covered Services, and if an agreement is reached, jointly petition the U.S. Copyright Office for its adoption pursuant to 37 C.F.R. §251.63(b). NMPA reserves its right to seek interest as a part of such royalty rate determination. RIAA reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear which royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

6. Accounting and Payment.

6.1. Beginning with the issuance of a License, a Participating RIAA Member will be required to account to HFA on a quarterly basis for activity under such License, 45 days after the close of each quarter, providing information comparable to that presently provided for physical products, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Without limitation, quarterly reports shall include a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by the Participating RIAA Member in its License request), and shall identify the specific Covered Services in which such On-Demand Streams and Limited Downloads were made. Each Participating RIAA Member shall preserve all usage and financial data that reasonably should be expected to be relevant, upon the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to require that each Covered Service it has authorized hereunder to make On-Demand Streams and Limited Downloads does the same. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, each Participating RIAA Member shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, each Participating RIAA Member shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, NMPA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, a Participating RIAA Member shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated or authorized by such Participating RIAA Member (but not any personally identifying information), which data is regularly gathered or compiled by such Participating RIAA Member or provided to such Participating RIAA Member by its licensees with the right to disclose such data to HFA hereunder; provided that a Participating RIAA Member may provide any such data to HFA in whatever form it is available to such Participating RIAA Member in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with the Participating RIAA Member the types of such data the Participating RIAA Member has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Participating RIAA Members shall not be required to provide, data that (given the volume and form of such data, the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and the Participating RIAA Member, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to a Participating RIAA Member and can be disclosed to HFA hereunder, at the request of HFA, a Participating RIAA Member shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated or authorized by such Participating RIAA Member during the reporting period; provided that any such information relating to a

Covered Service operated by a Participating RIAA Member shall be subject to an appropriate confidentiality restriction, and any such information provided to a Participating RIAA Member by a third party shall be subject to any applicable confidentiality and other contractual use restrictions. Notwithstanding the foregoing, to the extent that information requested by HFA under this Section 6.2 is subject to existing, proposed or future confidentiality restrictions that would preclude its disclosure to HFA, the relevant Participating RIAA Member shall in good faith seek the consent of the party that is the source of such information to disclose such information to HFA, subject to appropriate confidentiality restrictions.

7. Term. The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, RIAA member companies may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 3.6, 4.2, 4.4 and 4.5, and of Articles 6 and 7, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. Legal Framework for Agreement.

8.1. Subject to the other provisions of this Article 8, in order to settle issues in dispute and avoid litigation, provide assurance to record companies seeking to launch digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that under current law the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no Party, no Participating RIAA Member and no Participating NMPA/HFA Publisher shall take a position contrary to or inconsistent with Section 8.1, or lend support or resources,

financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no Party, no Participating RIAA Member and no Participating NMPA/HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, a Participating RIAA Member or Participating NMPA/HFA Publisher shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties, Participating RIAA Members and Participating NMPA/HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, RIAA and Participating RIAA Members may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, NMPA, HFA and Participating NMPA/HFA Publishers may participate in the litigation of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by RIAA and/or a Participating RIAA Member, other than that pending case in the Southern District of New York captioned Rodgers & Hammerstein Organization v. UMG Recordings, Inc., involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, neither NMPA nor HFA shall participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c).

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Participating RIAA Members shall not be entitled to a refund of any monies paid prior to such date.

8.6. This Agreement is entered into in settlement and compromise of certain disputes among the Parties and to clarify certain aspects of the licensing of On-Demand Streams and Limited Downloads. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, other than a Participating RIAA Member or Participating NMPA/HFA Publisher, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third-party beneficiary rights in any party other than Participating RIAA Members and Participating NMPA/HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On-Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

9. Copyright Office Proceedings.

9.1. RIAA and NMPA promptly shall file in the Copyright Office, in the Mechanical and Digital Phonorecord Delivery Compulsory License rulemaking proceeding (docket number 2000–7) (the "Proceeding"), an appropriate mutually agreeable document (the "Joint Statement") signed by representatives of both RIAA and NMPA and (1) explaining that they have entered into this Agreement to resolve certain differences between them and enable the expeditious launch of subscription music services; and (2) describing the material terms of this Agreement (including without limitation the agreement in Section 8.1). Unless the Parties agree otherwise, the Joint Statement shall not address the question of whether the Copyright Office

should or should not proceed with the Proceeding, and none of the Parties shall use the existence of the Agreement to argue to the Copyright Office that the Office should or should not proceed with the Proceeding.

9.2. Either in the Joint Statement, in joint comments submitted in response to the Copyright Office's Notice of Proposed Rulemaking dated August 28, 2001, or in a separate petition signed by representatives of both Parties to be filed in the Copyright Office promptly after the Effective Date, RIAA and NMPA shall request that the Copyright Office amend 37 C.F.R. § 201.18 to facilitate the licensing process for digital music services by addressing in a mutually agreeable manner such procedural issues as:

(a) Permitting combined notices of intention;

(b) Permitting service of notices of intention on the copyright owner's agent, and designating HFA as agent for the receipt of such notices;

(c) Eliminating the requirement that officer/director information be provided for publicly traded companies and their subsidiaries;

(d) Permitting notices of intention to be signed by any authorized representative of the licensee;

(e) Permitting mailing to a known correct address of the copyright owner; and

(f) Permitting the service of notices of intention by regular mail.

10. Congress. As soon as practicable after the Effective Date, and before any relevant congressional hearings then scheduled, if possible, the Parties shall draft and submit a mutually agreeable letter to appropriate members of Congress describing this Agreement and the benefits thereof.

11. Memoranda of Understanding. Promptly after the Effective Date, HFA and RIAA shall commence good-faith negotiations to (1) revise and renew for an additional year the Memorandum of Understanding dated September 21, 2000 (the "MOU") concerning interim licenses for DPDs, the revisions to address updated licensing procedures consistent with the licensing procedures to be implemented under this Agreement, and (2) enter into a second Memorandum of Understanding concerning certain licensing, payment and additional operational issues of mutual concern to HFA and RIAA members, which issues shall include:

(a) record companies' payment to HFA of 100% of royalties due for a particular musical work regardless of whether HFA acts as an agent for all owners of such work;

(b) record companies' provision of album label copy to HFA in order to facilitate the licensing process; and

(c) what information concerning publisher names and shares appropriately should be provided by HFA to Participating RIAA Members, and the appropriate confidentiality protections therefor.

Pending completion of such negotiations, HFA will continue to issue "Interim DPD Licenses" as described in the MOU in accordance with the practice that has developed under the MOU.

12. Economic Data. In order to help the Parties better understand and evaluate emerging business models for digital music services, RIAA and NMPA shall jointly hire an independent accounting firm to collect from Participating RIAA Members on a confidential basis information concerning the economics of emerging subscription service business models and report composite information to RIAA and NMPA for the duration of this Agreement.

13. Security. If RIAA or any Participating RIAA Member learns of any substantial (in terms of number of musical works affected, number of copies or prevalence) circumvention of security measures used by Covered Services resulting in unauthorized copying or distribution of sound recordings of musical works by authorized or unauthorized users of Covered Services, RIAA and/or the Participating RIAA Member shall use commercially reasonable efforts promptly to notify HFA of such unauthorized activity; provided, however, that RIAA and Participating RIAA Members shall be liable for damages for breach of this Article 13 only if, and to the extent, that they themselves are liable for direct, contributory or vicarious copyright infringement under applicable U.S. law, and in such case such damages shall be only those payable for such infringement.

14. Electronic Reporting. The Parties agree to work together in good faith to implement means whereby accounting information relating to Licenses will be provided to HFA in electronic, machine-readable form.

15. Publicity. RIAA and NMPA will issue a joint press release announcing this arrangement. In their communications to their members concerning this Agreement, the Parties shall recommend that their members avail themselves of this Agree-

ment. The Parties confirm that, subject to Section 8.6, this Agreement is not confidential.

16. Miscellaneous.

16.1. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

16.2. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

16.3. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

16.4. No Effect on Other Agreements. Without limitation, this Agreement shall not terminate, supersede, limit or otherwise affect the enforceability of, or the rights of any of the respective parties to, any of the following agreements: (1) the Settlement Agreement dated as of October 17, 2000 between HFA, MPL Communications, Inc. and Peer International Corporation, on the one hand, and MP3.com, Inc., on the other, and any amendments thereto; (2) the Governing Agreement dated as of October 2000 between HFA, MPL Communications, Inc. and Peer International Corporation, on the one hand, and MP3.com, Inc., on the other, and any amendments thereto; (3) the Digital Phonorecord Delivery License dated January 15, 1999 between HFA and Emusic.com Inc., and any amendments thereto; and (4) the Amendment Agreement dated November 2000 between HFA and Emusic.com Inc., and any amendments thereto.

16.5. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

16.6. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

Edward P. Murphy
President and CEO, NMPA

Hilary B. Rosen
President and CEO, RIAA

Gary Churgin
President and CEO, HFA

Cary Sherman
Senior Executive Vice President
and General Counsel, RIAA

EXHIBIT A

I. HFA/Listen Electronic License Request

II. & Output File Layout: Field Explanations

	Field	Type: *Mandatory (M) Optional (O) Conditional (C)*	Explanation	Example
1	**Manufacturer Number**	M	Account number assigned by HFA to Licensee	M12345
2	**Transaction Date**	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	**Manufacturer Request Number**	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	**Label Name**	M	The name of the record label that produced the applicable recording	Epic
5	**ISRC Code**	M	*International Standard Recording Code*. ISRC code assigned to the recording by the record label.	USSM19804780
6	**Playing Time - Minutes**	M	The number of minutes in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 005
7	**Playing Time - Seconds**	M	The number of seconds over the last full minute in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 52
8	**Artist**	M	The name of the artist performing the applicable recording	John Lennon, Paul McCartney

9	**Song Title**	M	Title of work for which a License is requested	Yesterday
10	**A/K/A Song Title**	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	**ISWC Code**	O	*International Standard Musical Work Code.* Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801
12	**HFA Song Code**	O	Identifier assigned by HFA to identify a work uniquely	Example: P12345
13	**Songwriter(s)**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	**Publisher Name**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
15	**HFA Publisher Number**	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	**Publisher Share**	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670
17	**Catalog Number**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
18	**Album (physical product) Title**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The title of a prior physical product that has been previously licensed (where applicable)	Parachute

19	**UPC Code**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The UPC code of a prior physical product that has been previously licensed (where applicable).	706301594728	
20	**Configuration Code**	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	**CV**	Use in Covered Services under this Agreement (includes LT, LU and S below)
				1. LT	*Time-Limited Digital Phonorecord Delivery*
				LU	*Use Limited Digital Phonorecord Delivery*
				B. S	*On-Demand Streaming (Single)*
				SP	Digital Phonorecord Delivery (Single)
21	**License Type**	M	Classification of license type requested. Numerous options available; most relevant is in example column.	**G**	Digital
22	**Server Fixation Date**	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304	
23	**Rate Code**	C *(one of the rate fields from 23 - 26 must be completed)*	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T	Statutory rate to be determined under this Agreement
				R	Under controlled composition clause in contract where controlled rate applies
				S	Statutory (already determined)
24	**Rate in Cents**	C *(one of the rate fields from 23 - 26 must be completed)*	Rate indicated as a penny rate.	.0755000	
25	**Rate in Percentage of Statutory**	C *(one of the rate fields from 23 - 26 must be completed)*	Rate indicated in percentage of statutory.	075.00	
26	**Rate in**	C *(one of*	Rate indicated in a percentage of	075.00	

	Percentage of Minimum Statutory	*the rate fields from 23 - 26 must be completed)*	minimum statutory.		
27	**HFA License Number**	Output	Number assigned by HFA for each license	1010120001	
28	**HFA License Reject Code**	Output	Code designating reason why request was not licensable as submitted. Numerous options available; most relevant are in example column.	01	NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED REJECT CODES)
				02	DUPLICATE LICENSE REQUEST (1ST PASS - PRELIMINARY SCAN; WITHIN THE CURRENT BATCH)
				03	DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)
				10	SONG TITLE NOT FOUND
				11	SONG TITLE MATCH ONLY, INSUFFICIENT FOR LICENSE
				12	SONG TITLE AND ARTIST MATCH ONLY, INSUFFICIENT FOR LICENSE
				13	SONG TITLE AND ALBUM MATCH ONLY, INSUFFICIENT FOR LICENSE
				14	SONG TITLE AND CATALOG / UPC # MATCH ONLY, INSUFFICENT FOR LICENSE
				21	CONTROLLED RATE REQUEST COULD NOT BE MATCHED TO PREVIOUSLY
				81	PUBLISHER NOT REPRESENTED BY HARRY FOX AGENCY
				82	PUBLISHER UNKNOWN
				83	PUBLISHER OPTED-OUT OF AGREEMENT
				91	ORIGINAL VERSION OF SONG IS IN THE PUBLIC DOMAIN IN THE USA
				92	PUBLISHER OWNERSHIP NOT YET VERIFIED
				93	SONG PLACED ON HOLD FOR LICENSING BY PUBLISHER
				94	SONG HAS RESTRICTIONS; REQUIRES PUBLISHER APPROVAL

				95	OLD DERIVATIVE VERSION OF SONG, CURRENT PUBLISHER UNKNOWN
				96	INVALID SONG CODE
29	**HFA Flag for Amended Publisher Data**	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y	Flagged so that requestor can note that HFA publisher information differs from that submitted

HFA/RIAA Electronic License Request & Output File Layout

Acceptable Data Formats:

1. *MS Access database*
2. *MS Excel Spreadsheets (with proper headings)*
3. *Flat File (follow the file layout below)*

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Label Name	A	15		M
5	ISRC Code	A	15		M
6	Playing Time - Minutes	N	3	0	M
7	Playing Time - Seconds	N	2	0	M
8	Artist	A	200		M
9	Song Title	A	200		M
10	A/K/A Song Title	A	200		O
11	ISWC Code	A	11		O
12	HFA Song Code	A	6		O
13	Song Writer(s)	A	200		C*
14	Publisher Name	A	60		C*
15	HFA Publisher Number	A	6		O
16	Publisher Share	N	7	4	O
17	Catalog Number	A	15		C*
18	Album (physical product) Title	A	200		C*
19	UPC Code	A	16		C*
20	Configuration Code	A	2		M
21	License Type	A	1		M

22	Server Fixation Date	N	8	0	M
23	Rate Code	A	1		C**
24	Rate in Cents	N	7	7	C**
25	Rate in Percentage of Statutory	N	5	2	C**
26	Rate in Percentage of Minimum Statutory	N	5	2	C**
27	HFA License Number	N	10		*Output*
28	HFA License Reject Code	A	2		*Output*
29	HFA Flag for Amended Publisher Data	A	1		*Output*

KEY: **TYPE:**
A = Alphanumeric Field
N = Numeric Field

LENGTH: For Alphanumeric fields, it is the maximum number of characters required.
For Numeric fields, it is the exact number of characters required

DECIMAL: Number of characters after decimal (for numeric fields only)

INPUT OPTION:
M = Mandatory
O = Optional
C* = Conditional --- As agreed, label must provide either: **(a)** Songwriter *or* **(b)** Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.
C** = Conditional --- One of the rate code fields from 23-26 must be completed

Mr. COBLE. Thank you, Mr. Sherman.
Mr. Simon?

STATEMENT OF EMERY SIMON, COUNSEL, BUSINESS SOFTWARE ALLIANCE

Mr. SIMON. Mr. Chairman, Mr. Berman, and Members of the Subcommittee, I'm grateful for the opportunity to appear before you today to present the views of America's leading software and computer companies on the section 104 report prepared by the Copyright Office.

I would like to start by congratulating the Copyright Office for having produced a sound and well-reasoned report. With few exceptions, primarily in the area of its analysis on temporary copies, we support its analysis and conclusions.

The report concludes that the law overall is working well and that changes in technology and the marketplace do not support significant changes at this time. We fully concur with this conclusion.

I note that the Commerce Department, which was also charged with the responsibility for conducting a 104 report, and which is also well-situated to analyze technology, issued its report earlier this year and also concluded that the law is working well. And in fact, it concluded that no changes at all were necessary.

The BSA member companies approach the issues and findings of the report with two equally important considerations.

First, our member companies are determined and committed to making the Internet and e-commerce thrive. BSA member companies make the computers, software, servers, and switches that make e-commerce possible.

As importantly, these companies suffer substantial losses due to piracy, amounting to billions of dollars each year. Strong copyright protection is the essential tool we rely on to attack and deter theft.

We highlight these points because many of the submissions made in the course of this report suggests that these are incompatible and conflicting goals, that e-commerce will wither unless changes are made to section 109 and section 117. We disagree.

We see no evidence in the marketplace that would support such grim predictions, and we are gratified to read that the Copyright Office has reached the same conclusions.

On the issue of temporary copies, the report is a bit more of a mixed bag. The legal analysis is generally sound, but it contains a number of statements which we find, at the best, imprecise, both in terms of immediate impact and their implication.

We're pleased to see that the report concludes that the reproduction right covers all forms of copies, regardless of duration, including copies in RAM, random access memory. It correctly notes that the leading case, MAI v. Peak, has been followed without deviation or qualification by all courts that have considered the issue, and there appears to be no confusion among the courts.

Clear legal protection of temporary copies is critically important to both the current and future business models of the software industry. Most popular computer programs are very large, consisting of millions of lines of code. Computers that run these programs operate by processing the code in pieces. The code is stored, fixed, buffered, or cashed in RAM—random access memory—until it is needed by the computer, at which time the central processor calls up the necessary data.

Using software over the Internet, which is likely to increase substantially in the coming years, takes place essentially the same way. Anyone connected to the Internet through a personal computer, handheld organizer, telephone, or other device can make full use of that software by making only a temporary copy of all or part of that program in random access memory.

Internet-based use typically takes place through the creation of temporary copies; some or all are temporary copies. Other than the single original copy on the host computer or server, no permanent copies need be made.

A relatively new development in the software marketplace is the emergence of application service providers. These companies permit users of software products—use of software products without having to buy or install a copy on a local computer. The software is accessed as needed over the Internet; for example, once a week to write checks for employees or do basic bookkeeping.

The marketplace evidence we think is clear: Our customers are becoming less interested in possessing a full copy of a software product than in having the software available to them as they need it.

If temporary copy exceptions were somehow introduced, or different, additional exceptions were introduced into law, we think this would create uncertainty.

I would like to turn to the specific conclusions of the report for a moment. It recommends changes to reproduction rights with respect to streaming performances of music. Although the BSA mem-

bers are not generally in the streaming audio business as such, the analysis that leads to this recommendation and the precedents it may set raise three questions.

First, the language on its face appears to be ambiguous. It could suggest an amendment which created an exception to reproduction right, but it could also be read to advocate amendment which would declare temporary buffer copies not to be reproductions within the meaning of the Copyright Act. We would have substantial reservations about either of these approaches.

Second, the report makes amply clear that the proposed changes would apply to buffer copies and not all temporary copies, but the concept of buffer copies is really indistinguishable from any temporary copy made in RAM, random access memory. In fact, the term "buffer" describes a function of the copy, a fixation of data packets in random access memory while they wait for recall from the device's central processing unit. They are merely one form of random access memory copies. And as the report points out, RAM copies generally should not be treated differently from any other reproduction.

Finally, while the report lists a number of justifications recommending this change, we find very troubling the rationale that the copies should be excused because they have no independent economic significance. If the Copyright Office is suggesting a concept of testing for economic value of a copy in determining whether it is a copy within the meaning of the Copyright Act, this proposal is without foundation or precedent.

In conclusion, Mr. Chairman, every indication from the marketplace suggests that e-commerce and the Internet will continue to grow vigorously. Over the past 3 years since the enactment of the DMCA, that growth has accelerated, despite our economic slowdown.

Thus, we would urge the Committee to proceed with utmost care to ensure that the positive developments now underway are not suppressed.

Thank you very much.

[The prepared statement of Mr. Simon follows:]

PREPARED STATEMENT OF EMERY SIMON

Mr. Chairman and members of the subcommittee, we are grateful for the opportunity to appear before you today to present the views of the software and computer companies that are members of the Business Software Alliance [1] on the Section 104 Report of the Copyright Office.

These comments will address four areas: the importance of the Copyright Act and the Digital Millennium Copyright Act (DMCA) to our industry; the first sale doctrine (section 109); temporary or buffer copies; and some miscellaneous points raised in the Report. As a general matter, we think the Report is sound, and well reasoned, and support its analysis and conclusions. We do have specific concerns in certain areas, most importantly in its analysis of the justification for, and scope, of its recommendations in respect of temporary or buffer copies.

[1] The Business Software Alliance (www.bsa.org) is the voice of the world's software and Internet industry 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. BSA members include Adobe, Apple Computer, Autodesk, Bentley Systems, CNC Software/Mastercam, Compaq, Dell, Entrust, IBM, Intel, Intuit, Macromedia, Microsoft, Network Associates, Novell, Sybase, Symantec, and UGS.

THE SECTION 104 DIRECTIVE FROM CONGRESS

It is our understanding that this Committee and the Congress directed this Report because, at the time of the enactment of the DMCA, it determined that changes to Sections 109 and 117 were not merited, beyond a narrow change for maintenance of computer programs that was made to section 117.

In a very real sense, the Congress ordered this Report, as a prudential measure: to ensure that the enactment of the DMCA, and intervening developments in technology, did not harm the marketplace. The Copyright Office's Report concludes that the law is working well, and that changes in technology and the marketplace do not support significant changes to the law at this time. We fully concur with this conclusion.

THE REPORT'S CONCLUSIONS ON THE DMCA

The member companies of the BSA believe the DMCA is a good law, which has made a substantial contribution to the development of their businesses. Its provisions limiting remedies against service providers in certain circumstances have promoted cooperation by service providers in our efforts to stem the threat of piracy. While that collaboration has at times been imperfect, the law is working. Similarly, our companies are increasingly relying on technological protection measures to defend themselves against those who would steal their works. In both respects, the DMCA has accomplished its intended goal of updating the Copyright Act, and has thus contributed to increasing confidence and encouraging the greater use of the Internet.

We wholeheartedly support the conclusion of the Report with respect to Section 1201, the rules on circumvention of technological protection measures. The Report states: "We are not persuaded that Title I of the DMCA has had a significant effect on the operation of Section 109 and Section 117 . . . Consequently, none of the legislative recommendations made in this Report are based on effects of section 1201 on the operation of {these} Sections) . . ." (At pg. 73)

More specifically, Congress directed the examination of two provisions of the Copyright Act: the "first sale doctrine" codified in Section 109, and the backup and archival copies provisions contained in section 117.

CONTEXT

Before commenting on the specific conclusions of the Report, I would like to note that the BSA's member companies approach these issues with two considerations of equal importance.

1. First, our member companies are determined and committed to making the Internet and e-commerce grow and thrive. BSA member companies make the computers, software, servers, and switches that make e-commerce possible. Many of these companies are also in the business of providing web-design, data management, hosting and other critical services.
2. As important, these companies suffer substantial losses due to piracy, amounting to billions of dollars each year. Strong copyright protection is the essential tool we rely on to attack and deter theft.

We highlight these points, because many of the outside submissions made in the course of this Report suggest these are incompatible and conflicting goals, and that e-commerce will wither unless changes are made to Sections 109 and 117. We disagree: we see no evidence in the marketplace that would support such grim conclusions, and we are gratified to read that the Copyright Office has reached the same conclusion.

Here are just two facts:

- Under current law, recent estimates suggest that e-commerce has grown ten fold over the past three years, and even though our economy has slowed, the growth in online transactions will continue to explode.
- By 2005, the BSA's CEOs anticipate that a compelling 66 percent of software will be distributed over the Internet-compared to only 12 percent in 2000, accounting for over $40 billion in sales.

Having set the commercial context, I would like to focus in the balance of these comments on Sections 109 and 117.

SECTION 109

Proposals considered by the Copyright Office included changing Section 109 to make all copies of all works, including software, distributed over the Internet—whether by purchase, lease or license—transferable, regardless of the terms on which the copy was acquired. The Copyright Office Report unequivocally rejects this proposition, concluding that ". . . Section 109 does not apply to digital transmissions . . ." (at pg. 80) and that change in the law are not needed.

Their reasoning, which we find both correct and compelling, focuses on issues of law and the practical threats of infringement in the marketplace. With respect to the issue of statutory interpretation, the Report correctly notes that the language of Section 109 must be read for what it is—modifying the distribution right—and if Congress had intended for it cover other rights, such as reproduction, Congress would have specifically included them. With respect to the marketplace realities, the Report concludes that it would be impossible to administer a rule that would require persons re-selling a copy of a work to simultaneously destroy the original copy in their possession.

BSA agrees with these conclusions. If Section 109 were read to apply to digital transmissions of works, the already acute piracy problem our industry faces would become substantially worse.

TEMPORARY COPIES

The second principal issue considered by the Report is that of temporary copies. In this regard the Report is mixed: it has elements of legal analysis that we support, but it contains a number of statements which we find at best imprecise, and potentially quite disturbing both in terms of their immediate impact and their precedent and implications.

We are pleased to see that the Report undertakes a thorough and comprehensive analysis that the reproduction right covers all forms of copies, regardless of duration, including copies in RAM. It correctly notes that the leading case, *MAI* v. *Peak*, has been followed without deviation or qualification by all courts that have considered the issue. In *MAI Systems* v. *Peak Computer* the court held that:

> Because the loading of software into a computer's RAM creates a copy that can be perceived, reproduced, or otherwise communicated as defined by the Copyright Act, such loading . . . create(s) a copy protected under the Act . . .

As the Report correctly notes, this legal conclusion was endorsed and affirmed by Congress through the enactment of the Digital Millennium Copyright Act. Title III of which creates an exception for making a copy of a computer program by switching-on a computer for the purposes of maintenance or repair. This exception would have been wholly unnecessary if Congress had concluded that temporary copies should not be subject to protection. Moreover, Congress had ample opportunity at that time to create a broader exception. It did not.

Finally, the Report notes that while a number of academic commentators have criticised *Mai* v. *Peak*, the Report also notes those criticisms are without merit, nor is there any evidence of confusion among the courts on the issues they raise.

THE IMPORTANCE OF TEMPORARY COPIES TO SOFTWARE DEVELOPERS

These conclusions are critically important to both the current and even more significantly future business models of the software industry. Because most popular software programs are very large, consisting of millions of lines of code, computers that run these programs operate by processing the code in pieces. Code is stored (fixed, buffered or cached in RAM), until it is needed for the program to operate at which time the central processor calls up the necessary data. Proposals submitted to the Copyright Office would have put these copies of portions of a program outside the scope of the reproduction right.

Our member companies, which make devices that "buffer" and cache data, do not see the logic of creating an exception from the reproduction right for these functions. Moreover, creating such exceptions could have dire negative economic consequences for the software industry. While exemptions from copyright liability are not to be made lightly, we do not object to creating exemptions from liability for temporary copies made in the course of otherwise authorized uses.

A substantial percentage of the software piracy problem consists of unauthorized use of software over local-area networks (LANs). Piracy results if the number of people using a software program stored on a central computer known as a "server" exceeds the number of licenses that the LAN operator has purchased from the copyright holder.

In the LAN environment, only one permanent copy needs to be installed on a server. Anyone connected to that LAN through a personal computer, handheld organizer, telephone, or other device, can make full use of that software by making a temporary copy of all or part of that program in random access memory (RAM). There is no need to make a permanent copy of the software on the internal memory of every PC or device to enjoy the full functionality of the software. Given the ubiquity of LANs, denying the software copyright owner the ability to control temporary digital copies in this environment is likely to significantly diminish the value of the software.

Using software over the Internet—which is likely to increase substantially in coming years—takes place essentially the same way as in the LAN environment, but on a vastly larger scale. As in the case of LAN, Internet-based use typically takes place through the creation of temporary digital copies of some or all a computer program in the RAM of the PC or other device running the software. Other than the single original copy on the host computer or server, no permanent copies need be made.

A relatively new development in the software marketplace is the emergence of application service providers (ASP). ASP's permit a company to use a software product, without having to buy or install a copy on a local computer. The software is accessed "as needed," over the Internet, for example once a week to write checks for employees and to do basic bookkeeping. Consumers are also using web based software services to pay their taxes and design websites.

ASP's can be a popular choice for business users because developing and maintaining an information technology system diverts in-house resources away from a company's main line of business. Companies are increasingly "outsourcing" their business software needs to outside vendors (ASPs). Companies find outsourcing attractive for several reasons including:

- Reducing the burden of maintaining in-house software systems
- Reducing the need for information technology staff;
- Allowing faster access to new software; and
- Creating a predicable cost structure for software use by substituting standard monthly service charges for up front payments.

The demand for ASP services is expected to grow rapidly, with some experts predicting that it will become a $21 billion business by 2002.

The marketplace evidence is clear: our customers are becoming less interested in possessing a full copy of our software products, than in having the software available to them, as they need them. Denying or limiting the legal ability of the copyright owner to control and manage the making of temporary copies flies in the face of this marketplace reality.

THE REPORT'S RECOMMENDATION ON BUFFER COPIES

Turning to the specific conclusion of the Report, it recommends changes in the reproduction right. While these changes are narrowly cast with respect to streaming performances of music, and although the BSA members are not generally in the streaming audio business as such, the analysis that leads to this recommendation, and the precedents it may set, raises a number of important questions.

The relevant part of the Report's recommendation states:

> We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying music. (at page 142–43).

This proposal raises three questions. First, the language on its face appears to be ambiguous. It could suggest an amendment which would create an exception to the reproduction right, but it could also be read to advocate an amendment which would declare "temporary buffer copies" not to be reproductions within the meaning of the Copyright Act. For reasons explained below, we would have substantial reservations about the either of these approaches. We believe the intent of the recommendation is to create an exception from liability, but not from the reproduction right or public performance right—for copies that are incidental to an otherwise licensed digital transmission of a public performance. Such an approach, if adopted by Congress, would be a more logical and measured means to address the interests of all parties.

Second, the proposed change would apply to "buffer" copies, and not to all temporary copies, as the Report makes amply clear. The concept of buffer copies, however, is really indistinguishable from any temporary copy made in RAM. In fact, the

term "buffer" describes a function of the copy (fixations of data packets in RAM while they wait for a call from the device's processing chip). They are merely one form of RAM copy, and as the Report points out, RAM copies generally should not be treated differently from any other reproduction.

Finally, while the Report lists a number of justifications for recommending this change, we find very troubling the rationale that these copies should be excused because they have ". . . no independent economic significance." (at pg. 143.) If the Copyright Office is suggesting a concept of testing for the economic value of a copy in determining whether it is "a copy" within the meaning of the Copyright Act, its proposal is without foundation or precedent. Section 101 of the Act, directs the analysis to determine whether there has been a fixation, in a material object, from which the work can be perceived, reproduced or otherwise communicated. It stops there. The Copyright Office's apparent suggestion that the Act contains a further precondition of economic value would present enormous problems to our industry. As I noted above, in both the local area network use of software, and in the ASP environment, full enjoyment the work may require only temporary copies. For copyright owners to have to prove that each such portion copied had distinguishable and independent economic value would create an enormous burden along with unprecedented uncertainty and insecurity. While the economic impact of a particular unauthorized temporary copy may be a relevant factor to be considered in analyzing whether the reproduction in question constitutes a fair use, see 17 USC 107, this "economic value" evaluation should have no role in determining whether the making of that copy was an unauthorized exercise of the reproduction right in the first place.

SECTION 117

The software industry is the specific object of the back-up and archival provisions of Section 117. With one notable exception discussed below, these provisions have not presented substantial issue for our industry. The software industry has been subject to this provision for over 20 years, and as the Report correctly notes, it has never been the subject of a reported litigation. The facts summarized in the Report are all correct: that prudent computer users regularly back-up their files, that such files may include a number of works, and that the act of making backups may result in the making of copies not specifically authorized. But there was no evidence presented in the submissions, nor is there any in the Report, that these practices result in either uncertainly, confusion or litigation.

The Report discusses in some detail one aspect of Section 117 that has posed a problem for our companies. Recently, operators of pirate web sites have been posting notices on these sites suggesting that downloading software be excused by Section 117. Their deliberate goal is to mislead, by suggesting that these acts of unauthorized downloading are not illegal. While the Copyright Office Report correctly notes that these posting by pirates have no basis in law, and are deliberately misleading, the Report does not make any recommendations on how to address the problem. As this Committee proceeds with its work, we would urge you to take these facts into account.

TWO FINAL POINTS

First, the Report notes that "tethering" copies of works to a particular machine may, if it becomes widespread, have implications for the first sale doctrine. We respectfully disagree. "Tethering", as used in the Report, consists of making a copy of a work available for use with a specified device. One of the most serious piracy problems confronting the software industry is the loading on multiple machines, sometimes thousands of machines, of a single copy of a word processing or accounting software program. This practice, common within corporations, causes substantial lost sales and direct harm. Copyright owners may, in certain circumstances, find that "tethering" copies of works, through the use of technological measures, to one or a limited number of devices is the only practical solution for addressing piracy of this sort.

Finally, almost as an afterthought and certainly outside the scope of the Section 104 mandate, the Report includes a section on contracts and licensing practices. The Report correctly states that there "is consensus among the courts that enforcement of contracts is not prohibited . . ." by the Copyright Act, and cities the leading case of *ProCD* v. *Zeidenberg* for this proposition. It also notes that no court has overruled contract provisions relying principally in its reasoning on the Copyright Act. The Report nonetheless suggests that the freedom of parties to contract should be monitored. We find this concept very troubling indeed. Parties have long used contracts to specifically state which of the copyright owners bundle of rights (reproduction,

distribution, translation, etc.) are implicated by a particular transaction. With the advent of the Internet, it has become commonplace for software developers to make their works available subject to a "click-I-agree" contracts where the user must click on an onscreen "I agree" button in order to begin using the program. These practices and use of contracts generally, are critical to the way our industry works. The rules governing these contracts has been upheld consistently the courts. Moreover, contract law has historically been a matter of state law, and those laws contain safeguards, such as unconscionability doctrines, to protect against abuse.

CONCLUSION

In conclusion, every indication from the marketplace suggests that e-commerce and the Internet will continue to grow vigorously. Over the past three years since the enactment of the Digital Millennium Copyright Act, that growth has accelerated. Thus, we would urge this Committee to proceed with utmost care to ensure that the positive developments now underway are not suppressed by the legislative initiatives you pursue. Our concerns in this regard are most acute in respect of the changes you may consider with respect to the reproduction right.

Mr. COBLE. Thank you, and I thank the entire panel.

Now, we have imposed the 5-minute rule upon you all, and in a sense of fairness, we will impose the 5-minute rule upon us as well. If the Members want it, I am not adverse to a second round of questioning, so we'll sort of play that by ear.

Ms. Peters, is it your opinion that, if a temporary reproduction has no economic significance, it does not implicate the copyright owner's reproduction right?

Do you want me to repeat that?

Ms. PETERS. Yes.

Mr. COBLE. Is it your opinion that, if a temporary reproduction has no economic significance, it does not implicate the copyright owner's reproduction right?

Ms. PETERS. No. That is not our position.

In fact, we conclude that these temporary copies are in fact copies, and then the question is whether or not there should be liability. In other words, you need to license the use.

And the piece about whether or not it has any economic significance, it is whether or not it has any separate economic significance apart from the licensed use.

In other words, you license the activity, and what we're saying is, in this case, the copies that are made merely facilitate the licensed use. And we believe that because it facilitates the use that's licensed, they don't have any separate economic value apart from that already licensed use.

Mr. COBLE. Hypothetically, if the parties at this table, and other tables on the issue, hammered out an agreement satisfactory to all, do you believe that legislation would still be needed?

Ms. PETERS. Well, I guess you're referring to the NMPA-RIAA agreement. To the extent that they agree between themselves that this is a way to solve the problem, it is fine. As to whether or not that is good copyright policy that should be binding on everybody, I think that's a different issue.

And so, to the extent that we believe that our recommendation is sound copyright and balanced copyright policy, we would stay with our recommendation.

Mr. COBLE. I thank you.

Mr. Sherman, now that you've reached an agreement with the music publishers, do you want the Congress to codify it, A, and, if

not, do you think that the agreement or the deal eliminates the need for Congress to act on the recommendations in the report?

Mr. SHERMAN. At this point, it's our feeling that our agreement does obviate the need for congressional action. We have always said that we prefer marketplace responses to these kinds of problems. These are business problems in need of business solutions. They're best worked out across the negotiating table.

If we were to rely on Congress to solve these problems for us, we'd be back here every 6 months, every time a new business model has emerged that is a new wrinkle on an old problem.

We're very pleased that we were able to, across the negotiating table, come up with a system that provides a framework for this system to operate. And, therefore, we think that legislation is not necessary at this point.

Mr. COBLE. Well, I concur. There's much to be said for marketplace resolutions. I don't disagree with that.

Mr. Ramos, we've heard a great deal today about downloads versus streaming, various business models for online music services, and developments in licensing that will enable the launch of these services. How much business has been created by these new services?

Mr. RAMOS. Mr. Chairman, regrettably, to date, virtually no business has been generated by legitimate services. The market has been dominated by pirates who are giving away my clients' copyrighted works free. That is the major problem that we face today.

And we believe that through this deal with RIAA that we will be able to assist the legitimate services to get out there and compete with the illegitimate ones, and that that is a positive step in the right direction.

Mr. COBLE. I thank you.

We didn't start my time until about a minute late, so technically my time has expired.

Mr. Simon, I will get you on the next round. I've not been ignoring you.

The gentleman from California?

Mr. BERMAN. Thank you. Mr. Chairman, I'd like to ask Ms. Peters a couple of questions, and then hear her answer, and if any other members of the panel want to add, contradict, comment on her answer, I'd be happy to hear them.

First, let's get to this issue of the RAM buffer copies. Part of the reason why you thought there was a good case to be made that this was a fair use was the absence of economic harm, as I understand it. Is that a fair——

Ms. PETERS. Right. We believed——

Mr. BERMAN [continuing]. Assumption?

Ms. PETERS [continuing]. That, yes, there was no separate economic value to the buffer copy.

Mr. BERMAN. Well, initially that struck me as a good argument. But at least the music publishers say, take this case, the streaming, the interactive digital streaming on demand, this is different than radio or webcasting in that sense, because now you're getting the music in perfect quality, exactly when you want it, and at any time that you want it; and that that is going to replace a sale, because why buy it, if I can get it any time I want it; and that, there-

fore, there is economic harm to the writers and owners of that copyright of that musical work; and that, therefore, this temporary buffer copy should be implicated as a—in the context of developing a legitimate mechanism for compensating; forget why the copy is made or what utility that copy has, that this is a good mechanism to balance equities with. And I would like to get your response to that argument.

Ms. PETERS. I agree with you until you get to the issue with the buffer copy. I agree that on-demand streams can have a negative impact with regard to the sale of records, because if you can get it whenever you want it, why own the physical object?

But what's happened is, it's the performance right that is implicated, and it's the value of the performance right that has now increased.

Mr. BERMAN. Well, I mean——

Ms. PETERS. Because the random access—you never make a copy from what's in the random access memory.

Mr. BERMAN. I understand that. But in reality, one plays his own CD, and it's not a public performance, but there's—in other words, we worked out these mechanisms ages ago to get in—to deal with the radio, the broadcasting, and the public performances versus the purchasing of a record or a CD. Now you have this individual—the streaming to the individual——

Ms. PETERS. Right.

Mr. BERMAN [continuing]. And on-demand at any time. Why isn't that more analogous to the purchasing of a CD? And why won't it replace the purchasing of the CD?

Ms. PETERS. It may, but the activity is essentially a performance. What you're getting at is the copyright law, as it exists today, breaks things into rights and you attach them to rights. This problem, and the reason why we only have this problem in the music area, was because there are two organizations that administer different rights. It didn't come up in any of the other areas because, if you are going to a company that owns all of the rights and you identify the activity, they price that activity. But if in fact different rights are administered by different people, each one has got to grab on to the piece that they have.

But the truth of the matter, with regard to streaming, is that it's performance. The European Union has in its directive a mandated exception. The activity that we propose to exempt is required to be exempted under the European Union directive.

So it's not that what we're suggesting is that far off. But all I'm saying is, the value is in the performance. What my argument is, is the performance right value goes up. The performance right value goes up. The music publishers get paid from the performing rights organizations. And the composers and lyricist get paid, and get paid directly.

So my own analysis is that they don't lose. It's just who gets to dish out the money and who gets to administer the right.

Mr. BERMAN. Mr. Chairman, could I just—does anyone else on the panel, particularly Mr. Ramos, want to make any response to this?

Ms. PETERS. I am sure they do. [Laughter.]

Mr. RAMOS. I just don't want to run over the time. If I may, I would like to address that.

I appreciate that this issue was a difficult one for the Copyright Office to address, because the questions of economics in this industry are not simply resolved.

I guess what I would say is that the objective of the music publishers and the songwriters they represent here is to hold on to the meager income streams—no pun intended—that they already have. And if they lose the income streams from on-demand streams on the Internet, they're going to lose income. They're going to be worse off.

And we believe that that should not be a necessary consequence of the development of music delivery on the Internet, as opposed to in the physical world.

Much has been made of this concept of the double-dip, and it has a certain superficial appeal, but the reality is that IP is not ice cream. We're not talking about taking two dips of ice cream. These are two distinct, separate rights that have been recognized in copyright law for over a century: the right of reproduction and distribution, and the right of public performance.

If I take a stack of CDs down to an auditorium for a high school dance and play those CDs, there's no question but that I need a performance license. That doesn't mean that I am entitled to go into Tower Records and take a stack of CDs without paying for them on the theory that, because I'm going to perform them, it would be a double-dip for the copyright owner to be paid for the record as well as the performance.

That has been the case for years in copyright law. And we think there's no reason for departing from that very simple concept.

There are two streams that the copyright owner relies on. They are meager streams. We are the small mammals——

Mr. COBLE. Mr. Ramos, if you'd wrap up——

Mr. RAMOS [continuing]. Going around the feet of the mighty animals.

Mr. COBLE [continuing]. Because I think your time is about up.

Mr. RAMOS. I'm done. Thank you.

Mr. COBLE. Thank you, sir.

Mr. RAMOS. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman from Tennessee.

Mr. JENKINS. Thank you Mr. Chairman. I don't have any questions at this time.

Mr. COBLE. I thank the gentleman.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Somewhere in this discussion there are issues far more complex than I ever imagined, very heavy philosophical questions, tremendous economic free-market considerations.

Mr. Sherman, I think you're the biggest free marketeer on the panel. Why doesn't the government just butt out of this stuff, and we wouldn't even have this hearing, and let the market work its way? What's wrong with that?

Mr. SHERMAN. At this point, I think that's what's happening. I think the fact that Congress has actually been looking at these

issues has actually been helpful in pushing the parties to work out these issues, and there really has been a beneficial effect.

But at this point, government regulation of this marketplace is more likely to interfere with the natural evolution of the marketplace than benefit it.

Mr. CONYERS. Right. That comes down to "butt out." [Laughter.]

Mr. CONYERS. OK, let's go to the next consideration.

Mr. SHERMAN. I don't think I can say that as freely as you can. [Laughter.].

Mr. CONYERS. Oh, OK.

And that might extend to antitrust considerations. I mean, we're always, "What's happening? Who's merging? Who's weighing in? Who's using their weight?" You think there's little bit too much of that, too?

Mr. SHERMAN. I don't think I can——

Mr. CONYERS. Just between you and me. [Laughter.]

Mr. SHERMAN. I think it is an unusual situation where companies with a 0 percent market share are being investigated for antitrust activity, but the marketplace will evolve. And the antitrust law should remain fully applicable and applied as deemed warranted, as the market develops.

Mr. CONYERS. Well, you're losing some of your free-market credentials here, sir.

OK, what about people being compensated for their ownership, creativity, even though they may not be corporations? What about that?

Mr. SHERMAN. Absolutely. Relationships with artists are critical in the industry. Without the artists, we wouldn't have music to sell.

Mr. CONYERS. Well, that's great. We're coming a long way now, because for a long time, that wasn't the case.

I mean, there are a lot of artists, not all of them dead, who never got a dime, and people made millions and millions of bucks. Did you know that?

Mr. SHERMAN. I have certainly heard that reported. But whatever the experience was in the past, I assure you that artists today are very well represented in their negotiations with record labels. In fact, most major record labels will not even negotiate with an artist unless they're represented by a lawyer.

Mr. CONYERS. I didn't know that.

You know what I know? I know artists who come in with their product, and they're given a contract, and they're told, "You've got 24 hours to sign this, buster. And if you don't sign it, don't ever walk in this door again."

You ever heard that before?

Mr. SHERMAN. Actually, I haven't, but I've heard of lots of stories where——

Mr. CONYERS. You've heard allegations——

Mr. SHERMAN [continuing]. There are multiple companies bidding for the same artist, and those artists and their agents are able to put one bid against another and increase the advance and royalties that they're paid. That is the effect of a marketplace.

Mr. CONYERS. Well, that's the free market at its finest moment, right?

Mr. SHERMAN. Well, it is the marketplace at work, yes.

Mr. CONYERS. That's the real world.

Well, I suggest that maybe we're both looking at the same glass of water, but you're looking at it from the top.

See, Quincy Jones really doesn't need ASCAP, to be honest with you. I mean, he can negotiate his own terms. But Barry Gordy, when he first started out, he needed every CAP there was in town, because he couldn't negotiate anything.

And so if you look at it from the top, it's great. I mean, the big guys, if you make it, you can sit down and do what you're talking about.

The little guys that you've heard allegations of, that I reported to you, of which there are many more than there are the guys at the top, guess what? They're told that if they try to change as much as a clause in this contract drawn up by the lawyers, they can just keep the contract and their music and go somewhere else.

So what we're trying—this is where the government comes in, Mr. Free Market Celebrity for This Panel, named by me. This is what the government does, my man. We create policy, and we think that there's something—there's a pirate problem in here somewhere that seems to me so simple and elementary, I can't figure out what all this very lofty conversation is about.

But maybe I'll see you on the next panel, next round.

Mr. COBLE. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you.

Given Mr. Conyers' line of questioning there, I hope he'll consider cosponsoring the Music Online Competition Act, which provides for direct payment to artists.

Mr. Chairman, I'd ask unanimous consent to submit for the record a recent article from the Washington Post.

Mr. COBLE. Without objection.

[The information referred to follows:]

Congress of the United States

Washington, DC 20515

December 11, 2001

Dear Colleague:

The attached article from the Washington Post describes the first post-Napster music download service licensed by major record labels. RealOne Music, the new online music download subscription service from Real Networks, allows users to download songs licensed to MusicNet, which is the online music distribution service which is jointly owned by three major labels (EMI, BMG and Warner Music) plus Real Networks.

The article describes how the service contains limited content, is extremely inconvenient to use, and in every case sacrifices customer convenience in the name of further expanded copyright protection. It describes extensive restrictions on use, and goes on to say,

"Let's be clear: These Dogbert-esque restrictions didn't come from Real or other companies, such as AOL, developing MusicNet services. The record labels behind MusicNet made this choice, electing to sacrifice convenience and choice to copy protection. Those behind PressPlay, a competing subscription system, seem on their way to making the same mistake."

This is the essential rationale for the Music Online Competition Act (MOCA). As long as the labels can use discriminatory licensing to quash competition in the online music distribution market, there will never be any drive to make these services more comprehensive or convenient. Indeed, it seems likely that the labels will hang onto the world of $20 CD's as long as they can.

Under MOCA, the labels would be required to license competing services (such as the new subscription-based Napster service) under the same price and conditions that they license their own joint venture distribution services. The article talks about how one could go through all the difficulties of using RealOne/MusicNet, and closes with the following:

"Or you could just copy the songs off of a friend's collection or a file-sharing service. That may not be legal, but the major labels can't expect people to choose anything else if "bargains" like MusicNet are the best they can offer."

Please join with us in promoting real customer choice and convenience through online distribution that respects copyright. To cosponsor MOCA or for more information on the issue, feel free to contact David Safavian in Chris Cannon's office (x57751) or Johanna Mikes in Rick Boucher's office (x53861).

Sincerely,

Chris Cannon

Rick Boucher

The Washington Post

A Potential Hit And a Miss on The Music Front

By Rob Pegoraro, Friday, December 7, 2001

The Washington Post, Page E01

Finally, you can download name-brand, major-label music off the Internet -- easily, quickly and in a high-quality format. The wait is over!

Oh, wait: That's been possible since the late 1990s.

Now, though, you can get these songs legally, using subscription services set up by major record labels. The first such venture, MusicNet, arrived Tuesday, along with the program needed to access it, RealNetworks' RealOne media player.

Both the software and the service constitute major changes. But only one also counts as an actual advance: Real's new player is an effective alternative to Microsoft's Windows Media Player, even if some key weaknesses linger in this version. MusicNet, however, represents one of the worst consumer bargains since the DivX pay-per-view DVD scheme.

In other words, there's a decent upgrade here if you can keep your credit card in your wallet.

RealOne comes only about 15 months after RealNetworks' last big release, but a lot has changed since RealPlayer 8. (Bear in mind that RealOne is still a beta release, with a finished version not due until early next year.) The new program ends the need to switch between separate player and jukebox applications, combining tools for finding, downloading, playing, copying and collecting music -- plus an Internet Explorer-based Web browser -- in one window.

RealOne looks a good deal sleeker than its predecessors. The company's designers took a belt sander to the standard Windows interface, rounding off corners and polishing the menu bar. The result resembles a busier version of Apple's QuickTime Player, with three frames for content, context and marketing tie-ins.

(RealOne runs on Windows 98 and newer Microsoft desktop operating systems; a Mac version is planned, but the company isn't talking yet about Mac OS X support or Linux or Unix releases.)

RealOne also dumps the screen-hijacking RealDownload add-on and is less aggressive about vandalizing users' desktops with links to Real and its marketing partner, AOL Time Warner.

RealOne doesn't, however, offer any new compression schemes, so Web radio at dial-up speeds sounds as tinny and metallic as before. It still doesn't play back broadcasts in Microsoft's Windows Media format, although it can open and save individual Windows Media files. Real says it's obtaining rights for Microsoft's streaming-media formats; until it does, you can't use this to replace Windows Media Player.

RealOne also doesn't offer a useful MP3 encoder unless you sign up for either of two $9.95-a-month offerings promoted on Real's Web site. (The free version is a little hidden; to get it, click the "RealOne Player" link atop the company home page, www.real.com, then follow the "Free Player" link halfway down the next page.)

