Intellectual Property

2010 FALL BULLETIN

Ninth Circuit Rules on Software Transfers in *Vernor v. Autodesk*

BY JENNIFER STANLEY AND MITCHELL ZIMMERMAN

On September 10, 2010, the U.S. Court of Appeals, Ninth Circuit issued a much-awaited ruling on appeal in *Vernor v. Autodesk,* No. 09-35969, 2010 U.S. App. LEXIS 18957, addressing whether software purchasers are owners or licensees of the copies of the software in their possession. The court held that "a software user is a *licensee* rather than an *owner* of a copy of the software 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."

The distinction between owner and licensee can be critical to software publishers because owners have certain rights not afforded to mere licensees under copyright law.

Background and Lower Court Ruling

Timothy Vernor is an individual who offered lawfully made packages of Autodesk's AutoCAD software for sale on eBay. When Autodesk sent eBay a DMCA take-down notice, Vernor countered and eventually sued for declaratory relief.

The copies at issue were originally provided subject to terms of an Autodesk software license agreement, which included restrictions on the transfer of the Autodesk software. Since the copies at issue were lawfully made, if Vernor and his predecessor transferee were deemed owners of the copies, they would plainly be allowed — pursuant to the first sale-doctrine — to sell their copies to others without violating Autodesk's distribution right. But if they were merely licensees, they would not have the right to re-sell the software. The lower court held that the initial transfer of the software from Autodesk was a sale, not a license.

Three-Prong Test for Software: a License or a Sale

The Ninth Circuit overturned the lower court's decision, siding with Autodesk and concluding that the first-sale-doctrine did not apply because Vernor was not an owner of the copies of the software he possessed.

Purporting to reconcile a group of earlier Ninth Circuit decisions which suggested varying tests, the *Vernor* court adopted a three-pronged test to determine whether software is licensed or sold: "First, we consider whether the copyright owner specifies that a user is granted a license. Second, we consider whether the copyright owner significantly restricts the user's ability to transfer the software. Finally, we consider whether the copyright owner imposes notable use restrictions."

The Autodesk software license agreement described itself as a license and the agreement specifically included limitations on the transfer of the software. On the critical issue of whether the agreement imposed "notable use restrictions," the court noted that it barred use outside the Western Hemisphere; modifying, translating,

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or reverse-engineering the software; removing any proprietary marks; and defeating any copy protection device. The court therefore concluded that "Autodesk's direct customers are licensees of their copies of the software rather than owners.…" This, the court held, had two ramifications: Vernor could not invoke the first sale-doctrine, nor could he assert an essential step defense on behalf of his customers. That defense provides that "the owner of a copy" of software does not infringe by making a copy (*e.g.*, loading the program into RAM) if it is "created as an essential step" in the use of the program in a machine.

Policy Arguments

Autodesk argued that the limitations on licensees are essential to the continuing success and overall good of the software industry, for example, by allowing for a tiered pricing structure for different markets, including the examples of reduced pricing for students, and lowering prices for everyone by spreading costs among a large number of purchasers. An *amicus* favoring Autodesk argued that because there is often no feasible way for a consumer to return a copy to the copyright owner, the ability to possess a copyrighted work indefinitely — the critical distinguishing point between sales and licenses, in the view of the lower court — should not compel a finding of a first sale. Other *amici* on the other hand, argued that ruling against Vernor would seriously hurt libraries and the creation of secondary markets for copyrighted works. They raised the spectre of the software industry's licensing practices being "adopted by other copyright owners, including book publishers, record labels, and movie studios," which could ultimately change the way third party materials and content are accessed and consumed by the public. But the Ninth Circuit declined even to comment on these arguments. There were "serious contentions on both sides," the court observed, "but they do not alter our conclusion that our precedent...requires the result we reach."

