

**Summary of Testimony for  
Seth Greenstein and/or Jonathan Potter  
on behalf of the DIGITAL MEDIA ASSOCIATION**

The Digital Media Association (DiMA) wishes to testify with respect to the issues raised under both Sections 109 and 117 of the Copyright Act.

**Section 109** For more than a century, international intellectual property policy has granted a right to transfer copies or phonorecords of a copyrighted work without further obligation to copyright owners. For e-commerce to flourish, consumers must be assured that digitally-downloaded purchases convey at least the same flexibility and value as physical media, including the right to resell, lend or give away media products. The economic and public policies underlying the first sale doctrine support extending this historical exemption into the digital environment. To the extent that this privilege is not already secured under current law, a legislative clarification to the first sale doctrine should permit the transfer of possession or ownership, via digital transmission, of media lawfully acquired by digital transmission. For media delivered using digital rights management or other technological protection methods, technology can ensure that only one usable copy or phonorecord remains after transfer. For media delivered without effective technological protection, the first sale doctrine should allow the sender to delete or disable access to the copy or phonorecord substantially contemporaneously with the transmission. This clarification would pose no greater risk to copyright owners than the current statute, yet would provide more protection than current law.

**Section 117** DiMA strongly supports interpretive or legislative clarifications that, first, temporary buffer copies made in the course of using or performing digital media are not subject to the copyright owners' exclusive rights; and, second, consumers who acquire media via digital transmission are permitted to make an archival copy or phonorecord thereof. Regarding the first issue, temporary buffer copies made during the course of streaming audio or video are mere technological artifacts necessary to allow media transmitted using the IP protocol to be perceived as smoothly as radio or television broadcasts. These buffer copies have no independent commercial value and justly should be protected as fair use. But as the streaming media industry grows, so too does the risk to the industry from extravagant claims of certain copyright owners that such temporary copies infringe their rights under Sections 106 or 115. Therefore, the type of legislative clarification suggested by H.R. 3048, or by the Copyright Office with respect to such buffers used for distance education, should be adapted to cover Internet streaming.

As to the second issue, consumers may wish to make removable archive copies of digitally-acquired media so as to protect their purchases against losses. Despite the convenience of digital downloading, media collections on hard drives are vulnerable because of technical reasons, such as hard disk crashes, virus infection or file corruption; and practical reasons, such as the desire to upgrade to a new computer or the need to add more storage capacity. DiMA therefore supports amending Section 117 to apply to digitally-acquired media the right to make an archival or back-up copy.

All these rights should apply to "lawful" uses and copies, regardless of whether they are "authorized" by a copyright owner. This formulation preserves consumer rights under the fair use privilege, the exemption for private performances and displays (e.g., personal streaming from a locker service) and other exceptions and exemptions under the Copyright Act.