

United States Court of Appeals FOR THE Ninth Circuit

Anthony Kornrumpf and Hoops Enterprise, LLC,
Appellants-Defendants,

v.

Adobe Systems Incorporated,
Appellee-Plaintiff.

On Appeal from the United States District Court,
Northern District of California, Oakland Division,
The Honorable Claudia Wilken, United States District Judge
Case No. 10-cv-02769 CW

BRIEF OF AMICUS CURIAE BSA | THE SOFTWARE ALLIANCE IN SUPPORT OF APPELLEE ADOBE SYSTEMS INCORPORATED

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CORPORATE DISCLSOURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* BSA | The Software Alliance (“BSA”) certifies that it is a trade association. BSA is not a publicly held corporation, does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Dated: July 5, 2013

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INTEREST OF BSA

BSA | The Software Alliance (“BSA”) is the voice of the world’s software industry and its hardware partners on a wide range of business and policy affairs. BSA’s members are responsible for more than 90 percent of the world’s office productivity software and an almost limitless array of other software products, from software for designing bridges to diagnosing diseases to safeguarding our national security. The members of BSA include Adobe, Apple, Autodesk, AVEVA, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, McAfee, Microsoft, Minitab, Oracle, Parametric Technology Corporation, Progress Software, Quest Software, Rosetta Stone, Siemens PLM Software, Symantec, TechSmith, and The MathWorks.¹

BSA’s members have immediate and critically important interests in the copyright issues in this appeal. As creators of much of the software that is indispensable to all aspects of a vital and growing economy, BSA’s members seek to preserve the settled law that has enabled the distribution of that software through licenses or sales, depending on the user’s specific needs. As innovators, they want to ensure that copyright law promotes development and innovation. And as users

¹ Appellant Adobe is one of 15 members of the Board of the BSA. However, no counsel for either party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

of software that they license from others, they want a stable, clear test that enables them to understand the rights they have been granted and thus avoid unpredictability and risk.

BSA files this brief with the consent of all parties. Fed. R. App. P. 29(a).

ARGUMENT

BSA urges this Court to affirm the district court’s judgment because that court applied directly applicable Ninth Circuit authority and correctly held that the transfer of Adobe Systems Incorporated’s (“Adobe”) software constitutes a license agreement, not a sale. Appellants urge this Court to jettison its precedent supporting the licensing model and effectively transform established licensing arrangements into sale transactions. Such a result is unwarranted by either the facts of this case or the Supreme Court’s *Kirtsaeng* decision. Furthermore, it would deprive software developers and users of the ability to tailor their transactions through licensing agreements that accurately reflect their specific needs and interests. Such a dramatic change is contrary to law and would have profound consequences for an economy that depends heavily on software. The licensing model has effectively satisfied the diverse needs of both software developers and users, from private industry to government to non-profit organizations. Forcing a vast array of software transactions into a single, one-size-fits-all sales model would drastically upend settled expectations and practices that

are critical to the U.S. economy. Accordingly, as the leading trade association of the software industry, BSA urges this Court to re-affirm the distinction between license and sale as set forth in *Vernor* and affirm the decision below.

I. THE DISTRICT COURT CORRECTLY APPLIED SETTLED LAW.

Copyright law grants copyright owners the exclusive right to distribute their works “by sale, or other transfer of ownership, or by rental, lease or lending.” 17 U.S.C. § 106(3). The law, by clear intent and with specificity, grants to authors the express right to choose the method of distribution. For decades, software creators have made available copies of their software to users primarily by license.

In *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010), the Ninth Circuit held that “a software user is a licensee rather than an owner of a copy where 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.” *Id.* at 1111. There is little doubt that under *Vernor*'s plain terms, Adobe's agreements are licenses. The Adobe agreements at issue here are entitled “Software Licensing Agreements,” and – among other restrictions – they impose product-specific distribution requirements and state that Adobe's software may be used only with the original hardware with which it was distributed. Indeed, the use restrictions in the Software Licensing Agreements are considerably more restrictive than the relatively modest restrictions at issue in *MDY Industries, LLC v.*

Blizzard Entertainment Inc., 629 F.3d 928, 938-39 (9th Cir. 2010), which were held to be sufficient to create a software license under the *Vernor* test. *See id.* (owner could transfer to any other party for any reason as long as owner transferred entire package, deleted software, and recipient accepted license agreement; owner could use product in any way as long as user avoided cyber cafes or unauthorized third-party add-ons). Thus, under *Vernor* as understood throughout the software industry, this is an easy case: the “Software Licensing Agreements” are licenses.²

