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before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary

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Oversight Hearing on Piracy Prevention and the Broadcast Flag

Mr. Chairman, Congressman Berman, Members of the Subcommittee, thank you for inviting me to appear before the Subcommittee today to discuss the copyright issues raised by measures for the protection of digital broadcast television signals, commonly referred to as the "broadcast flag" proposal. Let me offer my congratulations to you, Mr. Chairman. I look forward to working with you on this and many other copyright-related issues. You are off to a strong start and it is very encouraging to those of us in the copyright field.

As you know, in August 2002 the Federal Communications Commission issued a Notice of Proposed Rulemaking soliciting comments from interested parties on whether it was desirable to adopt a regulatory protection regime as part of the transition to digital broadcast television, and if so, how such a regime should he put into place.[1] While the subject matter of the broadcast flag proposal is technological, many of the comments submitted to the FCC arguing both for and against its adoption are rooted in copyright law.[2] As Congress has recognized, the Copyright

[1] 67 Fed. Reg. 53,903 (Aug. 20,2002).
[2] *See generally* Initial Joint Comments of Motion Picture Association of America (MPAA), *et al.*; Initial Comments of Consumer Electronics Association (CEA); Initial Comments of Computer & Communications Industry Association (CCIA); Initial Comments of Home Recording Rights

Office has a long history of providing expert advice and assistance on these types of issues.[3]

The purpose of my testimony is twofold. First, I want to explain the relationship between the broadcast flag proposal and important principles of copyright law, such as the reproduction right, the distribution right and the doctrines of "fair use" and "first sale." I believe that as consideration of the broadcast flag proposal moves forward, a clear understanding of copyright law is necessary so that important copyright principles and policy are not undermined by the establishment of any regulatory scheme. Second, to this end, I hope to provide some clarity on the "fair use" and "first sale" doctrines and their role in the broadcast flag discussions.

While I have no position on the hroadcast flag proposal at this time, I believe that producers of television programming have ample ground to fear that in the transition to digital broadcasting and with the advent of new consumer electronic devices that permit recipients of broadcasts to reproduce television programs and retransmit them on the Internet, they may encounter massive piracy in much the same way that record companies, recording artists, composers and musicians have suffered from phenomena such as Napster and its progeny. They have good reason to insist that something must he done to prevent such infringement. It may well he that the hroadcast flag proposal is the best available solution. I do not have sufficient mastery of the technical details to venture an opinion at this time.

I also do not take a position with regard to what uses ought to he allowed hy a broadcast flag, should that proposal be adopted. It is my understanding that many of the commenters in the FCC proceeding have insisted that implementation of the broadcast flag be done in a way that permits consumers to engage in acts of fair use. It is also my understanding that some proponents of the broadcast flag have taken the position that any technological measures that are adopted as part of the broadcast flag proposal should or at least could permit a number of practices that consumers desire to engage in even though they are beyond the scope of fair use. Copyright owners of broadcast programming may simply be willing to forego

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Coalition (HRRC).

[3] *See* **17 U.S.C. § 701(b).**

having technological measures prohibit those uses, while retaining their right to assert that some or all of those uses are infringing.

If there is consensus among copyright owners of broadcast programming that implementation of the broadcast flag should permit conduct by consumers that goes beyond fair use, I see no reason why such conduct should not he permitted. In other words, the conduct permitted by the broadcast flag need not necessarily be coextensive with fair use. If, on the other hand, the ultimate determination is to permit acts beyond those permitted by fair use and heyond those for which there is a consensus among the pertinent copyright owners, then there will be serious copyright implications which this Subcommittee will want to examine.

In any event, the fact remains that the FCC has been presented with a number of arguments asserting that the broadcast tlag proposal must accommodate fair use and the first sale doctrine, and that the people making those arguments have asserted that certain kinds of conduct must he accommodated because it falls within those doctrines. If these arguments are to be made and considered, it is important that they be done so with an accurate understanding of the fair use and first sale doctrines.