And here's where this software stops being such a bargain. One of these options is a multimedia subscription service -- confusingly enough, also called RealOne -- which seems targeted at broadband users who want to watch news, sports and entertainment programming but have some aversion to turning on the TV.

The other, RealOne Music -- Real's MusicNet option -- appears to be aimed at financial masochists.

For that $9.95 fee, you can check out tens of thousands of artists, as long as they're distributed by BMG Entertainment, EMI Recorded Music, Warner Music Group or Zomba. (Pop quiz: Which multinational corporation has *your* favorite artist inked a contract with?)

That makes browsing through MusicNet like shopping in the world's flakiest record store. Only three R.E.M. albums show up, none newer than 1987. The Rolling Stones are absent, but Keith Richards's solo work is available. Funkadelic appears, but not George Clinton's other project, Parliament. And so on.

The service could be useful for try-before-you-buy sampling, if you don't mind essentially paying for the label's own marketing. For collecting music, it's woeful.

Downloaded songs are available under the equivalent of a work-release program. You can download 100 titles a month and listen to 100 songs in low-fidelity streaming audio (an extra 25 downloads and streams are available if you also get the RealOne service). Each download expires in 30 days unless you spend part of the next month's quota to keep it active. You cannot make a backup copy of a song, write it to a recordable CD or transfer it to a portable player.

If your hard drive gets trashed or you want to move your collection to a new computer, you must call customer service to ask permission. You may even need to call the help line if you alter too much hardware on your PC -- like Windows XP, RealOne inspects your computer's configuration and decides for itself if it's still on the original machine.

Let's be clear: These Dogbert-esque restrictions didn't come from Real or other companies, such as AOL, developing MusicNet services. The record labels behind MusicNet made this choice, electing to sacrifice convenience and choice to copy protection. Those behind PressPlay, a competing subscription system, seem on their way to making the same mistake.

Should you stick with MusicNet and accumulate 100 songs that you like, it's not clear what you could do next. You could cease further downloads and simply pay rent on those 100 tracks until the end of time. You could buy the CDs containing each song, eating your subscription costs to date. You could open a second account and sink deeper into the quicksand.

Or you could just copy the songs off a friend's collection or a file-sharing service. That may not be legal, but the major labels can't expect people to choose anything else if "bargains" like MusicNet are the best they can offer.

Living with technology, or trying to? E-mail Rob Pegoraro at rob@fwp.com.

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Mr. CANNON. Thank you.

This article reviews the MusicNet digital music service offered by some of the major labels represented here today by the RIAA. The article offers, to say the least, a very harsh assessment of MusicNet from a consumer perspective, saying MusicNet represents one of the worst consumer bargains since the DivX pay-per-view DVD scheme.

The article also notes each download expires in 30 days. You cannot make a backup copy of a song, write to a recordable CD, or transfer it to a portable player. The record labels made this choice, electing to sacrifice convenience and choice to copy protection. Those behind PressPlay, a competing subscription system, seem on their way to making the same mistake.

Mr. Sherman, the article and others suggest that the major labels do not intend to fully embrace the Internet, preferring instead to continue to derive their revenues from the more lucrative and costly to consumers CD marketplace.

Reviews of the new online music services stand in direct contrast to what your superior, Hilary Rosen, promised last April before the

Senate Judiciary Committee, when she urged us to stay tuned for the rollout of services like MusicNet and to just give the industry time.

Specifically, she said, "I am amused by those who suggest that record companies don't want to be online with legitimate music, that we don't want to serve our customers."

But the realities of MusicNet, the MusicNet offering, seemed to confirm just the opposite. Of the top 20 billboard CDs for this week, only two have tracts available for download on the MusicNet services, and both those two CDs—that is Britney Spears and the Backstreet Boys—are distributed by Zomba Records, the largest independent label.

In short, the major labels have not made a single track available from top-selling CDs, even as rentals to download using that service.

Mr. Sherman, in your opening statement you said that the RIAA-NMPA deal will bring competition to digital music. Today's hearing is to examine the need for change to the copyright laws. However, I look forward to measuring your statement on competition in antitrust hearings next year on this issue.

But now for a question, if we can get there: Is the present copyright system under the DMCA in part to blame for your member companies' inability to offer what consumers want, or is it solely a function of your industry's desire to maximize control over content and profit margins? [Laughter.]

Mr. SHERMAN. That's one of those questions like, "When did you last stop beating your wife?" [Laughter.]

The truth is that it really would be a mistake to think that record companies don't want to be online, because they have to be online. They have no choice.

Right now, the online marketplace is simply a pirate marketplace. It is where all the music is available for free, any time of the day or night.

So record companies, even if they didn't want to be online, can't afford not to be. And therefore, they are trying to move online as aggressively as they can.

The DMCA has not been responsible for the difficulties in getting online. There are lots of reasons for the difficulties in getting online, some of them involving clearance of the various publishing rights and artists' rights that are necessary to do so.

You know, Mr. Conyers is very concerned about artists. Well, a lot of those artists own the rights for electronic distribution and aren't allowing their music to go online. That's why you don't have any Beatles songs on any of the services.

So before you jump to the conclusion that the major labels have chosen not to put their first releases, their new releases that are on the Billboard Top 20, online, you really need to understand whether it's the artist that has the rights or whether the publishing licenses haven't yet cleared.

Mr. CANNON. Pardon me, Mr. Sherman, but do you know, of the other 18 of the top 20 that are not available, what the cause is for those not being available?

Mr. SHERMAN. I do not know. It may be because they're owned by labels that aren't participating in MusicNet. It may be because

the—with new releases, we have a problem with getting publishing licenses out in a timely fashion. If my mechanical licenses haven't yet been issued, then they cannot yet go online. It is a problem that we are working hard to solve, but it is a problem.

Believe me, record companies want their new releases online, because they need to appeal to consumers to bring them to the legitimate alternative instead of the pirate marketplace. Bringing the newest material online is important to them.

Mr. CANNON. Thank you.

I see my time has expired, so I yield back what does not remain of it.

Mr. COBLE. I thank the gentleman.

Folks, we have six votes; you're talking about 45 to 50 minutes, but I think we can get the gentlelady from California in prior to going to vote.

Ms. LOFGREN. Thank you, Mr. Chairman. I'll be quick, because we do need to get over to the floor.

Ms. Peters, I found the report very interesting, and I wanted to explore just a couple of quick items.

As I understand it, the office, your office, did establish a concern about tethering and its impact on the first sale doctrine but don't recommend that we do anything about that at this time, because the tethering phenomenon is, in your office's judgment, limited. I am not so sure it is that limited, and I'm wondering what remedy you would urge us to explore if my assumption that the tethering is not as limited as you suspect is correct.

Ms. PETERS. I'm not sure that we said——

Ms. LOFGREN. If I've misstated it, correct me.

Ms. PETERS. No, no, no.

What we said was that tethering could become a problem in the overall balance, but I'm not sure that it went totally to first sale.

You can take the physical object and can transfer it. It's just that you are not going to have access to it, because the access is to a particular device. But first sale doesn't really necessarily go to access. It goes to the distribution of the physical copy.

So what we were doing was looking at a variety of concerns that libraries basically raised with regard to things like preservation and their issue with regard to access down the line and donated copies that may be tethered and someone is giving them a copy.

What we basically said is, at the moment, for example, we recognize that certain electronic books are tethered. We've talked to book publishers and they say that's a nascent market. They're aware of a library's need to preserve those works, and they will be working with libraries to figure out how libraries can be served.

I noted in my report that the Library of Congress is taking a leadership role in making sure that libraries have preserved the works for future generations, and that we're looking—the Copyright Office is looking to the library and the committee, which I basically serve as an adviser, to how to deal with those issues.

So it's not that we didn't say that there weren't legitimate issues. We didn't think it was necessarily exactly a first sale issue. But it is an issue for libraries with regard to access of works.

And in part, it has maybe more to do not with section 109 but with the DMCA and the access controls and the copy controls that may be put on these things.

Ms. LOFGREN. So do you think the consumer has a stake in this tethering issue?

Ms. PETERS. At the moment, any book that is being put out in electronic form is also available in a non-electronic form. So a consumer, as far as getting and reading the work and having access to the work, I think at the moment, it has not risen to the level of a major problem. It is something that we identified as it's something worth looking at.

Ms. LOFGREN. Although it's not subject to the same lingo, tethering, isn't it essentially the same, that if you paid to download a song and then you want to transfer the song that you paid for to your MP3 player, but you can't because of an access code, isn't that a form of tethering, in a sense? Isn't that the same thing as the books?

Ms. PETERS. Well, I think it's a little bit different.

One of the—the issue with regard to the downloaded song was in fact a first sale issue. It was, whether or not I acquire the work through a transmission, do I have a right to make a copy of it and put it someplace else? And the answer is, under first sale, you do not, because, in effect, first sale is only the distribution right.

With regard to the tethering, it's not really that you can't really basically distribute the copy sometimes. It's that there may be a control that limits it to a particular machine.

Nobody gave evidence that this was a real-world, large problem now. We basically commented that we thought that maybe the marketplace would address this. People are either going to accept it or they're not. It's either going to work in the marketplace or it's not.

And we hoped that we wouldn't see, you know, a big problem developing in this area. But we did say: Monitor it.

Ms. LOFGREN. But if the marketplace is really controlled only by a few actors in terms of distribution, in terms of legal distribution, isn't the real market competition the pirates?

Ms. PETERS. I don't know. What we were really referring to, and Emery Simon can comment on it, is if the restrictions are seen is too cumbersome by the consuming public, so that they don't purchase it—and it was in the software area where technical protection measures were used and given up. That's the marketplace we were talking about.

We think that if things are too onerous, consumers will not buy into it.

Ms. LOFGREN. My time is up, Mr. Chairman. Thank you.

Mr. COBLE. Mr. Berman and I have agreed to adjourn, unless the Members want a second round. I'll put that to the Members.

The gentleman from Alabama wants to introduce a statement, I think.

Mr. BACHUS. Yes. And, Mr. Chairman, I'm going to be very brief.

There are 20,000 video stores in the United States, and that's really how a lot of my constituents interact on these issues. And they have prepared a statement concerning the report, section 104 report. I'd like that to be introduced in the record.

[The information referred to follows:]

PREPARED STATEMENT OF VIDEO SOFTWARE DEALERS ASSOCIATION

The Video Software Dealers Association (VSDA), the international trade association representing the home video industry and video stores across the nation, submits this statement for the record of the oversight hearing on the DMCA Section 104 Report. We wish to make the Subcommittee aware of certain efforts of copyright owners to expand the limited privileges granted to them by Congress under the Copyright Act to control the lawful distribution and use of copyrighted products. These efforts promise to undermine the first sale doctrine and the public policies it serves, and ultimately will impede the development of online entertainment, to the detriment of consumers, retailers, and copyright owners.

VIDEO SOFTWARE DEALERS ASSOCIATION

Established in 1981, the Video Software Dealers Association (VSDA) is a not-for-profit international trade association for the $19 billion home entertainment industry. VSDA represents more than 2,000 companies throughout the United States, Canada, and 10 other countries. Membership comprises the full spectrum of video retailers (both independents and large chains), as well as the home video divisions of all major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry.

COPYRIGHT LAW AND HOME VIDEO

Having built the world's first home distribution system for motion pictures on the strength of first sale provision of the Copyright Act, video retailers may have more at stake in this discussion than perhaps any other market segment.

Copyright law, and particularly the first sale doctrine (codified at 17 U.S.C. 109(a)), provides the legal foundation that has facilitated the phenomenal growth of the home video industry over the past two decades. Section 109(a) provides that, notwithstanding a copyright owner's distribution right, the owner of a particular copy or phonorecord lawfully made under U.S. copyright law "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord." By giving retailers the right to sell and rent these lawfully made videos and video games without restriction by the copyright owner, the first sale provision benefits society by promoting retail competition and maximizing distribution of creative works.

When videocassette recorders (VCRs) first emerged as a consumer electronics product in the late 1970s, few imagined how ubiquitous they would become in America's homes and how popular watching a prerecorded video of a motion picture would be. For an overwhelming majority of America's 250 million plus consumers, renting and buying prerecorded videocassettes and digital versatile disks (DVDs) is an integral component of their entertainment options. More than 90% of the households in the U.S. own at least one VCR. And although the DVD is a relatively new format, it is projected that by the end of the year approximately 25 million U.S. households will own a DVD player. It is estimated that almost 2.8 billion videotapes and DVDs were rented in 2000. Approximately one-third of all video-equipped households rent a videotape or DVD weekly, while 50% rent at least once a month. More than 60% of video-equipped homes have a video library of some sort. The average videotape library contains 75 titles, while the average DVD collection contains 19 titles. Consumer spending on video rentals in 2000 was a record $8.25 billion. An additional estimated $10.8 billion was spent purchasing videotapes and DVDs, with DVDs representing 32% of the total dollars spent.

Although the motion picture studios strenuously resisted the emergence of the VCR and the creation of the video rental industry, even going so far as petitioning Congress to eliminate the first sale doctrine for prerecorded videos of movies, the home video industry today is an enormously profitable enterprise for the motion picture studios. Total revenue to the studios from domestic video sales and rentals totaled $9.5 billion in 2000. Over the past several years, revenue from home video has accounted for more than half of the studios' gross domestic film revenue.

Video retailing, while experiencing some of the consolidation and slowing of growth of a maturing industry, remains a vibrant enterprise. As of early 2000, there were 20,000 video rental specialty stores in the U.S. These stores included the major public chains such as Blockbuster, Hollywood Video, and Movie Gallery, and a significant number of independent retailers. It is estimated that more than 40% of video specialty stores currently are single-store operations. Another 8,000 non-spe-

cialists, primarily supermarkets and drugstores, also rent video as a regular part of their business, and numerous other retail outlets sell prerecorded videos.

Thus, the freedom to rent and resell videos guaranteed by the first sale provision has provided consumers with access to affordable, quality entertainment that they can enjoy in their homes, generated a tremendous revenue stream for the copyright owners, and created a thriving industry consisting primarily of small, community-based businesses.

THREATS TO THE FIRST SALE DOCTRINE

The benefits of the first sale provision to society, consumers, copyright owners, and video retailers are threatened by some of the trends in online entertainment. VSDA is opposed to any erosion in the rights provided by the first sale provision and the suppression of competition and restriction of consumer choice such erosion portends.

Copyright law maintains a careful balance between protecting the intellectual property of copyright owners and promoting the broad dissemination and enjoyment of protected works. Section 202 of the Copyright Act clearly delineates between ownership of the copyright to a work and ownership of a lawful copy of a copyrighted work. The copyright owner and the copy owner each have distinct rights under the Copyright Act, and the rights of each must be respected.

Some in the copyright owner community seek to disable the protections that copyright law provides to legal owners of lawfully made copies of copyrighted works—and expand the limited privileges granted to copyright owners by Congress—in order to control the lawful distribution and use of copyrighted materials, control Congress has expressly denied to them in the Copyright Act. Copyright owners have taken the position that they are free to control the distribution and use of digitally delivered copyrighted works through access control technology and non-negotiable contracts after ownership of a copy has passed to others. They seek this control in order to impose a business model under which they can charge for repeated use or multiple users of copyrighted works.

"Access control technology" serves important functions when used to protect rights granted by the Copyright Act. For example, it is acceptable for a copyright owner to deny initial access to a digitally distributed work until payment for the reproduction is received. But such access control technology must not be abused to expand the copyright monopoly without congressional warrant. Examples of the misuse of access control technology by copyright owners include "tethering" (limiting a download to use on a single computer) and "timing out" (disabling a download after a certain amount of time). The practical effect of such use of access control technology is to allow the copyright owner to restrict the lawful distribution and use of the work. The use of such technological locks is the digital equivalent of preventing anyone from reading a book unless they get permission from the copyright owner every time they wish to do so.

Non-negotiable contracts in the digital environment are most commonly presented as "click-thru end user license agreements." These contracts of adhesion typically incant that a sale is not a sale but a "rental" or a "license" that restricts the purchaser's ability to use and transfer ownership of the product. In a digital environment, "click here to agree" is a non-negotiable step in an automated transaction, leaving no opportunity to object.

Video retailers are concerned that such access control technology and non-negotiable contracts are being used not to prevent piracy, but to restrict the legal rights of lawful owners to give away, sell, and rent the digital copies they own, in contravention of first sale rights.

These concerns are not theoretical. The MovieFly "video on demand" online delivery service for motion pictures is set to launch soon. MovieFly is a joint venture of five motion picture studios. Reportedly, a download from this service will have to be watched within 30 days from the date of download and will be operable only for 24 hours after the first viewing, after which the movie will be rendered as inaccessible code. In addition, the download will be tethered to the computer on which it is downloaded.

Under the Copyright Act, the person who downloads a movie from the MovieFly service owns that copy and has the right to give it away, sell it, or lend it. The questions that must be asked are whether copyright owners are free to nullify those rights, and if so, what is the source of copyright owners' right to do so? We submit that copyright owners have no right to prevent the owners of lawfully made copies from disposing of them by gift, sale, or even lending, yet that is exactly what the technology to be employed by MovieFly apparently would do.

Because the first sale provision furthers the important public policies of promoting competition and maximizing dissemination of copyrighted works, the rights it confers cannot be extinguished either by technological controls or non-negotiable contracts. To conclude otherwise would make the rights granted by the first sale doctrine merely contingent on the technological prowess or goodwill of copyright owners.

The attempts of copyright owners to control distribution and use of digitally delivered works also have the potential to erode consumer choice, retail competition, and fair use and free speech rights in the digital marketplace and result in a new exclusive and unrestricted general copyright "right of use." They may also infringe upon consumer privacy. Therefore, Congress must closely examine the use of access control technology and non-negotiable contracts in digitally delivery by copyright owners.

THE NEED TO DETER VIDEO PIRACY

This is not a debate about piracy. Video retailers support the efforts of copyright owners to protect their intellectual property against infringement, as legitimate retailers are usually the first to feel the impact of piracy.

VSDA actively supported the enactment of the Digital Millennium Copyright Act of 1998 (DMCA) and specifically the anticircumvention provisions with the understanding that these provisions were intended by Congress to deter piracy. VSDA has supported the positions of copyright owners in *A&M Records v. Napster, Inc., DVD Copy Control Ass'n, Inc. v. Bunner*, and similar cases. VSDA also actively works with the Motion Picture Association of America to identify individuals engaged in piracy. Thus, VSDA is not aligned with those who seek to make meaningless the legal protections that copyright law provides to prevent piracy of covered works.

However, allowing consumers to exercise their right to give away, resell, or rent lawfully acquired digitally delivered works will not inevitably lead to the unauthorized exhibition, reproduction, or public performance of copyrighted works. Copy protection software is distinct from the software used to tether or time-out digital downloads. The technology exists today, through digital rights management, to facilitate the lawful digital distribution of works while respecting first sale rights and deterring piracy. Moreover, the Ninth Circuit's decision in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), demonstrates that copyright owners have adequate legal remedies at their disposal to address online piracy.

THE DMCA SECTION 104 REPORT

The DMCA Section 104 Report, issued by the Copyright Office in August, was requested by Congress in the DMCA. The Report examined the impact of Title 1 of the DMCA and the development of electronic commerce on the operation of the first sale doctrine and Section 117 of the Copyright Act, and the relationship between existing and emerging technology and the operation of the first sale doctrine and Section 117. During the study process, VSDA submitted written comments and made oral presentations to the Copyright Office.

First Sale Rights and Digital Downloads: The DMCA Section 104 Report states that the first sale provision unequivocally applies to digital downloads that are fixed in a tangible medium, such as a writable CD or DVD, a computer diskette, or a hard drive.

VSDA agrees that a digital copy authorized by the copyright owner that is reproduced by downloading onto a consumer's computer or portable storage medium is no different from a digital copy authorized by the copyright owner that is reproduced in the form of packaged media (such as a prerecorded videocassette or DVD). Both are lawfully made copies and are fixed in tangible media. First sale rights apply to both.

VSDA commends the Copyright Office for affirming that the first sale provision of the Copyright Act applies to videos and other entertainment lawfully downloaded from the Internet. This report should resolve whatever ambiguity may have existed regarding whether first sale rights apply to digital downloads.

However, VSDA strongly disagrees with the Copyright Office's dictum that the first sale provision is not a right, but is an unenforceable restriction on copyright owners. The Copyright Office said:

> Many of the commenters referred to the first sale doctrine as a "right." This is an inartful term to describe the doctrine. Rights are guaranteed to individuals and are generally enforceable in court. The first sale doctrine is not an enforceable right from the standpoint of the owner of a copy—that is, there is no independent remedy if a person is effectively denied the benefits of section 109 through technological or contractual means. The first sale doctrine is a limita-

tion to the scope of copyright; specifically it is a limitation to the distribution right of copyright owners.

This statement appears to invite copyright owners to infringe with impunity the first sale rights of owners of lawfully made copies. We can find no support for the proposition that the first sale doctrine is unenforceable, and the Copyright Office's interpretation is clearly at odds with the Supreme Court's recognition that the Copyright Act's limitations on copyrights should be given just as much weight as the copyrights themselves. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

Access Control Technology and Non-Negotiable Contracts: The Section 104 Report also touched on whether copyright owners can use access control technology and non-negotiable contracts for digital works to circumvent the first sale doctrine. The Copyright Office correctly noted that access control technologies that tether digital downloads to a single computer and non-negotiable "click-thru" contracts that attempt to override copyright law may negatively impact consumer choice and retail competition. It concluded, however, that the problems raised by them are speculative, or premature, or beyond the scope of the report.

In this respect, the Copyright Office was remiss. The announced efforts of copyright owners to defeat first sale rights and control retailers' and consumers' lawful use of digitally delivered media through restrictive access control measures and non-negotiable contract terms fall squarely within the Copyright Office's mandate from Congress. Yet the Copyright Office's report makes no mention of business models promoted by joint ventures among copyright holders over the past year, under which consumers would be locked out of their own property unless they keep paying the copyright owner for access. The problems created by overly restrictive access control technology and non-negotiable contracts need to be addressed now, not at some indefinite time in the future. To fail to do so leaves to the designers of access controls the allocation of rights between consumers and copyright owners, a function that previously was the exclusive responsibility of Congress.

These restrictions on consumers' abilities to transfer and use fully the products they lawfully purchase and download are not speculative and consideration of their impact is not premature. Motion picture studios will soon offer "video-on-demand" over the Internet through studio joint ventures. It appears these services will restrict purchasers' abilities to transfer and use fully the downloaded movies.

VSDA'S STATEMENT OF PRINCIPLES

In light of the Copyright Office's failure to adequately address the harm to consumers from overly restrictive access control technology and non-negotiable contracts, we believe Congress needs to address this issue. VSDA calls for the adoption of our "Principles to Facilitate Digital Delivery of Movies," which are attached to this statement. These principles are designed to ensure consumer choice, prevent piracy, and promote retail competition. VSDA's principles emphasize anti-piracy protections, endorsement of first sale rights for digital products, rejection of exclusive dealing, promotion of consumer choice, protection of consumer privacy, and limitation of digital rights management systems to copyright protection and management.

Consumers have legitimate concerns over their ability to use and transfer possession of digitally delivered copyrighted works; copyright owners have legitimate concerns about unlawful reproduction and distribution of their movies; and retailers have legitimate concerns about business models that would suppress or eliminate retail competition. Consumers, retailers, and copyright owners of motion pictures would all benefit from adoption of our principles.

CONCLUSION

Copyright law is a balance between the protection of intellectual creations and the promotion of broad public dissemination of these creations in a manner that benefits society as a whole. Congress must ensure the proper balance is maintained between the rights of copyright owners on the one side and consumers and retailers on the other so that lawful digital distribution can move forward.

VSDA is deeply concerned about the overreaching that appears to be part of some emerging business models for online entertainment. Copyright owners' use of access control technology and non-negotiable contracts are upsetting the equilibrium of copyright law. Many such uses do not deter piracy at all but instead control the lawful use, resale, and rental of digitally delivered entertainment. Overreaching by copyright owners, if unchecked by Congress, will impede the development of online entertainment, to the detriment of consumers, retailers, and copyright owners.

Video retailers see tremendous possibilities in digital distribution and want to see this market grow. They do not fear a free market, but believe that copyright owners should not be able to expand the limited privileges granted to them under the Copy-

right Act to lock out retail competition. They ask only for the opportunity to compete fairly for consumers in the digital marketplace. They disagree with the notion that any single participant in the marketplace should be allowed to dictate the winners and losers.

While it can be argued that, ultimately, business models that rely on consumer-unfriendly technology will fail, in the interim some retailers may be driven out of business and the development of the market for digital delivery will be severely impeded.

We call on Congress to support public policies for digitally delivered copyrighted works that preserve the balance of copyright law, promote competition for consumer allegiance, protect consumer rights, and stimulate technological innovation. These policies must ensure that the first sale, fair use, private performance, and other intellectual property rights of consumers guaranteed under the Copyright Act remain vital and meaningful in the digital marketplace. They must prevent copyright owners from misusing the limited privileges granted to them by Congress under the Copyright Act to extend their copyright monopoly. And they must enable copyright law to continue to stimulate artistic, business and technological innovation that benefits society, enhances the quality of life, and fuels economic growth.

Thank you.

STATEMENT OF PRINCIPLES FOR FACILITATING
DIGITAL DISTRIBUTION OF MOTION PICTURES

PRESENTED BY THE VIDEO SOFTWARE DEALERS ASSOCIATION

1. Federal law must continue to make it a crime to disseminate or use technology to circumvent the encryption of digital works for the purpose of creating unlawful copies. However:
   a. These provisions of federal law should not be utilized for purposes other than protecting against copyright infringement, such as extension of the copyright term or limiting the rights provided by the first sale doctrine.
   b. The anticircumvention provisions of the DMCA "[do] not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of the work ... even if such actions involve circumvention of additional forms of technological protection measures." H. Rpt. No. 105–551(I) (1998). Accordingly, technological measures should not be employed by copyright owners to limit the lawful owner's ability to realize the full value of ownership, such as by use of time-out or limited play features, or binding the initial access to a single computer and thereby preventing the lawful copy from being played in a different computer.
2. The first sale doctrine, and its codification at 17 U.S.C. § 109(a), are essential parts of U.S. copyright law.
   a. Copyright law provides content owners with special legal protection of their work in exchange for their maximizing dissemination of their works to the public.
   b. The first sale doctrine is a distinct right under copyright law, not an exception to the copyright owner's exclusive right of reproduction or a fair use defense.
   c. The first sale doctrine encourages wide distribution of creative works that can benefit society and promotes competition and consumer choice.
   d. While the first sale doctrine is a right belonging to the owner of a lawfully made copy against the copyright owner, it exists for the benefit of the public and therefore cannot be abrogated or voided by the copyright owner, either unilaterally (such as by use of technology) or by agreement with the owner of the copy (such as by an end-user license agreement).
3. The first sale doctrine transcends technologies and should not be abandoned. The public policy considerations against restraints on alienation of property or trade in lawfully acquired copyrighted works are technology-neutral.
4. The first sale doctrine applies to digital copies lawfully made under the Copyright Act that are fixed on any tangible medium of expression (including computer hard drives or portable storage media) and the lawful owner of such digital copies may transfer ownership of such copies. In the case of audiovisual works, the owner may also transfer possession by rental.
   a. The first sale doctrine does not authorize the owner of a lawfully made digital copy to make other digital copies, such as by e-mailing copies to friends and family.
   b.

The copyright owner may not restrict how a lawfully made copy is used by its owner because there is no general "use" right under copyright law. A lawfully made copy is personal property, even though it contains intellectual property.

5. Exclusive dealing (including exclusive cross-licensing among suppliers) that forecloses an open and competitive market for electronic distribution of motion pictures should not be permitted.
6. Consumers should continue to be assured of aggressive competition for price, service, selection, and convenience in the retailing of motion pictures. They should be able to select the retailers from whom they obtain digitally delivered motion pictures, just as they currently are able to do with packaged media, and retailers should have access to product from all suppliers in order to meet consumer demand and ensure competition.
7. Any digital rights management ("DRM") systems should be limited to preventing copyright infringement and should not be used to restrict otherwise lawful access and use, whether by retailers or consumers.
8. Consumers should not be required by copyright owners, directly or indirectly, to surrender personally identifiable information as a prerequisite for obtaining motion pictures via digital distribution from third parties.
9. A retailer's customer base is as important to the retailer as copyrights are to the copyright owner. The copyright owner's use of DRM systems to protect its copyrights should not require that the retailer's customers (or their addresses) be identified to the copyright owner or any third party.
10. All digital delivery systems must ensure that the privacy of consumer video sales and rental records are protected at all times, as required under the Video Privacy Protection Act (18 U.S.C. §2710). No retailer should be made to violate the federal law by use of technology that captures personally identifiable information the retailer is prohibited from disclosing.

Mr. BACHUS. I also have five questions, and Ms. Peters will be back here tomorrow; particularly for one question—Mr. Sherman.

I'm not going to ask it, but I would like to submit it to him in writing——

Mr. COBLE. Without objection, that can be done.

Mr. BACHUS [continuing]. And have him respond to it.

[The information referred to follows:]

QUESTIONS FOR MARYBETH PETERS, REGISTER OF COPYRIGHTS, FROM REPRESENTATIVE BACHUS

1. The Copyright Office states that the first sale provision of the Copyright Act is not a right, but is an unenforceable restriction on copyright owners (footnote 41). Doesn't the Copyright Office's interpretation of first sale rights make those rights contingent on the technological prowess and goodwill of copyright owners?

Do you believe that Congress intended the rights it granted to the owners of lawful copies in the Copyright Act to be subject to voiding by copyright owners?

Unlike the exclusive rights of the copyright owner set forth in section 106 of the Copyright Act, first sale is not referred to as a "right" in section 109. Moreover, while infringements of a copyright owner's exclusive rights are subject to the remedies set forth in chapter 5 of the Act, "infringements" of first sale are not subject to any remedies. Consequently, within the statutory scheme created by Congress it is not accurate to refer to first sale as a "right." Rather, as stated in footnote 41 of the Report, the first sale doctrine "is a limitation on the scope of copyright": The owner of a particular copy of a work cannot be sued for infringement for disposing of possession or ownership of that copy.

While section 109(a) permits the owner of a particular lawful copy to dispose of it "[n]otwithstanding the provisions of section 106(3)," that is no guarantee that the owner of that copy can in fact dispose of it as he wishes. Plainly, applicable law (e.g., laws concerning obscenity or libel), or contractual obligations to third parties (e.g., exclusive dealing arrangements) may limit the ways that the owner of a copy may dispose of it. Similarly, copyright owners have long had the ability to impose limitations on the disposition of copies. Certain types of works have traditionally been licensed (e.g., 35mm prints of motion pictures for exhibition, computer pro-

grams and databases) or rented (e.g., classical music, stage plays and musicals) rather than sold, thus avoiding the first sale doctrine entirely. These practices—which often benefit consumers by allowing them to gain access to works more cheaply than if copies were sold outright—were in existence at the time that section 109 was formulated and there's no indication that Congress intended to disturb them.

Other works are distributed subject to contractual restrictions on further disposition of the copy. As in other fields of commerce, contracts permit parties to order their business dealings in the way that is most efficient for them, often resulting in greater availability of a work than would be possible under the default rules in the Copyright Act. Congress recognized when it enacted section 109 that the first sale doctrine "does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79 (1976). There is substantial case law holding that copyright owners and their licensees may, by contract, generally agree to limitations on the licensee's conduct that may otherwise be permitted under copyright law, and that such contracts are not preempted by the Copyright Act. See, e.g., ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Trandes v. Guy F. Atkinson Co., 996 F.2d 655 (4th Cir.), cert. denied, 114 S.Ct. 443 (1993); National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426 (8th Cir.), cert. denied, 114 S.Ct. 176 (1993); Harper & Row, Publishers v. Nation Enters., 723 F.2d 195 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985).

Finally, Congress has amended section 109 twice to limit the first sale doctrine to allow copyright holders to exercise their distribution right as to copies of certain types of works in order to prevent rental of those copies. For all of these reasons it is clear that section 109 does not confer an absolute right on owners of copies to dispose of them in any manner. Congress was aware of a number of circumstances where the ability to dispose of copies would be limited and, in some circumstances, endorsed the ability of copyright owners to impose limitations.

2. You have stated that the issue of contract preemption is outside the scope of the Section 104 Report (p. 163). However, the mandate of Section 104, in part, was to "evaluate . . . the effects of . . . the development of electronic commerce and associated technology on the operation of [the first sale doctrine]." Contract provisions that attempt to override the rights of owners of lawful copies is an issue in electronic commerce and they do have an impact on the ability of those owners to exercise their first sale rights, particularly when the contract is enforced by access control technology. Can you explain why you declared contract preemption to be outside the scope of the interplay between electronic commerce and the first sale doctrine?

Electronic commerce comprehends the entire gamut of commercial issues as applied to the Internet. In instructing the Copyright Office to examine the effects of the development of electronic commerce on sections 109 and 117 of the Copyright Act, it can be safely assumed that Congress did not intend the Office to examine all of the effects of all of the commercial issues involved in electronic commerce on those two sections of the Act. In interpreting the scope of our mandate under section 104 of the DMCA, we focused on those issues that are unique or different in the online context. Contract preemption is not one of those issues. It is, rather, an issue that predates electronic commerce, and has as much importance in the off-line world as in the online world.

Our interpretation is confirmed by the legislative history of section 104 of the DMCA, which is reviewed on pages 14-19 of the Report. The legislative history of section 104 indicates that the study was intended to cover a subset of the issues that were raised by the proposals in H.R. 3048 in the 105th Congress. Sections 4 and 6 of that bill proposed amendments to sections 109 and 117 of the Copyright Act, to create a digital first sale doctrine and a temporary copy exemption, respectively. Section 7 of that bill would have amended section 301(a) of the Act to preempt state-law enforcement of non-negotiable license terms that abrogate or restrict limitations on copyright owners exclusive rights. Section 109 of the DMCA directs the Office to examine sections 109 and 117 (corresponding to the proposals in sections 4 and 6 of H.R. 3048), but does not direct the Office to examine section 301(a). We interpret the failure to mention section 301(a) as a strong indication that the proposal on contract preemption in section 7 of H.R. 3048 is outside the scope of the study.

3. In light of the opening of MusicNet and the imminent launch of PressPlay and the online movie delivery services Movies.com and MovieFly, do you have a concern that access control technologies, such as

tethering and time outs, that may be used by those services will have a negative effect on the operation of the first sale doctrine?

On page 76 of the Copyright Office Report we state that "if the practice of tethering were to become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers of such a development remains unclear."

At this point in time it is premature to conclude whether these services represent a trend toward use of access control technologies, such as tethering and time outs, in a way that would have a negative effect on the operation of the first sale doctrine. The services that you mention in your question are, by their own admission, the first, limited steps toward online delivery of these kinds of content. We are in a period of experimentation and change, and it is certain that a number of different types of services, offering content to consumers in a variety of formats, will come into (and go out of) existence in the coming years. What does appear certain to us, given the current environment, is that the availability of the existing services has not deprived consumers of the opportunity to obtain copies and phonorecords that are fully subject to the first sale doctrine.

Mr. COBLE. And, Mr. Simon, I'll give my question to you subsequently as well.

This, I think, is the best sense for everyone. It frees you all.

We appreciate your being here and appreciate your testimony.

This includes the first oversight hearing on the Digital Millennium Copyright Act section 104 report.

The record will remain open for one week.

Thank you for your cooperation. The Committee stands adjourned.

[Whereupon, at 3:16 p.m., the Subcommittee was adjourned.]

DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT

THURSDAY, DECEMBER 13, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good morning, ladies and gentlemen. Even though the Ranking Member from California is not here, I am sure he is en route, and we do have the Ranking Member of the full Committee, so we will commence the Subcommittee hearing, and I ask that it come to order.

Today we again will receive the testimony regarding the Digital Millennium Copyright Act Section 104 report submitted by the U.S. Copyright Office. As was stated yesterday, there is no avoiding the fact that the report presents complex and controversial issues.

Today we will hear from the Register of Copyrights and representatives, from Broadcast Music, Inc., the Digital Media Association and the Consumer Electronics Association. These witnesses will focus on the Copyright Office conclusions and recommendations regarding Sections 109 and 117 of the Copyright Act.

The Copyright Office was not persuaded that Section 109 or the first sale doctrine should be expanded to include digital transmissions. On the other hand, the Copyright Office was persuaded that the Copyright Act should be admended to permit what has become the customary practice of consumers when making archival or backup copies of the information stored on their computers. The Copyright Office recommended two alternatives to achieve this result, and we look forward to hearing the arguments both for and against these recommendations.

As I said yesterday, normally the opening statements are reserved for the Ranking Member from California and me, but we are glad to have the Ranking Member of the full Committee here. Representatives Cannon and Boucher have legislation in the hopper and if either of those two come and would like to be recognized—otherwise, by unanimous consent, I would like to move that all other opening statements be submitted into the record.

Mr. COBLE. I am now pleased to recognize the distinguished gentleman from California and Ranking Member, Mr. Berman.

Mr. BERMAN. I won't test your patience today with a lengthy statement. I just want to share few thoughts that were inspired by Mr. Conyers' comments yesterday.

The digital music debate that has raged for the past few years both here in Congress and in the press and in the marketplace has often been misdirected. It usually plays out as different industries arguing about how much they will have to pay to use copyrighted works, whether there is adequate competition in the markets that utilize works, and whether certain industries feel copyrighted laws impair their ability to bring new technologies to market.

Consistently lost in this debate are the artists over whose rights everyone is arguing, the men and women who pour their hearts and souls, days and nights, their life savings and economic security into a creative dream. Why do creators, the vast majority unheralded and unknown, take these great emotional financial and sometimes physical risks to write a book, create a song, record music, code a software program, or make a film? In no small measure because they love to do so or are driven to create. But also in no small measure because they hope against all odds that they will be able to support themselves and even prosper by creating.

It is the works and property of these creators that others end up arguing they should be able to exploit, use for free, benefit from, or take at a government rate. It is the rights of these creators, their copyrights, that others want to ignore, downplay, or belittle to advantage their industry.

Clearly, the effective utilization of property, the development of new technology, the creation of economic activity and the satisfaction of consumers are all very important goals and are goals consistent with the protection of copyrights, but in pursuit of these goals Congress should remain equally focused on the need to nurture artists, to exalt them, to ensure they thrive, not just survive.

Thank you, Mr. Chairman, and I yield back.

Mr. COBLE. I thank the gentleman from California.

Mr. Conyers, would you like to make an opening statement?

Mr. CONYERS. Only to welcome this panel and the previous panelist. I don't know what we would do without her. She heard all of this from what we did yesterday, so she has got a head start on everybody else.

But we have got the Digital Millennium Copyright Act, and we are trying now to figure out how this applies in the digital world and the question is now how we do this. We have got Boucher-Cannon which is attracting less and less attention so now we are going to do a whole drafting thing. When we go overseas, we promote copyright law, respect trademarks, understand authors, sympathize with composers, and then we come back home and say, well, we have got a new technology, and we start all over again.

Well, what do we do for these guys here? Around the world they are just getting used to the idea that copyright is a legitimate legal concept, but then we come here and what do we say? Well, digital, we don't want double dipping. We don't want these people to take advantage of the system.

It is almost like Welfare to Work. I mean, you know, we have got to get these guys out and off the dole. But this discussion around the failures of digitally transmitted material and whether copyright

laws should an attach to buffer copies and archival copies, ephemeral recordings, heavy, heavy stuff. But the question is, are we going to be fair?

And we have come a long way—it used to be that we weren't fair, period, I mean, without reference to digital. I mean, the recent past, it is something like when somebody around here introduces a reparations bill, they say don't talk about the slave experience. That's got nothing to do with it.

And we come here, we say, well, let us talk about how we will be fair. They say, don't go back into the early days of the industry where we didn't treat artists like anything, and they got nothing. We are now in the new era where we all respect each other. But now, this new technology, I don't know.

So the three primary ways to receive music from the Internet—webcasting, radio-like programming, streaming music performances in real time, downloading copies of music for the consumers to use—well, I mean digital is digital, and artists deserve performance royalties regardless of the type of transmission used. Is this a new statement of law foreign to the panelists? What is wrong with that?

The Copyright Offices report performance rights and mechanical rights do not always attach to the transmission of music. Well, that is great. Music can be copied and sold and given away, so why shouldn't the rights attach? What is different?

Well, that is why we kept her over for two sessions, because we are going to find out today. So that is what I am thinking about.

I am happy that Mr. Potter is here because we will probably be talking with each other, more than likely.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

We welcome as well the gentlemen from Virginia and California and Massachusetts.

Our first witness this morning will be the Honorable Marybeth Peters, who is Register of Copyrights for the United States. While she needs no introduction, we enumerated Ms. Peters' many achievements yesterday. Thank you again, Madam Register, for joining us.

Our next is Marvin Berenson, Senior Vice President and General Counsel of Broadcast Music Incorporated, who oversees the operation of the BMI legal department as well as the company's legal affairs. Mr. Berenson graduated cum laude from Michigan State University and received his law degree from Boston University School of Law and was admitted to the bar in 1967. Good to have you back with us, Mr. Berenson.

Mr. Jonathan Potter has served as the Executive Director of the Digital Media Association since its creation in June 1998. In this role he represents the digital media industries in public policy, industry promotion and industry relations activities. Mr. Potter is a graduate of the New York University School of Law and the University of Rochester.

Our final witness today is Mr. Gary Klein, who is currently Vice President of Government and Legal Affairs, General Counsel for the Consumer Electronics Association, whose 600 plus members produce virtually every consumer electronic product imaginable.

Prior to joining CEA, Mr. Klein served as counsel to the Senate Judiciary Committee's Subcommittee on Courts and Administrative Oversight, where he was responsible for the issues relating to intellectual property, antitrust, and tort reform. He earned his BA from Queens College and his JD with honors from the Harvard Law School LLM program. Good to have you with us.

We have your written statements which have been examined and which will be reexamined, I am confident, and I ask unanimous consent that they be submitted into the record in their entirety.

Now, lady and gentlemen, you all know our rule here. We are into the death throes of this session now and you won't be keelhauled if you violate it, but I direct your attention to the two clocks that are before you. When the amber light illuminates, that is your warning that you have about a minute left. So if you all can confine your oral statements to 5 minutes, we will be appreciative.

Mr. COBLE. Madam Register, we will start with you.

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Thank you, Mr. Chairman. I am pleased to be back today again for a second hearing on the DMCA Section 104 report.

Today's topic is Section 109 of the copyright law known as the first sale doctrine which limits a copyright owner's distribution right. Subject to certain limitations, it permits the owner of a lawfully made copy of a work to dispose of that particular copy, for example, by selling it, giving it away, or destroying it.

The first sale doctrine, originally a judicially created doctrine to prevent restraints on the alienation of physical property, was codified in the 1909 Copyright Act and carried forward in the 1976 Act. Many commenters voice concerns about perceived hurdles to the exercise of the first sale privilege raised by the application of technological protection measures such as the content scrambling system known as CSS on DVDs.

We concluded that at this point in time legal protection for technological protection measures are not having any significant effect on the operation of Section 109. While the application of CSS may limit the resale market for a particular copy of a work, Section 109 does not guarantee either the availability of a secondary market or a particular price for copies of copyrighted works.

The primary issue for us was whether Section 109 permitted the digital transmission of a copyrighted work by the owner of a lawfully made copy of that work. The problem is that such transmissions result in the creation of a new copy of the work on the computer of each of the recipients, thereby implicating the reproduction right.

The statutory first sale doctrine, however, is an express limitation on only the distribution right. It is not and never has been a limitation on the reproduction right.

Further, the legislative history indicates that the intent of Congress was to apply it only to the transfer of a particular tangible copy of a book, a CD, a floppy disc. A transmission does not transfer a particular copy of a work. A transmission results in the cre-

ation and distribution of a new copy. Thus a transmission of a work from one computer to another does not fall within the first sale doctrine.

The question then becomes whether the law should be amended to permit precisely this type of activity. Many commenters supported such an amendment, arguing that technological measures could be imposed in a way to ensure that the source copy would be deleted or would become inaccessible upon transmission of the work. This is generally referred to as the forward and delete model.

The appeal of this model is that it resembles the traditional application of the first sale doctrine. The owner of a lawfully made copy transfers that work to someone else and, in doing so, deprives himself of the copy that he had.

Our answer to the question of whether the law should be amended to permit this activity is no.

First, such an amendment would be inconsistent with the purpose of the first sale doctrine and its legislative history. The doctrine was primarily adopted to prevent restraints on the alienation of physical property. That focus on tangible copies was carried over in the congressional codification of the doctrine. A digital transmission of a work presents a substantially different set of circumstances than the transfer of a tangible copy, even if the disposition of the work at the conclusion of the transmission bears a superficial resemblance to the effect of the transfer of a particular tangible copy.

Second, the technology to enforce a forward and delete model is unreliable and expensive. There are issues with respect to who would bear the cost of these technological measures and what incentives there are to use these measures. Of course, without widespread use of a reliable forward and delete technology, any pretense with regard to similarity between the first sale doctrine and digital first sale disappears.

Third, we are very concerned about the effect that such a change could have on the balance that was struck when the doctrine limiting copyright owners' distribution or vending right was created and enacted into law. When the existing balance was struck, it was in the context of all the inefficiency of the resale market for tangible copies. Exhausting the distribution right after first sale of a copy did not and was not likely to impair a copyright owner's market for the work.

In a digital network environment, the considerations and the balance are totally different. In 1909 and in 1976, the effect of the first sale doctrine on the market of a work was limited by virtue of application only to tangible copies. Time, space, effort, cost, and the quality of the copy are all factors which have limited the practical effect of the first sale doctrine on the market for the work. These factors continue for digital tangible copies and for all tangible copies, but in the environment of digital transmissions the balance that was struck disappears. The market for copyrighted works would be substantially harmed by the easy and wide availability of perfect secondhand copies.

Finally—my time is up—let me just say that we did do an analysis of Section 117 and archival copies in that intersection of that analysis with Section 109. As you mentioned, we did conclude that

reality today, where everybody backs up everything on their computer, is not consistent with what is in Section 117. We also found that there seem to be no problems for consumers in exercising these archival rights. It just doesn't match the law.

We therefore ask Congress to amend the law to basically make it fit with what is established practice and to fit with what we perceive is a potential problem between lawfully made archival copies and the first sale doctrine. We hope that Congress does in fact really take one of the courses of action that we suggest.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Madam Register.

Let me welcome the gentleman from Utah and the gentlelady from Pennsylvania who have joined us since we started.

Mr. Berenson.

STATEMENT OF MARVIN BERENSON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, BROADCAST MUSIC INCORPORATED

Mr. BERENSON. Good morning, Mr. Chairman and Members of the Subcommittee. I appear on behalf of BMI, one of three U.S. Music performing licensing organizations. BMI has been entrusted by approximately 300,000 songwriters, composers and music publishers to license their performing right in over four million musical works.

BMI's general message to the Subcommittee is Congress should continue to promote authorship and let the marketplace resolve business issues such as the value of a performing right. Obtaining a performing right license has never been an obstacle to transmission of music on the Internet. All the music user has to do is request the license from BMI and ASCAP and the user is instantaneously licensed.

Examples of BMI licensees on the Internet include Yahoo, MP3.Com, MSN Music, MusicNet. In fact, BMI has a digital music licensing center which allows small users to take a license on line through a technology called "Klik-Thru" licensing, very easy.

Briefly, I will cover three topics.

First, the Register and the Department of Commerce through the NTIA did not file a joint report to Congress as was required. In its report the NTIA made no legislative recommendations. The Register diverged from the NTIA's approach and made recommendations that, if enacted, would adversely affect the rights of songwriters, the ultimate small businessmen. BMI agrees with the NTIA.

Second, the Register, having proposed an exemption for music publishers' reproduction rights in streaming, considered the applicability of the performing right to digital downloads of music when no contemporaneous rendering takes place. The Register concluded that, assuming digital downloads of music are public performances, they should be considered fair use. BMI disagrees with the Register's approach as flawed, outside the scope of the inquiry, and not supported by the record.

Just looking at the continuum of commercial uses for which both performing and mechanical rights are implicated demonstrates the defects in the Register's simplistic approach. Examples would be you could have a download of a single song per song fee. You can

have downloads of an unlimited number of songs for a monthly subscription; you can have downloads that are limited, namely only three songs for—you can listen to them once, twice, three times, and then you would pay them again if you wanted to hear them again. The purpose is to hear the music here.

Third, despite the fact that BMI disagrees with the substance of the Register's report, we have considered her conclusions and, rather than simply opposing, we have examined whether common ground can be achieved. BMI, along with ASCAP and the NMPA, has suggested a possible marketplace solution with respect to pure audio downloads, criteria such as, (1) the musical work could not be heard while the transmission was taking place, and (2) the sole purpose of the transmission was to deliver a phonorecord of the musical work to the home user, and (3) the resulting phonorecord received by the home user was permanent, capable of further noncommercial duplication by the home user and is not limited by the time, usage or further payment or any other factor, and (4) the transmission of the musical work was made on demand. That would be a pure audio-only download.

Regarding the performing right in a musical work, any legislative action by Congress is premature. We should let the marketplace develop. Now is not the time to weaken the current protections afforded the songwriters.

As Frances Preston, BMI's President and CEO, has said time and time again, "it all starts with a song," but the song is written by a songwriter, an individual. How does a songwriter give back to society? She creates music that we hear every day. Songs give confort and courage, they inspire us in times of adversity, they lift hearts in the face of tragedy, they unite and rally society, they evoke love.

What does this have to do with the topic before us today? Simply put, the Register has raised an issue as to the value of a songwriter's creation when transmitted on the Internet. She suggests a certain Internet usage of songwriters creation have little value or are fair use. Implicitly she suggests that songwriters should be denied a right of compensation for these uses.

I can go on and on about a songwriter's contributions to society. However, in light of what happened on September 11—I was going to play a videotape to demonstrate the value of the songwriter to society, however, due to the—basically, the consumer technology not working in this hearing room, we are not going to hear that.

The three musical works on the videotape were written by people performing the songs and were examples of the many songs that were written to help lift the spirit of America since September 11. I would like the opportunity to leave a copy of the videotape with the Subcommittee so they can hear it and offer it as part of the record.

