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LOST IN CYBERSPACE: THE DIGITAL DEMISE OF THE FIRST-SALE DOCTRINE

by KEITH KUPFERSCHMID†

I. INTRODUCTION

Over the last several years a debate has raged about how copyright law ought to apply to the Internet.[1] Much of the debate has revolved around such highly charged, copyright-related Internet issues as:

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1. The issue first officially reared its head in 1993, when President Clinton formed the Information Infrastructure Task Force ("IITF") to articulate and implement the Administration's vision for the National Information Infrastructure ("NII"). Shortly thereafter, a Working Group on Intellectual Property Rights was established by the IITF to examine the intellectual property implications of the NII. In September 1995, this Working Group released a report entitled "Intellectual Property and the National Information Infrastructure," commonly referred to as "the White Paper." This report explained how intellectual property law applies in cyberspace and proposed initial legislative recommendations. *See* Bruce A. Lehman, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 1 (Sept. 1995) [hereinafter White Paper].

Specifically, the White Paper recommended that: (1) the distribution right in Section 106 of the Copyright Act be amended to clarify that electronic transmissions are a type of distribution; (2) devices and services that would defeat technical copyright protection devices and systems be made illegal ("black box" provision); (3) the integrity of copyright management information be protected; and (4) special copying provisions for libraries be updated to permit certain digital copying.

Following release of the White Paper, bills were introduced in the House and Senate to amend the Copyright Act as recommended in the White Paper. These bills were quite controversial. In particular, the issue of on-line service provider ("OSP") liability, while not addressed by the bills, became the primary obstacle hindering passage. Also, the provisions relating to technological means of protection in the bills raised significant concerns. Although Representative Goodlatte and the U.S. Patent and Trademark Office attempted to remove the OSP liability obstacle by devising an appropriate solution that all interested

whether and to what extent an on-line service provider should be liable for the transmission of copyright infringing material over their networks[2] and how to craft an anticircumvention provision that appropriately balances the interests of copyright owners in preventing the circumvention of technical means they use to protect their copyrighted works against the interests of the fair use community and the consumer electronics industry.[3] These issues have been the subject of extensive debate and discussion by policy makers in the Government, private sector, members of the public, and on Capitol Hill.

One extremely significant copyright-related Internet issue, however, appears to be lost among the morass of copyright-related cyberspace issues being debated on and around Capitol Hill. This issue is: how to

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parties could accept, these attempts did not lead to resolution of the issue and the 104th Congress adjourned in October 1996 without passage of the amendments.

Although there was no domestic intellectual property activity related to the Internet, international activity in this area did occur in late 1996. In December 1996, the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions adopted two treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The two treaties contain provisions that incorporate international standards from the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPs") and provisions relating to the so-called "digital agenda." In particular, both Treaties include provisions that ensure the integrity of technological measures of protection and protect the integrity of electronic copyright management information.

Before the United States can join these treaties, they both must be ratified by the U.S. Senate, and the Congress must pass any needed implementing legislation. Also, the treaties do not come into force until they have been ratified by thirty countries.

2. Under existing law, OSPs are subject to the same standard of liability as anyone else who distributes a copyrighted work. An OSP may be held directly liable for its own acts of infringement. In addition, an OSP may be found vicariously liable if the OSP has the right and ability to control another's act of copyright infringement and receives a direct financial benefit from that act, and may be found liable as a contributory infringer if the OSP knew of the infringing act and induced, caused, or materially contributed to the act. Ever since the IITF was formed, OSPs have been attempting to get an exemption from liability or reduction in their liability.

3. The issue of protecting against the circumvention of technical means that copyright owners use to protect their works first arose in the White Paper and has continued to be a significant issue in bills introduced by Congress and the two new WIPO treaties. Before the United States can join either of the treaties, a provision relating to anticircumvention devices must be enacted. This has proven difficult because of the conflicting interests of the interested parties. Content providers would like a broad anticircumvention provision that protects against not only circumvention of anticopying mechanisms, but also unauthorized access. The consumer electronics industry would like a narrow anticircumvention provision that would allow the industry to produce devices that inadvertently circumvent (like general purpose computers) or that ignore anti-copying systems. The fair use community would like a very narrow anticircumvention provision or no provision at all because they believe that the fair use defense in Section 107 of the Copyright Act grants a right of access that would be practically impossible to take advantage of by enactment of a broad anticircumvention provision.

apply the first-sale doctrine[4] to transactions in cyberspace. Remarkably, even though incorrect application of the first-sale exception[5] could drastically alter the face of copyright law, it has, to date, received little attention by the Administration and Congress. If decided wrongly, the first-sale issue has the potential to swallow up crucial copyright issues and destroy the delicate balance between copyright owners and users of copyrighted material.

This article analyzes the first-sale exception and seeks to answer the question of how it ought to be applied in cyberspace. The first section of this article describes the first-sale exception, including its purpose and history. The second section analyzes whether the first-sale exception applies to network transmissions and, if so, how. The second section also discusses possible limitations to the first-sale exception that might be appropriate in the digital environment. The third section sets forth the conclusion that the first-sale exception is not applicable to network transmissions and recommends that Congress take steps to limit the applicability of the first-sale exception with regard to digitized copies of works by granting a rental right to copyright owners of these digitized works.

II. BACKGROUND

Since the very first Copyright Act was enacted in 1790, the drafters of our copyright law have attempted to craft provisions that would stand the test of time and technology. Nevertheless, it seems that whenever a new means for reproduction or communication is created or a change in commercial business practices occurs, the applicability and appropriateness of the copyright law is called into question.[6] As a result, Congress has periodically revised the copyright law over the years to account for these technological advances and changes in business practices.

Once again, it is time to confront the challenge of a new technology and with it those who question whether the provisions in the 1976 Copy-

4. *See* 17 U.S.C. § 109 (1994).

5. *See id.*

6. New technologies have always presented a challenge to the copyright law. Indeed, the very first copyright law, the Statute of Anne, was enacted as a result of the invention of the printing press. From the printing press to the photocopy machine to the digital audio tape, new technologies have been invented and popularized that test the boundaries of the literal language as well as the intent of the copyright law. For instance, when the photocopying machine became widely used, copyright owners of printed works became concerned that this new technology would result in mass piracy of their works, thereby destroying the value of their works. These concerns largely never came to fruition largely because, in most cases, it is much more time-consuming and costly to photocopy a book than to purchase the book from the book publisher and because the quality of a photocopy of a book is not as good as a copy of the book purchased from the publisher.

right Act[7] adequately and appropriately address this challenge. The new technology is the development of electronic networks and communication systems such as the Internet. With the use and popularity of the Internet growing at astounding levels,[8] the copyright law is once again confronting the challenge of a new technology.

The question some have begun to ask and this article attempts to answer is—does the existing first-sale doctrine as codified in Section 109[9] of the Copyright Act apply to transactions over the Internet; and if not, should Section 109 be amended to apply to transactions over the Internet? To address these questions, it is necessary to size up the challenger—the Internet—and the law being challenged—Section 109 of the 1976 Copyright Act.

A. The Technological Challenges to the Copyright Act Presented by the Internet

The Internet,[10] as it exists today and in its most general sense, is a collection of thousands of local, regional, and global Internet Protocol networks that links millions of computer users via telephone lines and satellite connections allowing users to communicate with each other in real time.[11] The Internet enables users to share files, search for information, send electronic mail, and log onto remote computers. Empowered by these new-found capabilities, computer users of today find themselves endowed with unprecedented access to information.

The Internet increases the speed and ease by which someone may make copies of a work and distribute copies of that work.[12] Any person with a computer, Internet access, and a digitized work can make a copy of that work and distribute it to millions of people within seconds. All it

7. 17 U.S.C. §§ 101-810 (1994).

8. There are an estimated 50 million people in 150 countries connected to the Internet, and the number is growing rapidly. Remarks by United States President Bill Clinton in Announcement of Electronic Commerce Initiative 2 (July 1, 1997).

9. *See* 17 U.S.C. § 109.

10. The Internet is just one aspect of what is referred to as the National Information Infrastructure ("NII") or Global Information Infrastructure ("GII").

11. Intellectual Property Protection in Cyberspace: A View from the Ad Hoc Copyright Coalition 2-3 (Ad Hoc Copyright Coalition, 1996); *see also* Daniel P. Dern, The Internet Guide For New Users 16 (1994).

12. Traditional means of distributing a copyrighted work involve transferring (via shipping, mail service, or otherwise) the work from the manufacturer to the wholesaler, then from the wholesaler to the retailer, and then finally, from the retailer to the consumer. This distribution method takes significantly more resources and time than a distribution over the Internet. The Internet permits a work to be distributed from the copyright owner directly to the consumer without the need for any of the middlemen associated with the traditional means of distribution. Consequently, a distribution over the Internet will take considerably less resources and less time.

takes is a mere stroke of a key on a computer keyboard or simply the dragging of an icon with the computer's mouse, and a person can send a work to virtually anyone in the world.

