DEPARTMENT OF COMMERCE
UNITED STATES PATENT AND TRADEMARK OFFICE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Docket No. 130927852-3852-01

Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity and Innovation in the Digital Economy.

Submitted by: John Ossenmacher, Founder ReDigi Inc.
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ReDigi is The World's Largest Marketplace for the Resale of Use Digital Goods.

Introduction

ReDigi appreciates the opportunity to participate in these proceedings. Before answering the questions asked in the Oct. 3 Request for Comments (RFC), ReDigi would like to make some preliminary observations based on assertions made in the notice with which we take issue.

At the outset, the notice refers to the application of the first sale doctrine in terms of "a physical copy" of a work. This incorrectly sets an immediate and incorrect bias against "digital", this is of great concern when the actual terminology from the statute refers to; original works "fixed in **any** tangible medium of expression, now known **or later developed**." This distinction is hugely important when considering the statement made in the RFC because it sets an assumptive standard the would need to be overcome for digital when, in fact, the statute directly supports inclusion of digital with the words "any" and "or later developed".

The RFC further states "The First Sale Doctrine…does not apply to digital transmissions where copies are created implicating the reproduction right." This statement draws its own conclusion; which may only be partially correct, in so much as, the term 'reproduction' must be considered in the current state of technology for digital downloads. First Sale Doctrine is an exception granted to the distribution right but in order to realize its protection the reproduction right must be addressed appropriately in the digital economy and either considered "fair use" for the purposes of lawfully transacting digital goods or the definition updated to consider digital reproduction in order to match the intent of physical reproduction which, in its most basic interpretation, was to prevent multiple copies of a copyright work from being circulated, sold, gifted, donated, etc. while a royalty had only been paid for a single copy. This intent is very readily achievable today and the technology is currently in use that provides far better control of "unlawful" reproductions than ever before thought possible for physical ones.

Additional Requested Update: Update the term "reproduction" wherever necessary as it applies to digital transactions, when doing so be sure it is correctly defined by todays computer science standards, so that rules of law like the first sale doctrine will not adversely discriminate against methods of content delivery in todays commerce, ie: digital delivery.

Note: If the reproduction right is clarified, it is believed that the First Sale Doctrine would also apply to digital transmissions, as the doctrine does not exclude any specific form of material or delivery. This is one reason that we believe the first sale doctrine does not to be formally "extended" to the digital media, as the notice suggests. The use of the term "extension" in the Notice is misleading; the first sale doctrine does exist and it is law, one that has its own foundation independent of the Copyright Act. It does not need to be "extended" to digital, by its nature digital should be protected under the doctrine, however, we do believe that clarification is always helpful to prevent confusion.

Is the USA falling behind? The European Union has taken quite a different and more electronic-age-appropriate interpretation of digital resale and the exhaustion principle (of which the first sale doctrine is an example), their legal view involves ownership in a

specific number of digital instances versus an actual specific digital instance that is "fixed" on a hard drive or other medium, since, in the digital realm, no such thing actually exists.

It is historically apparent that the intent of the law is to have all Copyright goods protected regardless of their delivery formats. First sale is not about the medium in which a work is held; it is about the exhaustion of the owner's rights upon the collection of the first payment in consideration of a sale, or even a transfer of a particular copy without payment. Is a copyright good any more or less protected merely because it is on paper, rather than on tape or on plastic or on a magnetic disk, canvas or parchment? The answer is of course not.

The discussion is not, should first sale be "extended" to new forms or means of sale and distribution, but how do policymakers and lawmakers maintain the **status quo** for all parties? The group includes the creators the owners and the consumers in the marketplace, all of which must be served if the kind of balance and growth of the digital market envisioned by copyright law it to be achieved.

Answers to specific inquiries

7. What are the benefits of the first sale doctrine? And to what extent are those benefits currently being experienced in the digital marketplace?

The benefits of the first sale doctrine make a direct and significant impact in our countries financial well-being. Billions of dollars in copyright goods are transacted by consumers each quarter, the First Sale Doctrine is what allows this secondary market to flourish and for consumers to be able to realize the value of their property and to buy and sell and then buy again. As commerce becomes more and more electronic the impact of First Sale on our countries fiscal growth will be critical. Any change in the status quo that would prevent or limit consumers from being able to realize the value of their property through digital resale will be a significant and direct blow to our economy.