Basically, these songs were written to bring people together, and the last song on there was basically Lee Greenwood performing at the September 11 memorial at Yankee Stadium bringing—truly trying to heal.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Berenson. Without objection, we will accept that tape; and I regret the inappropriate forum and time when our electronic media failed on us.

[The prepared statement of Mr. Berenson follows:]

PREPARED STATEMENT OF MARVIN L. BERENSON

Mr. Chairman, Mr. Ranking Minority Member, Members of the Subcommittee, thank you for the opportunity to testify on a very important subject, the Copyright Office's DMCA Section 104 Report, mandated by the Digital Millennium Copyright Act of 1998 (the "Report"). My name is Marvin L. Berenson. I am Senior Vice President and General Counsel of Broadcast Music, Inc. ("BMI"). BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its 300,000 affiliated songwriters, composers and music publishers, including thousands of foreign works through BMI's affiliation agreements with over sixty foreign performing right organizations. BMI's repertoire is licensed for use in connection with performances by over one thousand Internet web sites, as well as by broadcast and cable television, radio, concerts, restaurants, stores, background music services, sporting events, trade shows, corporations, colleges and universities, and a large variety of other uses. BMI issued the first commercial Internet copyright license for music performed on web sites in April 1995 and has continued to provide innovative licensing solutions for the evolving online music marketplace.

Some of BMI's individual songwriter and composer affiliates are well-known to the public and through their music participated in the recent tributes to the victims and fallen heroes of the tragedies at the World Trade Center and the Pentagon. Their songs of patriotism and grief and their artistry have been a major vehicle for fund-raising for the victims and their families. However, most BMI affiliates are ordinary citizens who receive a modest income for the creative efforts of writing music that is publicly performed by others. There can be no question that the majority of songwriters are not wealthy. They struggle to make a living, day to day, just as the average citizen does. Now is especially not the time to send a negative message to them.

At the outset, on behalf of BMI and its affiliates, I would like to commend this Subcommittee not only for its leadership on intellectual property issues but for the body of copyright law that it has produced over the past three decades.[1] The copyright law serves as an economic incentive to stimulate the creativity of authors who make their livings from the fruits of their creativity. The incentive works. If the incentive is reduced, there will be less creativity. The law is not perfect; perfection is impossible in a time of globalization and given the blinding speed of technological change. However, the current copyright statute, as a law that fuels the American free-market economy in a global environment, is well-suited to the on-line world.

BMI's general message is twofold. First, Congress should continue to promote and protect authorship. To quote from BMI's President Frances W. Preston, "it all starts with a song." Without the songwriter to create the song, there is no music. Second, in the Internet space, it is abundantly clear that a sole songwriter, composer, or music publisher cannot easily monitor the astronomical number of public performances of a musical work that may occur. Collective licensing for the performing right organizations is even more necessary and cost efficient in this market than it has historically been in other markets. The performing right organizations—BMI, ASCAP and SESAC—are recognized in the Copyright Act and, although not the subject of today's hearing, should continue to play a pivotal role in administering authors' rights in the electronic environment. In the final analysis, Congress should not only protect creativity and promote competition, it should also allow the marketplace to develop with such time-tested tools as collective licensing.

In my testimony today, I propose to cover three topics: first, a general appraisal of the Report; second, specific views on the Report's recommendations for section 109 and section 117 of the Copyright Act, including the Report's statements about the public performing right; and third, a marketplace solution to the Report's recommendations about perceived problems with music licensing.

I. A GENERAL APPRAISAL OF THE REPORT.

Section 104(a) of the Digital Millennium Copyright Act ("DMCA") required the Register of Copyrights and the Assistant Secretary for Communications and Technology, U.S. Department of Commerce, to "jointly" evaluate "(1) the effects of the

[1] I am authorized to report that BMI has received no federal grants or engaged in any federal contract or subcontract the disclosure of which would be required by House Rules.

amendments made by [Title I of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and (2) the relationship between existing and emergent technology and the operation of sections 109 and 117. . . .”[2] Further, section 104(b) required the two agencies to submit to Congress a “joint report” on their evaluation, including any legislative recommendations they might have.[3]

Although the Register and the Department of Commerce, through the National Telecommunications and Information Administration (“NTIA”), did jointly evaluate information obtained pursuant to a public comment and hearing period, they did not submit to Congress a “joint report” as required by section 104(b). The NTIA issued its report in March 2001, and made no legislative recommendations.[4] The Register issued the Copyright Office DMCA Section 104 Report in August 2001. While agreeing with the NTIA that no changes are needed to section 109 of the Act, the Report advised several legislative changes concerning section 117.

The Copyright Office’s report was correct on the main point at issue when it agreed with the NTIA that no change is necessary to the First Sale Doctrine in Section 109 of the Act at this time. To this extent, the NTIA and the Office share a common viewpoint that it is appropriate to take a conservative approach to changing the copyright law in the face of new technologies. The Office diverged with this cautious approach to dealing with technological change, however, in its comments specifically directed to the music industry that will injure the rights of the music community. First, the Office proposed an unwarranted exemption to the reproduction right for the making of certain temporary buffer copies of musical works incidental to streaming. Second, and for reasons that are not within the Office’s mandate under Section 104 of the DMCA, the Report makes groundless statements about the scope of the public performing right in digital downloads of musical works. BMI opposes the Report’s recommended legislation as unwarranted expansions of section 117 and also opposes the Report’s “off the cuff” observations about the scope of the public performing right in downloads. Both proposals are well beyond the scope of the Congressional DMCA Section 104 mandate and without evidentiary support in the record.

II. SPECIFIC VIEWS ON SECTIONS 109 AND SECTION 117 OF THE ACT.

a. No changes are necessary to section 109 of the Act.

BMI agrees with both the Register and the NTIA in their respective conclusions concerning the First Sale Doctrine that no legislative changes to section 109 of the Act are necessary at this time. Section 109 of the Act permits the owner of a copy of a copyrighted work like a compact disk (“CD”) to redistribute that property without violating the exclusive right set forth in Section 106(3) of the Act. Digital transmissions on the Internet for downloading music are different from distributions of physical media because they implicate several copyright rights—including the public performing right, the public display right and the reproduction right in addition to the distribution right. Applying the first sale doctrine to digital transmissions would adversely affect the copyright owners’ ability to license mechanical rights and public performing rights in their musical works as the online music marketplace continues to develop.

In the past five years, there has been a continued explosion in transmissions of music on the Internet. The Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files. In view of this, it is hard to make a factual case that section 109 is inhibiting digital transmissions. In these circumstances, we support the conclusions of both the NTIA and the Copyright Office that no change to section 109 of the Act is warranted at this time.

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[2] Section 109 of the Copyright Act contains an exemption from the distribution right in Section 106(3) of the Act permitting owners of copies or phonorecords lawfully made to sell or otherwise dispose of that copy or phonorecord, subject to certain limitations. This is commonly known as the First Sale Doctrine. Section 117 of the Act contains a small number of narrowly tailored exemptions to copyright rights allowing users of computer software to make copies in certain circumstances involving machine functionality and/or repair.

[3] Public Law No. 105–304, § 104(a), 112 Stat. 2860, 2876 (1998).

[4] The NTIA’s report is firmly grounded in recognition of electronic commerce, existing and emergent technology change, and their impact on sections 109 and 117 of the Copyright Act (the “Act”). Based on this recognition, NTIA prudently concluded that “it is premature . . . to draw any conclusions or make any legislative recommendations at this time. . . .” NTIA Report at 1.

b. The Proposals Regarding Section 117 Exemptions Are Unwarranted.

1. Buffer Copies in Streaming

The Report recommends that Congress enact legislation to amend the Copyright Act "to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work." [5] The Report recites the fair use factors from section 107 of the Act and purports to engage in a balancing of the equities in favor of the users. But there is no indication that the marketplace or the current provisions of the Act are not satisfactory to handle the issue of buffer copies.

Section 115 of the Act provides for the conducting of CARP proceedings to set rates for digital phonorecord deliveries and incidental digital phonorecord deliveries. The first such case has been noticed, and there is no need to amend the Act prior to learning the outcome of that proceeding. Indeed, recent reports of a negotiated license between the Harry Fox Agency and the record industry confirm that this issue is capable of being resolved by the marketplace.[6]

2. Downloads of Musical Works

Having proposed an exemption for music publishers' reproduction rights in streaming, the Register then felt compelled to go beyond reproduction right issues under section 117 and venture into what the Report characterized as an unsettled point of law that is subject to debate, the applicability of the public performing right to digital downloads of music when no contemporaneous rendering takes place. The Report concluded that assuming digital downloads of musical works are public performances, they should be considered fair use.[7] BMI disagrees with the Report's approach to musical works on a number of levels.[8]

First, the Report's conclusory statements regarding the value of the public performing right are outside the scope of the Register's Congressional mandate under section 104 of the DMCA. To shoehorn section 106(4) of the Copyright Act into an analysis of section 117 (a "copying" exemption) is (to say the least) a stretch.[9] A review of the request for public comment issued by the Copyright Office and the NTIA on June 5, 2000, confirms that all specific questions related to sections 109 and 117 of the Copyright Act.[10] No mention was made of public performances in digital downloads, and no user group filed written comments about the licensing of public performing rights. At least with respect to the public performing right the Register did not act on a full record in making the comments in her report.[11]

When Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Congress clarified the applicability of the mechanical compulsory li-

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[5] *See* Report at pp. 142–143.

[6] "Label Deal to unclog music logjam," issued September 17, 2001, by CNET News.com, at http://news.cnet.com/news.

[7] Report at pp. xxix-xxx; *see also* pp. 147–148 ("(I)t is our view that no liability should result from a technical 'performance' that takes place in the course of a download").

[8] Musical works are written by composers and lyricists and are usually owned or administered by music publishers. The copyrights in musical works are to be distinguished from those in sound recordings, which are the particular renditions of the musical works performed by the artists and which are usually controlled by record companies.

[9] The Register's rationale, that a bill had been introduced in 1997 by Representatives Boucher and Campbell (H.R. 3048, 105th Cong., 1st Sess. (1997)) who proposed to amend section 117 by permitting reproductions of digital works necessary to the operation of a device and not affecting the normal exploitation of the work, squares neither with the plain meaning of section 104 nor an actual reading of H.R. 3048. In pertinent part, H.R. 3048 proposed to amend section 117 to provide that "it not be 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*." (emphasis added). H.R. 3048's language, although somewhat murky on protecting the author, at least pays deference to the author.

[10] *See* 65 Fed. Reg. 35673–75 (May 16, 2000).

[11] The notice of public hearings adhered to this circumscribed approach. At the public hearing held by the Office and the NTIA on November 29, 2000, I testified about the applicability of the public performing right to digital transmissions under the Act to illustrate the inapplicability of the first sale doctrine to digital transmissions. At the hearing I testified about the legal rationale for performing right organizations to license a public performance of the underlying musical work that occurs in the course of transmitting sound recordings from the vendor's server to the consumer's personal computer. In response to a question from the panel about such licensing, I replied that the marketplace would handle this as a licensing matter. For all practical purposes, that is the extent of the record before the Office on this subject on which the Report purports to base a "fair use" analysis of the applicability of the public performing right to music downloads. See Hearing Transcript at 199–201.

cense to digital phonorecord deliveries. In so providing, it preserved the applicability of the public performing right to digital transmissions.[12] In reviewing the DPRA, Nimmer observes that "the prudent course would seem for purveyors of the new digital services to pay royalties under both theories [i.e., performance and mechanical]." [13]

The Report's conclusion that the public performance that takes place in the course of a download is fair use is simplistic and ignores the substance of the fair use doctrine as it is codified in section 107 of the Act. Section 107 sets forth four non-exclusive factors to be considered by courts in determining whether or not a particular use is fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. As this Committee stated in its Report on the 1976 Copyright Revision Act, ". . . courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[14]

The Copyright Office has in a prior rulemaking proceeding wisely decided that it would not interpret definitions in the Act in cases involving complex, fact-specific inquiries similar to "fair use" claims. *See Petition for Rulemaking Denial, Public Performance of Sound Recordings; Definition of Service*, 65 Fed. Reg. 77330, 77332 (Nov. 21, 2000). In that proceeding the Office denied a request by webcasters to issue a general rule interpreting the statutory definition of "interactive service". The Office's denial was based on the rapidly changing nature of the marketplace for digital music services. That same prudent rationale adopted for treatment of sound recording copyrights was not followed by the Office, however, in making its sweeping comments about exemptions for licensing musical works rights online.

The federal courts have much better fact-finding abilities when it comes to analyzing fair use claims. In a recent decision resolving litigation between music publishers and the Universal Music Group over mechanical licensing of streaming services, the district court rejected the defendant record label's contention that the issue of infringement of mechanical rights should be deferred until the Copyright Office issued its rulemaking. The court stated: *"The Second Circuit has recognized that 'the Copyright Office has no authority to give opinions or define legal terms, and [that] its interpretation on an issue never before decided should not be given controlling weight.'"* [15] The Court found liability for infringement of mechanical rights even though the service in question was licensed for public performing rights by BMI and ASCAP.

While the Report discussed the four fair use factors as they applied to the reproduction right and the making of "buffer" copies by webcasters (BMI does not believe their conclusions were correct, however), there was no similar analysis for the public performing right. The Report merely incorporated by reference the fair use analysis for the reproduction right.[16] In a giant leap of faith, the Report concluded that "fairness requires that we acknowledge the symmetrical difficulty that is faced by the online music industry: digital performances that are incidental to music downloads." [17]

In order to test the Report's logic, let us consider five types of digital performances that occur in digital downloads:

- Downloads of a single song for a per-song fee;
- Downloads of an unlimited number of songs for a monthly subscription;

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[12] *See* 17 U.S.C. § 115(d) (definition of digital phonorecord delivery); *see also* 17 U.S.C. § 115 (c)(3)(K) ("Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of digital transmission. . . .").

[13] 2 Nimmer § 8.24[B]. A work is publicly performed if it is transmitted in such a way that it can be seen or heard by the public, such as a broadcast or webcast, or by a limited portion of the public, such as cable or satellite transmissions that are available only to subscribers. To "transmit" a performance "is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101. A work is publicly performed if it is transmitted electronically over the air by a network to a local broadcasting station or a cable system, or streamed over the Internet by a webcaster. The transmission's definition as a performance is not dependent on a particular number of people who choose to receive a transmission.

[14] H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 66 (1976); *see also* H.R. Rep. No. 102–286, 102nd Cong., 2d Sess. (1992).

[15] *Rogers and Hammerstein Organization, et al. v. UMG Recordings, Inc. and the Farm Club Online, Inc.*, 00 Civ. 5444 (S.D.N.Y. September 25, 2001), slip. op. at 22 (citations omitted), 2001 U.S. Dist. LEXIS 16111.

[16] *See* Report at 147, fn. 441.

[17] Report at 147.

- Limited (e.g., three songs only, or listen for two days only) downloads of songs for promotional purposes, free-of-charge;
- Technical downloads of audio programming for purposes of digital radio broadcasting;
- Technical downloads of audiovisual programs for purposes of broadcasting digital television.

Would the fair use analysis be the same for each scenario? Obviously not. In fact, it is easy to see that there will be a wide variety of delivery methods of music online that involve downloads, each of which has the potential to impact the market for public performing rights.

To give one example, MusicNet announced the launch of its subscription music delivery service to compete with unlicensed peer-to-peer services such as Aimster. One possible model under discussion, according to *Billboard Bulletin*, would offer consumers 50 musical tracks in the form of downloads, on-demand streams, or a mixture, for $9.95 per month.[18] Under the Copyright Office's flawed reasoning, BMI would be able to license the streams for value, but not the downloads. Clearly the marketplace makes no arbitrary distinctions in the types of transmissions as the Office claims users need or require.

BMI understands that PressPlay and MusicNet will offer limited download services that will compete with radio and cable broadcasting. At a recent keynote address before the NAB convention, a respected commentator Walt Mossberg (*The Wall Street Journal* computer columnist) warned the radio industry that these new services will compete with them for audience.[19] Obviously, any negative impact on radio listenership and revenues will also hurt the public performing right licensing marketplace.

As if to excuse the lack of analysis of the public performing right issue, the Report buttressed its conclusion by explaining that "this issue only applies to the music industry . . . because in other industries the public performance and reproduction rights are exercised by the same entity." But why should the music publishing industry be disadvantaged because of its historic structure? Other industries can license the value of all rights by combining control over all rights in one entity. In foreign countries, the music licensing societies frequently license the public performing right and mechanical right in digital transmissions, and assign a value to each component of the license.

Many user groups have paid both performing right fees and reproduction rights fees for the entertainment services they provide. Background music services are one example. They obtain public performing right licenses from performing right organizations as well as electrical transcription licenses from music publishers. Television broadcasting also involves both rights: synchronization rights for recording the music and the public performing right for broadcasting.

The Copyright Act of 1976 created the concept of divisibility of rights, and there is no reason to revisit that decision. Divisibility of rights is one of the incentives to authorship. Indeed, divisibility of copyright rights promotes competition. In our view, by commenting on the structure of the musical works marketplace the Copyright Office is essentially opining on policy matters that are outside the purview of its expertise. But the Office's suggestions regarding musical works licensing actually would have more profound affects on the very nature of the Copyright Act, itself. Through the leadership of this Subcommittee, Congress created the 1976 Act as a technologically neutral statute that has proven flexible enough to respond to the incredible pace of change brought about by computers in the past 25 years. The Office seeks to upend the Act to respond to certain technologies, in a manner that is no longer technology neutral. This could have unsettling consequences for future developments in the law.

Despite the fact that BMI disagrees with the procedures and substance of the Register's Report that relate both to "buffer" copies and public performances in digital downloads, we respect the influence of the Register of Copyrights. We have considered her conclusions and recommendations, and rather than simply opposing the Register, we have examined whether common ground can be achieved. We have identified one area in which commonality of interests is present. The attached joint statement of BMI, ASCAP and HFA discusses the current evolving state of music

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[18] *Billboard Bulletin*, September 27, 2001, MusicNet Unveils Platforms for Technology, Business.

[19] In covering the Mossberg address, the *M Street Daily* wrote "(W)hen the labels debut their own legal successor to Napster, they'll charge a download fee and also code the song to vanish off a hard drive in 30 days. To Mossberg, renting a song equals streaming." *M Street Daily*, September 6, 2001, at 1.

online and makes suggestions designed to accommodate the reasonable needs of webcasters and music users. We believe this presents a model for marketplace solutions to licensing problems. Legislative "fixes" to what are essentially business problems are not called for and, in our view, would be more damaging than useful at this time.

CONCLUSION

In summary, section 117 is a limited exception aimed at copying computer software and has nothing to do with the webcasting or downloading of musical works. There is insufficient support in the Report or in the record before the Office for the Report's proposed exemptions and purported "fair use" analyses concerning music. The Register's recommendation regarding the public performing right is not in the public interest, and we believe that no legislation is required.[20]

The Berne Convention and the WIPO Copyright Treaty require that the marketplace for new uses of copyrighted works have the opportunity to develop in a manner that does not unreasonably prejudice the legitimate interests of authors. These treaties prohibit limitations on (and exceptions to) copyright that interfere with authors' rights and copyright owners' legitimate business opportunities, whether they are established licensing practices or prospective in nature.[21]

There is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music public performing right issues on the Internet. In view of the explosive growth of webcasting since 1998, it is difficult to see how a diminution of the public performing right is necessary to foster webcasting over the next several years.

It is clear that we have entered into the era of globalization. Realizing this fact, BMI has entered into agreements with other performing right organizations for the global licensing of performing rights on the Internet. Obviously, transmissions over the Internet are global in nature. Therefore, whatever this Subcommittee recommends and the Congress enacts will have an effect on the rest of the world. The U.S. should not become a lawless haven for entities that want to avoid liability from copyright liability.

We should strengthen our laws to promote lawful activities rather than diluting our laws to promote free-riding. We should set and adhere to high standards for the rest of the world to follow, rather than following the lowest common denominator approach. BMI looks forward to assisting this Subcommittee in exercising its oversight and legislative responsibilities to monitor developments in the area of emerging technologies and their impact on various aspects of U.S. copyright law.

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, BROADCAST MUSIC, INC., AND THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION/HARRY FOX AGENCY

ASCAP, BMI and the NMPA (through its licensing subsidiary, HFA) represent virtually all American songwriters and music publishers, in licensing all the rights that are necessary for Internet music services to use copyrighted musical works.[1] At the outset, we unequivocally state our desire to license copyrighted musical works for transmission on the Internet so that consumers may have on-line access to the world's repertory of musical works.

HFA has licensed many Internet music services and, together with the NMPA, recently reached landmark agreements with the RIAA and Napster to license the reproduction and distribution rights in copyrighted musical works for a broad array

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[20] Several key members of this Subcommittee have stated in a letter to Colleagues that in their view no legislation concerning the Internet music marketplace is necessary: "If there is one thing we know about the Internet music marketplace, it is how little we know. . . . It is a marketplace without a proven business model. . . . [T]he most appropriate Congressional role at this point is to continue to develop our knowledge and monitor marketplace developments." The letter concludes that "We strongly believe it is premature for Congress to act on legislation that regulates this quickly evolving marketplace" and notes that any legislation attempted by Congress will "most likely be obsolete before it is enacted." Letter to Colleagues from the Hon. Howard L. Berman, John Conyers, Jr., Elton Gallegly, Bob Goodlatte, Henry J. Hyde and Robert Wexler sent September 2001.

[21] See, e.g., Art. 10, WIPO Copyright Treaty.

[1] Musical works—songs or other musical compositions—are written by composers and lyricists and usually owned or administered by music publishers. The copyrights in musical works are to be distinguished from those in sound recordings, which are the particular renditions of musical works recorded by performing artists and usually owned by record companies. We deal here only with musical works, not sound recordings.

of Internet music subscription services. BMI and ASCAP have licensed and will continue to license any Internet users who request a license for the public performance of musical compositions.

These licensing agreements confirm that the marketplace, while continuing to evolve, will adapt to meet new business models as they emerge. We thus agree, in the strongest terms, with the recent statements made by members of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property:

- "If there is one thing we know about the Internet music marketplace, it is how little we know. . . . It is a marketplace without a proven business model. . . ."
- "[T]he most appropriate Congressional role at this point is to continue to develop our knowledge and monitor marketplace developments."
- "We strongly believe it is premature for Congress to act on legislation that regulates this quickly evolving marketplace."
- "Government regulation can only stifle the tremendous innovation in this market and serve to pick winners and losers, and, in any case, will most likely be obsolete before it is enacted."[2]

It has nevertheless been suggested by others that Congress should intervene now to change the legal framework in which the marketplace is evolving. The Copyright Office, for example, recently issued a report suggesting that Congress amend existing law to limit the rights of songwriters and music publishers to be compensated for the use of their copyrighted musical works on the Internet.[3] A bill has also been introduced that seeks to regulate the still-evolving marketplace for Internet music. We believe strongly that legislative intervention is unwarranted and could impede marketplace solutions.

In particular, we wish to respond to the suggestion by the proponents of these changes that certain economic rights expressly granted under the Copyright Act have no value in the digital domain. We appreciate that different uses of different rights may be valued differently in the marketplace. At opposite ends of the spectrum, for example, it can be said that "pure" audio-only downloads should not require payment for the public performing right and that "pure" audio-only webcasts should not require payment for the mechanical right.[4] In between those examples, however, both rights may be implicated. How to value those various uses should be left to the marketplace—as it was, with a successful resolution, in the NMPA/HFA-RIAA agreement and in the many ASCAP and BMI license agreements.

The recent NMPA/HFA-RIAA agreement proves that marketplace solutions work. The agreement provides a flexible model for immediately licensing reproduction and distribution rights to all subscription services delivering music in a variety of forms, including on-demand streaming and time-limited downloads. Although the agreement does not establish industry-wide rates at this time, it contemplates that different uses of music may have different values in the marketplace. Indeed, NMPA/HFA and RIAA have committed to engage in good faith negotiations to agree on industry-wide mechanical royalty rates for Internet services—and to issue licenses even before such rates are set so as to assure that consumers have access to music now.

So, too, ASCAP and BMI, in licensing the public performing right, have repeatedly expressed their desire for, and willingness to engage in, marketplace negotiations for licenses that also reflect the different values of different uses of music on the Internet. Indeed, BMI and ASCAP have already licensed thousands and thousands of Internet music users, covering all their performances.

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[2] "Oppose Regulation of the Internet Music Market," Letter from the Honorable Howard L. Berman, John Conyers, Jr., Elton Gallegly, Bob Goodlatte, Henry J. Hyde and Robert Wexler to Colleagues (September 2001).

[3] U.S. Copyright Office, DMCA Section 104 Report (August 2001).

[4] For example, a "pure" audio-only download could be one that met all these requirements: (1) the musical work could not be perceived (i.e., heard) while the transmission was taking place; (2) the sole purpose of the transmission was to deliver a phonorecord of the musical work to the home user; (3) the resulting phonorecord received by the home user was permanent, capable of further non-commercial duplication by the home user, and not limited by time, usage, further payment, or any other factor; and (4) the transmission of the musical work was made on demand. By contrast, a "pure" audio-only webcast could be one that met all these requirements: (1) no copy was made on a local storage device (e.g. the hard drive of a user's computer or portable device) that would be accessible for subsequent listening; (2) the webcast was not part of an "interactive service" (as that term is defined in Section 114(j)(7) of the Copyright Act); and (3) the webcast does not exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13) of the Copyright Act).

These developments prove that the free marketplace works. It should be allowed to continue to work, without legislative intervention.

Mr. COBLE. Mr. Potter.

STATEMENT OF JONATHAN POTTER, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION

Mr. POTTER. Thank you, Mr. Chairman, Representative Berman, and Members of the Subcommittee. On behalf of more than 50 companies of DiMA, the Digital Media Association, thank you for inviting me to testify today about the DMCA Section 104 report and particularly about the important legislative recommendations of the Copyright Office. We thank Chairman Coble and Representative Berman for your continued commitment to sound copyright policy that benefits all Americans.

We also thank Representatives Cannon and Boucher for introducing the Music OnLine Competition Act, which includes provisions that reasonably implement the recommendations of the Copyright Office report.

As reflected in my written statement, DiMA appreciates the reasoned analysis and persuasive legislative suggestions made by the Copyright Office. The report's overpowering theme is that logic must prevail in copyright law, public policy, and commerce.

DiMA is particularly appreciative of the report's conclusions in the following respects: First, that RAM buffer and server copies of sound recordings and musical works made in association with lawful webcast performances should be exempt from reproduction royalty obligations as a matter of law.

Second, that performance royalties should not be paid on downloads known as digital phonorecord deliveries because they either do not qualify as a legal performance or, if they do qualify, the technical performance cannot be perceived and therefore should not trigger a performance royalty.

Third, that consumers have the right to archive or make backup copies of their purchased digital media.

I would like to provide a business perspective on the importance of these recommendations. As you may know, webcast streaming technology breaks the musical sounds into millions of packets that take different routes through the Internet to the user's computer. These packets are played from a buffer in the PC that puts them in order so that the consumer listening experience is as smooth as broadcast radio.

NMPA and Harry Fox say that this buffer, used solely to enable licensed webcast performances, requires a separate royalty payment in addition to the performance license. The Copyright Office concludes so firmly that no second royalty should be due that it suggests legislation to ensure that no duplicative royalty is sought and that no business leverage is created by the risk of infringement liability. DiMA agrees.

DiMA further agrees with the Copyright Office recommendation that webcast server copies also should be exempt from reproduction royalties and reproduction liability. Terrestrial broadcasters for 25 years have enjoyed an exemption from the reproduction right so that they can make tapes or electronic copies of musical works simply to support their broadcasts.

Webcasters need several copies to accommodate different media formats and bandwidth speeds, but each webcast ephemeral reproduction has the same essential qualities as that single broadcast reproduction. Each is intended only to facilitate a lawful and compensable performance and each is inaccessible to consumers and thus secure against piracy.

Here, again, the Copyright Office has suggested that webcasters be exempt from the reproduction right as broadcasters are, the full value of the economic act is compensated in the paid performance and, thus, the server reproduction has no independent economic value.

From a business perspective, the recommended server copy and buffer royalty exemptions are very significant. The NMPA RIAA license demands that signatories concede the existence of rights that the Copyright Office states do not exist. Indeed, this license prohibits licensees from publicly disagreeing with the NMPA's legal position or even supporting the Copyright Office report's conclusions.

Do not be misled by those who proclaim that this license evidences marketplace solutions. On the contrary, the aggressive provisions of this agreement illustrate the point made yesterday by Register Peters. Sound copyright policy requires that Congress exempt server copies and buffers that support licensed compensable streaming.

DiMA emphatically disagrees with any contention that on-demand streaming changes this analysis a bit. Rather, we agree with the Copyright Office conclusion that only the performance right is implicated by on-demand streaming and that creators, songwriters and publishers can be compensated for any lost sales royalties through higher performance royalties.

Moreover, testimony yesterday from the RIAA confirmed that even under the NMPA agreement the process for obtaining publishing licenses is impeding digital music services from making the most popular music available online. We encourage this Committee to quickly adopt improvements to the Section 115 compulsory mechanical license process that will remove these roadblocks.

DiMA further appreciates that the Copyright Office soundly rejected the contentions of performing rights organizations ASCAP and BMI which have repeatedly claimed that whenever a music file is transmitted, even when that file cannot be perceived, that a public performance has occurred. DiMA hopes that this Committee agrees with the Copyright Office conclusion that unless a transmission can simultaneously be heard by human ears no performance has occurred and no royalty obligation or liability should be incurred.

Mr. Chairman, the Copyright Act imposes stiff statutory infringement liability penalties, up to $150,000 per work. In that environment, NMPA and the PROs today are using the leverage of legal uncertainty to force on-line music companies to sign licenses and pay duplicative royalties upon rights that do not exist. This legislation or the legislation recommended by the Copyright Office is important to clarify the law, even in the absence of specific litigation.

In conclusion, Mr. Chairman, the recommendations of Register Peters and her staff carefully balance the interests of creators, con-

tent owners, digital media companies and the public. We urge you to act promptly to implement her recommendations.

Mr. COBLE. Thank you, Mr. Potter.

[The prepared statement of Mr. Potter follows:]

PREPARED STATEMENT OF JONATHAN POTTER

Mr. Chairman, Representative Berman, and Members of the Subcommittee:

I am Jonathan Potter, Executive Director of the Digital Media Association ("DiMA"), which represents the interests of the online media industry. On behalf of more than 50 DiMA member companies, thank you for inviting me to testify today concerning the Section 104 Reports of the Copyright Office and the National Telecommunications and Information Administration ("NTIA"). For DiMA companies, the Reports address issues of great and timely importance, which must be resolved for ecommerce in music and video to flourish on the Internet.

In summary, DiMA is gratified by the Copyright Office conclusion that amendments to the Copyright Act are necessary. After hearing testimony from all the interested parties and balancing carefully the needs of creators, consumers, copyright owners and digital media companies, the Copyright Office has concluded that logic must prevail in law, in public policy and in business: a public performance royalty should be due only when a transmission can actually be perceived; and a reproduction royalty should be paid only when the reproduction has economic value that is distinct from the authorized performance it has enabled. DiMA urges the Subcommittee to accept the Copyright Office's careful and persuasive legislative recommendations, and proceed toward expeditious enactment of amendments that will resolve many significant legal and business issues that have hindered the development of the online music marketplace.

Specifically, DiMA agrees with the Copyright Office's conclusion that Internet companies should not be charged royalties just to make copies of music that enable licensed performances and downloads—the same way that radio broadcasters today do not pay royalties on the making of copies that enable their terrestrial broadcasts. By clarifying that these "broadcast use" server copies are exempt from copyright liability, Congress will speed deployment and stabilize the future of new music services, and thereby support value to consumers and new sources of royalties to songwriters and performers.

DiMA would have preferred that the Report also concur with our view that consumers deserve the right to exercise a "digital first sale" privilege by giving away, lending or selling digitally-purchased content via digital transmission. Notwithstanding the Copyright Office's conclusion to the contrary, we support the Report's suggestion that Congress continue to monitor how the absence of this digital first sale privilege affects ecommerce, and whether new digital rights management technologies can securely implement the digital first sale privilege while protecting the rights of copyright owners.

Finally, Mr. Chairman, we note that many of the provisions recommended by the Copyright Office already have been proposed to this Subcommittee in legislation introduced by two of your members, Representatives Chris Cannon and Rick Boucher. DiMA and its members thank these Congressmen for their interest and insight in assuring a fair and competitive online music marketplace, and we urge the Subcommittee to carefully consider the legislative solutions offered in the Music Online Competition Act of 2001, H.R. 2724, as a reasoned way to implement many of the recommendations of the Copyright Office's Section 104 Report.

DiMA Represents the Interests of the Online Media Industry.

DiMA advocates the interests of a relatively new industry that digitally delivers and markets music and video in online electronic commerce. Our member companies, large and small, are leaders in developing new technology, infrastructure and business models for the digital entertainment economy. DiMA member companies are a mix of well-known brand names and small start-ups, but each subscribes to certain core principles: First, copyright owners and artists deserve fair and reasonable compensation for commercial uses of their content. Second, copyright and commercial law should not discriminate against new media companies or, conversely, favor existing media companies, based upon the technology used to deliver content to the consumer. Third, in this regard, the laws applicable to analog media and preexisting technologies should be extended and expanded to grant equivalent and appropriate rights to spur the growth and enjoyment of new digital media.

DIMA'S LONGSTANDING CONCERN WITH THE ISSUES ADDRESSED IN THE REPORT UNDER THE DMCA

Since our founding in June 1998, DiMA has urged policymakers to consider solutions to issues that appear at the crossroads of copyright and ecommerce:

- The need for streamlined licensing of sound recordings for Internet webcasting;
- Exempting from copyright liability the caching and temporary buffers created during the technical process of webcasting;
- Clarifying that downloading and webcasting are two separate acts, so as to avoid duplicative royalty payments to music publishers and composers;
- Assuring consumer rights to make back-up copies of media they lawfully acquire online;
- Obtaining an exemption or right to make multiple ephemeral server recordings of musical works and sound recordings;
- Extending the existing "in-store" exemption for music performances in section 110(7) of the Copyright Act, to support Internet retailing of sound recordings; and,
- Exercising the first sale privilege by digital retransmission.

In 1998, when developing the DMCA, Congress responded favorably to several key points raised by DiMA. Most importantly, Congress clarified and extended the statutory license for the digital performance of sound recordings, in section 114(d) of the Copyright Act, to unambiguously cover noninteractive Internet webcasting.

Additionally, to avoid delaying passage of the DMCA and, yet, interested in the developing online media issues that were first highlighted by Representative Boucher and former Representative Tom Campbell, Congress enacted section 104 of the DMCA, requiring the Copyright Office and NTIA jointly to study two additional concerns, namely, the temporary copying of digital works, and consumers' right to use digital transmission technology in the exercise of the first sale privilege.

DIMA'S PARTICIPATION IN THE COPYRIGHT OFFICE AND NTIA STUDY

DiMA actively participated in the study conducted by the Copyright Office and NTIA in preparing their respective reports. In extensive comments and reply comments, and in testimony at the November 29, 2000, hearing, DiMA essentially elaborated upon four key points:

1. Extending the existing pro-consumer elements of today's copyright law into the digital environment is consistent with the policies underlying the Copyright Act and the World Intellectual Property Organization treaties implemented by the DMCA.
2. Copyright law provisions (*i.e.*, 17 U.S.C. § 117) that legitimize archiving and usage of computer software should be adapted and applied to digitally-delivered audio performances and copies of downloaded sound recordings. Specifically, temporary copies that enable the performance of digital media, including streaming audio, should explicitly be exempted from the exclusive rights of copyright owners, including the rights of reproduction and distribution. Further, consumers should retain the right to make one archival copy of digitally-delivered media to guard against losses from technical errors or equipment failure.
3. To create a level playing field for ecommerce in digitally-delivered audio, video and other media, the first sale doctrine of 17 U.S.C. § 109(a) should apply to content lawfully acquired by digital transmission. Unless consumers receive from digital media the same quality, value and convenience they receive from physical media, ecommerce may be left stranded at the starting gate.
4. To rapidly promote ecommerce, it would be preferable for Congress to enact these limitations into law now, rather than wait for the courts to sort through the panoply of issues. Unanswered questions surrounding the legal status of webcasting or consumer rights in digitally-purchased media indisputably will continue to dampen promising markets and technologies.

Six DiMA member companies also testified at the hearing before the Copyright Office and NTIA, where they amplified these points with real world examples of how legal uncertainty continually inhibited their businesses. Specifically, the companies noted that well-funded agents of music publishers were seeking to be paid reproduction royalties for public performances of music over the Internet, and public per-

formance royalties for downloads or distributions over the Internet. As the Copyright Office noted, these music services were being asked unfairly to pay the same copyright owners twice for a single economic act (*i.e.*, webcasting or downloading) primarily because the copyright owners are being represented by different agents. Indeed, in some cases these agents refused to grant licenses to DiMA members only for the rights that the companies wanted, unless the companies also paid for licenses that were not necessary and, indeed, could not lawfully be licensed by these agents because the claims were not within the copyright owners' rights.

Moreover, our members testified, the requirement to pay duplicative royalties would significantly change the economics of webcasting, and diminish the potential return on margins that already were razor-thin. In an environment in which license rights are uncertain, the current return on investment is elusive, and the possibility of copyright infringement suits and crippling statutory damages remains a constant threat, our member companies told the Copyright Office that it had become increasingly difficult to attract new capital investment necessary to their survival.

DiMA therefore appreciated the acknowledgement in the NTIA report that these licensing conflicts were impeding the development of electronic commerce in online music, and the suggestion in that report that Congress should examine closely the underlying legal issues and take appropriate legislative action.

THE COPYRIGHT OFFICE SECTION 104 REPORT: AN IMPORTANT EVENT FOR CONSUMERS AND THE ONLINE MUSIC INDUSTRY

Mr. Chairman, although the August 29, 2001, Copyright Office Section 104 Report does not adopt all of the changes suggested by DiMA and its members, we are gratified that the Copyright Office confirmed three central points: that Internet companies should not have to pay twice for a single economic act, that copyright law should treat webcasters and terrestrial broadcasters essentially alike, and that consumer rights should not be associated only with traditional media or business models.

DiMA Applauds the Report Finding that Temporary RAM Buffers are Fair Use.

Internet webcasters pay license fees to perform copyrighted music and sound recordings over the Internet. Those performance rights fees are paid to the music publisher, the songwriter, the sound recording copyright owner and the performing artist.

As you may be aware, the technical process of webcast "streaming" creates on the user's computer a small, evanescent buffer of data, so that webcasts will sound to the user as smooth and uninterrupted as terrestrial broadcasts. These buffers are a technological artifact necessitated by the technology of Internet communications. In brief, when the user "tunes in" to an Internet webcast channel, individual packets of data, each constituting a minute portion of the webcast signal, are sent by a multiplicity of routes to the end user's computer. The user's computer sequences and stores these packets continually, until it has accumulated a sufficient amount of data in its memory as insurance against further transmission delays. Once the first data in the buffer are performed (*i.e.*, the music is played for the listener), the buffered data are gone and inaccessible to the user. Those data are replaced by the next bits of data, which then will be performed and replaced, and so on. As the Copyright Office found, these buffers have no independent economic value apart from their role in enabling the performances themselves.

Unfortunately, for several years the Harry Fox Agency ("HFA") and the National Music Publishers Association ("NMPA") have been taking the position that these buffers infringe the reproduction rights of music publishers and songwriters, and have insisted that Internet webcasters should pay a license fee for these buffers, in addition to the performance royalty fees that the webcasters already pay to these same music publishers and songwriters through ASCAP, BMI and SESAC. Thus, DiMA and its members appreciate that the Copyright Office Report agrees that no additional royalty payments should be required, because "[t]he buffer copy has no economic value independent of the performance that it enables, so there appears to be no conceivable effect upon the market for or value of the copyrighted work" Report at 139. Therefore, the Copyright Office concludes, there is a strong case that the making of these buffers is a fair use that does not infringe the publishers' and songwriters' copyrights and does not require a mechanical license payment. The Report further finds that "there appears to be some truth to the allegation made by some commenters that copyright owners are seeking to be paid twice for the same activity." Report at 140.

Notwithstanding this definitive pronouncement from the Copyright Office, music publishers are conceding no ground. Indeed, they have undertaken an aggressive effort to maximize any remaining legal uncertainty and stifle opposing points of view

before Congress, the Copyright Office and the courts. On October 5, 2001, the NMPA, HFA and the RIAA entered into a private agreement that guaranteed RIAA members particular rights that they needed in order to offer subscription on-demand music services, *IF* the RIAA also conceded that current law requires a mechanical license for the server copies used to make the licensed downloads and performances, and for the buffers made on the users' PCs during webcast streaming. This is not a question of subtle interpretation, Mr. Chairman; it is right there in black and white in paragraph 8.1 of their agreement.

Perhaps this concession and the additional royalty costs pose no problem for record labels, as they can pass on the costs to independent Internet companies who license their sound recordings. But HFA now is offering this same deal to webcasters; and for webcasters the proposed agreement creates the very scenario that the Copyright Office said should not occur, and that would be avoided if Congress agrees with the 104 Report's suggestion—webcasters having to pay the same copyright owners twice for a single act of streaming. Effectively, through this agreement the NMPA is using its aggregation of copyright licensing rights to force Internet companies to acquire a tied license that they do not want and do not need, in order to obtain mechanical license rights that are required in order to offer online music services. This, we respectfully submit, is unfair as a matter of business and perhaps as a matter of law.

Furthermore, Mr. Chairman, the NMPA and HFA inserted an additional poison pill into the agreement. Section 8.2 of the agreement specifically states that a licensee cannot argue to any governmental agency—including this Subcommittee, the Copyright Office or the Department of Justice—that the Copyright Office Report is correct, and that under current law webcasting does not require a mechanical license payment. Indeed, the agreement goes so far as to prohibit any licensee from providing financial support to any organization that advocates that the Copyright Office's interpretation of the law is correct. What is the intention of this clause? If DiMA had signed this license agreement on behalf of its members, would I be able to give this testimony here today, or to honestly answer your questions, without jeopardizing our members' license rights that they need to compete online? Does this agreement require any DiMA member that signs it (e.g., to avoid costly litigation with music publishers) to resign from DiMA? Would a company that signs this agreement be unable to join DiMA?

For these reasons, Mr. Chairman, the final recommendation of the Copyright Office with respect to temporary webcast buffers is so important. Even though the Report finds that webcasting buffers are protected under the fair use doctrine, the Copyright Office strongly recommends that buffers be exempted from any copyright liability *by statute*, so as "to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying work." Report at 142–143. As demonstrated by the RIAA's need to concede their own fair use rights when faced with the risk of expensive complex litigation, legislation clearly and indisputably is needed, now.

Server Copies Used for Licensed Transmissions should be Exempt from Duplicative License Fees.

Solving the buffer problem, Mr. Chairman, would be significant, but would not be sufficient to stimulate the true potential of the legitimate online music market. Perhaps the greatest hurdle to long-term success of new, comprehensive digital music services that will generate valuable new royalty streams for artists, songwriters and publishers, is the ongoing dispute over the need to obtain separate licenses and pay additional royalties in order to make the server copies necessary to make licensed performances of musical works.

To explain webcasters' dilemma: In order to make licensed digital phonorecord deliveries (DPDs) or licensed public performances of musical works over the Internet, it is necessary for the Internet service first to copy the sound recording onto computer servers. Given that these Internet transmissions must be made to many consumers, who access the Internet at various speeds (e.g., telephone dial-up, cable modem, DSL or T1), using different software (e.g., RealNetworks' "RealPlayer" or Microsoft's "Windows Media Player"), Internet companies must make multiple copies of the sound recordings in order to make these licensed transmissions to the marketplace.

Unfortunately, here again the agents of music publishers and composers are exploiting digital media services' need for multiple copies into a demand for excessive reproduction royalty payments. After thoughtfully considering all sides of this issue, which were ably presented in written and oral testimony, the Copyright Office concluded that there is not "any justification for the imposition of a royalty obligation

under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license." Section 104 Report at 144 n. 434. In other words, because Internet webcasting and DPDs are subject to statutory and compulsory licensing, there is no reason for music publishers, composers or, for that matter, recording companies, to charge additional fees for the reproductions of their musical works and sound recordings that are used to facilitate these licensed performances and downloads. Accordingly, the Copyright Office suggested that Congress (A) repeal Section 112(e) of the Copyright Act, which provides an "ephemeral" copy royalty to sound recording owners, and (B) provide webcasters with an exemption from copyright royalties for all server and cache copies of musical works and sound recordings that are made in (and limited to) the furtherance of licensed performances and downloads. DiMA strongly endorses these proposals.

In this context also, Mr. Chairman, the October 5, 2001, agreement between HFA and NMPA, and RIAA plays a role. That agreement requires reproduction royalty payments for server copies that are used solely to enable licensed webcasts and downloads—precisely the server copies that the Copyright Office suggests should not trigger royalties. Thus, NMPA may claim to this Committee that its agreement with the RIAA is evidence of "marketplace resolution" which obviates the need for legislation. DiMA vigorously disagrees. Rather, this agreement further demonstrates that—as the Copyright Office recommends—Congressional action is needed to establish plainly that multiple server copies made by digital music services in furtherance of licensed webcasts and downloads, are exempt from copyright liability.

Consumers and the Online Music Market Would Benefit From a Workable Electronic Section 115 Mechanical License Process.

In part because of these problems, as highlighted in the Copyright Office Report, there is a continuing need in the digital media marketplace for a functioning compulsory mechanical license in the Copyright Act. Unfortunately, the consensus of users and potential users of the section 115 compulsory license is that it simply does not work for the Internet music market. Testimony from Internet companies and recording labels before this Subcommittee at a May 17, 2001, hearing uniformly criticized the existing process for obtaining the section 115 compulsory mechanical license as unduly expensive, unwieldy and unworkable.

To obtain a compulsory license, one must send a notice of intention to the copyright owner of each individual musical composition for each sound recording to be transmitted by digital phonorecord delivery. To find the name of the copyright owner, one must search the records of the Copyright Office. Electronic searching was only recently made available, but (a) the electronic database only begins in 1978, and so manual searching still is required for a large body of recorded material, and (b) the Copyright Office electronic database is not updated regularly enough. For example, the number one song in the U.S. on the Billboard charts last week is called "U Got It Bad," by an artist named Usher; the number one country song is "I Wanna Talk About Me," by Toby Keith; the number one Modern Rock track is "How You Remind Me," by Nickelback; the top rap record is "Dansin Wit Wolvez (Where My Tribe At?)," by Strik 9ine; and the number one Adult Top 40 record is called "Superman (It's Not Easy)," by Five for Fighting. An online search of the Copyright Office electronic database shows no copyright registration information for any of those musical works.

Once the information is located, a notice must be sent to the copyright owner on a song-by-song basis. If the copyright owner information is incorrect or if the owner refuses the notice—which, despite the fact that this is a compulsory license, happens more often than you might suspect—then the Internet service has to serve a new notice on the Copyright Office.

That's just for one song. New music services being launched this month and in future months each require mechanical licenses for more than 100,000 sound recordings. The existing Copyright Office system clearly cannot handle this load, and so the system must be updated so that all necessary searches and filings with the Copyright Office can be performed online.

Undoubtedly, you will hear testimony at this hearing that the HFA-RIAA agreement is the marketplace solution to these services' mechanical licensing concerns. However, putting aside for argument's sake the unacceptable terms of that agreement, it still does not resolve new music services' dilemma. Even if the Harry Fox Agency represented every music publisher in the United States (which it does not), each HFA publisher has the right to opt out of each agreement that purports to license their rights, including the recent agreement with RIAA. Many publishers in fact have opted out of the RIAA agreement, but HFA apparently refuses to tell its licensees which publishers have dropped out and what songs those publishers rep-

resent. Conversely, HFA even refuses to say which publishers have opted in to the agreement, and which songs they represent. Moreover, the fact that a publisher has opted in to an agreement with one service does not guarantee that it will opt in to agreements with all services. Plainly this is not an acceptable solution.

This leaves Internet music services in an impossible quandary, a Catch-22 for the Internet age. If online music services don't know what licenses they will be getting under the HFA voluntary agreement, the only way services can protect themselves from lawsuits would be to file compulsory license requests. But, as I noted, the current system for obtaining the compulsory license is outmoded and unworkable.

Mr. Chairman, Representative Berman and Members of the Subcommittee: We wish that it were otherwise, but most emphatically the marketplace for Section 115 mechanical licenses does not work for online music services. When the world's largest recording company—Universal Music Group—cannot get statutorily-mandated music licensing rights to launch new interactive services that consumers want—without risking hundreds of millions of dollars in infringement damages—something is profoundly wrong with our copyright licensing regime.

What record companies and online music companies (and consumers who wish to utilize legal innovative services) need, Mr. Chairman, is certainty that necessary licenses can be obtained and that payments will flow accurately to creators and publishers. Congress enacted the compulsory mechanical license intending that it be usable by those who needed it. Today, that means there should be simple and reliable electronic methods to comply with the law and to pay creators and copyright owners every dollar they are due. DiMA urges this Subcommittee to consider carefully and act promptly to implement the types of improvements to the existing compulsory mechanical license process proposed by Representatives Cannon and Boucher in H.R. 2724.

DiMA Agrees with the Copyright Office that Downloads are Not Compensable Public Performances.

DiMA and our member companies appreciate that the Copyright Office went beyond the duplicative royalty issues discussed above, and also addressed the symmetrical issue associated with claims for public performance fees being made against digital phonorecord deliveries, or DPDs. A DPD essentially is the equivalent of buying a CD electronically rather than in a physical store. The consumer purchases a copy of the music, then downloads and records the music on a home PC or on a recordable CD (rather than purchasing the music prerecorded on a physical medium manufactured by the recording label). DPDs clearly are an important element of tomorrow's online commerce. DPDs are a terrific option for consumers who can buy the music and have it delivered to them digitally within minutes. DPDs also are a good deal for the recording industry, which will receive royalties and profits from the sale of DPDs without incurring the costs of manufacturing, warehousing and distributing compact discs.

The Copyright Act states in section 115 that DPDs implicate the *reproduction* rights of the music publishers and songwriters in the same way that those rights are implicated by the manufacture and distribution of a compact disc. However, each of the three performing rights organizations ("PROs") in the United States—ASCAP, BMI and SESAC—at various times has demanded that Internet music services make *public performance* rights royalty payments for the downloading of music files.