Implications of *Vernor*

Vernor provides a template for software licensors who wish to make sure that their software is licensed with certain restrictions (and not deemed to have been "sold") — assuming the Ninth Circuit ruling stands and other circuits agree with its reconciliation of the cases on this issue. The first two requirements of *Vernor's* three-prong test — calling the agreement a license and imposing transfer limitations — will be satisfied whenever the issue is posed, so the key issue under the Ninth Circuit's ruling always will be whether the agreement imposes "notable use restrictions." But *Vernor* does not make clear what use restrictions are necessary to satisfy its third prong, other than that the restrictions set forth in Autodesk's Software License Agreement are sufficient. Possibly, the Ninth Circuit's forthcoming opinions for two recent first sale-doctrine decisions heard on appeal, *MDY Industries v. Blizzard Entertainment, Inc.*, 89 U.S.P.Q.2d 1015 (D. Ariz. July 14, 2008) and *UMG Recordings, Inc. v. Augusto*, 558 F. Supp.2d 1055 (C.D. Cal. 2008), will help clarify this issue.

Blizzard is the creator and operator of World of Warcraft (WoW), a multiplayer online role-playing game. MDY sold a program called WoWGlider, which played the game for its owner while the owner was away from the computer and enabled a user to progress more quickly in the game. Blizzard sued MDY for copyright infringement claiming, for example, that MDY knew that the use of WoWGlider was against the terms of the end-user license agreement between Blizzard and its users (and therefore copyright infringement) and that MDY caused the infringement by selling WoWGlider. One of MDY's defenses was an ownership defense under 17 U.S.C. § 117 — that an owner is permitted to make a copy of software if so doing is an "essential step" of using the software. The district court held the restrictions imposed by the end-user license agreement meant that users of WoW were licensees, not owners, so their conduct was not protected by § 117.

In contrast, UMG Recordings creates and distributes promotional CDs to music industry insiders. The CDs bear labels stating that the CD is property of the record company, is licensed to the intended recipient for personal use only, and that resale and transfer of possession are not permitted. Augusto was not a music industry insider, but obtained numerous promotional CDs from music shops and resold the CDs online through eBay, a fact pattern remarkably similar to Vernor. UMG alleged that Augusto violated UMG's exclusive right to distribute and sell promotional CDs and therefore is liable for copyright infringement. However, Augusto asserted that his conduct was protected by the first sale-doctrine. The court agreed with Augusto, holding that the initial transfer from UMG was not a license based on the economic realities of the act of distribution. The court noted that UMG had no intent to regain possession of the CDs and received no recurring benefits from the recipient's possession of the CDs, such as a license fee or an agreement to promote the music. Based on these considerations, the court characterized the distribution of the promo CDs as a sale or gift, not a license, immunizing Augusto's resale. However, in light of the *Vernor* ruling, it seems that if the agreement between UMG and Augusto comprises the elements of the *Vernor* three-prong test, we can likely assume that *Augusto* on appeal will follow *Vernor*. Seemingly, the critical issue will be whether *Vernor*'s requirement of "notable use restrictions" will be satisfied by the "personal use only" restriction. Such a holding could have far-reaching implications for other classes of works.

Conclusion

The *Vernor* three-prong test is not necessarily limited to software licensing. Under *Vernor*, owners of any kind of content or material may be in a position to try prohibition of certain actions in their agreements. Certainly, the terms held sufficient in *Vernor* for license status — bars on reverse engineering, removal of trademarks, and attempts to thwart copy protection — are common in the software industry, and various other restrictions (present or to be adopted) may qualify as "notable." It will be interesting to see how other industries outside of the software industry react to this decision and if any of their practices will change as a result.

Vernor's counsel has indicated that he intends to ask a full panel of eleven judges in the Ninth Circuit to review the September 10 decision *en banc* before considering a possible appeal to the U.S. Supreme Court.