In addition to transmitting copies of a work directly to others, the Internet provides other means for distributing content. For instance, a person can "post" or "upload"[13] a copy of a work on a bulletin board service ("BBS") or other service.[14] Any individual with a computer can then access the BBS and download the content.[15] In many instances, the person who has uploaded the content does not even know the identity of the person who has downloaded the content.

Not only does the Internet make it possible to distribute and copy works faster and easier than ever before, it also preserves the quality of the original work. When multiple analog copies or photocopies of a work are made, the analog copies or photocopies will deteriorate as each new generation of copies is made. That is not the case when multiple digital copies are made. The quality of the first copy of a digitized work is no different than the thousandth copy—each copy is a perfect reproduction of the original copy of the work.

Never before has any new technology offered such a perfect reproduction and delivery system. This has not gone unnoticed by businesses and computer users who are changing the way they create, reproduce, store, and distribute their works and the works of others to take advantage of the benefits offered by the Internet. As a result of the rather dramatic change in business and information dissemination practices caused by the advent and popularity of the Internet, the copyright law is receiving its greatest challenge.

B. The First-Sale Exception as Codified in the Copyright Act

The Copyright Act grants copyright owners certain exclusive rights, which together comprise the bundle of rights known as copyright. Specifically, Section 106 of the Copyright Act gives copyright owners the rights of reproduction, adaptation, distribution, public performance, and

13. "Uploading" is the process by which a user copies digitized copies from a local computer onto a centralized computer or network.

14. A bulletin board system ("BBS") is a type of information and content dissemination center residing on a computer. By accessing the BBS, users of the BBS can gain access to the information and content on that BBS. The information and content available on the BBS may be controlled by a specific individual or group. In many cases, however, users of the BBS upload and download information and content to the BBS without restriction. Just about anyone can create their own BBS. All that is needed to create a BBS is a computer, a modem, the appropriate software, and access to the Internet (which can be obtained through an OSP).

15. "Downloading" is the process by which a user copies digitized content from the centralized computer or network where it resides to the downloader's local computer.

public display.[16] This essentially means that one needs the permission of the copyright owner to copy the work, make an adaptation of it, distribute it, or perform or display it publicly.[17]

There are several exceptions to the copyright owner's exclusive rights scattered throughout the Copyright Act.[18] One of these is the

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16. 17 U.S.C. § 106 (1994) provides:

> Subject to Sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

17. Not all works fully enjoy these rights. For instance, copyright owners of sound recordings only have a right to control the performance of their sound recordings when the performance is by means of a digital audio transmission and provided certain other preconditions in Section 114 of the Copyright Act are satisfied. 17 U.S.C. § 114 (1994).

18. Exceptions and limitations to the exclusive rights are found in Sections 107 through Section 121 of the Copyright Act. *See* 17 U.S.C. §§ 107-121 (1994). Section 107 codifies the fair use doctrine. *See* 17 U.S.C. § 107 (1994). This provision permits a party to make use of a work without the copyrights owner's authorization and without compensating the copyright owner for such use if the use qualifies as a fair use. *See id.* To determine whether a particular use made of a work is considered to be a fair use, the factors to be considered include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

See id. Section 108 provides an exception that allows libraries and archives to reproduce and distribute one copy or phonorecord of a work at a time for the purposes of preservation and security, deposit for research use in another library if the work is unpublished, or fulfilling a request by a library user. *See* 17 U.S.C. § 108 (1994). Section 109 provides for a first-sale exception. *See* 17 U.S.C. § 109 (1994). Section 110 provides a very limited exception to the performance and display right for, *inter alia*, purposes of classroom education performances, religious services, nonprofit performances, and transmissions to the handicapped and to the blind. *See* 17 U.S.C. § 110 (1994). Section 111 establishes a limited compulsory license system for cable retransmissions. *See* 17 U.S.C. § 111 (1994). Section 112 permits broadcasters to make an ephemeral copy of a performance or display to facilitate an authorized transmission of the performance or display. *See* 17 U.S.C. § 112 (1994). Section 113 provides for narrowly tailored limitations on the scope of rights in pictorial, graphic, and sculptural works. *See* 17 U.S.C. § 113 (1994). Section 114 provides for limited

first-sale exception. The first-sale exception is codified in Section 109 and can be separated into two parts: Section 109(a), which provides for an exception to the copyright owner's right of distribution, and Section 109(c), which provides for an exception to the copyright owner's right of public display.

1. *Section 109(a): Distribution Portion of the First-Sale Exception*

The first part of the first-sale exception is codified in Section 109(a) and provides an exception to the copyright owner's right of distribution under Section 106(3) of the Copyright Act. Specifically, Section 109(a) provides that:

> Notwithstanding the provisions of Section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[19]

Generally, this provision has been interpreted to mean that the owner of a material object embodying the copyright owner's work can dispose of possession of that object without violating the copyright owner's distribution right.[20] This provision allows people to freely sell or otherwise transfer legitimate copies and phonorecords. In practice, it is

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exceptions to the scope of rights granted in sound recordings. *See* 17 U.S.C. § 114 (1994). Section 115 establishes a compulsory license for the making and distributing of phonorecords provided the specified prerequisites are met. *See* 17 U.S.C. § 115 (1994). Section 116 provides for arbitration of negotiated licenses for coin-operated phonorecord players (e.g., jukeboxes). *See* 17 U.S.C. § 116 (1994). Section 117 allows the owner of a copy of a computer program to make a copy or adaptation of that program provided the copy or adaptation is created as an essential step in the utilization of the program and for archival (back-up) purposes. *See* 17 U.S.C. § 117 (1994). Section 118 provides for exceptions to the rights in nondramatic musical and artistic works used for the purposes of noncommercial broadcasting. *See* 17 U.S.C. § 118 (1994). Section 119 establishes a compulsory license for satellite retransmissions that allows for secondary transmissions of superstitions and network stations for the purpose of private home viewing. *See* 17 U.S.C. § 119 (1994). Section 120 provides for limitations on the scope of rights in architectural works. *See* 17 U.S.C. § 120 (1994). Section 121 allows certain organizations to reproduce and distribute previously published literary works to the blind or other people with disabilities in specialized formats. *See* 17 U.S.C. § 121 (1994). In all these cases there are numerous prerequisites that must be met for the exception or limitation to apply.

19. *See* 17 U.S.C. § 109(a) (1994).

20. Section 202 of the Copyright Act states the distinction between copyright ownership and ownership of a material object in which the work is embodied. *See* 17 U.S.C. § 202 (1994). When a party transfers ownership of a material object in which a copyrighted work is fixed, such transfer does not transfer any rights in the copyrighted work itself. *See id.* Likewise, when a party transfers ownership of a copyright or any of the exclusive rights under copyright to another party, such transfer does not transfer a property right in the material object in which the copyrighted work is embedded (unless agreed otherwise). *See id.*

this provision that allows people to sell their old comic books at their garage sales, you to give your three-year old niece the latest Barney videotape as a gift, and libraries to loan books to the public.

The first-sale exception is not a new concept. It first appeared in the common law and later was codified in Section 27 of the 1909 Copyright Act.[21] Section 27 provided that "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."[22] When this provision was added to the Copyright Act in 1909, Congress intended it to be used as a means for balancing the copyright owner's right to control the distribution of the work with the public interest in the alienation of copies of the work.[23]

It is significant to note that the first-sale exception embodied in Section 109(a) only applies to the distribution right. It does not protect, from copyright infringement liability, one who reproduces, publicly performs, or adapts a copyrighted work without authorization.[24] Thus, a person who reproduces, adapts, or publicly performs a copyrighted work without the authority to do so, will be liable for copyright infringement even though the first-sale exception allows the person to distribute their copy of that work.

Several other limitations apply to the first-sale exception in Section 109(a). First, and perhaps most significantly, the exception applies only to the "particular" copy or phonorecord in a person's possession. It does not apply to the copyrighted work itself, and thus, gives a person no rights whatsoever in the work itself.[25] For example, the first-sale exception would allow a person to dispose of his or her paperback copy of John

21. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 351 (1908) (holding that the copyright owner's right to "vend" his book did not give the copyright owner the right restrict future retail sales of the book or the right to require the that the book be sold at a certain price per copy).

22. 17 U.S.C. § 27 (1970).

23. CRAIG JOYCE, COPYRIGHT LAW 528 (2d ed., 1991) (stating that "the first-sale doctrine . . . attempts to strike a balance between assuring a sufficient reward to the copyright owner and permitting unimpeded circulation of copies of the work").

24. *See* Red-Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 281 (4th Cir. 1989) (stating that "courts and commentators likewise agree that the first-sale doctrine has no application to the rights of the owner of a copyright guaranteed by § 106, except the right of distribution."); *see* Columbia v. Redd Horne, 749 F.2d 154 (3d Cir. 1984) (holding that the first-sale exception did not immunize the operators of a videocassette rental store from violating a copyright owner's performance right when they operated booths for the public to view the video cassettes for a fee because the first-sale exception does not immunize unauthorized performances, only unauthorized distributions).

25. *See* 17 U.S.C. § 202 (stating that when a party transfers ownership of a material object in which a copyrighted work is fixed, such transfer does not transfer any rights in the copyrighted work itself).