Let me be clear what this means in practice. When a compact disc is purchased in a brick and mortar record store, music publishers and composers are paid a single royalty for the mechanical reproduction of their songs in that compact disc. When a CD is purchased from an Internet retailer, like Amazon.com, CDNow or Tower Records Online, and the CD is shipped to the consumer via FedEx, music publishers and composers again are paid the same single mechanical license royalty. But when a DPD is purchased from an Internet retailer and the music is shipped digitally through the Internet, PROs are demanding that Internet services pay the music publishers and composers a second royalty, based on a tortuous interpretation of the law which concludes that any "transmission" of a song file is a "public performance" that justifies a royalty.

Fortunately, the Copyright Office Report rejected the PROs' interpretation. DiMA noted in its testimony that the definition of "perform" in the Copyright Act unambiguously provides that a transmission is not a "performance" unless the work is being displayed or heard simultaneously with the transmission. As noted by the "White Paper" report of the United States Information Infrastructure Task Force in September 1995:

> A distinction must be made between transmissions of copies of works and transmissions of *performances* or *displays* of works. When a copy of a work is trans-

> mitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user's computer, without the capability of simultaneous "rendering" or "showing," it has rather clearly not been performed. Thus, for example, a file comprising the digitized version of a motion picture might be transferred from a copyright owner to an end user via the Internet without the public performance right being implicated.

Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights at 71 (Sept. 1995); emphasis in original.

Moreover, the illogical nature of the PROs' claim was apparent during the November 29, 2000, hearing, in the following colloquy between Copyright Office General Counsel David Carson, and BMI's Senior Vice President and General Counsel Marvin Berenson:

Mr. BERENSON: Our contention is that download or not, if there is a transmission, the public performance right is implicated along with the other rights.

Mr. CARSON: So I may download the file from some website but I may never actually play it and hear it. That's still a public performance?

Mr. BERENSON: Yes.

Mr. CARSON: You realize how intuitively that seems to be absolutely wrong?

Notwithstanding the Copyright Office Report's conclusion that a download does not implicate the performance right, the PROs continue to insist that Internet music sites pay performance rights on downloaded music files. BMI's Internet license, for example, currently requires payments on downloads as well as streaming:

> This Agreement shall only include public performances in the Territory of musical works by transmissions over the Internet received via personal computers or by means of another device capable of receiving the Internet through streaming technologies AS WELL AS THOSE TRANSMISSIONS THAT ARE DOWNLOADED BY PERSONS ON PERSONAL COMPUTERS OR OTHERWISE. . . .

Thus, DiMA particularly appreciates the finding by the Copyright Office Report that, regardless of whether there is any technical or theoretical "performance," the transmission has no economic value apart from the value of the download itself and, therefore, is a fair use for which no double-dip payment is required. We urge this Committee to re-affirm the conclusions of the Copyright Office and the National Information Infrastructure Task Force.

DiMA Supports an Exemption for the Making of Archival "Back-Up" Copies.

As ecommerce flourishes, consumers anticipate that they will receive from the goods they purchase electronically tomorrow the same value they acquire from the goods they purchase physically today. The same should be true for music that consumers purchase electronically, online, by DPD. DiMA therefore commented to the Copyright Office and NTIA that consumers need the right to make personal back-up copies of music they download, as a safeguard against accidental erasure, damage from viruses, hard disk crashes, and as a way to migrate downloaded music collections to new computers or more capacious hard drives. We noted that in 1976, Congress enacted in 17 U.S.C. § 117 an archival exemption for computer software, for analogous reasons. Therefore, DiMA suggested that an extension of the current section 117 archival exemption to also cover audio files acquired by digital downloading would be consistent with existing legislative policy, as well as beneficial in promoting ecommerce and consumer satisfaction.

DiMA therefore supports the Copyright Office Report's conclusion that it would be consistent with policies underlying existing law for an archival exemption to protect downloaded music files against technical vulnerabilities that afflict all digital files. The Report further acknowledges that a strong case can be made that most common consumer archival activities qualify as fair use.

The Copyright Office Report suggests two ways that this archival privilege could be established. We strongly advocate the second of these alternatives; that is, that Congress should ensure consumers' right to protect their investments in online music by securing the archiving privilege, via an amendment to section 117. We do not support the first alternative, that is, making a change to the language of section 109 (the "first sale" statute). This proposal could lead to uncertain and potentially prejudicial results for consumers and music retailers, particularly in light of the Copyright Office's conclusion that the first sale doctrine should not otherwise be amended to allow consumers to exercise their first sale privilege by digital transmission. We discuss this point from the Section 104 Report below.

DiMA Supports a "Digital First Sale" Privilege.

DiMA is disappointed that the Copyright Office declined to support consumers' digital first sale privilege. Although many business models are being tested, we expect that there will always be a role for the purchasing of digital media by download, and that consumers will expect their purchased downloaded digital media to have the same value as purchased paper books or plastic discs. Consumers deserve the right to utilize, for their own legitimate purposes, the flexibility inherent in digital technology, including the right to resell, lend or give away digital media via digital transmissions. Moreover, we are confident that technology exists to ensure copyright owners that digital redistribution does not have the effect of duplication for multiple uses simultaneously.

Although the Copyright Office Report observes that a digital first sale privilege would benefit consumers (as well as libraries, museums and educational institutions), the Copyright Office believed that the potential threat to copyright owners from abuse outweighed the potential benefit to the public. DiMA remains concerned that the law not reduce well-established economic privileges of law-abiding citizens because of fears associated with the few who misbehave. Moreover, unless the law grants the public at least the same rights and privileges in their digital purchases as their physical purchases, the law will deter rather than facilitate e-commerce.

In the absence of immediate action, we agree with the Copyright Office suggestion that Congress continue to monitor whether the absence of a digital first sale privilege has a negative impact on consumers, ecommerce and the public interest and, if so, to revisit this question in the future. In addition, we recommend that Congress and this Committee monitor the progress of digital rights management technology, so that when technologies are developed that facilitate the secure operation of the first sale doctrine, then Congress could reassess whether the balance has tipped in favor of the use of such technologies to exercise the first sale privilege.

DIMA SUPPORTS THE ENACTMENT OF THE PROVISIONS OF H.R. 2724, THE MUSIC ONLINE COMPETITION ACT OF 2001.

We note, Mr. Chairman, that before Congress and this Committee now is a bill, authored by two members of this Subcommittee, that resolves many of the issues raised in the Section 104 Report in a manner that is fully consistent with the Copyright Office's recommendations. On August 2, 2001, Representatives Cannon and Boucher introduced the Music Online Competition Act or "MOCA," H.R. 2724. Although some have contended that certain provisions of MOCA might prove disruptive to marketplace negotiations, nonpartisan observers such as the Duke University Law and Technology Review have concluded that that MOCA is a modest and "important first step in making beneficial changes to copyright law." See "The Music Online Competition Act Of 2001: Moderate Change Or Radical Reform?" 2001 Duke L. & Tech. Rev. 0031, *available online* at http://www.law.duke.edu/journals/dltr/articles/2001dltr0031.html

To those who would counsel against considering the provisions of MOCA now, we would urge this Subcommittee to consider carefully how Congressional action can spur rather than deter the marketplace by creating a level and certain playing field. Early Congressional intervention into the webcasting market, through the enactment of a statutory license for the performance of sound recordings, created the legal certainty necessary to foster investment in webcasting services. Today, music webcasting is ubiquitous, royalty payments are flowing and will increase steadily in future years, and even the hearings of this Subcommittee are webcast over the Internet.

Legislative resolution of the legal (and associated business) issues that NTIA and the Copyright Office identify will have the same result: a more stable, more efficient, more innovative online music industry that generates more royalties for creators and copyright owners, and more value and excitement for consumers.

Since the introduction of MOCA, the intention behind several of its key provisions has found acceptance in both the Copyright Office Report and in private commercial practices. Specifically:

- Section 6 of MOCA narrowly implements two of the findings of the Section 104 Report, with respect to the making of temporary copies during the course of lawful audio webcasting, and the right to make archival copies of music files lawfully acquired by DPD.
- Section 3 of MOCA addresses the Report's suggestion that multiple server copies made to facilitate lawful webcasting and DPD activities also should be exempt from copyright liability.

- Section 5 of MOCA, dealing with the administration of the compulsory mechanical license in section 115 of the Copyright Act, includes a number of elements that are suggested in the October 5, 2001, agreement between HFA, NMPA and RIAA, and in a recent request for comment published by the Copyright Office.

MOCA includes a number of other elements that we believe are worthy of this Subcommittee's consideration. One particular provision would modestly and reasonably extend current law into the digital age, by allowing online music retailers the right to give consumers the ability to "try before they buy"—to hear short excerpts of songs they might be interested in purchasing online—without payment of performance license fees. I say that this provision is modest and reasonable for two reasons. First, whereas current law allows brick and mortar retailers to play entire songs, indeed entire CDs, the MOCA provision would permit only the transmission of 30 or 60 second samples of these songs. Second, it is modest and reasonable because the October 5 agreement between the music publishers and the RIAA includes a provision whereby each of them can use sound recording samples for free when promoting the sale of music online. It therefore stands to reason that the exemption for these samples also should be extended to independent Internet retailers.

CONCLUSION

In conclusion, we thank Chairman Coble, Mr. Berman and this Subcommittee for scheduling hearings on the Copyright Office Report. DiMA believes that the recommendations of the Report with respect to exempting by statute temporary buffers made during webcasting, consumer back-up copies of lawfully downloaded music, and the making of multiple server copies of music files, are sound and necessary to the promotion of a robust and competitive Internet music market that will generate substantial royalties to creators. We therefore urge this Subcommittee to implement these recommendations, and in so doing, to carefully consider the approach and additional provisions of the Music Online Competition Act.

Thank you.

AGREEMENT

This agreement (the "Agreement"), dated as of October 5, 2001 ("Effective Date"), is made by and between the Recording Industry Association of America, Inc. ("RIAA"), on the one hand, and National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA"), on the other (all of the foregoing collectively referred to as the "Parties").

WHEREAS, record companies desire to offer to consumers, or authorize others to provide to consumers, certain digital music services that provide On-Demand Streams and Limited Downloads (as defined below);

WHEREAS, music publishers desire to make their copyrighted musical works widely available to consumers by licensing such services;

WHEREAS, while the Parties have differed concerning certain legal and procedural questions implicated by the licensing of musical works for use in such services, record companies have always believed that musical work copyright owners should receive for the use of musical works in digital music services a fair royalty that reasonably reflects the value of the use of those works, irrespective of the particular rights of the copyright owner applicable to that use, and music publishers have always believed that their copyrighted works should be made available through such services for fair compensation;

WHEREAS, there has been litigation concerning the use of musical works in digital music services; the U.S. Copyright Office has issued a Notice of Inquiry whether to conduct a rulemaking concerning the legal status of On-Demand Streams and Limited Downloads; the U.S. Copyright Office has issued a report pursuant to Section 104 of the Digital Millennium Copyright Act addressing certain issues relating to streaming; and certain record companies may prefer to make business decisions concerning the launch of Covered Services (as defined below) with greater assurance concerning the legal status of such services;

WHEREAS, the Parties desire to avoid the uncertainty and expense of litigation concerning the use of copyrighted musical works by Covered Services, and to provide assurance to record companies and others seeking to offer such services to consumers;

WHEREAS, Section 115(c)(3) of the U.S. Copyright Act authorizes voluntary negotiations for determining royalty rates and terms under the mechanical compulsory license; and

WHEREAS, in settlement of their differences and to facilitate the expeditious and widespread launch of digital music services, the Parties have reached this Agreement with respect to terms pursuant to which RIAA member record companies may obtain licenses to make and authorize On-Demand Streams and Limited Downloads of musical works in Covered Services;

NOW, THEREFORE, pursuant to 17 U.S.C. § 115(c)(3), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Covered Services. Any member of RIAA that seeks to use, or authorize the use of, a copyrighted musical work for which an HFA publisher-principal has the right to grant the rights that are the subject matter of this Agreement in connection with the operation of one or more Covered Services may obtain through HFA on behalf of such HFA publisher-principal a mechanical license ("License") to make On-Demand Streams and Limited Downloads of the work through Covered Services, through to the end user, including by making server and related reproductions of the work used in the operation of Covered Services.

1.1. "Covered Service" means a service that offers (but the offerings of which are not necessarily limited to) On-Demand Streams and/or Limited Downloads of sound recordings of musical works from servers located within the United States (including the territories and possessions thereof), where the basic charge to users for the service is a recurring subscription fee (in contrast to the basic charge being a per-download, per-play or per-song fee), including any use of such a service on a limited basis without charge to users in order to promote the subscription service.

1.2. "On-Demand Stream" means an on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology, which may include but is not limited to Real Audio or Windows Media Audio, that is configured by the provider of the Covered Service in a manner designed so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device (e.g., the hard drive of the user's computer or a portable device) so that such reproduction is available for listening other than at substantially the time of the transmission.

1.3. "Limited Download" means a digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device (e.g., the hard drive of the user's computer or a portable device), using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) not to extend more than thirty (30) days beyond the expiration of the user's subscription, or (2) for a limited number of times not to exceed twelve (12) times after the expiration of the user's subscription.

1.4. Any member of RIAA that obtains a License hereunder is referred to herein as a "Participating RIAA Member." Any member of NMPA or HFA publisher-principal that grants a License and/or accepts a portion of an Advance Payment hereunder is referred to herein as a "Participating NMPA/HFA Publisher." The terms "Participating RIAA Member" and "Participating NMPA/HFA Publisher" are limited to such entities and their majority-owned subsidiaries.

1.5. Any digital music service that is majority owned by one or more RIAA members in the aggregate shall be entitled directly to obtain a License hereunder, and so shall be treated as a "member of RIAA" for purposes of Section 3.1. If such a service either obtains a License directly or is authorized under a License hereunder to make On-Demand Streams and/or Limited Downloads through Covered Services, such service shall be treated as a "Participating RIAA Member" for all purposes of this Agreement.

2. Covered Deliveries.

2.1. A License with respect to a musical work includes all reproduction, distribution and DPD rights necessary for Covered Services to make On-Demand Streams and Limited Downloads of that work, from the making of server reproductions to the transmission and local storage of the On-Demand Streams or Limited Downloads. A License does not extend to other transmissions made by a Covered Service or to activities not encompassed by a mechanical license, including, without limitation, print or display rights, merchandising rights, adaptation (derivative work) rights except as provided in Section 115(a)(2) of the Copyright Act, rights to synchronize musical works with visual images resulting in audiovisual works, or karaoke rights, all of which rights are specifically reserved. The Parties agree that server reproductions made under a License to transmit On-Demand Streams or Limited Downloads may be used to make transmissions other than On-Demand

Streams and Limited Downloads; provided that the foregoing is without prejudice to any applicable requirement, if any, that the Participating RIAA Member also obtain a license for such other transmissions made using such server reproductions. It is understood that this Agreement does not address or extend to any performance rights that may be implicated by the making of On-Demand Streams or Limited Downloads through Covered Services.

2.2. A License includes the right to make, and there shall be no separate payment or accounting for, On-Demand Streams of Promotional Excerpts (as defined below) of sound recordings of musical works licensed hereunder used for promotional purposes, provided that the applicable Participating RIAA Member shall be deemed likewise to authorize the relevant copyright owner or copyright owners of such musical work (or an organization of copyright owners designated by such copyright owners as their common agent) to make On-Demand Streams of Promotional Excerpts of that sound recording for the purpose of promoting that musical work without payment of any royalty. "Promotional Excerpt" is defined as a stream consisting of no more than thirty (30) seconds of playing time of the sound recording of a musical work, or in the case of sound recordings with a playing time of more than five minutes, a stream that is of no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of the sound recording of the musical work.

3. Licensing Process.

3.1. Commencing on the Effective Date, a member of RIAA may submit License requests in electronic form, either individually or batched, and either for On-Demand Streams and/or Limited Downloads alone or in combination with other configurations, substantially in accordance with Exhibit A. Promptly after the Effective Date, during the opt-out period described in Section 3.2, the Parties shall arrange discussions between appropriate personnel of HFA and of certain RIAA members concerning electronic licensing procedures, with the goal of refining and testing HFA's electronic licensing procedures so that they can be used readily for the issuance of mechanical licenses expeditiously following the completion of such opt-out period, and with the goal of enhancing such procedures so that they later can be used readily by RIAA members to request and obtain mechanical licenses for all configurations for which they desire licenses in a single request. In addition, a member of RIAA may submit License requests by other means generally accepted by HFA, including but not limited to SirNet (for so long as it is available), HFA's new web-based licensing system (when it becomes available), and HFA's standard paper form (but only using paper forms for complex License requests (e.g., requests involving medleys or samples), in limited numbers during times when electronic licensing capabilities are unavailable, or at other times in numbers that are generally consistent with such RIAA member's past use of paper forms, and in any case in numbers that do not exceed what HFA can reasonably be expected to process under the circumstances). HFA may modify its license request and license forms from time to time, provided that it gives reasonable notice thereof to RIAA and Participating RIAA Members and such modifications do not unreasonably affect the ability of Participating RIAA Members to submit license requests and obtain licenses. License forms may be issued electronically or in paper form, but when a Licensee submits a License request in electronic form in accordance with this Section 3.1, HFA shall, promptly after processing the License request, return to such Licensee an electronic file substantially in accordance with Exhibit A, with (1) the addition of that information indicated in Exhibit A as being "output" fields, (2) the addition of information, other than individual publisher share information, to complete any blank optional fields in the request, to the extent that such information is available in HFA's databases and is matched to the request in the License issuance process, (3) the substitution of information concerning HFA publisher-principal names where such information in HFA's databases is different from that in the request, and (4) the aggregated share of Participating NMPA/HFA Publishers. If an RIAA member submits a License request in accordance with this Section 3.1 but the request contains insufficient information for HFA to find a match for the relevant work in its databases, HFA will work with such RIAA member to provide the information necessary to enable a License to be issued, and if such RIAA member resubmits such request with the necessary information and the License can be issued, the provisions of Section 3.4 shall apply from the date of the original request. The Parties acknowledge the importance to NMPA, HFA and music publishers of having License requests submitted promptly, and the importance to RIAA and record companies of having License forms issued promptly. The Parties shall cooperate in good faith to promote each of those goals.

3.2. The authority of HFA to license any individual musical work on behalf of its publisher-principals is subject to the approval of the relevant publisher-principal.

HFA shall not require its publisher-principals to opt in to this Agreement either before or after commencing to issue Licenses, but HFA may establish an opt-out period before commencing to issue Licenses, provided that such period ends not later than six (6) weeks following the Effective Date. If an HFA publisher-principal at any time requests that HFA not issue Licenses on its behalf (either with respect to particular musical works or in general), HFA will honor that request; provided, however, that any such request shall not affect the validity or subsistence of a License issued prior to such request. During the opt-out period described in Section 3.2, HFA shall notify RIAA weekly of HFA publisher-principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement. Thereafter, through December 31, 2002, HFA shall notify RIAA quarterly of HFA publisher-principals that have notified HFA that they do not wish to make Licenses of their works available under this Agreement.

3.3. HFA shall issue mechanical licenses for DPD configurations (including but not limited to Licenses under this Agreement) with respect to a musical work in its entirety if one or more of its publisher-principals owns or controls a partial interest in such musical work, even if other co-owners of such musical work are not HFA publisher-principals, except that, pursuant to Section 3.2, if all the HFA publisher-principals that own or control a partial interest in such work request that HFA not issue mechanical licenses on their behalf, HFA will not issue such licenses. In the case of a mechanical license issued as descibed in this Section 3.3, a Participating RIAA Member shall pay directly to each co-owner that is not an HFA publisher-principal (or such co-owner's authorized payee) such co-owner's share of the applicable royalty payments under Section 6.1.

3.4. License forms issued by HFA pursuant to this Agreement shall be retroactive to the date of the License request made by the Participating RIAA Member on or after the Effective Date in accordance with Section 3.1. To the extent that the Participating RIAA Member makes or authorizes On-Demand Streams and Limited Downloads of musical works pending the processing by HFA of license forms in response to proper License requests submitted on or after the Effective Date in accordance with Section 3.1, NMPA and HFA shall not directly or indirectly file, encourage, aid, support, finance, contribute to, promote, or participate in any claim, suit, action or proceeding asserting that such activities are infringing.

3.5. Subject to Section 3.3, HFA shall also accept License requests to make On-Demand Streams and Limited Downloads through Covered Services of musical works as to which no HFA publisher-principal has any ownership interest or control, in whole or in part, and for which a License is not otherwise available under this Agreement. In such a case, HFA shall use commercially reasonable efforts to secure the requested Licenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this Agreement. (Non-HFA publisher-principals who grant Licenses through this arrangement shall be referred to as "Participating Independent Publishers".) In addition to any commission charged to the Participating Independent Publisher, HFA may charge the relevant Participating RIAA Member a one-time administrative fee of ninety-five dollars ($95) for each publisher that agrees to become a Participating Independent Publisher (it being understood that no such administrative fee shall be payable for any subsequent Licenses issued on behalf of that Participating Independent Publisher to any Participating RIAA Member), unless the Participating Independent Publisher also authorizes HFA to grant mechanical licenses other than Licenses under this Agreement, in which case no such fee shall apply. The Advance Payment described in Article 4 may be applied to such administrative fee when payable by a Participating RIAA Member specified by RIAA, and HFA shall provide to RIAA or an independent accounting firm designated by RIAA sufficient information concerning liability for such administrative fee to allow reconciliation of the Advance Payments as described in Section 4.4. When HFA arranges Licenses from Participating Independent Publishers pursuant to this Section 3.5, HFA shall collect and distribute mechanical royalties to such Participating Independent Publisher (or other authorized payees) unless the Participating RIAA Member requests to make such payments directly.

3.6. It is understood that compilations of data supplied by HFA in electronic form pursuant to Section 3.1, except to the extent that they consist of data provided by the relevant Participating RIAA Member pursuant to Section 3.1, are proprietary in nature and shall not be used by the recipient Participating RIAA Member to engage in business activities in competition with HFA or for any purpose other than to request and administer licenses issued by HFA and/or other licenses such Participating RIAA Member acquires with respect to the same works or other works owned or controlled by the same copyright owners, and shall not be disclosed by the recipient Participating RIAA Member to any other party except insofar as it is reasonably

necessary to disclose specific data relating to particular works for the purpose of requesting or administering licenses issued by HFA and/or other licenses such Participating RIAA Member acquires with respect to the same works or other works owned or controlled by the same copyright owners.

3.7. Nothing in this Agreement, including but not limited to the availability of Licenses or the procedures for obtaining the same, shall preclude an RIAA member or digital music service from at any time serving or filing a notice of intention to obtain a compulsory license in accordance with applicable law or, other than in Article 8, imply that any notice of intention so served or filed is valid or invalid. Nothing in this Agreement shall preclude any digital music services from seeking, or HFA or any of its publisher-principals from granting, direct licenses to digital music services, including without limitation Covered Services, on whatever terms might be agreed upon between the relevant parties, and it is the intention of HFA to make such licenses widely available as described more fully in a press release to be issued by HFA. By taking Licenses pursuant to this Agreement, Participating RIAA Members will be able to facilitate on a prompt and widespread basis the availability of music over the Internet through Covered Services.

4. Advance Payment.

4.1. Within thirty (30) days after the Effective Date, RIAA, on behalf of Participating RIAA Members (including their licensees), shall pay to HFA a non-refundable advance royalty payment of one million dollars ($1,000,000) in the aggregate ("Advance Payment"). If, by the second anniversary of the Effective Date, there has then been no final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, then, subject to Section 4.2, until such a determination, RIAA, on behalf of Participating RIAA Members (including their licensees), shall each month pay to HFA a supplementary Advance Payment of sixty-two thousand five-hundred dollars ($62,500) in the aggregate.

4.2. Effective at the second anniversary of the Effective Date or any time thereafter, RIAA may terminate this Agreement upon thirty (30) days advance written notice to NMPA and HFA. In the event RIAA does so, all Licenses previously issued under this Agreement shall terminate at the same time as this Agreement, without prejudice to the right of Participating RIAA Members thereafter to obtain new licenses under 17 U.S.C. § 115. Effective at the second anniversary of the Effective Date or any time thereafter, any Participating RIAA Member may opt out of this Agreement upon thirty (30) days advance written notice to each of the Parties. In the event a Participating RIAA Member does so, (1) the provisions of this Agreement thereafter shall not apply to such Participating RIAA Member except as provided in Article 7, and (2) all Licenses previously issued to such Participating RIAA Member under this Agreement shall terminate at such time, without prejudice to the right of such Participating RIAA Member thereafter to obtain new licenses under 17 U.S.C. § 115. In the case of termination by either RIAA or one or more Participating RIAA Members, (a) payments shall be due in accordance with Section 6.1 for activities under this Agreement prior to the termination of the relevant Licenses, (b) Advance Payments may be applied against such payments in accordance with Section 4.4, and (c) to the extent remaining, Advance Payments also may be applied to royalties due under new licenses for On-Demand Streams and Limited Downloads made through Covered Services, which licenses are issued by HFA at least one year after the relevant date of termination to the Participating RIAA Members whose Licenses were terminated. In addition, in the event a Participating RIAA Member that is one of the five "major record companies" (as that term is commonly understood, including any successors thereto and the subsidiaries thereof) so opts out of this Agreement, RIAA's monthly supplementary Advance Payments under Section 4.1 thereafter shall be reduced proportionately, based on the number of major record companies at such time (e.g., if there are then five major record companies and one opts out, RIAA's monthly supplementary Advance Payments shall be reduced by twenty percent (20%)). In addition to the foregoing, if there is a decision of the U.S. Copyright Office or a court, or any new legislation, inconsistent with Section 8.1, with the result that mechanical royalties are not required to be paid for some or all On-Demand Streams and/or Limited Downloads made through Covered Services, then the amount of RIAA's monthly supplementary Advance Payments under Section 4.1 shall be reduced to take into account such decision or legislation, based on actual usage under this Agreement to date, with the exact amount of such reduction to be agreed upon by the Parties promptly after such decision or legislation; provided that if any such decision is appealed and finally reversed on appeal, the amount of RIAA's monthly supplementary Advance Payments under

Section 4.1 shall be restored, and RIAA shall promptly pay to HFA the total amount by which the supplementary Advance Payment was reduced in the interim.

4.3. HFA shall deposit Advance Payments into an interest-bearing bank account (with such interest being treated as part of the Advance Payment). HFA shall be free to distribute the initial and supplementary Advance Payments to HFA publisher-principals in accordance with a reasonable and nondiscriminatory methodology based on market share, actual usage or a per musical work payment (which methodology HFA shall provide to RIAA), as well as to any Participating Independent Publishers pursuant to Section 3.5. Except insofar as it is recouped pursuant to Sections 4.4 and/or 4.5, the Advance Payment shall be nonrefundable.

4.4. Upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, as the case may be, the total amount of Advance Payments (including interest) shall be applied against undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Participating RIAA Members under this Agreement. Such Advance Payments shall be applied to the accounts of individual Participating RIAA Members as specified by RIAA, or an independent accounting firm designated by RIAA, by written notice to HFA within 45 days after the date of such final non-appealable determination of royalty rates. If the Advance Payments are not fully recouped at such time, any remainder of the Advance Payments thereafter shall be applied against all undisputed amounts owed to HFA on behalf of its publisher-principals and Participating Independent Publishers by Participating RIAA Members identified by RIAA, under mechanical licenses issued by HFA for On-Demand Streams and Limited Downloads made through Covered Services (including but not limited to Licenses under this Agreement), until such amount is fully recouped, unless RIAA notifies HFA of a different allocation of the Advance Payments among the accounts of Participating RIAA Members from time to time. HFA shall provide to RIAA or an independent accounting firm designated by RIAA sufficient accounting information to allow payments between RIAA and Participating RIAA Members, or vice versa, as necessary for each Participating RIAA Member ultimately to have paid to RIAA a net amount equal to that portion of the Advance Payments recouped by royalties actually owed by such Participating RIAA Member hereunder.

4.5. At the request of HFA, with RIAA's written consent, which consent shall not be withheld unreasonably, Advance Payments may be applied to other undisputed amounts (e.g., other mechanical royalties) owed by Participating RIAA Members to HFA on behalf of its publisher-principals.

5. Royalty. The royalty rate payable under a License shall be determined through negotiation and/or a CARP proceeding. The applicable rate will be structured as determined through negotiation or by the CARP, and may comprise separate royalty rate components for distinct uses of the musical work authorized by the License. The Parties shall meet to negotiate royalty rates in good faith, with the goal of concluding such negotiations promptly after the launch of Covered Services, and if an agreement is reached, jointly petition the U.S. Copyright Office for its adoption pursuant to 37 C.F.R. § 251.63(b). NMPA reserves its right to seek interest as a part of such royalty rate determination. RIAA reserves its right to seek to have such royalty rate determination reflect any payments under foreign copyrights in the case where On-Demand Streams or Limited Downloads are transmitted to users outside of the United States. Whether royalty rates are determined by negotiation or a CARP, and regardless of how royalty rate categories may be denominated, the Parties shall seek a determination of royalty rates such that it is clear which royalty rates are applicable to each of On-Demand Streams and Limited Downloads.

6. Accounting and Payment.

6.1. Beginning with the issuance of a License, a Participating RIAA Member will be required to account to HFA on a quarterly basis for activity under such License, 45 days after the close of each quarter, providing information comparable to that presently provided for physical products, and specifically including the number of On-Demand Streams and Limited Downloads of each work made during such quarter. Without limitation, quarterly reports shall include a breakdown of On-Demand Streams and Limited Downloads made by Covered Services under Licenses in the applicable quarter, by musical work and delivery method code (indicating On Demand-Streams and/or Limited Downloads), and including ISRC number if available, catalog number if available and HFA license number if available (in the same manner indicated by the Participating RIAA Member in its License request), and shall identify the specific Covered Services in which such On-Demand Streams and Limited Downloads were made. Each Participating RIAA Member shall preserve all usage and financial data that reasonably should be expected to be relevant, upon

the determination of royalty rates, to the calculation of royalties hereunder and use commercially reasonable efforts to require that each Covered Service it has authorized hereunder to make On-Demand Streams and Limited Downloads does the same. Subject to Article 4 and Section 3.3, upon the final non-appealable determination of royalty rates for On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding, each Participating RIAA Member shall make the applicable payment for all previous quarters then completed, from the launch of the applicable Covered Services to date, within 45 days, to be accompanied by a cumulative statement setting forth and aggregating the information provided in the previous quarterly reports supplied under this Agreement. Thereafter, on a quarterly basis, 45 days after the close of each quarter, each Participating RIAA Member shall account to HFA for activities and/or revenues realized on such activities during such quarter as determined through negotiation and/or by regulation, providing such information as is required by regulation, a CARP, and/or a negotiated rate agreement, and, subject to Article 4 and Section 3.3, pay royalties at the applicable rate. Notwithstanding the foregoing, NMPA reserves its right to seek more frequent access, including without limitation real-time access, to usage information.

6.2. At the request of HFA, a Participating RIAA Member shall accompany its quarterly reports with any available data in addition to that described in Section 6.1 concerning the numbers of On-Demand Streams and Limited Downloads made through Covered Services operated or authorized by such Participating RIAA Member (but not any personally identifying information), which data is regularly gathered or compiled by such Participating RIAA Member or provided to such Participating RIAA Member by its licensees with the right to disclose such data to HFA hereunder; provided that a Participating RIAA Member may provide any such data to HFA in whatever form it is available to such Participating RIAA Member in the ordinary course of its business and subject to any applicable confidentiality and other contractual use restrictions; and provided further that, before making any such request, HFA shall review with the Participating RIAA Member the types of such data the Participating RIAA Member has and can disclose to HFA, and the form in which such data is available, and HFA shall not request, and Participating RIAA Members shall not be required to provide, data that (given the volume and form of such data, the degree to which such data is reflected in quarterly reports, the data processing capabilities of HFA and the Participating RIAA Member, HFA's intentions to use such information, and other relevant factors) would not be commercially reasonable to provide. In addition, to the extent such information is available to a Participating RIAA Member and can be disclosed to HFA hereunder, at the request of HFA, a Participating RIAA Member shall accompany its quarterly reports with the total number of subscribers to and total number of subscriber months for each Covered Service operated or authorized by such Participating RIAA Member during the reporting period; provided that any such information relating to a Covered Service operated by a Participating RIAA Member shall be subject to an appropriate confidentiality restriction, and any such information provided to a Participating RIAA Member by a third party shall be subject to any applicable confidentiality and other contractual use restrictions. Notwithstanding the foregoing, to the extent that information requested by HFA under this Section 6.2 is subject to existing, proposed or future confidentiality restrictions that would preclude its disclosure to HFA, the relevant Participating RIAA Member shall in good faith seek the consent of the party that is the source of such information to disclose such information to HFA, subject to appropriate confidentiality restrictions.

7. *Term.* The term of this Agreement shall commence on the Effective Date and, subject to Sections 4.2 and 8.5, continue until the final non-appealable determination of royalty rates for each of On-Demand Streams and Limited Downloads through negotiation and/or a CARP proceeding. New Licenses shall continue to be issued pursuant to this Agreement for the duration of such term. Thereafter, RIAA member companies may request, and HFA shall issue, mechanical licenses covering On-Demand Streams and Limited Downloads at the applicable royalty rates in accordance with its customary practices for the issuance of licenses where there is an applicable statutory rate, which the Parties currently understand to include the means of application described in Section 3.1. Notwithstanding the foregoing, Licenses once issued under this arrangement shall remain in effect unless terminated for default in respect to payment (once royalty rates are determined) or accounting (either before or after royalty rates are determined) pursuant to 17 U.S.C. § 115(c)(6) (or other applicable provision of law, if any), it being understood that a License may not be terminated for such a default where the default is remedied as provided in 17 U.S.C. § 115(c)(6). In addition, the provisions of Sections 3.6, 4.2, 4.4 and 4.5, and

of Articles 6 and 7, shall survive the expiration or termination of this Agreement or any License under this Agreement.

8. Legal Framework for Agreement.

8.1. Subject to the other provisions of this Article 8, in order to settle issues in dispute and avoid litigation, provide assurance to record companies seeking to launch digital music services and enable HFA's issuance of license forms for Covered Services hereunder:

(a) The Parties agree that under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act. The Parties further agree that under current law the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of a DPD, and thus does not require a mechanical license. The foregoing does not express or imply any agreement that, and shall not be used to support any argument that, the process of making On-Demand Streams other than through Covered Services, or the process of making streams that would not qualify for a statutory license under Section 114(d)(2) of the Copyright Act (including, without limitation, because such streams are part of an "interactive service" (as that term is defined in Section 114(j)(7)) or exceed the "sound recording performance complement" (as that term is defined in Section 114(j)(13)) does or does not involve the making and distribution of a DPD, and the Parties expressly reserve all their rights with respect to that issue.

(b) The Parties agree that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

(c) The Parties agree that under current law a compulsory license to make On-Demand Streams and Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the On-Demand Streams and Limited Downloads) is available under Section 115 of the Copyright Act.

8.2. Subject to Sections 8.3 and 8.5, for the term of this Agreement, no Party, no Participating RIAA Member and no Participating NMPA/HFA Publisher shall take a position contrary to or inconsistent with Section 8.1, or lend support or resources, financial or otherwise, to any other person or entity taking a contrary or inconsistent position, before the Copyright Office, a CARP, a court or any other government office or tribunal. Thereafter, no Party, no Participating RIAA Member and no Participating NMPA/HFA Publisher shall commence or lend support to any action in court to challenge the validity of the rates determined pursuant to Article 5 on the ground that On-Demand Streams and Limited Downloads do not involve the making or distribution of DPDs. It is understood that, for purposes of this Section 8.2, a Participating RIAA Member or Participating NMPA/HFA Publisher shall not be deemed to lend financial support or resources to affiliated entities merely through intra-enterprise financial arrangements in the ordinary course of business.

8.3. Notwithstanding Sections 8.1 and 8.2, the Parties, Participating RIAA Members and Participating NMPA/HFA Publishers may at any time (1) raise and litigate (including, without limitation, before a CARP) the economic value of, and the appropriate royalty rates to be applied to, On-Demand Streams and Limited Downloads; (2) take or support any position they choose with respect to sound recordings (as distinguished from any musical works embodied therein) and the rights therein, including, without limitation, rights under Sections 106 and 114 of the Copyright Act, and (3) make or lend support to any arguments they choose to prosecute, or defend or counterclaim against, an infringement claim relating to activities before the Effective Date. Notwithstanding Sections 8.1 and 8.2, RIAA and Participating RIAA Members may at any time make or lend support to any arguments they choose to defend or counterclaim against an infringement claim relating to activities on or after the Effective Date, in the event that a License with respect to the relevant works is not available hereunder (it being understood that, subject to Section 8.4, NMPA, HFA and Participating NMPA/HFA Publishers may participate in the litiga-

tion of any such claim, so long as their doing so is consistent with Sections 8.1 and 8.2). The Parties agree that they will act in good faith not to induce, promote or encourage the litigation of an infringement claim relating to activities as described in the immediately preceding sentence.

8.4. To the extent that an action being litigated by RIAA and/or a Participating RIAA Member, other than that pending case in the Southern District of New York captioned Rodgers & Hammerstein Organization v. UMG Recordings, Inc., involves the question of the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c) for a musical work for which a License is not available under this Agreement, neither NMPA nor HFA shall participate in or lend support to such action. The Parties agree that they will act in good faith not to induce, promote or encourage litigation concerning the validity of a notice of intention to obtain a compulsory license as described in Section 8.1(c).

8.5. To the extent that a final, non-appealable decision of the Copyright Office or a court, or any new legislation, is inconsistent with Section 8.1, this Agreement shall be inapplicable to the extent of the inconsistency as of the date thereof, but subject to Article 4, Participating RIAA Members shall not be entitled to a refund of any monies paid prior to such date.

8.6. This Agreement is entered into in settlement and compromise of certain disputes among the Parties and to clarify certain aspects of the licensing of On-Demand Streams and Limited Downloads. Nothing in this Article 8 shall be used by, or be enforceable by, a third party not a Party to this Agreement, other than a Participating RIAA Member or Participating NMPA/HFA Publisher, in any manner or in any context, including without limitation in any legal proceeding. This Agreement does not give rise to any third-party beneficiary rights in any party other than Participating RIAA Members and Participating NMPA/HFA Publishers. The agreements set forth in this Article 8 and the course of dealing hereunder shall be inadmissible, and shall not be used to support any argument of law, in any litigation or arbitration relating to (1) activities before the Effective Date or (2) activities other than making and distributing On-Demand Streams and Limited Downloads through Covered Services, except making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act.

9. Copyright Office Proceedings.

9.1. RIAA and NMPA promptly shall file in the Copyright Office, in the Mechanical and Digital Phonorecord Delivery Compulsory License rulemaking proceeding (docket number 2000–7) (the "Proceeding"), an appropriate mutually agreeable document (the "Joint Statement") signed by representatives of both RIAA and NMPA and (1) explaining that they have entered into this Agreement to resolve certain differences between them and enable the expeditious launch of subscription music services; and (2) describing the material terms of this Agreement (including without limitation the agreement in Section 8.1). Unless the Parties agree otherwise, the Joint Statement shall not address the question of whether the Copyright Office should or should not proceed with the Proceeding, and none of the Parties shall use the existence of the Agreement to argue to the Copyright Office that the Office should or should not proceed with the Proceeding.

9.2. Either in the Joint Statement, in joint comments submitted in response to the Copyright Office's Notice of Proposed Rulemaking dated August 28, 2001, or in a separate petition signed by representatives of both Parties to be filed in the Copyright Office promptly after the Effective Date, RIAA and NMPA shall request that the Copyright Office amend 37 C.F.R. § 201.18 to facilitate the licensing process for digital music services by addressing in a mutually agreeable manner such procedural issues as:

(a) Permitting combined notices of intention;

(b) Permitting service of notices of intention on the copyright owner's agent, and designating HFA as agent for the receipt of such notices;

(c) Eliminating the requirement that officer/director information be provided for publicly traded companies and their subsidiaries;

(d) Permitting notices of intention to be signed by any authorized representative of the licensee;

(e) Permitting mailing to a known correct address of the copyright owner; and

(f) Permitting the service of notices of intention by regular mail.

10. Congress. As soon as practicable after the Effective Date, and before any relevant congressional hearings then scheduled, if possible, the Parties shall draft and submit a mutually agreeable letter to appropriate members of Congress describing this Agreement and the benefits thereof.

11. Memoranda of Understanding. Promptly after the Effective Date, HFA and RIAA shall commence good-faith negotiations to (1) revise and renew for an additional year the Memorandum of Understanding dated September 21, 2000 (the "MOU") concerning interim licenses for DPDs, the revisions to address updated licensing procedures consistent with the licensing procedures to be implemented under this Agreement, and (2) enter into a second Memorandum of Understanding concerning certain licensing, payment and additional operational issues of mutual concern to HFA and RIAA members, which issues shall include:

(a) record companies' payment to HFA of 100% of royalties due for a particular musical work regardless of whether HFA acts as an agent for all owners of such work;

(b) record companies' provision of album label copy to HFA in order to facilitate the licensing process; and

(c) what information concerning publisher names and shares appropriately should be provided by HFA to Participating RIAA Members, and the appropriate confidentiality protections therefor.

Pending completion of such negotiations, HFA will continue to issue "Interim DPD Licenses" as described in the MOU in accordance with the practice that has developed under the MOU.

12. Economic Data. In order to help the Parties better understand and evaluate emerging business models for digital music services, RIAA and NMPA shall jointly hire an independent accounting firm to collect from Participating RIAA Members on a confidential basis information concerning the economics of emerging subscription service business models and report composite information to RIAA and NMPA for the duration of this Agreement.

13. Security. If RIAA or any Participating RIAA Member learns of any substantial (in terms of number of musical works affected, number of copies or prevalence) circumvention of security measures used by Covered Services resulting in unauthorized copying or distribution of sound recordings of musical works by authorized or unauthorized users of Covered Services, RIAA and/or the Participating RIAA Member shall use commercially reasonable efforts promptly to notify HFA of such unauthorized activity; provided, however, that RIAA and Participating RIAA Members shall be liable for damages for breach of this Article 13 only if, and to the extent, that they themselves are liable for direct, contributory or vicarious copyright infringement under applicable U.S. law, and in such case such damages shall be only those payable for such infringement.

14. Electronic Reporting. The Parties agree to work together in good faith to implement means whereby accounting information relating to Licenses will be provided to HFA in electronic, machine-readable form.

15. Publicity. RIAA and NMPA will issue a joint press release announcing this arrangement. In their communications to their members concerning this Agreement, the Parties shall recommend that their members avail themselves of this Agreement. The Parties confirm that, subject to Section 8.6, this Agreement is not confidential.

16. Miscellaneous.

16.1. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to conflicts of law principles thereof).

16.2. Amendment. This Agreement may be modified or amended only by a writing signed by each of the Parties.

16.3. Entire Agreement. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

16.4. No Effect on Other Agreements. Without limitation, this Agreement shall not terminate, supersede, limit or otherwise affect the enforceability of, or the rights of any of the respective parties to, any of the following agreements: (1) the Settlement Agreement dated as of October 17, 2000 between HFA, MPL Communications, Inc. and Peer International Corporation, on the one hand, and MP3.com, Inc., on the other, and any amendments thereto; (2) the Governing Agreement dated as of October 2000 between HFA, MPL Communications, Inc. and Peer International Corporation, on the one hand, and MP3.com, Inc., on the other, and any amendments thereto; (3) the Digital Phonorecord Delivery License dated January 15, 1999 between HFA and Emusic.com Inc., and any amendments thereto; and (4) the Amendment Agreement dated November 2000 between HFA and Emusic.com Inc., and any amendments thereto.

16.5. Counterparts. This Agreement may be executed in counterparts, including by means of facsimile, each of which shall be deemed to be an original, but which taken together shall constitute one agreement.

16.6. Headings. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

Edward P. Murphy
President and CEO, NMPA

Hilary B. Rosen
President and CEO, RIAA

Gary Churgin
President and CEO, HFA

Cary Sherman
Senior Executive Vice President
and General Counsel, RIAA

EXHIBIT A

I. HFA/Listen Electronic License Request

II. & Output File Layout: Field Explanations

	Field	Type: Mandatory (M) Optional (O) Conditional (C)	Explanation	Example
1	**Manufacturer Number**	M	Account number assigned by HFA to Licensee	M12345
2	**Transaction Date**	M	Date electronic license request submitted to HFA	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304
3	**Manufacturer Request Number**	M	Unique identifying number (numerical only) assigned by Licensee for each work for which a license is requested	12345678
4	**Label Name**	M	The name of the record label that produced the applicable recording	Epic
5	**ISRC Code**	M	*International Standard Recording Code*. ISRC code assigned to the recording by the record label.	USSM19804780
6	**Playing Time - Minutes**	M	The number of minutes in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 005
7	**Playing Time - Seconds**	M	The number of seconds over the last full minute in the duration of the applicable recording	Duration = 5 minutes and 52 seconds Data entered: 52
8	**Artist**	M	The name of the artist performing the applicable recording	John Lennon, Paul McCartney

9	**Song Title**	M	Title of work for which a License is requested	Yesterday
10	**A/K/A Song Title**	O	Other names by which the work is known	Over the Rainbow; Somewhere Over the Rainbow
11	**ISWC Code**	O	*International Standard Musical Work Code.* Code assigned to works by the network of ISO/ISWC Local or Regional agencies	Example: T-034.524.680-1 Data Entered: T0345246801
12	**HFA Song Code**	O	Identifier assigned by HFA to identify a work uniquely	Example: P12345
13	**Songwriter(s)**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	Name of the composer(s) of the work.	Format: [First Name] [Last Name], [First Name], etc Example: Michael Ross, Tom Smith
14	**Publisher Name**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	Name of publisher owning a share of the work. Additional publishers should be listed on separate lines using the same manufacturer's request number assigned to the work.	EMI Mills
15	**HFA Publisher Number**	O	Identifier assigned by HFA to identify a publisher uniquely.	P12345
16	**Publisher Share**	O	Percent of song owned by publisher.	Example: 66.667% Data Entered: 066.6670
17	**Catalog Number**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The catalog number of a prior physical product that has been previously licensed (where applicable.)	12345-2
18	**Album (physical product) Title**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The title of a prior physical product that has been previously licensed (where applicable)	Parachute

19	**UPC Code**	C *Provide either: (a) Songwriter or (b) Publisher, Catalog #, Album Title and UPC*	The UPC code of a prior physical product that has been previously licensed (where applicable).	706301594728	
20	**Configuration Code**	M	Code designating configuration type(s) applicable. Numerous options available; most relevant are in example column.	**CV**	Use in Covered Services under this Agreement (includes LT, LU and S below)
				1. LT	*Time-Limited Digital Phonorecord Delivery*
				LU	*Use Limited Digital Phonorecord Delivery*
				B. S	*On-Demand Streaming (Single)*
				SP	Digital Phonorecord Delivery (Single)
21	**License Type**	M	Classification of license type requested. Numerous options available; most relevant is in example column.	**G**	Digital
22	**Server Fixation Date**	M	The date the applicable recording was or is expected to be fixed to the server for distribution via streaming or downloading.	Format: YYYYMMDD Example: 3/4/2001 Data Entered: 20010304	
23	**Rate Code**	C *(one of the rate fields from 23 - 26 must be completed)*	Code designating type of rate applicable. Numerous options available; most relevant are in example column.	T	Statutory rate to be determined under this Agreement
				R	Under controlled composition clause in contract where controlled rate applies
				S	Statutory (already determined)
24	**Rate in Cents**	C *(one of the rate fields from 23 - 26 must be completed)*	Rate indicated as a penny rate.	.0755000	
25	**Rate in Percentage of Statutory**	C *(one of the rate fields from 23 - 26 must be completed)*	Rate indicated in percentage of statutory.	075.00	
26	**Rate in**	C *(one of*	Rate indicated in a percentage of	075.00	

	Percentage of Minimum Statutory	*the rate fields from 23 - 26 must be completed)*	minimum statutory.		
27	**HFA License Number**	Output	Number assigned by HFA for each license	1010120001	
28	**HFA License Reject Code**	Output	Code designating reason why request was not licensable as submitted. Numerous options available; most relevant are in example column.	01	NO MATCH FOUND (FOR OTHER THAN SPECIFICALLY LISTED REJECT CODES)
				02	DUPLICATE LICENSE REQUEST (1ST PASS - PRELIMINARY SCAN; WITHIN THE CURRENT BATCH)
				03	DUPLICATE LICENSE REQUEST (2ND PASS, ALREADY LICENSED, PART OF EDIT VALIDATION PROCESS)
				10	SONG TITLE NOT FOUND
				11	SONG TITLE MATCH ONLY, INSUFFICIENT FOR LICENSE
				12	SONG TITLE AND ARTIST MATCH ONLY, INSUFFICIENT FOR LICENSE
				13	SONG TITLE AND ALBUM MATCH ONLY, INSUFFICIENT FOR LICENSE
				14	SONG TITLE AND CATALOG / UPC # MATCH ONLY, INSUFFICENT FOR LICENSE
				21	CONTROLLED RATE REQUEST COULD NOT BE MATCHED TO PREVIOUSLY
				81	PUBLISHER NOT REPRESENTED BY HARRY FOX AGENCY
				82	PUBLISHER UNKNOWN
				83	PUBLISHER OPTED-OUT OF AGREEMENT
				91	ORIGINAL VERSION OF SONG IS IN THE PUBLIC DOMAIN IN THE USA
				92	PUBLISHER OWNERSHIP NOT YET VERIFIED
				93	SONG PLACED ON HOLD FOR LICENSING BY PUBLISHER
				94	SONG HAS RESTRICTIONS; REQUIRES PUBLISHER APPROVAL

				95	OLD DERIVATIVE VERSION OF SONG, CURRENT PUBLISHER UNKNOWN
				96	INVALID SONG CODE
29	**HFA Flag for Amended Publisher Data**	Output	Indicates that publisher information submitted by licensee differs on HFA database (for HFA represented publishers only)	Y	Flagged so that requestor can note that HFA publisher information differs from that submitted

HFA/RIAA Electronic License Request & Output File Layout

Acceptable Data Formats:

1. *MS Access database*
2. *MS Excel Spreadsheets (with proper headings)*
3. *Flat File (follow the file layout below)*

	Description	Type	Length	Decimal	Input Option
1	Manufacturer Number	A	6		M
2	Transaction Date	N	8	0	M
3	Manufacturer Request Number	N	8	0	M
4	Label Name	A	15		M
5	ISRC Code	A	15		M
6	Playing Time - Minutes	N	3	0	M
7	Playing Time - Seconds	N	2	0	M
8	Artist	A	200		M
9	Song Title	A	200		M
10	A/K/A Song Title	A	200		O
11	ISWC Code	A	11		O
12	HFA Song Code	A	6		O
13	Song Writer(s)	A	200		C*
14	Publisher Name	A	60		C*
15	HFA Publisher Number	A	6		O
16	Publisher Share	N	7	4	O
17	Catalog Number	A	15		C*
18	Album (physical product) Title	A	200		C*
19	UPC Code	A	16		C*
20	Configuration Code	A	2		M
21	License Type	A	1		M

22	Server Fixation Date	N	8	0	M
23	Rate Code	A	1		C**
24	Rate in Cents	N	7	7	C**
25	Rate in Percentage of Statutory	N	5	2	C**
26	Rate in Percentage of Minimum Statutory	N	5	2	C**
27	HFA License Number	N	10		*Output*
28	HFA License Reject Code	A	2		*Output*
29	HFA Flag for Amended Publisher Data	A	1		*Output*

KEY: **TYPE**:
A = Alphanumeric Field
N = Numeric Field

LENGTH: For Alphanumeric fields, it is the maximum number of characters required.
For Numeric fields, it is the exact number of characters required

DECIMAL: Number of characters after decimal (for numeric fields only)

INPUT OPTION:
M = Mandatory
O = Optional
C* = Conditional --- As agreed, label must provide either: **(a)** Songwriter *or* **(b)** Publisher, Catalog Number, Album Title and UPC. If (a) is provided, then (b) is not required; and vice versa.
C** = Conditional --- One of the rate code fields from 23-26 must be completed

BMI®
http://www.bmi.com

WEB SITE
MUSIC PERFORMANCE AGREEMENT

INTERNET-01

AGREEMENT, made on _____, 200_, by and between BROADCAST MUSIC, INC. ("BMI"), a New York corporation with its principal offices at 320 West 57th Street, New York, New York 10019 and _____ ("LICENSEE"), a _____ (State)

(check one) ❑ corporation
❑ partnership
❑ limited liability company
❑ individual d/b/a _____ (complete if applicable)

with its principal offices at _____
_____(the "Agreement").

