Statement for the Record
of

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"First Sale Under Title 17"

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The Software & Information Industry Association (SIIA) submits these comments for the record in order to assist the Subcommittee in understanding the role the copyright law's first sale doctrine plays in the creation and distribution of innovative new software and information products and services and the harm to the software and information industries that could be caused if the first sale doctrine were to be expanded to apply to licensed material or digital transfers.

SIIA is the principal trade association of the software and information industries and represents over 800 technology companies that develop and market software and digital content for

business, education, consumers, the Internet, and entertainment.[1] SIIA's members range from start-up firms to some of the largest and most recognizable corporations in the world. They are leading providers of, among other things: software publishing, graphics, and photo editing tools; corporate database and data processing software; financial trading and investing services, news, and commodities exchanges; online legal information and legal research tools; education software and online education services; open source software; and many other products and services in the digital software and content industries.

SIIA is concerned that potential application of the first sale doctrine to licensed material or other undue restrictions that may be placed on either the ability of publishers to license or the manner in which publishers license, will make it more challenging for publishers to recoup the investment they have made to develop new products and update existing ones and to widely distribute their products and services to the public in the manner that consumers enjoy today. We are also significantly concerned with the fallout from the *Kirtsaeng* decision and the imbalance in the first sale defense caused by the decision

A. The Importance of Licensing

The Internet has permanently changed the relationship between users and the software and information industries. Electronic commerce has provided users with more options, more alternatives and more opportunities than ever before. The richness and inherent value of electronic commerce and high-tech products to consumers is derived from the wide availability of software and content and the ease by which these products and services can be accessed and used by people with new high-tech products. For users of products and services that incorporate software and/or information, electronic commerce facilitated through licensing provides a robust new delivery channel. By using the Internet to deliver software and digital content, users can take advantage of the lower transaction costs, simplified delivery systems, direct interaction with providers, and minimal time-to-market.

[1] A list of the more than 800 SIIA member companies may be found at: http://www.siia.net/membership/memberlist.asp.

Through licensing, software and information publishers are able to meet customer needs – whether their customers are the general public or discrete customer groups – and at the same time protect against misuse of their rights. Licenses have allowed software and information publishers the flexibility to tailor their products to their various customers, adjusting features, benefits, rights, and price according to the needs of each customer base rather than a "one size fits all" model – a model which logically could require a higher price. Consequently, more often than not these licenses provide benefits to consumers not provided in a traditional sale limited by the first sale doctrine of current copyright law.

This has resulted in consumers now having unprecedented choice, convenience and access to informational, as well as creative, content and new high-tech products that simplify their lives. Today's consumers benefit from access to a range of software and information products — the likes of which have never been seen before.

Thus, consumers are also enjoying unprecedented access to copyrighted works. Today's online marketplace offers consumers more opportunities to access copyrighted works anytime, anywhere than ever before. Many of the opportunities consumers engage in the analog world made possible by the first sale doctrine are being made available without that doctrine in the digital world, as illustrated in the following examples.

For several decades, the software industry has relied on a licensing model for the distribution, maintenance, and updating of its software products and services to and for its customers. Today, licenses govern most software transactions.[2] The software licensing model permits a wider range of users to access and use software. A publisher need not reduce or degrade the function of its product in order to provide it at a reduced price appropriate for a particular market of users. Rather, the publisher can simply vary the rights of using it. So, for example, a software publisher may offer a fully functional "academic" version of its product to students at a deeply

[2] See Software & Information Industry Association, *Software and Information: Driving the Knowledge Economy* (January 24, 2008) at 7-8, http://www.siia.net/estore/globecon-08.pdf.

reduced price, but the rights granted do not permit use for commercial purposes.[3] Similarly, "OEM licenses" bundle software with, or install software directly on, specific hardware, such as a scanner or desktop computer, and require the software to be used and distributed only with that hardware. Often, the hardware manufacturer was granted a deep discount as part of the OEM license terms. Another example is "site licenses," which are defined by some geographic restriction on use, such as a specific company, area, or even department or floors of a building.[4]