Grisham's *The Firm*,[26] but does not give that person any right to copies of the paperback that belong to others nor to any rights in the literary work entitled *The Firm* embodied on the pages of the paperback.

Second, the exception applies only to legitimately produced copies and phonorecords.[27] If the copies or phonorecords in a person's possession are piratical goods (*i.e.*, goods made without the authority of the copyright owner or the law), the first-sale exception does not apply and that person's disposition of the pirate copy or phonorecord is an infringement of the copyright owner's distribution right.

Third, the first-sale exception does not apply when the particular article transferred is a computer program or a sound recording and the computer program or sound recording is transferred by rental, lease, or lending for direct or indirect commercial purposes.[28] This limitation is commonly referred to as the copyright owner's rental right and is codified in Section 109(b) of the 1976 Copyright Act.[29]

The rental right was added to Section 109 of the 1976 Copyright Act in two stages. In 1984, the Record Rental Amendment Act was enacted to provide copyright owners of sound recordings with the right to control the commercial rental of their sound recordings.[30] Prior to the passage of this Act, record rental stores posed a serious threat to recording indus-

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26. *See, e.g.*, JOHN GRISHAM, THE FIRM (1991).

27. *See* 17 U.S.C. § 109(a) (only a person possessing a copy legally made is entitled to the first-sale exception).

28. The rental right is not applicable when the rental, lease, or lending is "for nonprofit purposes by a nonprofit library or nonprofit educational institution." 17 U.S.C. § 109(b)(1) (1994). The rental right limitation would not prevent the owner of a particular copy of a sound recording or a computer program from otherwise disposing of the program or sound recording. *See id.* For instance, the owner of a particular Smashing Pumpkins CD could sell or give away the CD and still fall within the first-sale exception.

29. As originally enacted, the record and computer software rental amendments included a sunset provision that was to become effective on October 1, 1997. Prior to October 1997, Congress decided to make this provision permanent and deleted the sunset provision. In addition to being accepted domestically, the rental right has also become universally accepted by the international copyright community as well. The TRIPs Agreement requires Member States to provide copyright owners with the right to control the commercial rental of originals or copies of their computer programs, sound recordings, and, in certain cases, cinematographic works. TRIPs, Art. 11 & 14. TRIPs is one of a package of agreements that were negotiated under the auspices of the General Agreement on Tariffs and Trade ("GATT") as part of the Uruguay Round of multilateral trade negotiations. The rental right has also been recognized in other international fora. Both the WIPO Copyright Agreement and the WIPO Performances and Phonograms Agreement, which were concluded in December 1996 at the World Intellectual Property Organization ("WIPO") in Geneva, include provisions that require Member States to provide copyright owners with a commercial rental right. WIPO Copyright Treaty, Art. 7; WIPO Performances and Phonograms Treaty, Art. 9 & 13.

30. Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (Oct. 4, 1984, amended in 1988), *reprinted in* 1984 U.S.C.C.A.N. 2898.

try profits because stores would rent phonorecords to individuals who would make reproductions of those phonorecords on blank audio cassettes in lieu of purchasing the phonorecords.[31] This resulted in a drastic reduction in phonorecord sales. By enacting the Record Rental Amendments Act, Congress explicitly recognized the need to protect the recording industry from new technology (the audio cassette tape and the audio home tape recorder) and new business practices (record rental stores) which threatened the industry's survival.

In 1990, Section 109 was amended once again when Congress enacted the Computer Software Rental Amendments Act.[32] The Computer Software Rental Amendments Act provided copyright owners of computer programs with the right to control the commercial rental of their computer programs.[33] At the time the Computer Software Rental Amendments Act was enacted there was no evidence that computer software copy shops were becoming widespread to a degree comparable to the situation that led to enactment of the Record Rental Amendments Act.[34] Instead, Congress recognized that the ease of reproducing computer programs and the minimal cost associated with making copies of computer programs made computer programs particularly susceptible to widespread copying, and therefore enacted the Computer Software

31. *See* H.R. REP. No. 98-987, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899; S. REP. No. 98-162, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899.

32. Judicial Improvement Act of 1990, Pub L. No. 101-650, 104 Stat. 5089, 5134-35 (1990) (codified as 17 U.S.C. § 802 (1994)), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6957.

33. Section 109(b) does provide two exceptions to the rental right. In essence, these exceptions apply when the computer program is embodied in a product and the product, not the program, is the purpose of the rental. Specifically, the first exception provides that there is no right to control the rental of a computer program embodied in a machine or other product that cannot be copied when the machine or product is used or operated in its normal manner. *See* 17 U.S.C. § 109(b)(1)(B)(i) (1994). This exception is intended to cover the renting of consumer products, such as automobile, microwaves, calculators, and other products that contain computer programs that are rented for the purpose of using the product, not for the purpose of copying the computer program within the product. *See* H.R. REP. No. 101-735, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6939. The second exception provides that the rental right shall not apply to a "computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes." 17 U.S.C. § 109(b)(1)(B)(ii) (1994). For years, Congress has been under pressure from the copyright owners of video games to delete this provision, and thereby grant copyright owners of video games with a rental right. Article 11 of the TRIPs Agreement also provides an exception to the rental rights. Specifically, Article 11 provides that, "[i]n respect of computer programs, the [rental right] does not apply to rentals where the program itself is not the essential object of the rental." The two exceptions noted above are consistent with this limitation.

34. H.R. REP. No. 101-735, at 6, 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6937, 6939. Congress noted that, even though only a small number of software rental outlets had developed, the need for a rental right was even more compelling for software than for sound recordings. *See id.*

Rental Amendments Act before a proliferation of computer software copying shops opened for business.[35]

2. *Section 109(c): The Display Portion of the First-Sale Exception*

The second part of the first-sale exception is codified in Section 109(c). This part provides for an exception to the copyright owner's right of public display under Section 106(5) of the Copyright Act. Specifically, Section 109(b) provides that:

> Notwithstanding the provisions of Section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.[36]

It is this provision that allows owners of sculptures and paintings to display them in galleries and department stores to display clothing in their windows to attract customers. Similar to the distribution portion of the first-sale exception, the display portion of the first-sale exception is a traditional privilege enjoyed by the owner of a particular copy of a work.[37] In enacting Section 109(c), Congress attempted to balance the rights of copyright owners, to control the public display of their works, with the rights of the owner of a particular copy of a work to make use of and enjoy that copy.[38] In so doing, Congress chose to limit the copyright owner's display right where a display of the copy would not affect the copyright owner's ability to commercialize or otherwise exploit the work.[39] An additional purpose of Section 109(c) was to account for "new communications media, such as television, cable and optical transmission devices, and information storage and retrieval devices, for replacing printed copies with visual images."[40]

There are several limitations to the display portion of the first-sale exception. First, the display portion does not apply unless the particular copy being displayed is produced legitimately. If the displayed copy is not lawfully made (e.g., a pirate copy) the first-sale exception does not apply and, in the absence of any other defense or exception, the display of the copy will infringe the copyright owner's display right.

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35. *See id.*

36. 17 U.S.C. § 109(d) (1994).

37. H.R. REP. No. 94-1476, at 80 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693-94.

38. *See id.*

39. *See id.* Congress intended to "preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected." *Id.*

40. *See id.*

Second, when a display is indirect, such as by projection of an image, the first-sale exception applies only if one image is being displayed at a time. When multiple copies of this image are displayed simultaneously, the first-sale exception would not be a defense to infringement. For example, the first-sale exception would not apply where a lecture hall is equipped with individual viewing devices that permit multiple persons in that lecture hall to view the displayed image on each individual viewing device at the same time.[41]

Third, with regard to indirect displays, the exception applies only when those viewing the display are doing so at the same place where the copy is located.[42] For instance, an unauthorized projection of a copy of a particular copyrighted work would not violate the copyright owner's display right if all viewers of that projection are located in the same physical surroundings as the copy.[43] Of course, there is no such limitation on a direct display because the very nature of a direct display requires that it occur within the immediate presence of the viewers.

Finally, a limitation applies to both portions (Sections 109(a) and (c)) of the first-sale exception. This limitation, codified in Section 109(d), provides that the mere possession of a copy of a work does not entitle the possessor of that work to avail himself or herself to the first-sale exception.[44] To qualify for the first-sale exception the person distributing or displaying the copy of the work must be either the actual owner of the particular copy of the work or must be authorized by the copyright owner to distribute or display the copy of the work. If a person comes into possession of a copy of a work illegally or by rental, lease, loan, or any other means, that person does not qualify for the first-sale exception under Section 109(d).

III. ANALYSIS

Over the last few years the Federal Government, on-line service providers[45] ("OSPs"), content providers, libraries, academic communi-

41. *See id.*

42. *See id.*

43. Therefore, displays of visual images via closed or open circuit television or computer system would not be permitted. *See id.* There is a certain ambiguity in the phrase "place where the copy is located." MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 820 [B] (1997). It would appear that this phrase should be interpreted to mean that the viewers must be located in the "same physical surroundings" as the copy. *Id.*

44. 17 U.S.C. § 109(d) (stating: "The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.").

