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To whom it may concern:

#### SPECIFIC QUESTIONS

##### 1. Section 109

ÊÊÊÊÊ(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

So far, the effects are minimal, since a lot of the current publishing methods do not yet have such protection measures. However, it is quite clear, that as such methods are adopted, practices that are today standard and accepted, will no longer be possible. Increasingly stringent protection schemes will tie content not only to a particular user, but also to a particular device. e.g. an electronic book might be tied to the serial number of a particular reading device. Copying and perusing the book to a personal computer may be impossible. Also, the idea to put one's books on a personal web site, such as to overcome the limitation of physical books, and allow one to access the personal library from home, work, travel, etc. may not only be prohibited by licensing clauses, but also impossible due to protection schemes. All such uses however merely would be using the new media capabilities for what they are meant for, and have nothing to do with copyright infringement. Yet protection schemes may make such use impossible, and the illegality of circumvention of such schemes will severely limit what is possible under circumstances that would clearly be considered fair use today.

ÊÊÊÊÊ(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

The answer here is pretty much the same as the answer to the question above. Ultimately, in order to ensure the ability to work with content that has protection schemes in place in a way that is possible under current fair use definitions, will require to render ineffective the protection schemes that try to undermine such fair use. If that is done by means of circumvention, alteration, removal, etc. does not matter. The end result is the same, and it's just a matter of what strategy works best with any particular protection scheme.

ÊÊÊÊÊ(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale

doctrine?

Electronic commerce and associated technology has the effect of drastically lowering the costs of publishing and thus increasing the profit margins. Barely any of these benefits were shared with the consumers or artists. In other words, the limited monopoly granted to publishers by means of the copyright laws has benefitted the publishers in a rather lopsided way.

When the discrepancy between distribution costs and content prices grows too large to be ethically justifiable, then the temptation to pirate content rises. Instead of bringing prices in line with distribution, media and other costs, the publishing industry pushed for more stringent laws.

In other words, there is no interest in letting go of the stranglehold and in sharing the benefits of new technology in an equitable way with content creators and consumers. The interests of the public at large have taken second place to special interests of the publishing industry.

ÊÊÊÊÊ(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

The existing technologies are far from exploiting what is technologically possible. As such the publishing industry has an interest in getting the laws passed first, tested and upheld in court second, before they introduce new technologies that will take full advantage of the new rules.

The rude awakening as to the consequences of the new legislation will come later, when it's too late.

They do this by e.g. going after services like Napster, which essentially only allow people to access each other's files, and which can be equally well used for legal purposes as for piracy, or by suing the people who wrote the DeCSS code, which was written not to pirate DVD content, but to make it possible to view DVD content on non-proprietary devices and software systems.

The two cases mentioned above are conceptually equivalent to trying to outlaw cars, because cars can be used to transport stolen goods or bodies of murder victims, or to sue people who find a way to use cheap unleaded gas instead of expensive lantern fuel in some Coleman gas lantern.

More than that however, these cases also shows how unacceptably vague the law is when it forbids technology that's

"primarily designed or produced to circumvent a technological measure that effectively controls access to or unauthorized copying of a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures."

Such phrasing leaves way too much room for interpretation.

ÊÊÊÊÊ(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The first sale doctrine is based on the common sense assumption that intellectual property should be treated like physical goods: it should be legal for the purchaser to use the property anyhow they please, as long as it is used like a physical item, i.e. not at more than one location or by more than one person at once.

Few people would accept a law that prohibits them from lending a CD to a friend, yet for new media the publishing industry tries to exactly establish practices that would be equivalent to that.

As such, the publishers try to convince the public that the new media and distribution channels are "fundamentally different", while in fact, they are not.

The only thing that is fundamentally different, is the increased possibility to tighten the control over content by the publishers and the possibility of increasing profit margins by achieving distribution costs that asymptotically approach zero.

ÊÊÊÊÊ(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

see answer above.

ÊÊÊÊÊ(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

Yes, because just because content is transmitted in digital form does not alter anything about the basic nature.

In other words, fair use practices should apply the same for digital transmissions as for physical media.

There is ethically no difference between making a tape of a record for listening in the car and creating an MP3 file to listen to the same record on the computer at work.

