

Consumer Groups Urge the Supreme Court to Reconsider the Vernor Case

By Keli Johnson

A number of consumer groups – including the Electronic Frontier Foundation, the Consumer Federation of America, the American Library Association, Association of Research Libraries, Association of College and Research Libraries, U.S. Public Interest Research Group, and Public Knowledge – recently filed a “friend of the court” brief asking the Supreme Court to reconsider the Ninth Circuit’s decision in *Autodesk v. Vernor*. Those groups are asking the Court to determine what they consider to be an important question: What is the impact of technology licensing on the First-Sale Doctrine?

The Supreme Court will determine whether it will reconsider the Ninth Circuit *Vernor* opinion holding that an owner of a copyrighted work may license its work and retain ownership and control over its distribution. The Ninth Circuit overturned a lower court ruling that the First-Sale Doctrine applied to software sales, and that purchasers of software licenses were entitled to transfer, distribute, or sell the software. The First-Sale Doctrine allows an owner of a copy of copyrighted work to transfer or sell the copy, unlike a license, which restricts the transferability of a copyrighted product. The consumer groups are petitioning the Supreme Court to grant a hearing to determine whether the First-Sale Doctrine applies to the sale of software, and grants the owner of the copy the right to sell, rather than a license to use the product.

The Supreme Court will evaluate whether so-called “magic words” contained in an End User License Agreement (“EULA”) undermine a consumer’s right to own and distribute a copyrighted work. These “magic words” are terms relating to licensing restrictions in the EULA. If the Supreme Court decides there is merit in the arguments set forth in the brief, it may grant a hearing to consider the *Vernor* case. If the Supreme Court grants the petition, it will likely set a date to hear oral arguments from each party before making a final ruling.

A new decision in the *Vernor* case may potentially have far-reaching implications for copyrighted works, especially software. If the Supreme Court determines that purchasers of software own a copy of the work, rather than just a license, consumers might be free to sell or transfer their copies of copyrighted works without regard to the restrictions in the EULA. The consumer groups who filed the brief argue that “after an individual copy has been sold, the first sale doctrine puts further dispositions of the copy beyond the reach of the copyright owner.”

If you are facing a copyright infringement claim from a software publisher, you should contact experienced counsel to assist you with evaluating your rights and the appropriate strategy for your defense.



About the author Keli Johnson:

As an associate attorney at Scott & Scott, LLP, Keli is primarily focused on software licensing and copyright infringement matters. She advises clients in a variety of industries to ensure compliance with software licenses and develop strategies for maximizing the value of software licenses.

Get in touch: kjohnson@scottandscottllp.com | 800.596.6176