IT IS HEREBY AGREED AS FOLLOWS:

1. Term

The Term of this Agreement shall mean the period from either January 1, 2001 or _____ (date after January 1, 2001 on which audio was launched), whichever is later, through December 31, 2003 and continuing on a year-to-year basis thereafter. Either party may terminate the Agreement upon 60 days' prior written notice at the end of December of any year beginning with December 31, 2003. BMI shall have the right to cancel this Agreement along with the simultaneous cancellation of the Agreements of all other licensees of the same class and category as LICENSEE as of the end of any month during the initial term or any subsequent renewal term, upon 60 days' prior written notice.

2. Definitions

As used in this Agreement, the following terms shall have the following respective meanings:

(a) "Allocation of Run-Of-Site Revenue" shall mean Run-Of-Site Revenue multiplied by a fraction the numerator of which is the total Music Page Impressions for the reporting period, and the denominator of which is the total Page Impressions for the reporting period. (Run-Of-Site Revenue x (total Music Page Impressions ÷ total Page Impressions))

(b) "Direct Music Area Revenue" shall mean the total of: (1) In-Stream Advertising Revenue; (2) Music Page Banner Advertising Revenue; (3) Music Subscriber Revenue; and (4) Other Music Revenue.

(c) "Gross Revenue" shall mean all revenue, including all billings on behalf of, and all payments made to, LICENSEE, or as authorized by LICENSEE, its employees, representatives, agents or any other person acting on LICENSEE's behalf, and all billings on behalf of, and payments made to, any person, company, firm or corporation under the same or substantially the same ownership, management and control as LICENSEE for: (1) access to and/or use of the Web Site or portions thereof, including online time, subscriptions, and other transactional charges (excluding revenue generated by LICENSEE for the direct sale of manufactured products), including commissions from third parties on transactions; (2) advertising (including sponsor "hot links") on the Web Site, including billings to and payments received from sponsors, less advertising agency commissions not to exceed 15% actually incurred to a recognized advertising agency not owned or controlled by LICENSEE; (3) the provision of time or space on the Web Site to any other person or company; (4) donations; (5) the fair market value of merchandise, services or any thing or service of value which LICENSEE may receive in lieu of cash consideration for the use of the Web Site (i.e. trade and barter); and (6) LICENSEE's proprietary software used to access the Web Site, or download any aspect thereof. Gross Revenue shall include such payments as set forth in (1) through (6) above to which LICENSEE is entitled but which are paid to a parent, subsidiary, or division of LICENSEE or any third party, in lieu of payment to LICENSEE, for LICENSEE's Web Site. LICENSEE may deduct from Gross Revenue any bad debts actually written off during a reporting period which are related to any billings previously reported, but shall increase Gross Revenue by any recoveries thereof.

(d) "In-Stream Advertising Revenue" shall mean that portion of Gross Revenue as defined in Paragraph 2(c)(2) and 2(c)(5) which is derived from advertising embedded in audio or audiovisual programming on the Web Site which contains music.

(e) "Music Area Revenue" shall mean Direct Music Area Revenue plus the Allocation of Run-Of-Site Revenue.

(f) "Music Page" shall mean a Web Page which presents one or more icons or hyperlinks that may be clicked on to access performances of music or at which music is played upon loading the Web Page.

(g) "Music Page Banner Advertising Revenue" shall mean that portion of Gross Revenue as defined in Paragraph 2(c)(2) and 2(c)(5) which is derived from advertisements appearing on or in connection with Music Pages or portions thereof on the Web Site.

(h) A "Music Page Impression" shall mean a transfer request for a single Music Page.

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(i) "Music Subscriber Revenue" shall mean that portion of Gross Revenue as defined in Paragraph 2(c)(1) which is derived from granting access to performances of music or Music Pages or portions thereof on the Web Site.

(j) "Online Service" shall mean a commercial computer online information and/or entertainment programming packaging service including, but not limited to America Online, @Home Network, Road Runner, Microsoft Network, CompuServe and Prodigy, which offers consumers, for a fee, access to proprietary centralized databases and remote sources of audio and video programming and which may provide Internet access.

(k) "Other Music Revenue" shall mean that portion of Gross Revenue as defined in Paragraphs 2(c)(1)-(6) (other than Gross Revenue defined in Paragraphs 2(d), 2(g) and 2(i)) which is directly attributable to performances of music or Music Pages or portions thereof on the Web Site.

(l) "Page Impression" shall mean a transfer request for a single Web Page.

(m) "Run-Of-Site Revenue" shall mean that portion of Gross Revenue as defined in Paragraphs 2(c)(1)-(6) which is attributable to the entire Web Site, or any part or parts of the Web Site that include one or more Music Pages or portions thereof. Run-Of-Site Revenue shall not include Direct Music Area Revenue or other revenue derived from targeted advertising buys where an advertiser buys advertising banners or other opportunities on or in connection with, or LICENSEE charges for access to, specific Web Page(s) other than Music Page(s) or portions thereof.

(n) "Territory" shall mean the United States, its Commonwealth, territories, and possessions, and the territories represented by non-U.S. performing rights licensing organizations listed on Exhibit C as may be amended from time to time by BMI during the Term of this Agreement by adding to or deleting from the list of countries posted in the licensing section of the BMI web site located at http://www.bmi.com/. BMI will provide notice to LICENSEE (by e-mail to the address provided by LICENSEE on the profile attached hereto as such may be amended in writing by LICENSEE) of the deletion of any non-U.S. performing rights licensing organization from Exhibit C during the Term hereof.

(o) "U.S. Territory" shall mean the United States, its Commonwealth, territories, and possessions.

(p) "Web Page" shall mean a set of associated files transferred sequentially from the Web Site to, and rendered more or less simultaneously by, a browser. For purposes of this Agreement, such associated files shall include, but shall not be limited to, 'pop-up' windows that open upon accessing the Web Page as well as proprietary software 'players' that open when accessing an audio or audiovisual file associated with the Web Page.

(q) "Web Site" shall mean an Internet computer service comprising a series of interrelated Web Pages currently registered with a domain name registration service and known as _____ that LICENSEE produces and/or packages and then transmits or causes to be transmitted either directly or indirectly to persons who receive the service from the URL http://_____ over the Internet by means of a personal computer or by means of another device capable of receiving Internet transmissions. LICENSEE may license additional Web Sites owned, operated and/or controlled by LICENSEE by listing such additional sites on Exhibit A hereto, and may amend Exhibit A from time to time during the Term hereof by written agreement signed by both parties. LICENSEE must comply separately with all reporting requirements and pay separate license fees under this Agreement, including Annual Minimum License Fees, for each Web Site listed on Exhibit A. References herein to Web Site shall include those additional sites listed on Exhibit A.

3. Grant of Rights

(a) BMI hereby grants to LICENSEE, for the Term, a non-exclusive license to perform publicly within the Territory (subject to Paragraph 3(b) below), in and as part of LICENSEE's Web Site transmitted or caused to be transmitted either directly or indirectly by LICENSEE over the Internet all musical works, the right to grant public performance licenses of which BMI controls. This Agreement shall only include public performances in the Territory of musical works by transmissions over the Internet received via personal computers or by means of another device capable of receiving the Internet through streaming technologies as well as those transmissions that are downloaded by persons on personal computers or otherwise, where such transmissions are accessed through the Web Site simultaneous to viewing a page on the Web Site. Public performances outside of the Territory may be subject to appropriate separate licensing. This Agreement shall not license transmissions of musical works that are accessed through a web site owned or controlled by a third party simultaneous to viewing a page on the third party's web site. This Agreement does not include dramatic rights or the right to perform dramatico-musical works in whole or in substantial part. This Agreement also does not license public performances in any commercial establishments, including, but not limited to, where all or a portion of LICENSEE's Web Site is used as a commercial music service (as that term is customarily understood in the industry); such performances of BMI music shall be subject to appropriate separate licensing.

(b) Notwithstanding the foregoing, the territorial scope of the grant of rights with respect to any musical works which are affiliated with BMI through a non-U.S. performing rights licensing organization not listed on Exhibit C hereto is limited to public performances in the U.S. Territory. Public performances of such musical works outside of the U.S. Territory may be subject to appropriate separate licensing.

(c) Nothing herein shall be construed as the grant by BMI of any license in connection with any transmission which is not part of LICENSEE's Web Site transmitted or caused to be transmitted by LICENSEE and nothing herein shall be construed as authorizing LICENSEE to grant to others (including, but not limited to, third party web sites, Online Services, cable television system operators and open video systems (acting as other than Internet service providers)) any license or right to reproduce or perform publicly by any means, method or process whatsoever, any of the musical compositions licensed hereunder.

(d) This Agreement grants only public performing rights to LICENSEE, and does not grant any reproduction, distribution, performance right in sound recordings or any other intellectual property right(s) in any musical works to any person or entity that may receive and/or download or otherwise store the transmission of musical works.

(e) In the event that all or a portion of LICENSEE's Web Site is offered for resale by a third party as a pay or premium audio or audiovisual service, or is packaged or included on a tier of services by a third party for additional revenue, either independently or with other Web Sites, LICENSEE shall immediately notify BMI in writing of any such arrangements. BMI and LICENSEE expressly agree that any such uses are not licensed under this Agreement and shall be subject to appropriate separate licensing.

4. License Fee

In consideration of the license granted herein, LICENSEE shall pay to BMI for each calendar quarter of the Term hereof a license fee in accordance with the following rate calculations at LICENSEE's option:

(a) Gross Revenue Calculation

LICENSEE shall pay to BMI 1.75% of LICENSEE's Gross Revenue generated by LICENSEE's Web Site during each quarter year of the Term according to the Payment Schedule below (Gross Revenue X 1.75%); *or*

(b) Music Area Revenue Calculation

LICENSEE shall pay to BMI the greater of: (1) 2.5% of LICENSEE's Music Area Revenue generated by LICENSEE's Web Site during each quarter year of the Term according to the Payment Schedule below (Music Area Revenue X 2.5%); and (2) total Music Page Impressions during each quarter year of the Term according to the Payment Schedule below divided by 1,000 and multiplied by $0.12 ((Music Page Impressions ÷ 1,000) X $0.12).

(c) Payment Schedule: LICENSEE may elect between the Gross Revenue Calculation and Music Area Revenue Calculation upon filing each of its Financial Reports for each immediately preceding calendar quarter of the Term in accordance with Paragraph 6 according to the following Payment Schedule:

PAYMENT SCHEDULE

Quarter	Period Ending	Payment Due Date
First	March 31	April 30
Second	June 30	July 31
Third	September 30	October 31
Fourth	December 31	January 31

5. Annual Minimum License Fee

For each calendar year of the Agreement, LICENSEE shall pay to BMI an Annual Minimum License Fee as follows:

(a) Upon signing this Agreement, LICENSEE shall estimate its annual Gross Revenue and shall pay to BMI an estimated Annual Minimum License Fee in accordance with the Minimum Fee Table below prorated based on the number of months remaining in the first calendar year covered by the Agreement. Thereafter, LICENSEE shall pay to BMI any additional amount that may be due based on actual Gross Revenue upon filing its Financial Reports in accordance with Paragraph 6. Annual Minimum License Fee payments are credited against any additional license fees that LICENSEE shall owe to BMI in the same year to which the Annual Minimum License Fee shall apply. Overpayments shall be credited to LICENSEE's account. Web Sites paying only Annual Minimum License Fees must still submit financial reports under Paragraph 6.

(b) The Annual Minimum License Fee due for 2001 is specified in the Minimum Fee Table below. For each year of this Agreement after 2001, the Annual Minimum License Fee shall be adjusted to reflect the increase (or decrease) in the United States Consumer Price Index (National, All Items) between October 2000 and October of the year preceding the year subject to the minimum fee, and shall be rounded to the nearest dollar amount.

MINIMUM FEE TABLE

Gross Revenue	2001 Annual Minimum Fee
Up to $12,000	$259.00
$12,001 to $18,500	$388.00
$18,501+	$517.00

6. Financial Reports and Audit

(a) LICENSEE shall submit to BMI separate Financial Reports as to Gross Revenue generated by LICENSEE's Web Site as follows:

(i) For each calendar quarter of this Agreement, a report, certified by an authorized representative of LICENSEE, for the Web Site, in the form substantially the same as the Web Site Music Performance License Quarterly Report Form annexed to this Agreement as Exhibit B. LICENSEE's Financial Reports are due at the same time as the

applicable quarterly license fee, including the Annual Minimum License Fee, as set forth in Paragraph 4. LICENSEE agrees to use commercially reasonable efforts to use software which BMI may provide to LICENSEE to prepare and deliver such reports electronically, or such other commercially reasonable alternative method upon which the parties agree. LICENSEE's Financial Reports shall be treated as confidential. BMI will not disclose the contents of such reports except as may be required by law or legal process; *provided, however,* that nothing contained herein shall limit or preclude BMI from providing affiliated or represented songwriters, composers, music publishers, and/or non-U.S. performing rights licensing organizations with itemized royalty statements and responding to inquiries from such affiliates or non-U.S. organizations related thereto.

(ii) BMI shall have the right to estimate the fees due for a given quarter year on the basis of the highest quarterly fee during the previous twelve (12) months and bill LICENSEE therefor in the event that LICENSEE fails to report as required. Neither BMI's estimation of the fee for a reporting period nor anything else shall relieve LICENSEE of the obligation to report and make actual fee payments for the reporting period. If BMI's estimate was less than the actual license fee due, LICENSEE shall pay BMI, at the time the report is rendered, the difference between the actual fee due and the estimated fee paid. If LICENSEE's report reflects that the actual fee for the quarter year was less than the estimated fee paid, BMI shall credit the overpayment to LICENSEE's account. If LICENSEE has submitted all contractually required prior reports and payments to BMI and this Agreement is terminated, BMI shall refund the overpayment to LICENSEE.

(b) BMI shall have the right to require that LICENSEE provide BMI with data or information sufficient to ascertain the license fee due hereunder.

(c) BMI shall have the right, at BMI's sole cost and expense, once with respect to each year of the Term (or portion thereof), by its duly authorized representatives, at any time during customary business hours and upon thirty (30) days' advance written notice, to examine the books and records of account of LICENSEE necessary to verify any and all statements, accounting and reports rendered and/or required by this Agreement and in order to ascertain the license fee due BMI for any unreported period. The period for which BMI may audit LICENSEE shall be limited to three (3) calendar years preceding the year in which the audit is made; *provided, however,* that if an audit is postponed at the request of LICENSEE, and BMI grants such postponement, BMI shall have the right to audit for the period commencing with the third calendar year preceding the year in which notification of intention to audit was first given by BMI to LICENSEE. In the event that an audit reveals a deficiency of ten percent (10%) or greater, BMI shall have the right to audit one (1) additional calendar year, for a total of four (4) calendar years preceding the year in which the audit is made. This limitation on the period for which BMI may audit LICENSEE shall not apply if: (i) LICENSEE fails to file its financial reports due under Paragraph 6(a)(i) in a timely manner; and/or (ii) LICENSEE fails or refuses after written notice from BMI to produce the material books and/or records of account necessary to verify any report or statement required under the Agreement. BMI shall treat as confidential all data and information coming to its attention as the result of any such examination of books and records, and shall not use any such information other than in connection with its administration of this Agreement.

(d) In addition to any other remedy that BMI may have, in the event that BMI conducts an audit under Paragraph 6(c) and such audit reveals that LICENSEE has underpaid license fees to BMI, LICENSEE shall immediately pay the amount LICENSEE owes BMI and, in addition, if such underpayment amounts to ten percent (10%) or more of LICENSEE's annual fees for the audited period, LICENSEE shall pay BMI a late payment charge in the amount of one and one-half percent (1 1/2%) per month of all monies owed commencing on the actual date such monies were due.

7. Late Payment Charge

BMI may impose a late payment charge of one and one-half percent (1 1/2 %) per month from the date payment was due on any quarterly payment that is received by BMI more than ten (10) days after the due date.

8. Music Use Reports

(a) LICENSEE shall provide BMI, in electronic form, quarterly Music Use Reports which shall contain detailed information from LICENSEE's Web Site usage logs concerning the transmission of all musical works on LICENSEE's Web Site. Such information shall identify each musical work by title, composer/writer, author, artist, record label, any unique identifier (e.g. ISWC, ISAN), length, type of use (i.e., theme, background or feature performance) and manner of performance (i.e. instrumental or vocal) (or any other methodology agreed to by BMI and LICENSEE) and specify the number of times each musical work was transmitted and whether such transmission was streamed or downloaded. In the event that a charge was made for an on-demand transmission where the user chose to access a particular work and paid a fee to LICENSEE for such service, LICENSEE shall include the gross price that the end user was charged to receive such transmission(s). With respect to transmissions of audiovisual works, such information shall also include the title of each audiovisual work, and the primary author, director, and principal actor(s) of the audiovisual work. With respect to on-demand transmissions where users are able to access transmissions of specific works upon request, such information shall also include the country where the end-user received such transmission. LICENSEE shall request reports from its licensors or outside producers with respect to all content provided by others and transmitted by LICENSEE as part of LICENSEE's Web Site. LICENSEE shall notify BMI immediately in the event that LICENSEE is unable to obtain such reports, and BMI shall use commercially reasonable efforts to secure any missing reports from LICENSEE's licensors or outside producers, but nothing contained herein shall relieve LICENSEE of its obligation to deliver the reports to BMI in the event that BMI is unable to obtain such reports.

(b) LICENSEE shall deliver to BMI Music Use Reports on or before the thirtieth day following the end of such quarter pursuant to the Payment Schedule set forth in Paragraph 4. LICENSEE agrees to use commercially reasonable efforts to use software which BMI may provide to LICENSEE to prepare and deliver such reports electronically, or such other commercially reasonable alternative method upon which the parties agree.

(c) BMI shall not disclose, other than as individualized music use information accompanying royalty statements, any specific music performance data contained in the Music Use Reports without LICENSEE's prior written consent. Nothing contained herein shall preclude BMI from using the music use information as part of aggregated, publicly disseminated market data, so long as the source of such information is not specifically identifiable as coming from LICENSEE, or disclosing any such data as may be required by law or legal process.

9. Indemnification

Provided that LICENSEE has not failed to cure a breach or default within thirty (30) days of receiving notification from BMI thereof under the Agreement, BMI shall indemnify, save and hold harmless and defend LICENSEE and its officers and employees from and against any and all claims, demands and suits alleging copyright infringement that may be made or brought against them or any of them with respect to the public performance within the Territory of any musical works licensed hereunder; *provided, however,* that such indemnity shall be limited to those claims, demands or suits that are made or brought within the U.S. Territory, and provided further that such indemnity shall be limited to works which are BMI-affiliated works at the time of LICENSEE's performance of such works. This indemnity shall not apply to transmissions of any musical work performed by LICENSEE after written request from BMI to LICENSEE that LICENSEE refrain from performance thereof. BMI shall, upon reasonable written request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertoire. LICENSEE shall provide the title and the writer/composer of each musical composition requested to be identified. LICENSEE agrees to give BMI immediate notice of any such claim, demand, or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand, or suit; provided, however, that LICENSEE may retain counsel on its behalf and at its own expense and participate in the defense of such claim, demand or suit.

10. Warranty; Reservation of Rights

This Agreement is experimental in nature. BMI and LICENSEE recognize that the license granted herein covers certain transmissions originating from and/or received in certain territories outside of the U.S. Territory pursuant to experimental agreements with certain non-U.S. performing rights licensing organizations around the world, and that this Agreement is broader in geographical scope than BMI's previous Internet licenses. Notwithstanding, BMI is offering this Agreement at the same rate as its previous Internet license on an experimental and non-prejudicial basis for the sole purpose of evaluating such international licensing initiatives. Nothing contained in this Agreement is intended to reflect BMI's position with respect to the reasonable value of the license granted herein; BMI hereby expressly reserves its right to re-evaluate the appropriateness of the fees and terms herein, including, but not limited to, the reasonable value of a license that covers transmissions beyond the U.S. Territory, for periods following the Term.

11. Breach or Default

Upon any breach or default of the terms and conditions of this Agreement by LICENSEE, BMI shall have the right to cancel this Agreement, but any such cancellation shall only become effective if such breach or default continues thirty (30) days after LICENSEE's receipt of written notice thereof. The right to cancel shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this Agreement by LICENSEE in any one or more instances shall be a waiver of the right to require full and complete performance of this Agreement thereafter or of the right to cancel this Agreement in accordance with the terms of this Paragraph.

12. Discontinuance of Music

In the event that LICENSEE ceases to publicly perform music in connection with its Web Site, LICENSEE may cancel this Agreement by sending written notice to BMI prior to the effective date of cancellation as specified in such notice by LICENSEE. BMI will cancel this Agreement, retroactive to the effective date of cancellation, but only if, within ninety (90) days after the effective date, LICENSEE: (a) has submitted to BMI all reports and payments due under the Agreement through the effective date; and (b) has not resumed publicly performing music in connection with its Web Site. In the event that LICENSEE fails to provide such reports and payments or resumes publicly performing music in connection with its Web Site within the ninety (90) day period, LICENSEE's request to cancel this Agreement shall be deemed withdrawn and this Agreement shall remain in full force and effect for the duration of the Term in accordance with Paragraph 1 above.

13. Arbitration

All disputes of any kind, nature or description arising in connection with the terms and conditions of this Agreement (except for matters within the jurisdiction of the BMI rate court) shall be submitted to arbitration in the City, County, and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties shall, by written notice to the other, have the right to appoint one arbitrator. If, within ten (10) days following the giving of such notice by one party the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator, then either party may, in writing, request the American Arbitration Association to

appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of costs, expenses, and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

14. Withdrawal of Works

BMI reserves the right at its discretion to withdraw from the license granted hereunder any musical work as to which legal action has been instituted or a claim made that BMI does not have the right to license the performing rights in such work or that such work infringes another composition.

15. Notice

All notices and other communications between the parties hereto shall be in writing and deemed received (i) when delivered in person; (ii) upon confirmed transmission by telex or facsimile device; or (iii) five (5) days after deposited in the United States mails, postage prepaid, certified or registered mail, addressed to the other party at the address set forth below (or at such other address as such other party may supply by written notice):

BMI: 320 West 57th Street
New York, New York 10019
Attn: Senior Vice President Licensing

with a separate copy to:

Senior Vice President and General Counsel

LICENSEE:

with a separate copy to:

16. Assignment

This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder.

17. Entire Agreement

This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This Agreement cannot be waived, added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by the parties. This Agreement, its validity, construction, and effect, shall be governed by the laws of the State of New York. The fact that any provisions herein are found by a court of competent jurisdiction to be void or unenforceable shall not affect the validity or enforceability of any other provisions.

BROADCAST MUSIC, INC.

By: _____
(Signature)

_____
(Print Name of Signer)

_____
(Title of Signer)

Please return signed agreement together with minimum fee to :

BMI
320 West 57th Street
New York, NY 10019
ATTN: Web Site Licensing

PLEASE COMPLETE ALL OF THE FOLLOWING:

LICENSEE's main offices are located in the U.S. Territory
YES____ NO____

The majority of LICENSEE's employees are located in the U.S. Territory
YES____ NO____

LICENSEE's annual accounts are audited in the U.S. Territory
YES____ NO____

_____
(LICENSEE)

By: _____
(Signature)

_____
(Print Name of Signer)

_____
(Title of Signer)

BMI
http://www.bmi.com

WEB SITE
MUSIC PERFORMANCE AGREEMENT

INTERNET-01

EXHIBIT A

WEB SITE NAME	URL

EXHIBIT B

BMI®

WEB SITE MUSIC PERFORMANCE AGREEMENT
Gross Revenue Calculation
QUARTERLY FINANCIAL REPORT FORM

Report For Calendar Quarter: Jan. 1 – Mar. 31 ☐ Apr. 1 – June 30 ☐ July. 1 –Sept. 30 ☐ Oct. 1 – Dec. 31 ☐ _____ YEAR

Company Name: _____
Address: _____
_____
Telephone No.: _____
Name of Web Site: _____
URL: _____

YOUR GROSS REVENUE

1. Subscriber Revenue (including commissions on third party transactions) $ _____
2. Advertising Revenue (less agency commissions) $ _____
3. Provision of Space or Time $ _____
4. Donations $ _____
5. Trade or Barter $ _____
6. Proprietary Software $ _____

TOTAL GROSS REVENUE (add lines 1 through 6) $ _____

TOTAL GROSS REVENUE $ _____ X 1.75% = $ _____
LICENSE FEE

TOTAL PAYMENT DUE = $ _____

I hereby certify on this _____ day of _____, _____ that the above is true and correct.

BY: _____
(SIGNATURE)

_____
(PRINT NAME OF SIGNER)

_____
(TITLE OF SIGNER)

Please return report and payment to:

Web Licensing
BMI
320 West 57th Street
New York, NY 10019

Please e-mail any questions to weblicensing@bmi.com

EXHIBIT B

BMI®

WEB SITE MUSIC PERFORMANCE AGREEMENT
Music Area Revenue Calculation
QUARTERLY FINANCIAL REPORT FORM

Report For Calendar Quarter: ☐ Jan. 1 – Mar. 31 ☐ Apr. 1 – June. 30 ☐ July. 1 – Sept. 30 ☐ Oct. 1 – Dec. 31 _____ YEAR

Company Name: _____
Address: _____
_____
_____
Phone #: _____
Name of Web Site: _____
URL: _____

MUSIC AREA REVENUE

DIRECT MUSIC AREA REVENUE

1. In-Stream Advertising $_____ less agency commissions $_____ $_____
2. Music Page Banner Advertising $_____ less agency commissions $_____ $_____
3. Music Subscriber Fees $_____
4. Other Music Revenue $_____
5. DIRECT MUSIC AREA REVENUE (add lines 1 through 4) $_____

ALLOCATION OF RUN OF SITE REVENUE

6. Subscriber Revenue (including commissions on third party transactions) $_____
7. Advertising Revenue $_____ less agency commissions $_____ $_____
8. Provision of Space or Time $_____
9. Donations $_____
10. Trade or Barter $_____
11. Proprietary Software $_____
12. RUN OF SITE REVENUE (add lines 6 through 11) $_____
13. ALLOCATION OF RUN OF SITE REVENUE

_____ (RUN OF SITE REVENUE) x (_____ (TOTAL MUSIC PAGE IMPRESSIONS) ÷ _____ (TOTAL PAGE IMPRESSIONS)) $_____

14. TOTAL MUSIC AREA REVENUE (add lines 5 and 13) $_____

MUSIC AREA LICENSE FEE
(the greater of A and B)

A. TOTAL MUSIC AREA REVENUE
$_____ (*from Line 14*) x 2.5% = $_____

B. MUSIC PAGE IMPRESSIONS
_____ (*Total Music Page Impressions*) ÷ 1,000 x $0.12 = $_____

MUSIC AREA LICENSE FEE $ _____

I hereby certify on this _____ day of _____, _____ that the above is true and correct.

BY: _____
(SIGNATURE)

_____
(PRINT NAME OF SIGNER)

_____
(TITLE OF SIGNER)

Please return report and payment to:
Weblicensing
BMI
320 West 57th Street
New York, NY 10019
Please e-mail any questions to weblicensing@bmi.com

EXHIBIT C
Last Updated: 7/23/01

PERFORMING RIGHTS ORGANIZATION	COUNTRY
AEPI	Greece
AKM	Austria
APRA	Australia
ARTISJUS	Hungary
BUMA	The Netherlands
CASH	Hong Kong
COMPASS	Singapore
GEMA	Germany
IMRO	Ireland
JASRAC	Japan
KCI	Indonesia
KODA	Denmark
MACP	Malaysia
MUST	Taiwan
PRS	United Kingdom
SABAM	Belgium
SACEM	France
SACM	Mexico
SADAIC	Argentina
SCD	Chile
SGAE	Spain
SIAE	Italy
STIM	Sweden
SUISA	Switzerland
TEOSTO	Finland
UBC	Brazil

BMI
http://www.bmi.com

INTERNET-01

WEB SITE
MUSIC PERFORMANCE AGREEMENT

WEB SITE PROFILE
Please complete and return with your signed agreements so we can service your account properly

Site URL: _____

Site Name: _____

Corporate Name: _____

Corporate Contact: _____ **Title:** _____

Corporate Address: _____

Telephone: _____ **Fax:** _____

E-Mail: _____

Financial Contact: _____ **Title:** _____
If different from above

Billing Address: _____
If different from above

Telephone: _____ **Fax:** _____

E-Mail: _____

Music
Use Reports Contact: _____ **Title:** _____
If different from above

Telephone: _____ **Fax:** _____

E-Mail: _____

Questions? Please visit our web site at
http://www.bmi.com

Mr. COBLE. Mr. Klein.

STATEMENT OF GARY KLEIN, COUNSEL, CONSUMER ELECTRONICS ASSOCIATION

Mr. KLEIN. Thank you, Mr. Chairman and Members of the Committee.

On behalf of the Home Recording Rights Coalition and the Consumer Electronics Association, I appreciate the opportunity to be here today to discuss the subjects addressed by the Copyright Office's report pursuant to Section 104 of the DMCA.

The HRRC, as you probably know, was formed 20 years ago in response to a decision that held that an object as "threatening" as the Betamax video cassette recorder was illegal. Our attention is attracted whenever the subject is consumer affair use, a doctrine which narrowly survived the Betamax case and periodically re-

mains the subject of litigation. Unfortunately, no technical advance in consumer electronics has gone unpunished by the content owner community.

The HRRC's view as to the Copyright Office's recommendations is summarized as follows:

HRRC is disappointed that the Register did not support legislation to confirm that the first sale doctrine covers copies made from digital transmissions. HRRC supports the provision of the Boucher-Campbell bill that would have done so. We find the Office's rationale for not recommending this step unpersuasive.

Given our disappointment with the Register's report, we have joined with the American Library Association, the Association of Research Libraries and others in a letter to you more fully articulating our shared concerns.

I would like to also submit for the record a letter from approximately 50 of our Nation's leading intellectual property law professors addressing this and related points, as well a statement from the National Association of Recording Merchants who agrees with some of our positions.

[The information referred to follows:]

October 15, 2001

The Honorable Howard Coble
Chair, Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C.

Dear Representative Coble:

In August 2001, the United States Copyright Office missed an opportunity. Under the broad mandate of Section 104 of the Digital Millennium Copyright Act of 1998, it had been open to the Office to inquire widely and reflect deeply on the effects of that legislation and "the development of electronic commerce and associated technology" on some of the basic structural features of the Copyright Act. But although the views of many interested persons and organizations were received in the course of the Office's study, undertaken in coordination with National Telecommunications and Information Administration, the resulting Report of the Register of Copyrights is in many ways a disappointing one. Although it contains some interesting suggestions for modest adjustments to the law, the Report is excessively narrow and cautious in its approach to the important issues it addresses, and too often its reasoning reflects incorrect assumptions or incomplete analysis. Accordingly, the undersigned teachers of intellectual property law suggest that after reviewing the Report, the Subcommittee on Courts and Intellectual Property should conduct its own, independent inquiry on the three major topics addressed by the Report: the status of the "first sale" doctrine in the digital environment, appropriate treatment of temporary or ephemeral reproductions, and the proper scope of the Sec. 117 exemptions.

First Sale

There is wide agreement that the "first sale" doctrine, a traditional limitation on the distribution right now codified in Sec. 109(a) of the Copyright Act, does not literally apply when a person who has acquired a lawful digital copy retransmits it over a network; this is so because the end result of such a retransmission is to make a new "copy" of the work in question in the memory of the recipient's computer, rather than merely to "distribute" an existing copy. The real question is whether the "first sale" doctrine, or some version of it, should apply in this situation. Ultimately, the Copyright Office Report declined to endorse any proposal to create a digital equivalent to "first sale." In particular, it rejected the proposal originally advanced, during the 106th Congress, in H.R. 3048 (the Boucher-Campbell bill), which would have permitted retransmission in connection with simultaneous or near-simultaneous deletion from the sender's system. Many of us disagree strongly with the Report's conclusion, and — having supported H.R. 3048 — would continue to advocate for its approach to this issue. More pertinently here, however, all of us join in the view that the Copyright Office based that conclusion on faulty premises, and that -- therefore -- that conclusion should be revisited.

The fundamental flaw of the Report's analysis lies in its failure to recognize the special role that "first sale" has played in promoting the purposes of our copyright scheme. By overlooking the importance of the doctrine, past and present, the Report skillfully undercuts all arguments for its extension in the future. Insisting that it is simply a specific instantiation of the common law's general antipathy to restraints on the alienation of personal property, the Report overlooks the cultural work performed by "first sale" in promoting the circulation of useful information and the development of artistic reputation. Indeed, the Report's authors go so far as to say that it "does not advance the argument" to consider the doctrine in light of the underlying constitutional policy: "To Promote the Progress of Science and useful Arts." (88) Superficially, the Report's narrow vision of "first sale" may appear to enjoy support in contemporary treatises and other authorities. To understand how deeply flawed that vision is, therefore, one, must dig a little into the history of the doctrine.

A reader of the Report might be forgiven for supposing that the "first sale" doctrine had sprung into being in 1908, with the Supreme Court decision in *Bobbs-Merrill v. Strauss*, 210 U.S. 339. In fact, the doctrine had been explicitly recognized in a number of nineteenth century American cases, just as it had been woven into the fabric of Anglo-American copyright law from its beginning in 1710. But in 1908-09, "first sale" was in peril. The publishers whose efforts at retail price maintenance had been rebuffed in *Bobbs-Merrill* lobbied for the inclusion of language curtailing the doctrine in the then-pending revision of copyright law, and the issue remained open until shortly before March 1909, when it was resolved in favor of "first sale" through the inclusion of Sec. 27 in the new Copyright Act. The argument that apparently carried the day was made by Thomas Parkinson of the ABA committee on patent and copyright legislation, who (having pointed out the reference to Article I, Sec. 8, cl. 8 in *Bobbs-Merrill* itself) went on to urge members of the House subcommittee to "remember that one object of these statutes is to secure the diffusion of knowledge." He then continued: "Our authors owe in large part the extended markets they have for their productions to the liberal policy of encouraging the distribution of literature which has prevailed . . . a development of which they are gathering the harvest." *Arguments before the Copyright Subcomm. of the House Comm. on Patents on Common-Law Rights as Applied to Copyright* 35 (Jan. 20, 1909) (GPO).

Thus, at the moment of its first codification, the importance of "first sale" as an engine for the promotion of the arts and humanities was recognized. Since then, the doctrine has proved its worth by supporting such diverse developments as the rise of free public lending libraries and (more recently) the proliferation of video rental outlets. Of course, the fact that "first sale" has a cultural significance that the Report studiously avoids acknowledging does not mean, in itself, that it (or its equivalent) should be established in the network environment. But it does suggest that the arguments for doing so should be taken more seriously than the Copyright Office felt it necessary to do. And while those arguments may not be irresistible, we would point out that some of the specific objections that the Report marshals against the recognition of a digital "first sale" doctrine seem weak, if not illusory.

Thus, for example, the Report notes that, the near-simultaneous deletion of the

transmitter's copy, a precondition for the assertion of a "first sale defense" (as proposed in H.R. 3048) "would be difficult to prove or disprove . . . thereby complicating enforcement." (83) Obviously, however, the burden of proof in such a case would be on the individual asserting the defense. So it is difficult to understand how its existence would create additional trouble or expense for copyright owners. One way or another, without or without "first sale," copyright plaintiffs will encounter enforcement costs (although we note that the provisions of 17 U.S.C. Sec. 505 may, in appropriate cases, allowing for the shifting of these costs to defendants.)

Likewise, it seems counterfactual (or, alternatively, sophistic) to assert that "there appears to be little or no evidence of desire on the part of consumers to engage in the kind of conduct — transmission and simultaneous deletion — that would be covered in a digital first sale doctrine." (101) In fact, today's on-line information users engage ubiquitously in the retransmission of lawfully accessed information (as is witnessed, for example, by the phenomenon of e-mail retransmission of topical content received from mailing lists, news organizations' websites, etc.) Nor are we persuaded by the Report's claim (also at 101) that "self-correcting market forces" will obviate the need for congressional action to provide a reasonable space for consumer retransmission of digital content -- a claim that rests on (among others) the erroneous assumption that all information products are inherently fungible. Rather, by its nature, a digital "first sale" doctrine, like the core doctrine of Sec. 109(a) itself, should be regarded as a "premarket" disposition, and (thus) as the appropriate subject of legislation.

Finally, the Report's suggestion that the recognition of a digital "first sale" doctrine would somehow put the U.S. out of step with its international partners, or in conflict with its international obligations (92 ff.) seems strained, at best. In fact, the 1996 World Intellectual Property Organization treaties of 1996 provide member states with wide latitude as to how to implement protection for works in the digital environment. The fact that European states, which have notably less robust "first sale" traditions than our own, have chosen to limit the redisposition of authorized digital downloads (to apply its limits even to works downloaded in material forms independent of computer memory, thus going beyond what could conceivably be justified under existing U.S. law) should not inhibit the United States from making its own policy choices, consistent with its own copyright tradition.

In sum, the subject of "first sale" deserved more, and deeper, analysis than the Copyright Office chose to give it.

Temporary Reproduction

On the issue of temporary reproduction, the Report recommends "that Congress enact legislation . . . to preclude any liability from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work." (xxvi) This recommendation is welcome, as far it goes. But it does not go far enough. In preparing its

Report on this topic, the Copyright Office squandered a historic chance to go "back to basics" and reassess the treatment of necessary, temporary or ephemeral digital versions of works made in memory incidentally to the operation of computers or networks. In particular, it lost a chance to restore the law on this question to the healthy footing on which Congress placed it in the 1976 Copyright Act.

The legislative history associated with the "fixation" requirement of the 1976 Copyright Act indicates that Congress did not consider such temporary versions to be "fixed copies" -- and, therefore, potentially infringing if unauthorized. The House Report provides:

> [T]he definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the "memory" of a computer.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 53 (1976).

A fair interpretation of this language, and thus of the statutory provision that it glosses, would exclude temporary, incidental versions of works made in connection with the operation of computers and networks. To avoid such an interpretation, the Copyright Office must torture the statutory references to the requisite "permanence" and "stability" of fixed copies, and selectively read the 1980 CONTU Report, all the while failing to engage the extensive academic literature criticizing the extreme interpretive position it adopts. Although this growing body of critical writing is partially acknowledged in footnote 367 of the Report (120),* its authors never confront the central tenet of the critique: that no good end is served by interpreting the Sec. 101 definition of "copy" to create a minefield of potential liability for legitimate technology providers and users. Mandated to consider what constitutes sound policy for copyright law in the digital environment, the Report instead takes refuge in formalism.

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* The Report does not cite, for example, Professor R. Anthony Reese's powerful recent article, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies,"* 2001 Ill. L. Rev. 83, which argues persuasively that the congressional decision to exclude transitory versions of digital works from the category of "fixed copies" was part of a larger design to deal with the rights and liabilities in the emerging digital domain.

Similarly, the Report avoids confronting the policy issues by relying on the Ninth Circuit's opinion in *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (1993), and other recent decisions following it, which disregard the sensible understanding of the statute suggested by its legislative history. In so doing, it ignores earlier decisions, made closer in time to the enactment of the 1976 Copyright Act, and taking a contrary view, such as *Apple Computer, Inc. v. Formula Int'l*, 594 F. Supp. 617, 622 (C.D. Cal. 1984) (holding that RAM copies, unlike those in ROM, are merely "temporary"), and *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982) (stating that video game images stored in permanent ROM memory are fixed, and [thus] implicitly concluding that images on a monitor screen are not). It also relies on a 1988 Fifth Circuit decision, *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, while overlooking that Circuit's more recent decision in *DSC Communications v. DGI Technology, Inc.*, 81 F.3d 597 (5th Cir. 1996) (holding that plaintiff's claim that running a computer program creates infringing RAM copies improperly seeks to expand the scope of copyright, triggering application of the misuse doctrine). And footnote 372 of the Report (122) cites as supporting *MAI*'s reasoning a prior Seventh Circuit decision that many of us regard as casting doubt on the Ninth's Circuit's position: as we read *NFLC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231 (1995), it suggests that dumb terminals do not make "copies" under the 1976 Act, even though the work is reproduced on screen!

Two other arguments advanced in the Report for the general treatment of temporary, incidental copies as "reproductions" are makeweights, at best. One is the notion that the amendments to the Sec. 117 in the Digital Millennium Copyright Act somehow ratify the *MAI* court's understanding of the temporary reproduction issue (xii, 30, 54). We do not believe this interpretation to be inevitable; more to the point, we note that it begs the question presented here: if Congress did in fact proceed in 1998 on the assumption that *MAI* accurately restated the law of the 1976 Act, the Copyright Office had an opportunity, in its Report, to recommend reconsideration of that premise. To its credit, the Copyright Office seems to have been unwilling to place much reliance on this line of argument.

The same cannot be said of its tendentious review of "International considerations." (124 ff.) Specifically, the Report offers a controversial and one-sided interpretation of the events that occurred at the 1996 World Intellectual Property Organization Diplomatic Conference, and led to the inclusion of Agreed Statements (in connection, for example, with Article 1[4] of the final WIPO Copyright Treaty) relating to reproduction right. Earlier proposals for treaty language would have made the treatment of temporary versions of digital works as potentially actionable "reproductions" mandatory; instead, after much conflict over the issue, the final language stated a consensus only on the proposition that "the storage of a protected work in digital form in an electronic medium constitutes a reproduction . . . . " (emphasis added).** In other words, nations

** The sequence of events is reviewed, in detail, in Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369, 382-98 (1997).

subject to the new WIPO treaties — including the United States — were given an option as to how to approach the issue of temporary, incidental and technological necessary versions of digital works under their domestic law. Thus, for example, the Report itself cites (at 128-29) the choice made by the European Union, in its recent Directive 2001/29/EC, which amounts to the functional equivalent of the exemption for network and computer-related temporary versions originally proposed in H.R. 3048 — and now, apparently, rejected by the Copyright Office.

Extension of the Sec. 117 Exemption for Archival Copies

Concluding in a different vein, we would offer another criticism of the Report — not for what it fails to do, but for what it does. In a discussion with which we are generally sympathetic, the Copyright Office suggests the alternative of amending Sec. 117 to bring its authorization for making "back up" copies into conformity with the standard practices of information systems administrators and individual consumers. Another way to accomplish the same result, it suggests, would be to clarify that such backups qualify under the Sec. 107 "fair use" doctrine. (153 ff.) Unfortunately, these salutary suggestions are coupled with another: Congress should either bar the exercise of "first sale"-based redistribution rights under Sec. 109(a) with respect to so-called "fair use copies" (a category including, but not limited to, archival backups authorized under Sec. 117), or specifically amend Sec. 117 to augment users' authority to make archival copies while prohibiting redistribution of all legally made "backups" (which apparently would be defined broadly). Either way, the effective result could be to limit (for example) consumers' ability to share non-commercial home recordings of television programming with other members of their own households, or with family members living in different households, thus limiting the "fair use" principle established by the U.S. Supreme Court in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

Aspects of the Report's suggestions on this issue deserve serious consideration. But the Congress should not consider a fundamental abrogation of "fair use" without further detailed inquiry and full consultation with all affected parties -- including the home viewers who had no reason to know that their interests were at stake in the just-concluded Sec. 104 study.

****

We end where we began. Despite its limitations, the Copyright Office's Report is a worthwhile contribution to several important contemporary debates about the future of U.S. copyright law. But it can be no more than that. Given the failure of the Report to fully address the underlying policy issues or to fully evaluate the consequences of its proposals for statutory change, we would suggest that a further, detailed congressional inquiry is in order. We stand ready to assist the subcommittee in this effort.

Sincerely,

Keith Aoki (Oregon)
Stephen Barnett (UC-Berkeley)
Dan Burk (Minnesota)
Michael W. Carroll (Villanova)
Fred H. Cate (Indiana-Bloomington)
Richard Chused (Georgetown)
Julie E. Cohen (Georgetown)
Dennis Corgil (Widener)
Alan Durham (Alabama)
Christine Farley (American)
Eric M. Freedman (Hofstra)
Michael Froomkin (Miami)
Laura N. Gasaway (North Carolina)
Llewellyn Joseph Gibbons (Toledo)
Dorothy Glancy (Santa Clara)
Paul Heald (Georgia)
Richardson Lynn (Pepperdine)
Peter Jaszi (American)
Faye Jones (McGeorge)
Dennis Karjala (Arizona State)
Robert Kreiss (Dayton)
Lewis Kurlantzick (Connecticut)
Lydia Loren (Lewis and Clark)
Charles McManis (Washington U.)
Michael Madison (Pittsburgh)
Peter B. Maggs (Illinois)
Michael J. Meurer (Boston)
Suman Naresh (Tulane)
Dawn Nunziato (George Washington)
Robert Oakley (Georgetown)
Tyler Ochoa (Whittier)
Ruth Okediji (Oklahoma)
Carol M. Parker (Tennessee)
Mark R. Patterson (Fordham)
L. Ray Patterson (Georgia)
Malla Pollack (Northern Illinois)
Kenneth Port (Marquette)
Margaret Jane Radin (Stanford)
David. R. Rice (Roger Williams)
Michael L. Rustad (Suffolk)
Pamela Samuelson (UC-Berekely)
Roger Schechter (George Washington)

Niels B. Schaumann (William Mitchell)
Martin Scordato (Maryland)
David Seipp (Boston)
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PREPARED STATEMENT OF NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS (NARM)

SUMMARY OF NARM'S RESPONSE TO THE COPYRIGHT OFFICE DMCA SECTION 104 REPORT

The Copyright Office Report on Section 104 offers important clarifications that could help facilitate electronic commerce in copyrighted works, but it also offers suggestions that, if followed, would seriously undermine public rights while offering additional rights to copyright owners without adequate justification. The Report correctly responds with concern about mounting evidence of practices by copyright owners to expand their copyright control beyond the limits imposed by Congress, but suggests that market forces be given a chance to correct the problem. When the Copyright Office and NTIA conducted the study last year, PressPlay and MusicNet had not yet been formed, and there was still hope that free market principles would come into play. In the year since then, we have witnessed the failure of free market forces, and we respectfully suggest that it is no longer premature for Congress to step in to restore the necessary balance. We applaud the Copyright Office for recognizing that the first sale doctrine does, indeed, apply to all lawfully downloaded (reproduced) works, but we are disappointed that its Report suggests that copyright holders may enjoy carte blanche to nullify the rights granted copy owners in Section 109(a) of the Copyright Act.

America's retailers of music, represented by the National Association of Recording Merchandisers,

AGREE with the conclusion that a mechanical royalty should be paid when a reproduction is made (a download), and that a performance royalty should be paid when a public performance is made (streaming). No reproduction infringes the performance right unless someone can actually hear the performance. No public performance infringes the reproduction right unless a "copy or phonorecord" remains after the public performance is over.

AGREE with the conclusion that lawfully made digital downloads of sound recordings are entitled to the full application of Section 109(a). Section 109(a) entitles the owner of a lawfully made copy to sell it or give it away without the consent of the copyright owner.

DISAGREE with the Copyright Office's assertion in Footnote 41 that Section 109(a) is a right without a remedy. There is absolutely no legal basis for concluding that Congress didn't mean what it said in enacting Section 109(a), or that Congress intended Section 109(a) to be voidable at the discretion of a copyright owner.

AGREE with the Copyright Office's conclusion that Section 109(a) should not be interpreted to authorize the sale of other disposition of archival copies apart from the originals. If an archival copy is sold separately from a legally downloaded copy it is no longer archival, and therefore, it no longer enjoys Section 109 rights.

AGREE that consideration be given to the creation of a new archival exemption that provides expressly that backup copies may not be distributed (option 2), but with care to avoid unintended results. The proposal to amend Section 109(a) to require that copies be lawfully made "and lawfully distributed" (Option 1) would have the effect of completely nullifying Section 109(a)'s applicability to digital downloads, and

should be rejected. Such language would give copyright owners control over perfectly lawful downloaded copies for which retailers and consumers have already paid.

