

**Statement for the Record by Sandra M. Aistars, Chief Executive Officer,
Copyright Alliance
Before the Subcommittee on Courts, Intellectual Property and the Internet on
“First Sale Under Title 17”**

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Ceremonial Courtroom, U.S. District Courthouse, New York City

The Copyright Alliance is a non-profit, public interest and educational organization of artists, creators, and innovators of all types. Our members include artist membership organizations and associations, unions, companies and guilds, representing millions of creative individuals. We also collaborate with and speak for thousands of independent artists and creators and small businesses who are part of our One Voice grassroots group.

We submit this statement to aid the Subcommittee in understanding the significant investments made by creative businesses in a variety of disciplines in meeting the interests of consumers online through innovative new digital business models based on licensing creative works, and to explain the destructive effect further limiting authors' exclusive rights to reproduce and distribute their works would have on creative and innovative businesses across the country.

Calls to Expand the First Sale Doctrine Should Be Rejected

As the Copyright Office has correctly observed, the first sale doctrine already clearly applies to works in digital form.¹ Physical copies of works in digital formats, such as CDs or BluRay discs, are subject to the limitations of Section 109 when they are sold, in the same way as physical copies of works in analog form. Thus the question before the Subcommittee is not whether the first sale doctrine should apply in the digital world, but rather whether it should be redefined in two unprecedented and unwarranted ways: (1) to limit not only the copyright owner's exclusive right of distribution, but also the exclusive right of reproduction by allowing the copying and resale of digital copies of works on the internet in competition with the author of the works; and (2) by imposing restrictions on

¹ U.S. Copyright Office, DMCA Section 104 Report xviii (2001).

the use of licensing transactions for the distribution of works. The Subcommittee should reject both calls for expanding the first sale doctrine because they would have a destructive effect on newly-developing digital markets for creative works, as well as on long-standing license-based industries in the visual arts, software and other sectors of the creative economy. At bottom, proponents of redefining the first sale doctrine are asking the Subcommittee to reject new digital business models, and force the Internet to act like the analog world.

Adopting such policies would also cut creators out of the value chain for the works they create and reduce the marketplace value for creative works below sustainable levels. This is because there is no such thing as a “used” digital file, so there can be no such thing as a secondary market for “used” digital goods. The “secondary” market would be interchangeable with the “primary” market and the lowest market price would prevail – regardless of whether it supports the creation and dissemination of new creative works.

Expanding the First Sale Doctrine to Limit the Exclusive Right of Reproduction Would Run Counter to its Origins

We welcome this opportunity to review how section 109 is serving authors, motivating the creation of new works of authorship, and the commercialization and dissemination of such works, for the benefit of our society. All three of these purposes are indispensable to a well functioning copyright system that serves consumers and creators alike. Ensuring that authors can support themselves and their families through their creativity, that distributors find value in commercializing copyrighted works, and that copyright owners of both commercial and non-commercial works feel empowered disseminating their works is key to ensuring an appropriate framework of laws. While the focus may begin on the author, the benefits flow to society as a whole.

These principles have been at the heart of policy-making regarding the first sale doctrine since its inception. The first sale doctrine derives from *Bobbs-Merrill Co. v. Straus*, which concerned the setting of retail prices once a book had been sold by the

publisher at wholesale.² In deciding the case the Supreme Court rejected calls to merely analogize to cases in the patent context and instead undertook a fresh analysis under the copyright laws. The bulk of the Justices' analysis focuses on discerning the statutory motivations animating the protections afforded copyright owners under the law. The Justices began by observing that:

While the nature of the property and the protection intended to be given the inventor or author as the reward of genius or intellect in the production of his book or work of art is to be considered in construing the act of Congress, *it is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes.* (emphasis added).

Having concluded that guarding against unauthorized reproduction of an author's work was the key consideration at issue, the Court ruled that where a publisher had obtained the price it sought in selling its books in the wholesale marketplace, and had not entered into a license agreement with the retailer of the books, and where the books were not subject to further unauthorized copying and distribution in competition with the publisher, the publisher had obtained the intended benefits of the statute and was not entitled to exert control over the price set by the retailer by virtue of a legend inscribed in the books.

While the Court in *Bobbs-Merrill* did not find in favor of the copyright owner, the decision is notable in several respects. First, it demonstrates the Court's interest in analyzing copyright law through the lens of the author and seeking to interpret the law to ensure that authors' interests are adequately served so that they are motivated to create and disseminate their works. The Court did not look to other factors or policy motivations.

Second, the case leaves no doubt that it would be inconsistent with the goals of the first sale doctrine to expand it to limit the copyright owner's exclusive right of reproduction – a right the protection of which the Court repeatedly refers to as “the main purpose” of the law.³ Congress has noted that this same reasoning should apply where an

² 210 U.S. 339 (1908).

