No. 09-35969

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TIMOTHY S. VERNOR,

Plaintiff-Appellee,

v.

AUTODESK, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
in Case No. C-07-1189-RAJ (Hon. Richard A. Jones)

BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, and ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae the Electronic Frontier Foundation, Public Knowledge, the American Library Association (which includes the Association of College and Research Libraries), and the Association of Research Libraries (collectively, "Amici") state that none of Amici have a parent corporation and that no publicly held corporation owns 10% or more of the stock of any of Amici.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislative Authorities

Other Authorities

STATEMENTS OF IDENTITY AND INTEREST OF AMICI CURIAE

This brief is filed pursuant to Fed. R. App. Proc. 29(a) and 9th Cir. R. 29-2 with the consent of all parties.

The Association of Research Libraries is a nonprofit organization of 125 research libraries in North America, including university, public, governmental, and national libraries. The American Library Association is a nonprofit professional organization of over 65,000 librarians and friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries, the largest division of ALA, is a professional association of academic and research librarians. Collectively, these three library associations represent over 139,000 libraries in the United States. These libraries rely on the first sale doctrine to lend books and other materials to the public and to accept donations of special collections.

The Electronic Frontier Foundation (EFF) is the nation's leading nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 14,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between copyright law and the public interest.

Public Knowledge (PK) is a Washington, D.C. based not-for-profit public interest advocacy and research organization. PK promotes balance in intellectual property law and technology policy to ensure that the public has access to knowledge and the ability to freely communicate and innovate in the digital age.

INTRODUCTION

This Court's precedents require it to grant Appellee's Petition for Rehearing *En Banc*. The district court correctly found that this Court's precedents on determining ownership of copies of copyrighted works are in irreconcilable conflict. The conflicting precedents at issue cannot be distinguished, as the conflict stems from disparate legal frameworks. Thus, the panel should have referred the matter for *en banc* review. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*) ("the appropriate mechanism for resolving an irreconcilable conflict is an *en banc* decision. A panel faced with such a conflict must call for *en banc* review..."); *see also United States v. Hardesty*, 977 F.2d 1347, 1347-48 (9th Cir. 1992) (*en banc*).

Instead, the panel attempted to resolve the conflict. Unfortunately, that effort ignored this Court's precedents, and created further conflicts with prior decisions from the Supreme Court, this Court, and other circuit courts.

Consumers, innovators, libraries and software vendors rely on the first sale doctrine; it is an essential part of the traditional copyright balance. With respect, the panel's decision threatens to upend that balance, to the severe detriment of the public. Amici respectfully urge the Court to reconsider the decision *en banc*.

ARGUMENT

I. This Court's Precedents Require That the Conflict between *United States v. Wise* and the "*MAI* Trio" Be Resolved By *En Banc* Review.

This case presents the question of how to determine the ownership of *copies* of copyrighted works. This Court's precedents on this question differ dramatically, on how to determine the nature of a transaction involving the transfer of a tangible copy.

A. This Circuit's Prior Precedents on How to Determine Ownership of Copies of Copyrighted Works Cannot Be Reconciled.

1. The "Economic Realities" Approach.

In *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), *cert. denied*, 434 U.S. 929 (1977) the court determined copy ownership based on the economic realities of the transaction. As the court noted: "'in each case, the court must *analyze the arrangement at issue* and decide whether it should be considered a first sale.'" *Id*. at 1188-89 (*emphasis added*) (quoting *United States v. Bily*, 406 F. Supp. 726, 731 (E.D. Pa. 1975)).

Wise involved motion picture prints provided under various agreements to "VIPs" and others. *Id*. at 1184. One such agreement allowed an actor to retain a film print "at all times" for her "personal use and enjoyment," but purported to prevent her from transferring the print to anyone else. *Wise*, 550 F.2d at 1192. The court determined that this contract described a sale despite the purported restrictions on transfer, illustrating that such restrictions were not dispositive.

This Court followed the *Wise* "economic realities" approach in *Microsoft Corp. v. DAK Indus.*, 66 F.3d 1091 (9th Cir. 1995), which addressed whether a software transaction was "a lump sum sale" or merely "a grant of permission to use an intellectual property." *DAK Indus.*, 66 F.3d at 1095. Noting that the label on a transaction had little to do with its import, the Court looked beyond the transaction's "form to the 'economic realities of the particular arrangement...'" *Id*. After considering a host of factors, the court concluded that "the economic realities of this agreement" indicated that it was a sale. *Id*. at 1096 n.2.