The Tortoise, the Hare, and the Status Quo

BY JENNIFER R. BUSH AND STUART P. MEYER

In recognition that one-size-fits-all examination timing may not be ideal for every applicant, earlier this year the U.S. Patent and Trademark Office proposed a three-track system to allow applicants greater control over patent application processing. The three-track initiative would provide an option for fee-based prioritized examination (Track I), and an applicant-controlled examination delay of up to 30 months option (Track III), in addition to traditional examination (Track II).

Since David Kappos became the new PTO director a year ago, he has tried to focus on a perennial complaint about PTO backlogs being unacceptably long. Patent applicants long have complained that the typical experience of waiting several years for a first substantive response from a patent examiner, and then several more years to get the application allowed, eliminated much of the benefit of patenting their inventions. Thus, it is not surprising that initially most of the attention for the three-track proposal was focused on Track I, which would provide a fast track for prosecution aimed at reducing time to first office action to four months (currently at 26 months) and overall application pendencies to 12 months (currently at 36-45 months).

U.S. patent applicants traditionally have had just a few less-than-attractive options for speeding up examination. Applicants have been able to petition to make a case "special" in order to qualify for expedited processing, but there are a number of strings attached that make this approach unattractive even for the limited number of applicants who qualify. More recently, Kappos successfully implemented two additional alternatives. "Project Exchange" allows applicants to sacrifice one application (i.e., expressly abandon it) in order to win the right for another to get fast track processing. This exchange can be made between co-owned applications, or those with at least one inventor in common. The theory is that this process would remove a less-wanted application from the processing queue while advancing another through the queue more quickly. In addition, last year a fast track procedure for select "green" patent applications was implemented, to advance those applications out of turn to help encourage U.S. cleantech development. Track I of the three-track proposal can be seen as a larger effort in the same direction.

Implementing such fast track changes is not easy. With static or reduced operating funding, speeding up the processing of some applications is bound to slow down the processing of others unless significant new efficiencies can be realized. Aware of that issue, Director Kappos took note of the old adage, "If you can't fix it, feature it," and proposed that certain applications could be intentionally delayed. Under Track III, applicants could opt to delay regular processing of the application for an additional two and a half years. As an additional benefit, the trigger for putting the application in the normal queue is payment of the PTO's examination fee, so the applicant gets to delay that payment as well. This aspect of the proposal is notable in that it is entirely in the applicants' discretion when, during the 30-month period, they wish to pay the examination fee to move their applications into either the normal processing queue or the fast track. Thus, a company can move from a low-cost holding pattern during its self-funded startup phase to a fast track after it completes its first round of outside financing.

The proposal didn't get much response initially–the PTO's solicitation for written comments prior to the July 20, 2010 public hearing on the topic drew less than a dozen responses. But even those few comments provided a wide range of views. Andrea Doering wrote that rewarding those who could afford the opportunity to jump ahead of others "seems to come very close to bribery, if you ask me." Others applauded the fast track. One comment suggested that any third party, by paying the appropriate fee to move out of the slow track (to either the normal track or the fast track) would allow third parties with sufficient interest to resolve that uncertainty more quickly. S. Cangialosi argued that deferred examination should be a preferred track, and that "the 30 month delay period should be renewable subject to an appropriate fee up to the time limit of the patent term."

Public response sharply increased after the hearing, with a total of 52 written comments provided on the PTO website within a month's time, primarily by businesses and intellectual property associations. Most commentators praised Track I, raising only implementation questions such as whether it would be available to all applications or only new filings, whether a small entity discount and/or sliding scale fee structure would apply, and whether refunds would be issued if pendency targets were not achieved (in view of PTO targets not being reliable for other fast track options). In contrast, Track III was the subject of much concern. Most controversial was the exclusion of applications first-filed internationally, and an accompanying fear of retaliation by foreign patent offices or undermining of the Patent Cooperation Treaty (PCT), followed by a concern over the lack of public notice for such a prolonged period without the safeguard of a search report like that issued during the similar PCT delay. A few concerns were raised about the proposal generally, such as what effect it would have on regular examination (Track II) pendency, and whether the increased fees received would actually be used within the PTO (i.e., because Congress maintains a longstanding practice of diverting PTO-generated fees for other purposes).

