

SLAC Comments For Possible Inclusion in the Report to Congress Pursuant
to Section 104 of the Digital Millennium Copyright Act

by

John M. Thompson

Legal Clerk

SLAC Office of Technology Transfer

1. Section 109

- (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?

Prohibitions on circumvention of technological protection have had no effect on the operation of the first sale doctrine. Current technological protection measures are easily defeated and do little towards protecting digital works from duplication, resale, and distribution. Additionally, duplication of digital works is extremely efficient and difficult to trace. This makes enforcement of technological protection laws nearly impossible. However, for a user who does not defeat technological prevention measures, the circumvention clause of the DMCA can make it difficult to resell products. In that case the first sale doctrine is negatively impacted by prohibitions on circumvention of technological protection.

- (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?

Because copyright laws are extremely difficult to enforce as applied to digital works, prohibitions on falsification, alteration or removal, of copyright management information has had no effect on the first sale doctrine. Digital works such as computer programs, digitally encoded music files (MP3), and digitally encoded movies (DVD, AVI, ASF, MPEG) are often distributed for free on the Internet with copyright notices intact. There is little reason or incentive for software "pirates" to remove the notices. In fact, leaving the copyright notices intact helps to show that the illicit copy is the genuine product. Fear of copyright enforcement seems to be almost non-existent and those trading in illegal files act without regard to the law.

- (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 has had little effect on the first sale doctrine. Electronic commerce is merely an alternative method to buy and sell goods and services. Tangible goods are usually delivered via a shipping service. Once the consumer receives those goods, the first sale doctrine applies as normal. The buyer is then free to resell the goods, subject to standard limitations. For transactions that take place only in the digital realm, the first sale doctrine applies the same way as it does to tangible goods. Because digital goods are much easier duplicated than tangible goods, digital goods are more often duplicated and redistributed for free or for minimal cost.

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

As the copyright laws currently stand, with enforcement as applied to digital works nearly impossible, the burden of protecting intellectual property is increasingly falling on the producers rather than the law. Those developing new technologies are continually developing new ways of protecting their works. This often comes in the form of a technological lock or protection against unauthorized duplication. Because the locks are usually easily defeated most digital works can be found for free download on the Internet.

- (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 most effective as applied to “old technology works” such as print media. Unlike digital, printed objects are much more difficult to reproduce and distribute on a wide scale level. Because of this, it is difficult for the original buyer to keep a copy of the product and sell the original. However, with digital works, copies are easily made with no loss of quality between copies. This allows consumers to easily make copies, and distribute those copies, while at the same time retaining their original. The first sale doctrine as applied to digital works is much less effective than it is when applied to non-digital works.

- (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?

The emergence of new technology (specifically digital works) has made the copyright laws obsolete and ineffective. Digital works are easily reproduced and redistributed. Once a digital work resides on the hard drive of a single user it is extremely easily redistributed to many users. This conduct is nearly untraceable and results in many illicit copies of digital works. Technological fixes have developed as an alternative to copyright to protect digital works. However, technological protections are routinely defeated and do little to protect intellectual property. Currently, copyright laws, in

relation to digital works and individual users, are generally followed on the honor system. However, development of intellectual property continues to flourish, suggesting that other forces are at work which encourage the creation of new intellectual property. For this reason, the lack of the applicability of copyright laws to digital works is not as problematic as it might seem at first glance.

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

Like owners of “old technology works” (such as printed books), owners of works in digital forms should be included in the first sale doctrine. It has long been recognized that a consumer that buys a product also has a right to resell that product. Although digital works are easily reproduced, this is not a reason to not extend the first sale doctrine to owners of digital works. The principles of the first sale doctrine must apply equally to all products. The first sale doctrine should not be limited to certain works only because some works are easier to reproduce than others. Other methods must be developed to control reproduction rather than changing the fundamental principles of the first sale doctrine.

- (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?

Consumers would be provided with more protection if the first sale doctrine were extended to digital works. If an owner of a computer software program wants to resell it he does so at the risk of violating the law. If the first sale doctrine is extended to digital works it will rightfully provide the same protections to all types of works.

2. Section 117

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

Acts permitted under § 109(a) and § 117 may be in violation of § 1201(a). For example, one who has purchased a CD-ROM has lawfully acquired access to that work. Under § 109(a) and § 117 that person is allowed to use the disc in another computer or lend it to a friend. However, if that CD-ROM requires connecting to a central computer and entering a password upon use, any attempt to circumvent the password protection for a lawful purpose (such as lending the CD to a friend) will violate § 1201(a). This dilemma can be resolved by amending the law to only bar circumvention of technological measures controlling access to a copy of the work. Then, once you had lawfully acquired your copy, you would be able to lawfully use it in a computer, or circulate that copy, without

further prohibitions imposed or reinforced by the Copyright Act. Despite the current illegality of circumventing technological protection measures, these measures are routinely defeated. So, in practice the law has not had a significant effect on controlling copying and distribution of digital works.

- (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?

Like the above scenario, prohibitions on falsification, alteration or removal of copyright management operation has the potential to collide with acts permitted to the owner of a copy under § 117. In order to lend a lawfully acquired CD-ROM to a friend, that friend might be required to falsify ownership information of the program in order to access the software. While loaning the software to a friend is permitted under § 117, falsifying the ownership information in order to access the disc is not allowed under § 1201. However, actions in violation of § 1201 regularly occur and the law has done little to prevent the violations.

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

In some ways electronic commerce has further hindered the consumer's ability to take advantage of permitted acts under § 117. For example, a consumer may never actually possess a copy of a program, but only use the program across a computer network. This allows the producer of the software to control access without needing protections of copyright laws. Because copyright laws are doing little to stop the unauthorized reproduction and distribution of digital works, this is one example of how companies are coping with the ineffectiveness of the copyright laws as it relates to digital works.

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

Emerging technology is being created in a way that does not rely on § 117 or any other section of the copyright law to protect it. Producers are developing more sophisticated methods of tracking use of software and access to software. Until copyright laws or a new method is developed that better protects digital works, technological protections will continue to be developed and improved upon.

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

Section 117 seems directed to software that is easily copied and circulated. It does not apply to software that is used over a network which is never in the physical possession of the user.

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

Section 117 applies to computer programs that are in the possession of the user. It might not be as applicable to software which is never in the possession of the user, but is accessed only across a computer network.

3. General

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

Copyright law in regard to digital works is not protecting the intellectual property embodied in these works. Currently it is almost impossible to trace the unauthorized duplication of digital works. A new system needs to be instituted for protecting digital works. This new system might work best if it is based on controlling access to the works.

- (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?

Hearings would be helpful in determining the direction, if any, Congress should take with regard to protecting digital works. I am willing to participate in the hearings.