Because software is virtually always licensed and not sold, the first sale defense does not apply. Someone who purchases a software license is not the "owner of a particular copy" under Section 109 of the Copyright Act, they are an "owner of a license to use a copy" of the software. Thus, the first sale defense does not apply. But as shown in the examples above, even though the first sale defense does not apply to these software transactions, consumers are able to enjoy many of the benefits commonly associated with the first sale doctrine. Any change in the copyright law that made the first sale defense applicable to these software licenses would cause a very significant problem and would jeopardize the future availability of discounted software to those markets.[5]

These examples are not limited to the software industry. The textbook industry is rapidly moving to a licensing model for online and digital versions of their textbooks. The new digital textbook licensing model provides numerous benefits to students and teachers. Digital textbooks often come with special features, like embedded quizzes, electronic flash cards, the ability to share notes online with fellow students and/or embedded links to videos and articles from a professor's lectures. These digital texts may also allow the teacher to monitor a student's progress, the amount of time the student spends reviewing the material, and the student's performance on the embedded quizzes and then use this information to determine what material

[3] See, e.g., *ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) ("Instead of tinkering with the product . . . [software companies] turned to the institution of contract."); id. at 1455 ("Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.").

[4] See, e.g., Software & Information Industry Association & LicenseLogic LLC, *Certified Software Manager Student Manual* (SIIA Publications 2004) at 4:1–4:52

[5] See *Vernor v. Autodesk*, 621 F.3d 1102, 1114-15 (9th Cir. 2010)

the student may be struggling with and develop a personalized study plans to keep the student on the right track. Because these textbooks are digital they can be updated and edited much more quickly than analog texts and distributed to users almost immediately.

These are the new generation of textbooks for a new generation of students and teachers. The difference between traditional textbooks and the offerings in new digital and online textbooks is astonishing. But that's not all that is different. The distribution and pricing model for these textbooks is also very different.

The average eTextbook costs significantly less than a new version of that same print textbook. For example, the digital version of the widely used textbook, "Biology" by Sylvia Mader and Michael Windelspecht, published by McGraw-Hill Education, costs $120. Its traditional print counterpart is priced significantly higher at $229. Many eTextbooks are also available for rental by students – a business model that further lowers students' textbook spending and has begun to reduce the market share of the traditional used book market.

There is one other trend that is further lowering students' textbook spending — campuses and professors increasingly want course materials delivered "inside" their digital classrooms so they can ensure that all students have access to the same materials and they can see how each student is performing. This leads to increasing situations where the institution is the customer.[6] The result of all these evolving business models has been a dramatic drop in student textbook spending from $192 in the fall of 2008 to $138 in the spring of 2013.[7] These business models, and the resulting drop in students textbook spending, might not be possible if textbook publishers were no longer able to rely on licensing models and the inapplicability of the first sale doctrine.

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[6] The institution may or may not pass the costs of the course materials onto students in the form of fees.

[7] *See* Stephanie Simon and Madeline Will, *Textbook publishers revamp ebooks to fight used market*, 4-traders.com (July 23, 2013) at http://www.4-traders.com/PEARSON-PLC-4000637/news/Textbook-publishers-revamp-ebooks-to-fight-used-market-17119420/. (This is despite the prices of new textbooks rising about 6 percent a year. See GAO Report 13-368, *College Textbooks: Students Have Greater Access to Textbook Information* at 6 (June 2013)at http://www.gao.gov/assets/660/655066.pdf.

Textbook publishers are able to offer their digital textbooks at lower prices because they save on printing, shipping and processing of returns. But another significant factor in the reduced eTextbook price is the secondary market. Because the publisher of a print textbook has to factor in the likelihood that the book will be resold by the original student buyer, either directly to another student or indirectly through a campus bookstore offering used books, the publisher has to set a higher price for the new print book in order to recoup its investment. Because the new features of these digital textbooks support a more personalized and interactive relationship between the publisher and students and teachers than a traditional textbook and the publisher may continue to innovate and update these features more quickly than the traditional print cycle would allow, publishers choose to license these materials. The license allows a more flexible, nuanced relationship between the publisher and consumers of the book. It enables teachers and students to use only the features they need, and pay only for what they use and for the time period for which they use it.