45. The term "on-line service providers" is used generically here to include any entity that provides services to a user that enable that user to access the Internet or otherwise

ties, the consumer electronic industry and other interested parties have been attempting to determine whether the provisions in the Copyright Act adequately address Internet-related transactions. This article addresses this inquiry, with the goal of retaining the delicate balance between the rights of copyright owners and the interests of copyright users while ensuring that Internet commerce can be conducted in a reliable and secure environment. The underlying premise of this article dictates that copyright law applies to transactions on the Internet similar to the traditional application of copyright law to an original work of printed text on paper. The original text being a digitized representation and the paper being a host computer.

A. How the Distribution Portion of the First-Sale Exception Applies to the Internet

There are four notable theories on how the first-sale exception applies to works having the potential to be distributed over electronic communication networks (i.e., the Internet). To best illustrate the theories, suppose a person transmits a legitimate copy of a copyrighted work to another person over the Internet without the copyright owner's authority. The theories provide that the transmission: (1) is not an infringement of any of the copyright owner's exclusive rights because the copyright owner's exclusive rights do not extend to Internet transmissions;[46] (2) is not an infringement of any of the copyright owner's exclusive rights because, although the transmission may be a distribution, it is permitted by the first-sale exception;[47] (3) should not be an infringement of any of the copyright owner's exclusive rights under the first-sale exception if the person responsible for the transmission destroys his or her copy of the work simultaneously with the transmission;[48] or (4) is an

access on-line content. OSPs include Internet service providers ("ISPs"), bulletin board operators, telecommunication providers, hardware providers, etc.

46. *See* Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29, 41-44 (1994); *See* Pamela Samuelson, *Legally Speaking*, Nat'l Info. Infrastructure Intell. Prop. Rep. (1994).

47. *See* Digital Future Coalition, *Summary of Issues and Proposals to Amend the "NII Copyright Protection Act."* (proposing that Section 109(a) of the Copyright Act be amended "to make clear that the 'First-Sale' doctrine applies to digital copies lawfully by means of transmission to the same extent—*no more or no less*—that it applies to physical analog copies."). *See also* Conference, Public Hearings Explore IP and Fair Use on Information Highway, 48 Pat. Trademark & Copyright J. (BNA) No. 1197, at 567 (Sept. 29, 1994) (stating that at the hearings on the Green Paper, Gary Shapiro, representing the Home Recording Rights Coalition, testified that "the applicability of the first-sale doctrine should not depend on the method of distribution.").

48. *See* James V. Mahon, *A Commentary on Proposals for Copyright Protection on the National Information Infrastructure*, 22 Rutgers Computer & Tech. L.J. 233, 262-63 (1996).

infringement of the reproduction, distribution, and display rights of the copyright owner regardless of whether the original copy transmitted is simultaneously destroyed.[49] Of these four theories, the fourth is the most tenable theory in support of the balance the Copyright Act seeks to preserve.

Despite the first-sale exception, an unauthorized transmission over the Internet constitutes a copyright infringement for three crucial reasons. First, it is not possible to transmit a copy of a work over the Internet without making a copy of the original copy[50] in the random access memory ("RAM") of the receiving computer. When a copy of the original copy is made in the computer's RAM, the copyright owner's right of reproduction is implicated[51] by the transmission. As the first-sale exception cannot be used as a defense against infringement of the reproduction right, the RAM copy and therefore the transmission will not be excused by the first-sale exception. Second, even if one assumes that transmitting a copy of the work does not infringe the copyright owner's reproduction right, the first-sale exception would not apply because the copy being distributed is not the "particular copy" but rather a new copy. Third, to apply the first-sale exception to transmissions over the Internet would be inconsistent with the purpose of the first-sale exception and public policy because it would unduly impinge upon copyright owners' distribution rights by discouraging them from using the Internet as a vehicle for delivering their works to consumers.

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49. *See* White Paper, *supra* note 1, at 90-95. In the Green Paper, which was an earlier version of the White Paper published as a vehicle to obtain public comment on the Administration's preliminary policy positions, the Administration recommended that Section 109 be amended to make clear that the first-sale exception did not apply to transmissions. *See* Intellectual Property and the National Information Infrastructure, a Preliminary Draft of the Report of the Working Group of Intellectual Property Rights 125 (July 1994) [hereinafter Green Paper]. In the White Paper, however, the Administration determined that no such amendment was necessary, as it was clear that the first-sale exception did not immunize unauthorized transmissions from liability. *See* White Paper, *supra* note 1, at 95.

50. The term "original" is used throughout the article to refer to the copy of a work that resides in the originating or transmitting computer, not to the actual original copy of a work first produced by the author. In other words, the term "original" is used to indicate where the copy is located, not when the copy was created. Use of "original" in the above defined context should not be confused with the "originality" requirement necessary for a work to qualify for copyright protection under the Copyright Act. *See, e.g.*, 17 U.S.C. § 102 (a) (1994).

51. The term "implicate" is used throughout this article instead of "infringe" to account for the possibility that a violation of a Section 106 right may be implicated without the right being infringed. There are numerous exceptions in the Copyright Act that may preclude a Section 106 right from being infringed. For instance, a person reproducing a copyrighted work without the copyright owner's authority when the reproduction is excused as a fair use under Section 107 "implicates" the copyright owner's reproduction right but does not infringe the right.

1. *The First-Sale Exception Does Not Apply Because an Unauthorized Transmission of a Work Infringes the Copyright Owner's Right of Reproduction*

When a work is transmitted from one computer to another, a temporary copy of the work is made in the RAM of the "receiving" computer.[52] Although this RAM copy is a temporary copy, it is a copy nonetheless and therefore implicates the copyright owner's reproduction right. Without authorization from the copyright owner or an applicable defense or exception in the Copyright Act that permits such reproduction, the making of the RAM copy infringes the copyright owner's reproduction right.

The first-sale exception provides no defense to the making of a RAM copy. The first-sale exception is a defense only to a violation of the distribution right and does not immunize acts that violate the copyright owner's reproduction right.

As the first-sale exception does not immunize acts of reproduction, such as the making of a RAM copy (transmissions over the Internet cause RAM copies to be made), the transmission of a copy of a work from one computer to another also constitutes an infringing act (unless there exists an applicable exception or limitation in the copyright law, other than the first-sale exception, that would immunize the reproduction from infringement). Some have argued that the making of RAM copies does not implicate the copyright owner's reproduction right and therefore the transmission would not infringe the copyright owner's reproduction right.[53] These individuals argue that copies made in a computer's RAM do not fall within the definition of "copies" as defined by the Copyright Act because RAM copies are not sufficiently fixed. Section 101 of the Copyright Act defines "copies" as:

> material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[54]

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52. This RAM copy is different from a permanent copy that is made when a work is downloaded to a storage device, such as a disk or computer hard drive, by the user. Unlike the permanent copy, the RAM copy temporarily disappears when the computer is turned off. Perhaps the most important attribute of the RAM copy is that there is no way to prevent a RAM copy from being made. The computer must make a RAM copy to operate. When a work is transmitted over the Internet it is not possible to transmit a copy of a work over the Internet without making a copy of the original copy.

53. See Litman, *supra* note 46, at 41-44; Samuelson, *supra* note 46.

54. *See* 17 U.S.C. § 101 (1994). The same argument is made with respect to phonorecords, as defined in Section 101: "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

Section 101 of the Copyright Act also defines when a work is considered to be "fixed:"

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.[55]

Based on the statutory definitions of "copies" and "fixed," RAM copies are considered to be "copies" for copyright purposes, and thus reproductions under Section 106 of the Copyright Act, if RAM copies are sufficiently stable so as to permit them to be perceived or otherwise communicated for more than a transitory period of time.

The issue of whether a RAM copy is fixed has been the subject of much debate over the last several years. The debate appears to have resulted in the Federal Government and virtually the entire copyright community concluding that RAM copies are sufficiently fixed to qualify as copies for copyright purposes.[56] Nevertheless, interested parties continue to argue the point.

On one side of the RAM-copying issue are the OSPs, content providers and the academic and library communities.[57] Section 109(d) does not allow OSPs relief via the first-sale exception because they are not the actual owners of the distributed material thus OSPs have a vested interest in ensuring that RAM copies are not considered copies under the Copyright Act. OSPs make temporary as well as permanent copies of works in the course of providing their services.[58] Because part of the OSPs' business activities involve the making of copies, they are concerned that if the making of RAM copies is deemed to violate a copyright owner's reproduction right, they could be held vicariously liable or liable as direct or contributory infringers for the making of such copies.[59] The academic and library communities suggest that if RAM copies are considered to be copies under the Copyright Act, browsing and reading con-

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55. *See id.*

56. Julie L. Sigall, *Copyright Infringement was Never this Easy: RAM Copies and their Impact on the Scope of Copyright Protection for Computer Programs*, 45 CATH. U. L. REV. 181, 203-04 (1995) (stating that RAM copies do not meet the statutory definitions of 'fixed' and 'copies' appears untenable").

