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Copyright Policy, Creativity, and
Innovation in the Digital Economy

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Comments of ScreenPlay, Inc., and Rain City Video¹

limited to the questions under

“First Sale in the Digital Environment”

DIGITS ARE THE NEW INK

To put “digital” in perspective, it is important to bear in mind that there is nothing particularly special about “digital” so far as the law is concerned. We did not abandon basic copyright principles when we developed audio and videotape. Digital media should be no different. Here are some basic truths that are often forgotten.

“If you get hit in the head with a hard drive, it will hurt a lot more than a CD.”

That was the comment I made to former Register of Copyrights, Marybeth Peters, during a question and answer session at a Future of Music Coalition Summit in Washington, DC, at the turn of the millennium. She had been asked whether the first sale doctrine applied to digital downloads, and her initial response was “no”, explaining that there had to be a tangible medium of expression, and downloads were not tangible. My somewhat disrespectful but urgent retort prompted her, on further reflection, to publicly reverse her position then and there. “Yes.” If legally downloaded onto a tangible medium of expression, the first sale doctrine applies.

¹ ScreenPlay, Inc., is a major provider of on-demand Internet streaming (delivering over 30 million video streams to an audience of over 300 million unique viewers, through everything from local kiosks to roaming smartphones). It manages the world’s largest catalog of promotional video content, including movie trailers, music videos, and video game trailers, and reaches a worldwide audience. Based in Seattle, Washington, Rain City Video is one of the nation’s oldest video rental companies, with two neighborhood stores.

It is common to hear a distinction being made between “digital copies” and “physical copies,” forgetting that a movie on a DVD is 100% physical *and* digital. The first sale doctrine has always focused on the copy/copyright distinction rather than the technology used for making the copy. Section 202 of the Copyright Act (which was part of the original enactment or the statutory first sale doctrine in 1909) drove home the distinction between the ordinary ownership of “things” (such as paper, shampoo bottles, discs or hard drives) that might contain works of authorship and the intangible rights conferred with respect to those works. Even the popular term “file-sharing” missed the mark, because there are no “files” independent of the medium onto which they are reproduced. Those bits of data in the “files” may be digitally transmitted to reproduce the work onto another medium, they may be digitally transmitted so as to be performed, or they may be transported from one place to another as an integral part of the tangible medium on which they are embedded – exactly like Robert Frost’s “ink files on paper” (as contrasted with digital files on plastic) that could be reproduced onto other paper, read as part of a public performance, or delivered to someone else by transferring possession of the paper bearing the ink that reproduced the work onto it.

As we shift from ink on paper to bits on something else, we are left with more of a practical problem than a legal one – How do I exercise my right to lend, give away or sell the copy of Work No. 1 on my hard drive without also having to part with my hard drive containing Works No. 2 through 2,345,962? That is the real issue.

Digital copies existed long before digital delivery.

Recording “bits” onto a hard drive using the Internet is no different than recording bits onto Digital Audio Tape, a CD or a DVD using a cable connecting the master to the replicator in a factory. At the end of the day, there will be a “lawfully made copy or phonorecord” subject to the first sale doctrine, such that its owner enjoys the right to redistribute it. For many years before downloads, consumers were enjoying digital copies made in a factory and shipped to their homes through various distribution channels. Digital delivery merely puts the consumer into possession of a lawfully made copy by using the home replicator rather than the factory replicator.

As early as 2001, when Congress was grappling with the legal consequences of digital delivery, the Motion Picture Association of America made a similar analogy. Addressing the question of whether the delivery of content through e-commerce networks should be considered trade in goods or trade in services, MPAA’s Vice President for Trade & Federal Affairs gave the following example:

If a consumer were to place a telephone order for a DVD of the film “Finding Forrester” and have a copy of that DVD delivered to his house on a UPS truck, that is a “goods” transaction. Likewise, if the same consumer ordering a copy of the same DVD on his/her computer and had the same content delivered digitally and downloaded from his computer to a write-able DVD – that is still

a “goods” transaction. The only difference is that a digital network instead of a delivery van provided the transportation from the retailer to the consumer.

