

No. 09-35969

**In the
United States Court of Appeals
for the Ninth Circuit**

TIMOTHY S. VERNOR,
Plaintiff-Appellee,

v.

AUTODESK, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington
Hon. Richard A. Jones

**BRIEF OF AMICUS CURIAE EBAY INC.
IN SUPPORT OF APPELLEE TIMOTHY S. VERNOR
AND OF AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae eBay Inc. hereby states: eBay is publicly held; eBay does not have a parent corporation, and no other company or person owns ten percent or more of the common stock of eBay.

Dated: February 11, 2010

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STATEMENT OF IDENTITY AND OF INTEREST OF AMICUS CURIAE

All parties have consented to the filing of this brief by eBay Inc., which, among other things, operates an online marketplace that allows third-party users to buy and sell items of all kinds. *See eBay*, <http://www.ebay.com> (last visited Feb. 10, 2010). eBay sellers create, edit, and approve the listings in which they offer their items for sale. Any item listed on eBay can be offered either at a fixed price or in an auction-style format. In the fixed-price format, the transaction between an eBay buyer and an eBay seller is immediately concluded upon the buyer's purchase of the listed item. In the auction-style format, the contract is formed between the seller and highest bidder at the end of the bidding period. In both cases, the parties then finalize the transaction between themselves.

eBay hosts approximately 126 million live listings worldwide at any given time, with approximately 7.3 million new listings added every day. Indeed, a significant secondary market exists through eBay for a wide variety of goods, including books, music CDs, DVDs, and, as in this case, computer software. For example, the "Software" category on the eBay website contained roughly 77,000 listings as of February 10, 2010. *See eBay-Software, Computer Networking and Education Reference Items*, <http://computers.shop.ebay.com/Software-/18793/i.html> (last visited Feb. 11, 2010).

On eBay, as elsewhere, copyrighted works, such as those noted above, are governed by intellectual property laws, including the Copyright Act of 1976, which grants a copyright owner an exclusive right of distribution as to the first sale of a copy of the owner's work. *See* 17 U.S.C. § 106(3). As to subsequent sales of that copy, however, the Act expressly authorizes the owner of a copy to sell or otherwise dispose of that copy in the manner of the owner's choosing. *See id.* § 109(a). Known as the "first sale doctrine," this aspect of copyright law enables consumers to lawfully sell copies of copyrighted works that they own.

Appellee Timothy Vernor is an eBay user who sold, among other things, copies of appellant Autodesk's AutoCAD software on eBay. Alleging that the listings infringed its copyrights, Autodesk submitted notifications of claimed infringement to eBay through eBay's "VeRO Program," which operates in accordance with the Digital Millennium Copyright Act (DMCA). *See* 17 U.S.C. § 512.¹ Upon receipt of Autodesk's first notice, eBay expeditiously removed Mr. Vernor's listing from the website, as contemplated by the DMCA. *See id.* § 512(c)(1)(C). Mr. Vernor subsequently submitted a DMCA-compliant counter notice, asserting that the listing was removed as a result of mistake or

¹ Established in 1998, the VeRO Program is one of the most successful and longstanding "notice and take-down" programs of its kind. Through the VeRO Program, eBay fully complies with the DMCA and responds expeditiously to any notifications alleging infringement that it receives. *See* Part II *infra* (discussing the VeRO Program).

misidentification. *See id.* § 512(g)(3). When Autodesk did not, after receipt of the counter notice, inform Mr. Vernor or eBay that it had filed a court action to enforce its rights, in accordance with the DMCA, *id.* § 512(g)(2)(C), the disputed item was relisted. The same chain of events recurred when Mr. Vernor posted additional listings of physical copies of AutoCAD software he had purchased.²

While eBay respects copyright owners' rights and has undertaken extensive measures to protect those rights, eBay also believes that a thriving, secondary market for copyrighted works benefits consumers and society generally and should be encouraged to the extent permitted by law. Accordingly, while eBay commits substantial resources to the "notice and take-down" procedures in the VeRO Program, the DMCA should not be used by copyright owners to effect removal of items that do not infringe copyrights. Overreaching use of the DMCA by copyright owners impedes the economic efficiency of secondary markets and thwarts Congress's intent to ensure the alienability of copies of copyrighted works. *See* 17 U.S.C. § 109(a).