In this model, license terms generally do not permit transfer to another user, though, if there were demand, it might be reasonable for publishers to offer a transferable license for a higher price. It is important to consider that the publisher has higher development and operating costs in offering rapidly changing, personalized features, such as embedded dictionaries or glossaries, highlighter and markup features, support for multiple electronic reader platforms, videos, testing with online scoring, testing analytics, and data storage so it can track and support each user's individual experience. To recoup these higher costs, publishers structure their licenses to restrict the downstream distribution of their textbooks so they can offer digital books to each of their users at a reduced price. If they did not restrict the resale of these books, publishers would be forced to raise their prices. By licensing the textbooks at a lower price, students benefit from the lower cost and increased functionality of the digital textbooks and textbooks publishers are able to secure a reasonable return on their investment.

As is the case with software, discussed above, the first sale defense also does not apply to these licensed digital textbooks because a student who purchases a license to use the textbook is not the "owner of a particular copy" under Section 109 of the Copyright Act. Even though the first sale defense does not apply to these types of transactions, students, teachers and other users are

able to enjoy many of the consumer benefits intended by the first sale doctrine. Any change in the copyright law that made the first sale defense applicable to these licenses would jeopardize the future availability of these materials.

Extending the first sale defense to licensed content would not only be injurious to publishers and users, but would also be contrary to the foundation of the first sale defense set forth in the *Bobbs-Merrill* case.[8] The Court in *Bobbs-Merrill* – not unlike the Ninth Circuit in the *Vernor v. Autodesk* case[9] – was concerned with the manner in which the customer came into possession of the work. In several parts of the decision the Court clearly restricts the application of its decision to "one who has sold a copyrighted article, *without restriction*"[10] and those who "*made no decision* as to the control of future sales."[11] The Court noted that "[t]here is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book."[12] Given the Court's language, it is clear that the *Bobbs-Merrill* Court had no intention of extending the first sale defense to licensed works.

The same reasoning holds true today. If a consumer obtained a set of rights to a copyrighted work under license, and the consumer resells the work and asserts the first sale defense, the focus of the first sale analysis should be on the terms and conditions of the agreement itself. If there is an agreement between the copyright owner or its agent and the consumer and that agreement makes it clear that a license is being granted (or the copyright owner otherwise reserves title) and that the license contains certain restrictions on transfer and use that are not usually present with ownership, the transaction should be construed as a license for purposes of the first sale defense, and the first sale defense should be inapplicable to the transaction.

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

[9] *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010).

[10] Id. at 350 (1908) (emphasis added). (stating that "[i]n this case, the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those *who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book*, undertaking to restrict retail sales to a price of one dollar per copy." (emphasis added).

[11] Id.

[12] Id.

For example, software licensors typically limit their conveyance of rights to a licensee in a number of ways: by location of use, term of use, type of user, field of use (academic, non-commercial), use with certain hardware ("OEM"), transferability, and reverse engineering, to name just a few. In contrast to a licensee, a purchaser who becomes an "owner," would have no such limits by contract and could use the copy of software however he/she wanted consistent with applicable laws, statutes, ordinances, etc.

While consideration of the types of restrictions that a licensor places on transfer and use within the agreement is important, it is not necessary or appropriate to also consider the types of restrictions that a licensor does *not* place on transfer and use. It should not be necessary that a license include certain terms to avoid conveyance of ownership, such as multiple payments or return of a worthless plastic CD. It is the code, content and associated rights that are valuable, not the vehicle of delivery or conveyance (whether CD, DVD, or data transmissions on the Internet). While a licensor theoretically could require destruction of the disc or erasing the data file, the transaction costs to enforce that restriction would in many cases dwarf the license fee and serve to do nothing more than inconvenience the customer, and thus it makes no sense to penalize licensors that omit such a requirement.

Consumers will be able to take advantage of new technologies and business models only to the extent that the laws do not inhibit the creation and use of new technologies and business models. If the law creates undue burdens on providers, the result will be increased transactional costs, without producing any corresponding tangible benefits to users, and in the end, both the providers and the users' interests will be harmed. This is especially true where the legal requirement on the provider is one that the user cares little about or has the ability to secure in the absence of any legal requirement.

If undue restrictions are placed on either the ability of publishers to license or the manner in which publishers license it will be more challenging for publishers to recoup the investment they have made to develop new products and update existing ones and to widely distribute their products and services to the public in the manner that consumers enjoy today. This is especially true with mass market click-through agreements and products offered through the cloud. Certain

informational products can only be distributed through the use of license terms and conditions. If these terms could not be enforced, these products may not be distributed, and in some cases, the incentive to create certain products may have been reduced so significantly that these new products would never be created.