Testimony of Bonnie J.K. Richardson before the House Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection, May 22, 2001, prepared statement at 12.

In Copyright Act terms, the UPS delivery involves reproduction onto a medium that has not yet been distributed, whereas digital delivery over the Internet involves reproduction onto a medium that has already been distributed to the person receiving the download.² The question to be addressed now is whether and how to facilitate the second and third distribution of that digitally delivered copy without the impractical extremes – having to distribute the entire hard drive or other storage medium, on the one hand, or opening up a free-for-all replication (or multiplication) of copies without the copyright holder’s consent, on the other.

Digital copies are evolutionary, not revolutionary

Legally speaking, digital copies are substantively evolutionary, not revolutionary. Recording “bits” on a hard drive, USB, or any other tangible medium is the legal equivalent of recording ink on paper, grooves in vinyl, chemical reactions on film, and magnetic impulses on “analog” cassette or 8-track tape. During most of the 160 or more years that the first sale doctrine has existed (over a century since its first codification in 1909), the tangible medium was easier to re-distribute than to replicate. That is, the easiest way to let someone read my copy of a popular book was to lend the book. It became the public policy that copyright owners should exercise no control at all over the copies they put into circulation.³ But replication has now caught up with and surpassed distribution as the most efficient way of passing on the content of my copy to someone else. If we do not allow a comparable manifestation of the principles underlying the first sale doctrine evolve alongside the technological evolution, we risk losing the important benefits of the doctrine.

To illustrate, at the height of the Harry Potter craze, my entire family went to the bookstore to wait for the midnight release of the latest Harry Potter adventure. My daughter would be the first to read it. Exercising our rights under Section 109(a), she passed it on to my son, who wanted to read it before flying off to Spain for a semester abroad. My wife and I would

² See, e.g., *United States v. Cohen*, 946 F.2d 430, 434 (6th Cir. 1991) (“[C]opyright law does not forbid an individual from renting or selling a copy of a copyrighted work which was lawfully obtained or lawfully manufactured by that individual.” (emphasis added)); *United States v. Sachs*, 801 F.2d 839, 842 (6th Cir. 1986).

³ Nearly one hundred years ago, the committee of the United States Congress that recommended codification of the judicially created first sale doctrine stated, “it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.” H.R. Rep. No. 2222 (1909).

wait our turns. Unfortunately, my son was still unfinished with one of Harry Potter's escapades, with about 20 pages remaining when it came time to board his flight. As my daughter (the fiercest defender of the series, who would collect them on her shelf) had fallen asleep, my wife and I made the parental decision to rip the last 20 pages out of the book and hand them to our son as he got ready to board, with instructions to mail them back to us as soon as he arrived in Spain. That way, we could begin reading the book before while our son finished it, even though we were thousands of miles apart. And, mailing back 20 pages would be much more efficient than mailing the entire hardback tome.

We infringed upon our daughter's right to trust her parents, but did not infringe upon J.K. Rowling's copyright. To the extent that the last 20 pages our son flew off with and the dismembered portion remaining in our possession each were, technically, "a copy of a work of authorship," there was actually no reproduction of the work into two copies. My wife and I remained in possession of an instance of the work remaining in the now thinner hardback copy, and our son flew off in possession of a partial copy of the same work. Only one reproduction was involved, but my wife and I could read part of it even as our son read a different part, miles away. We could not, however, read the same pages at the same time.

Today, our son flies off with an entire library of books on a Kindle. He can lend us the Kindle any time, but to allow us to read his eBooks he has to deprive himself of his whole library. When he recently flew off to Manila, there was no way for us to pull the Harry Potter stunt and rip out a few pages. But there should be. The only reason that we don't have the technology to do so in use today is that the law's growth has been stunted by those who wrongly assumed that the rules and underlying principles had to change when things went digital.

With those fundamentals in mind, we now address the specific questions under the heading, "First Sale in the Digital Environment."

THE ANSWERS

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 have come to be part of the fabric of our culture since back when Abraham Lincoln studied law using borrowed books.