QUESTION the wisdom of continuing to just let the marketplace try to solve these issues. In recent months the music industry has announced plans in which consumers will be limited to one of only two similar business models, two media players, little or no price competition, and an incomplete selection of music through a handful of retail channels. Contrary to the first sale doctrine's principles, copyright monopolies are being leveraged to eliminate or restrict all competition in the retailing of copyrighted content. The Copyright Office Report fails to note the potential harm to the public of limiting exclusively to the copyright owners the right to develop new business models.

DISAGREE with the suggestion that use by copyright owners of Section 1201 to protect business models rather than copyrights does not warrant Congressional concern. Congress never intended for Section 1201 to permit copyright owners to neutralize the limitations Congress justifiably placed upon their copyrights, or to use technology to create for themselves rights never before conferred, such as the right of private performance. Today, Section 1201 is being used to shield the unauthorized usurpation of public rights by copyright owners. Copyright owners are claiming that though the owner of a lawfully made copy may legally sell or give away that copy, the copyright owner may nevertheless use access control technology to prevent the buyer or gift recipient from privately and lawfully performing the work. Such power upsets the careful balance of public and private interests that Congress has historically preserved in crafting the Copyright Act.

QUESTION some of the unsubstantiated allegations of economic harm (or threats to possible future economic harm) to copyright owners that have colored the Report. Retailers of music are the first to feel the sting of sales lost to pirates. We share the concern of copyright owners about potential harm to our industry. Nevertheless, retailers are reluctant to attribute every lost sale to piracy. Sales are also lost to free CDs from record clubs, to lousy weather, a soft economy, and poor releases. Retailers know that Napster did not kill the singles market. Before Napster came along, record companies were killing the singles market by not releasing singles. We need independent studies which can help us all better evaluate the impact of new technologies on the economics of our business.

QUESTION the conclusion that Section 109(a) should not be updated so that the principles of the first sale doctrine may carry forward to prevent copyright owners from exercising control over individual copies that they do not own. The Constitution and the public policy foundations of copyright law lend no support for allowing copyright owners to expand their control over electronic commerce once they have been fully compensated for the license to their exclusive rights.

Additional support for and explanation of NARM's position is set forth below.

NARM—The Voice of Music Retailing

The National Association of Recording Merchandisers (NARM) represents music retailers that share both the enthusiasm of the recording industry for digital distribution as well as concerns about the potential negative impact of digital piracy. NARM supported the RIAA litigation against Napster with an *amicus* brief and has a long history of supporting copyright enforcement and anti-piracy efforts. We do not, however, believe that the rights of owners of lawful copies need be sacrificed to protect the rights of copyright owners. We do not believe that the only way copyright owners can receive adequate compensation for their properties is through total control over distribution and use.

Our segment of the music industry is most intimately involved with the workings of the first sale doctrine and Section 109(a) of the Copyright Act. Our members are beneficiaries of the right to sell sound recordings without the consent of the copyright owner, thereby preserving vigorous competition for price, service, selection and customer loyalty. Our customers also enjoy the right to sell, lend or give away the CDs they purchase, thereby preserving avenues for others to acquire lawfully made sound recordings by second-hand sales, lending (including library lending), gifts and bequests. By keeping such activity beyond the control of copyright holders, the constitutional objective of the Copyright Act—to encourage wide dissemination of creative works to the public—is carried out.

The First Sale Doctrine

When Congress first codified the first sale doctrine in Section 27 of the Copyright Act of 1909, the House Committee on Patents stated that "it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909). Though still referred to as the "first

sale doctrine," the current codification in Section 109(a) of the 1976 Act, as amended, no longer requires a sale, but merely the *ownership* of a lawfully made copy. The Constitution's purpose for copyright law (the promotion of science and the useful arts) is better served if copyright owners are denied control over retail distribution and redistribution, leaving such commerce to a free and competitive marketplace. Likewise, consumers who purchase CDs should never have to be the "ultimate" consumers, but should instead be free to pass along their lawfully made copies to others, whether by gift, bequest, lending, barter or resale. The first sale doctrine is, then, one of the most critical parts of the balance struck in the Copyright Act. In exchange for a grant of certain limited exclusive rights, authors are required to give up the right to control who can buy or otherwise obtain a lawful copy of a work, and also give up the right to control to whom it may be transferred and under what terms.

Section 109 is a Right

One of the most curious portions of the Copyright Office report is footnote 41, which declares that Section 109(a) is a right without a remedy. There is, in fact, no legal support for such a statement. To the contrary, Section 109(a) itself is cast in terms of rights, and statements to the effect that Section 109(a), like Section 107 (fair use), is merely a limitation on the rights of copyright owners but not a right in itself are simply wrong. (Even the Bill of Rights is cast largely in terms of limitations upon the rights of the government.)

Section 109(a) states that notwithstanding the distribution right, the owner of a lawfully made copy or phonorecord is "entitled," without the consent of the owner of the distribution right, to transfer ownership or possession of that copy or phonorecord. (In fact, the distribution right in Section 106(3) is made "subject to" Section 109(a).) Section 109(d) refers to the provisions of 109(a) and 109(c) as "privileges." These important terms mean what they say, and elevate the first sale doctrine to more than a mere defense to a claim of copyright infringement

Public debate has often lumped the first sale doctrine in with "fair use" rights, but Congress was careful to treat it separately and distinctly, and with good reason. Fair use relates to the use of the *work* (that is, the intellectual property itself), regardless of who owns the copy or phonorecord being used, or even whether a copy or phonorecord is being used. Section 109(a), in contrast, codifies a doctrine aimed at protecting retail competition and encouraging infinite re-distribution. It provides that the right to dispose or transfer possession of a lawfully made copy or phonorecord is a right belonging to the owner of the *copy* or phonorecord. It is not cast as a defense to a claim of infringement of the distribution right but, rather, as an *entitlement* and a *privilege* that serves to exhaust the distribution right as to any particular copy or phonorecord. The Copyright Office acknowledges that Congress was careful to point out in Section 202 that there is a significant distinction in the Copyright Act between ownership of intangible work protected by copyright and ownership of a tangible copy that embodies the work.

Section 109 and Contract Preemption

The Copyright Office Report concluded that the general issue of contract preemption was outside the scope of the report. While we disagree with that conclusion, we are encouraged that they acknowledged the possibility that rights holders, rather than Congress, may potentially determine the landscape of consumer privileges in the future. We agree, and believe the time for statutory change is now.

During the Copyright Office and NTIA inquiry into this issue, the Copyright Industry Organizations made it clear that, though they acknowledged that the first sale doctrine applied to copies and phonorecords made by means of a licensed reproduction, including downloading, they nevertheless believed that they could nullify the public's rights under Section 109(a) by use of restrictive end-user license agreements ("EULAs"). This view is contrary to law.

As recently stated by Judge Pregerson, a significant effect of Section 109(a) is to "negate copyright owner control over further or 'downstream' transfer to a third party." *Softman Products Co. v. Adobe Sys., Inc.*, 2001 U.S. Dist. LEXIS 17723, at *11 (C.D. Cal. October 19, 2001) (citing *Quality King Dist. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 142–44 (1998)). "The first sale doctrine *vests the copy owner with statutory privileges* under the Act which operate as limits on the exclusive rights of copyright owners." *Id.* (emphasis added).

In *Softman*, the District Court had little patience for Adobe's insistence that its "license to use" could trump the first sale doctrine:

> Adobe asserts that its license defines the relationship between Adobe and any third-party such that a breach of the license constitutes *copyright infringement. This assertion is not accurate because copyright law in fact provides certain*

rights to owners of a particular copy. This grant of rights is independent from any purported grant of rights from Adobe. The Adobe license compels third-parties to relinquish rights that the third-parties enjoy under copyright law.

Id. at *11–12 (emphasis added, footnote omitted). The EULA used by Adobe to limit those Section 109(a) rights "conflicts with the first sale doctrine in copyright law, which gives the owner of a particular copy of a copyrighted work the *right* to dispose of that copy without the permission of the copyright owner." Id. at *13 (emphasis added).

(Though the posture of *Softman* was that the owner of the lawfully made copies was able to enforce its Section 109(a) rights once it was sued by Adobe, the only reason that case made it to court was that the owner was free to ignore the EULA in the exercise of those rights. If, however, Adobe had employed access control technology to prevent the owner of the lawfully made copies from even having the option of selling the products separately, justice compels the conclusion that the owner of the lawfully made copy should have had the right to seek declaratory and injunctive relief against Adobe's infringement.)

In its consideration of the public interest in the dispute, Judge Pregerson offered words of wisdom we commend to this Committee: "The Court finds that the provisions contained in Adobe's EULA purport to diminish the rights of customers to use the software in ways ordinarily enjoyed by customers under copyright law. Therefore, these restrictions appear to be inconsistent with the balance of rights set forth in intellectual property law." *Id.* at *35 (footnote omitted). Because the balance in copyright law is already tilted heavily in favor of copyright holders, the need to protect the rights retained for the public is more important than ever. *Id.* at *35–36. Almost as though it was speaking of the major record companies as they prepare to control all distribution through PressPlay and MusicNet, the Softman court found that Adobe was seeking "a vast and seemingly unlimited power to control prices and all channels of distribution." *Id.* at *37. "A system of 'licensing' which grants software publishers this degree of unchecked power to control the market deserves to be the object of careful scrutiny." *Id.*

We disagree that the concerns identified by Judge Pregerson are speculative. Some pre-recorded CDs already contain EULAs asserting that if the CD is not returned to the copyright owner within seven days after purchase from the retailer, the consumer agrees never to give it away or play it on a different device. (The EULA will not even be seen in the ordinary private performance of the CD.) One Internet site offering licensed downloads required agreement to an eight-page EULA in which Section 109(a) rights would be waived. The consumer had to agree that the lawful copies would not even be left to the owner's heirs.

We ask that this Committee heed Judge Pregerson's admonition, and give careful scrutiny to efforts to use EULAs to obtain unchecked control over pricing and distribution.

Section 109(a) and Technological Controls

Because the same principles Judge Pregerson examined in relation to EULAs also apply to technological restraints such as "tethering" and "time-outs" used in the place of EULAs, we believe that the same scrutiny should be applied to them as well. We believe that the Congressional mandate in Section 104 of the DMCA included consideration of how use of digital technology is affecting the public's rights under Section 109(a), and respectfully disagree with the Copyright Office's conclusion that this impact falls beyond the scope of the study.

Digital technology brings with it the ability of copyright owners to exercise the very control Congress has denied them. Copyright owners have acknowledged the right of the owner of the lawfully made copy to sell it or give it away, but are attempting to obtain a waiver of that federal right or, failing that, to use technological controls, typically "tethering" or "time-out," with the object of making the exercise of that right futile. This use of technological access controls is the equivalent of saying "you can give your book to the library, but the library cannot lend it without paying us to unlock it;" "you can lend your CD to your classmate, but your classmate cannot listen to it without paying us to unlock it;" and "you can sell the DVD movie your kids have outgrown on eBay, but the parents that buys them from you will only get worthless pieces of plastic." Moreover, when tethering and time-outs are carried out collaboratively by the major copyright industries, the effect not only impacts Section 109(a) rights but permits copyright owners to expand their control beyond the limits of the copyright grant.

a. Section 109(a) and Tethering

We were encouraged that the Copyright Office report acknowledged that the practice of tethering, if it became widespread, would have the effect of diminishing Sec-

tion 109. We believe, however, that Congress should not wait for more serious damage to be done, and encourage the Committee to question the companies behind MusicNet and PressPlay regarding the tethering provisions of their subscription services and the impact on first sale rights.

b. Section 109(a) and Technological Time-Outs

The business model of choice of all of the major copyright owners in the music industry is the "subscription" model, otherwise known as a "limited download." Touted as a "new" choice, in reality it takes an existing choice and limits it, by timing out access to the consumer's own copy. These time-outs are either by time (such as 24 hours or 30 days) or by number of private performances (such as 12 plays). In the music industry, MusicNet and PressPlay are based upon this model. What distinguishes the "subscription model" being adopted collaboratively by the major record companies and motion picture studios to the suppression of competing businesses is that, by use of these technological time-outs, the right of reproduction is masquerading as a public performance. Rather than going to the expense of streaming a performance publicly and having to pay for the cost of transmission each time, they are licensing reproductions that lead to the making of lawful copies and phonorecords, and then, applying technological controls to take away the rights Congress has attached to ownership of those copies, they are collecting a fee for entirely private performances over which the Copyright act grants them absolutely no right of control or remuneration. Copyright owners have the choice of licensing public performances (Section 106(4)) or licensing reproductions (Section 106(1)), but have no right to leverage the license to reproduce into usurpation of the rights that Congress has granted to the owners of lawfully made reproductions, or to create a *de facto* right of private performance where none exists under the law.

If the copyright owner can control private performances, it can effectively control retail sales protected by Section 109(a) as well. Just as buying a used car would be to no avail if the manufacturer retained control of the access, if consumers who buy lawful copies of books, sound recordings or movies must pay the copyright owner for the right to read the book, play the CD or watch the DVD, retailers would be relegated to selling worthless paper or plastic unless they obtained the copyright owner's permission to unlock the access.

Some copyright owners have protested that if the law prevents copyright owners from charging per play or per view, or to individually charge listeners or viewers, then theater owners would be at risk. Such an alarmist view requires a complete distortion of copyright law. The theater owner licenses the right to perform a work publicly, but the patron does not license any right under the Copyright Act to listen or view, for none exists. If someone sneaks in without paying, the theater owner may get angry and demand payment, but this implicates no rights under the Copyright Act. Indeed, copyright owners may license public performances of music over the Internet (streaming), but it is the right to perform the work publicly that is implicated—not the ability to listen the public performance. Just as copyright owners have no right to license anyone to *listen* to the radio, those who listen to the streamed audio infringe no copyright. Likewise, the copyright owner may not tax those who listen to their own CDs, for the right of the copyright holder only extends to the right to license public performances. *See, e.g., Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996). The copyright holder has no right to prevent anyone from singing the copyrighted song in the shower, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975), or playing a movie at home or in a hotel room, *Columbia Pictures Indus., Inc. v. Professional real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989).

Notwithstanding these legal restraints, some copyright owners are moving ahead with efforts to avoid them. The Recording Industry Association of America ("RIAA") recently petitioned for the right to pay authors a lower mechanical royalty for reproductions which were timed out (so-called "limited downloads"). 66 Fed. Reg. 14099 (March 9, 2001). The request was premised on the notion that authors should not receive the full royalty if the consumer was going to be denied full enjoyment of the reproduction. NARM objected to this petition, arguing that the limited download was, in purpose and effect, nothing more than a device to gain control over private performances. Nevertheless, the RIAA has entered into an agreement with the National Music Publishers Association to accomplish the same result. If they succeed, not only will consumers have to pay to listen to their own music, but any lawfully made copies sold or given away pursuant to Section 109(a) could not be enjoyed by the new owner unless the copyright holders are paid again, and again.

In short, very real technological and contractual restraints are being placed upon lawfully made copies that have the effect or destroying the public's rights under Section 109(a) while extending the copyright owner's control beyond the very clear lim-

its set by Congress. Nothing in the record suggests that tethering and time-outs contribute to the battle against piracy. Indeed, the technology to time out a song after a certain number of plays is entirely separate from the technology to prevent unauthorized duplication. Because the right to listen to what is bought is central to the retail transaction, imposing a "pay-per-listen" model onto lawful copies directly impairs Section 109(a) rights without in any way making copyrights themselves more secure from piracy.

The Need For Modernization of Section 109(a)

Access to Reproduction Licenses

In the five or so years that digital distribution has been viable, we have seen the number of available business models, digital players and compression codecs shrink. Thanks to the efforts of the five major record companies to amass 85% or more of all distribution through either PressPlay or MusicNet, consumers undoubtedly will be denied access to innovative and highly competitive retail channels. Today, most lawfully made copies are still produced in a factory and resold through various distribution channels before reaching the retailer and, finally, consumers. Occasionally, one retailer might negotiate an exclusive on a music product. Thanks to Section 109(a), however, even those exclusives leave ample room for a variety of competitive responses with which other retailers can (and do) respond: Some will simply refuse to stock the product; others will buy the product at the exclusive outlet and resell it for the same price, hoping that their losses on each resale will be made up in the long run by keeping their customers happy; still others may buy in small quantities from the exclusive outlet, but not promote the title. Most important in such scenarios is that despite the effort of a content owner to pick and choose which trading partners win in the marketplace, is the ability of the marketplace to protect competition and choice for the consumer.

In the online world, by contrast, "resales" are in reality "sublicenses." That is, if the exclusive licensee were to offer licensed reproductions available exclusively from that dealer, its competitors could not offer their own customers the right to download from those copies even if the store paid for the right to download its own, because each download implicates the right of reproduction and requires the copyright owner's consent. The first sale doctrine would allow the exclusive licensee's competitors to download from the exclusive dealer onto a writeable CD and then sell that CD, but the exclusive dealers' competitors would be unable to compete in the market for digital downloads (sublicensing reproductions) without the copyright owner's consent. Under this hypothetical scenario, the exclusive dealers' competitors would be unable to compete at all, and consumers lose all choice in the marketplace.

Thus far, record companies have shown the most interest in cross-licensing digital rights to each other, or to companies they control or in which they have invested. They have withheld rights from retailers who are perfectly capable of offering secure, compensated digital downloads, but who they no longer see as partners, but as competitors. We estimate that over 99% of the repertoire owned by copyright holders today remains off limits to legitimate retailers who are trying to compete with peer-to-peer file sharing.

For these reasons, NARM supports reasonable measures to protect the consumer's right to vigorous retail competition for their dollars. The objective should be to bring the historic benefits of the Section 109(a) right to sub-distribute physical goods to the sub-licensing of downloads, which can result in copy virtually identical to the pre-recorded CD.

This could be done in a number of ways. Congressmen Boucher and Cannon have introduced the Music Online Competition Act which would require any copyright holder that licenses an affiliated retail venture (the right to sublicense reproductions to the public) to license competing retailers on the same basis. Whatever approach is taken, it is imperative that Congress act expeditiously to stimulate the free market in distribution of lawfully made copies outside of the control of copyright holders.

Freedom to Advertise What Is For Sale

Total control over distribution is something Congress has historically insisted must never fall into the hands of copyright owners, because "the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation." M. Nimmer, D. Nimmer, Nimmer on Copyright, § 8.12[A]. Since this freedom of alienation would be severely restrained if a license were required to advertise the product to be transferred under Section 109(a), we recommend codifying the right of retailers to make promotional use of copyrighted works for the purpose of exercising their Section 109(a) rights.

It had long been understood that retailers of copyrighted goods enjoy the right to reasonably copy portions of the works, display them, and publicly perform them, where the purpose is to promote the sale of the works in question. Notwithstanding the copyright owner's exclusive right to publicly display a work, it has been standard practice for retailers of books, music and video to display publicly over the Internet those works that are being offered for sale. Just as the bookseller may allow patrons to leaf through and read books in the store without purchasing them, so too may a music retailer allow patrons to listen to the music in the store. Just as the bookseller may post a sample of a book's text on the Internet, so, too, may a music retailer post a sound clip.

All of that is changing now. Our members are reporting efforts by copyright owners to prohibit these forms of advertising without a license. The only effective way for retailers to advertise even pre-recorded sound recordings over the Internet, even for physical distribution, is to post an image of the artwork and offer a 30-second or so sound clip as a sample. BMI has taken the novel position that a 30-second sound clip, long considered the industry norm within the bounds of fair and sensible use, is illegal absent authorization from the copyright owner. Some record companies are demanding that retailers get their permission even to post the graphics of the CD itself. There cannot possibly be any diminution in value to the copyright owner when retailers promote the lawful sales of the copyright owner's own works. The sole purpose for this seemingly irrational behavior appears to be to gain greater control over distribution. Indeed, at least one record company has offered to license these uses at virtually no cost, yet requiring a written acknowledgment that a license is required, and reserving for itself the right to withhold authorization to show graphics or offer 30-second samples of any songs it chooses. A major movie studio has sued to prevent one vendor from streaming promotional movie samples to retail customers, while at the same time allowing competitors to do the same thing without charge. Absolute and total control over distribution appears to be the sole objective, and Congress should act now to preserve the full value of Section 109(a). The provisions for this in the Music Online Competition act are a god first step.

Conclusion

We thank this Subcommittee for scheduling hearings on the Copyright Office Report and for allowing the views of music retailers to be entered into the record. We commend the Copyright Office and the NTIA for their hard work over the past many months, and we encourage Congress to continue to ask for input into these complex issues.

NARM asks that the first sale doctrine be respected for digital downloads just as it is for pre-recorded copies. We do not believe that protecting the first sale doctrine will result in rampant piracy. Rather, NARM's retail members are confident that, given a fair opportunity, they could offer products and services superior to those offered either by free peer-to-peer file copying or by restrictive "subscription" services, such as MusicNet and PressPlay.

The Committee has heard from copyright owners and others on the fringes of the first sale doctrine. We suggest that this Committee should also set aside time to hear from those who are operating at the heart of the first sale doctrine, who truly have practical experience with it, and who actually enjoy the benefits of it—the retailers and consumers of lawfully made copies of copyrighted works.

For further information, please contact Pamela Horovitz, NARM's President, at (856) 596–2221.

Mr. KLEIN. With regard to temporary buffer copies, HRRC would not oppose the enactment of the legislative relief proposed by the Copyright Office. HRRC believes, however, that such relief should be extended to other instances of clear fair use recording, as recommended in the Ashcroft-Boucher-Campbell bill.

With respect to archival copies, the Copyright Office suggests modifying both the nature and the scope of Section 117. HRRC sympathizes with the stated goal which is to broaden this back up copying exemption so as to reflect the actual practice of IS administrators and consumers. However, we are concerned that an effort to tweak this provision could result in a narrowed interpretation of the more general fair use home recording right.

First, we are uneasy with the basis upon which the Office rests this proposal. The Office acknowledges that a fair use defense remains available as to archival and other home recording. The report suggests a need for legislation only because it suddenly anticipates that a defendant might additionally invoke a first sale defense for having given a lawfully made fair use copy to someone else. Such a case has not yet arisen under the present Section 117. Apparently, the office is concern that it could arise once Section 117 has been amended to embrace the additional media.

According to this rationale, the perceived problem seems to exist only if the solution has already been enacted. This Committee usually rests its enactment on more compelling arguments.

Second, the Copyright Office proposes moving to a more code-like statement of the law, because it anticipates that additional types of content and media, not just computer programs, will be acquired on line. Our dilemma is: If the new provisions explicitly or implicitly overlap with fair use jurisprudence, will fair use, in turn, be squeezed down to fit the confines of the new provision? The Copyright Office proposals, though well intentioned, seem laden with this possibility. We see a potential Trojan horse, and we are staring it in the mouth.

We worry about either of these legislative approaches suggested by the Office. The first would amend the first sale provision in a manner that could be read by courts as a congressional intention to scale back fair use generally. If Congress is to reconsider the scope of fair use, it should do so explicitly and only after intense study and advice.

The second approach would seem flatly to circumscribe existing private noncommercial home recording by, one, including a vast range of home recorded material under the new definition of backup copies and, two, declaring that such backup copies may not be given to others. In its discussion, the Office takes a view of private and noncommercial home recording that is intensely personal and self-centered, and with which we disagree strongly. It seems to give no consideration whatever to the fact that home recordings routinely are shared with the rest of the household or with members of the family residing in a different household.

Surveys done by the Office of Technology Assessment and others have shown consistently that such home recording has a clear promotional effect on sales of prerecorded music. Congress should not even consider going down this road, making a fundamental abrogation of fair use, without a full airing of all such issues.

We are also concerned that a code-like regime as to home recording would create more uncertainty rather than less for manufacturers such as CEA members who would wish to comply with the new law. We are glad that the Office has noted, with some concern, that manufacturers and their customers are increasingly subject to technical and licensing regimes imposing de facto limitations on product design. Adding a parallel, de jure regime by drawing inflexible lines about what may be done with recordings may subject manufacturers as well as consumers to inconsistent regimes.

In HRRC's view, Congress's first priority should be to proceed now with enacting relief as to temporary buffer copies, for which the case is clearly and urgently established. It should only address

Section 117 with respect to archival copies if it is confident that it can do so without explicitly or implicitly impinging on the fair use doctrine. If Congress is to address the issues related to Section 117, it should start with the more cautious approach taken in the relevant parts of the Boucher-Cannon bill, H.R. 2724.

Thank you.

And if I may just add, in conclusion, to Marvin that perhaps—we sympathize with his plight, but perhaps it is a technological protection measure in his video, as opposed to the electronics, that is causing the difficulty.

Mr. COBLE. Thank you, Mr. Klein. But why did it have to happen here in the Judiciary hearing room? It could have been in another forum.

[The prepared statement of Mr. Klein follows:]

PREPARED STATEMENT OF GARY KLEIN

On behalf of the Home Recording Rights Coalition I appreciate the opportunity to appear today to discuss the subjects addressed by the Copyright Office in its report pursuant to Section 104 of the Digital Millennium Copyright Act. The HRRC was formed 20 years ago after an appellate court ruled that it was illegal to provide consumers with an object as "threatening" as a Betamax video cassette recorder. Our attention is attracted whenever the subject is consumer fair use, a doctrine which narrowly survived in the Betamax case and periodically remains the subject of litigation. No technical advance in consumer electronics has gone unpunished by the content owner community.

I am also appearing today as a Vice President and counsel of the Consumer Electronics Association. It is CEA members that bring to market the new products that consumers wish to enjoy at home.

The HRRC was quite active in arguing for a balanced approach to the DMCA, respecting the reasonable and customary practices of ordinary consumers. We succeeded in some key areas, such as Sections 1201(c)(3) ("no mandate") and Section 1201(k), which recognizes that technical restraints must be accompanied by "encoding rules" that protect consumers. However, we also supported resolving the deeper issues raised by the so-called "ABC" legislation offered in that Congress, named after its sponsors—Senator, now Attorney General Ashcroft; Congressman Boucher of this Committee, and former Congressman Tom Campbell. The final DMCA compromise resulted in some issues raised by the "ABC" bill being held over for further study by the Copyright Office and by the National Telecommunications and Information Administration. Thus, our continuing interest in the Copyright Office report on issues presented for study in DMCA section 104, which is the subject of this hearing.

Summary of HRRC Positions

The HRRC view as to the Copyright Office's recommendations is summarized as follows:

DIGITAL FIRST SALE

HRRC disagrees with the recommendation not to extend the "first sale" doctrine to copies made from digital transmissions. As we stated in testimony before the Copyright Office, HRRC supports the provision of the Boucher-Campbell bill (H.R. 3048, 105th Congress) that would have extended the first sale doctrine to digital transmissions. We find the Office's rationales for not recommending this step unpersuasive.

Mr. Chairman, our concerns about the Register's report are widely shared. In testimony before the Copyright Office, our nation's leading library associations expressed particular concern about the first sale doctrine:

> 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 access needs of their users is undermined while the ability of publishers to control and monitor use of works is expanded.

Given our disappointment with the Register's report, we have joined the American Library Association, the Association of Research Libraries, and others in a letter to

you more fully articulating our shared concerns, a copy of which is attached to my testimony today. I would also like to submit for the record a letter from our nation's leading intellectual property law professors, for inclusion in the hearing record. Accordingly, though we recognize that this Committee at present is more interested in comments as to what the Copyright Office did recommend, we hope that the Congress will keep this issue on its copyright agenda.

TEMPORARY BUFFER COPIES

HRRC would not oppose the enactment of legislative relief, as proposed by the Copyright Office, to preclude any liability arising from assertion of the reproduction right with respect to temporary buffer copies incidental to a licensed digital transmission of a public performance. HRRC believes, however, that such relief should be extended to other instances of clear fair use recording, as recommended in the Ashcroft-Boucher-Campbell bill. Otherwise, this issue will keep coming back and coming back in new guises. Accordingly, HRRC would prefer that the legislative solution be extended to the full scope of the provision in H.R. 3048 and S. 1146.

EXTENSION OF SECTION 117 EXEMPTION

HRRC has long been and remains a champion of the rights of consumers to make responsible private, noncommercial use, including home recording, of material that is lawfully acquired. One might therefore have expected that HRRC would automatically endorse any expansion of an exemption from copyright liability. We might, if we were assured that we could draft the final version of such a provision. But we are, frankly, concerned about what each option suggested by the Copyright Office might look like once our friends in Hollywood and the recording industry have had an opportunity to interpret or "improve" them.

The Copyright Office suggests modifying both the nature and the scope of Section 117. HRRC sympathizes with the stated goal, which is to broaden this "back up" copying exemption so as to reflect the actual practices of IS administrators and consumers. However, we are concerned that an effort to tweak this provision could result in a narrowed interpretation of the more general fair use home recording right.

First, we are uneasy with the basis upon which the Office rests this proposal. The Office acknowledges that a fair use defense remains available as to archival and other home recording. The Report suggests a need for legislation only because it suddenly anticipates that a defendant might, additionally, invoke a first sale defense for having given a lawfully-made fair use copy to someone else. Such a case has not yet arisen under the present Section 117. Apparently, the Office is concerned that it could arise once Section 117 has been amended to embrace additional types of content and media. According to this rationale, the perceived "problem" seems to exist only if the "solution" has already been enacted. (In other words, if archival copies were governed only by the existing Section 117, plus the doctrine of fair use, apparently the Office would see no need for legislation.) This Committee usually rests its enactments on more compelling arguments.

Second, the Copyright Office proposes moving to a more code-like statement of the law, because it anticipates that additional types of content and media—not just computer programs—will be acquired online. Our dilemma is: if the new provisions explicitly or implicitly overlap with fair use jurisprudence, will fair use, in turn, be squeezed down to fit the confines of the new provision? The Copyright Office proposals, though well intentioned, seem laden with this possibility. We see a potential Trojan Horse, and we are looking it in the mouth.

The Office suggests these options:

1. Amend section 109(a) to ensure that fair use copies are not subject to the first sale doctrine; or
2. create a new archival exemption that provides expressly that backup copies may not be distributed.

We worry about either approach. The first would amend the first sale provision, in a manner that could be read by courts as a congressional intention to scale back fair use generally. The temptation to guide judicial interpretation, by crafting a legislative history treatise as to fair use and home recording, could prove overwhelming. If Congress is to reconsider the scope of fair use, it should do so explicitly and only after intense study and advice.

The second approach would seem flatly to circumscribe existing private, noncommercial home recording, by (1) including a vast range of home recorded material under the new definition of "backup" copies, and (2) declaring that such "backup" copies may not be given to others. In its discussion, the Office takes a view of private, noncommercial home recording that is intensely personal and self-centered,

and with which we disagree strongly. It seems to give no consideration whatever to the fact that home recordings routinely are shared with the rest of the household, or with members of a family residing in different households. Surveys done by the Office of Technology Assessment and others have shown consistently that such home recording has a clear promotional effect on sales of prerecorded music. Congress should not even consider going down this road, making a fundamental abrogation of fair use, without a full airing of all such issues.

We are also concerned that a code-like regime as to home recording would create more uncertainty, rather than less, for manufacturers such as CEA members who would wish to comply with the new law. We are glad that the Office has noted, with some concern, that manufacturers and their customers are increasingly subject to technical and license regimes imposing de facto limitations on product design. Adding a parallel, de jure regime drawing inflexible lines about what may be done with recordings may subject manufacturers, as well as consumers, to inconsistent regimes.

In HRRC's view, Congress's first priority should be to proceed now with enacting relief as to temporary buffer copies, for which the case is clearly and urgently established. It should only address Section 117 if it is confident that it can do so without explicitly or implicitly impinging on the fair use doctrine. If the Congress is to study issues related to Section 117, it should start with the more cautious approach taken in the relevant part of the Boucher-Cannon "MOCA" bill, H.R. 2724.

PREEMPTION OF STATE LAW PROVISIONS RE CONTRACTS

HRRC continues to support the Boucher-Campbell provision that would pre-empt UCITA, and other state laws that would reduce or eliminate rights granted to consumers under federal copyright law.

On behalf of the HRRC I again thank the Committee for giving us the chance to present our views.

December 11, 2001

The Honorable Howard Coble
Chairman
Subcommittee on the Courts, the Internet, and Intellectual Property
House Judiciary Committee
Washington, D.C. 20515

Dear Mr. Chairman:

The Subcommittee is holding hearings regarding the legislative proposals contained in the Digital Millennium Copyright Act (DMCA) Section 104 report issued by the Copyright Office on August 29, 2001. While these proposals are important and worthy of discussion, the undersigned organizations wish to draw the Subcommittee's attention to other aspects of the Section 104 report--in particular, the report's flawed reasoning in rejecting other legislative proposals.

Background

During the debates surrounding the DMCA in 1998, librarians and technologists pointed out that the DMCA threatened to upset the balance struck in the Copyright Act, giving an unprecedented degree of control to copyright owners at the expense of the public.

In particular, the DMCA is at odds with two copyright law provisions meant to benefit the public: the first sale doctrine and the right to make software backups. The "first sale" doctrine permits an owner of a copyrighted work to resell, lend, or otherwise dispose of the work without having to obtain the permission of the copyright owner. It is this provision that makes lending libraries and used book and video rental stores possible. The software backup provision was meant to permit consumers to make copies of software for backup purposes. Both provisions are threatened by the DMCA--if a copyright owner adds technical protection measures that make the exercise of these rights impossible, the ban on circumvention and circumvention devices would make it impossible for a consumer to exercise either of these rights. Legislation, H.R. 1858, proposed by Representatives Rick Boucher and Tom Campbell and cosponsored by 50 Members of the House would have solved these problems. Instead, responding to the concerns of librarians, technologists, and consumers, Congress asked the Copyright Office to study how the DMCA's circumvention ban might affect the "first sale" doctrine and the right to make software.

The Copyright Office Report

Office misses the forest for the trees and concludes that the DMCA does not pose a threat to these important elements of the public side of the copyright balance. Although the Copyright Office analysis is flawed in a number of respects, two failings stand out:

Underestimating the Threat to Libraries

In its report, the Copyright Office recognizes that the spread of technical protection measures used to "tether" works to particular computers may pose a serious threat to the viability of the lending library system. In its report, however, the Copyright Office concludes that these systems have not yet been widely deployed, and thus that the DMCA does not pose a threat at this time. The difficulty with this view is that it ignores the imminent introduction of numerous "tethering" technologies. For example, the leading e-book formats developed by Microsoft and Adobe each permit the tethering of e-books to particular PCs or readers. The MusicNet online subscription music service also includes a similar tethering system. Many digital rights management (DRM) systems not only tether works, but also include "time out" after a limited period of time. These capabilities are a central tenet of most DRM systems (see article in October Wired magazine).

The technological protections also present significant challenges to libraries. If library patrons are faced with a collection comprised entirely of "pay per (view") use content that must be individually activated on a PC, the library will have been transformed into little more than a retail distributor for copyrighted works. (As the Copyright Office report noted, there are other threats to libraries, such as restrictive licensing regimes, which compound the problem.)

The Library of Congress (of which the Copyright Office is a part) itself illustrates this impending crisis. In order to register a copyright in the U.S., a copyright owner must deposit copies of the work with the Copyright Office. Much of the Library of Congress' collection is drawn from these registration deposits. Imagine, however, that e-books are submitted with DRM systems that restrict access to the work (the first e-books were recently accepted by the Copyright Office as registration deposits). The Library of Congress would suddenly find its shelves filling with works inaccessible to the public without payment. Any effort by the Library to circumvent these DRM systems would run afoul of the DMCA.

Ignoring the Threat to Innovation

The second central flaw in the Section 104 report is its treatment of temporary copies made in the random access memories (RAM) of computers. The report concludes that "no compelling evidence was presented to us during the course of our study that would support a blanket exception for incidental copies." By once again missing the forest for the trees, the report overlooks the threat to innovation caused by treating temporary copies as potential infringements.

RAM copies are essential to the operation of computers, and thus are essential to the operation of the Internet. A copyrighted work can not be transmitted across the Internet without the making of multiple temporary copies. Although the report found no compelling evidence supporting a blanket exemption for temporary copies, Congress

already has had to fashion two exceptions for such copies. First, the "mere conduit" safe harbor in Section 512(a) of the DMCA was fashioned largely to insulate service providers from potential liability for temporary copies made on their systems. Second, Title III of the DMCA expands Section 117 of the Copyright Act to permit temporary copies of computer programs made during the course of hardware maintenance by independent service organizations. The report recommends yet a third exception, this time for buffer copies made during the course of webcasting. Three amendments within three years should constitute sufficient evidence for the Copyright Office to conclude that a serious problem exists.

Temporary copying is inherent to digital technology. If Congressional relief from copyright liability must be sought every time a new digital application emerges which makes a new kind of temporary copy, innovation will be impeded. Requiring technology companies and their customers to rely on the fair use doctrine in every instance is unworkable. As the Copyright Office itself said in the context of buffer copies, "the case-by-case fair use defense is too uncertain a basis for making rational business decisions."

Failing to recognize the uncertainty caused by treating temporary copies as potential infringements, the report opposes adoption of the temporary copy exception contained in legislation introduced in the 105th Congress by then-Senator Ashcroft, and Congressmen Boucher and Campbell (S. 1146/H.R. 3048).

We urge the Subcommittee to conduct its own inquiry, and to consider again the proposed contributions of Mr. Boucher and his colleagues to the advancement of fair use through the adoption of balanced copyright legislation.

If you have any questions, please contact Professor Peter Jaszi at (202) 274-4216.

Respectfully submitted,

American Library Association
Association of Research Libraries
Computer & Communications Industry Association
Digital Future Coalition
Electronic Frontier Foundation
Home Recording Rights Coalition

Mr. COBLE. Lady and gentlemen, thank you all for your testimony.

Not unlike many hearings on this Hill, the testimony and conclusions that we have heard this morning are subject to interpretation. Now, for what it is worth, at this juncture I remain unconvinced that additional legislation is needed. However, I hope many of you will agree that I am an easy dog to hunt with—or an easy dog with whom to hunt, to be grammatically correct, and therefore I am going to go into this open-mindedly. But that is for the record. When I said nothing needed, maybe with the possible exception of 117, except for that I am not convinced yet, but I will hear you out.

Ms. Peters, I am told that Section 117 of the Copyright Act is being misused by website operators to make and distribute unauthorized copies of protected material under the guise of legitimacy. These websites claim to be selling backup copies which are permitted under Section 117 for personal archival use only. Do you agree that making and selling these unauthorized copies of software is illegal, A; and, B, how can we clarify the meaning of 117 to prevent this piracy?

Ms. PETERS. Yes. I would agree with you totally that the, quote, backup copies or archival copies that you see very prevalently on Internet sites are, in fact, pirated copies and that there is nothing in the language of Section 117 that would allow anything like that.

117 is a very narrow exception. It applies only to copies of computer programs that are made by an owner of a copy, not a mere possessor, solely for archival purposes. You actually can only keep the archival copy as long as you have lawful use of that computer program, and there is no way that you can transfer it to anyone else unless you are transferring the copy of the computer program that you own.

So, yes, it is a problem with regard to people taking that part of the law and saying it does something it does not, and to the extent that there is confusion we are more than happy to work with you to see what we can do to straighten that out.

Mr. COBLE. Thank you.

Mr. Berenson, how many DiMA members has BMI licensed—or approximately?

Mr. BERENSON. BMI has licensed a—most of the majority of the DiMA members that are using music—and this was done through either negotiated agreements or basically they have—as I said in my testimony, they made an application to BMI, and they were instantaneously licensed, and we are negotiating rates. I would say the vast majority of those DiMA members that are performing music are licensed by BMI.

Mr. COBLE. Thank you, sir.

Mr. Potter, your statements suggest that both buffer copies and server copies should be exempt from infringement liability and, therefore, the obligation to pay any royalty to the music copyright owner. Are you suggesting that the public performance right and only the public performance right should be relevant for any service employing streaming technology?

Mr. POTTER. What we are suggesting, Mr. Chairman, is that, to the extent that Internet providers are streaming music in a performance media, similar to the way broadcasters perform on the radio, that it is the performance right and only the performance right which is implicated. This Committee and the Congress exempted broadcasters from the ephemeral production right, their equivalent of a server copy, 25 years ago; and in the context of competing on-line radio with terrestrial radio we would argue for the exact same exemption or for an equivalent exemption which would—in our case would mean multiple copies, all of which, of course, are inaccessible to the consumer and which are merely to support the compensable public performances.

I am confident that Mr. Berenson and BMI and his counterparts at ASCAP and SESAC can figure out the economics of any lost

sales associated with on-demand streaming and can increase their royalties through the performance royalty system enough to offset lost revenues for their composers.

We are in no way suggesting that composers and songwriters should not be paid or should not receive absolutely full value for their performance, and it may be a higher value for on-demand streaming than for preprogrammed streaming. We are suggesting, however, that it goes through the performance right folks rather than the reproduction right folks.

Mr. COBLE. Thank you, sir.

Let me beat the red light with a question to Mr. Klein.

Mr. Klein, consumer access to copyrighted works and e-commerce have increased greatly since the passage of the Digital Millennium Copyright Act. How does that affect your position that the DMCA has harmed consumer use of the first sale doctrine and that only by expanding the doctrine to include digital transmissions will consumers benefit?

Mr. KLEIN. Well, first, I would like to correct the premise. I mean, our position is that the first sale doctrine does apply to digital, because we see nothing in the legislation or judicially that has ever limited it. It's a first sale doctrine.

How does it harm—well, the content that has become available to consumers has certainly increased. Our concern is that, and the Copyright Office notice noted this in their report, that access control is being used to protect business models, as opposed to protecting copyrights, and that consumers are sometimes not getting what they think they are getting when they purchase something on line and then realize that they can't do with it what they normally expect to be doing with it, including, for example, sending it within a home network if it is protected with some sort of technological measure that prevents that kind of transmission.

Mr. COBLE. Thank you.

I have to go to another meeting, and I am going to ask the gentleman from the Roanoke Valley to chair the hearing. I will try to return, Howard, but if I don't I want to thank the panelists again and thank those of you attending the hearing. I will try to return, however.

The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman.

Ms. Peters, Mr. Potter states that the Copyright Office report suggested that Congress provide webcasters with an exemption from copyright royalties for all server and cache copies of musical works and sound recordings that are made in and limited to the furtherance of licensed performances and downloads. Did the Copyright Office make such a recommendation?

Ms. PETERS. The Copyright Office made a recommendation with regard to audio files, and we did make a recommendation where the purpose of the use and the licensed purpose was to provide a public performance through a stream, and the only copy that arguably was made—we didn't talk about the server copy per se and that recommendation—was that it was this transitory incidental copy that was required by the computer that, yes, that that copy should be subject to no additional liability.

The server copy issue really went more to the ephemeral copy issue and the fact that the exemption that exists for broadcasters and the television medium is different than what exists for webcasters, and we note that had we thought that the analysis was the same for both and questioned the different treatment——

Mr. BERMAN. But in a footnote to the report, the Copyright Office suggests that server copies made in the furtherance of a performance allowed by a compulsory license should not incur a royalty obligation because they have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license.

But webcasters make many server copies specifically because they do add value to the performance by allowing performances at different speeds and different formats and for more convenient locations. Isn't the Office's logic akin to saying that if the government creates a compulsory license governing one exclusive rights, it should take away all associated rights with no compensation?

Ms. PETERS. No, we are not really saying that. What we analogized it to was the deal that was struck in 1976 with respect to broadcasters and the fact that when broadcasters were basically performing the work exceptions were made in Section 112 for the ephemeral copies that were necessary to carry out that particular public performance. All we were saying is that if you take that analysis, that which facilitates the licensed broadcast—then that should apply in the web casting environment.

That was our take. Obviously, the law is different. We just—we noted that for us the analogies are similar.

Mr. BERMAN. Well, I guess that is the question.

Ms. PETERS. You see it differently, but I am just saying that we did see it that way.

Mr. BERMAN. I am not sure what I see in these. It is very ephemeral.

Also, Ms. Peters, section 106(3) gives copyright owners the exclusive right to distribute copies both by sale and by rental lease or lending. Aren't time limited and tethered downloads more akin to rental and leasing of copies than sales? If so, is there any reason to believe that time limited or tethered downloads restrict or violate the first sale doctrine which I think you referred to in the context of Section 109 as a restriction, not as a consumer right but as a restriction on a copyright owner's ability to control distribution after the first sale?

And is there any reason to believe that these time limited or tethered downloads restrict or violate the first sale doctrine, which apparently requires a sale before it can be invoked if they are more analogous to some kind of leasing or rental arrangement?

Ms. PETERS. It may be that much of the tethered downloads are subject to a license or are similar to the rentals. Some of them may not be. Certainly if it is tethered and we note this in our report, the intent of the first sale doctrine which is you can transfer it so somebody else can look at the content, you can argue that the philosophy behind first sale is subverted in that tethered situation.

Mr. BERMAN. What about a time limited download?

Ms. PETERS. Time limited download, actually, that is an issue with respect to musical compositions that currently is before the

Office in a rule-making activity, and that is one that we have sought comment on. What is the nature of a limited download? Is it a digital phonorecord delivery? Is it an incidental phonorecord delivery? What is it?

Clearly, the fact that it is limited in time with respect to—I guess you have to look at—what we say is if it is a pure download from one to the other, to the computer, first sale really isn't implicated and the question really comes up in another context on what is it and what rights attach to it. It has really come up much more in the context of the 115 compulsory license and how do you characterize it and does it fall within it and, if it does fall within it, what is the rate for it. And it has come up on whether or not it really is a mechanical distribution, a DPD, or it is more in the nature of a rental, lease or lending, and we haven't really come to grips with that. We are still in the process of that rulemaking.

Mr. GOODLATTE. [Presiding.] Actually, the gentleman from California's download has been time limited.

I am going to pass my questions for a moment, and I am going to recognize the gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I would like to say that, Ms. Register, that your comments are always cogent and illuminating, and I appreciate your insights.

And, Mr. Potter, you expressed very well the issues before you; and if I could ask you a question. Others have testified yesterday, they argue that on-demand performances are different, that they potentially undermine sales of traditional physical media and thus that these performances are worthy of a reproduction right. Is there something about the law of performance rights that prevents the marketplace, the music publishers or ASCAP and BMI from modifying the performance right licensing or rate structure to account for any different nature of on-demand performances so that songwriters, composers and music publishers can be adequately compensated?

Mr. POTTER. No. Frankly, I think Mr. Berenson should take a crack at that question. I agree 100 percent that there is risk that an on-demand transmissions, on-demand performances have the potential to reduce sales. I would also agree that the reduction in revenue that is associated with the reduction in sales is only a reduction in the reproduction rights revenue and there should be an offsetting increase in revenue through the performance royalty system and through the performance rights collectives.

I don't anticipate any inflexibility from ASCAP or BMI or SESAC or from publishers licensing directly when they sit down at the negotiating table to raise their rates on the performance royalty side appropriately so that the publishers get paid 100 percent of the full value of the economic act which in that case is the performance.

Mr. CANNON. Thank you.

Would you like to comment, Mr. Berenson, and then Ms. Peters——

Mr. BERENSON. Basically, in theory what Mr. Potter says may be true, but in practice it is not true. Mr. Potter is well aware since he has represented many clients in his prior law firm, Weil, Gotshal & Manges, that the minute the performing rights organization attempts to raise their fees we are in rate court before a judge,

and ultimately we cannot unilaterally raise these fees. We would have to convince a judge to agree to what Mr. Potters says, and that is up in the air.

We also administer a performing right, not a mechanical right.

The fact that two different organizations in this country represent two different rights should not penalize the songwriter or the publisher, sir. You have situations in Europe where you have one organization representing both the mechanical and the performing right, and they are collecting both on downloads, the performing right and the mechanical. They allocate it to their members. There is no reason why, because of the way this industry developed over the years, that the songwriter and the music publisher should be penalized by saying we should only be able to collect once.

There was a question of value. There is no question. When I testified before the Copyright Office part of my testimony—as Mr. Potter's paper, he left out one part. He said, is it a public performance if no one hears it. Technically, under the law it is, yes, and it is a question of value. That is a marketplace decision or, if the parties cannot agree, a rate court decision.

Thank you.

Mr. CANNON. Thank you.

Ms. Peters.

Ms. PETERS. Certainly when both the reproduction right and the performance right are involved, we believe they should be licensed.

Ms. PETERS. The position that we took was where you have a stream, it is a performance, and the only reproduction is the transient incidental copy that flows through the buffer in order to render that performance, we believe that that should be exempted. We agree with Mr. Potter in theory that with demand stream there is a potential loss, and it needs to be compensated. What we said was that we believe that it is inappropriate to hang on to that incidental transient copy as the mechanism for doing that.

Now, there may be problems in coming up with what the appropriate performance right value is. We may have to deal with that. But I would basically stand by our recommendation and, in fact, note that under the European Union directive, that activity would be exempt from liability, and that is a mandated exemption.

Mr. CANNON. Mr. Berenson, you obviously have something to respond. Would you like to do that?

Mr. Chairman, I have other questions that I would like to submit to the panel. I ask unanimous consent that we be allowed to do so.

Mr. GOODLATTE. We may do a second round, but we are going to stick by the time limit. We will see how it goes.

Mr. BERENSON. I shook my head no to a portion of what Ms. Peters said. It may have—the directive may exempt these copies, as she said, but it certainly does not in any way exempt the public performing right in the musical work in downloads.

Mr. CANNON. Mr. Chairman, I yield back, but let me point out I was not asking for additional time for questions, but rather unanimous consent to submit questions to the panel, written questions.

Mr. GOODLATTE. I think that is very appropriate. Without objection, it is so ordered.

[The information referred to follows:]

RESPONSES OF MARY BETH PETERS, REGISTER OF COPYRIGHTS, TO FOLLOW-UP QUESTIONS OF REPRESENTATIVE CHRIS CANNON

1. Ms. Peters,

Madam Register, the Report states that:

"the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place is an unsettled point of law that is subject to debate." (P. 147)

First of all, your Report does not actually discuss the merits of whether or not a public performance occurs, you just note that it is an unsettled point of law without taking sides, correct?

