

PUBLIC HEARING OF U.S. COPYRIGHT OFFICE AND
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
ON REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DIGITAL
MILLENNIUM COPYRIGHT ACT
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TESTIMONY OF NIC GARNETT, SENIOR VICE PRESIDENT OF TRUST UTILITY,
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Good morning, Madam Register and Mr. Assistant Secretary.

My name is Nic Garnett, and I am Senior Vice President of Trust Utility for InterTrust Technologies Corporation of Santa Clara, California. On behalf of InterTrust, I wish to thank you for the opportunity to testify this morning on this important issue, in particular the effect of the amendments made by title 1 of the Digital Millennium Copyright Act and the development of electronic commerce on the operation of Section 109 of the Copyright Act, otherwise known as the "first sale doctrine."

InterTrust Technologies Corporation is a developer and provider of sophisticated Digital Rights Management technology and solutions, known in short as DRM. DRM has been the subject of comments by many organizations participating in this study. As a DRM provider, InterTrust can lend insight into the state of DRM technology and its deployment by our customers, which include copyright owners as well as aggregators and disseminators of copyrighted works, in electronic commerce.

To begin, InterTrust believes that electronic commerce in copyrighted works has noticeably lagged due to the lack of a trusted and consistent environment that neutrally supports the rights of both owners and users of copyrighted works. For example, disseminating copyrighted works in digital form often makes such works vulnerable to unlawful reproduction and distribution of such unauthorized copies. On the other hand, this very character creates new opportunities for copyrighted owners to disseminate their works – such as the oft-mentioned “viral” adoption of new works and services – and opportunities for consumers to use copyrighted works in ways that are significantly more flexible than those afforded by the mere purchase of a copy.

InterTrust strongly believes that DRM technology and solutions are essential for electronic commerce in copyrighted works to flourish and reach its full potential. In order to manage the risks and the opportunities of digital dissemination, the creators, publishers, and distributors of digital content - as well as service providers, governments, institutions, and users - must be able to create digital content secure in the knowledge that their ownership rights can be protected. They also must be able to associate rights and rules regarding ownership, access, payment, copying, and other exploitation of the work. DRM provides the means to do so, and thus to create a trusted digital environment for disseminating and using copyrighted works.

DRM is not a single technology system. It is a term which has come to be used for any application of technology involving the deliver of content; in many cases they relate to a single business model. It is important not to confuse the reference to of a particular business model with the reference to DRM as a generalized and generic concept.

Effective DRM solutions, such as those provided by InterTrust and its partners, comprise technological measures as well as a trusted neutral third party administrator to protect the integrity of the technology and manage its continual adaptation – including the development of rights and permissions practices - to changing technology and user needs. **For example, consumers can be given a wide range of usage options – pay per play and subscription as well as straight sale of content and superdistribution.**

As seen by these examples, the purpose of DRM solutions is three-fold – (i) to enable copyright owners to manage their exclusive rights effectively throughout the electronic commerce value chain, (ii) to provide maximum flexibility in the arrangements struck between copyright owners and their customers, and (iii) to provide a neutral and trusted environment in which technology guarantees these arrangements.

Thus, sophisticated DRM solutions are entirely consistent with a key objective of copyright law – to protect the rights of copyright owners while promoting wider dissemination of and greater access to copyrighted works. Nonetheless, a number of organizations have expressed concerns that DRM technologies and electronic commerce could impair operation of Section 109 of title 17 and have called for its scope, and thus its limitation on rights holders, to be expanded.

Such concerns appear to be at best premature. Digital delivery coupled with DRM will improve the dissemination and use of copyrighted works in new and more convenient ways. Moreover, it

is important to recognize that the first sale doctrine continues to apply in the digital environment. But it is also important to recognize that the operation of the first sale doctrine is limited to the exclusive right of distribution of copies, and does not limit application of the other exclusive rights of the copyright owner – reproduction, adaptation, public display, and public performance. Therefore, digital delivery of a copyrighted work does not necessarily mean that a copy has been delivered. Technologies such as a digital broadcast and audio and video streaming may not deliver a copy at all. This is especially the case if the streaming transmission is secured by various DRM technologies that prevent the recipient from making a copy of the transmission.

It is also important to recognize that the operation of the first sale doctrine is limited to situations in which ownership of the copy is transferred from the copyright owner to another party. Even in those circumstances in which digital dissemination does in fact deliver a copy of a work, that delivery does not necessarily mean that the parties expected that ownership of a particular copy has changed hands. For example, DRM may render such a copy unusable under certain circumstances, such as the passage of time or the failure to compensate the copyright owner, in which case it seems unlikely that the parties would consider mere retention of an unusable copy as a “sale” of the copy.

For these reasons, great caution should be exercised in considering proposals to alter such a fundamental tenet of copyright law as the first sale doctrine. Doing so could unsettle long established legal rights, thus making electronic commerce more **uncertain as well as effectively advancing certain business models at the expense of others**. Moreover, such changes could

constrain the development and use of sophisticated DRM technologies and solutions (which remain in their formative stages). The unfortunate result would be to discourage the lively experimentation necessary to develop viable, sustainable electronic commerce in copyrighted works.

In conclusion, there is no single concept or model of DRM technology and, a fortiori, any failure of DRM technology that is somehow restricted or impeded by the current formulation of Section 109.

That concludes my remarks. Once again, on behalf of InterTrust, I thank you for the opportunity to appear before you today.