57. Sigall, *supra* note 56, at 204.

58. See Eric Schlachter, *To Cache or Not To Cache?*, LEGAL TIMES, Dec. 6, 1996, at 45. OSPs and others "cache" or store content that is frequently accessed to make the Internet operate more efficiently and more quickly. *See id.* There are several types of caching. *See id.* For instance, a browser may cache recently or frequently visited web pages in a user's computer's RAM, or a server may cache web sites on the server. *See id.*

59. *See* White Paper, *supra* note 1, at 114-24.

tent on the Internet will be an infringing activity.[60]

On the other side of the debate are the executive, legislative, and judicial branches of the federal government, as well as virtually all of the copyright community. The position of the executive branch is stated in the report entitled "Intellectual Property and the National Information Infrastructure" (commonly referred to as "the White Paper"). The White Paper states the Administration's position on RAM copies as follows: "when a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief pe-

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60. *See e.g.,* Digital Futures Coalition *supra* note 47. *See also* Litman, *supra* note 46, at 41-44; Jessica R. Freidman, *A Lawyer's Ramble down the Information Superhighway: Copyright*, 64 FORDHAM L. REV. 705, 708 n.33 (1995).

This argument misses the point. It is not the act of browsing that may be a copyright violation, but rather the act of copying that occurs while browsing. Just because a copy is made, however, does not necessarily mean that an infringement has occurred. When copying is authorized by the copyright owner, exempt from liability as a fair use, otherwise exempt under the Copyright Act, or of such a small amount as to be *de minimis*, then there will be no infringement liability. In the case of browsing, one or more of these exceptions from liability may apply. In most cases, the mere act of browsing, absent any other infringing or unlawful act would not subject the browser to liability.

In many cases, temporary, incidental reproductions, such as when copies are made in RAM when browsing the Internet will constitute a fair use. This view is consistent with the fair use doctrine as it is interpreted by courts today under Section 107 of the Copyright Act, because the act of making temporary, incidental copies when browsing the Internet is not a commercial use that harms potential or actual markets. This may, however, change as technology changes and people begin to use temporary copies for commercial purposes. (For instance, a commercial computer program used by the general public to draft a will or a screen saver could be uploaded onto the Internet where it could be used by others without downloading the program or the screen saver. In both cases, although the user has only made a temporary copy, the temporary copy has displaced the commercial sale of the computer program or screen saver, which harms the copyright owner's market for his product.)

In addition, reproductions made while browsing may not be infringing because they are typically made with the implicit authority of the copyright owner. By making a work freely available on the Internet and not encrypting or otherwise preventing or warning users not to browse or download the work, the copyright owner is implicitly granting users the authority to browse the copyrighted material, and thus to perform any of the acts necessary to browse, such as copying the copyrighted material to the computer's RAM. Of course, this "implicit authority" exception to liability only applies where the copyright owner or a person authorized by the copyright owner has uploaded the work onto the Internet. If a third party uploads a copyright owner's work without that copyright owner's authority, there would be no implicit authority to copy the work. It should also be pointed out that much of the "information" on the Internet is "chat" and e-mail, which people make available with no intent to enforce their copyrights or without obtaining license fees.

Finally, it is significant to note that reading content on the Internet, standing alone, is not and never will be considered to be an infringing activity. The mistaken belief that reading a document on a screen when browsing the Internet is a copyright violation apparently stems from a misinterpretation of the reproduction right in Section 106 of the Copyright Act. It is the act of copying that implicates the copyright owner's rights, not the act of reading.

riod, a copy is made." This position was reiterated by the Administration during the Diplomatic Conference held at the World Intellectual Property Organization ("WIPO") in December 1996 (which concluded with the adoption of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). The United States Delegation supported language that would clarify that the reproduction right provided for in Article 9 of the Berne Convention includes a copyright owner's right to control of temporary reproductions stored in a computer.[61]

The legislative branch also has taken the position that RAM copies are sufficiently fixed to qualify as copies under the Copyright Act. Admittedly, the first attempt by Congress to address the issue of RAM copying was unsuccessful. The House Report accompanying the 1976 Copyright Act stated that "the definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen . . . or captured momentarily in the 'memory' of a computer."[62] It would appear that this statement was later corrected by Congress when it adopted the Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU").[63] The CONTU Report states that "[b]ecause works in computer storage may be repeatedly reproduced, they are fixed and, therefore, are copies."[64] The Report furthers states that "[i]nsofar as a

61. *See* Agreed Statements Concerning the WIPO Performance and Phonograms Treaty, Art. 1(4), Diplomatic Conference on Certain Copyrights and Neighboring Rights Questions, WIPO (Dec. 20, 1996).

62. H.R. REP. No. 94-1476, at 80 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693-94. It is not entirely clear that this phrase in the House Report was meant to refer to RAM copies. The redundant use of terms, such as "momentarily," "briefly," "evanescent," and "transient" would indicate that this phrase was not addressing all temporary copies, but just those temporary copies that were too brief or too transient to be considered to be fixed. The Senate report was silent as to whether copies made in a computer's memory should be considered to be copies for copyright purposes.

63. In 1974, Congress created the National Commission on New Technological Uses of Copyrighted Works ("CONTU") to address copyright issues related to the creation of new works with computer assistance and the use of copyrighted works in conjunction with computers. Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. 2 § 206(b), 88 Stat. 1873 (codified as amended at 2 U.S.C. § 206(b) (Supp. IV 1974)), *reprinted in* 1974 U.S.C.C.A.N. 6849. CONTU issued its Final Report in 1978. The Report included several recommendations changes to the copyright law, including the addition of Section 117 and a definition of computer programs in Section 101. Final Report of the National Commission on New Technological Uses of Copyrighted Works (1978). [hereinafter CONTU Report].

Congress subsequently adopted CONTU's recommendations when it enacted the Computer Software Copyright Act in 1980. H.R. REP. No. 96-1307, pt. 1, at 23-24 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6460, 6482-83. The brief legislative history of the Act combined with the fact that Congress enacted CONTU's recommendations with virtually no changes has led courts to treat the CONTU Report as legislative history. *See* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988).

64. CONTU Report, *supra* note 63, at 22 n.111.

contrary conclusion is suggested in [the House] report accompanying the new law, this should be regarded as incorrect and should not be followed, since legislative history need not be perused in the construction of an unambiguous statute."[65]

In addition to the language in the CONTU report, additional evidence shows that Congress intended RAM copies to fall within the definition of copies in the Copyright Act. In particular, Congress enacted Section 117 of the Copyright Act, which explicitly permits owners of a computer program to make copies (such as RAM copies) of computer programs. These copies comprise an essential step in using the computer program with the computer.[66] If RAM copies were not "copies" in the copyright sense, there would be no need for such a broad exception and the exception could have been drafted much more narrowly or omitted entirely.[67]

The judicial branch also has made its position known on the RAM-copying issue. In *MAI Systems Corp. v. Peak Computers Inc.*,[68] the Ninth Circuit Court of Appeals held that Peak Computers Inc., was liable for copyright infringement. Peak Computers Inc. is a company that maintains computer systems and it temporarily loaded a computer's operating system, owned by MAI and licensed to MAI's (and Peak's) customers, onto the computer's RAM to repair the operating system. The court stated that the "loading of copyrighted software into RAM creates a 'copy' of that software in violation of the Copyright Act."[69] In addition to *MAI v. Peak*, several other cases have examined whether a RAM copy is sufficiently fixed to qualify as a copy under the Copyright Act, each reaching the same conclusion as the Ninth Circuit Court in *MAI v. Peak*.[70]

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65. CONTU Report, *supra* note 63, at 22 n.111.

66. 17 U.S.C. § 117 (1994) which provides the following:

> Notwithstanding the provisions of Section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner . . . .

Id.

67. *Vault Corp.*, 847 F.2d at 260. The court in Vault stated:

> [b]ecause the act of loading a program from a medium of storage into the computer's memory constitutes a copy of the program, the CONTU reasoned that the 'one who rightfully possesses a copy of a program . . . should be provided with a legal right to copy it to the extent which will permit its use by the possessor.

Id.

68. 991 F.2d 511 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 671 (1994).

69. *Id.* at 518.

70. *See* Advanced Computer Services v. MAI System Corp., 845 F. Supp. 356 (E.D. Va. 1994) (holding Advanced Computer Systems ("ACS"), a company that maintains computer

There is overwhelming support for the proposition that RAM copies are sufficiently fixed to qualify as copies under the Copyright Act. Arguments to the contrary have little or no support and have been consistently rejected by the courts, the Administration, and the Congress. Consequently, a RAM copy created while transmitting a copy of a work is a "copy" as defined by the Copyright Act and, because the first-sale exception applies only to distributions and displays, the RAM copy infringes the copyright owner's reproduction right.[71]

2. *The First-Sale Exception Is Not a Defense Because the Particular Copy Is Not Being Transmitted*

Even if one assumes *arguendo* that the transmission of a copy of a work between computers does not implicate a violation of the reproduction right, the first-sale exception still would not immunize the unauthorized transmission of a copy of a work because the copy residing in the receiving computer is not the "particular copy" owned by the transmitter.