The PTO was fairly clear in its original notice that its proposal was just a starting point, and therefore solicited comments and held hearings to flesh out implementation parameters such as those as raised in the written comments. Recently, during his "First Anniversary Review" with media representatives and on his public blog, Director Kappos noted that many public comments about the proposal had been received, and that the PTO is taking them into consideration as it refines the proposal for implementation, which is expected to proceed in the coming year. While there are many details to be worked out, the PTO is to be commended for considering novel solutions to the backlog issues that have hounded it for so long.

Quick Updates

New Fraud Standard for Trademark Cases Addressed by the USPTO

Last year, the U.S. Court of Appeals for the Federal Circuit set a new standard for analyzing fraud claims in procuring or maintaining a trademark registration. Namely, fraud occurs when an applicant or registrant "knowingly makes a false, material representation with the intent to deceive the PTO." *In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009). The USPTO previously analyzed fraud claims under a "knew or should have known" standard. If a trademark owner submitted a statement claiming use of its mark for all the goods or services in an application or registration, but was, in fact, not using the mark on one of the goods or services, the application or registration became void because the owner knew or should have known it was not using the mark on all the goods or services. Earlier this year, the Trademark Trial and Appeal Board addressed the open issue of whether a reckless disregard for the truth is sufficient evidence of a deceptive intent.

Bose stated in its 2001 renewal application that it was using its WAVE mark in commerce on all the goods in the registration, even though it had stopped manufacturing audio tape recorders and players in 1997. Bose contended that its statement of use was proper because it repaired recorders and players and transported them back to their owners. Although transportation of repaired goods does not satisfy the use in commerce clause, the court found insufficient evidence that Bose made its erroneous statement with deceptive intent. Equating fraud to patent inequitable conduct, the court held that a deceptive intent is required to establish fraud, overruling the USPTO's "should have known" standard as it lowered fraud to simple negligence. Deceptive intent may be established by direct evidence or may be inferred from indirect or circumstantial evidence, but there is no fraud if a false representation is occasioned by an honest misunderstanding, as in *Bose*, or is inadvertently made without a willful intent to deceive. In its decision, the court declined to address whether a reckless disregard for the truth is sufficient evidence of a deceptive intent.

That question was addressed in March of this year, when the USPTO suggested that a reckless disregard for the truth might be sufficient to show deceptive intent. *DaimlerChrysler Corp. v. American Motors Corp.,* 94 USPQ2d 1086 (T.T.A.B. 2010). DaimlerChrysler sought summary judgment on its claim that American Motors committed fraud upon the USPTO when American Motors submitted statements that it had used its AMC mark on automobiles and parts when, in fact, it had not used the mark at all. In ruling against DaimlerChrysler, the USPTO found that DaimlerChrysler had not introduced any evidence that American Motors had a deceptive intent, "or at least had a reckless disregard for the truth." Although its decision suggests that a reckless disregard for the truth may be proof of deceptive intent, the USPTO did not explain what types of evidence it would have determined to be a reckless disregard for the truth.

Bose made fraud claims more difficult to prove. Nonetheless, it is important for trademark owners to ensure the accuracy of statements made to the USPTO, as deceptive intent can be inferred from indirect or circumstantial evidence, or may be established by a reckless disregard for the truth. Although trademark owners retain common law rights in their mark upon a finding of fraud, the time and resources spent obtaining the registration are lost. Trademark owners can refile, but that would require additional expenditures that may not be accommodated easily as trademark prosecution budgets shrink. Therefore, it is important to ensure the accuracy of statements made to the USPTO.

Copyright Registration: Cheap Thrill, Big Benefits

The Ninth Circuit recently ruled that a copyright holder can bring an infringement suit without a completed copyright registration so long as an application for registration is on file. *Cosmetic Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d. 612 (9th Cir. 2010), *petition for cert. filed*, (U.S. Aug. 19, 2010) (No. 10-268). While registration is not necessary to perfect the copyrights in a work, the benefits of timely registration are so great that copyright owners should make a practice of registering their copyrights long before any infringement or litigation is contemplated.