In arguing for reversal of the District Court’s judgment, Appellants urge this Court to overrule or substantially modify *Vernor*. Appellants’ Br. 16-24 (urging overruling of *Vernor*); *id.* at 26-29 (urging court to apply *Vernor* only to End User License Agreements); *id.* at 41-43 (urging court to analyze “economic realities of the transactions” rather than specific contractual provisions). For at least three reasons, the Court should reject Appellants’ suggestion and reaffirm *Vernor*. First, *Vernor* was correctly decided and supplies a predictable and administrable rule for software companies. Second, the Supreme Court’s recent decision in *Kirtsaeng v.*

² *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011), is easily distinguishable from this case. In *UMG*, the Court held that the transfer of a CD was not a “license” when the recipient had the “right to retain, use, discard, or dispose of [the CDs] in any manner that [they] see[] fit, without obligation to the sender.” *Id.* at 1181 (quotation marks omitted, alterations in original). Here, the recipient has no such right under the Software Licensing Agreements.

John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013), only strengthens *Vernor*'s doctrinal foundation. Third, Appellants' suggestion that *Vernor* applies only to end user license agreements has no basis in the Copyright Act or case law, and would undermine the predictability that is the very benefit of the *Vernor* test.

A. *Vernor* was correctly applied.

The three-part test in *Vernor* is a correct interpretation of the Copyright Act. First, the plain language of the Copyright Act supports the distinction between owners (who can invoke the first-sale doctrine) and licensees (who cannot). The first-sale doctrine applies only to “the owner of a particular copy or phonorecord lawfully made under this title.” 17 U.S.C. § 109(a), and explicitly does not “extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it,” *id.* § 109(d). Thus, *Vernor*'s refusal to apply the first-sale doctrine to software licensees – who “acquired possession of the copy . . . without acquiring ownership of it” – is mandated by the Copyright Act's plain language.

Indeed, the 1998 amendments to the Copyright Act demonstrate that Congress intended to preserve a distinction between software licenses and sales. In *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), this Court held that the “essential-step” defense to copyright infringement in 17 U.S.C. § 117 did not apply to software licensees, because 17 U.S.C. § 117 applies only to

the “owner of a copy” and a licensee is not an owner.³ In response to *MAI*, Congress made certain modifications to the essential-step defense, but it “did not disturb MAI’s holding that licensees are not entitled to the essential step defense.” *Vernor*, 621 F.3d at 1111. Thus, Congress reaffirmed the well-settled principle that a software licensee is not an “owner” under the Copyright Act.

Second, *Vernor* properly concluded that the determination of whether a transfer is a “sale” or a “license” should be made based on an analysis of the contract between the copyright owner and the downstream possessor. Copyright owners have the right to sell or license their intellectual property as they please, based on their particular business models and goals. Thus, *Vernor* correctly held that if the copyright owner states that it is granting a license and imposes use and transfer restrictions, then the copyright owner’s decision to grant the license should be respected and enforced by the courts. *Id.*

Third, *Vernor* correctly rejected the argument that “the key factor is whether transferees are entitled to indefinite possession of their copy of a copyrighted work.” *Id.* at 1113. There is simply no statutory or practical reason to treat this factor as dispositive. If a possessor is subject to significant use and transfer

³ In *Vernor*, the Ninth Circuit held that the word “owner” in § 109 had the same meaning as the word “owner” in § 117. 621 F.3d at 1109-10. Accordingly, it “consider[ed] [MAI’s] construction of ‘owner of a copy’ controlling” in its analysis of § 109. *Id.* at 1110.

restrictions, then he is properly termed a licensee, regardless of whether the license continues into perpetuity.

Fourth, *Vernor* supplies a predictable and administrable test for copyright owners. Based on *Vernor*, software owners know that the sale/license determination will be determined by reference to the specific language and terms of the copyright owner's contract with the possessor. As long as the copyright owner terms its agreement a "license," and imposes the sort of transfer and use restrictions typical of licensing agreements in the software industry, the software developer can be certain that the first-sale doctrine will not apply. The software developer need not worry about a court analyzing the independent decisions of downstream actors, or conducting its own ad-hoc analysis of the "economic realities of the transactions," as Appellants suggest. Appellants' Br. 41-43. In BSA's experience, such predictability is critical for companies building their business models in the highly-competitive software industry. Accordingly, BSA urges this Court to adhere to its doctrinally correct and practically sensible holding in *Vernor*.