Because of the nature of existing technology involved in transmitting a copy of a work from one computer to another, the first-sale exception will not apply to any such transmission. When a copy of a work is transmitted from one computer to another, the "original" copy resides on the transmitting computer and a new "second-generation" copy resides on the receiving computer. Experts may dispute whether the second-generation copy is sufficiently fixed to qualify as a "copy" in the copyright sense of the word,[72] but they do not dispute that a new copy of the work resides on the receiving computer and that this new "second-generation"

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systems, liable for contributory copyright infringement when ACS induced the licensees of MAI's operating systems to permit ACS to temporarily load the MAI operating system onto the computer's RAM to repair the operating system). The court averred that "where . . . a copyrighted program is loaded into RAM and maintained there for minutes or longer, the RAM representation of the program is sufficiently 'fixed' to constitute a 'copy' under the Act." *See id.*; *see also Vault Corp.*, 847 F.2d at 260. In *Vault,* the court held the defendant was not liable for producing a computer program designed to defeat plaintiff's anticopying program when it produced the program by copying plaintiff's anticopying program into the computer's memory. *See id.* Although the court held that a copy was made in the computer's memory, the court held that such copy was excused from infringement by Section 117. *See id.; see* Apple Computer, Inc. v. Formula Int'l Inc., 562 F. Supp. 775 (C.D. Cal 1983), *aff'd* 725 F.2d 521 (9th Cir. 1984). The court held that copying a computer program from a diskette to a computer resulted in a copy of that program in the computer's RAM. *See id.; see also* ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310 (N.D. Ill. 1990); Micro-Sparc, Inc. v. Amtype Corp., 592 F. Supp. 33 (D. Mass 1984); Triad Sys. Corp. v. Southeastern Express Co., 36 U.S.P.Q.2d 1028 (9th Cir. 1995).

71. Of course, there may be an applicable exception or limitation in the copyright law, other than the first-sale exception, which would immunize the reproduction from infringement liability. *See supra* note 18 and accompanying text (discussing the exceptions and limitations in the copyright law).

72. *See supra* Part III.A.1.

copy is a different entity than the copy that resides on the transmitting computer.

The first-sale exception does not give an individual the wholesale right to distribute a work. Rather, it applies only to the "particular copy" of the work owned by an individual. When an individual transmits a copy of a work over the Internet that person is not distributing his or her "particular copy" as required by the first-sale exception, because the particular copy remains with the transmitter. Accordingly, the first-sale exception does not immunize a transmission that occurs over the Internet.

Perhaps some time in the future a new technology will be invented that permits a person to transmit his or her "particular copy" of a work from one computer to another without creating a second-generation copy. Surely, anyone familiar with the popular "Star Trek" television shows and motion pictures can envision a technology that allows individuals to "transport" or "beam" a particular copy of a work from one place to another without making a copy of it.[73] Nevertheless, at this time, there is no computer-related technology that can transmit a copy of a work without making a reproduction of that copy in the process. Therefore, at present, there is no technological means by which the first-sale exception can be exercised with respect to transmissions.

a. Simultaneous-Destruction Proposal

Some have suggested that the first-sale exception should apply if the transmitter simultaneously destroys the "original" copy at the time of transmitting the work. The rationale for this proposal is that by destroying the "original copy" the transaction more closely resembles a traditional distribution because the same number of copies exist at the end of the transaction as at the beginning.

At first glance this may seem like a tenable proposal. But it has some significant evidentiary and procedural problems that make it infeasible. For instance, it would not be possible or practical for a copyright owner or the courts to verify that the transmitter actually discards his or her particular copy. Further, even if the copyright owner could verify that the transmitter discarded the original copy, it would not be possible or practical for the copyright owner or the courts to verify that the copy was discarded simultaneously. It would take little effort on the part of the transmitter to retain the original copy only to dispose of it at a later date to claim the first-sale exception. Moreover, if the simultaneous-destruction proposal were adopted, copyright owners might be forced to

73. For those individuals unfamiliar with the Star Trek television shows or motion pictures, members of the crew were able to travel between their spaceship and planets by transporting or "beaming" between the starship and the planet. When this occurred, the crew member, not a copy of the crew member, could travel back and forth.

monitor computer users and consumers for simultaneous destruction to protect their works from piracy. Such monitoring might stifle the intended purpose of first-sale exception in encouraging the alienation of copyrighted works as well as cause conditions abhorrent to privacy laws.

One means suggested for circumventing these evidentiary and procedural problems would be to embed, in the original copy of the work, copyright-management information[74] or technical protections.[75] These embedded protections would instruct the originating computer to automatically detect the transmission of a copyrighted work and delete the copy of that work once the copy was successfully transmitted to the receiving computer.[76] This suggestion would appear to address the evidentiary and monitoring concerns, however in reality it does not. First of all such technology does not exist. Besides, even if it did, an individual would merely have to remove, or configure his computer to ignore, the copyright-management information to retain the original copy.[77] In addition, this proposed solution fails to account for instances where the transmitter may be entitled to retain a copy of the work, such as under Sections 108 or 115 of the Copyright Act.[78]

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74. Copyright management information is information associated with a work, such as the title of the work, the author's name, the copyright owner's name, and terms and conditions for use of the work. This information will be used by content providers to provide users with valuable information about their works and to provide the public with simple licensing schemes which can be used to easily access and use their works.

75. For instance, technical protections could be embedded in the header of the work that instructs the computer not to copy the work or to destroy the work upon transmission.

76. *See* Mahon, *supra* note 48, at 262-63.

77. Legislation introduced in the 104th and 105th Congress protecting the integrity of copyright management information and protecting against the circumvention of technical protection mechanisms used by content providers to protect their works would go along way towards eliminating the evidentiary and procedural problems associated with monitoring. *See* NII Protection Act of 1995, S. 1284, 104th Cong., 141 CONG. REC. S14550-53 (daily ed. Sept. 28, 1995) (introduced by Hatch); NII Protection Act of 1995, H.R. 2441, 104th Cong., 141 CONG. REC. H9737-38 (daily ed. Sept. 29, 1995) (introduced by Moorhead, Schroeder and Coble); WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997, H.R. 2281, 105th Cong., 143 CONG. REC. H6025-26 (daily ed. July 29, 1997) (introduced by Coble).

78. *See* 17 U.S.C. §§ 108, 115 (1994). Section 108 provides an exception that allows libraries and archives to reproduce and distribute one copy or phonorecord of a work at a time for the purposes of preservation and security, deposit for research use in another library if the work is unpublished, or fulfilling a request by a library user. 17 U.S.C. § 108. Section 115 establishes a compulsory license for the making and distributing of phonorecords when a nondramatic musical work has been publicly distributed as a phonorecord in the United States with the copyright owner's authority provided certain other prerequisites are also met. *See id.* § 115. The compulsory license only permits distribution of phonorecords to the public for private use. *See id.* It does not permit distribution for other commercial purposes, such as distribution to broadcasters or to background music services. *See id.*

In addition to the evidentiary and procedural problems associated with the simultaneous-destruction proposal, the primary obstacle to the proposal is that the existing language of the first-sale exception only allows for the distribution of the "particular copy" owned by the transmitter. Destruction of the "particular copy" owned by the transmitter does not change the nature of the second-generation copy residing in the receiving computer. The second-generation copy is just that—a second-generation copy. It does not become the "particular copy" under the Copyright Act merely because the "particular copy" was destroyed.

To further illustrate the problems associated with the simultaneous-destruction proposal it is helpful to apply the proposal to a traditional copyright industry such as the book publishing industry. The first-sale exception would not allow an individual to photocopy a "particular copy" of a book, destroy the book, and then distribute the photocopy because the first-sale exception attaches to the "particular copy." This proposition should not change merely because the material object in which the copy is embedded is a digital medium instead of a nondigital medium.

Perhaps the simultaneous-destruction proposal derives some support because it has the same effect as the traditional operation of the first-sale exception in that there exists one copy at the beginning and at the end of the distribution. The first-sale exception, however, like all statutory provisions, has an intended purpose as well as an intended effect, and while the simultaneous-destruction proposal may satisfy the intended effect, it fails to satisfy the intended purpose of the first-sale exception.

The first-sale exception seeks to balance the copyright owner's interest in distributing the work with the interest of the public in being able to alienate and trade in copyrighted materials. But alienation does not mean *unbridled* alienation. For example, Congress has deemed it appropriate to restrict the public's ability to freely transfer a work by enacting the rental-right limitations in Section 109(b) and the mere-possession restrictions in Section 109(d). Thus, the purpose of the first-sale exception is not to give unlimited ability to individuals to distribute their copies of a work, but rather to permit individuals to distribute copies they lawfully own when such distribution would not conflict with the normal exploitation of the work or adversely affect the legitimate interests of the copyright owner in that work.[79]

79. H.R. REP. 94-1476, at 80 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693-94. *See also* TRIPs, *supra* note 32, at art. 13, which requires the United States to confine its limitations and exceptions, including Section 109, "to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." *Id.*

The simultaneous-destruction proposal conflicts with the normal exploitation of a copyrighted work and adversely affects the legitimate interests of the copyright owner, in turn thwarting the purpose of the first-sale exception. Because the quality of the first copy of a digitized work is no different than the thousandth copy, the resale market for the generational digital copies will adversely impact the copyright owner's market for the original work. This is not the case with nondigitized copies. For instance, over time the quality of a book or analog audiotape will deteriorate and, as a result, the resale market for that book or audiotape will likewise deteriorate. A digitized book or digital audiotape, however, will not degrade in quality, and thus the resale market for these products will compete with the market for the copyright owner's products.