³ *Id.* at 351.

entity while not technically duplicating a work distributes it in a way where the author's market for the work is affected.⁴

Finally, the Court's analysis demonstrates that the first sale doctrine and licensing were intended to coexist. The court repeatedly refers to the fact that there was no claim of contractual relationship or license agreement between the parties, and cites this fact in support of its conclusion.⁵

In contrast to the undisputed interest in ensuring the continued incentive to create and disseminate works, many of the policies cited by supporters of an expanded first sale doctrine are of very recent vintage and not found in the historical record. For example, during the revision effort that culminated in the 1976 Copyright Act, inclusion of the doctrine "attracted no opposition"⁶ but also attracted little attention. The drafters of the Act did, however, take into account "the potentialities of the new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices" on authors of literary and visual works by recognizing a right of public display and limiting the ability of an owner of a copy under the first sale only "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."

As the House and Senate Reports indicate, the "intention is 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."⁷ As in *Bobbs-Merrill*, the focus of Congress was on authors and the ability of authors to sustain themselves from disseminating their works. It took care to ensure that the first sale doctrine was not unduly extended to encroach upon those rights.

⁴ Copyright Law Revision (House Report No. 94-1476) at 80 (1976); Copyright Law Revision (Senate Report No. 94-473) http://www.copyright.gov/history/law/clrev_94-473.pdf at 72 (1976).

⁵ *Id.* at 350 ("There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book").

⁶ Second Supplementary Register's Report on the General Revision of the U.S. Copyright Law (1975).

⁷ Copyright Law Revision (House Report No. 94-1476) at 80 (1976); Copyright Law Revision (Senate Report No. 94-473) at 72 (1976).

Much more recently, the Copyright Office has also reviewed the policies surrounding the first sale doctrine in the digital world and concluded that the risks of expanding the doctrine would outweigh the benefits. As the Copyright Office has noted:

Physical copies degrade with time and use; digital information does not. Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost. Digital transmissions can adversely affect the market for the original to a much greater degree than transfers of physical copies. Additionally, unless a “forward-and-delete” technology is employed to automatically delete the sender’s copy, the deletion of a work requires an additional affirmative act on the part of the sender subsequent to the transmission. This act is difficult to prove or disprove, as is a person’s claim to have transmitted only a single copy, thereby raising complex evidentiary concerns. . . . Even if [an effective forward and delete technology existed], it is not clear that the market will bear the cost of an expensive technological measure.⁸

Innovation in the Digital Economy is Driven by Licensing of Creative Works

While the history and original policy motivations of the first sale doctrine provide strong support for rejecting a radical new expansion of the doctrine, the dynamic changes that have occurred in the licensing of works in the digital economy provide even more compelling reasons for not forcing constraints on an emerging and innovative digital marketplace.

Innovation in the digital economy is increasingly being driven by licensing access to rather than sales of creative works. This is unsurprising as consumers are turning to access or sharing models for consuming even durable goods (note the success of services such as Zipcars, bikeshares, and the turn to acquiring “experiences” rather than material goods, particularly among younger consumers). Benefits to consumers from such transactions are clear. They are not forced to acquire rights they don’t need, and they pay only for what they use. Licensing in the creative sector is no different – it creates a dynamic marketplace that affords creators and distributors the flexibility to give consumers a range of choices — accessing the creative works they want, when they want, at a variety of price points. This sales/license distinction should not be eroded through the imposition of government-mandated requirements on licenses; availability of a greater

⁸ U.S. Copyright Office, DMCA Section 104 Report xix (2001).

selection of expressive works in the marketplace is not merely an abstract societal benefit, it is a principal goal of copyright law.

Customers today have exponentially more options than they did in the analog world. Rather than imposing outdated and rigid sales models from the analog world on consumers, the creative industries have embraced licensing models which offer access on more flexible terms. Licensing allows the management of relationships among copyright owners, distributors, and consumers on a granular level, permitting a degree of customization not possible when a buyer-seller relationship is the only option.

Copyright Alliance member offerings, supported by licensing, surpass what was available in the analog world:

- Digital music—Among the 60+ licensed digital services currently available in the U.S.,⁹ iTunes, Rhapsody, Spotify, Pandora, GooglePlay, Amazon all provide flexibility in terms of access by offering, for example, individual songs instead of whole albums; downloads or on demand streaming of millions of songs; and different price points.
- Film and TV¹⁰—Amazon offers short-term rentals, indefinite access, and on demand streaming; Netflix allows streaming on multiple devices simultaneously; services such as VUDU, Barnes & Noble’s Nook Video, iTunes, GooglePlay, UltraViolet, and nearly 100 other services in the U.S. provide cloud storage, downloading, streaming and physical copies.
- Digital books and magazines—eBooks are now part of the mainstream. Amazon enables borrowing from its “library” as well as audio enabled packages. Sony ReadStore gives readers the right to download, read, listen and view digital content. Services such as Kobo, Barnes & Noble; audible.com, and audiobooks.com give readers an array of additional choices.
- Digital photography — Companies like Shutterstock and Getty Images allow access to millions of images under a variety of licensing terms using different price points, sizes, placements and uses. Getty recently announced a free embed service available to individuals and non commercial users which allows such users to legally embed Getty images in their blogs and websites for free.