- a. Intermediaries are ready, willing and able to get the works out into the hands of people that the first seller may consider too marginal. Whether a distributor, such as a "one stop" who services smaller accounts that would overwhelm a major publisher, a retailer that concentrates on smaller markets that might fall below the threshold for major chains, a small, independent retailer willing to do business in less affluent neighborhoods, the used product merchant or the 99-cent video rentals from kiosks, it would be impossible for a publisher to directly reach the consumers in all of these markets.

- b. Distribution reaches beyond “first consumers” in the commercial marketing sense. The first sale doctrine advances the progress of art and science by reaching those unwilling or unable to pay the market price to own a new copy. Rental models, library lending, second-hand stores, and private sales through yard sales or online markets such as eBay and Craigslist, all enable the widespread dissemination intended by the Constitution’s copyright clause. Plus, copies regularly wind their way from one person to another at no cost through gifts, lending and inheritance. First sale doctrine case law includes redistribution even as far as copies intended for the trash heap or retrieved from the recycling bin. It gives the copyright owner the right to charge what it wants for the copy it owns, but prohibits the copyright owner’s subsequent control over whether someone else may come to own it or possess it.
- c. Market viability of original publication increases. The value of the original sale is greater because of its redistribution value. Consider how new car sellers trumpet the high resale value of their new cars. In the consumer’s mind, the “resale” value need not be cash – the value in giving it to a relative, trading it in on a newer model, or donating it to charity in exchange for a good feeling or a tax deduction, all enhance the market value of the original. Absence of the first sale doctrine would be comparable to an automobile market where new cars could only be disposed of as scrap, or after successfully negotiating a transfer license from the manufacturer.
- d. Dissemination cannot be limited. Whether it was Bobbs-Merrill trying to keep the price of *THE CASTAWAY* above one dollar, or Mark Twain trying to artificially bolster the perceived value of his books, or the major college textbook publishers trying to charge the most the market will bear in different regions of the globe, the right of the owner of a non-infringing copy to redistribute it over the copyright owner’s objection has provided an important safety valve against artificial scarcity that would limit access only to those with deepest pockets. Mark Twain learned that the first sale doctrine (along with the copy/copyright distinction) protected distributors who chose to breach price fixing agreements from liability for copyright infringement;⁴ the Supreme Court held that Macy’s was free to resell *THE CASTAWAY* for pennies on the dollar notwithstanding an end-user license agreement to the contrary;⁵ the Supreme Court held that copyright owners could not escape the first sale doctrine’s limitation on their copyrights by making the copies abroad;⁶ and ordinary merchants remained free to buy from the “exclusive” retailer and put the product on their own shelves.⁷ Without a first sale doctrine, however, we would

⁴ *Clemens v. Estes*, 22 F. 899 (C.C.D. Mass. 1885).

⁵ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

⁶ *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US __, 133 S. Ct. 1351(2013).

⁷ Back in 1993, Orion Pictures provided McDonald’s with an exclusive video title, and reportedly “attempted to prevent McDonald’s from selling tapes to retailers after reports

have a legal landscape in which Abraham Lincoln's lender would have needed a license from the copyright holder before letting him borrow books, an executor of an estate would need to search out the copyright owners for permission before transferring property by inheritance, the birthday gift shopper would need to be sure the copy came with a re-distribution authorization, and a donation of books to the after-school program for underprivileged students would be limited to those books for which permission to donate had been obtained.

The digital marketplace should be no different in that regard, as the most attractive target consumer is the heavy spender with the financial means to purchase downloads at whatever "optimal" price the market will bear. But once a movie has been watched or a book has been read, it just takes up space on the hard drive. The owner of the hard drive is not likely to part with it so that someone else can enjoy the copy of the work if, to do so, means parting with the entire smartphone, laptop or personal computer containing the hard drive. It is perfectly lawful to do so, but it comes with a tremendous practical barrier – the equivalent of Abraham Lincoln having to cart away the book owner's entire library collection just to read one book.

If the individual copies sharing a single tangible medium of expression could be transferred to a different tangible medium, freeing up space while making the work available to someone else, who is perhaps only able to afford the secondary market price, it would be a good thing.

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?

