Computer & Communications Industry Association
666 Eleventh Street, N.W., Sixth Floor
Washington, D.C. 20001
202.783.0070 Fax 202.783.0534

Mr. Jesse M. Feder
Policy Planning Advisor
Office of Policy and International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 20024

Mr. Jeffrey E.M. Joyner
Senior Counsel
Office of Chief Counsel
National Telecommunications and Information Administration
Room 4713
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act (DMCA)

Dear Messrs. Feder and Joyner:

The Computer & Communications Industry Association (CCIA) respectfully submits these comments in response to the Federal Register Notice on June 5, 2000, concerning the study required by Section 104 of the Digital Millennium Copyright Act (DMCA).

The Computer & Communications Industry Association (CCIA) is an association of Internet, computer, telecommunications, software, and electronic commerce companies ranging from small, entrepreneurial companies to some of the largest in the industry. CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, resellers, systems integrators, and third-party vendors. Its member companies employ well over a half-million employees and generate annual revenues exceeding $300 billion.

The June 5 Notice requests, *inter alia*, comments on the effects of the development of electronic commerce and the operation of Section 117 of the Copyright Act, and the relationship between existing and emerging technology and the operation of Section 117. Our view is that the Section 117's narrow scope has impeded the growth of e-commerce.

I. Section 117 and Computer Programs.

Congress adopted Section 117 in 1980 as part of the Computer Software Protection Act. Congress based Section 117 on language recommended by the National Commission on New Technological Uses of Copyrighted Works (CONTU) in its 1979 report. Twenty-one years ago, long before the advent of the World Wide Web, CONTU concluded that the Copyright Act required relatively few amendments to accommodate computer programs properly. Specifically, CONTU recommended an exception that permitted the making of a copy of a computer program 1) as an essential step in the utilization of the computer program, e.g., loading the program into the computer's hard drive; or 2) for back-up or archival purposes.

In 1980 Congress followed CONTU's recommendations, with one significant difference. CONTU suggested that the exception apply to the "rightful possessor" of a copy of the computer program. Congress, however, replaced the phrase "the rightful possessor" with "the owner" of a copy of the computer program. At first, courts did not place great weight on this word choice, and applied Section 117 to entities that obtained the software pursuant to a license agreement. *See, e.g., Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988). More recently, courts withheld availability of Section 117 from licensees. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). Because almost all software is distributed subject to a license, be it a negotiated agreement or a "shrink-wrap" contract, this recent line of cases in essence has repealed Section 117.

The *MAI v. Peak* decision contained another critical holding: that the temporary copy of a program in a computer's random access memory (RAM) constituted an actionable reproduction under the Copyright Act. This holding is on questionable footing; the House Report accompanying the 1976 Copyright Act states that "For a work to be 'reproduced,' its fixation in tangible form must be 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*.'" (Emphasis supplied.) Nonetheless, *MAI* has been followed by other courts.

These two holdings, taken together, leave the licensee completely at the mercy of the licensor. Virtually every use of a computer program involves the making of RAM copies; and Section 117 does not excuse the making of copies by licensees. Thus, the licensee can use the software it paid for in full only in the manner specifically permitted by the licensor. For example, the licensor can require that the software be maintained only by the licensor's service organization.

II. Section 117 and the Internet.

The advent of the World Wide Web only compounds the temporary copy problem. Even if Section 117 were to apply to all rightful possessors of copies, rather than just owners of copies, Section 117 by its terms concerns only computer programs. It does not refer to other works, such as text, sound recordings, or films. Since the Internet operates by packets of information moving from the RAM of one server to the RAM of the next, the

Internet involves the making of copies that the *MAI* decision considers to be potentially unlawful and Section 117 clearly does not sanction. One court, for example, found unlawful the RAM copy made by a user while browsing a website.

This basic framework of the theoretical illegality of virtually all Internet transmissions has imposed serious barriers on the growth of the Internet. The potential exposure of Internet service providers for activities initiated by third parties led to the lengthy and costly negotiations that culminated in the Digital Millennium Copyright Act's safe harbor provisions. Service providers now often find themselves modifying the structure of their services in order to comply with the safe harbors' complex legal requirements rather than deploying the most technologically efficient solutions. When the activity can not be squeezed into the DMCA's safe harbors, service providers and users alike must really on uncertain legal doctrines such as fair use, copyright misuse, and implied license to avoid legal liability.

Further, foreign jurisdictions have followed the U.S. model of the illegality of Internet transmissions, again leading to costly lobbying with uncertain results. For example, the draft EU Copyright Directive states that "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form…." This provision, in turn, has led to great controversy over the scope of the exception to the temporary reproduction right.

III. Conclusion.

Temporary copying is inherent to digital technology. Unless it results in the making of a permanent copy, or in a public performance or display, the legitimate interests of the rightsholder have not been harmed. Moreover, even if the temporary copy does result in the making of a permanent copy, or a public performance or display, then the copyright analysis should focus on that permanent copy or public performance or display, and not the temporary copy. Treating temporary copies as potentially infringing copies has imposed needless complexity and uncertainty on the Internet. The temporary copy problem in the U.S. would evaporate if Section 117 were amended to include the following language from S. 1146 and H.R. 3048 introduced in the 105th Congress:
"Notwithstanding the provisions of Section 106, it is not 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."

Thank you for the opportunity to comment on this important matter. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Jason M. Mahler

Vice President and General Counsel
Computer & Communications Industry Association