

Birth of the First-Download Doctrine—The Application of the First-Sale Doctrine to Internet Downloads under EU and U.S. Copyright Law

Research project

Investigator:

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Abstract:

In the landmark case of *UsedSoft GmbH v. Oracle International Corp.* (C-128/11), the European Court of Justice (ECJ) has held that the re-sale of "used" software does not violate E.U. copyright law even if the software was not initially purchased on a tangible medium such as a CD but downloaded from the software manufacturer's website. The same principles are likely to apply to other categories of copyrighted works. If the ECJ's interpretation of the first sale doctrine is applied generally, the exhaustion of the distribution right to any copyrighted work would occur at the point where a copy of a work is downloaded in exchange for remuneration and the user is given the right to use the downloaded copy for an unlimited period. Since neither a sale—strictly speaking—nor the transfer of title in a material object is required, through a new "First-Download Doctrine", the first-sale doctrine has effectively been extended by the ECJ, and this may eventually enable the development of a large second-hand market in electronic copies of copyrighted works such as movies, ebooks, or songs.

This research project will analyze this new legal situation in the E.U. and will put it into perspective by comparing it with the current case law in the U.S. In the 2010 case of *Vernor v. Autodesk, Inc.*, the 9th Circuit Court of Appeals held that a software user could not rely on the first sale doctrine if the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions. However, this holding that provided a rather strict interpretation of the first-sale doctrine was distinguished in 2011 by the same Circuit in *UMG Recordings, Inc. v. Augusto*. In that case, the court held that the unsolicited shipping of promotional music CDs with a shrink-wrap license constituted a "sale" under the first-sale doctrine and thus allowed recipients to resell the CDs. U.S. copyright law, too, therefore still provides much room for interpretation which may yet lead to the adoption of the E.U.'s First-Download Doctrine

While the First-Download Doctrine gives users more rights over the content they purchase, it also raises the question as to how copyright owners may use legally protected technological protection measures (i.e. DRM technology) and different technological approaches (e.g. cloud services) to prevent users from exercising such new rights.

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