There is a big failure in the market because, currently, all of the comparable activities fall into a "licensing" scheme controlled by the copyright holder, and only the fortunate licensees or the unlicensed infringers can compete. Even informally, the demand tends to be met by infringing reproductions due to lack of any useful lawful alternative. (In music, this informal "non-commercial" reproduction is immune from lawsuit, 17 U.S.C. 1008.)

For example, what we refer to in digital delivery as a "rental" is really an aberration – the single copy equivalent of a self-destructing copy. The copy is rendered inaccessible after a period of time. But with the right to "transfer" the accessible digital file from one medium

surfaced that Trans World Music, Musicland and other retailers had purchased them at fast-food chain [sic] for resale in their stores." VIDEO WEEK (April 5, 1993), p. 4. There is no indication that Orion's efforts met with any degree of success; nor could they, since any given McDonald's customer buying a sandwich with a premium could happen to be a video store employee doing the boss a favor. Indeed, any customer is free to resell their tapes, whether to video stores or to each other.

to another, the works would be made available to more people. Whether this is in an informal market (where an individual can transfer access to a file to someone else), or in a commercial environment (where libraries, video services or bookstores could allow customers to have access to the work, one at a time), it will tend to spur the development of more business models at more price points and make the works more widely available if the owner of the copy is free to split it off to a different tangible medium without needing authorization from the copyright owner.

Permission-based market substitutes are clumsy, at best. Denial of permission from just one major publisher in the licensee's market can doom a new enterprise before it gets off the ground. Permission may be revoked on a whim. A copyright holder that believes one revenue channel is more profitable might restrict other channels from competing with it. In the home video industry, for example, it is no secret that some studios have attempted to shift consumers to a sales model rather than a rental model, but thanks to the first sale doctrine, the public benefits when low cost rentals and used product delivery channels compete with "new" sales. In fact, back in the 1980's, when there was an effort to exclude videocassette movies from the first sale doctrine, Jack Valenti suggested that the price of a "licensed" one-night rental should be about the same as that of a movie theater ticket. Fortunately, for the millions of Americans who can't afford many one-night rentals at \$10-\$12 per night, Congress saw fit to keep the first sale doctrine unscathed. In the music industry, in contrast, Congress gave the copyright owners the exclusive right to authorize rentals, and we have yet to see a single retailer licensed to rent CDs.

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?

There is no indication that the market is moving in the direction of offering a digital-delivery counterpart to the analog first sale doctrine benefits. The reason is simple: The first sale doctrine eliminates the permission-based bottleneck. At best, needing permission creates friction in the market that requires many hours of negotiations and lawyer fees to sort out. At worst, it gives major publishers power to simply veto a new enterprise or business model they don't like. If, for example, just one of the major movie studios had denied Rain City Video the right to rent any of that studio's movies, Rain City Video would have gone out of business years ago. Fortunately, video rental stores are free to buy any movies they wish, from any source they wish, and sell them or rent them to whomever they wish, and at whatever prices they wish, without needing to ask permission. The Copyright Act gives them all the permission they need.

But there are ways to foster the first-sale doctrine equivalent in the digital delivery environment by removing the need for authorization from the copyright holder while still

ensuring that the distribution right does not undermine the reproduction right.⁸ For many years, now, the basic “forward-and-delete” technology has been available.⁹ And, copyright law itself contemplates that the only copy that counts is one that is accessible. (17 U.S.C. § 101: “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.”) That is, it does not really matter if ten people have the file on their hard drive if only one of them at a time has access in a manner where it can be “perceived, reproduced, or otherwise communicated.”

Adoption of a lawful means, independent of copyright owner control, to transfer one-at-a-time access to a reproduction resulting in a lawfully made copy residing on any medium – including hard drives and other mass storage devices – would tend to foster development of new technologies to make access more affordable, more effectively, to more people. And, just as the value of a new car is enhanced by the resale value, the fact that the owner of a copy in a hard drive can make it available to someone else when done with it, will enhance the perceived value of the download to begin with. In the analog counterpart, during the early days of video rental, the rented tapes typically cost over \$75 to buy. But the profit from selling to those who invested in the business of renting was so great that it stimulated the creation of movies that would never have been considered affordable had they had to rely on theatrical and television licensing only. “Direct to video” movies were born – titles where investors did not need to rely on the box office to guarantee a profit. The most

⁸ The only reason that an exclusive right of distribution was created was to protect the reproduction right. Without a distribution right, persons hawking infringing copies would be immune from prosecution so long as they were not responsible for the reproduction. The distribution right was intended to perfect and protect reproduction right, not to allow perpetual control over the disposition of non-infringing copies owned by others.