But the Report goes on to say that regardless of the fact that this is an unsettled point of law, it is your "view that no liability should result from such a technical 'performance' that takes place in the course of a download.' (P. 148)

The Copyright Act as I understand it provides statutory damages for copyright infringement of each work. What is the minimum amount of statutory damages that a court must award in case of a finding of infringment? So, if an Internet music service were to offer 100,000 songs, and a court were to disregard the Copyright Office Report and still find that this service committed a technical act of copyright infringement for those 100,000 songs, what would the minimum statutory damages be?

Is the threat of this type of high statutory damages one of the reasons why the Copyright Office supports legislation to clarify the legal status of server copies and buffer copies?

If it is an unsettled point of law that is creating disruption in the marketplace, and your Office is of the belief that there should be no public performance liability for the download transmissions, then wouldn't it be appropriate for Congress to enact legislation to clarify this point, just as you have recommended for temporary buffers?

Or, would it be enough to eliminate this marketplace disruption for this Subcommittee to make a strong legislative policy statement supporting the conclusion in your Report?

It is correct that the Report does not take a position on whether a public performance occurs during a digital download even when no contemporaneous performance takes place, but concludes that if a public performance takes place under such circumstances, no liability should result from the performance if the download was authorized.

Section 504 of the Copyright Act provides that the minimum award of statutory damages per work for copyright infringement is $750. Therefore, an internet music service offering downloads of recordings of 100,000 songs would face a potential minimum award of statutory damages in the amount of of $7,500,000 if a court concluded that the music service was making infringing public performances and if all 100,000 songs had been timely registered.

My recommendation of a legislative exemption for temporary buffer copies made in the course of authorized streaming was based in part on a concern that, notwithstanding my conclusion that the making of such buffer copies is fair use, a court might find a service engaged in streaming to be liable for the making of temporary buffer copies. Certainly the possibility that a court might make an award of substantial statutory damages for a possible public performance—a performance that my Report concludes should give rise to no liability—is one reason why I believe that an exemption is warranted.

For similar reasons, I believe that it would be appropriate for Congress to enact legislation precluding any liability arising from the assertion of a copyright owner's public performance right with respect to any technical performance that may take place as a necessary byproduct of an authorized download, so long as no audible performance actually takes place simultaneously with the download. If, on the other hand, an audible performance takes place along with the download, I believe that a compensable public performance results, for such a performance would be indistinguishable from, or at least tantamount to, a streaming transmission.

If no such legislation is enacted, I believe that a court may heed a strong legislative policy statement supporting my conclusion that such "performances" are fair use. However, a court would not be required to give deference to such a statement.

2. Ms. Peters,

Mr. Ramos spends a great deal of time in his written testimony arguing that on-demand performances are different, that they potentially under-

mine sales of traditional physical media, and thus that these performances are worthy of a reproduction right.

Is there something about the law of performance rights that prevents the marketplace—the music publishers or ASCAP and BMI—from modifying the performance right licensing or rate structure to account for any different nature of on-demand performances, so that songwriters, composers and music publishers can be adequately compensated?

In your opinion, does the different nature of the on-demand performance suggest that there should be a reproduction right associated with it, or rather should the performance right owners and administrators be able to address the different nature of on-demand performances through their traditional performance systems?

I agree with Mr. Ramos that on-demand performances are likely to have adverse effects on the market for sales of phonorecords in traditional physical media. This effect, of course, results from the licensed performance, and not from the incidental copy. I understand music publishers' concern that this will result in decreased income for composers and publishers. I do not believe that this has to be the case. On-demand performances of music must be licensed by the music publisher or its performing rights society, and the publisher should be able to insist upon higher license fees for on-demand streaming to reflect its impact on traditional record sales. Thus, any reduction in royalties for reproduction and distribution should, in theory, be made up in the form of increased performance royalties.

Therefore, I do not believe a copyright owner should be able to assert the reproduction right with respect to an on-demand performance.

3. Ms. Peters,

My understanding is that in your Report you have made the following legislative recommendations:

—A tailored approach to exempt temporary buffer copies that are incidental to a licensed digital transmission;

—Repeal of Section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption for both sound recordings and musical works; and,

—An exemption for consumers to make a back-up copy of music files that they lawfully acquire from a music service.

I further understood from the Report that the reason for your recommendations was in large measure because of confusion in the marketplace over what the appropriate scope of rights is.

Did the marketplace change in response to your Report? For example, do you have an understanding whether the music publishers stopped demanding mechanical license payments for webcast streaming, or did the performing rights organizations stop demanding performance royalties for downloads?

In your opinion, does the recent agreement between the RIAA and the Harry Fox Agency alleviate the need to address any of those points?

In Footnote 434 on Page 144, you make a recommendation for legislation. Is there a reason this is in a footnote? Does it make it "less important" than others?

It is probably too soon to tell whether the marketplace has changed in response to the Report. However, since the Report was published, we have been advised by music publishers that they have no intention of asserting the reproduction right with respect to noninteractive streaming or of asserting performance rights with respect to "pure" downloads, i.e., downloads that result in the making of phonorecords that are not limited in terms of time or the number of permitted performances and that do not result in the making of audible performances simultaneously with the download.

The recent agreement among the Recording Industry Association of America, the National Music Publishers' Association, Inc. and the Harry Fox Agency, Inc. is certainly a major step forward in resolving some of the differences between music publishers and record companies that have hindered the development of the marketplace for online music. However, it has not caused me to reconsider the recommendations in the Report.

The issue addressed in footnote 434 appears in a footnote because it is not squarely within the scope of the mandate set forth in section 104 of the Digital Millennium Copyright Act. But because my analysis of the buffer copy issue relied in part on an analogy to the ephemeral recording exemption found in section 112, it was nec-

essary to point out that section 112 was amended in 1998 to provide for a compulsory license, rather than an exemption, for certain kinds of "ephemeral" copies relating to activities such as webcasting. Because the point of the analogy was that an exemption for buffer copies is appropriate for the same reasons that justify the ephemeral recording exemption, it was pertinent to mention that the most recent amendment to section 112 was inconsistent with the approach that I was endorsing, and to observe that I would favor repeal of that amendment and adoption of an exemption.

4. Ms. Peters,

In your report you describe at some length the "symmetrical" issue created by the performing rights organizations seeking performance royalties on music downloads. You note that this issue has not been settled by any court, and that in your opinion that no performance royalty should be due for the single economic act of making the music download. However, rather than recommending legislation to fix this problem, in your testimony today you state that "if courts rule" on this issue then Congress should step in . . .

A. Given the music industry's inclination to litigate (something I would very much like to see end, at least as it concerns Napster) and the risks of defending against litigation, including statutory damages that would apply to potentially hundreds of thousands of copyrights, wouldn't it be prudent to fix this problem now?

As I stated above, I would support legislation precluding any liability arising from the assertion of a copyright owner's public performance right with respect to any technical performance that may take place as a necessary byproduct of an authorized download, so long as no audible performance actually takes place simultaneously with the download.

B. Could we not ensure that temporary copies having no use other than for transmission be considered exempt under Section 117? It seems to me that we should not wait for litigation that will only slow down the advancement of well-intentioned, otherwise legal online music services. Do you have a specific fix in mind? Couldn't Congress statutorily exempt such music downloads from the performance right?

I have recommended that legislation be enacted exempting temporary buffer copies made in the course of authorized streaming. I have not proposed specific legislative language, and it is not clear whether an amendment to section 117 would be the preferable way of accomplishing this goal.

5. Ms. Peters,

Approximately how many 115 mechanical licenses does the Copyright Office currently process each day?

Is the Copyright Office ready to process 50,000 to 100,000 at any given time to enable the launch of a comprehensive online music service?

What would be necessary to enable the Copyright Office to comply with the Paperwork Reduction Act or the E-government Initiative by allowing filing and processing of licenses to be done electronically?

In calendar year 2001, the Copyright Office received a little more than 400 notices of intention to obtain a compulsory license for making and distributing phonorecords of non-dramatic musical works pursuant to section 115. This relatively modest number of notices was, nevertheless, the largest number of notices received by the Office in recent years (and, we believe, since the enactment of section 115). The Office does not maintain statistics distinguishing between notices of intention to utilize the traditional section 115 mechanical license and notices of intention to utilize the new section 115 license to make and distribute phonorecords by means of digital phonorecord delivery, but we believe that all or almost all of the notices involved the traditional mechanical license.

If the Office were to be inundated with 50,000 to 100,000 notices of intention, it would have great difficulty in processing them. Because of the low volume of notices filed with the Office, the Office has not had to devote substantial resources to process the notices. There has been a low volume of notices because a person wishing to use the compulsory license is authorized to file a notice of intention with the Office only if the Office's registration and other public records do not identify the copyright owner and the copyright owner's address, or if a notice of intention has been returned to the sender because the copyright owner no longer can be located at the address appearing in the Office's public records. Therefore, it seems unlikely that the Office would receive 50,000 to 100,000 notices of intention.

The Office is currently engaged in an information technology requirements analysis with the goal of permitting electronic filing, processing and retrieval of a variety of records. Because of the small number of notices of intention to use the section 115 compulsory license that are (and that may be) filed with the Office, the Office has not considered it a high priority to establish a system that would accept electronic filings of those notices, but has focused on its major responsibilities such as copyright registration and recordation of transfers of copyright ownership. Therefore, at this time we do not know precisely what would be necessary to enable the Office to allow electronic filing and processing of notices of intention. If it appeared likely that the volume of notices of intention filed with the Office would increase significantly, the Office would have to commission a study of what would be required to establish a system for electronic filing. Such a study could be conducted as part of the Office's ongoing business process reengineering efforts.

6. Ms. Peters,

Others who have testified yesterday and today argue that on-demand performances are different, that they potentially undermine sales of traditional physical media, and thus that these performances are worthy of a reproduction right.

A. Is there something about the law of performance rights that prevents the marketplace—the music publishers or ASCAP and BMI—from modifying the performance right licensing or rate structure to account for any different nature of on-demand performances, so that songwriters, composers and music publishers can be adequately compensated?

B. In your opinion, does the different nature of the on-demand performance suggest that there should be a reproduction right associated with it, or rather should the performance right owners and administrators be able to address the different nature of on-demand performances through their traditional performance systems?

Please see my response to question 2.

7. Ms. Peters,

Mr. Berenson testified that, in his view, the Section 104 Report conclusion that no compensable public performance occurred in the making of a digital phonorecord delivery that could not simultaneously be perceived by the recipient, was contrary to the "making available" right recognized in the WIPO Copyright Treaty.

A. In your view would the United States be deemed in violation of the WIPO Copyright Treaty if Congress were to adopt all of the recommendations in your Section 104 Report? Would the adoption of your recommendations be consistent with our obligations under this treaty? Have any other governmental entities that have agreed to implement the WIPO Copyright Treaty adopted exceptions similar to those recommended by the Copyright Office?

The recommendations in the 104 Report are fully consistent with U.S. obligations under the WIPO Copyright Treaty (WCT). The WCT requires that each contracting party grant authors the exclusive right of making their works available to the public in such a way that members of the public may access them on demand, but does not specify how that right should be categorized in domestic implementing legislation. The obligation is fulfilled so long as one or more of the exclusive rights in a contracting party's domestic copyright law covers the act of making a work available on demand. Since downloading a music file entails, at a minimum, an exercise of the copyright owner's exclusive right of reproduction, exempting a technical performance that may take place as a result of the download would not alter the fact that the conduct is covered under the author's exclusive rights.

I am not aware of any WCT country that has adopted an exception from the public performance right for performances incidental to downloads. With respect to the recommendations in the Report concerning temporary copies, however, the European Union has adopted a Directive which requires the EU member states to enact a general exception for temporary acts of reproduction with no independent economic significance that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a lawful use. A principal purpose of the Directive is to implement the WCT and its companion treaty, the WIPO Performances and Phonograms Treaty.

B. The WIPO Copyright Treaty provides separately for two distinct rights: a right of distribution, and a right of communication to the public. Is it your understanding that under United States copyright law the making of a digital phonorecord delivery would be consistent with the right of

a distribution to the public as to which the reproduction right applies; and, separately, the making of a public performance would be consistent with the right of communication to the public?

The right of distribution in Article 6 of the WCT applies only to circulation of physical copies of works; the right of communication to the public (including the right of making available) in Article 8 of the WCT applies to the exploitation of works in intangible form by means of wired and wireless transmissions. As I mention in my response to question 7(A), while the WCT requires that the conduct covered in Article 8 be covered by exclusive rights, it does not specify how those rights must be categorized under the laws of a contracting party. Activities that would fall under Article 8, for example, may implicate the distribution right in the U.S. Copyright Act, which, unlike Article 6 of the WCT, is not limited to circulation of physical copies.

Under the WCT, on-demand downloads, such as certain digital phonorecord deliveries, would fall under the communication to the public right and, more specifically, the making available right (in addition to the reproduction right). Under U.S. copyright law, on-demand downloads entail an exercise of, at a minimum, the distribution right and the reproduction right. Streaming, which would also fall under the WCT's communication right, entails exercise of the public performance and (because of the buffer copy) reproduction rights under U.S. law.

C. Can you explain the nature of the term "making available" right in the WIPO Copyright Treaty? Was it intended to provide that a public performance right exists in a digital phonorecord delivery? Or, was it intended to more generally ensure that all signatory countries could protect all modes of digital dissemination of copyrighted works, pursuant to their respective copyright regimes?

In my view, the making available right in the WCT is intended to ensure that all contracting parties provide authors an exclusive right over intangible, on-demand dissemination of their works, while affording contracting parties with a degree of flexibility in the implementation of that exclusive right. Although the making available right is not limited to digital dissemination, it was the advent of digital networks that was the primary motivation for adopting this new right.

D. Article 10 of the WIPO Copyright Treaty permits countries to include in their national laws certain limitations and exceptions that "do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." The Agreed Statement that accompanies the treaty further explains that signatory countries may carry forward and devise new exceptions and limitations to the rights provided in the treaty that are appropriate in the digital network environment. Is the reference in the Report to the absence of any independent economic value for buffers and certain server copies consistent with these criteria? Are the recommendations of the Copyright Office to exempt from royalty obligations these buffers and server copies consistent with these criteria?

The Copyright Office recommendations are consistent with the tripartite test set forth in Article 10 of the WCT. The absence of any independent economic value is an important factor both in our recommendations and in our conclusion that the recommendations pass muster under the WCT and other international instruments that incorporate the same standard, such as the Berne Convention and the WTO TRIPS Agreement.

RESPONSES OF CAREY RAMOS, NMPA, TO FOLLOW-UP QUESTIONS OF REPRESENTATIVE CHRIS CANNON

1. Mr. Ramos,

NMPA and RIAA have recently entered into an agreement to facilitate the development of business models such as PressPlay and MusicNet, which rely upon licensing the reproduction of a sound recording at home, and then timing out the consumer's use of it after 30 days or 12 plays unless the owner of the downloaded copy keeps paying for continued access.

What interest does NMPA have in helping to restrict the number of times, or the length of time, that a consumer can listen to a lawfully made sound recording for their own private enjoyment?

NMPA has no such interest. NMPA's members—music publishers which own or control copyrighted musical works—are subject to a compulsory license and

therefore are required to make their works available to any licensee who complies with the provisions of Section 115 of the Copyright Act. Music publishers, moreover, are not in the business of recording or distributing phonorecords of their musical works, and do not prescribe or restrict the manner in which those works are distributed.

The marketplace for on-line music is in its infancy. There is widespread piracy, and no successful legitimate business model has yet emerged. The business models that have launched are evolving and in flux. NMPA's members have issued mechanical licenses to a broad array of Internet services, offering consumers a diverse selection of music delivery services, including full downloads, limited downloads, on-demand streaming and locker services. These licenses necessarily conform to the distribution methods defined by the licensees.

Doesn't that give you the ability to in fact meter completely private performances of the works?

No, because NMPA's licensing affiliate, The Harry Fox Agency ("HFA"), does not license performances of music publishers' works. Under Section 115, licensees must account, among other things, for the number of digital phonorecord deliveries they make ("DPDs") just as they have long been required to account for the number of CDs and tapes (and prior to that vinyl records and 78's) that they distribute containing licensed musical works. HFA has a legitimate interest in this information in order to assure that royalty payments are being made as required by section 115 of the Copyright Act. HFA has never sought personal information about specific consumers' purchasing or listening habits or preferences.

Since consumers have right to sell or give away a CD onto which a song is legally downloaded, how does your agreement with RIAA ensure that the right to do so is not abridged?

The first sale right is prescribed by statute. NMPA's agreement with RIAA does not purport to vary the law in this regard.

2. **Mr. Ramos,**

The October 2001 agreement with the RIAA provides a license for on-demand streaming, as well as for digital phonorecord deliveries and limited downloads. In testimony submitted for this hearing, some Internet music services claim that they want mechanical licenses only to make digital phonorecord deliveries and limited downloads, but they contend that they do not need a mechanical license to engage in on-demand streaming. Would the NMPA and HFA be willing to give these Internet services the same license deal for just DPDs and limited downloads?

HFA is prepared to license any type of digital delivery that is subject to the compulsory license prescribed in Section 115 of the Copyright Act. Licensees may elect to take licenses for only certain types of delivery (e.g., full downloads or limited downloads). Such an agreement, however, would not cover any other type of DPD configuration for which a license is required under Section 115.

NMPA and HFA encourage prospective licensees to negotiate terms for licensing any digital delivery of copyrighted musical works that is subject to compulsory licensing under Section 115.

On February 6, 2002, NMPA, HFA and the Recording Industry Association of America ("RIAA") jointly proposed that the Copyright Office adopt regulations to make available to all prospective licensees the licenses that HFA recently agreed to provide RIAA members to make or authorize the making of limited downloads and on-demand streams by subscription service. That proposal is currently pending before the Copyright Office.

Mr. GOODLATTE. We still may do a second round.

The Chair at this time recognizes the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

Don't you guys feel kind of bad beating up on the only lady on the panel? I mean, everybody has got exceptions. They don't like this, they don't like that. And Mr. Potter, you have done very well, I must say. Your reasonableness quotient is far higher than Mr. Klein's, so comparing it—you know, in comparison, you are coming off as a very reasonable man.

Now, if you download it and nobody hears it, Mr. Berenson, why do you get royalties?

Mr. BERENSON. The ultimate objective is that people do hear it. In my submission, sir, I indicate what a pure audio download would be. The criteria is set forth. Yes, in those instances we—we, meaning BMI and ASCAP—would not seek to be compensated for the performing right, although there would be a technical performance. But when you have business models that are changing by the hour, sir, that ultimately you can download a song and for a fee hear it three times or four times, then it magically disappears on your computer; you want to hear it again, you pay another $9.95 or $4.95, you can hear it another four times or five times; the purpose of that is to hear the song as well as a copy being made so that you can hear it.

And the concept here is, on the extreme, there is a continuum here. And no one, the NMPA, BMI and ASCAP, say, at the true end no one is asking for a fee. But when you get off the end of the continuum, there are business models which basically incur liability for the performing right and for the mechanical, for the reproduction right.

And it is not unique that there are situations, sir, where you have a user paying for two rights, for the same basically, transmission. As an example, background music services pay a right to make a copy of the phonograph record. They also pay a performance right when it is shipped down to the consumer. Muzak is an example. They pay for two rights. There are situations where a broadcast entity, a network as an example, takes a signal, shoots it via satellite to a television station, an affiliated station; that is also a public performance. When the station then transmits it into your home, that is a public performance, although you as a consumer cannot hear the first public performance.

Mr. CONYERS. Sure. Mr. Potter, reasonable, is it not, Mr. Berenson's response?

Mr. POTTER. When you go to Tower Records over by George Washington University and you purchase a CD, you are purchasing it with the ultimate objective of hearing it, in Mr. Berenson's words. You do not pay a public performance royalty for the pleasure of going to Tower Records and purchasing the CD and bringing it home. If you went to Tower Records—if the United States had not eliminated the record rental rate—the record rental right several years ago, and had you gone to Tower Records and rented that record or that CD for 3 days and brought it home and played it 3 times and then returned it or chose to rerent it for 3 more days, would you not have paid a public performance royalty?

Mr. CONYERS. So, Mr. Berenson, why all the agitation over in your seat?

Mr. BERENSON. Well, firstly, they are not doing business the same way. I mean, no one is saying if you sell records in Tower Records, or you go on the corner and sell them at a kiosk, you are not transmitting anything, you are not publicly performing it. You are selling it; you are distributing it. But they are using technology to distribute and ultimately publicly perform. Again, as in my statement, I gave criteria where there would be a pure audio only download where we feel the performing right would not incur.

Mr. CONYERS. Now Mr. Potter is grimacing. Why?

Mr. POTTER. I am so appreciative of Mr. Berenson suggesting that we are using the Internet to distribute a public performance. There is a right of distribution, there is a right of reproduction, there is a right of public performance. In this context the fact is that the—your DSL line or your cable coaxial or fiber or satellite dish is a replacement for walking down the street to the corner and picking it up and bringing it home. There is no reason to impose a second right, and there is certainly no public performance.

Mr. BERENSON. I guess we could go on for about a day on this, but truly there is a public performance. It is rendered. You do not have to hear it. According to the law, you don't have to hear it, you don't have to see it. It is a transmission to the public. That is a public performance. What the value is under those circumstances is a separate issue.

And BMI and, I know, ASCAP has always said, talk to us, we will talk about value. It may be worth a lot, it may be worth a little, depending upon the usage. But we have a situation where certain entities don't even want to talk to us about what this value is, and they are claiming they want an exemption. Well, it is nice to get an exemption whereby a songwriter foots the bill for these corporate entities.

Mr. CONYERS. Ms. Peters, what do you think of this conversation?

Ms. PETERS. We have been involved in this conversation for a long time. We took a position that where what is delivered from one place to another was a pure download and the transmission was not such that you could, not necessarily that you would, but you could not hear it as it was being delivered, and in that case it was the equivalent of the sale in the record store.

So, if, in fact, at the point that it is being downloaded, you listen to it, we agree that there is a public performance, and there is also a download; but if, in fact, the technology is such that it is the total equivalent of going to the record store, it is downloaded, downloaded, you don't have the capability of hearing it at all, then we would argue that, no, it is not a public performance.

Mr. CONYERS. Now, is this a lean toward Berenson or Potter?

Ms. PETERS. I am not sure. It is probably in the middle, but it may be closer to probably what Mr. Potter said.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

I recognize myself for 5 minutes.

Ms. Peters, Mr. Klein has submitted for the record a number of a letters from a number of law school professors criticizing your report. How do you respond to that criticism?

Ms. PETERS. Actually when I read his testimony and saw a reference to it, we e-mailed him and we asked if we could have a copy of it, which we got yesterday afternoon. I have to say that I was extremely disappointed by the letter. I was disappointed in the analysis that is reflected in the letter of a certain number of intellectual property law professors. I could probably take the rest of the hearing time in telling you why I disagree with or have problems with the analysis, but I won't do that.

I will just—I could give you an example of the problems that I quickly saw as I looked at it last night. One of the examples is the

fact that they basically, in determining what the true congressional intent is for the first sale doctrine, rely on the statement of a single witness, not a Mr. Thomas Parkinson, but a Robert Parkinson who basically representd the ABA, when, in fact, we relied on the Committee reports. I can't believe that congressional intent would really be based on what I would say.

They characterize——

Mr. BERMAN. It isn't even based on what we say.

Ms. PETERS. Another example, they basically call the way that we analyze something as I think counterfactual and sophistic, and the example that they use is actually—I think comes—and basically is not an example of what the forward and delete model is, but, in fact, really is more an example of what the Napster model is where you forward it, but don't delete it. And it really talks about e-mails. And, I think it really stands much more for the proposition that we made of the concern with regard to a digital first sale doctrine. When I do an e-mail, and I am not the most sophisticated person, I rarely delete my e-mail.

So there are a number of issues that are in that letter that I find troubling and disturbing.

Mr. GOODLATTE. Thank you.

Mr. Klein, Mr. Coble asked a question earlier of Ms. Peters regarding the misrepresentation of section 117 on a number of Websites online, and I wonder if you would be willing to work with the Subcommittee on language if it considers legislation to address section 117?

Mr. KLEIN. We would be very happy to work with the Subcommittee on drafting language with regard to 117 provided that it—it is carefully drafted so as not to arouse our concerns that it turn into some sort of, well, we are going to give you this, but we are actually going to wind up taking back more of fair use rights that consumers have. So we have worked with the Committee before, and we would be very happy to do so again.

Mr. GOODLATTE. Do you agree with Ms. Peters' interpretation that when they cited section 117, that they are indeed misrepresenting the law when they offer various downloads of online music?

Mr. KLEIN. I would actually have to look into it. Specifically the law says that a copy lawfully acquired may, in fact, be given away, sold, whatever. That is what the first sale doctrine says. So the question then becomes was it a copy that was lawfully acquired.

Mr. GOODLATTE. Does that mean it can could be given away to a million?

Mr. KLEIN. No. No. No. No. No. If you are talking about digital retransmission over the Internet, we have always said that we will work with anyone to prevent that. We have been working to develop technology that will prevent that.

Mr. GOODLATTE. Ms. Peters, do we need to amend section 117? Is there evidence of harm to consumers or to copyright owners as a result of these sites?

Ms. PETERS. If you are talking about the fact that everybody backs their material that they have on a computer up at the moment, we said we didn't really find any harm. The problem was—and it is not the way Mr. Klein characterized it—that we believe that you can have a digital reproduction that is a fair use, and you

can, in fact, have a distribution that is fair use. But in each case, you do the fair use analysis for the reproduction, then you do the fair use separate analysis for the distribution.

What we found out was if you read section 109 literally, fair use distribution, and you don't stick to the fair use analysis of the reproduction, but instead you go to 109, you find you have a lawfully made copy, and now section 109 on its face, though I don't think its intent, means you could basically transfer it. There is the concern. And one of the ways to handle this without going to 117, as we point out, is to simply amend section 109 to say lawfully made and lawfully distributed.

Mr. GOODLATTE. Thank you. It is my pleasure to recognize the gentleman from Virginia, my neighbor Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Ms. Peters, I wanted again to thank you and your staff for all of the time and effort that you devoted to a rigorous study of the issues that are contained—and suggested that you study—in section 104 of the DMCA. As the author, along with Tom Campbell, of that provision, I think that you have done a generally commendable job.

I find things in your report with which I agree; I find some other things with which I disagree. Let me start with something about which I agree, and that is your proper finding that archival copies qualify as fair use. You correctly point out that the common practice of backing up material that is on a hard drive is prudent and does no harm to copyright owners, and that the practice is fair use.

Let me ask you what I think is a rather intriguing question, and that relates to the intersection of fair use and section 1201(a) of the Digital Millennium Copyright Act, which, as you may recall, punishes any act of circumvention of a technological protection measure which guards access to a copyrighted work. Let me cite a hypothetical. I would like your view of what the legal outcome would be in this circumstance.

You have indicated that archival copying is fair use. Let's suppose that a consumer purchases from a vendor a digital product that is protected by some regime of digital rights management. And let's further presume that this particular purchaser has gone down to the local college book store and bought the T-shirt that has on it the code that enables him to get around this particular digital rights management. As we all know, all digital rights management will be published, and the code to get around will be published in T-shirt form sooner or later. He would like to exercise his fair use right to archive that digital media, but it is guarded by the password or whatever the digital rights management is.

What happens if he chooses to exercise his fair use right by utilizing the code that enables him to circumvent, purely for the purpose of archiving, for no other purpose, whatever?

Ms. PETERS. Are you specifically asking about the program that was found to be an infringement of section 1201?

Mr. BOUCHER. I am just citing a hypothetical. Pick your own real-world example of this, if you like. But the hypothetical is very simple. I mean, the person acquires some data. He pays for it. It is his. It is protected by password. He knows how to get around the password or the other form of digital rights management. He wants

to archive it. If he chooses to exercise that fair use right, which you have declared in this report, to archive it, what happens to him in view of the provisions of section 1201(a)?

Ms. PETERS. The truth of the matter is that the question you asked is something that we face in the 1201 rulemaking that we get to do every 3 years. And as we determined in the 1201 last rulemaking, the issue with regard to the question that you raised really isn't front and center. But with respect to archiving, it is not the access right that really is going to prevent you from making an archival copy of what you legitimately own. If I actually purchase a work that has an access control on it, obviously I have the access to it. And archive copying really is more prevented through a copy control, not an access control.

So you know, the situation that was really presented to us with regard to archival copying wasn't really with regard to access, it really was much more with regard to the copy control of all restrictive licenses.

Mr. BOUCHER. Let me see if I can propound the question very directly. Is it a violation of section 1201(a) if that individual in the circumstance I have described utilizes his knowledge of how to circumvent the measure that guards access to the copyrighted work solely for the purpose of archiving; is that a violation of section 1201(a)?

Ms. PETERS. I would basically say it was a mismatch. You don't circumvent an access control to make an archival copy.

Mr. BOUCHER. So your answer is, no, it is not a violation. That would be very comforting to the people who might be inclined to do this. I appreciate that answer. I am sorry, did I misinterpret you?

Ms. PETERS. I basically thought I was disagreeing with you. So if you think I was agreeing with you——

Mr. BOUCHER. Well, you said it was not a violation of section 1201(a) in that particular instance, circumvent for the purpose of archiving.

Ms. PETERS. No. I basically said it doesn't arise in that context.

Mr. BOUCHER. What doesn't arise?

Ms. PETERS. The only thing with archiving is to make an archival copy, it is making a copy, so the issue is the copy control, not the access control. So from my point of view, the issue of the access control does not arise.

Mr. BOUCHER. Well, Ms. Peters, I think you have confounded everyone in the room with that particular statement. It is, I mean, a fairly straightforward question as to whether or not section 1201(a) is violated in the instance that the person utilizes the knowledge that he has about how to circumvent this particular technological protection measure for the purpose of archiving. So I would simply ask you, yes or no, does he violate section 1201(a) if he circumvents for that purpose, or doesn't he?

Ms. PETERS. My answer is the same. It is that in making an archival copy, the issue is not the access control. The issue is the copy control. What you are doing is making a copy. You need to have legitimate access before you have a right and legitimate possession before you have a right.

Mr. BOUCHER. So you are saying he does not have legitimate access——

Mr. GOODLATTE. Let me interrupt. The gentlemen has exceeded his time by about 2 minutes now. We are going to do a second round, so you can pursue it that way, or Ms. Peters might help everybody involved if she wanted to take the time after the hearing to put her answer to this question in writing. Would that——

Mr. BOUCHER. Mr. Chairman, I think we were about to get to the conclusion. Could I indulge the Committee for 30 more seconds on this? I have some other questions I would like to get to in a second round.

Ms. Peters, what you are basically saying is that the access must be lawful before the fair use right arises; is that what you are saying?

Ms. PETERS. What I am saying is that before you have a right to archive, you really have to have a copy that is lawfully made, and my presumption is that you should have lawful access.

Mr. BOUCHER. The copy was lawfully made at the time it was purchased. It is lawfully on the hard drive.

Mr. GOODLATTE. I don't think we are going to get to this in 30 seconds. You can come back on your second round, or we can get a further answer in writing.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. GOODLATTE. The Chair takes notes of the arrival of the gentleman from Alabama, and I think he has graciously agreed to allow the gentleman from California to go next since he has been here the duration. We are pleased to recognize Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Those of you who don't know me, I sometimes am described as the person who got the Sonny Bono seat on Judiciary. I am not an attorney, but I have done fairly well with the intellectual property that I have been part of producing. So I have a great deal of respect for what I will read as a neophyte: "clause 8, the Congress shall have power to promote the progress of science and useful art by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." .

That is the entire authority. Obviously it has been modified on monopoly laws. That leads to all the discussion, I guess, we have been having here.

I would like to limit my 5 minutes to something simpler, if I could, especially since Her Honor has gotten bottled in between right and law, which is a terrible place to be. You have my sympathy as someone who thinks that right should always trump law and that law should respect rights. And I think quite candidly you made it clear that law may not respect rights in this case.

But going back to the original point that I would like comment on, if I sort of understand the history of this, and I think I got it out of testimony, we are arguing about laws because some of your clients are wanting to get more money in a digital era just as they got more money when CDs came out and became more popular. When we began playing tape and CD and 8-tracks even in cars, there has been a steady increase in the amounts of this music, particularly audio, that has been available, and we have bought more original copies.

Now in a digital age suddenly everyone is saying, wait a second. What was already going on a little bit, and yet we made more money, more money than the year before, may go the wrong way and our clients may make less money, when, in fact, our goal, your goal, is to make them make more money. Is there anyone that sees that as absolutely wrong, that this isn't about how do we get more revenue, not less revenue, and that that is really what these hearings degenerate to in lawmaking?

Having heard none, I will reclaim my time. You got to be quick here. I told you I had the Bono slot.

I would like to hear about how we preserve the consumer's right without allowing a Napster-type rip-off to occur. And those who have solutions for this body, or proposals for this body, that we can codify in law and/or your industries can agree to, that is what I would like to hear, because I think all the other discussion is about how one group can get more or less money. And since I haven't heard much from Mr. Klein, I will start with you and then probably back to the lady who seems to have most of the answers.

Mr. KLEIN. Well, Mr. Issa, I have known you for a while. As you know, the industry that you were once a part of, when you talk about making money, the consumer electronics industry, they lose money on everything they sell, but they make it up in volume. It is the only industry where product prices keep coming down every year, add more features, and consumers get more value for their money.

Our industry only makes money if we can sell product. We can only sell product if there is content available. We have a very symbiotic relationship with the content industry.

Mr. ISSA. So you are happy if there is simply content available for your products.

Mr. KLEIN. Content available for our products and consumers having the ability to use those products with the reasonable and customary expectations that they have come to expect in using the products, which includes a certain amount of fair use in terms of being able to take content that they have lawfully acquired, lawfully paid for, use them from one device to another device to another device, and hopefully our industry sells three devices as content gets transformed from one to another to another.

Mr. ISSA. Okay. That is a simple enough position.

Ms. Peters, if you could enlighten me about how we maintain the status quo as much as possible in light of the Constitution rather than shifting as some people would like to either for or against a given group?

Ms. PETERS. I don't think the goal is to maintain the status quo. The goal is to maintain an appropriate balance between rights of creators and the needs of users.

Mr. ISSA. Yes.

Ms. PETERS. I think that part of the problem that we have seen in the music industry is what we heard yesterday, is that the online services were mostly pirated services, and they were free, and people having a difficult time in trying to put together business models in which the composers and the lyricists and the music publishers and the recording artists and the record companies can all make money.

But the truth is that when you go from an analog environment to a digital network environment, some of the models don't work out exactly the way that they did. The question is what is the best way to transition to that model and make sure that the beneficiaries, the people in the Constitution that you talked about, that we were trying to encourage to create, and the people who disseminate those products, we want them to continue to disseminate them. How do we reach that balance, and how do we get there? As you are saying, it is not easy.

Mr. GOODLATTE. The time of the gentleman has expired.

The gentleman from Alabama is recognized for 5 minutes.

Mr. BACHUS. I thank the Chairman.

I am going to direct this question to Mr. Potter, Mr. Klein and Ms. Peters. The Copyright Act establishes a rather detailed legal framework for copyrights. It grants specific rights to the copyright owner. It also grants specific rights to the copyright user, or another way of saying copyright user, the consumer.

Now, I want to direct you to one part of the report that you made, Ms. Peters, in the copyright thing, the testimony says—the copyright office states that the use of access control technology and non-negotiable contracts, quote, increases the likelihood that right owners—right holders and not the copyright policies established by Congress will determine the landscape of consumer privileges in the future.

Now, let's just say that copyright owners attempt to redistribute the balance of rights in their favor and away from consumers through contracts of adhesion, say, that prohibit consumers from exercising their rights. Would those contracts—number one, would they be illegal or void? And number two, would they be unenforceable because they would be against public policy? And I will start with Mr. Klein.

Ms. PETERS. Oh, good.

Mr. KLEIN. I thought I was here just to make him look reasonable.

Mr. BACHUS. Maybe a short way of saying that we establish a legal framework. We said these are the rights of the respective parties, but the report tends to say that the marketplace not is—is going to——

Mr. KLEIN. That quote, Congressman, is one that we looked at, too. We think that is a legitimate concern, because the so-called click-through and user licensing agreements can, in fact, take away rights that consumers normally expect. In fact, there are CDs you can buy, bring home, put in your hard drive, and all of a sudden a license will pop up telling you that you cannot play this on any other device that you own in your home. You cannot give it to anyone else in your home. If you don't agree with this license, simply put it back in the package, return to the record store. This is actually after you have already purchased it so you think you own it.

The same thing can happen, obviously, when you are downloading, and the question is can—well, contractual rights and copyrights have existed for a long time. Most courts have, in fact, held that contractual—State courts have held that contractual rights will trump copyright law. And rather than use up all your time, I will let the others take a crack at it.

Mr. POTTER. I can't say I am an expert on the subject, especially of contract law and copyright. I did read, I thought, in the last couple of days a judicial decision that ruled that a click-through license did not—was not enforceable. I know this is a mess in the courts on the click-through licenses. And clearly the contract issues that are arising in the context of services and copyrights are something that we are going to be dealing with for a long time to come.

Consumer expectations versus consumer rights is another issue, what has the consumer come to expect. And what the courts said that, therefore, is they actually have the

right—or what the Congress has said, well, we are not going to limit the opportunity because they have come to expect it. I think it all comes back to what Ms. Peters said about balancing the law and balancing the policy.

Mr. BACHUS. Ms. Peters.

Ms. PETERS. The truth is that contract law always was available to the purchaser and the one who was selling, the seller, to modify what is in the copyright law. That is the American way. People can contract away what they otherwise own.

The concern with regard to shrink-wrap licenses and click-through licenses that raised the issue of what you talked about, contracts of adhesion, that body is alive and well, and the issue is, is it a contract of adhesion, was there really a meeting of the minds. I think that that will be alive and well in the future.

Obviously, if something is too much of a balance in the wrong way, so that there is no choice, there is a problem. So what we said was that if, in fact, something is offered a particular way, and everyone somehow gets together and says this is the only way we are all going to offer it, and that is against the policy balance, then there may be some concerns. But we ultimately kind of believe in the marketplace adjusting, and we are hopeful that the reactions of consumers and the needs of consumers get reflected in the licensing policies.

Mr. GOODLATTE. The time of the gentleman has expired. We have about less than 7 minutes left on a vote on the floor, but the Committee will reconvene after a recess to vote.

[Recess.]

Mr. COBLE. [Presiding.] Ladies and gentlemen, I am told that we will have a vote in about 20 minutes, so I hope we can complete our second round prior to that time rather than hold you all here. That would preclude our having to come back.

Mr. Berman, do you have second questions for the second round?

Mr. BERMAN. Okay.

Mr. COBLE. I recognize the gentleman from California.

Mr. BERMAN. Well, to the extent that I can understand it, this is sort of an interesting discussion. Let me sure I understand one thing.

Mr. Berenson, you, BMI, the performing rights societies, is it—I read something that you guys put out as a joint statement about a month ago that said you have to see how these things are used to sort of know what rights are implicated. In the course it seemed like you conceded that a download that is not heard doesn't implicate a performance right. Am I right about that?

Mr. BERENSON. I think there was a commercial that said—not exactly. Not exactly.

Mr. BERMAN. You agree with that?

Ms. PETERS. Yes.

Mr. BERMAN. I am going to find your statement.

Mr. BERENSON. We basically—we set forth where we define and attempt to define a pure audio-only download and set forth criteria where we say at that particular juncture, if that download met those criteria, there would not be a fee requested by the performing rights organizations.

Mr. BERMAN. Just 1 second here. What I remember is in this joint statement of ASCAP, BMI, and the music publishers, I believe you talked about two ends of the spectrum and said at each end there is a quite a consensus as to what rights are implicated and what rights aren't. It is in the middle where you have all these complicated problems. That is what I am trying to get my hands on.

I will spend all my 5 minutes ruminating here if I don't move on, and Chairman Coble has not yet talked about a third round. So let me move to something else here. We will get back to that——

Mr. BERENSON. If you want, it is on——

Mr. BERMAN [continuing]. In the next 5 years.

Mr. BERENSON. It is on page 3 of the addendum. It is footnote number 4.

Mr. BERMAN. Oh, here it is. It is in your—yes, right. At opposite ends of the spectrum, for example, it can be said that the pure audio only downloads should not require payment for the public performing right.

Are you making a distinction between a performance right, public performance right, being implicated and getting paid for it?

Mr. BERENSON. We are saying that while there may be a public performing right implicated, we would not seek a fee for it under those criteria set forth in the footnote.

Mr. BERMAN. All right. You won't concede the right, just the remedy.

So then I go to Mr. Potter, and I say, you talk about in these areas of on-demand inactive digital transmissions, it shouldn't be viewed as a reproduction right, and we ought to adjust the way the public—the performance right is compensated. But if—why can't the CARP ultimately be the decider of what the value is? Let—if there are copies, then there are rights, but if there are copies that have no particular inherent value, then CARP, in a sense—if the parties can't negotiate this out, CARP can decide what they are worth. Why isn't that as good a process for resolving this issue as asking us to try and legislate in what situations a copy is meaningful versus it isn't meaningful? I mean, I am talking very simplistically here, but there is—you get the point of what I am trying to say?

Mr. POTTER. Yes. First, I would propose to you that the Committee and the Congress has made these distinctions in several respects before, specifically in the broadest terrestrial broadcast environment. Broadcasters have enjoyed an exemption, a privilege, to

make an ephemeral reproduction for the purposes of facilitating their broadcasts for 25 years.

Our members compete with broadcasters. They perform music using the Internet instead of using towers. We need to compete on a level playing field. If this Committee would prefer to withdraw the exemption that it has granted to broadcasters 25 years ago, that is a whole other shooting match, and we would probably look forward to that process, but it would be long and ugly, and we all know that.

In the second issue with respect to the CARP, I will tell you that we are now contacting the CARP for sound recording royalties in the context of Internet radio. It has gone on—it is a process that, including procedural motions, has gone on for 3 years. It has cost several million dollars on both sides. And to merely—to suggest, as some of the parties have, gee, we are willing to negotiate, perhaps, a very, very low royalty, but you are going to have to go to a several-million-dollar CARP in order to fight us for that royalty. Or if you are not really going to do a CARP, you are going to have to have the license we give you because ultimately that is the outcome. Or you have got over your head this bludgeon of statutory penalties and some court decisions which candidly have said quite firmly that a reproduction is a reproduction is a reproduction, and it is worthy, and it is an infringement if you make that reproduction.

Judge Rakoff was very clear in his decision last year, and other judges have been the same. It is a question of business certainty, of investment environment, of building an industry that is essentially facing a set of laws which were reasonably developed for the existing technologies. And we are saying if you are in a competitive line of business doing essentially the same thing to the consumer, the consumer is agnostic as to whether he gets it over a pipe, or bounced off repeaters, or through a DSL line. The consumer thinks it is radio. Twenty-five years from now we won't even talk about online radio versus terrestrial. It will just be radio. So what we are saying is provide the same rights and the same obligations.

We are more than happy to pay Mr. Berenson's folks a reasonable royalty based on the new value of the new technologies and the new services.

Mr. BERMAN. Well, Mr. Chairman, my time is up. I will try to seduce you into a third round.

Mr. COBLE. Mr. Boucher, let me make a proposal to the gentleman from Virginia.

Rick, I have questions, but if you could ask your questions within the 5-minute time frame, I will yield to you. If you can't, I will question then recognize you. That will be your call.

Mr. BOUCHER. Thank you, Mr. Chairman. I will stay within 5 minutes.

Mr. COBLE. I recognize the gentleman from Virginia.

Mr. BOUCHER. Mr. Potter, let me ask you if you would, to talk about the circumstance as we find it in light of the agreement that has now been entered into between the Recording Industry Association and parties who represent music publishers, slash, songwriters. We have some provisions in the Music Online Competition Act that relate to a means for the effective clearance of the pub-

lisher and songwriter copyright interests. In view of the fact that there has been some historic difficulty in people who seek to use that material being able to identify who all of the owners of that copyright interest are, and in the absence of being able to identify who they are and give them notice of the fact that their material is to be used and satisfactorily compensate them for it, the user of the material can be subject to suit and to statutory minimum damages. So there is a huge disincentive in the current law and an enormous inability to clear these interests which we respond to by a precise provision in the Music Online Competition Act.

Now, since we introduced our measure in August, an agreement has been entered into between the recording industry on the one hand and parties representing publishers on the other. My simple question to you is where do we stand in light of that agreement? Is it satisfactory in and of itself as a means of clearing the publishing interests? Are there any flaws in it? Is there any incompleteness in the wake of that agreement that still would call for legislation that addresses the means of clearing the songwriter and publisher interest?

Mr. POTTER. It is an excellent question, Mr. Boucher. If I can refer to Ms. Peters' comment yesterday, she made two separate comments. Her first was in her testimony where she said that the Harry Fox-RIAA-NMPA agreement does nothing to change the copyright office analysis in the section 104 report. So we start from that premise.

Secondarily, Mr. Sherman from the recording industry flat out said that they are still having trouble clearing licenses for current songs, which are specifically the songs that consumers want to hear. So, in fact, the new services—and we are thrilled that new services are launching and that they have the opportunity to deliver to the consumers real innovation as well as delivering to the creators real money. But if you can't get the rights, even in the alleged marketplace agreement, then you can't deliver the service, and you can't pay the royalties. So the creators lose, and then they lose again.

In the context of 115 reform, if the copyright office had ample budget authority or ample appropriation to create an electronic system such as has been posited by other Internet companies prior, long prior, to us that—so that you can do bulk licensing and deliver in a zip drive or download 100,000 tracks and get back who are the folks, pay the money, pay it right away, it is a win-win. Nobody loses in that context. The creators get the money; they get it faster. The services launch and then have the chance to build market share and deliver more money back to the creators. That is my understanding of the MOCA provision which relates to 115 that would require electronic filing.

The second piece of that is that it would require there to be an escrow system so that if an Internet music company wanted to pay the copyright owner, but could not figure out who the copyright owner is or the administrator—and Lord knows, the record industry said yesterday they can't figure it out even with this agreement—if we want to pay, let us write a check, let us put it aside, and let us then figure out later how—you know, how to find that

person, but make a good faith effort and actually pay the money into an escrow account.

Mr. BOUCHER. I believe that a statutory provision is necessary in order to carry forward that kind of approach; is that correct?

Mr. POTTER. Absolutely.

Mr. BOUCHER. Thank you, Mr. Chairman. You will be pleased to note I have stayed within my time.

Mr. COBLE. I commend the gentleman. He is true to his word.

Well, I have not had my second round. I will be right with Mr. Bachus. I won't take the 5 minutes.

Mr. Potter, I was going to plow the same field that my friend Mr. Berman plowed. I was going to ask you to elaborate on your members' need to be exempt from liability for server copies and how you—how they are similar or different from broadcasters. I think you responded to that. I would like to hear from Mr. Berenson on that, see if he has a take on it.

Mr. BERENSON. Well, Mr. Chairman, I do have a take on this, obviously. We start with basics. Mr. Potter's clients want to make money, want to go into commercial enterprise on the backs of songwriters, creations, the content. Without it, they don't make any money. They are offering songs.

And with respect to the performing right itself, sir, the United States is an adherent to the WIPO, World Intellectual Property Organization, copyright treaty. When that was developed in Geneva, there was a concern in the Internet world, the on-demand world, whether the public performance right should—public performing right should be implicated in these types of transmissions.

In that treaty to which the United States is an adherent to, it says specifically when a work is "made available," not performed, "made available" on a server, it constitutes a communication to the public which translates to our public performing right. So, therefore, you don't have to hear it, you don't even have to play it, and there is a public performing right that is involved.

We are saying that we have to protect the rights of individual songwriters in this Internet world so that when it is downloaded, when have you a download, as an example of one song into a black box, it is a compressed signal, black box, all you want to do is the minute you hear it, poof, it disappears; that is intended to be a public performance. And I am just saying that what is an exemption would be giving a free ride to Mr. Potter's clients when they want to make money on the backs of the songwriters.

Mr. COBLE. Mr. Berenson, are you all receiving more royalties from online licensing or traditional licensing? I would assume the latter, but——

Mr. BERENSON. Offline licensing basically is the huge, huge lion's share of our revenues. I think in the last year with all the Internet transmissions, all the Internet licenses that we do have, we have basically taken in less than $1.5 million as opposed to $400—excuse me, $540 million. They are not walking up to the plate taking licenses.

Mr. Potter's clients, as I said in my opening statement, don't even want to talk or negotiate value, if any, on a download.

Mr. COBLE. Thank you, sir.

Pardon my immodesty, I want to remind all that I was well within my 5-minute time frame. The gentleman from Alabama very generously agreed to forgo his questioning yesterday, so we will be liberal with you today. You are recognized.

Mr. BACHUS. Appreciate that, Mr. Chairman.

Ms. Peters, let me direct some questions to you.

Mr. COBLE. If the gentlemen will suspend. The gentleman from California says he is a liberal, so he will be recognized subsequently. The gentleman from Alabama is not a liberal. He is recognized now.

Mr. BACHUS. But I want to say I am a liberal if it gets me recognized now.

You stated that the issue of contract preemption is outside the scope of the section 104 report, and you are saying that you are agreeing with that. However, the mandate of section 104 in part was, and I will quote, evaluate the effects of the development of electronic commerce and associated technology on the operation of the first sale document—doctrine. How do you square those two, your position with the mandate to consider it?

Ms. PETERS. First sale, if—well, let me basically say that in looking at first sale, we were looking at the transfer of ownership of a copy. If what you are saying is that by contract, for example, owners of computer software don't sell a copy per se and transfer the ownership, but rather by contract say that, in fact, it is not a sale, then maybe you can look at it that way. But the truth was that we basically were looking at the fact that from the beginning of the first sale doctrine, there were situations where there were rental, leases or lending by contract, and that was acknowledged. So we were just looking at what were considered sales.

Ms. PETERS. And we were focusing on when you sell a work through a digital transmission, what effect that would have on first sale, not that the contract characterized that as the difference between a perceived rental or lease, or the contract basically said it was a sale. We just basically looked at the sales and we interpreted our mandate that way.

Mr. BACHUS. But you agree the mandate was to consider the first sale doctrine?

Ms. PETERS. Yes.

Mr. BACHUS. And the effect of electronic commerce on that doctrine and maybe an erosion of copyright users' rights under that doctrine?

Ms. PETERS. The truth with regard to first sale—the difference with regard to contract or noncontract really isn't necessarily an e-commerce issue, and we were focusing on what is different about e-commerce. The issue with regard to contracts and whether or not someone is an owner of a copy exists in the tangible world, and it exists today with tangible products of software. It exists with regard to tangible products of, you know, motion pictures. So we didn't see it as an e-commerce issue.