District courts within this Circuit, including the court below, have applied the *Wise* "economic realities" approach to determining copy ownership. *Softman Prods. Co. v. Adobe Sys. Inc.*, 171 F. Supp. 2d 1075, 1084 (C.D. Cal. 2001) ("It is well-settled that in determining whether a transaction is a sale, a lease, or a license, courts look to the economic realities of the exchange.") (citing *DAK Indus.* and *Wise*); *Datalex (Ireland) Ltd. v. PSA, Inc.*, No. 01-06482, 2003 U.S. Dist. LEXIS 27563, *6 (C.D. Cal. Jan. 30, 2003) ('Economic realities' of exchange determine whether transaction is sale, lease, or license. (citing *DAK Indus.*)); *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1060 (C.D. Cal. 2008) ("In determining whether a transaction is a sale or a license, courts must analyze the 'economic realities' of the transaction.") (citing *DAK Indus.*).

2. The Approaches of the "*MAI* Trio."

A conflicting approach to determining copy ownership originated with a cursory footnote in *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 518 n.5 (9th Cir. 1993). Citing no authority, the Court declared that "Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117." *Id*. With this, it adopted without discussion an approach to determining copy ownership that appears to rely exclusively on the label applied to the transaction.

The Court's conclusion has been widely criticized by leading commentators[1] and other appellate courts.[2] In particular, the *MAI* court's statement conflates the intangible copyright with the tangible copy, and thus fails to recognize that a licensee of one or more of the rights of copyright might also be an owner of a particular copy.[3]

Similarly, in *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995) the court erroneously assumed that there was an insuperable distinction between licensees of a right under copyright and owners of copies of

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1 2 David Nimmer & Melville B. Nimmer, Nimmer on Copyright § 8.08 [B][1][c] (2009).

2 *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.3d 769, 786 n.9 (9th Cir. 2006); *DSC Commc'ns. Corp. v. Pulse Commc'ns., Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999).

3 *Contra Wise*, 550 F.2d at 1187. This is a centuries-old principle, codified at 17 U.S.C. § 202, and recognized repeatedly by the courts. *See, e.g.*, *Ager v. Murray*, 105 U.S. 126, 129-30 (1882); *Stevens v. Gladding,* 58 U.S. 447 (1855); *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948); *Harms v. Cohen*, 279 F. 276, 281 (E.D. Pa. 1922); *Werckmeister v. Springer Lithographing Co.*, 63 F. 808, 811-12 (C.C.D.N.Y. 1894); *Hughes Tool Co. v. Fawcett Pubs., Inc.*, 315 A.2d 577, 579-80 (Del. 1974).

copyrighted works when it wrote, "In 1986, however, Triad began licensing rather than selling its software[.]" *Id*. at 1333.

Finally, in *Wall Data Inc. v. L.A. County Sheriff's Dep't*, the Court relied entirely on *MAI* (without referencing or distinguishing *Wise*) to conclude that "if the copyright owner makes it clear that she or he is granting only a license to the copy of software and imposes significant restrictions on the purchaser's ability to redistribute or transfer that copy, the purchaser is considered a licensee, not an owner, of the software." 447 F.3d at 785.

This trio of decisions is diametrically opposed to *Wise*. The "economic realities" approach holds that the labels applied to the transaction by the copyright owner are not dispositive and that the copyright owner's claim to reserve title to the copy will not be given credence when other realities of the transaction contradict this assertion. Most important to the economic realities approach is whether the possessor of the copy has a right to perpetual possession—a traditional hallmark of ownership.

Under the first two cases within the *MAI* trio, then, a bald assertion that one licenses and does not sell software is usually enough to settle the copy ownership question, and if there is any doubt, *Wall Data* suggests that purporting to impose additional restrictions seals the deal. These approaches to determining copy ownership utterly conflict with the approach taken in *Wise* and *DAK Indus*.[4]

B. These Precedents Cannot Be Distinguished Because the Conflict is About the Appropriate Analytic Framework to Adopt in Determining Copy Ownership.

The panel attempts to "reconcile" the differing precedents by creating an analytical framework that incorporates language from both sets of cases. This approach sidesteps the requirement that a court must decide between conflicting analytic approaches *en banc*. *Atonio*, 810 F.2d at 1478-79; *Hardesty*, 977 F.2d at 1347-48.

The panel attempted to reconcile *Wise* and the *MAI* trio by selecting three factors from those mentioned in the two frameworks. But these differing approaches cannot co-exist: if the copyright owner may retain title simply by claiming to do so, then the court can disregard the actual economic arrangement between the parties, and if the court must look to the economic realities of the situation, then the copyright owner's use of the word "license," coupled with the imposition of transfer and use restrictions, cannot control.