The Broadcast Flag Dehate Raises Important Issues Related to Copyright

As the first paragraph of the FCC's notice indicates, digital broadcast copy protection has been offered as a way to address the concern that "[i]n the absence of a copy protection scheme for digital broadcast television, content providers have asserted that they will not permit high quality programming to be broadcast digitally."[4] The reason for this reticence is concern about infringing downstream uses of digital broadcasts. This Subcommittee has become quite familiar with the characteristics of digital technology and the Internet. While those technologies provide enhanced quality of content and expanded opportunities for marketing, they also dramatically increase the ease and reach of copyright piracy.[5]

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4 67 Fed. Reg. 53,904.

5 For a more in-depth discussion nf some of the differences between analog and digital technology,

see Copyright Office, Copyright Office DMCA Section 104 Report (2001), at 82-85. The results of this study were reported to Congress on August 29,2001 and are available at: www.copyright.gov/reports/studies/dmca/dmca_study.html.

As we understand it, the "broadcast flag" is one solution for placing certain limits on how digital broadcasts can he redistributed after receipt by a consumer, so as to prevent harm to the economic value of that programming. In many ways, this dilemma is simply a specific example of the problem addressed by copyright law generally – how much protection is necessary to provide an incentive for authors to create and disseminate works to public for their use and enjoyment. Not surprisingly, therefore, many of the comments submitted to the FCC focus on questions of copyright law, such as to what extent personal copying and distribution of broadcast programming are governed by the fair use or first sale doctrines in copyright law, and how the Supreme Court's 1984 decision in Sony *Corp. v. Universal City* Studios, *Inc.* should be applied in creating a regulatory regime like the brnadcast Hag.

In addition, implementation of the broadcast flag may provide some precedent for how other activity involving digital technology and copyrighted works will be addressed under fair use and other provisions of the Copyright Act. As a result, the broadcast flag proposal cannot be considered in a vacuum, without regard to important aspects of copyright law and the use of copyrighted works. Moreover, the issues involved in the hroadcast flag debate may have ramifications in the international copyright system.

Fair Use and the Sony Betamax Decision

In the next part of my testimony I hope to provide background on the fair use doctrine, the Sony decision and the first sale doctrine, and how they might relate to the broadcast flag. As I noted, many of the comments submitted on the broadcast

flag proposal raised important questions of copyright law, such as the doctrine of "fair use."[6] A correct and complete understanding of fair use will assist in an evaluation of those comments. My testimony today is intended in part to provide a concise explanation of the fair use doctrine, and its application by the Supreme Court in the *Sony* case (often referred to as the Betamax **decision**)[7] – the central case around which much **of** this debate revolves.

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[6] *See* **note 2.**

[7] *Sony Corp. v. Universal City Studios, Inc.*, **464 U.S. 417 (1984).**

Fair use is often described as an "equitable rule of reason," for which "no generally applicable definition is possible, and each case raising the question must he decided on its own facts."[8] It was a common law doctrine until **1976,** when Congress first codified it in Section **107** of the Copyright Act as part *of* the general revision to copyright law it enacted that year."[9] The statutory text does not define fair use – rather, it provides guidelines for such a determination in the form of a list of four nonexclusive factors that must be applied to the entire circumstances of a particular case. In addition, the preamhle to the section sets forth examples *of* uses that traditionally have been found to be fair uses, such as criticism, comment, news reporting and teaching. While this list is not determinative of the fair use issue, it was intended to provide additional guidance to courts as to the types of uses that had been ruled fair prior to the **1976** Act."[10]

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[8] **H.R.** Rep. 94-1476, 94th Cong., 2d Sess., ut 65 (1976).

[9] 17 U.S.C. § 107. The text of the section provides:

> Notwithstanding the provisions of sections 106 nnd 106A, the fair use ot'a copyrighted work, including such use by reproduction in copies or phonorccords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, leaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to he considered shall include-
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> (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.
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> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[10] *See* H.R. Rep. 94-1476, at *66.* The Judiciary Committee made clear that pre-1976 fair use precedent rcmaincd in effect, as Section 107 was to "restate the presentjudicial doctrine of fair use, not to change, narrow, or enlarge it in any way."

There is no question that fair use is a fundamental component of U.S. copyright law, as it provides an essential safeguard to ensure that copyright does not stifle uses of works that enrich the public, such as "criticism, comment, news reporting, teaching ..., scholarship, or research."" Along with other doctrines like the first sale doctrine (which I discuss below) and the idea/expression dichotomy, fair use provides necessary "breathing room" in copyright and helps achieve the proper balance between protection of copyrighted works and their use and enjoyment. As the Supreme Court recently explained in the *Eldred* case, fair use is also one of copyright law's important First Amendment accommodations."