ÊÊÊÊÊ(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

Yes, it puts the consumer in a considerable disadvantage, while giving an excessive amount of power to the publishing industry. A typical example is people who buy DVDs either in the US or Europe and then move to another continent. They cannot legally bring and enjoy their belongings, since operating a non-zone conformant device is clearly an intent to bypass and circumvent the region coding built into the DVD distribution scheme.

Further, such region coding (and other protection schemes) can be successfully used to censor information. e.g. China can prevent "poisonous" western thought from entering the minds of the people, by making sure that none of the DVD players sold there can play DVDs from a western zone.

Bypassing and circumventing the various protection schemes is a critical element in the achievement of free speech and

world wide competition of ideas, both of cultural and political nature.

Current legislation and increasing technological sophistication will put a severe strain on our free speech rights.

Publishers should either rely on the law for protection against unauthorized copying, and enforce their rights like the owner of any other sort of property, or they should rely on trade secrets. If they do the latter, it should however remain their own task to keep them secret, and if they divulge information to the public, the public should be able to disseminate it without fear of legal repercussion.

1. Section 117

ÊÊÊÊÊ(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

It renders that section essentially ineffective. A well working copy protection scheme will make archival and back-up copies equally impossible as piracy.

ÊÊÊÊÊ(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

Same as answer to the question above. It just depends on the protection scheme if circumvention, alteration, removal, etc. is the most appropriate form of disabling the effects of such protective scheme.

ÊÊÊÊÊ(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

Between the difficulty of making copies and the lack of physical evidence of ownership, it is very difficult to regain access to lost information without paying multiple times. The record keeping in electronic distribution is inadequate. The burden of the risk of loss rests almost entirely with the consumer.

ÊÊÊÊÊ(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

The position of the consumer is getting more and more disadvantaged. The only help in the fight for fair use rights is the ability to bypass protection methods if they go too far. This however has been made illegal.

ÊÊÊÊÊ(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

Section 117 is too narrow in specifying only computer programs. A classic example is the case of so called CD rot: A bunch of CDs for example have problems where the ink corrodes the

data layer. The only way to preserve the investment in a legally purchased CD is to make a CD-R copy of such disks before the so called CD-rot makes the data layer unreadable.

DVDs are a very similar technology, with very similar issues. Some DVDs are limited issues, due to licensing rights, and are already now out of print, going for as much as several hundred dollars each in the collectors market. It is quite clear that such disks will sooner or later have the potential to develop defects akin to the CD problems mentioned above. In such case, the investment can only be salvaged by copying the DVD to a different medium, which currently entails the need to break the CSS encryption.

ÊÊÊÊÊ(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

The section 117 is too narrow in its definition. It is effectively useless, because its execution will in many cases require the outlawed circumvention, removal, etc. of protection schemes.

## 2. General

ÊÊÊÊÊ(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

There are some global considerations, overall trends in the political, cultural and legal environment that need to be viewed together, to see the true danger we are facing. Each little legal change by itself may seem innocuous, but put together, the outlook is not very bright.

Publishing used to be a very risky and immensely resource intensive business. As such copyright privileges were granted to the publishing industry. At that time it was clearly understood that these rights granted were revokable privileges, that were solely granted to prevent copycat publishers from going after the profitable items after the competition with potentially huge losses made a particular work successful. In other words, the economics of publishing were at the time such that competition would become ruinous and in the end the public would suffer because of a lack of publishers.

The second purpose, and the only one that can be argued to be founded in natural law, is to protect the creator of the original work, and to ensure he gets properly compensated for his creativity and work.

Times have changed however, and the near-risk free, low-cost publishing methods, including print on demand, CD-R, DVD-R, internet distribution, etc. have largely eliminated the original purpose of protecting publishers.

On the other hand, technological advances have also created technologies that e.g. by means of cryptographic methods, allow ever more stringent control of information, something

functionally akin to books that can only be read with special glasses that fit only one particular person's head.

Anything conceptually comparable to lending a book to a friend, borrowing books from a public library, etc. is starting to become technologically impossible. Similarly fair use has been ever more narrowed under the lobbying influence of the publishing industry who can easily outspend and out-organize the public and who have all the tools at their disposal to influence public opinion by manufacturing consent.