B. *Kirtsaeng* strengthens the doctrinal foundation for *Vernor*.

Appellants contend that the Supreme Court's recent decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), requires this Court to revisit *Vernor*. To the contrary, *Kirtsaeng* demonstrates that *Vernor* was correctly

decided.

In *Kirtsaeng*, a Thai student, Supap Kirtsaeng, had purchased textbooks in Thai bookshops and re-sold them in the United States. *Id.* at 1356. John Wiley, the copyright owner, sued Kirtsaeng for copyright infringement, and in response, Kirtsaeng invoked the first-sale doctrine. *Id.* at 1357. It was undisputed that Kirtsaeng was the “owner of a particular copy” under 17 U.S.C. § 109(a). However, John Wiley, the copyright owner, argued that the first-sale doctrine was not a defense to copyright infringement because the book had been manufactured outside the United States, and the first-sale doctrine applied only to books manufactured inside the United States. *Id.*

The Supreme Court rejected this “geographical limitation,” holding that the first-sale doctrine applied even if a book was manufactured in a foreign country. *Id.* at 1355-57. Thus, the Court did not disturb *Vernor*’s holding that a licensee is not an “owner of a particular copy,” and thus cannot invoke the first-sale doctrine. Rather, the Court held that when a person *is* an “owner of a particular copy,” he can claim the first-sale doctrine even if that “particular copy” was created in a foreign country. *Id.* Therefore, notwithstanding Appellants’ attempt to establish that *Kirtsaeng* somehow overruled *Vernor*, *Kirtsaeng* is actually inapplicable to this case. The Court addressed the situation in which there is a foreign transfer of title; it did not address the situation in which there *is no* transfer of title, which is

what occurred here.

Indeed, if anything, *Kirtsaeng* actually reinforced *Vernor*'s view that the first sale doctrine does not apply when a person licenses, rather than buys, a piece of software. As part of its analysis, the Court observed that Congress specifically intended to *exclude* from § 109(a) “those who are not owners of a copy, but mere possessors who ‘lawfully obtained’ a copy,” such as “owners of movie theaters, who during the 1970’s (and before) often *leased* films from movie distributors or filmmakers.” *Id.* at 1361. And later, when giving examples of distributors who would *not* be protected by § 109(a), the Court gave the specific example of “any . . . licensee.” *Id.* at 1368. This analysis makes crystal clear that the current version of § 109(a) distinguishes between *owners* of a copy (who are permitted to invoke the first-sale doctrine), and *non-owners who have lawfully obtained* a copy (who cannot invoke the first-sale doctrine).

C. *Vernor* applies to all license agreements, not just end user license agreements.

Appellants argue that the *Vernor* test should apply only to agreements between copyright owners and “users,” and should not apply to agreements between copyright owners and distributors. Appellants’ Br. 26-29. The Court should reject this novel limitation. It has no basis in the statutory text or in *Vernor*'s reasoning, and it would imperil *Vernor*'s real-world practical benefits.

First, Appellants’ argument lacks any basis in the statutory text. Under the

plain text of § 109(a), the first-sale doctrine applies only to “owners.” A licensee is not an “owner,” regardless of the specific position of the licensee along the chain of distribution.

Second, applying *Vernor* only to end users would make little practical sense. By definition, the first-sale doctrine only comes into play when a person attempts to distribute software. When end users obtain Adobe software, they only occasionally intend to distribute it; in contrast, when OEM manufacturers acquire Adobe software, they *always* attempt to distribute it. And yet, in Appellants’ view, *Vernor* applies only in the unusual situation when an end user attempts to distribute Adobe software, and not in the far more common situation in which an OEM manufacture attempts to distribute Adobe software – which is the manufacturer’s very *purpose* in obtaining software licenses. The Court should not adopt this narrow and unexpected reading of *Vernor*.

