

Summary of Written Testimony for Charles Jennings, CEO of Supertracks, Inc

As founder and CEO of Supertracks, I believe I have a unique perspective regarding the issues of this hearing. Over the years, I have founded many successful technology-related companies focused on Internet privacy and the digital delivery of software, music, and video, including Truste, Preview Systems, and GeoTrust. I have also been successful in the creative side of business having been a former newspaper columnist and the author of six books, The Hundreth Window being the most recent. In addition, I was a film and television producer for Paramount and Warner Brothers, and I am a co-creator of the comic strip Pluggers.

There are several issues concerning the extension of the first sale doctrine to digital goods that I would like to address. First, content owners often fear losing control over their content once it's on the Internet in digital form. However, this fear, regardless of how tangible it may seem, is not justified given current technology. Technology is available that protects and prevents digital goods from unauthorized copying. We did it for music at Supertracks, and we did it for software at Preview Systems. For this reason, there is no longer a valid reason not to extend the same consumer rights to digital goods as those in the physical world. In fact, it is now possible to create greater copy protections for digital goods than those on a physical CD.

Legally, when digital goods are treated differently from physical goods, rules are imposed upon consumers that are not always in the consumer's best interest. In our experience with music at Supertracks, we found that content owners treated digital goods as licenses, not products. As a result, consumers had to contract for these licenses by "click through" agreements, meaning that consumer bargaining power was nonexistent and many restrictions were imposed upon them that would otherwise not be the case. By classifying a digital delivery in terms of a license rather than a sale, content owners can set prices in the market place for those licenses in ways they cannot set for products.

All consumers expect to own the digital product they buy and to have the same rights of ownership they have with physical goods. When their rights are different from or when access to digital goods is difficult due to measures implemented to protect imposed conditions, they are frustrated and far less inclined to make purchases. Since the key to digital commerce is acceptance by consumers, it must be ubiquitous, easy-to-access, and personally satisfying to use. Obviously, there is no market if consumers are not buying due to cumbersome usage rules.

A related issue is the archival copy exception in Section 117. Let me to return to the idea that a digital good bought by a consumer should be a good bought, not a good licensed, leased or sold in some other form of nonpermanent ownership. Consumers should be able to move or store, music they have purchased to other personal, non-commercial devices. They should be able to protect their investment by making archived copies for personal use, whether or not those copies are susceptible to destruction by mechanical or electrical failure. In the physical world, they already have this right. In the digital world, they don't.

This hearing seeks to determine why an exemption should exist permitting the making of temporary digital copies of works incidental to the operation of a device. One of the steps to digital delivery is the necessity of producing multiple copies of the same digital good on a server. Currently, there is no uniform technology for digital goods: often several copies need to be made in different formats to accommodate varying system requirements. These goods are then encrypted and sent to other servers, proxy servers, and routers in the network that make up the Internet. All of these copies are required as the data is passed along the network. Nevertheless, these copies are not the same as reproductions that constitute a product a consumer can access and use. This happens once the data reaches a machine, the PC for example, that can render the copy perceivable by a person. At that point, a potentially revenue generating event happens. Content owners are not losing out on potential revenue by the making of these various copies.

Charles Jennings, CEO Supertraks