To be sure, the Court should "reconcile prior precedents if [it] can do so," which is one reason *Atonio* allows a court to distinguish cases when differing facts militate towards applying a different legal framework. *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1058 (9th Cir. 2006). Thus, in *Cisneros-Perez*, the Court was able

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[4] *See* Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, Berkeley Tech. L.J. (forthcoming), *available at* http://ssrn.com/abstract=1586580

to reconcile apparently conflicting precedents by distinguishing the facts at issue and applying separate precedents to separate factual scenarios. 451 F.3d at 1058-59. Here, however, the panel has attempted to merge separate analytical frameworks involving similar facts. Under *Atonio*, *en banc* review is required.

II. Consideration by the Full Court is Necessary to Secure Uniformity of the Court's Decisions.

En banc rehearing is also necessary to ensure that the decision conforms to both Supreme Court precedent and the leading case: *Wise*.

A. <u>The Panel's Decision Conflicts with the Supreme Court's Decision in *Bobbs-Merrill Co. v. Straus*.</u>

The foundational first sale case of *Bobbs-Merrill Co. v. Straus* is directly applicable. There, the copyright owner attempted to use a notice attached to a work to control post-sale distribution of copies of that work. 210 U.S. 339 (1908). The Supreme Court held that such terms should not give the copyright holder "a right not included in the terms of the statute, and. . . extend its operation, by construction, beyond its meaning." *Id.* at 351.

The panel held that Autodesk may do exactly what Bobbs-Merrill could not, as long as it calls the text a "license" and restricts usage and transfer. On this logic, if only Bobbs-Merrill had drafted its in-book notice differently, the first sale doctrine need not have existed in the first place.

The panel attempts to distinguish *Bobbs-Merrill* by noting that the Court itself observed that there was no claim in that case regarding license agreements.

Id. at 350. However, this cannot mean that the Supreme Court intended to turn its decision upon a publisher's failure to recite that the notice in the book was a license. Taken in context, the Court was stating that its holding depended upon statutory construction, and not the interpretation of either a contract or license agreement.[5] In making this distinction, the Supreme Court actually highlights the need to recognize when remedies would lie in contract law (as when a lessee fails to abide by the terms of the lease), as opposed to copyright law.

B. The Panel's Decision Conflicts with *United States v. Wise*.

In adopting its test, the panel claimed to incorporate the *Wise* precedent, but its analysis conflicts with *Wise* by relying upon only three factors, all of which are determined at the discretion of the agreement's drafter. Because *Wise* remains the leading case (as explained by the district court), this conflict cannot be allowed to stand. *Vernor v. Autodesk, Inc.*, No. C07-1189RAJ, 2009 U.S. Dist. LEXIS 90906, at *35-36 (W.D. Wash. Sep. 30, 2009).

Indeed, the panel's three-pronged test ignores the realities of the circumstances under which the recipient paid for and expected to gain possession and use of the copy, including any expectations of possession or return. Instead, it looks to the vocabulary by which the agreement refers to itself, the transfer

[5] "We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book." 210 U.S. at 350.

restrictions within the agreement, and any use restrictions within the agreement—all factors entirely within the control and discretion of the copyright holder.

By contrast, the *Wise* court inspected, among other things, the payment of the cost of the copy[6] and whether the possessor actually maintained control over the copy.[7] These determinations are not solely dependent upon the language of the purported license agreement; instead, they require a court to assess the details and context of the transaction. Whether or not the actor maintained possession of her copy of the film—a factor considered relevant by this Court—is not encompassed by the three factors the panel proposes. The conflict is clear and irreconcilable.

III. This Proceeding Involves a Question of Exceptional Importance.

This proceeding involves a question of exceptional importance because the panel's decision (1) conflicts with the Second Circuit's approach, set forth in *Krause v. TitleServ*; (2) undermines congressional policy; and (3) tilts the traditional copyright balance against the public interest.

A. <u>The Panel Decision Conflicts with the Authoritative Decision of the United States Court of Appeals for the Second Circuit in *Krause v. Titleserv*.</u>

A question of exceptional importance exists where "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals

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[6] 550 F.2d 1180 at 1192 ("While the provision for payment for the cost of the film, standing alone, does not establish a sale, when taken with the rest of the language of the agreement, it reveals a transaction strongly resembling a sale with restrictions on the use of the print.").