Many of the comments in the FCC proceeding, however, misstate the nature nffair use and its role in our copyright system. Much of this confusion sterns from a misreading of the Supreme Court's opinion in *Sony Corp. v. Universal* City *Studios,"* the first opinion in which the Supreme Court addressed fair use.[14]

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[11] 17 U.S.C. § 107.

[12] *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

[13] 464 U.S. 417 (1984).

[14] *Sony* was the first case in which the Supreme Court interprctcd the 1976 Copyright Act and its cndification ol' fair use in Section 107. Before the 1976 Act, the Supreme Court heard two cases that raised fair use issues, hut did not issue an opinion in either of them. See *Sony*, 464 U.S. at 476 (dissenting opinion) (citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1978), *aff'd by an*

equally divided court, 420 U.S. 376 (1975) & *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court suh nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958)).

In *Sony*, motion picture copyright owners brought a copyright infringement action against the manufacturer of the Betamax VCR. The claim was asserted under a theory of secondary liability, based on the consumers' use of the VCH to record television programs broadcast free over the air. The Court's 5-4 opinion addressed two issues: first, borrowing from the "staple article of commerce" doctrine in patent law, it ruled that secondary copyright liability could not be imposed based solely on the manufacture of copying equipment like the VCR where the device at issue "is capable of substantial noninfringing uses."[15] Second, it found that the VCR had "substantial non-infringing uses," including making reproductions of broadcast television programs for purposes of "time-shifting," that is, watching a show at a time later than when it is broadcast.[16]

The Court's finding that "time-shifting" of broadcast television programs was fair use was based predominantly on its analysis of the first and fourth factors in Section 107 – namely, whether time-shifting adversely affects the market for or value of the copyrighted works at issue. The court concluded that "time-shifting merely enables a viewer to see such a work which he had been invited to see free of charge" and that therefore it was a "non-commercial" use.[17] It also found that the

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[15] 464 U.S. 412.

[16] *Id.* at 442-456.

[17] *Id.* at 449.

copyright owners had not provided sufficient evidence "that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works."[18]

[18] *Id. at* 451.

Having found that "time-shifting" was a "substantial non-infringing use" of the VCR, the Court did not consider whether other activity related to home taping of broadcasts – such as creating a library of recorded shows, making further copies from the initial recording or distrihuting recorded shows to friends or others – would qualify as fair use. Nor did the Court rule, as one cnmmenter suggests, that recognizing "time-shifting" as fair use was hased on First Amendment cnncerns."' Thus, the suggestion that the *Sony* decision established a fair use "right" for individuals to engage in a wide variety nf reproduction and distribution activities is simply incorrect.*"

Mnreover, because fair use is a case-by-case, fact-specific determination, one must consider the circumstances of the *Sony* case when attempting to apply it to today's environment. In the early 1980s, there was very little the typical consumer could do with the analog tape recording of a television show made with a VCR – further reproduction and distribution were subject to substantial physical constraints. The 1980s consumer did not have access to personal computers with

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"See Initial Comments of CCIA, at 17.

[20] The phrase "fair use rights" is a misnomer. It is not true, as some commentere have argued, that consumers have *a* vested, enforccahle right to make uses of a copyrighted work that may hc dccmcd "fair" under the fair use doctrine. Rather, if such a use is made, fair use protects the otherwise infringer from liability. The structure and language of Section 107 make clear that fair use is not *a* right, but merely an affirmative defense to potential copyright infringement. *Compare* 17 U.S.C. § 106 (enumerating specific rights granted by copyright) *with* 17 U.S.C. § 107 (beginning "Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work ... is not an infringement of copyright.") Courts have recognized this technical but important distinction in limiting the ahility of commercial services to rely on the purported "fair use rights" of their customers to excuse reproduction and distribution of copyrighted works. See William F. Patry, *The Fair Use Privilege in Copyright Law (2d ed.1995)* at *432-33; see, e.g., Pacific & Southern Co. v. Duncan*, 744. F.2d 1490 (11th Cir. 1984). *cert. denied,* 741 U.S. 1004 (1985), *on remand,* 618 F. Supp. 469 (N.D. Ga. 1985), *aff'd* 792 F.2d 1013 (11th Cir. 1986); *Basic Books, Inc. v. Kinko's Graphic Corp.*, 785 F.Supp. 1522 (S.D.N.Y. 1991) (copy shop found not to he acting as agent of colleges where professors provided materials for copying); *RCA/Ariola Int'l, Inc. v. Thomas Grayston Co.*, 845 F.2d 773,782 (8th Cir. 1988) (fair use claim by manufacturer of machines permitting customers of retail stores *to* duplicate tapes rejected); *cf. Princeton University Press v. Michigan Document Services,*