To register a copyright, the copyright owner must submit an application to the Copyright Office that collects information about the work and its creation, along with the registration fee and a copy of the work for deposit. The fees vary but are generally low. Online applications can be filed for $35. Filing a paper application currently costs $65 for most works.

Early registration of a work offers many advantages, but perhaps the most consequential advantages are the ability to obtain statutory damages and attorney's fees. Statutory damages do not depend on the actual harm to the copyright holder or the ill-gotten gains of the infringer, and awards can range between $750 and $30,000 for each infringed work. In the case of willful infringement, awards can go as high as $150,000. To qualify for statutory damages and attorney's fees, a copyright owner must register the work prior to publication, prior to the act of infringement, or within three months following the first publication of the work. Otherwise, only actual damages or infringer's profits may be recovered, which can be difficult and costly to prove, and are often less than the applicable statutory damages. And, *Cosmetic Ideas* notwithstanding, in many jurisdictions no copyright infringement suit can be brought until a certificate of copyright registration has been issued, which can sometimes cause troublesome delay.

Other benefits of timely registration include:

- Recording the registration with the U.S. Customs and Border Protection to prevent the importation of infringing copies.
- A legal presumption of the validity of the copyright and of the facts stated in the certificate.
- Establishing a public record of copyright ownership, which makes proving infringement easier.
- Gaining the confidence of potential investors and lenders.

For many works, like brochures and pamphlets, the process is straightforward and can be done without the assistance of counsel. But registration of more complex works like computer programs and websites usually calls for the assistance of counsel, at least the first time.

Because the costs of a copyright infringement lawsuit can often exceed the likely damages recovery, especially in isolated instances of infringement, the copyright holder may, as a practical matter, have no real remedy for infringement unless he or she is eligible for statutory damages and attorney's fees. Those who fail to timely register their works have limited remedies. It behooves any business whose assets include copyright-protected works to set up a registration program that will enable them to obtain full and meaningful remedies under the Copyright Act.

EPA Regulations Change, Limiting Trade Secret Protection of Chemicals

The United States Environmental Protection Agency (EPA) recently took several actions to increase transparency regarding chemicals and their potential environmental and health risks. These changes will reduce the trade secret protection previously available to chemical manufacturers.

The regulatory changes involve the 1976 Toxic Substance and Control Act (TSCA), which prohibits manufacture of chemicals that are not on the TSCA chemical inventory. The EPA reviews new chemicals for possible addition to the inventory, and can regulate or refuse approval to manufacture chemicals found to have unreasonable environmental or health risks. The TSCA also requires public access to chemical health/safety information, including certain health studies involving inventory chemicals. However, manufacturers can claim the actual identities of chemicals as Confidential Business Information (CBI) to protect legitimate commercial interests. As a result, companies have routinely claimed chemical identities as CBI, arguing that competitors could use a disclosed chemical identity to learn trade-secret manufacturing processes for that chemical. This practice has led to much criticism that companies abuse CBI protections to the detriment of the public and the environment.

The EPA responded to that criticism this year with a series of actions limiting protection of chemical identities. In January 2010, the EPA announced in the Federal Register (75 Fed. Reg. 3462) its plan to begin rejecting CBI claims on chemicals listed on the public portion of the TSCA inventory when those chemicals were submitted to the EPA with studies showing a substantial health and environmental risk. This change imposes a surprising limit on what previously were routine CBI claims permitted with few limitations.