At present there are minimal benefits being realized; the few copyright monopolies that exist are doing a good job at swaying the legal system in an effort to control their revenue streams while stifling creativity and preventing the fair trade of digital goods in America. Currently, these organizations are resisting any attempt to allow consumers to realize the value of their digital property and at the same time they are controlling and suppressing the rights of the actual creators.

The potential for benefit, however, by including digital commerce, is enormous. The secondary market in physical objects, online and off, far exceeds the size of the market in new object transactions, and buying and selling goods is a way of life for most all Americans. Used Books, CDs LPs, video games, software, educational materials, artwork, and goods of almost every other kind are an important part of our everyday commerce. Hundred's of billions of dollars of used physical goods are transacted each year between buyers and sellers.

Seth Greenstein, writing in Fortune, regarding digital resale, said: "The economic implications of the first sale doctrine are enormous. According to Commerce Department figures, video rental in the United States is a $9.5 billion industry. Video game retailer GameStop (GME) reported nearly $2.4 billion in 2009 revenue from used game sales. Considering that, in just a few years, Apple (AAPL) has sold more than 10 billion music downloads, 3 billion apps, and 375 million television episodes, the future impact of the first sale doctrine could be huge."

That should be an indication of the demand. Companies like eBay, Amazon (and others like them) which also sell used things, and every used bookstore and clothing store, "previously owned" car lot, etc., in the country. The existence and sales of those stores, much less yard sales, which exist but probably can't be quantified, answers the last part. Everything else can be resold. Obviously, consumers are not reaping the benefits in the digital marketplace because of the perception that the law restricts the used market. Digital music and books are the prime examples of industries in which most every

This begs the question, why are the benefits of the right of secondary sale, that are applicable to each and every other category of property in America, potentially being discriminated against and withheld from digital commerce? Where does the First Sale Doctrine exclude, prejudicially, digital goods? By correcting and clarifying digital as part of Copyright law and the First Sale Doctrine the legitimate interests of the creator, the copyright owner, the purchaser, and the interest of society as a whole, a free and efficient digital marketplace will be realized and maximized. It is important to clarify that the first sale doctrine is independent of the medium of the copyright material and applies to all transactions properly considered to be sales, regardless of how they may be characterized by the seller.

The secondary market provides an outlet for copyright goods no longer used by their owner and provides value to that person and at the same time may make a copyright good available to someone who may not have been able to purchase the goods at the "new" price. A secondary market in digital will lessen the divide between the haves and the haves-less and will free up billions of dollars of currently locked up value on peoples personal computers and devices.

8. To what extent does the online market today provide opportunities to engage in actions made possible by the first sale doctrine in the analog world, such as sharing favorite books with friends, or enabling the availability of less-than-full-price versions to students.

The opportunities are severely limited.

Amazon allows you to loan one book one time only, for 14 days. It must be read either on Kindle or on a device with the Kindle software. Amazon has a Kindle Owners Lending Library, with the following terms: The Kindle Owners' Lending Library is available to Amazon Prime members—paid Amazon Prime, paid Amazon Student, 30-day free trial, and customers receiving a free month of Prime benefits with a Kindle Fire device—who own a Kindle device. The Lending Library features over 350,000 titles,

including many New York Times bestsellers. Books borrowed from the Lending Library have no due date and can be delivered to other Kindle devices registered to your Amazon account.

Books that are borrowed from the Kindle Owners' Lending Library can be read only on Kindle devices. There are some startups that want to get into the business, but none has made a splash. Scribd, the document service, has announced a plan to get into the business as well.

Apple does now allow lending and limited sharing is allowed within iTunes accounts.

As an additional point, there often seems to be an assumption that the first sale doctrine somehow implies a "fire sale" in "used goods"; this is also incorrect. Not everyone buys "used" because it is "less-than-full-price". Often older classics or limited editions are worth substantially more than new versions; with today's technology this type of collectability is also a reality.