Some have argued that copyrighted products come bundled with long, legally complex click-wrap licenses that consumers do not read, and as a result most consumers do not know what they are really getting. This may be the case, but publishers have worked hard to make their agreements shorter and more understandable to their customers and will no doubt continue to make improvements in this area.[13] To the extent this remains a problem, however, it is not solely or even primarily a copyright problem.

We are beginning to see a shift in the way consumers consume *all* products. "The next few decades will witness a massive decline in ownership. Renting, not owning, will become the primary way people [] consume."[14] Consumers may still own certain essential things and things they use very often, but "there will be little need to own things we use only occasionally (a fancy pair of shoes, most jewelry or that really nice pizza-making set)."[15] This move toward licenses to use will have the positive benefit of giving consumers "more choice, convenience and opportunity to experiment."[16] It would be unwise and unfair to single out copyright products and treat them differently by creating licensing standards that apply only to copyrighted goods.

Consumers are faced with lengthy, complex agreements when engaging in common, every-day commercial transactions. They are present when renting a car, obtaining a credit card, getting a

[13] See e.g., SIIA webcast, Christopher T. Anderson, LexisNexis, *Content Gone Wild: What Happens to Your Content After It's Published* (Dec. 18, 2013) at https://copyright.webex.com/ec0701l/eventcenter/recording/recordAction.do?theAction=poprecord&AT=pb&isurlact=true&renewticket=0&recordID=76023507&apiname=lsr.php&rKey=ef95227d3efec9a4&needFilter=false&format=short&&SP=EC&rID=76023507&siteurl=copyright&actappname=ec0701l&actname=%2Feventcenter%2Fframe%2Fg.do&rnd=1669799775&entactname=%2FnbrRecordingURL.do&entappname=url0201l.

[14] See Auren Hoffman, *The Coming Decline in Ownership*, Summation Blog (Dec. 19, 2013) at http://blog.summation.net/2013/12/the-coming-decline-in-ownership.html.

[15] Id.

[16] Id.

new cell phone, buying or selling items on an auction site, agreeing to a website's privacy policy and in numerous other common-place commercial transactions engaged in by your average consumer. SIIA is not unsympathetic to this challenge and should Congress wish to examine ways that customer expectation can be improved by all players in the commercial marketplace, we would have no objection, so long as it is not limited to or focused solely on copyrighted works.

The economic foundations of the software and information industries depend upon a licensing business model. "Overriding" such licenses would have far-reaching, adverse effects on everything from the availability of educational software and content, to warranties and support services, to the development of new products. It is therefore essential that the basic principle of freedom of contract be recognized and preserved by any legislation. Nothing in the law should restrict the rights of parties to enter freely into licenses or any other contracts with respect to the use of copyrighted works. This is more important now than ever before because in an increasingly digital knowledge economy it is almost certain that software and information publishers will make their products and services available subject to critical contractual terms that are essential to ensuring the widespread access to innovative new digital products and services.

B. The Impact of the Kirtsaeng Decision

There is no better example of the importance of the balance between copyright owners' distribution right and the first sale defense and the effects of upsetting that balance than the case of *Kirtsaeng v. John Wiley & Sons, Inc.*.[17] The case involved the legality of purchasing copyrighted textbooks that were made and sold overseas with the authority of the publisher and then reselling them into the United States without the publisher's authority. At issue in the case was whether the first sale doctrine applies to copyrighted products that were made abroad.

[17] 133 S. Ct. 1351 (2013).

