

# **ESA OPPOSES EXPANSION OF “FIRST SALE” DOCTRINE**

## **What is the “First Sale” Doctrine?**

The “First Sale” doctrine is a key element of the legal framework to encourage dissemination of copyrighted works. As now codified in the Copyright Act, the doctrine allows the owner of a particular lawful copy of a work to “sell or otherwise dispose of the possession of that copy” without the permission of the copyright owner. This provision enables, for example, wholesalers to sell copies to retailers, libraries to lend copies to patrons, and individuals who have lawfully acquired copies of works to give them to friends or family. The doctrine states (with some exceptions) that the copyright owner’s exclusive distribution right no longer applies to a particular copy once it has been sold the first time.

But the First Sale doctrine has never allowed someone who owns a particular copy to make further copies of it without the permission of the copyright owner. That’s because the most fundamental right of a copyright owner – to make reproductions of his work – continues to apply even after first sale of a particular copy.

## **Does the First Sale doctrine apply to digital copies?**

Absolutely. Someone who buys a legitimate copy of a videogame in CD format, for instance, has the same right to re-sell, lend or give away that copy as someone who buys a book in hard copy format. But the buyer does not have the right, under the First Sale doctrine, to make additional copies of the CD product to sell, lend or give away, nor to allow others to do so by making them available in digital form on Internet sites.

## **Then what is the argument for updating the doctrine for the digital age?**

Proponents argue that someone who downloads a videogame from the Internet onto the hard drive of a PC, for instance, should be able to send that copy to a friend online. This is misleading. In fact, the sender is making a copy to pass along, while retaining the original. He or she is not distributing the particular copy first acquired, but making an unauthorized copy and distributing it. The First Sale doctrine has never allowed this. If it were expanded in this way, the incentive for copyright owners to use online distribution channels would sharply diminish, since they would in effect give up legal control over further copying of materials disseminated online.

Accordingly, the underlying rationale for the First Sale doctrine does not exist in a digital networked environment, like the Internet, because the owner of a particular digital copy does not sell or dispose of that copy. The first owner can retain the original copy, and the recipient of the transmission receives another copy of that work. This scenario can continue with the third copy, fourth copy, and on to the millionth. Because digital technology allows perfect copies of entertainment software to be made from copies (so that the millionth copy is as pure as the first), expanding the First Sale doctrine to permit the distribution of copyrighted works over the Internet would devastate copyright owners.

### **Does “forward and delete” technology justify expansion of the doctrine?**

Some propose that unauthorized copying should be allowed under an expanded First Sale doctrine, so long as only a single copy is sent, and the original is immediately erased. This “forward and delete” condition would be virtually impossible to enforce, without prying into the hard drive directories and e-mail logs of millions of private citizens. Since such a surveillance regime would never be tolerated, the practical result would be to open a huge gap in copyright protection and any individual could become a “legal” source of unauthorized copies. We already know, from Napster, how quickly such a set-up gets out of hand.

### **Is other technology available to solve this problem?**

No. Some argue that Digital Rights Management (DRM) technology can be used to automatically delete the original after a copy has been forwarded, as well as to support other business models. But DRM is a new technology that has not been adequately tested in the marketplace, and remains too expensive for some applications. Consequently, it’s far too early to write any such technological solution into law.

### **The Entertainment Software Association (ESA)**

The Entertainment Software Association (ESA) is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$6.9 billion in entertainment software sold in the U.S. in 2002, and billions more in export sales of U.S.-made entertainment software. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the Electronic Entertainment Expo trade show, business and consumer research, government relations and First Amendment and intellectual property protection efforts.