It is ironic then that good companies like ReDigi who have made sure that legally obtained digital goods can be resold in a very controlled manner have been sued by monopolistic interests motivated by the same instincts that would close all used record stores, flea markets and similar outlets for the legitimate resale of used goods. The justice system needs guidance to prevent such injustices and the damage being caused to legitimate market interests.

9. If the market does not currently provide such opportunities, will it do so in the near future? If not, are there alternative means to incorporate the benefits of the first sale doctrine in the digital marketplace? How would adoption of those alternatives impact the markets for copyrighted works?

Opportunities are extremely limited and complex today so, yes; let's hope legal clarification will come from our lawmakers in the near future to clarify our laws and to help prevent manipulation, in an ever increasingly digital world. Digital is just another medium of delivery and it would appear that the Copyright Act would benefit from an explicit recognition of first sale principles in the digital context, especially given technology available today that facilitates compliance by users. An update to de-emphasize the role of "reproduction" in a controlled transfer of a digital good, not unlike that forged by the European Court of Justice in its software decision, would go far to reinstate the legitimate balance between the copyright owner's interest and that of the consumer that characterized the copyright world for all time before the emergence of digital commerce.

Such adoption/clarification of Digital First Sale, would greatly expand the markets for copyright works in all areas; purchase, resale, gifting, donation, etc. Ownership should be ownership and paper, plastic, disk or digital all should have the same rights and opportunities in the marketplace. To suggest alternatives is to divorce artificially the long-held right of alienation of property from the essential bundle of property rights recognized by centuries of common law, to the great detriment of both the creator and the

consumer (even if it sometimes seems counterintuitive to copyright owners).

Certainly large companies recognize the potential for a digital secondary market, as Amazon and Apple have filed for patents (and Amazon has received one) for methods for a secondary market.

In its application for a patent for a secondary market for digital objects, Amazon said:

> "As use of digital objects increases, users may wish to transfer the digital objects to other users. These transfers may include a sale, a rental, a gift, a loan, a trade, etc. … A secondary market which allows users to effectively and permissibly transfer 'used' digital objects to others while maintaining scarcity is therefore desired."

Apple has filed for a similar patent, also recognizing the potential benefits of such a system. However, it is unlikely that either will come to fruition unless the law is changed to back to the first principles of first sale.

The concept of First Sale was established by the U.S. Supreme Court in Bobbs-Merrill v Straus in 1908, and codified the next year by Congress. At the time, the law read, ""nothing in this Act 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." The big change came in 1976 when the law was rewritten to center on the owner of the copy. Sec. 109 defines first sale, "…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."

University of North Carolina Law Professor Anne Klinefelter, writing in Information Outlook in May, 2001, described what came next: "When software entered the picture and was recognized as a proper subject for the copyright, copyright owners focused new energies on avoiding the first sale doctrine's limitations on their control over each copy sold. In 1990 Congress passed the Software Rental Amendments Act in response to software publishers' concerns that sales of their products were diminished by the development of a secondary market that would rent the software to other users. This amendment narrowed first sale rights significantly by forbidding the renting or lending of computer programs, providing an exception only for nonprofit libraries serving a nonprofit need."

The test case came the next year, in Step-Saver Data Sys., Inc. v. Wyse Tech, in the Third Circuit U.S. Court of Appeals. On the surface, the case dealt with box-top licensing of software, but the court also made an astute observation about the use of licenses: "When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine."

The court wrote: "By characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale, and by making the license personal and non- transferable, software producers hoped to avoid the reach of the first sale doctrine."

The result is the system of e-books and digital music that we have today. Where some sellers of digital music and e-books surreptitiously characterized their products as licensees, although few people had any idea that it was not a normal and typical purchase.

NOTE: The European Court of Justice in the Oracle case said that copyright holders who "license" downloaded software without a time limit on use are deemed to "sell" it, leaving the purchaser free to re-sell it as long as the purchaser takes necessary steps to destroy any additional copies. In short, the Court recognized the applicability of the exhaustion principle to downloaded software, without erecting an insurmountable technological obstacle to the "reproduction" deemed to occur in the act of effecting the transfer. Rather, pay for a single instance, sell a single instance, pay for multiple instances, and sell multiple instances. European creators and consumers have welcomed this clarification of digital rights and significant increases in revenue are expected for all. The secondary market always has supported the primary market--market dynamics 101.