By reporting and seeking removal of Mr. Vernor's listings, Autodesk attempted to control distribution of copies of AutoCAD software in a manner that

² The district court's two opinions and parties' appellate briefs set forth the relevant facts, which eBay will not restate in full in its amicus brief. *See Vernor v. Autodesk, Inc.*, ___ F. Supp. 2d ___, No. C07-118RAJ, 2009 WL 3187613, at *1 (W.D. Wash. Sept. 30, 2009) (*Vernor II*); *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164, 1165-66 (W.D. Wash. 2008) (*Vernor I*); Vernor Br. at 7-12; Autodesk Br. at 13-14.

is not supported by the Copyright Act. Because the first sale doctrine codified at 17 U.S.C. § 109(a) expressly authorized Mr. Vernor to re-sell physical copies of AutoCAD software that he had purchased, eBay submits this brief as amicus curiae in support of Mr. Vernor and urges the Court to affirm the district court's judgment.

ARGUMENT

I. THE COURT SHOULD DECLINE TO JUDICIALLY EXPAND COPYRIGHT OWNERS' CONGRESSIONALLY DEFINED RIGHTS.

A. The First Sale Doctrine Reflects Congress's Careful Balance Between Copyright Owners' Monopoly of Rights and the Public Interest in Copyrighted Works.

The Copyright Act “creates a balance between the artist’s right to control the work during the time of the copyright protection and the public’s need for access to creative works.” *Stewart v. Abend*, 495 U.S. 207, 228 (1990). Thus, although the statute confers a bundle of exclusive rights on copyright owners, *see* 17 U.S.C. § 106(1)-(6), these rights are not without limitation. *See, e.g., id.* §§ 107-122. To preserve Congress’s careful balance, the Supreme Court requires courts to construe the Act in a manner that effectuates the full extent of copyright owners’ congressionally defined rights, while also being mindful that the Act “ought not to be unduly extended by judicial construction to include privileges not intended to be conferred.” *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908). Because Autodesk’s constrained view of the first sale doctrine would unduly extend the scope of its exclusive distribution right under the Act—bestowing it with

“privileges not intended to be conferred” by Congress, *id.*—the Court should reject Autodesk’s proposed construction and hold that the first sale doctrine authorized Mr. Vernor to sell the particular copies of AutoCAD software that he legitimately purchased.

The Supreme Court recognized in *Bobbs-Merrill* that Congress intended to limit a copyright owner’s “sole right to vend copies” of its copyrighted work to the initial sale of the copy. 210 U.S. at 351.³ “To add to the right of exclusive sale the authority to control all future retail sales,” the Court explained, “would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.” *Id.*; see also R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 580 (2003) (noting the Copyright Act’s historic disfavor of restraints on the alienation of personal property).⁴ Congress later confirmed the propriety of the inherent “first sale” limitation recognized by the Supreme Court, specifying, within the text of the Act itself, that “the owner of a particular copy . . . lawfully made under this title . . .

³ The current version of the Act frames the “sole” right of “vending” construed in *Bobbs-Merrill* as an exclusive right “to distribute copies . . . of the copyrighted work.” 17 U.S.C. § 106(3).

⁴ The copyright owner in *Bobbs-Merrill* attempted to control downstream retail sales of the book *The Castaway* by inserting a notice on the title page of each copy, which stated: “The price of this book at retail is \$1 net. No dealer *is licensed* to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.” 210 U.S. at 341 (emphasis added).

is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.” 17 U.S.C. § 109(a).

As *Bobbs-Merrill* establishes, a copyright owner has no authority *under the Copyright Act* to impose license-based restraints on the alienability of copies it sells. 210 U.S. at 341, 350-51 (emphasizing that the case presents only a question of statutory construction). To the extent such limitations could be achieved *non-statutorily*, through a license or other contract between the copyright owner and the first purchaser of a copy, a violation of that agreement would not give rise to a claim of copyright infringement under the Act, which is what Autodesk asserts against Mr. Vernor. *See id.* The Court should reject Autodesk’s invitation to judicially rewrite the Act to “extend[] by judicial construction . . . privileges not intended to be conferred” by Congress on copyright owners. *Bobbs-Merrill*, 210 U.S. at 346; 17 U.S.C. §§ 106(3), 109(a); *cf. Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 152 (1998) (noting, in refusing to cabin the first sale doctrine in the context of unauthorized importation of copies, that “the Solicitor General’s cramped Reading” of the Act, in support of the copyright owner, was “at odds . . . with the necessarily broad reach of § 109(a)” and would impermissibly expand the scope of the distribution right granted in § 106(3)).

B. The First Sale Doctrine’s Authorization of Secondary Markets for Copies of Copyrighted Works Contributes to the Public Good.