hard drives, recordable DVD players, wireless home networks, websites, peer-to-peer software applications and high-speed Internet connections, all of which make acquisition, reproduction and distribution of recorded broadcasts (in high-quality digital form) easy and inexpensive.

74 F.3d 1512 (6th Cir. 1996).

In today's digital world, the "private" and "non-commercial" use of works can quickly and easily become public distribution of copies that has a substantial harmful effect on the commercial value of copyrighted works. As my predecessor as Register of Copyrights observed nearly 40 years ago, "a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come."[21] We have all watched over the past few years as Napster and other peer-to-peer software applications transformed private hard drives and individual, person-to-person exchanges of digital files into a major distrihution network of unauthorized copies of works. Indeed, this Subcommittee held a hearing on precisely that topic last week. That activity has undercut the ability of legitimate, revenue-generating distribution services on the Internet to develop and flourish. Indeed, the Ninth Circuit Court of Appeals recognized this situation in the *Napster* case when it distinguished *Sony* in analyzing the potential market harm caused hy individuals' distribution of copyrighted music files over the Napster service."

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[21] COPYRIGHT LAW REVISION, 89TH CONG., 1" SESS., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, PART 6, at 14 (Comm. Print 1965). See *also* S. Rep. Y4-473, 94th Cong., 1st Sess., at 65 (1975) ("Isolated instances of minor infringements become in the aggregate a major inroad on copyright that must he prevented.").

[22] *A&M Records, Inc. v. Napster, Inc.*, 23Y F.3d 1004, 1016-17 & 1019 (9th Cir. 2001).

Other commenters suggest that the Sony decision requires that fair use must vindicate "consumer expectations" as to the functionality of their home electronics devices. This claim, too, misstates the nature of fair use. Consumer expectations are typically asserted and vindicated in the marketplace, not through fair use. Recent history shows that to the extent copyright owners offer a product in a format that consumers find unattractive and limiting, it will he rejected.[23] The Sony decision is not based on whether time-shifting met "consumer expectations" about what they could do with their VCRs, hut rather whether it met the criteria for fair use in Section 107, including principally whether the activity harmed the market for copyrighted works.[24]

The proper fair use inquiry would include an assessment of whether the consumer's activity, if permitted on a widespread basis, will provide henefits to the public without undermining the incentive for the creation and distribution of works – that is, the ability of authors to receive compensation for the dissemination of their works. Consumer expectations in and of themselves are not particularly relevant to this question. Indeed, users of peer-to-peer services like Napster are hecnming

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[23] *See e.g.*, Michael Liedtke, *H&R Block Jabs at TurboTax Software*, ASSOC. PRESS, March 4, 2003; Stephanie Stoughton, *Circuit City's Slipped Disc; Firm Concedes Defeat; Abandons Divx Technology*, WASH. POST, June 17, 1999; Associated Press, *Circuit City, Partner Let Divx Expire Luck of Industry Support Cited*, DAILY PRESS, June 17, 1999.

[24] That is not to say that in determining whether to implement a broadcast tlag proposal, legitimate consumer expectations should not be taken into account. But if they are, it should not be because they purportedly arc equivalent to fair use.

accustomed to the notion that creative works should be provided free without any restrictions on further copying and distribution. Such "consumer expectations" are not only inconsistent with traditional fair use jurisprudence, they are destructive to copyright's principles and purpose.