[7] *Id*. ("No evidence was presented with respect to the whereabouts of the print furnished to Vanessa Redgrave.").

that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). This decision does just that, directly contradicting the Second Circuit's approach in *Krause v. Titleserv*, 402 F.3d 119 (2005). In *Krause*, the court determined copy ownership in applying section 117's "essential step" limitation to copyright. Like section 109, section 117's applicability depends upon ownership of the copy of the work. As in *Wise*, the *Krause* court made its determination based upon the economic realities of the transaction, giving relatively short shrift to the question of title in favor of a focus on "incidents of ownership" of a particular copy. *Id.* at 123-24. These "incidents of ownership" included payment of substantial consideration for the recipient's sole benefit, location of the copies on recipient's computers, lack of repossession right by the copyright holder, permanent possession of the copy, and the right of the recipient to discard or destroy the copy. *Id.* at 124.

The piece of paper accompanying boxed software could satisfy all of the factors cited by the panel, while none of these "incidents of ownership" would change at all. Following *Krause*, a Second Circuit panel presented with facts similar to those raised here would undoubtedly rule in Vernor's favor. The panel's decision creates a circuit split with the Second Circuit.

B. <u>The Panel Decision Expands Exclusive Rights For Copyright Owners, Contrary to Congressional Policy.</u>

The Copyright Act carefully enumerates the exclusive rights of copyright owners in 17 U.S.C. § 106, and circumscribes those rights by indicating that those rights are "subject to" the limitations and exceptions found in sections 107 through 122. 17 U.S.C. § 106.

Unfortunately, the panel's decision departs from the statutory framework, implicitly suggesting that copyright owners may distribute their copyrighted works by "license." *Vernor v. Autodesk*, No. 09-35969 2010 U.S. App. LEXIS 18957 (9th Cir. Sep. 10, 2010). Software distributors have embraced a fiction and chosen a word to describe it—"license"—that had a pre-existing use within copyright, leading many courts, such as the *MAI* court, to conflate *copyrights* with rights in copies. But when software distributors use the word "license" here they are not speaking of licensing copyrights, but of a new notion of permanently transferring a good while purporting to retain title to the transferred good.

This Court should not endorse that confusion. An implied right to distribute by "license" contradicts the terms of the statute (which gives copyright owners only the right to distribute "by sale or other transfer of ownership, or by rental, lease, or lending"),[8] and cannot be squared with traditional principles of property. Simply put, there is no such thing as distribution of tangible goods by "license," neither in the Copyright Act, nor in any other area of commerce. One licenses exclusive *rights,* not tangible *things*.[9]

[8] 17 U.S.C. § 106(3).

[9] Of course, one may transfer possession without necessarily transferring title—by lending, renting, or leasing. But these distributions are all conditioned upon the existence of a non-

The limitation on a copyright owner's distribution right is a natural expression of the purposes behind the right. Congress did not create the distribution right to empower copyright owners to control disposition of tangible property, but rather to buttress the reproduction right by giving copyright owners recourse against illegitimate distributors who had not themselves infringed the reproduction right and thus might otherwise escape punishment. *See* Nimmer, § 8.12[A]. This gap-filling rationale does not apply to resales of authorized copies:

> In such circumstances, continued control of the distribution of copies … is rather primarily a device for controlling the disposition of the tangible personal property that embodies the copyrighted work. Therefore, at this point, the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation.

Id. Indeed, in any other context, if one purported to give a tangible good to someone else and told him that he was free to keep it forever, destroy it, or throw it away, the recipient would rightly assume (as buyers of mass-distributed software do now) that he was the owner of that good. Indeed, in cases where no other rule governs, the Uniform Commercial Code's "Passing of Title" rules also limit sellers to the reservation of at most a security interest—reservation of title after sale and delivery is simply not possible. U.C.C. §2-401(1)-(3); *see also* U.C.C. §1-201(35).

Put another way, the panel's decision allows the wording of an agreement between two parties to create a servitude that runs with a tangible good—a

permanent lending term.

covenant running with a chattel. Allowing boilerplate text to create a perpetual restraint on alienation creates precisely the situation that the Supreme Court sought to prevent in *Bobbs-Merrill*:

> Was [the statute] intended to create a right which would permit the holder of the copyright to fasten, by notice in a book . . . a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? . . . [o]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it.