Mr. BACHUS. The Copyright Office says that the first sale provision of the Copyright Act is not a right but it is——

Ms. PETERS. No. It is an exception to a right. First sale is an exception to the distribution right.

Mr. BACHUS. Well, I am just reading this footnote 41, but it is an unenforceable restriction on copyright owners.

Ms. PETERS. It is a restriction on copyright owners. It exhausts their distribution right on a sale of a particular copy with respect to their control of further distribution of that particular copy.

Mr. BACHUS. Does your interpretation of the first sale rights make those rights contingent on technological prowess or goodwill of the copyright owners?

Ms. PETERS. It basically is triggered by whether copyright owners actually transfer the ownership of that copy. It goes to the distinction that is actually in section 202 of the law, which is there is a distinction between ownership of a physical object like a book and ownership of the copyright. And what it says is, when the copyright owner chooses to basically transfer the ownership of a physical object, his right to control any further distribution of that physical object is over. So it is triggered by how the copyright owner characterizes the transaction. So if the copyright owner basically is selling the object and transferring title to the physical object, his rights are——

Mr. BACHUS. So you are saying that the copyright owner, their characterization of it——

Ms. PETERS. It is the nature of the deal. This was always—this was an issue way back with regard to motion pictures. When motion pictures were made available and you had 35-millimeter prints that were being made available and they were cycled to theatres, was that in the nature of a sale and a transfer of ownership, or was it in the nature of a lease of the film print, with it coming back? So there have always been questions of is it a sale or isn't it a sale.

Mr. BACHUS. Well, let me ask you this, and maybe I will just sum up. Here is what I am thinking. The Copyright Act, or Congress—or we have bestowed on copyright owners some real protections. I mean without these protections today, somebody could get it off the airways, they could get a song or something or they could take something off TV and they could turn around and sell it many times over. Without a copyright, those who created it have very little protection, and that is not the marketplace. It is sort of like we are saying the marketplace electronic commerce, it overrides consumers' rights under the Copyright Act, and that is just the marketplace. Well, couldn't we say that same thing about copyright owners? If you are going to afford protection to copyright owners, it seems like those rights would be limited by what you bestow on copyright users or the consumers. I mean, am I wrong?

Ms. PETERS. I would flip it the other way, which is if you go to the Constitution and you look at why we have copyright laws, you say it is to encourage creativity, which is in the public interest. And the way that you do that is by granting authors exclusive rights, and because authors need distributors, you actually grant rights through authors to distributors. In doing that because there is a public interest, you are balancing the rights that authors get against the rights, the needs, of users. You are drawing a balance on what do you believe is fair, what is it that you need in order to encourage creators to create, and what do you need in order to

create publishers, distributors, people to make it available? Those are very critical people, and you draw the balance.

What I was saying is with regard to first sale in the United States, in 1909 we followed what had been court cases saying that we believe that when a copyright owner has sold a copy of a work, he has parted with ownership of that copy. We believe the balance is such that the person who purchased it should be able to exercise dominium over that particular copy.

Now, in international treaties, it is up to a different—a country to decide whether or not they wish to limit that distribution right that way or not. In the United States we always have, but even back in 1909 when we added it, the division was not that the copyright owner made the work available, it was that the copyright owner sold it. He basically chose to part company with that copy. And you can say that you should walk away from that as the dividing line, but I think then you have to go back and you have to do the analysis of how does that affect encouraging creativity and encouraging the dissemination of the works? In other words, you have to do the whole balance.

Mr. BACHUS. Yes. I just get back to the fact that saying that contract preemption is outside the scope of this report I think is in error. I think it was anticipated by the Congress that you would look at excess control technology and whether that eroded rights of consumers and——

Ms. PETERS. If what you are saying is technical protection measures that, basically you can argue, enforce contracts, what we found—we did look at that, and what we found at this point in time, those technological protection measures, digital rights management systems, were not at this point in time affecting electronic commerce.

Mr. BACHUS. You said that they may——

Ms. PETERS. They may; but we are saying at this point in time they did not.

Mr. BACHUS. Thank you.

Mr. COBLE. I thank the gentleman. The gentleman from California.

Mr. BERMAN. Just on a couple of issues on what Mr. Bachus raises. I mean, he put it as should electronic commerce be allowed—should copyrights in the context of electronic commerce be allowed to trump the rights of consumers, in effect, or obliterate or substantially diminish them. You pointed out you can flip it around. The question is, should the existence of new technologies essentially wipe out and vitiate any value in copyright? And, I mean, that that sort of is what underlies this whole big fight.

Everybody is very worried about what is going to happen. You go and you take a look at the first sale doctrine and you conclude in this new technology world there is still a first sale doctrine. By the way, it ain't hugely important. Part of the reason why there was never a first sale doctrine is because it wouldn't have much commercial consequence. But now, of course, in a world of digital transmissions, depending how you look at it, it could have a huge consequences.

What people had with the first sale doctrine, they haven't really lost much of. But, by the way, there are potentials for the original

owners losing it. But the whole debate about ownership, I mean it is all—where you start is sort of where you end up. If you weren't selling it, if you were licensing a use of software, then you weren't selling the software. So the first sale doctrine never came into play and there is nothing that compels you to sell it rather than to license its use, it seems to me, so a lot of this I do—you can argue it both ways, on both sides.

To Mr. Potter, when you negotiate licenses, your guys get licenses; you have gotten licenses from music publishers, right?

Mr. POTTER. Some of our members have negotiated directly with the publishers. Some of our members have signed the licenses proffered by ASCAP or BMI or SESAC, and some of our members have merely requested a license which, as a matter of, law makes them licensed. And several of the members, the most sophisticated ones, frankly, have not signed these licenses which include the imposition of rights that really don't exist or that should not exist. Instead, they have just requested the licenses and therefore become licensed as a matter of law.

Mr. BERMAN. What are they paying you for those licenses?

Mr. POTTER. I am not privy to what they are paying. If they requested it as a matter of law, then I presume they are engaged in negotiation and we don't know the answers yet.

Mr. BERMAN. Is there some separate line item for the buffered copy in these license agreements?

Mr. POTTER. In the BMI license which is attached to your package it says, "This agreement shall only include public performances in the territory of musical works by transmissions over the Internet received by a personal computer or by means of other device, capable of receiving through the Internet through streaming technologies as well as those transmissions that are downloaded by persons on personal computers or otherwise." "As well as." the downloading has nothing to do with whether or not there is a simultaneous performance.

So what you get off of the BMI Web site, it is the form license. In their definition of the grant of rights, they are saying you are being granted the right to download. A public performance royalty administration collective is granting me the right to something that they don't have the authority to grant me. I would be happy to go to Harry Fox for that right to download. In fact, my guys do go to Harry Fox for that right to download. They don't want go to Harry Fox for the right to stream.

Mr. BERMAN. The fact that they granted you a right that you don't think they have to grant you, having said that, so what?

Mr. POTTER. If the marketplace were to accept the imposition of that right from that party and create a standard in the industry, a standard that could be used against one in a court of law, if someone chose not to take that right, if one was to accept the certain rights or try to negotiate out of that right, a publisher could sue based on the mere existence of it.

It creates a legal liability, a legal uncertainty, by an arguably expert and longstanding respectable organization, and an uncertainty which is pervasive throughout the industry and which investors are quite knowledgeable about and which is used against us in negotiations when we want to get the royalty. If you cut a royalty deal on

the rights you want, they say, well, you have to do it; but here is the license, and it includes the rights that you don't want. I don't want to pay for the rights that I don't want and don't need. I want to pay for everything that the creators do for the rights that I use.

Mr. BERMAN. Mr. Berenson, you wanted to respond?

Mr. BERENSON. One quick comment. The reference by Mr. Potter to the BMI license agreement does not in any way, shape, or form give his client a reproduction right in the download. It is what we maintain is a public performing right in the download. As I said, there is a spectrum. Each end of the spectrum is easy. When you get in the middle, we are saying there is a public performance right that is implicated in these downloads. That is what we are covering by this license agreement.

Mr. POTTER. I agree. And the Register of Copyrights, the report says even if there is a legal technical performance under current law in a download, there shouldn't be. And the Register of Copyrights proffered to Congress a recommendation that, yes, even if Mr. Berenson is right, he shouldn't be right, and the law should be changed. And that we support emphatically.

Mr. BERMAN. Well, I think you probably would like to close——

Mr. COBLE. I don't want to cut you off.

Mr. BERMAN. No.

Mr. COBLE. Mr. Berenson, you were chomping at the bit, as we say in the rural South, and I will happy to let you chomp for a second or two.

Mr. BERENSON. I think I am chomped out. Mr. Potter and I go back a few years, and we could go at this together, and it is really just an issue is there a public performing right. We say yes and he says no. As I said before, the WIPO treaty says there should be. And that is all—I don't want to repeat over——

Mr. COBLE. Folks, this voyage will continue. We have not reached our port of call. We are still underway.

Did you want to say one more thing?

Mr. BERMAN. Would you indulge me one more time?

Mr. COBLE. Sure.

Mr. BERMAN. I forgot one thing I wanted to ask you. How do we compete with the broadcasters, you said, when we have got all this stuff and you have that preferential situation created by law for broadcasters and their right to make server copies; but in the real world isn't everything going to go your way? Why, traditionally, you can have in Webcasting, you are not geographically limited, even in noninteractive Webcast you can have so many different channels, and I am told you even have the ability to monitor how somebody listens to music and what they listen to and almost to tailor their own personal portfolio based on what you think they might like. And you have all these things that traditional over-the-air broadcasting doesn't have, even when it is transmitted digitally, so shouldn't you be a little more optimistic about the future instead of being so obsessed with this little provision, let us have them make server and backup copies?

Mr. COBLE. We are getting ready to shut down, so brevity——

Mr. POTTER. I appreciate that, Mr. Chairman. I appreciate your prognostication and I hope it comes to happen. The single greatest threat to this industry is the inability to clear publishing licenses.

It is, in fact, server copies that grabbed MP3.Com. It is server copies that grabbed Universal Music when they got sued by the music publishers. Those folks were paying performance royalties.

So at the end of the day, the question is where are the inhibitions to the development of this potentially significant industry? And as this Committee heard from several members of the recording industry including, yesterday, Mr. Sherman, there is an inability to clear licenses to pay publishers, to pay creators. If ASCAP, BMI and Harry Fox want to merge and if the antitrust division and others want to give them the exemption that they need to do that, and we can create a unitary license and write one check, and let them decide who gets to administer which piece of that so it can go back to the same publisher, we are happy to have that occur.

Mr. COBLE. I reiterate, the voyage continues. Folks, we have gone far afield up here and out there, and I have permitted that. There is nothing wrong that.

But Mr. Potter had the final word, and I invite each of you, if you want to respond to his final word in writing, we will be happy to accept that.

And in the spirit of the season, we are about to adjourn this road show. On behalf of Mr. Berman and the entire Subcommittee, I want to wish you a Happy Hanukkah, Merry Christmas, and good wishes for a happy and prosperous 2002. This concludes our second day of oversight hearings on the Digital Millennium Copyright Act Section 104 report. The record will remain open for 1 week.

Thank you, and the Committee stands adjourned.

[Whereupon, at 12:31 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Thank you Mr. Chairman for holding this very important hearing on the subject of the Copyright Office report provided to Congress pursuant to Section 104 of the Digital Millennium Copyright Act (DMCA).

Over the past few years, we have seen the Internet explode into a revolutionary tool for business, communication, education, and commerce. Even so, the Internet is still in its infancy, and we are still struggling to determine how and when we should apply our existing laws to this new and growing medium.

Intellectual property is the creative core of the information age. Ironically, the technology driving these advances now poses a threat to that very content. If we are not careful, the way the new technology is used could eliminate the innovation that is the source of so much excitement.

Copyright protections have been central to America's prosperity and economic development for centuries. American movies, books, computer software, television and music are among our most successful exports. They are our most powerful influence on the rest of the world. U.S. industries depending on copyright protection employ nearly 4 million workers, producing over $65 billion of our exports—more than agriculture and automobiles. Congress must stand firm in its commitment to ensuring that our copyright laws provide adequate incentive for copyright holders to distribute their works over the Internet.

There is no question that the Internet provides great opportunities to consumers and the people who earn their livelihoods writing, performing and distributing copyrighted works. At the same time, the Internet poses enormous challenges because files can be copied and distributed around the world wide web at the touch of a button.

The recognition of an author's ownership of creative original work is one of our legal system's core principles. If we allow people to take that work without paying for it, artists will no longer have any financial incentive to create new movies, software, video games, books and music.

Adapting long-established law to new technologies is often difficult. The Digital Millennium Copyright Act was enacted 3 years ago. For the first time, copyright protections were effectively and explicitly extended to the web and digital content. The DMCA accomplished a number of important goals to take account of copyright protection in the digital era: it ensured legal protection and created legal remedies to address the circumvention of copyright protection measures. However, the DMCA is already being challenged by the onrushing pace of technology. That is why the Section 104 report of the Copyright Office is so crucial to providing some clarity to the application of the DMCA in this quickly evolving marketplace.

I believe that Congress has an important role in monitoring the marketplace to ensure that new business models are developed in a timely manner to provide legitimate delivery systems that will meet the needs of consumers and still afford copyright protection to the author of that work.

Recently we have seen a number of positive developments such as the agreement between the RIAA, the National Music Publishers Association and the Harry Fox Agency regarding a framework for licensing subscription music services. In addition, we have seen the launch of a number of new music delivery systems that offer consumers legitimate options for utilizing the Internet.

However, while the Section 104 Copyright Office report concludes that our existing laws are working and that an overhaul of copyright law is not warranted at this time, Congress has a responsibility to carefully review the recommendations of the Copyright Office and to determine whether our copyright laws are keeping pace

with new technology. I look forward to the testimony of our witnesses over the next two days and to fully examining the conclusions of the Copyright Office as well as some issues that were not addressed by the Copyright Office in its Section 104 report.

PREPARED STATEMENT OF NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

INTRODUCTION

The National Association of Broadcasters ("NAB") appreciates this opportunity to submit written testimony concerning issues affecting broadcasters that are addressed by the Copyright Office in its report required in compliance with Section 104 of the Digital Millennium Copyright Act ("DMCA").

Hundreds of NAB's members are or have "streamed" some or all of their broadcast signals over the internet. Streaming has been particularly prevalent among radio stations that have streamed their signals simultaneously with the over-the-air transmission of those signals. These streaming activities include, of course, the transmission of sound recordings and underlying musical works embedded in those sound recordings. Numerous copyright issues have arisen in connection with these streaming activities including, but not limited to, whether or to what extent additional copyright liability is, or should be, incurred by broadcasters with respect to various alleged public performance and reproduction rights, both in the sound recoding and the underlying musical works. Some of these issues, such as whether the simultaneous streaming of broadcast signals is subject to a performance right in sound recordings, and the rate music performing right organizations should receive for streaming of radio signals have been publicly and vigorously debated. (*See Bonneville v. Peters* (ED.PA); Radio and Records 11/29/01 "BMI Industry Groups Agree On Fees"). Other issues, such as potential or alleged broadcaster liability to music composers and publishers for mechanical licenses for radio webcasting have, so far, remained relatively moribund. (*See* Testimony of Carey Ramos on behalf of the NMPA, December 12, 2001, at p. 2 "For radio-style webcasting, we have agreed not to seek mechanical licenses."). But individually and collectively, the uncertainty these issues have caused, and the potential liabilities they raise have, unquestionably, had a "chilling" effect on broadcasters' ability and willingness to communicate with the audiences they were licensed to serve through the streaming of their signals. Having identified just some of the many copyright issues confronting broadcasters desiring to stream their signals, NAB realizes this hearing is neither the time nor the place to resolve them all. NAB will therefore limit its remarks to those issues impacted by the Copyright Office's Section 104 Report.

Temporary Incidental Copies of Sound Recordings and Musical Works Created As a Part of The Streaming Process Should Not Give Rise To Liability

A. Background

Twice in the past six years, the development of digital technologies has prompted Congress to revise the sections of the Copyright Act that govern rights in both musical works and sound recordings. Congress intended to effectuate these reforms "without upsetting the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. No. 104–128, at 13 (1995).

Under these "long-standing relationships" broadcasters, historically and traditionally, have paid music composers and publishers for the right publicly to perform (by broadcasting) their works and have not incurred liability for the public performance of the sound recording. Since 1976, pursuant to Section 112 of the Copyright Act, broadcasters who are authorized to transmit to the public performances of these musical works have, upon compliance with certain conditions, been authorized to make "ephemeral" copies and phonograms of works that were incidental to the licensed or otherwise authorized public performance of these works. In other words Congress has recognized that, having paid for, or otherwise obtained authorization to publicly perform these works, Congress determined that broadcasters should not have to pay again for reproductions that have no economic value independent of the public performance reproductions incidental and necessary for accomplishing those public performances.

Turning now to the streaming of broadcast signals, the streaming technologies employed by FCC-licensed broadcasters generally involve the use of a temporary memory buffer to accumulate and correctly order data packets (each containing snippets of data) in order for the work to be performed in a continuous listening experience at the user's computer. Notably, streaming software installed on the

user's computer is not designed to enable the streamed content to be used or available to the user once the stream is completed. The user's experience is not different than listening to a traditional radio broadcast.

The streaming of their signals, and the performance of works they are otherwise authorized to publicly perform may also necessitate broadcasters to make "server copies." Because there may be many listeners desiring to tune into a station's streamed signal, the internet service providing the streaming may need to make multiple copies of the station's signal, including works imbedded in the signal, to place on computer servers. As with the buffer copies, these server copies are merely incidental to the underlying reason why broadcasters license works—which is to publicly perform them by broadcasting.

B. Copyright Office Report Recommendations on Temporary Copies

1) Buffer Copies

In its Section 104 Report, the Copyright Office concluded that a "strong case" could be made that the making of buffer copies in the course of streaming was "fair use." It also correctly concluded that "the case-by-case fair use defense is too uncertain a basis for making rational business decisions." (p.141). Accordingly the Office recommended that:

> "Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work." (*Id.*, p. 142–143)

The Copyright Office's rationale for this recommendation is compelling:

> "The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance of these works. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology replicates the reproduction right and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right.
>
> The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place—to the detriment of other copyright owners, webcasters and consumers alike—or to extract an additional payment that is not justified by the economic value of the copies at issue." *Id.* at p. 143

Indeed, the Copyright Office found a "close analogy" between the "present circumstances" relating to the proposed exemption for buffer copies and the historical broadcaster exemption for copies under Section 112:

> "Ephemeral recordings are copies that are made and used by a transmitting organization to facilitate its transmitting activities. Congress saw fit to exempt those copies when the transmission is either made under license (including the compulsory license for webcasting and subscription digital transmissions) or under an exemption from exclusive rights (as in the case of analog public performances of sound recordings). As with temporary buffer copies, ephemeral recordings are made for the sole purpose of carrying out a transmission. If they are used strictly in accordance with the restrictions set forth in Section 112, they have no economic value independent of the public performance that they enable." *Id.* at p. 144.

2) Server Copies

While not addressing directly the issue of server copies, the Copyright Office rationale for exempting buffer copies would apply with equal force to server copies. Like buffer copies, server copies are temporary, have no independent economic significance, and are incidental and made solely to enable the public performance of the works through broadcasting. Accordingly legislative clarification is also needed to exempt server copies from liability.

Copyright Office and Digital Media Association ("DiMA") Assertions That Congress Intended Webcasters and Broadcast Streamers To be Treated "Equally" Under The Copyright Laws Are Wrong: There Are Critical Distinctions Justifying A Broadcaster Exemption

While NAB concurs with much of DiMA's testimony on the reasons why temporary copies of musical works and sound recordings created as part of audio

streaming should not create additional copyright liability, we strongly disagree with DiMA's premise that were Congress to decide to create exemptions just for broadcasters, there would be no sound basis for doing so.

In its oral testimony, DiMA echoed a false and erroneous premise asserted by the Copyright Office to the effect that there is "no justification for the disparate treatment of broadcasters and webcasters regarding the making of ephemeral recordings" (Copyright Office Report at p. 144 n.434). There are, in fact, significant justifications for such disparate treatment and Congress itself has specifically recognized them.

First, a fundamental premise—apparent on the face of the DMCA and from decades of legislative history—is that Congress has elected to maintain the mutually-beneficial relationship among the radio broadcasting industry, the authors of music and the recording industry, a relationship whose benefits remain identical whether the FCC-licensed broadcaster transmits its programming over the air or over the internet. Internet-only retransmitters—who themselves are not subject to FCC licensing restrictions, who have not created the programming that is so beneficial to the recording industry and have not been part of the balance among these industries—stand on a different footing.

The legislative history of the DPRA is replete with references to the desire of Congress not to adversely affect the historic symbiotic relationship between the record and radio broadcast industries, and reinforcement of that policy only as applied to broadcasters in what one will find in the DMCA legislative history.

Why would Congress treat AM/FM radio streamers differently from internet-only webcasters? First, and foremost, the radio broadcast industry had a decades-long history of promoting record sales and no evidence of depleting sales from off air copying, whereas internet-only webcasting was a new industry with no proven track record as to its impact on record sales. Second, radio broadcasting is a highly regulated industry—whose programming must satisfy the detailed FCC requirements to serve the local communities in which they are licensed to broadcast over-the-air, whereas the internet-only webcasters are free to operate without any regulatory restraints. Third, AM/FM radio streamers have a very different product than webcasters. The former have a single channel whose programming—by FCC regulation—must include a number of elements geared to the local community in which they operate. Internet-only webcasters, on the other hand, typically operate numerous channels—in some cases more than 100 channels—presenting a very broad variety of discrete genres of music appealing to audiences literally world-wide. Thus, AM/FM radio broadcasters view streaming as simply another means of reaching their unique local audience, whereas internet-only webcasters target a much more diverse, national if not global market.

In sum, AM/FM radio streamers and internet-only webcasters largely may be viewed as being in different businesses, albeit using similar technology to reach their consumers. Therefore, Congress could have every reason to see them as being distinct industries that do not require the same treatment under the Copyright Act.

CONCLUSION

If copyright law is to move smoothly into the new Millennium and onto the internet, it must be construed in accordance with a common-sense view of economic reality. Historically, the bundle of copyright rights matched the different means by which a work could be exploited. Thus, the making of a public performance required a license to make the performance; the reproduction and distribution of copies required for licenses for those rights. In the rare cases where a single economic activity incidentally required the exercise of multiple rights, the law either provided an exemption (e.g., the section 112(a) ephemeral recording exemption for copies made solely to facilitate performances) or the existence of a single licensor and licensing regime obviated any inefficiency, and led to a unitary payment to a single payee.

Such construction makes economic sense. When the economic activity is a performance—in other words, the transmission of a work in real time in order to provide a real-time listening experience for the recipient—and that performance is licensed, the copyright owner is fully compensated for the use of his or her work by the fees it receives for the performance. The mere fact that the technology chosen to make the performance, or the device that receives the performance, incidentally operates by making "copies" of all or parts of the performed work in order to effectuate the performance adds no value to the recipient or to the transmitter; it should not create added liability. Any other approach would cause mass confusion, inhibit the providing of new, desirable services to consumers, and result in unwarranted double-dipping by the same copyright owner for the same use of the same work.

Nowhere are the problems of multiple rights and attempts to double dip more clear than in the case of recorded music. Any entity that wishes to create a service

based on the use of recorded music faces an inscrutable morass of multiple copyrighted works, multiple copyright owners, multiple agents authorized to license different rights in the same work on behalf of the same owner, and multiple, and often inconsistent, legal rules and systems governing the licensing of those rights.

Any decision by Congress on the issues presented in this proceeding must take into account the economic purpose and technical realities of the conduct at issue. When a performance of a musical work or sound recording is licensed or otherwise authorized, the copyright owner receives full compensation for the use of his or her work in connection with that performance. That should end the matter.

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United States House of Representatives
Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary

Hearing on Digital Millenium Copyright Act Section 104 Report
December 12 and 13, 2001

TESTIMONY OF LIQUID AUDIO, INC.

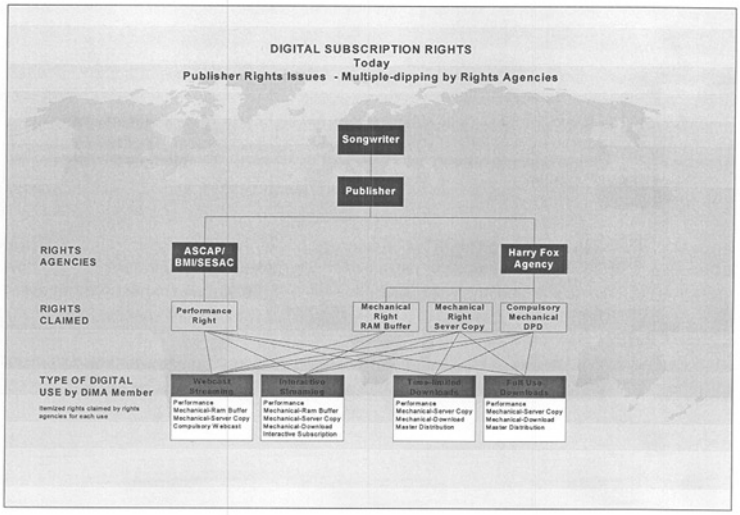
Mr. Chairman, Representative Berman, and Members of the Subcommittee:

I am Gerry Kearby, CEO of Liquid Audio, Inc. and a member of the Digital Media Association ("DiMA"), which represents the interests of the online media industry. We at Liquid Audio wish to provide this brief written statement in support of DiMA's testimony concerning the Section 104 Reports of the Copyright Office and the National Telecommunications and Information Administration. We believe that Congressional support of these recommendations and resolution of the issues are critically important to the survival of companies like Liquid Audio and other DiMA members, and to promote the fair competitive development of the online music services for the American consumer. I hope to summarize our viewpoint with the following two diagrams illustrate respectively:

- THE PROBLEM: The current set of complex problems we encounter in attempting to license rights from rights agencies. Notice that for each single form of Internet music distribution, rights agencies claim three and sometimes four royalties

- THE SOLUTION: The US Copyright Office Recommendations which Liquid Audio and DiMA support.

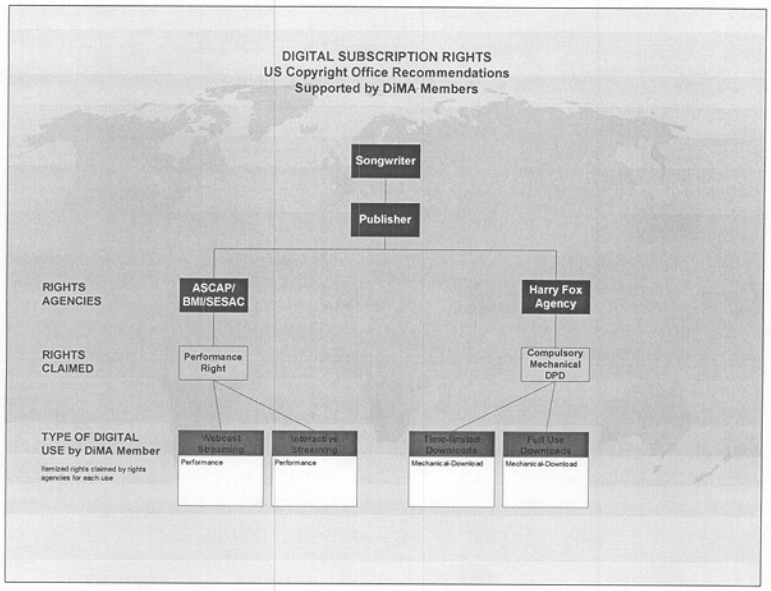
Diagram 1 - The Problem



THE PROBLEM

- Rights Agencies' claim of multiple royalties for each type of Internet music distribution has hindered the development of online music market.
- NMPA/HFA has unfairly claimed that multiple royalties for server and distribution copies are due on the single download of a music file.
- NMPA/HFA has unfairly claimed that multiple royalties for server and distribution copies, as well as RAM buffer memory are due on a single Internet music stream, in addition to the performance rights claimed by ASCAP, BMI and SESAC.
- ASCAP, BMI and SESAC have unfairly claimed that performance royalties due on the single download of a music file, in addition to the mechanical rights claimed by NMPA/HFA.
- Due to the impossible rights cost and complexity caused by this "double-dipping", Liquid Audio has abandoned two technologies for which it spent millions of dollars and years to develop:
    - Time-limited download technology
    - Interactive streaming technology

Diagram 2 - The Solution



THE SOLUTION

The second diagram illustrates the simple common-sense approach recommended by the US Copyright Office

- Liquid Audio agrees with the US Copyright Office that Internet companies should only have to pay performance royalties for streaming. This is a logical extension of the current performance right to the online market.
- A single compulsory mechanical royalty should be paid for each download only. This is a logical extension of the current compulsory mechanical right to the online market.
- Server copies, cache and RAM buffer memory do not constitute separate mechanical rights. They are technological necessities in order to facilitate the single economic acts of downloading and streaming respectively.
- The US Copyright Office recommendations for Internet music accurately and logically extend the simplicity and wisdom in the US Copyright law as intended by US Congress.
- Congressional support of the legislation proposed by the Copyright Office would solve many of these problems.
- We recommend Congressional support of the Music Online Competition Act,

H.R. 2724, as a reasoned way to implement many of the recommendations of the Copyright Office's Section 104 Report.

CONCLUSION

In conclusion, we thank Chairman Coble, Mr. Berman and this Subcommittee for scheduling hearings on the Copyright Office Report. We therefore urge this Subcommittee to implement these recommendations, and in so doing, to carefully consider the approach and additional provisions of the Music Online Competition Act.

Thank you.

PREPARED STATEMENT OF DOUGLAS LOWENSTEIN

THE ENTERTAINMENT SOFTWARE INDUSTRY

The Interactive Digital Software Association (IDSA) is the trade association representing publishers of entertainment software for video game consoles (Microsoft's X-Box, Nintendo's Game Cube, and Sony's PlayStation), personal computers, handheld devices (Game Boy) and the Internet. Our members' products and businesses are vitally dependent on the strongest possible copyright protection and vigorous worldwide intellectual property enforcement. IDSA member companies collectively account for more than 90 percent of the $7 billion in entertainment software expected to be sold in the U.S. in 2001, and billions more in export sales of U.S.-made entertainment software. A study released last year on the economic impact of the interactive entertainment software industry showed that demand for video games stimulated $10.5 billion in economic activity in 2000; on top of that, the industry generated employment for 219,600 persons in the U.S. alone, who earned wages of $7.2 billion and paid $1.7 billion in federal and state taxes. Wall Street analysts forecast that industry sales will approach $16 billion within five years, and a recent article at CNET News.com concluded, "No segment of technology expects more expansion in the near future than the game software industry."

IMPORTANCE OF STRONG COPYRIGHT PROTECTION

IDSA member companies depend upon strong copyright protection and enforcement for their works of authorship and they conduct active enforcement campaigns against the worldwide scourge of entertainment software piracy. Piracy in all its forms is the single greatest threat to the continued impressive economic expansion of the entertainment software industry, and to an even more robust world of online game content. Packaged goods piracy last year resulted in the loss of at least $2 billion in sales on a worldwide basis, and the actual losses almost certainly exceed $3 billion. When you add the Internet to the mix, the numbers balloon even more, though by how much it is impossible to estimate.

We do know that at any given moment, our member companies' works are being made available illegally through thousands, perhaps even tens of thousands of websites, FTP sites, chat sessions, and through the use of file sharing utilities.

By taking advantage of the tools provided by the DMCA, IDSA has succeeded in taking down over 5,000 pirate sites in the last year alone, and a recent electronic search has uncovered more than 3,000 sites offering counterfeit game products for download in just the last four weeks. As effective as these measures have been, they can only be applied on a case-by-case basis and after the fact—after infringing product has already been made available for unlawful distribution on a worldwide scale. Our industry has a huge and direct stake in any proposals to tinker with the DMCA, a law we rely on to stop the rampant piracy of our works.

THE SECTION 104 STUDY

Section 104 of the DMCA called for the Copyright Office and NTIA (the National Telecommunications and Information Administration) to carry out a joint evaluation and report on the impact of certain kinds of legal and technological developments on the operation of two specified sections of the Copyright Act. In March, 2001,

NTIA released a report separate from the Copyright Office, concluding it would be "premature to draw any conclusions or make any legislative recommendations at this time with respect to either Section 109 or 117."

In August, 2001, the Copyright Office released its report to Congress. IDSA strongly supports the conclusions of the Copyright Office with respect to anti-circumvention and digital first sale issues, and we appreciate the sound legal and policy analysis underlying them. On the other hand, we have shared with the Copyright Office our view that the report should have also addressed more definitively the most significant issue facing the video game industry: the rampant practice by online pirates of misquoting and misinterpreting the "archival copies" provision of copyright law (17 U.S.C. § 117) to legitimize the illegal business of making "back up" copies available to the public. While we believe this issue clearly falls within the boundaries of Congress' request of the Copyright Office, the Copyright Office did not address its. And while the Copyright Office has indicated it shares our views on this particular Section 117 issue, the decision not to confront it directly in the Report compels us to ask Congress to take the necessary corrective steps.

SECTION 117: BACKGROUND

The basic provisions of Section 117 were added to the Copyright Act in 1980, and provide a limited exception to the exclusive right of reproduction of a computer program. The exception to allow so-called archival or back-up copying of a computer program, without the permission of the copyright owner, is set forth in Section 117 (a), which provides in relevant part—"Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of a computer program provided—

. . . (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

It is clear that the creation of Section 117(a)(2), and the intention of Congress in enacting it into law, were greatly influenced by the state of computer technology at that time. In the late 1970s, the personal computer was in its infancy, and computer programs were embodied in media such as punched cards, open reel magnetic tape, and increasingly in the innovative magnetic disk format called a floppy disk. Hard disks were not yet widely in use, and so programs were run more-or-less directly from floppy disks—disks that were highly prone to electrical or mechanical failure, or to demagnetization from a number of sources. Computer systems were much more vulnerable to malfunctions than they are today, and the accidental erasure of a program was a real danger, especially when the computer was being operated by an inexperienced user. Hence the need for Section 117(a)(2), which enabled the owner of a copy of a program to make an archival copy of his original without having to seek the permission of the copyright owner.

The technology-specific reasons underlying Section 117(a)(2) also account for the narrow scope of the exception it creates. Section 117 (b) provides that archival copies made pursuant to Section 117(a)(2) may only be transferred along with the master copy, and "only as part of the lease, sale or other transfer of all rights in the program." Section 117(a)(2) itself requires that all archival copies be destroyed whenever "continued possession of the [original] computer program should cease to be rightful."

Put another way, the existence of a secondary market in so-called "back-up copies," or in equipment or services purportedly intended to be used to make or to use such copies, is completely antithetical to the specific language of § 117(a)(2), and totally alien to the technological assumptions which underpinned its enactment.

§ 117: THE CURRENT LANDSCAPE

Today, however, we encounter a much different reality than when Section 117 (a)(2) was enacted.

First, computer programs for the mass personal computer market are commonly distributed in formats such as CD-ROM which are themselves intended to serve as archival copies. The working copy, which is loaded onto the hard drive of the user's PC, does not need to be refreshed or re-created each time the user wishes to run the program. When it is necessary to re-install the program, the CD-ROM or similar copy which the user acquired in the first place remains conveniently available to him or her. Furthermore, while the type of "mechanical or electrical failure" of the 1970s—or its 21st century equivalent, the system crash—still occurs, the user does not need to make an archival copy in order to be ready to recover from it; the originally acquired copy serves that purpose.

In the case of game playing over the Internet, the technology often does not require that the end-user ever come into possession of a complete copy of the computer program in order to play the game. Thus, since the Section 117(a)(2) exception can only validly be exercised by (or at the direction of) the owner of a copy of a computer program, the essential factual predicate for its use is missing, and the exception may never apply at all.

Secondly, by and large the courts have interpreted the boundaries of the Section 117(a)(2) exception rather strictly. Although at least one court has taken a somewhat broader view of the range of risks against which the making of an archival copy may legitimately provide protection, none seem to have countenanced trafficking in so-called "archival copies" or in the tools for making them.

Despite these developments, however, § 117(a)(2) is being widely claimed as a shield for copyright piracy, especially in a medium for the dissemination of copyrighted material (in both legitimate and pirate versions) which the drafters of § 117(a)(2) could not have anticipated: the Internet.

THE ENTERTAINMENT SOFTWARE INDUSTRY: FACING A "BACK-UP COPY" EPIDEMIC

Despite the historical mismatch between the current Section 117 and modern computing practice, and the lack of any judicial precedent for expanding the scope of Section 117(a)(2), the Internet is replete with sites purporting to offer "back-up copies" of videogames containing computer programs, or of the means for making them. Many of these sites specifically refer to Section 117 as providing a legal basis for their operations (please see Attachment 1) and actually reproduce the statutory language of Section 117, thus making the phrase "Section 117" or any suitable string of the statutory language an effective search term by which one can locate pirate sites on the Internet.

Other sites (please see Attachment 2) purport to provide a legal "backup" service legitimized by proclamations such as "[b]y purchasing a backup you are claiming that you currently own the original cd. If you sell or lose the original cd you must destroy the backup . . . Do not inform me if you plan to use these CD-R backups illegally. By complying with these regulations, it allows me as a service provider to duplicate and you as a consumer to receive the right to use backups to protect your original software."

Still other sites depart even more incredibly from the letter and intent of the law to suggest the existence of a "backup trial period" authorized by Section 117 and the Copyright Act. The website in Attachment 3 suggests that "[i[f you do not own the Original you may purchase a Back-up for evaluation purposes. You have 24 hours to Evaluate the game. In which time you may keep the Back-up Disc(s) if you go out and buy the original. If you don't decide to Purchase the Original within that time period you may be breaking Copyright Laws in your Area, and must Destroy the Disc(s). "

Of course, the operators of these sites are not offering copies of which they are the rightful owners, nor are they offering to distribute the "back-up copies" along with the originals in an all-rights transaction, as Section 117(b) requires for any transfer of a copy made pursuant to Section 117(a)(2). Nor do these sites restrict themselves to the distribution of copies of computer programs, which are the only kind of copyrighted work affected by Section 117(a)(2); their inventory extends, for example, to audio-visual works embodied in videogames, to which the archival copying exception clearly has never applied.

What these sites are offering, simply, is pirate copies of entertainment software and other products containing copyrighted computer programs. Some might say this conduct is so clearly illegal as to not be a cause for concern. However, pronouncements such as these are so prevalent that they take on a legitimacy as urban legend. Online sellers and traders refer to Section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction—a download of pirate product—might in fact somehow be lawful. They exploit the statute, in other words, not as a legitimate defense to infringement, but as an enticement to engage in piracy.

LEGISLATIVE REMEDY REQUIRED FOR BACKUP COPY ABUSES

Despite evidence of widespread piracy utilizing the Section 117 loophole, piracy equating to billions of dollars in losses to the U.S. economy, the Copyright Office did not take advantage of the opportunity to use its bully pulpit to explicitly declare that the practices we cite are illegal, nor did it recommend legislative changes to make absolutely clear that the "backup copy" right does not include the activity we describe herein.

In our view, developments have made it clear that the impact of emergent and existing technology justified narrowing the language of Section 117(a)(2), such as by making it clear that the provision does not allow a free-standing market in so-called "back-up copies," and that it only covers the copying of computer programs to the extent required to prevent loss of use of the program when the original is damaged or destroyed due to electrical or mechanical failures.

Such an adjustment would not only accurately reflect the changes wrought by two decades of technological advancement, but would also promote legitimate electronic commerce. Perhaps most importantly, it would eliminate much of the confusion created in the minds of some users by those who justify their piratical activities by reference to a supposed "right" to make "back-up copies" of entertainment software products.

Additionally, in its review of Section 117, the Copyright Office raised a new concern by highlighting a possible expansion of the "fair use " doctrine with respect to the distribution of back up copies. We have grave concerns with any interpretation of the Copyright Office's analysis on this point that results in a video game pirate having the ability to make and distribute not one, or two, but an infinite number of back up copies, claiming "fair use." The Report speaks to a possible fair use right to distribute "lawfully made" copies under Section 109, which would allow for wide spread distribution of not only back up copies, but to any copy that is permitted under the fair use doctrine. Should distribution under Section 109 be permitted in this manner, it would be harmful to our industry. This is especially troubling given the abuses we have discussed. It conjures up the frightening prospect of video game pirates not only making "backup" copies available, but claiming further the right to freely distribute pirate copies. This perverse outcome may seem farfetched to some, but given the stakes, our industry cannot afford to take a chance.

The Copyright Office has recommended two possible legislative approaches to address this fair use "potential concern" it has identified. The IDSA urges the subcommittee to consider the two recommendations only if it first clarifies that current law doesn't already forbid such widespread copying and distribution.

THE REPORT'S RECOMMENDATION REGARDING BUFFER COPIES

With respect to the Copyright Office's recommendation regarding buffer copies made in RAM in the course of licensed streaming audio, IDSA believes it is premature to enact legislative change at this time. While the recommendation concerning buffer copies in its present form appears narrowly tailored, an attempt by Congress to statutorily implement the recommendation will, as a matter of course, carry precedential value and have a spill-over effect on other industries, including the entertainment software industry, that deliver content over the Internet. In fact, one IDSA member recently announced that it will soon stream PC game content to users' desktops. We cannot say for certain whether this practice will be economically viable, or whether it will become widespread, but that should be something consumers, game companies, and the market determine, not Congress.

Thus, we do not believe this is an area of law where stopgap or quick solutions are warranted. Change should only be considered after the technologies employed by successful business models becomes more settled, and after all concerned parties, including those in our industry, have weighed in with respect to the actual impact on their businesses resulting from any proposed changes. We urge Congress to move with the utmost caution should it consider implementing the Copyright Office's recommendation with respect to buffer copies.

IDSA'S LEGISLATIVE RECOMMENDATION

As stated, while key findings of the Copyright Office are to be commended, to the entertainment software industry the report fell short where it could have succeeded most: in squarely and very strongly spelling out the proper boundaries of the exception to Section117 (a)(2). Specifically, if this Subcommittee drafts copyright legislation it should make clear that:

1. The "archival copying" exception applies only to computer programs. There is no exception to copyright protection to allow the creation of "back-up copies" of any other kind of work, including sound recordings, music, audio-visual works, or databases, except by libraries, archives, broadcasters, and other specifically identified institutions under circumstances defined by law. Anyone offering unauthorized copies of works other than computer programs as "back up copies" is in violation of the law.
2. The archival copying exception in Section 117(a)(2) is a narrow exception, and applies only to the extent that it is necessary to make a back-up copy

in order to protect the original copy against damage or destruction by mechanical or electrical failure. Thus it generally does not apply to contemporary PC, videogame console, or online gaming environments, where these threats are minimal and archival copying is not needed to prepare for them.

3. Only the legitimate owner of a copy of a computer program can make or authorize the making of an archival copy under § 117(a)(2), and only from a legitimate copy that he or she owns. A web site or other source offering "back-up copies" for distribution to the public falls outside the exception and is committing copyright infringement.
4. The law forbids the transfer of an archival copy except in conjunction with the transfer of an original and the transfer of all rights in that original. Anyone offering to transfer "back up copies" in any other context is in violation of the law.

We welcome the opportunity to work with the members of this Subcommittee as it considers these important issues.

STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Before the House Subcommittee on Courts, the Internet and Intellectual Property
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December ~~12~~, 2001

The American Society of Composers, Authors and Publishers (ASCAP) submits this statement to the House Subcommittee on Courts, the Internet and Intellectual Property concerning the DMCA Section 104 Report of the United States Copyright Office (August 2001).

ASCAP is an unincorporated membership association of 130,000 writers and publishers of music. On behalf of its members, and members of affiliated performing rights organizations throughout the world, ASCAP licenses the right of nondramatic public performance of their copyrighted musical compositions.

As there frequently is confusion about the term "music" when applied to the Internet, we should be clear: Musical works – songs or other musical compositions – are written by composers and lyricists and usually owned or administered by music publishers. Copyrights in musical works are to be distinguished from copyrights in sound recordings, which are the particular renditions of musical works recorded by performing artists and usually owned by record companies. We deal here only with musical works, not with sound recordings

Internet Performances of Musical Works

Music is used in many ways by many different types of users. There are many different types of music uses on the new medium of the Internet, and those uses are known by many different terms. Those uses and the terms used to describe them include (among many others) retransmitting broadcast radio signals over the Internet, "webcasting" (in essence, transmitting

radio station-like programming over the Internet), "streaming" (transmitting performances of music in "real time") and "downloading" (allowing copies of the music transmitted to be made in the ultimate user's computer).

There should be no confusion over whether these various Internet music uses are performances – we believe that the law is clear that, in each case, a public performance of the musical work occurs. Indeed, this Committee answered that question 25 years ago in its remarkably prescient report on the 1976 revision of the copyright law. The Committee anticipated the development of the Internet itself with these words defining the nature of the public performance right:

> A performance may be accomplished "either directly or by means of any device or process" including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any sort of electronic retrieval system, and any other techniques and systems not yet in use or even invented.[1]

We believe that the Committee's statement was crystal clear as to the nature of a public performance and the scope of the public performing right. The development of the Internet has neither blurred that clarity nor altered this Committee's consistent adherence to the 1976 Act's definition. For support for this proposition, one need look no further than the statements of this Subcommittee and its counterpart in the Senate on the Performance Right in Sound Recordings Act of 1995:

> Under existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work. . . . New technological uses of copyrighted sound recordings are arising which require an affirmation of existing copyright principles and application of those principles to the digital transmission of sound

[1] H. Rep. No. 94-473, 94th Cong., 1st Sess., 60 (1975).

> recordings, to encourage the creation of and protect rights in those sound recordings and the musical works they contain.[2]

No provision of the DMCA changed this principle either directly or by implication.

The fact that every transmission to the public involves the public performance of copyrighted musical works does not, however, address a crucial point – a point we have always addressed openly and forthrightly: that there are differing values for different types of performances. Those values have been, and should be, worked out by the interested parties in the marketplace.

The Copyright Office Report makes a crucial error in that it suggests that there are only two forms of music use on the Internet: streaming and downloading. The Report then suggests that there is no value to the performing right in downloads (and, concomitantly, no value to the reproduction and distribution right – the "mechanical right" – in streaming).

We suggest that such a worldview is overly simplistic and hence inaccurate. Certainly, it can be argued that the value in a "pure" audio-only download is in the mechanical right, and not the public performing right (and, concomitantly, that value in a "pure" audio-only webcast is in the performing right, and not the mechanical right).[3]

In between those endpoints, however, there is a continuum of uses for which both rights are unquestionably implicated and for which both have value. How to value those rights for the various uses should be left to the marketplace – as it has been since ASCAP first began licensing Internet music users in 1995.

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[2] H. Rep. No 104-274, 104th Cong., 1st Sess., 22 (1995); S. Rep. No. 104-128, 104th Cong., 1st Sess., 27 (1995).

[3] For example, a "pure" audio-only download could be one that met all these requirements: (1) the musical work could not be perceived (i.e., heard) while the transmission was taking place; (2) the sole purpose of the transmission was to deliver a phonorecord of the musical work to the home user; (3) the resulting phonorecord received by the home user was permanent, capable of further non-commercial duplication by the home user, and not limited by time, usage, further payment, or any other factor; and (4) the transmission of the musical work was made on demand.

ASCAP's Internet Licensing

Certain characteristics of ASCAP's licensing must be stated at the outset, for doing so will show that the marketplace not only should be left to function freely, but that it has been, and is, working properly and efficiently.

First, ASCAP will license any Internet music user who requests a license. ASCAP will not deny any user the right to perform the copyrighted musical works in its repertory. There can be no claim by any Internet user that ASCAP is keeping them from using music. Indeed, all that an Internet music user need do is make a written request for a license, and it is automatically licensed from that point forward.

Second, ASCAP must quote a reasonable license fee to an Internet music user. If the user believes that the fee ASCAP has quoted is unreasonable, it can have the federal court determine a reasonable license fee. And the burden will be on ASCAP to prove that the fee it seeks is reasonable.

Third, ASCAP must offer different types of license to Internet music users. Under the consent decree that governs ASCAP's operations, ASCAP must offer both a "blanket" license (for which the fee is not dependent on actual music use) and a "per-segment" license (for which the fee is dependent on actual music use) to on-line music users if they so request.

ASCAP has licensed over 2,000 websites, and it is revealing to analyze the ASCAP license status of major Internet music users. Both PressPlay and MusicNet, the record companies' on-line services, have requested ASCAP licenses, and both are therefore licensed to

perform all musical works in the ASCAP repertory. ASCAP is in discussions with each of them as to the proper fee to be paid.

Equally revealing is the license status of DiMA's members. As of October 30, 2001, DiMA's website listed 58 members. Of those 58, 22 were not sufficiently involved with music to warrant licensing. Of the remaining 36:

- 10 have entered into license agreements
- 19 have applied for a license and are therefore licensed
- 4 more are in negotiations
- 3 are prospects for licensing

Hence, of the 36 DiMA members requiring licenses for their performance of music, 33 are either licensed or in negotiations for a license. Further, of DiMA's 13 Board members, 11 are licensed.

These licensing agreements confirm that the marketplace continues to evolve and adapt to meet new business models as they emerge. We thus agree, in the strongest terms, with the statements made by members of this Committee that there is no need for legislative action:

- "If there is one thing we know about the Internet music marketplace, it is how little we know . . . . It is a marketplace without a proven business model . . . ."
- "[T]he most appropriate Congressional role at this point is to continue to develop our knowledge and monitor marketplace developments."
- "We strongly believe it is premature for Congress to act on legislation that regulates this quickly evolving marketplace."

- "Government regulation can only stifle the tremendous innovation in this market and serve to pick winners and losers, and, in any case, will most likely be obsolete before it is enacted."[4]

Congress should not intervene to change the legal framework in which the marketplace is evolving and working. Indeed, legislative intervention could impede marketplace solutions. The free marketplace should be allowed to continue to work, without legislative intervention.

[4] "Oppose Regulation of the Internet Music Market," letter from the Hon. Howard L. Berman, John Conyers, Jr., Elton Gallegly, Bob Goodlatte, Henry J. Hyde and Robert Wexler to Colleagues (September, 2001).