The first sale doctrine facilitates the creation of secondary markets—like eBay’s online marketplace—for copies of copyrighted works, including copies of software, books, CDs, and DVDs. *See, e.g.,* Reese, *supra*, at 577 (“[T]he first sale doctrine has been a major bulwark in providing public access by facilitating the existence of used book and record stores, video rental stores and, perhaps most significantly, public libraries.”). Two of the primary effects and public benefits of the first sale doctrine are increased access to, and affordability of, copyrighted works. *E.g., id.* at 578. Consumers not only have additional opportunities to purchase copies of copyrighted works, but also frequently make those purchases at prices significantly lower than the price at which copies initially were sold. *See id.* at 586. Additionally, the availability of a secondary market may decrease the effective cost of purchasing a copy new, if the purchaser later resells the copy he purchased and thus recoups a portion of the original price. *See id.* at 587; John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 79 (2004).

Secondary markets encourage economic efficiency by creating opportunities for buyers and sellers to exchange copies of copyrighted works at mutually satisfactory price points. *See, e.g.,* Rothchild, *supra*, at 80 (noting that, if one user can sell a good to another “who values it more highly, the welfare of both is

increased.”); Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103, 1163 (2008) (noting, from an economic-efficiency perspective, that “[t]he reuse and recycling of products that have lost utility for their original owners, but that retain commercial value, should be encouraged”). These efficiencies are magnified in the context of online secondary marketplaces, where buyers and sellers can reach a broad audience and swiftly communicate and transact. Kim, *supra*, at 1161 (noting that the secondary market for goods has become “more accessible due to the low barriers to entry for Internet resellers” and that the goal of “economic efficiency . . . is furthered by the Internet and sites like eBay and Amazon, which bring buyers and sellers together and reduce transaction costs and the need for intermediaries”).

Although Autodesk suggests that the first sale doctrine and secondary marketplaces pose unique threats in the software context—facilitating piracy and driving up retail prices for consumers, *see* Autodesk Br. at 45, 48—the district court correctly dismissed these concerns.⁵ “[A] pirate is presumably just as happy to unlawfully duplicate software purchased directly from Autodesk as he is to copy software purchased from a reseller like Mr. Vernor,” the court explained. *Vernor II*, 2009 WL 3187613, at *14. The district court also correctly reasoned that, if software producers increase retail prices to compensate for lost profits in secondary

⁵ Autodesk does not contend that the copies of AutoCAD software sold by Mr. Vernor on eBay were pirated or in any other way inauthentic.

markets, that potential harm to consumers would be accompanied by a “concomitant price benefit in the form of reduced resale prices.” *Id.*; *see also* Kim, *supra*, at 1161-62 (reasoning that the software industry’s fear of lost profits does not mandate unique restrictions on the first sale doctrine in that context but, instead, reflects the shared reality of many industries whose business models must evolve to compete with internet sales and the proliferation of secondary markets).

The benefits of secondary markets are not limited to economic efficiency. Secondary markets also may improve copyrighted works’ longevity. If a copyright owner decides not to distribute any more copies of its work, for example, the first sale doctrine authorizes owners of previously distributed copies to continue making that work available to the public in the secondary market. *See* Reese, *supra*, at 592. Together, the first sale doctrine and secondary markets expand the window during which copies circulate publicly, “contributing to the preservation and survival of works over time.” *Id.*

During difficult economic times, in particular, secondary markets create important opportunities. On a transactional level, they make it possible for consumers on shrinking budgets to purchase copies of works they could not afford new. But secondary markets also, at a higher level, promote entrepreneurship and innovation, facilitating the development of resale businesses that contribute to the

American economy while respecting the balance of rights Congress struck in the Copyright Act.

II. SECONDARY MARKETPLACES LIKE EBAY RESPECT AND PROTECT COPYRIGHT OWNERS' RIGHTS, BUT PROTECTION PROGRAMS SHOULD NOT BE MISUSED TO THWART THE FIRST SALE DOCTRINE.

eBay is “committed to protecting the intellectual property rights of third parties and to providing our members with a safe place to buy and sell.” *How eBay Protects Intellectual Property (VeRO)*, <http://pages.ebay.com/help/policies/programs-vero-ov.html> (last visited Feb. 5, 2010). As part of its commitment, eBay created the Verified Rights Owner (VeRO) Program more than a decade ago to “let[] intellectual property rights owners request the removal of listings on eBay that offer items or contain materials that infringe on their rights.” *What is VeRO and Why Was My Listing Removed Because of It?*, <http://pages.ebay.com/help/policies/questions/vero-ended-item.html> (last visited Feb. 5, 2010); *see also Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 478-79 (S.D.N.Y. 2008) (describing the VeRO rights-protection system). A principal component of the VeRO Program is a “notice and take-down” system adhering to the DMCA. *See* 17 U.S.C. § 512.