Because the "seller" controls the content, situations can arise as in 2009 in which Amazon deleted copies of George Orwell's "1984" on the Kindle devices of customers. After an outcry, Amazon said it wouldn't do such a thing again.

Yet, last year, a similar case emerged in Europe in which a woman in Norway, where Amazon did not operate, purchased a Kindle in the U.K. When the device acted up, Amazon replaced it once. When the replacement developed a problem, she tried again and found her account, and all her books, had been wiped out for an unexplained violation of Amazon's policies. Clearly, that could not have happened if she owned the books on the device. Instead, she was an unwilling lessee.

Clearly, as the companies try to amend the law with their own versions/agreements the secondary market including digital music or e-books is at risk. Reverting to the 1908 definitions would be one way to do it. Another would be to adapt first-sale requirements to meet the expectations of consumers. If a consumer wishes to lease, he may do so. If she wishes to buy, she may do so. It is technically possible to do those things easily enough, and to make certain the original copy is deleted if indeed there is a sale. But make sure that it is transparent to the consumer what they are actually getting and make sure that whatever it is complies with the law.

Such a protocol would have a positive affect at all on the markets for copyrighted works. As shown, the secondary market for video games is going strong, as is the original sale of games, which is actually supported by wealth created by the consumer's secondary sale. A healthy secondary market would develop just as it has in books or in physical music CDs.

Concerns that electronic content does not degrade over time, particularly when concerning e-books, are misplaced. The content may not degrade, but public tastes change. A book or song popular today will be an afterthought next year -- except to the person looking for it or the person looking to sell it and nowhere in copyright law was condition contemplated.

Question 10: Are there any changes in technological capabilities since the Copyright Office's 2001 conclusions that should be considered? If so, what are they? For example,

could some technologies ensure that the original copy of a work no longer exists after it has been redistributed?

The fundamental issues in this docket are what has changed since the Copyright Office's 2001 report and, as importantly, what has not.

Yes, there are substantial changes in technological capabilities. However, the Copyright Office may have been under-reaching in 2001 by simply not clarifying that digital delivery of a copyright good carries all of the same protections and exclusions as a physical delivery method and cleaning up definitions like reproduction and phonorecord. This would have helped prevent special interests from creating confusion regarding those terms and as to how they should be interpreted in the digital age.

And yes, technology has evolved significantly in the past 12 years in such a way that business and society are even more able to provide copyright protections to digital goods that are far superior to even those protections available for their non-digital counterparts. It is important to note that the fact remains; existing law provides ample remedies to discourage piracy without the need to erect artificial barriers to a legitimate secondary market where participants can innovate and implement systems to prevent copyright abuse.

Furthermore, systems now exist that allow digital files to be secured without device digital rights management (DRM) schemas and provide the transfer of single instances of those protected files, while rendering ancillary copies inoperable. Limited editions are a reality now. Forensic analysis for removal of pirated goods is a reality now, as well as, technologies that provide ongoing monitoring of resold items. Instantaneous transactions, where copies are never made as part of a transaction between a buyer and seller, eliminated the need for old-fashioned "forward and delete" methods. The technology described is in use and exists today that has surpassed the forward and delete methods.

At the same time, the market place has clearly changed since the original report. Digital materials are now mainstream. Music and books in digital form have become the norm. In that sense, they deserve to be treated much as a book was in the original first sale case, Bobbs-Merrill.

Look at the trends over the years. When the 2001 report was issued, compact discs (CD) accounted for almost 94 percent of revenues in the music business. The cassette was in the final throes of its demise. Downloading of singles and albums wasn't even a blip on the charts, according to data compiled by the Recording Industry Association of America (RIAA). It wasn't until 2004 that downloading even appeared, and the downloading of singles accounted for 1.1 percent of revenue, and downloading of albums for 0.4 percent.

The International Federation of the Phonographic Industry (IFPI) in 2004 issued its first "Online Music Report." One highlight was the 2003 emergence of iTunes, which sold 25 million downloads by mid-December of that year. Ten years later, customer have downloaded 25 billion songs worldwide. The IFPI reported there were between 400,000

and 500,000 tracks available to consumers. Now, consumers have a choice of 26 million – and that is from iTunes alone.