Things that were considered fair use, like e.g. making a tape of a record to be able to listen to the music in the car, are not only becoming illegal, due to the necessity to overcome copy protection schemes, but also technically ever more challenging, due to ever more sophisticated hardware and software encryption methods.

By thus getting an increased amount of power, both in terms of legal and technological instruments, the publishing industry is now in a position to have a stranglehold on the public. Within a few years it will be able to dictate to the public technologies that are the equivalent of a book where you pay each time you read a word or a sentence, regardless of how often you have already read and paid for the same word or sentence before.

But the consequences go further: Our western civilization has been able to develop because of the free sharing of information. The age of enlightenment, that brought scientific advance, would not have been possible with today's copyright laws. A large body of classical music typically called "Variations on a theme by..." would have been impossible in today's legal structure. Art forms like collages, be they visual, audio visual, etc. are in danger due to copyright laws. This goes to the core of freedom of expression: you will be prevented from making a political statement by cutting and pasting together excerpts from a particular person's work to show their contradictions or inconsistencies, because the works you copy and paste from are under copyright.

One shocking example of this tendency is the case where a former Scientology sect "priest" who left the cult tried to expose the cult as the religious fraud it is, and quoted from the "secret scriptures" to make his point.

He was sued, his privacy breached, all in the context of violating "trade secrets".

(While this case happened in Finland, these sort of things will happen here, too, given the legal climate currently in place.)

On a similar issue, patent, trademark and service mark protection is similarly expanding in an uncontrolled way under the influence of the monied interests.

In addition, the new technologies produce a social injustice, since information that used to be available for free in public libraries is now only available on a pay-per-view basis, with pricing oriented at the most wealthy clients. e.g. try to get access to historical financial records. These things used to be available for free in

libraries. Today they are available in expensive databases that one has to subscribe to for several thousand dollars per year. Similar examples can be found in the legal and medical field, etc. The information is being monopolized by the few who can afford it, putting the rest of the population at a disadvantage.

Meanwhile, the strawman put up by the publishing industry, the artist and creative talent worth protecting, is equally harmed by the new laws: artistic work is now considered work for hire, and thus again decreases the protection of the artist and increases the power of the publishers.

Further, with the increasing pressure for campaign financing reform, the publishers become ever more critical as "king makers" in the political process, for they have an arsenal to control the dissemination of information that by far surpasses everything known to history so far.

If we add to this the concept that companies can get intellectual property protection on nature, i.e. on human, animal and plant genes, that they are allowed to collect personal information and copyright the information, etc. then a man will soon be in a position where it has to pay royalties just to be himself.

All these developments together create a rather disturbing image of the future. It is time to stop the reckless expansion of intellectual property rights, to reexamine their original motivation, and to test what's in the public's interest. We have to be aware of the fact that the economy exists for the people, and not vice versa. All the wealth created is useless, if it comes at the price of creating indentured servants.

Short term greed is using the fruits of our culture's history to undermine the very principles that made it possible for us to arrive where we are at today. It is a clear case of biting the hand that feeds...

As subversive as it may sound, speaking in economic terms, piracy is a market force. People are willing to pay a premium for original cover art, convenience, the knowledge to support their artist of choice, etc.

However, they are not willing to pay prices that are the result of unfair monopoly pricing.

The Robin Hood's that pirate such works create a market force that makes publishers think about profit maximization in different terms. In an increasingly more enforceable monopoly, thanks to modern cryptography, prices can skyrocket almost without limit. This will eventually benefit a few large publishers and extremely popular artists that with large marketing efforts can sway the public to allocate their limited resources towards the purchase of their works.

At the same time however, this limits the availability of resources for lesser known artists and small publishers.

It raises the barriers of entry for those, and thus decreases the cultural diversity.

Piracy forces prices down to that level where the vast

majority of people is willing to pay the premium for a legal copy over pirated works. The lower prices result in more works being bought, and thus it broadens the reach of individual works, and increases cultural diversity, while at the same time lowering the barriers of entrance of smaller players into the market.

ÊÊÊÊÊ(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

Yes, on both accounts.

ÊÊÊÊÊInformation collected from responses to this Federal Register Notice will be considered when preparing the required report for Congress.