Moreover, significant sectors of the creative community have long relied on license-based transactions exclusively— or virtually so—to make their copyrighted works available to consumers. This is particularly true of the visual arts and software sectors.

⁹ See <http://www.whymusicmatters.org> for a list of licensed digital music providers.

¹⁰ See <http://www.wheretowatch.org> for a list of licensed online film and television providers.

The software industry is built upon the licensing of products to consumers. This is beneficial to consumers for a variety of reasons – including because licensing relationships are required to facilitate the installation and provision of security updates and patches; often provide rights that might not be available under a normal sale (such as installing software across multiple devices); and allow for more precise tailoring of features and functionality to particular markets or for variations in usage models and pricing (e.g., per device v. per user). Reliance on licensing is only increasing as consumers move to cloud based computing models which are “services” rather than “goods” based. Such services also offer clear consumer benefits like easier access to stored work, flexible and expandable storage and usage models, access to the latest business applications, and better protection from malware and viruses. Interfering with such well-functioning and reliably growing markets which demonstrably serve consumer interests would be unwise.

Similarly photographers, graphic artists and illustrators have historically negotiated licenses with their customers in order to provide them the rights they need to a given work. This allows greater flexibility in meeting client needs, and enables clients who would not be able to afford an “all rights included” deal to use the work for the purposes they require.¹¹

Hundreds of stock image businesses exist across the United States ranging from small and medium size enterprises, to leaders in the global media marketplace. These businesses also rely exclusively, or virtually exclusively, on licensing to serve the marketplace for visual works. Getty Images, a leading creator and distributor of still imagery, video footage, and music, employs an entirely licensing-based business model to deliver to its clients worldwide award-winning news, sports and entertainment imagery, rare and contemporary archival imagery and a wide range of pre-cleared music tracks. Getty was the first company to license digital imagery online, and serves a diverse array of clients – from individual bloggers to Fortune 500 companies. It has developed and deployed tools to allow users to intuitively search for, license, and

¹¹ Ed Shems, graphic artist and illustrator, and member of the Copyright Alliance explains how changes to the first sale doctrine would negatively affect visual artists in his field in his testimony for this subcommittee hearing.

download images for use online, in publishing, and broadcast settings. Meeting the needs of such a diverse array of clients and making available such breadth of copyrighted work requires the flexibility to set different terms for different uses and users of works. Moreover, because Getty licenses over 30,000 images a day (more than 2 images per second) it must have the ability to efficiently set license terms via automated digital transactions.

Efficient licensing models for digital media serve multiple interests. As noted, they allow consumers of media access to an infinite variety of works that can be used in myriad creative ways. Equally important, the online licensing services deployed by entities like Getty also allow creators of copyrighted works like photographers a variety of options to distribute their work to broad audiences. Whether the subject matter of the work is newsworthy photography of national or international events, or archival photography of iconic personalities or critical cultural moments, there is a shared benefit to the artist and the ultimate audience of the work in ensuring that the image reaches its target most effectively and that the licensing revenues earned can be used to support the creation of new work.

Given the already challenging infringement environment for imagery on line, imposing additional restrictions on the exclusive rights of copyright owners, or interfering with their ability to enter into license based transactions with customers would inject uncertainty into this dynamic and ever evolving marketplace. Among other concerns, depending on the scope of the first sale requirements that could be imposed on licensors of images, it could become difficult/impossible to accurately and transparently negotiate licenses and disclose rights being granted and acquired because previous licensees of an image might have the right to distribute the work in competition with the artist or the stock image service.

Finally, it bears mentioning that licensing rather than selling one's work in the visual arts world also enables artists to use their gifts to benefit society. Often, retaining the right to continue to use an image enables the artist to use his or her work for other, socially beneficial purposes. Because he retains the rights to his work and engages in

licensing rather than sales of his photography, one of our grassroots members, New York-based documentary photographer Douglas Menuez was able to produce a book -- *Transcendent Spirit* -- which chronicles the lives of 20 Ugandan orphans. The children travel and perform as a dance troupe to bring attention and raise funds for other Ugandan children orphaned by HIV/AIDS and war. Through auctions of prints of some of the images and sales of copies of the book Doug was able to raise more than \$150,000 to support the work of the Ugandan children. If first sale concepts are imposed on licensing transactions, and photographers like Doug are forced to either sell all rights to their images to commercial clients, or if licensees of their works are allowed to sublicense images in competition with the photographer, projects like *Transcendent Spirit* would not be possible.

Conclusion

The options and benefits available to consumers through licensing and online distribution of creative works in today's digital marketplace are unprecedented. Licensing-based offerings to consumers of software, gaming, visual arts, film, music, books, magazines and newspapers, are driving online enjoyment of creative works and fueling new creativity and authorship. Rather than embrace these new business models and their attendant consumer benefits, proponents of redefining the first sale doctrine would rather sacrifice both new and long standing licensing-based businesses in order to force the Internet to act more like the analog world. We urge the Subcommittee not to interfere with the growth and innovation of digital businesses in the creative sector in this manner.