⁹ During the 105th Congress, in 1997, Rep. Boucher introduced the “Digital Era Copyright Enhancement Act,” H.R. 3048, that would have authorized use of such technology:

SEC. 4. FIRST SALE.

Section 109 of title 17, United States Code, is amended by adding the following new subsection at the end thereof: “(f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.”

The primary criticism was not of the concept, but that it depended on trust that the deletion took place concurrently. Modern technology has sufficiently developed over the ensuing 17 years to remedy that flaw, replacing trust with secure automation.

important element of the success of the home video market, however, was that these new distribution channels and business models were invented and developed by entrepreneurs who did not need the copyright owner's consent. In fact, they did in the face of fierce opposition.

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 technological *capability* to allow multiple files to exist while limiting access to only one instance at a time has existed for quite a long time. Although “copy and delete” and “forward and delete” technology has been around for decades,¹⁰ and could be made as secure as current industry copy protection standards, investors in such technology would first have to weigh the legal expense of weathering a bruising legal battle to prove that their legal theory was correct. The technical ability to maintain a “single instance” of a copy, even as many other inaccessible files with the same bits remain inaccessible, is not rocket science. We have, today, the ability to roll out a model in which I cannot read my copy of the eBook or watch my copy of the downloaded movie while it is out “on loan” to someone else. Given the legal uncertainty, however, it is hard for any technology company to invest in perfecting a secure means of making only a single accessible instance available. The only

¹⁰ See, DMCA Section 104 Report, A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act, U.S. Copyright Office, August 2001, at 48; John T. Mitchell, DRM: The Good, The Bad, And The Ugly, June 2004, at 44, n.68 (available at http://www.ftc.gov/sites/default/files/documents/public_comments/ftc-town-hall-address-digital-rights-management-technologies-event-takes-place-wednesday-march-25/539814-00747.pdf):

As part of the Secure Digital Music Initiative (or “SDMI”) led by the major record companies, efforts were made to obtain agreement from hardware and software manufacturers to create a “secure” digital environment operating under certain rules. Before failing, the organization issued specifications for portable devices that included concepts of “Move” (content “copied to its destination, and the original is made permanently unusable”), “Check-Out” (“the ability to render SDMI Protected Content for Local Use is copied via the LCM [Licensed Compliant Module] to a single other location . . . and the number of permitted copies decremented by one”), and “Check-In” (“the ability to render SDMI Protected Content for Local Use is restored via the LCM to its original location . . . and the number of allowed copies is incremented by one. The Checked-Out copy shall then be rendered unusable.”) *SDMI Portable Device Specification, Part 1, Version 1.0*, July 8, 1999, available at http://www.sdmi.org/download/port_device_spec_part1.pdf.

certainty is a lawsuit. But if the law is clarified to allow it, and perhaps even includes a means of obtaining independent certification of a reasonable level of robustness, it should stimulate bringing this particular model to market. Making cheap second-hand access available will, in the same manner, reduce the demand for illegal copies.

11. To what extent are there particular market segments or categories of users that may warrant particularized legal treatment?

The market will tend to sort itself out. Just like with bookstores, record stores, or video stores, one sees high-end stores in high-end neighborhoods, and simpler no-frills stores in lower income neighborhoods. We can expect those supplying the demand commercially to make strategic choices as to which markets they will target. A significant segment of the market still borrows music CDs from the public library even as others purchase downloads. The beauty of the first sale doctrine in the analog world is that no permission is needed for a merchant to take on any market, including consumers considered too marginal for national brands to concern themselves with.