In addition to adversely impacting the market for the copyright owner's work, the simultaneous-destruction proposal would impair the copyright owner's interests by dramatically increasing the frequency of use of the first-sale exception. Many people would be unwilling to go through the effort of copying a nondigitized copy and destroying their original copy just so they can distribute that copy to another person. Because digitized copies can be reproduced so easily, however, many people would be willing to copy a digitized copy of a work and destroy the original copy in order to distribute it. For example, few people would be willing to photocopy an entire book just for the purpose of availing themselves of the first-sale exception, as revised by the simultaneous-destruction proposal.[80] Many people would be willing to copy a digitized copy of that book, however, because a copy could be made by the mere stroke of a key on the computer keyboard.[81] Consequently, the simultaneous-destruction proposal would dramatically increase the frequency of usage of the first-sale exception and have a dramatic effect on the copyright owner's market for the digitized work.

For all of the above reasons, it would be inappropriate for the courts, Congress, or the Administration to embrace the simultaneous-destruction proposal or any other proposal that would extend the first-sale exception to cyberspace.

b. Transmission is Not a Distribution

Some argue that transmissions over the Internet are not distributions under Section 106(3) and thus do not need to be immunized from

80. *See* Marci Hamilton, *Impact of TRIPS Agreement on Specific Disciplines: Copyrighted Literary and Artistic Works*, 29 VAND. J. TRANSNAT'L L. 613, 626 (1996) (noting that photocopying nor taping have never produced a sufficiently high quality product or sufficient volume to completely replace the market for most copyrighted works).

81. *See* Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1005 (1994) (stating that the Internet makes any individual into a mass publisher).

liability by the first-sale exception. Proponents of this view argue that the definition of "distribution" in Section 106(3) in conjunction with the definitions of "copies" and "phonorecords" in Section 101 require that, for a distribution to occur, a material object must move from one location to another.[82] Proponents conclude that a transmission over the Internet is not a distribution because the act of transmitting a copy of a work from one computer to another does not transfer a *material object* from one location to another but rather results in a copy of the *work* itself existing in the originating and receiving computers.[83]

Proponents of the "transmission-is-not-a-distribution" view are correct when they assert that the definitions of "distribution" in Section 106(3) and "copies" and "phonorecords" in Section 101 require that a transmission involve a material object to qualify as a distribution under Section 106(3).[84] Where they are incorrect, however, is in suggesting that the transmission is only a distribution if the material object itself is moved from one location to another.

Nowhere in the Copyright Act is there a requirement that a distribution involve the movement of a "particular" material object from one computer to another. Violation of a copyright owner's distribution right is implicated anytime any material object embodying his work is deliv-

82. *See* Timothy Bliss, *Computer Bulletin Boards and the Green Paper*, 2 J. INTELL. PROP. L. 537, 546 n.56 (1995) (stating that "while a material copy can be generated on the receiving end, the transmission itself is not a material object and does not fall under the distribution right."). Proponents of this position argue that since the distribution right in Section 106(3) of the Copyright Act applies only to the distribution of "copies and phonorecords," then "copies and phonorecords," which are both defined in Section 101 of the Copyright Act as "material objects," the Act does not consider a transmission to be a distribution. *See id.* Furthermore, under the Copyright Act a transmission would be a distribution unless the material objects embedded within the copyrighted works move from one place to another. *See id.*

83. *Id.* Some also argue that the distribution right does not encompass transmissions because the definition of "transmit" in Section 101 of the Copyright Act includes performances and displays but not distributions. *See id.* Section 101 provides: "to 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place which they were sent." 17 U.S.C. § 101 (1994). The White Paper recommended amending this definition by adding the following phrase to the end of the definition: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent." White Paper, *supra* note 1, at app. 1 at 2. *Id.* This recommendation was intended to clarify the scope of the distribution right in the Copyright Act based on Congressional intent and case law; it was not intended to substantively change the scope of the right. *Id.* at 213-20.

84. For instance, a television broadcast is not a distribution because there is no material object being transmitted from one place to another. Although a broadcast involves a material object at the broadcaster's end of the transmission, there is no material object at the viewer's end. The television broadcast would constitute a performance.

ered into someone else's hands (or hard drive as the case may be).[85] In determining whether a distribution has taken place the relevant inquiry is whether, at the end of the transaction, a work is transferred from one location to another, not whether a material object is transferred from one location to another. As long as the recipient of the work being transmitted possesses a material object embedded with that work at the end of the transaction, a distribution has taken place.

This position is supported by the Administration as provided in the White Paper.[86] The White Paper recognized that "the distribution right can be exercised by means of transmission just as the reproduction, public performance[,] and public display rights can be."[87] Although the White Paper recommended that the Copyright Act be amended to expressly recognize that a copy of a work could be distributed by transmission, the White Paper also stated that the proposed amendment was not necessary because the "existing right of distribution encompasses transmissions of copies."[88]

Case law supports this position. In *Playboy Enterprises, Inc. v. Frena*,[89] the court held that Frena infringed Playboy's distribution and display rights. Frena operated a BBS from which Playboy's copyrighted images were made available and downloaded by others. The court stated that Frena's unauthorized transmission of Playboy's copyrighted works through its BBS implicated Playboy's right to distribute those works because "[s]ection 106(3) of the Copyright Act grants the copyright owner the exclusive right to sell, give away, rent, or lend *any* material embodiment of his work."[90] The court added that it did not matter that Frena did not make the copies himself.[91]

In *Marobie-FL, Inc. v. National Association of Fire Equipment Distrubutors*,[92] the court held that the Internet transmissions do implicate a copyright owner's exclusive right of distribution. In particular, the court stated that the defendant violated the copyright owner's exclusive right to distribute its copyrighted clip art not only because they made the files

85. As noted above, a television broadcast is a performance, not a distribution, because there is no material object embedded with the television broadcast at the viewer's end. If, however, the viewer were to record the broadcast with a VCR, the recipient would obtain a material object embodying the television program and, thus, the broadcast also would be a distribution.

86. Unfortunately, neither the Copyright Act nor its legislative history define the term "distribution," and thus, are silent as to whether a transmission is a type of distribution.

87. *See* White Paper, *supra* note 1, at 213-14.

88. *Id.* at 214.

89. 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

90. *See id.* at 1556 (emphasis added)

91. *See id.* Frena operated the BBS, but did not upload or download plaintiff's copyrighted works. *See id.*

92. 45 U.S.P.Q.2d 1236 (N.D. Ill. 1997).

available on their Web page, but also because the "server transmitted the files to some Internet users when requested."[93] Similarly, in the recently decided case of *Playboy Enter v. Webbworld, Inc.*,[94] the district court found defendant Webbworld liable for copyright infringement because it "distributed [Playboy's] copyrighted works by allowing its users to download and print copies of electronic image files."[95]

The *Frena*, *Marobie* and *Webbworld* cases establish that a distribution can take place by transmission provided that the transmission results in a material object at the receiving end of the transmission regardless of how that material object gets to the recipient. There are also a few other Internet related cases in which the courts considered a transmission to be a distribution. Most notable of these cases are *Playboy Enterprises, Inc. v. Chuckleberry Publishing Inc.*,[96] *Agee v. Paramount Communications*[97] *and Religious Technology Center v. Netcom On-Line Communication Services, Inc.*[98] In *Chuckleberry,* the court upheld an injunction that prevented Chuckleberry from distributing Playboy's copyrighted work in the United States operated to prevent Chuckleberry from transmitting the works via the Internet.[99] The *Chuckleberry* court noted that because Chuckleberry's Internet site permitted users to view and download Playboy's copyrighted images, the Chuckleberry's site was distributing these images.[100]

In *Agee v. Paramount Communications*, the Second Circuit Court held that Agee did not infringe Paramount's distribution right when Agee transmitted a news program that included a portion of Paramount's copyrighted work.[101] The court stated that a "distribution is generally thought to require transmission of a 'material object.'" Accordingly, the court held that the transmission was a performance (specifically a broadcast) rather than a distribution because there was no material object received at the end of the transmission.[102] The court noted that had the broadcast resulted in the recipients obtaining a material embodiment of the plaintiff's work, the broadcast would also have been a distribution.[103]

In *Netcom*, the court enjoined a BBS operator from reproducing,

93. *See id.*
94. 45 U.S.P.Q.2d 1641 (N.D. Tex. 1997).
95. *See id.* at 1646.
96. 939 F. Supp. 1032 (S.D.N.Y. 1996).
97. 59 F.3d 317, 325 (2d Cir. 1995).
98. 923 F. Supp. 1231 (N.D. Cal. 1995).
99. *See Chuckleberry*, 939 F. Supp at 1032.
100. *Id.* at 1039-40.
101. *Agee*, 58 F.3d at 325.
102. *See id.* at 325.
103. *See id.* at 325.

transmitting, or publishing plaintiff's works.[104] The court made clear that the injunction prevented defendant from placing plaintiff's copyrighted works into a computer hard drive or other storage device and from uploading or downloading plaintiff's copyrighted works.[105]

A significant amount of case law exists to support the position that the distribution right in Section 106(3) does in fact encompass the transmission of works over the Internet. Because transmissions over the Internet implicate a copyright owner's distribution right, a determination of whether the first-sale exception immunizes the transmission is appropriate. However, the first-sale exception is not a defense to transmissions over the Internet because all the prerequisites of the defense are not met.

