

Summary of Intended Testimony of

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on behalf of

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

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The copyright industry associations listed above do not believe that an amendment to section 109 of the Copyright Act to cover digital transmissions is either necessary or advisable. The first sale doctrine continues to apply with full force in the digital environment, when someone who owns a lawfully made copy or phonorecord wishes to sell or otherwise dispose of the possession of that copy or phonorecord. Proposals modeled on Section 4 of H.R. 3048, 105th Cong., go far beyond simply “updating” or even “extending” the first sale doctrine, which limits only the exclusive right of distribution. These proposals would hyperinflate first sale and impose completely new limitations on other exclusive rights long enjoyed by copyright owners, notably the reproduction right. Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy.

New distribution models offer the potential to increase consumer choice and promote the business viability of dissemination of works of authorship in digital formats. Limitations on the reproduction right like those proposed as amendments to section 109 would make it impossible to implement many of these models. Nor do current or reasonably anticipated future market conditions justify the encroachments on contractual freedom, or on the ability of copyright owners to employ access control technologies, that some commenters advocate (and somehow link to section 109). Finally, all the library activities identified in the questions posed in the October 24 notice may be carried out in the digital environment without the need for any amendments to section 109.

While the Digital Millennium Copyright Act made no changes to section 109, it did amend section 117, with the effect of reaffirming the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner’s exclusive reproduction right. This recognition takes on added importance in light of the increasing economic significance of such “temporary copies” in the legitimate dissemination of computer programs and other kinds of copyrighted works. Proposals to amend section 117 to overturn this well-settled principle of U.S. copyright law should continue to be rejected. There is no evidence that the fundamental exclusive right of copyright owners needs to be weakened in order to promote electronic commerce; indeed, the effect is likely to be to the contrary. Enacting the proposed “incidental copies” exception would undercut the reproduction right in all works, and would raise significant questions about U.S. compliance with its international obligations. The listed copyright organizations do not believe that the recent amendment to section 117 has caused any problems that would justify any expansion of that section.