

Joint Study on 17 U.S.C. Sections 109 and 117
Required Pursuant to DMCA Section 104

Public Hearing
November 29, 2000

Opening Remarks of Marybeth Peters

Good morning and welcome.

Today's hearing is being conducted in connection with the study that Congress has required the Copyright Office and the National Telecommunications and Information Administration to carry out under section 104 of the Digital Millennium Copyright Act of 1998. The purpose of today's hearing is to provide our two agencies with additional evidence, information and insights in order to flesh out the views and proposals made to us during the public comment period. All of the summaries of testimony that have been provided to us are already available on our website, and a transcript of today's hearing will be posted in about two weeks.

On my [right] [left] is Greg Rohde, the Assistant Secretary of Commerce for Communications and Information, who will now make a few opening remarks. I will follow with some additional opening remarks, then we will begin with the first panel.

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In 1997 and 1998, when Congress was considering the DMCA, Congressmen Boucher and Campbell introduced a bill that contained a number of proposals, several of which we will hear repeated in testimony today. At that time, based on the evidence available to it, Congress was unable to adopt those proposals, and instead asked us to study the issues and report back.

One of these proposals is to modify section 109 of the Copyright Act to make the first sale privilege apply expressly to digital transmissions of copyrighted works. Section 109 is a codification of a judicial limitation on a copyright owner's distribution right that developed early in the 20th century. At the time, the issue before the Supreme Court was whether a publisher could maintain control over the resale price of books through its exclusive right to "vend." In developing the first sale doctrine the courts focused on two rationales – the common law abhorrence of restraints on alienation of tangible property and the national policy against restraints on trade.

It would be helpful to us in preparing our report and recommendations if participants who are addressing this issue of a "digital first sale doctrine" would explain how the current proposals relate to the rationales that underpin the existing first sale doctrine.

A related issue on which we will hear testimony is the effect of current law – including section 109 and the amendments to title 17 in the DMCA – on certain activities of libraries. It would be helpful to us if participants could provide us with concrete, real-world examples of the effect of

current law on the important work of libraries, and how the legislative proposals that have been suggested to us will change that effect.

Apart from section 109, Congress also asked us to examine section 117 of the Copyright Act. Section 117 permits the owner of a copy of a computer program to copy or adapt the program in order to make a backup or as an essential step in using the program in a machine. It was added to the Copyright Act in 1980 at the recommendation of the CONTU commission. CONTU considered section 117 necessary to address two problems. First, an exemption was needed to permit copying as an essential step in using the program because “placement of a work into a computer is the preparation of a copy.” Second, making copies of a computer program was necessary “to guard against destruction or damage by mechanical or electrical failure.” Courts have generally interpreted the archival exemption fairly narrowly, even holding that computer programs stored in Read Only Memory may not be copied under section 117 because they are not vulnerable to destruction or damage by mechanical or electrical failure.

We will hear testimony today advocating a change in the scope of section 117's archival exemption. It would assist us if participants who testify on this issue would tell us how their proposals relate to the underlying purposes of section 117, and what concrete, real-world problems they seek to address in their proposals.

There are also a number of witnesses today who are proposing an exemption from the reproduction right for certain temporary copies. This is another of the proposals that was made

in the Boucher-Campbell bill. As with the proposal concerning the first sale doctrine, Congress did not adopt this proposal when it enacted the DMCA. With both of these proposals it would assist us greatly if participants could focus on what has changed, and what additional experience has been gained over the past two years that may persuade Congress to rethink these issues.

All of these proposals raise complex and difficult questions. As with any complex area of the law, changes can bring unintended consequences. To the extent that you can help us anticipate what they may be, it will be a great help to us.

Thank you all for taking the time to come and participate in this process. Let's begin.