210 U.S. at 349-50.

From its inception, the first sale doctrine has helped reconcile the limited statutory monopoly granted to copyright owners with traditional property law policies in favor of free alienability. *See id.*; *see also Brilliance Audio, Inc. v. Haights Cross Commc'ns, Inc.*, 474 F.3d 365, 374 (6th Cir. 2007); Joseph Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 Wm. & Mary L. Rev. 1245, 1291 (2001). Software vendors should not be able to bypass these fundamental principles with "magic words."

C. The Panel's Interpretation of the First Sale Doctrine Would Undermine the Traditional Copyright Balance.

Because it mediates between the tangible property interests of consumers and the intangible property interests of copyright owners, the first sale doctrine promotes access to knowledge and culture and fosters vibrant secondary markets that lower prices for consumers. In a world where myriad products incorporate software and come laden with purported "end-user license agreements," allowing software vendors to trump the first sale doctrine with the right "magic words" could significantly harm to the public interest. While the panel felt Congress should address policy considerations, courts developed numerous copyright principles at common law, including the first sale doctrine, and courts have ample room to apply and develop common law rules that preserve the benefits of the first sale doctrine in the digital marketplace. *See* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. (forthcoming), *available at* http://ssrn.com/abstract=1669562.

1. The first sale doctrine promotes important economic and democratic values.

While the grant of exclusive rights drives the creation of expressive works, the first sale doctrine has guaranteed the preservation and continued availability of expressive works. After their in-print lives end, libraries, archives, video rental establishments, and second-hand markets continue to make works available and accessible. Lawrence Lessig, *Free Culture* 113 (2004). Without a robust first sale doctrine, these activities would be imperiled by a copyright owner's distribution right.

Moreover, by decentralizing control over copyrighted works, the first sale doctrine promotes essential privacy and First Amendment values. *See* Liu, *supra*; R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev. 577, 583-610 (2003). With copies scattered among libraries, second-hand stores, and personal collections, consumers are able to access works without revealing their reading and viewing choices to copyright owners or other central authorities. This decentralization also hampers copyright owners from censoring or suppressing particular works after commercial release. *See* Reese, *supra* (collecting examples of copyright owners attempting to suppress works after initial publication); Geoffrey A. Fowler, *Kindle's Orwellian Moment*, Digits, Wall St. J. (Jul. 17, 2009).[10]

2. The first sale doctrine supports vibrant secondary markets that benefit consumers.

Vibrant secondary markets for copyrighted works also save consumers money. In recent years, the Internet has vastly increased the reach and efficiency of secondary markets, increasing the dividends that the first sale doctrine has paid to the public. Consumers can buy, sell, and swap unwanted books, CDs, DVDs, and software thanks to services like eBay, craigslist, Amazon.com, BookMooch and SwapTree. The rise of these secondary markets has unlocked new value in consumers' personal libraries and helped mitigate the environmental impact of producing the goods.

AutoDesk and its supporting amici suggested that a weakened first sale doctrine benefits consumers by facilitating price discrimination. *Vernor v. Autodesk*, 2010 U.S. App. LEXIS 18957, at *34-35. However, leading researchers

[10] http://blogs.wsj.com/digits/2009/07/17/an-orwellian-moment-for-amazons-kindle/.

have found that "it is impossible to say, in the abstract, whether price discrimination increases or decreases aggregate social welfare." William W. Fisher, *When Should We Permit Differential Pricing of Information?*, 55 U.C.L.A. L. Rev. 1, 22 (2007); *see also* Wendy Gordon, *Intellectual Property as Price Discrimination*, 73 Chi.-Kent L. Rev. 1367, 1390 (1998).

In addition, license agreements impose significant information costs, as conscientious buyers are forced to parse the terms of the agreement (as well as updates thereto). *Cf.* Aleecia McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies* 4 ISJLP Vol. 3 (2008);[11] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 3 (2000). By contrast, the first sale doctrine reduces such costs by providing consumers with a reliable, consistent and well-known rule. Herbert J. Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, NYU Annual Survey of American Law at 25 (2010); Liu, *supra*; Molly Shaffer Van Houweling, *The New Servitudes*, 96 Geo. L. Rev. 885, 897-98 (2008).

CONCLUSION

For the foregoing reasons, Amici respectfully urge the full Court to review the panel's decision and overrule an unworkable framework that could cripple future uses of software and other copyrighted works.

[11] *Available at* http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf.

Dated: October 12, 2010

By: */s/ Corynne McSherry*

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Brief of Amici Curiae complies with the type- volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 4,143 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

October 12, 2010 By: *<u>/s/ Corynne McSherry</u>*

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2010, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 12, 2010 By: *_/s/ Corynne McSherry_*

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