Third, software companies have relied on the predictable and sensible test announced in *Vernor*, and applying *Vernor* only to end users would undermine that predictability. As explained above, software companies have come to rely on *Vernor* as a predictable and administrable test to distinguish between sales and licenses. Appellants’ proposed rule would undermine that predictability. Any time a software company transferred software to a distributor, the *Vernor* test would be replaced by an ad-hoc, unpredictable inquiry regarding the purported economic

realities of the transaction. The Court should not subject software providers and users to such uncertainty and should instead retain the *Vernor* test.

II. OVERRULING VERNOR WOULD JEOPARDIZE THE SETTLED LICENSING MODEL OF THE SOFTWARE INDUSTRY.

The licensing of Adobe's software is typical of licenses across the commercial software industry, including gaming software, database software, networking software, educational software, and countless others. Such licenses condition the user's license of a copy of software on that user's agreement to and compliance with several well-defined restrictions. If a user breaches the conditions of the license, that user forfeits the granted permissions. If Adobe's distribution agreements are ruled to be sales, such a ruling would effectively overturn *Vernor* and transform a large percentage of licenses into sales. Such a dramatic change would disrupt the \$300 billion software industry and would have far-reaching consequences for software users throughout the economy.⁴

The types and uses of software are greatly varied. BSA members, for example, create software to study chemical compounds, manufacture cars, regulate shipping and inventory, explore space, operate defensive weapon systems, and serve countless other needs. The transfer of software products is likewise varied,

⁴ See John-David Lovelock et al., Gartner, *IT Spending Forecast, 4Q12 Update: 2013 – The Year Ahead*, slide 13, available at http://www.gartner.com/it/content/2273800/2273821/january_8_itspending_forecast_final.pdf.

ranging from retail purchases of standardized software products by millions of users, to the individualized transfer of a custom software product to a single user, to everything in between. In some of these circumstances, an outright sale may be the best and most cost-effective way to structure the transfer. But in most circumstances, creators and users have decided that a license of limited rights better suits their needs. As this Court has acknowledged, “software is rarely ‘sold.’” *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 785 n.9 (9th Cir. 2006).

When creators and users decide to structure their transaction as a license, they have many options. In this case, the license is an OEM license, or bundled license. This sort of license permits use in connection with a hardware product, but not as a stand-alone software product. The following is a small sample of the immense variety of other commercial software licenses:⁵

- ***Use license:*** permits a discrete set of ways in which the software may be used. Such licenses are common for promotional copies.
- ***Single-user licenses:*** permits use by only one user.
- ***Machine license:*** permits use on a particular computer or device, regardless of who uses that computer or device.
- ***Per-seat license:*** permits use by a group of individually-specified users. This license is common for high-value products used by

⁵ For detailed information about these and other types of software licenses, see generally Jeffrey I. Gordon, *Software Licensing Handbook* (2006).

specialized professionals, such as computer programming and chemistry.

- **Concurrent-use license:** permits use by a discrete number of simultaneous users. When the maximum numbers of users are running the software, no additional users may run it. This license is common for high-value software that users need to operate part of the time, such as such as electronic design automation.
- **Server License:** permits use by all users connected to a particular server.
- **Site licenses:** permits use by all users in discrete geographic area(s), building(s), organization(s), or other entities. This license is common for educational entities.

This diversity of licenses is a testament to the variety of situations in which creators and users decide that a limited transfer of rights, instead of an outright sale, best achieves their goals.⁶ Appellants' arguments, if adopted, would transform a vast number of these diverse licensing arrangements into sales. This would upset the varied licensing structures that currently meet the needs of creators and users and would dramatically restrict the ways in which those groups can structure future licenses to meet their needs. The Court should decline to do so for the reasons outlined below.

⁶ For additional explanation of the reasons creators and users engage in licensing transactions for certain types of software, see Christian H. Nadan, *Software Licensing In the 21st Century: Are Software “Licenses” Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555 (2004), and Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, 5 Va. J.L. & Tech. 11, 33-38 (2000).

A. Licensing Promotes Flexibility For Both Software Developers and Software Users.

Different software users obviously make different uses of software products; but beyond that, different types of users often make materially different uses of the *same* product. For example, in terms of frequency, functionality, and commercial exploitation, a student working at home uses software very differently than a large commercial enterprise. One organization may need a bundle of licenses dedicated to particular users because each given user employs the software regularly; another organization may need a bundle of licenses that may be shared throughout the organization because any one user employs the software only sporadically. A student might need a license that permits only a narrow set of basic uses; a professional might need a license that permits a more elaborate set of features. A large company might need a license that allows the software to operate on a server; for a small company, a license that allows the software to run on a personal computer might suffice. Licensing permits software creators to adapt their business models to the varying needs of their customers—both by granting rights according to the needs of different user groups and adjusting prices for different uses—because licenses can define with specificity the rights granted to users without compelling those users to pay for additional rights that they do not need. Thus, for example, licensing allows for market-specific pricing for software , such as discounted pricing for students and schools using software for educational

purposes.