In a 6-3 decision, the Supreme Court overturned an earlier Second Circuit decision and held that the first sale doctrine applies to copies of copyrighted works that are legally manufactured abroad. In reaching this conclusion, the Court "concede[d]" that its decision would "make it difficult, perhaps impossible, for publishers (and other copyright holders) to divide foreign and domestic markets"[18] and that a "publisher may find it more difficult to charge different prices for the same book in different geographic markets."[19]

For years, limitations on use of the first sale defense for imported goods enabled copyright owners to engage in international market segmentation and price differentiation – like many other industries did and continue to do today. As Hal Varian noted regarding cases of this kind, "…differential pricing can provide very significant efficiency gains since it allows markets to be served that would otherwise not be served at all."[20]

Differential pricing also gave publishers and authors another arrow in their international anti-piracy quiver because allowing their works to be sold at lower prices in developing countries – which are also the countries most plagued by counterfeiting and piracy – increases the availability of legitimate copies, invariably lowering these piracy rates and ultimately turning pirates into customers. But the *Kirtsaeng* decision destroyed all that. If developing-market-priced international editions can be freely imported and sold into the United States, then differential pricing for developing-markets becomes unsustainable, legitimate copies of some of the world's best pedagogy becomes unavailable within those developing markets, and, like Cinderella when the clock strikes midnight, consumers will revert back to obtaining and trafficking in pirated copies when publishers are forced to raise prices in those countries.

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[18] Id. at 416.

[19] Id.

[20] Hal Varian, *Differential Pricing and Efficiency*, First Monday, Volume 1, Number 2 (Aug. 5 1996) at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDMQFjAB&url=http%3A%2F%2Fwww.firstmonday.dk%2Fojs%2Findex.php%2Ffm%2Farticle%2Fview%2F473%2F394&ei=NL7OUuKCMcupsATJn4H4Cw&usg=AFQjCNH2xzSGgLzEVfBZ0b4NkIDZkFwLEQ&bvm=bv.59026428,d.cWc

One response to the result in the *Kirtsaeng* decision has been changed business models from price-differentiation by market to a uniform pricing model, because textbooks developed for the United States can no longer be discounted for sale in developing countries without the risk of those lower-priced copies – intended only for developing countries – being exported into the United States to compete with the U.S. versions.[21] Needless to say, the uniform price is much closer to the higher U.S. price than the discounted, developing–country price.

In this new post-*Kirtsaeng* world, everyone loses.[22] The uniform pricing of textbooks will in many cases make it impractical for students in foreign countries to obtain these textbooks legitimately. This will result in publishers selling fewer textbooks abroad which in turn diminishes publishers' opportunity to serve students and teachers in those markets, and consequently impairs U.S. publishers' ability to compete within and profit from these foreign markets, in turn, potentially diminishing future investments in the creation of new textbooks. As noted above, these higher prices will also encourage piracy, since fewer students may be able to afford the legitimate book. Since fewer books are sold, uniform prices may also be raised to cover development and production costs previously offset by foreign sales – operating costs that were previously spread over a larger global distribution market. To summarize, as a result of the *Kirtsaeng* decision, publishers will sell fewer books, U.S. consumers will likely pay more for these books, piracy rates will likely increase, and foreign students and consumers will no longer be able to afford U.S. books. In short, those ultimately harmed by this imbalancing of the first sale doctrine are not simply publishers and authors but also textbook consumers – students, teachers, universities, boards of education, governments, etc. – both foreign and domestic: in other words, all of us! The *Kirtsaeng* result is simply bad economic, social and copyright policy.

This result should be fixed by Congress. If done in a narrowly tailored and thoughtful way, legislation can restore balance to the first sale defense. This can be accomplished by – as Justice Kagan recommended in her concurring opinion in *Kirtsaeng* – restoring § 602(a)(1) of the

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[21] See e.g., Lisa Campbell, *Cengage adopts global pricing after Kirtsaeng*, The Bookseller (Oct. 6, 2013) athttp://www.thebookseller.com/user/login?destination=node%2F210780.

[22] The *Kirtsaeng* case dealt with the importation of physical goods that were sold. Thus, it has no direct effect on digital works transmitted in the online marketplace or works that are licensed, rather than sold.

