

Used DVD and Video Game Resales One Step Closer to Extinction

By Randall E. Colson¹

Whether through online auctions or local resale stores, consumers have become used to turning unwanted or unused products into cash or credits for future purchases, as well as purchasing second-hand products at a discount. In particular, a robust market in used DVDs and video games has developed in the last few years. Consumers can now easily monetize those DVDs and video games that have been watched, completed, or perhaps tossed aside due to frustration.

Unfortunately, both online and DVD and video game resellers may become extinct due to a September 10, 2010 ruling by the Ninth Circuit Court of Appeals. Timothy Vernor, a prolific eBay seller, purchased several used copies of Autodesk, Inc.'s AutoCAD Release 14 Software and attempted to resell those copies on eBay. Once Autodesk discovered Mr. Vernor's auctions, they contacted eBay and succeeded in not only delaying several auctions, but also closed his entire eBay account for a month.

With his eBay business ground to a halt, Mr. Vernor filed suit in an attempt to prove that his resales did not infringe Autodesk's rights because they were permitted under the copyright law's first sale doctrine. This required Mr. Vernor to prove that he purchased his AutoCAD copies from a company that was an owner, as opposed to a licensee, of those copies. The Court determined that a software user is a licensee rather than an owner of a copy when the copyright owner: (1) specifies that the user is a licensee; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable restrictive terms.

In this case, the Court found that Autodesk had met all three requirements. Autodesk retained title to the software, prohibited transfer of copies of the program without its consent, and even imposed restrictions on modification, reverse engineering, and efforts to defeat copy protection (among others). As a result, the company that sold Mr. Vernor his copies was a mere licensee and not an owner of those copies. Accordingly, it was not, and could not have been, authorized to sell the copies to Mr. Vernor, and neither the company nor Mr. Vernor were entitled to protection under the first sale doctrine. As a result, Mr. Vernor's sales were found to have infringed Autodesk's exclusive rights to distribute copies of its software.

Since this case involved traditional software, the result may not be too surprising. However, since DVDs and video games are nothing more than software, most people will be surprised what this case could mean for the thriving used DVD and video game industry (and, theoretically, for the used book industry as well).

Both eBay and The American Library Association ("ALA") filed briefs in this case highlighting the policy implications that the Court's decision might have on the resale market for copyrighted works. In particular, the ALA feared the impact the Court's decision would have on typical e-commerce transactions if book publishers, record labels, and movie studios adopted the software industries' licensing model. The Court, while admitting that the issues raised serious concerns, nonetheless brushed aside these concerns and directed eBay and the ALA to approach Congress to provide a different result.

¹ Randy Colson is a partner in the Dallas, TX office of the law firm of Haynes and Boone, LLP. His practice emphasizes information technology transactions. Randy may be reached at randy.colson@haynesboone.com or 214.651.5665.

With this Court's decision on the books, consumers (and sellers) of second-hand DVDs and video games are highly encouraged to carefully read the "shrinkwrap" terms and conditions that come with these products. If the DVD and video game publishers follow Autodesk's lead, consumers may not be able to sell their old DVDs or video games. As for businesses built around buying and selling used DVDs and video games, they are also encouraged to monitor this case, future cases, and any Congressional reactions, as adoption of the Ninth Circuit's reasoning could have a harmful—if not fatal—impact on their livelihood.