Without licensing, it would not be possible for software companies to follow business models tailored to the needs and requirements of users. As the Seventh Circuit has recognized, this tailoring benefits software creators because it increases sales and distributes risk, and benefits users because it lowers the price of software, thus permitting cost-sensitive users to benefit from software products that they otherwise could not afford:

If [the software creator] had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more . . . because [the software creators] could not obtain any contribution toward costs from the consumer market.

ProCD, Inc., v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).

B. Licensing Enables Users To Learn About New Software and Enables Software Creators to Bring Their Products to Market.

Licensing allows software creators to reach users who would not know whether a product meets their needs without first trying it. Some creators introduce users to software by licensing the product for a short period of time at little or no cost. Other creators license a free version of the product that has limited functionality while requiring the user to pay to license the full functionality. Licensing enables these and other types of product sampling by

ensuring that the time- or function-limited products are not used beyond the terms of the license. The ability to license in this manner is critical to the marketing and business development models of numerous software creators, whose products might otherwise never reach consumers uninterested in an outright purchase.

C. Licensing Enables A Continuing Relationship That Benefits Both Creators And Users.

By licensing a copy of software, a user may employ the software as specified under the terms of the agreement between the parties. In contrast to other transactions involving personal property, the relationship between the transferor (in this instance, the software creator) the property that is transferred (in this instance, the copy of the software), and the user does not end after the transaction is complete.

Under a large number of software licensing agreements, developers regularly update and improve their software and provide those updates and improvements to licensed users. Developers often produce supplementary software—“patches” or “updates”—that improve performance, add new functions, or fix minor problems known as “bugs.” Patches and updates also provide security enhancements to protect users from malicious software—software that is propagated by third parties to steal users’ personal information, misuse their computers, or damage their computers. The continuing evolution of malicious software requires ongoing efforts to maintain the security of legitimate software,

and creators typically provide those enhancements at no cost to licensed users. Licensed users may also have special rights to future versions of the software—e.g., the right to obtain future versions of the software at no or reduced cost. These features of licenses reflect the continuing and mutually beneficial relationship between the creator and user with respect to the particular software copy in the user’s possession.⁷

CONCLUSION

The Copyright Act aims to “enrich[] the general public through access to creative works,” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994), and to “promote the creation and publication of free expression” by rewarding authors. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Software creators assemble the creative and technical talent, invest time and money, and develop valuable software. The Copyright Act gives creators choices in how to transfer their work—sell, license, or otherwise transfer all, part, or none of it. For decades, software creators have chosen to transfer copies of their software primarily via

⁷ See, e.g., *Microsoft Corp. v. DAK Indus., Inc. (In re DAK Industries, Inc.)*, 66 F.3d 1091, 1092 (9th Cir. 1995) (describing a license under which the licensee “received the right to accept updates and new versions” of the software); Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. Empirical Legal Studies 677, 701 (2007) (describing maintenance and support provisions); Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 Geo. Mason L. Rev. 687, 695 (2004) (“software companies sometimes compete on . . . contractual terms”).

specific licenses. As consumers of copyrighted software, users likewise have choices—they can accept the license at a relatively inexpensive price, negotiate for a sale or some other transaction, or forego the software.

Software creators and users have settled into a stable, efficient market that operates primarily through licensing. Appellants request that this Court rewrite the rules and transform the practices by which that market operates. Acceding to that request would severely undermine the licensing model, creating risk for creators and users who have relied on licensing to specifically define their rights, risks, and liabilities. Such a result would undoubtedly make licensing less viable, and the breadth of options for users would decrease. This would thwart the Copyright Act by denying the public access to creative works. This Court should reject that request, affirm *Vernor*, and confirm the ability of creators and users to structure the transfer of copies of software as they see fit.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2013, I caused the foregoing Brief for BSA | The Software Alliance as *Amicus Curiae* in Support of Appellee Adobe Systems Incorporated, to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification to all registered users..

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