

**Testimony of John T. Mitchell
On Behalf of Video Software Dealers Association
Before
The United States Copyright Office, Library of Congress
And
The National Telecommunications and Information Administration
United States Department of Commerce
On
17 U.S.C. Section 109, Pursuant to DMCA Section 104
November 29, 2000**

Good afternoon, I am John Mitchell, counsel for Video Software Dealers Association, or "VSDA." We thank you for giving us this opportunity to testify, and for allowing me to substitute for VSDA's President, Crossan Andersen, who became suddenly ill this morning. You could say he is unable to exercise his "performance right" due to a viral technological control.

VSDA is the national trade association for the home video industry. VSDA's member companies are engaged in the retailing and distribution of home video products in most every neighborhood across the nation. We agree with NARM's position, as the problems facing the music industry will be affecting home video just as soon as bandwidth, transmission speed and storage capacity allow.

Please permit me a brief historical retrospective and a mixed metaphor -- for if we ignore history we should expect to be "fooled" again and again.

If we look back to the early days of the next-to-last technological breakthrough in packaged home video entertainment, the venerable VCR, we recall that we were warned in some extravagant hyperbole that "the VCR is to the American film producer and the American public what the Boston strangler is to the woman at home alone." Video retailers were seen then as opportunists, perhaps even as copyright thieves, not as entrepreneurs. They were not seen as entrepreneurs who based their concept of bringing economical motion picture entertainment into the home on a cardinal American legal concept -- that perpetual restrictions on alienability do not fit in the American scheme.

It bears repeating that these maverick entrepreneurs, supported by an important American legal tradition, built the most robust economic distribution system for motion pictures -- one which greatly enriched rightsholders and enriched consumers with access to these creative works.

We have heard this morning from several witnesses from among the copyright owners who object to “expansion” of Section 109 or the conferring of new first sale doctrine rights. We, on the other hand, object to the current contraction of Section 109 and the loss of existing first sale doctrine rights.

Let me turn to today’s controversies and start with where the rightsholders appear to agree with our position, and we agree with rightsholders:

- ! First, we agree that Section 109 provides rights to purchasers only with respect to “copies lawfully made under the Copyright Act.”
- ! Second, we agree that these rights apply to tangible copies in the sense that they apply to fixations which are palpable.
- ! Third, they apply only when the transferor does not retain a copy [unless it is lawful for him to do so].

Next, we agree that “a copy in a digital format is entitled to the **rights and privileges** in Section 109 just like any other physical copy.” And it bears emphasis here that in the House Report on Section 109 [*Section 27 of the Copyright Act of 1909*] the House Committee on Patents opined that “it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article . . . after [the] proprietor has made the first sale.”

We also agree that the first sale doctrine was established in part to prevent use of the Copyright Act as a price fixing tool. I would like to spend a moment on this point because this is another well established American legal tradition embodied in the first sale doctrine.

It would be illegal for suppliers to require all retailers to have the same returns policies, the same warranties, the same privacy policies or many other terms and conditions of sale. We must recognize that retailers are expected and ought to compete on these terms, as well as on price. Thus, it is unlawful for a supplier to add license restrictions which force retailers to offer digitally-downloaded copies at a fixed price – even when that fixed price is the same at which the supplier offers the copy directly to consumers.

We heard this morning from the Business Software Alliance, that they want to give authors and copyright owners the right to choose the best business model for distribution. But we should be reminded that there is no such exclusive right of choosing a single business model under Section 106 of the Copyright Act. Indeed, the very purpose of Section 109 is to see to it that they never have the power to control re-distribution of lawfully made copies.

Finally, we do not contend that Section 109 rights may be used to increase the number of lawfully made copies beyond those for which the rightsholders have received compensation. Particularly with respect to audiovisual works, we do not contend that the first sale doctrine creates a right to make a single additional non-temporary copy. But we contend that the Reproduction Right must not be used to destroy first sale rights to rent and sell copies lawfully made even if the digital distribution process involves an element of copying.

(This morning we heard a lot of talk about “transmissions” of intellectual property and the rights associated with those transmissions, but I would like to point out that the Copyright Act’s definition of the word “transmit” is not very helpful in this case, as a transmission can be different things. A transmission could be made pursuant to the exercise of the right of public performance, or pursuant to the exercise of the right of reproduction, but it is not the fact of the transmission itself that determines the right. And transmission does not determine the applicability of Section 109. If a copy is lawfully made, the first sale doctrine applies regardless whether it was made in a factory (perhaps after being digitally transmitted there), or transmitted to a store for reproduction and sale, or directly to a home for reproduction in the home manufacturing facility, the PC.)

Despite several areas of agreement, where we emphatically disagree with rightsholders is concerning their growing use and elevation of licenses, especially end-user license agreements. It is, of course, appropriate to license rights which are provided by copyright. Thus, we have no disagreement with the licencing of the right to MAKE a copy, or a license to DISTRIBUTE copies or a license to publically perform a movie.

However, once a copy is lawfully owned by another, we contend there is no intellectual or other property right in those copies. A “copy” is personal property, not intellectual property. The Copyright Act contains no “Use Right” in Section 106, and there is no basis upon which a copyright owner can license “use” once a copy is lawfully owned by someone else.

Retailers are particularly concerned about rightsholders’ reliance in their comments here on *Adobe Systems v. One Stop Micro*. The court in *Adobe* was simply wrong in holding in essence that a EULA can eliminate first sale rights --and that every owner down the chain of distribution also loses his or her first sale rights because the supplier created a EULA to which they are not even a party. This morning, the Business Software Alliance testimony indicated that they do not sell software, but only license it, so Section 109 does not apply. (If that is so, it makes one wonder why they are even here.) The fact is that they do sell copies of their software. If a single

payment is made, for a transfer of possession for an unlimited term, with no right of the copyright owner to demand or obtain a return, and it involves consumer market goods, it is a sale. The copyright owner cannot convert what otherwise has all of the indicia of a sale into a license just by calling it that. You can't take a CD or DVD and slap an end user license agreement on it and thereby change the nature of the transaction. In particular, you cannot make a purported end user license agreement between the copyright owner and the ultimate consumer binding upon retailers and distributors in between, who have not agreed to the EULA.

The implication from rightsholders' reliance on *Adobe* here is the assertion that they may impose upon retailers licensing agreements which restrict or prohibit the rental of audiovisual works, limit "use" to a single viewing, or, perhaps, require registration on the supplier's web site to obtain authorization for subsequent "use." Section 109 makes it patently clear that rental of a lawfully owned copy of an audiovisual work is lawful, even if it is completely against the will of the owner.

VSDA supported litigation to stop circumvention of the CSS copy protection system. We support the use of laws and technology to prevent unlawful copying. We do not support the use of technology to prevent "unauthorized" but perfectly lawful use, and where the use is one of RIGHT, as in the case of Section 109, we vehemently oppose the use of technology to circumvent that right.

VSDA does not assert that the DMCA must be reopened or revised so long as the basis of such a recommendation against change is that the first sale doctrine and Section 109 apply in full force to copies lawfully made through digital distribution. If, however, copyright owners insist upon using their Congressionally granted copyright monopolies as leverage to restrict competition among distributors and retailers, void Section 109, and capture the identities of all owners or "users" of lawfully made copies, VSDA will be front and center in support of any legislation necessary to prevent such abuses.

Thank you.