The first sale doctrine was amended to limit rentals of sound recordings when it was thought that the only reason to rent a record album was to copy it onto a cassette tape and return it. When computer software rentals were limited, however, Congress took care to exclude from the limitations those copies that could not generally be reproduced in ordinary use. Thus, a floppy disc with the latest version of WordStar word processing software could not be rented, but a Nintendo video game cartridge could. So could an automobile with computer software managing its engine's performance. Fundamentally, though, the single common denominator is that there should be a means for the owner of a lawfully made copy to voluntarily part with ownership or possession by transferring ownership or possession to someone else, but without the need to either seek permission or to part with ownership of the entire storage medium comprising copies of other works.

12. How will the Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013), impact the ability of right holders to offer their works at different prices and different times in different online markets? How will any such changes impact the availability of and access to creative content in the United States and elsewhere?

We expect this to be a net benefit. So long as international price discrimination is kept within reason, there will be little profit in arbitrage. The textbook publishing business is unique, in that the consumer does not make the decision as to which textbook to purchase. College students were captive to the price set for the textbook chosen by the professor. The GAO published a study exploring the dysfunction in the college textbook market, due largely to tactics used by publishers to interfere with the first sale doctrine's normal effect, coupled with ordinary price competition, of preventing supra-competitive prices from increasing faster than inflation.

If there is ever a legitimate basis for treating foreign markets differently, online merchants already have the capacity to tell where their customer is located, and charge for products in the local currency, block sales to a certain territory, or provide discounted prices in another. When the price discrimination or availability is so great as to prompt consumers to work around the price or availability barriers, the market itself will tend to self-correct.

But without the equivalent of a “digital delivery” counterpart to the first sale doctrine, we can expect that as publisher revenues move more heavily to digital delivery models the public will lose the counterbalancing benefits of the first sale doctrine.

CONCLUSION

A true digital delivery counterpart to physical redistribution cannot be accomplished without “reproduction” in the purely technical sense, but *can* be accomplished without “reproduction into copies and phonorecords,” in the Copyright Act § 101 sense, if the resulting files are not capable of being “perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Where there is a multiplication of instances in which the file can take up space on a hard drive yet only one that can be “perceived, reproduced, or otherwise communicated for a period of more than transitory duration,” there is, for all practical purposes, only one copy. The problem is that, although I and doubtless other attorneys are prepared to argue that this logic supports a finding of non-infringement for legal purposes, the soundness of the theory has yet to be tested in a pure digital delivery environment. That is, I would have to warn my client that a judge may not agree with me.

But it is already the case that we have the capability to effectively “move” a copy made as a digital file on a tangible medium from one material object to another in a way that does not infringe the copyright, if existing case precedent it followed. Although cases are rare in the “analog world,” courts in the United States and in Canada have substantively held that the transfer of a work from one medium to another using a technology that leaves only one copy at the end of the process is not a “reproduction” at all. In the U.S., lifting an image from one backing to place it on another is not a reproduction. *C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 190 (N.D. Tex. 1973) (use of acrylic resin “as a transfer medium to strip the printed indicia from the original surface on which it is printed, whereupon the image carrying film is applied to another article”). Presented with similar facts, the Supreme Court of Canada reached the same conclusion in *Théberge v. Galerie d’Art du Petit Champlain, Inc.*, [2002] 2 S.C.R 336, with a well-reasoned explanation that, in the absence of *multiplication* of copies, there is no infringement of the reproduction right.

These courts did not base their holdings on any limitation on the copyright owner’s right of reproduction or distribution, such as fair use, but on a finding that the processes of de-embedding “the work” from one medium and embedding it in another did not infringe the reproduction right in the first instance because, at the end of the process, only one copy remained. That is, the reproduction right is infringed by the replication of copies as

multiplication onto more tangible media, and not as transfer from one tangible medium to another.

This was not the path chosen in the peer-to-peer systems at issue in the early days of digital delivery. Those systems involve a *multiplication* of copies, each remaining accessible to be perceived and further reproduced. Where technology permits the secure transfer of a single instance of access to the work from one medium to another, such that the medium left behind no longer meets the definition of a work “fixed” in a tangible medium of expression, the law should embrace it, rather than leave the developers in fear of bankruptcy through litigation.

Respectfully submitted,

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