Copyright Act to its rightful function of enabling copyright holders to prevent the unauthorized importation of copyrighted goods, which would thereby allow them to segment international markets. Addressing the problem in this way would allow copyright owners (under certain circumstances) to control importation and first sale in the U.S. market of copyrighted items manufactured abroad, but appropriately limit controls on resale once the product has been disseminated in the U.S. market.[23]

Under this approach, if someone buys a copyrighted work in the United States, they can be assured that they have the resale rights, and will not need to verify manufacturing location and separately obtain resale rights, obviating any possible concerns from the parade of horribles that were raised in many amicus briefs filed with the Supreme Court. From an economic perspective this approach also makes sense because it reduces transaction costs for U.S. purchasers of copyrighted products who want to re-sell these products in the United States since these purchasers would not need to spend resources verifying where these goods were manufactured.[24]

On the other hand, this approach would permit copyright owners to challenge someone like Kirtsaeng who attempts to operate an international arbitrage regime through unlawful exportation. This policy would sustain geographical market segmentation, and in turn the availability of appropriately-priced products to meet market demand around the world. Unlike the result in the *Kirtsaeng* decision, amending Section 602 in this manner would transform the current "everybody loses" result into a win for U.S. consumers, a win for customers in overseas markets and a win for publishers and authors who desire to sell their products on a global basis.

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[23] See Keith Kupferschmid, *A Balanced Response to Kirtsaeng*, SIIA Blog Post, (Oct. 18, 2013) at http://www.siia.net/blog/index.php/2013/10/a-balanced-response-to-the-kirtsaeng-decision/.

[24] See Guy A. Rub, *The Economics of Kirtsaeng v. John Wiley & Sons, Inc.: The Efficiency of a Balanced Approach to the First Sale Doctrine*, Fordham Law Review (Feb. 2012) at http://fordhamlawreview.org/articles/2013/02

C. Digital First Sale

It is of critical importance that we not simply heedlessly import the first sale defense into the digital environment without first asking whether doing so is necessary and desirable. Trying to force today's digital works to behave like physical works of the past would be a step in the wrong direction and would have a chilling effect on the development of new business models and innovation.

The world is a very different place today than it was in 1908 when the Supreme Court decided the precedential first-sale case of *Bobbs-Merrill Co. v Straus*.[25] When that case was decided no one could have envisioned how new digital distribution technologies like the Internet would transform the way people access and use copyrighted works and the vast amount of copyrighted works that are available at any time, in any location, to any person.

It has been suggested that, as the marketplace moves toward a born-digital model – one where there is no physical version of the copy – the first sale defense will lose its vitality and consequently the first sale defense should be amended to create a so-called digital first sale defense that would allow the transmission of digital copyrighted works. There are several problems with this view.

First, to enact a so-called digital first sale doctrine would require the creation and implementation of "forward-and-delete" technology that automatically eliminates all copies owned by the original purchaser – no matter where such copies reside – simultaneously upon the digital transfer of the copy by the purchaser. No such technology exists today or in the foreseeable future. Even if such technology were to be available, it would be just a matter of time before it was hacked, allowing anyone to easily circumvent the law and burdening copyright owners with complex, costly and impossible problems of proof – to say nothing of the privacy implications associated with actually proving that someone actually deleted the work.

[25] 210 U.S. 339 (1908).

Second, even if such a technology were feasible in the future this argument fails to account for the inherent differences between physical and digital copies that dramatically affect the function and implementation of the first sale defense. For example, physical works degrade over time, whereas digital copies do not. Similarly, the more frequently a physical copy is used, the quicker it will degrade, whereas the frequency of usage has no bearing on a digital copy.

Transferring a physical copy is also significantly more difficult than transferring the digital copy. Transferring a digital copy is instantaneous and is unaffected by the identity of the transferee or transferor or by the distance between them. On the other hand, transferring a physical copy may take significantly more time, effort and money and is highly dependent on the identity or location of the parties. As the Copyright Office and many others have recognized, the manner in which physical copies are transferred "acts as a natural brake on the effect of resales on the copyright owner's market."[26] For these reasons, a digital first sale defense would allow "used" digital copies to compete *directly* with "new" digital copies on the secondary market. This is not the case with physical goods.

D. Conclusion

For the reasons discussed above we strongly urge Congress to retain the first sale defense in its present form and to not make any legislative change to Section 109. Changes to the first sale defense to expand the defense to apply to licenses or to digital transfers will have significant deleterious effects on the software and information industries and their customers and should be avoided at all costs. The only area where legislative change is appropriate would be to restore§ 602(a)(1) of the Copyright Act to its rightful function of enabling copyright holders to prevent the unauthorized importation of copyrighted goods, as Justice Kagan recommended in her concurring opinion in *Kirtsaeng*.

[26] Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774 (increasing minimum to $750, maximum to $30,000, and maximum for willful infringement to $150,000).