When a rights owner reports a listing to eBay through the VeRO Program, eBay expeditiously removes that listing. Indeed, removal is expressly contemplated by the DMCA, which requires a qualifying online service provider,

such as eBay, to remove or disable access to a reported item to avail itself of the safe harbors embodied in the DMCA. *See* 17 U.S.C. § 512(c)(1)(C). Notifications of infringement by rights owners thus are potent tools and, consequently, can be subject to misuse or abuse. Knowing that eBay is likely to remove a reported listing, rights owners may push the envelope regarding what is an infringing item. *Cf. Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154-56 (N.D. Cal. 2008) (holding that a copyright owner acts in bad faith by failing to consider whether an alleged infringement constitutes fair use before submitting a notice of infringement under the DMCA). In this case, Autodesk successfully utilized the VeRO Program to effect removal of Mr. Vernor's listings of copies of AutoCAD software, which the district court determined did not infringe Autodesk's copyright. *See Vernor II*, 2009 WL 3187613, at *1, *8-*9; *Vernor I*, 555 F. Supp. 2d at 1165-66, 1174; Vernor Br. at 8-10.⁶

Upon receipt of a rights owner's "Notice of Claimed Infringement," eBay removes the reported listing and sends the eBay seller an email explaining the reason for removal. *See VeRO: Reporting an Infringement*, <http://pages.ebay.com/vero/notice.html> (last visited Feb. 8, 2010); *Why Did eBay Remove My Listing*,

⁶ When Autodesk failed to respond to Mr. Vernor's counter notices demonstrating his ownership of the AutoCAD copies he listed for sale, eBay allowed reinstatement of Mr. Vernor's listings in accordance with the DMCA. *See Vernor I*, 555 F. Supp. 2d at 1155-66; Vernor Br. 9-10; *see How eBay Protects Intellectual Property (VeRO)*, *supra*.

<http://www.ebay.com/help/sell/questions/listing-ended.html> (last visited Feb. 5, 2010); *see also* 17 U.S.C. § 512(c)(3). If an eBay seller believes a rights owner has made a report in error, the seller may file a “counter notice” in accordance with the DMCA. *How eBay Protects Intellectual Property (VeRO)*, *supra*; 17 U.S.C. § 512(g)(3).⁷ Upon receipt of a DMCA-compliant counter notice, eBay forwards the notice to the rights owner and explains that it may allow the listing to be reinstated in 10 days unless the rights owner informs eBay that it is seeking a court order restraining the seller from relisting the item. *See How eBay Protects Intellectual Property (VeRO)*, *supra*.

The DMCA provides an effective vehicle for ensuring that a secondary market for copies of copyrighted works can thrive without infringing intellectual property rights: Rights owners have an efficient mechanism for reporting and obtaining removal of infringing listings, and sellers have an opportunity to establish the lawfulness of their listings through the counter-notice procedure. The DMCA should not, however, be used by copyright owners to report listings that do not infringe owners’ *statutory* rights under the Copyright Act. The Act expressly limits a copyright owner’s exclusive right of distribution to the first sale of a copy of the owner’s work, *see* 17 U.S.C. §§ 106(3), 109(a), and therefore Mr.

⁷ The DMCA provides that an online service provider shall not be liable for the removal of content (such as the eBay seller’s listings here) even if that content is later found to be noninfringing, if the service provider complies with relevant DMCA provisions. *See* 17 U.S.C. § 512(g).

Vernor—a legitimate purchaser of an authentic copy of AutoCAD software—was authorized by the Act to resell the copy he purchased without infringing Autodesk’s copyright.

The Court should affirm the district court’s judgment and make clear that, when a software manufacturer or other copyright owner places a copy of its work into the stream of commerce, the copyright owner cannot claim infringement and, therefore, should not file a notice of infringement under the DMCA when no cognizable violation of the Copyright Act has occurred. When copyright owners misuse eBay’s VeRO Program to obtain removal of listings that do not infringe the Act, substantial and unjustified costs are imposed—on eBay sellers, whose listings are removed; on eBay buyers, who lose access to affordable copies of works; and on eBay itself. To remain within the DMCA’s safe harbor provisions, eBay expeditiously removes listings upon receipt of a valid notification of infringement, and it then processes counter notices and informs rights owners that listings may be reinstated within 10 days if no court action by the rights owner is filed. *See* § 512(c)(1)(C), (c)(3), (g)(2)(C), (g)(3). eBay’s VeRO Program resources should be devoted to rights protection, not to unjustified attempts to restrict the first sale doctrine.

CONCLUSION

For these reasons, as well as those set forth by the district court and by Mr. Vernor on appeal, the Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B) because this brief contains 3,238 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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s/ Lisa R. Eskow

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Attorney for eBay Inc.

Date: February 11, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 11, 2010.

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s/ Lisa R. Eskow
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