To be clear, we do not disagree that legitimate consumer expectations should play an important role in consideration of the broadcast flag proposal. It appears that consumer expectations have been a driving force behind the proposal, as the proposed regime would permit unlimited copies for personal use, largely unrestricted use in the home network environment, and the potential for use outside a home network environment. Many broadcasters and copyright owners apparently recognize that even a mandated solution like the broadcast flag must meet the needs and desires of consumers or they will not embrace digital television." Our concern is that the important policy goals of copyright should not he undermined in the course of adopting any regulatory framework that purports to he protecting fair use, when in reality it permits far more than fair use.

The First Sale Doctrine and Digital Content

Some have also suggested that the "first sale" doctrine of copyright law requires that the broadcast flag proposal permit certain activity with respect to copies of digital hrnadcasts?" As this Subcommittee knows, the Copyright Office, pursuant to Section 104 of the Digital Millennium Copyright Act ("DMCA") of 1998, recently engaged in a comprehensive study of the relationship between the

[25] *See* Initial Comments of National Broadcasting Company, Inc. (NBC), at 4.
[26] *See* Initial Comments of CEA, ut 6.

first sale doctrine and existing and emergent technology.[27] The Copyright Office issued its report in August 2001 and I testified before this Subcommittee at the end of that year about our findings and recommendations in that report.

The "first sale" issues raised with respect to the broadcast flag appear very similar to those raised in the DMCA Section 104 Report: whether the first sale doctrine as it currently exists would permit certain activities related to digital transmission of copyrighted works. Some have suggested that the first sale doctrine requires that individuals be permitted to transmit digital copies of broadcasts to a circle of family or friends and inside and outside the home. As with the fair use issue, the Copyright Office helieves that consideration of the broadcast flag should not he made hased upon an incorrect or incomplete understanding of the first sale doctrine. I would like to provide a brief description of that doctrine and our conclusions from the DMCA study, which remain unchanged today.

The common-law roots of the first sale doctrine allowed the legitimate owner of a particular copy of a work tn dispose of that copy. This judicial doctrine was grounded in the common-law principle that restraints on the alienation of tangible property are to be avoided in the absence of clear congressional intent to abrogate this principle. This doctrine was first codified as section 27 of the Copyright Act of 1909 and now appears in section 109 of the Copyright Act of 1976. Section 109(a) specifies that notwithstanding a copyright owner's exclusive distribution right under section 106, the owner of a particular copy or phonorecord that was lawfully

[27] Copyright Office DMCA Sectinn 104 Report (2001).

made under Title 17 is entitled to sell or further dispose of the possession of that copy or phonorecord.

The first sale doctrine is a limitation on the copyright owner's exclusive right nf distribution. It does not limit the exclusive right of reproduction. While the sale or other disposition of a purchased VHS tape or book would only implicate the distrihution right, the transmission of an electronic copy of the same work from one device to another would typically result in the making of a reproduction. This activity therefore entails an exercise of an exclusive right that is not covered by section 109. In other words, there is nothing in the first sale doctrine as it currently exists which would authorize the type of activity that some have proposed that the broadcast flag should permit.

In the deliberations leading up to the DMCA Section 104 Report, several participants argued that first sale principles should apply to digital transmissions, notwithstanding that such transmissions typically involve the reproduction right.[28] It appears that a similar suggestion is being made in the broadcast flag proceeding. We concluded then, and continue to believe, that there are fundamental differences between digital copies transmitted in a networked environment and the physical copies covered by the existing first sale doctrine, and that those differences argue against recognizing a new form of first sale for digital copies.

Conclusion

In closing, Mr. Chairman, the Copyright Office has only begun its analysis of the broadcast flag proposal, and therefore at this time is taking no position on

[28] *See* Copyright Office DMCA Section 104 Report (2001), at 44-48, 80-105 for a summary and

whether the broadcast flag proposal should be adopted or whether it should be changed in any way to reflect any aspect of existing cnpyright law, such as the fair use or the first sale doctrines. Let me he clear though, the appropriate balance between copyright owners, broadcasters, equipment manufacturers and consumers is fundamental to our support of any effort to devise a regulatory scheme governing digital broadcasts. Such a compromise, and the debate leading to it, should not be based on an incorrect understanding of copyright law and policy.

I want to thank the Subcommittee again for giving me the opportunity to testify today. The Copyright Office would be pleased to assist the Subcommittee in its consideration of these important issues and I am happy to answer any questions you may have.

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analysis of the proposals for a digital first sale doctrine based on a "forward and delete" model.