More recently, the EPA took this new policy even further. In May 2010, the EPA published another notice (75 Fed. Reg. 29754) indicating that it would begin routinely reviewing CBI claims regarding all chemical entities that are part of a health/safety study. The EPA explained that, where a chemical identity does not explicitly contain manufacturing process information or reveal portions of a chemical mixture, the chemical identity will not receive confidential treatment. The EPA further proposed amendments to the TSCA in August (75 Fed. Reg. 49658) to require CBI claims to be accompanied by an upfront, detailed, written explanation of why the chemical identity should be confidential.

The EPA's revised take on chemical identity confidentiality seems timely in view of current concerns about the identity of chemical dispersants used in the British Petroleum (BP) oil spill. These dispersants are intended to break down oil in the ocean before it can reach the shore, but scientists have raised toxicity concerns about the dispersants' potential short- and long-term environmental effects. Yet, CBI claims have limited what information the EPA can release about these chemicals. The EPA's recent policy changes will likely increase future public availability of data regarding chemicals used by oil companies.

Going forward, chemical manufacturers may still protect well-justified chemical trade secrets under the TSCA. However, given the EPA's current stated goal to increase transparency, companies should plan for a continued trend toward reducing trade secret protection and increasing public access to information.

The Federal Circuit Rejects Attempt to Narrow Standing Requirements for False Patent Marking Claims under 35 U.S. C. § 292

On August 31, 2010, the Federal Circuit rejected a procedural attempt to stem the recent flood of "false patent marking" lawsuits in *Stauffer v. Brooks Brothers, Inc.,* No. 2009-1428, -1430, -1453, 2010 U.S. App. LEXIS 18144 (Fed. Cir. Aug. 31, 2010). It determined that the statutory assignment of the United States' rights in section 292(b) operates to confer standing on an individual as long as the individual alleges that the United States suffered an injury in fact, causally connected to the defendant's conduct that is likely to be redressed by the court.

The *Stauffer* decision is part of the recent surge of false marking suits filed since the Federal Circuit ruled last December that penalties in false marking actions should be imposed on a per article basis, as opposed to the previous single $500 penalty for all individual examples of a falsely marked product. This change caused concern for manufacturers who now may be exposed to large fines for inaccurately marked goods produced in large volumes. See *Forest Group, Inc. v. Bon Tool Co.,* 590 F.3d 1295 (Fed. Cir. 2009). Section 292 prohibits affixing the word "patent" to an unpatented article with the purpose of deceiving the public and specifically allows individual plaintiffs to pursue claims in the government's stead: "any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States." 35 U.S.C. § § 292(b). The *Stauffer* case dealt with allegations that a mechanism contained within Brooks Brothers' bow ties were falsely marked with patent numbers that had expired in the 1950s. In its decision, the Federal Circuit first clarified that section 292's *qui tam* provision operates to confer standing on an individual based on the United States' partial assignment of its damages claim to "any person." "Stauffer's standing arises from his status as 'any person' and he need not allege more for jurisdictional purposes." Therefore, an individual need only allege that the United States suffered an injury in fact casually connected to the defendant's conduct that is likely to be redressed by the court. The individual is not required to allege injuries to himself or to the public in order to satisfy standing requirements. On that basis, the Court expressly declined to address whether Stauffer's alleged injuries to himself or alleged injuries to competition were sufficient to give him standing.

The Federal Circuit also addressed the question of what constitutes sufficient injury in fact to the United States under Article III. Brooks Brothers had argued that abstract harm, such as injury to the interest in seeing that the law is obeyed, is not sufficiently concrete to meet standing. The court disagreed, accepting the government's argument that in enacting the false marking statute, Congress determined that violation of that act is sufficient injury in fact to confer standing on the government and thus on Stauffer as the governments' assignee.

Additionally, although the court did not rule on the issue, *amicus* Ciba had argued that section 292 is unconstitutional on the basis that the government cannot assign a claim to an individual without retaining control over that individual's actions because such an assignment would constitute a violation of the "take care" clause of Article II, Section 3 of the Constitution. While the Federal Circuit declined to address this issue, the argument may prove to be a viable defense for a business facing a challenge to its marking practices in the future.

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