As a result of the growth in legal downloading sources, the technology by which consumers received music continued to evolve. Cassettes disappeared. In 2010, CDs for the first time accounted for less than half of industry revenue. In 2012, CDs accounted for 35.8 percent of revenue, while downloaded songs were 23 percent and downloaded albums were 17.1 percent. Streaming entered the picture in 2005, and now accounts for 8.1 percent of revenue.

The RIAA reported that U.S. revenue from digital formats passed the $4 billion mark in 2012, accounting for about 60 percent "Industry revenues from digital formats continued to grow, and in 2012 surpassed $4 billion for the first time, accounting for about 60 percent of the total market in the U.S. After having crossed the 50 percent mark the year before. Digital downloads of songs accounted for $2.9 billion in revenue in 2012, while digital album downloads were just over $1 billion, according to RIAA's publication "News and Notes on 2012 RIAA Music Industry Shipment and Revenue Statistics."

The curve for e-books is even steeper.

According to the Association of American Publishers, digital books accounted for .005% of publisher net revenue in 2002, the year after the Copyright Office report was issued. By 2009, digital trade books were only 3.17 percent of the total. In 2012, after the introduction of many new tablets and e-readers, e-books accounted for 22.55 percent of net revenue. The trade books sector, which includes adult fiction and non-fiction, young adult, children's and religious books, was worth $7.1 billion last year.
Trends for e-book reading are accelerating, according to the Pew Research Center. In a June 25, 2013 report, 23 percent of Americans age 16 and over read an e-book in 2012, up from 16 percent in 2011. for readers age 16-17, the percentage doubled from 2011 to 2012, from 12 percent to 25 percent.

In the public's mind, their digital music and e-books are interchangeable with traditional phonorecords and printed books, and the copyright law should recognize that evolution and maintain that status quo.

At the same time as the consumer market and expectation have rapidly changed, certain technological realities and their accompanying statutes have not. The Copyright Office was correct in 2001 to recognize that a change was needed to the definition in Sec. 101. The Office said: "We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work."

The recommendation was based on the completely sound observation that: "The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance." A buffer copy is created every time anything is

downloaded. It exists for less than a second, yet this ephemeral collection of bits is holding up the creation and development of vast new markets for the resale of digital material that would benefit consumers and booksellers alike.

As an integral part of recommending a new first-sale doctrine, the Office should again make its recommendations regarding temporary buffer copies and a better definition of reproduction. This time, however, it should be in the context of the creation of a new digital age in which commerce is conducted and include the technology sector in drafting these updated note sole the copyright sector that is looking only to protect their self interest.

Also in 2001 the Copyright Office observed that a digital transmission creates a perfect copy of the work, which could both negatively affect the development of the digital marketplace and fuel piracy.

It has become quite obvious that any protection of copyright goods presumed to follow from the Copyright Office's recommended position proved to be wholly illusory; digital piracy in the past decade has been rampant with, for example, numbers of greater that 80% of digital music downloads being from pirated sources. The failure of the Copyright Act and its amendments to protect creators in the digital age by providing a mechanism of "value" for the digital goods being distributed in secondary transactions has proved, perhaps counter-intuitively, extremely harmful to the creators (not necessarily the copyright owners who are most often different from the creators themselves).

Many file sharers have openly stated "Why should I buy it when as soon as I do, the file I purchased has zero economic value." Never before in the history of property in the United States has a group of powerful monopolies so controlled the legal rights of both creators and consumers. Today there is not a balance between the interests of copyright owners and consumers (a hallmark of every non-digital marketplace in copyrighted goods). Absent digital first sale there is no longer incentive for creators to create or buyers to protect their copyright goods in the current broken digital system.

A system where the few copyright mammoths are permitted to twist the *intent and interpretation of "reproduction" and the common law* of *exhaustion*—which is the earliest enunciations of the first sale doctrine—they do so simply in order to protect their personal copyright monopolies in the rapidly expanding digital marketplace. This needs to be corrected.

Thank you.

John Ossenmacher
Founder, ReDigi Inc.
John@ReDigi.com