3. *Application of the First-Sale Exception to Internet Transmissions Conflicts with the Purpose of the First-Sale Exception and Public Policy*

Application of the first-sale exception to Internet and other network transmissions would be incompatible with the purpose of the first-sale exception. The purpose of the first-sale exception is to promote alienation and trade in copyrighted works. This purpose is balanced against the copyright owner's commercial exploitation interest. Where the first-sale exception adversely impacts the copyright owner's legitimate commercial interests it has been limited by statutory provisions in the Copyright Act.[106]

In addition to legal limitations on the first-sale exception, practical limitations inherent in traditional copyright distribution systems serve to help balance the alienation in copyrighted works with exploitation interests of copyright owners. In a traditional copyright-distribution system, the distributor conveys a specific material object, such as a book, videotape, or compact disc, that embodies a work to another person. The conveyance of a material object requires a certain amount of effort and resources.[107] For example, the material object may be shipped or mailed, both requiring time and money. The effort and resources needed to distribute copies of a work in a traditional copyright-distribution system lowers the frequency of usage of the first-sale exception, and thus serves as a practical impediment to operation of the first-sale exception.

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104. *See Netcom*, 923 F. Supp at 1361.

105. *See id.*

106. *See* 17 U.S.C. § 109(b) (1994). (limiting the first-sale exception through the granting of rental rights in certain works).

107. *See* Mahon, *supra* note 48, at 264-65 (noting that the inconvenience associated with delivering a physical object created a barrier to transfer of that object).

The practical impediments associated with traditional copyright-distribution systems are not present in transmitting copyrighted works over the Internet. Internet transmissions permit copies of works to be conveyed to consumers inexpensively, quickly, and easily. Therefore, if the first-sale exception is applied to Internet transmissions, the lack of practical delivery barriers associated with such systems will unduly increase usage of the exception, thereby adversely impacting the rights of copyright owners.

Furthermore, the reduction of practical delivery barriers resulting from the Internet reduces the need for a first-sale exception. The diminished practical barriers associated with a network-delivery system will likely encourage content providers to use new licensing mechanisms and new means for delivering works to consumers. These new licensing and delivery mechanisms will enable just about any computer user to obtain a copy of a work easily and quickly. In fact, these new licensing and delivery mechanisms will promote alienation and trade in copyrighted works to such a degree that individuals will have less of a need to avail themselves of the first-sale exception. Accordingly, there is no need for the first-sale exception to apply to such systems.

If, however, the first-sale exception were to be applied to Internet transmissions, apprehensive copyright owners might continue to distribute their works by traditional methods, rather than making their works available over a network, where they will be susceptible to rampant copying and distribution. In other words, application of the first-sale exception to transmissions may actually hinder alienation and trade in goods rather than encourage it. If the first-sale exception is applicable to Internet transmissions copyright owners will likely continue using traditional delivery methods thereby making it more difficult, more time-consuming, and more costly for consumers to obtain a copy of a particular work.

B. How the Display Portion of the First-Sale Exception Applies to the Internet

The display portion of the first-sale exception does not apply to transmissions over the Internet. Many conditions must be met for a display to fall under the first-sale exception. Two of these conditions are not satisfied by a transmission, and therefore preclude the first-sale exception in Section 109(c) from immunizing an Internet display from copyright infringement.

An unauthorized display is only excused by the first-sale exception in Section 109(c) if one image is being displayed at a time.[108] When mul-

108. *See* 17 U.S.C. § 109(c) (1994).

tiple images are displayed simultaneously, or are capable of being displayed simultaneously, the first-sale exception is not a defense to infringement. In general, the transmission of an image over the Internet has the potential to result in numerous images being displayed simultaneously.[109] For instance, an image that appears on a BBS can be accessed by any given number of users at one time, and there is no limitation on the number of computer screens that may display the BBS image at the same time. Therefore, in the case of most transmissions over the Internet, the display portion of the first-sale exception does not apply.

Even if the multiple image limitation in Section 109(c) were met by an Internet transmission, the Internet display would not be excused by the first-sale exception because of other requirements. Under Section 109(c), a display is only permitted when those viewing the display are doing so at the same place where the copy is located. This requirement is the primary factor preventing Section 109(c) from applying to the transmission of images over the Internet. The very essence of the Internet is to be able to transmit information or content from one location to another. Therefore, virtually every Internet transmission will fail to meet the "same-place" requirement and thus, fail to qualify for the first-sale exception.

C. Application of the First-Sale Exception Should Be Limited for Digitized Copies

In the past, Congress has amended Section 109 to limit the application of the first-sale exception to cases where copies of a work can be made with relative ease and with minimal cost. In particular, Congress determined that it was necessary to limit the application of first-sale exception when sound recordings and computer software are the subject of rental, lease, or lending agreements. This is so because the viability of sound recording and computer software industries was threatened by rental shops, which enabled individuals to rent sound recordings and computer software and thereafter make copies in lieu of purchasing copies. Accordingly, Congress enacted Section 109(b), which prevents owners of computer programs and sound recordings from renting, leasing, or lending their copies of these products.

It would certainly appear that the same concerns that propelled software and sound recordings may soon also exist for digitized copies. Like sound recordings and computer software, digitized copies of works

109. Of course, there are instances when a transmission of an image will not result in multiple images being displayed at a given time, such as when during the transmission of an image sent from one person to another via electronic mail.

are particularly susceptible to copying.[110] But digitized copies differ from traditional types of copies because they can be easily copied at minimal cost and without any degradation in the quality of the copies. Failure to grant a rental right in digitized works, like digital renditions of books and motion pictures, might result in the same problems and concerns that led to the enactment of the Record Rental Amendment Act and the Software Rental Amendments Act.

Businesses might begin renting digitized works to individuals who could copy them in lieu of purchasing a copy, thereby effectively destroying the market for these digitized works. In general, businesses providing digitized work rentals have not sprung up yet most likely because distribution of works in digital form is in its infancy and the technology used to make digital copies of these works is not yet widely available.[111] Nevertheless, like computer software and sound recording, it may be appropriate for Congress to investigate a broadening of the rental right in Section 109(b) to include a rental right for digitized copies of works.

Granting a rental right to digitized copies of works will have the added benefit of encouraging copyright owners to restore and digitize works not presently in digitized form. This will ensure the preservation of many renowned works so that future generation can enjoy quality copies of them. Without a rental right in these digitized works, copyright owners will have little incentive to restore and digitize older works because digitizing would only make it easier for the work to be distributed and copied against the behest of the copyright owner. If many of these works are not restored, they might deteriorate over time and our children would be unable to enjoy them as we have. Therefore, it is appropriate for Congress to examine an extension of the rental-right limitation in Section 109(b) to encompass digitized copies of works.

IV. CONCLUSIONS AND RECOMMENDATIONS

The first-sale exception does not apply to transmissions over the Internet. Transmissions over the Internet run afoul of the copyright owner's reproduction, distribution, and display rights and, for various

110. However, one difference between computer software and sound recordings and other digitized works, is that sound recording and computer software are more susceptible to copying because they are used more than once. Individuals will listen to a sound recording or use a computer program numerous times during the useful life of the work. In general, digitized books and motion pictures, however, are not subject to such frequent reuses. There are also exceptions here, such as children's books and movies, which are subject to frequent reuses. But that does not mean that a rental right in digitized copies is not warranted, just that it is not as clear cut case as for sound recordings and computer software.

111. For instance, the marketing of digital video discs ("DVDs") in the United States began just recently. The DVD machines presently being marketed are not capable of copying the DVDs.

reasons, the first-sale exception does not immunize such transmissions. Congress should not amend Section 109 so as to include computer-to-computer transmissions within the first-sale exception because broadening the exception in this manner would be extremely harmful to the legitimate interest of copyright owners and would not serve the long-term interests of the public.

Although it would not be appropriate for Congress to make any change in the first-sale exception with respect to electronic transmissions, it may be appropriate for Congress to limit application in the case of digitized copies because of the ease by which digitized copies can be reproduced and distributed. Accordingly, Congress should examine whether Section 109(b) of the Copyright Act should be amended to grant a rental right in digitized copies of works.