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Sent: Monday, September 26, 2016 5:12 PM
To: ATR-LPS-IPGuidelines
Subject: Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property

I believe that the proposed changes by the FTC and DOJ are a bit narrow when it comes to copyrights in literary works consisting of computer programs, and I would like to suggest a more enlightened and “copyright purist” approach.

Over the past several years, the Business Software Alliance has been developing a mantra, or sorts, claiming that “software is licensed, not sold.” This claim is demonstrably false, yet it is confounding courts and consumers — and even the DOJ/FTC’s “Example 1” in the Proposed Update. Example 1 fails to distinguish whether ComputerCo licensed one of the 17 U.S.C. § 106 rights (as limited by §§ 107-122), or licensed mere possession of a copy. Failure to make that distinction means that Example 1 could lead the reader to conclude that the analysis applies just as well to protect them from a Sherman Act § 2 monopolization claim or a § 1 claim for entering into a licensing agreement that would, for example, prohibit the very resales that Congress placed within the exclusive control of the owner of a lawfully made copy (17 U.S.C. § 109).

In my experience, some major computer software copyright owners have indeed been purporting to “license” their copyrights in what is substantively a leveraging of limited § 106 rights into unlimited control that Congress denied them. For example, following the Supreme Court’s holding in *Kirtsaeng v. John Wiley & Sons, Inc.* (§ 109 applies to copies made abroad and intended solely for distribution abroad, such that owners of such copies were free to redistribute them in the United States without the copyright owner’s permission), Abode Systems and Microsoft Corp. have both been using the veil of “license agreements” to control such redistribution anyway. They go so far as to claim that no one may “use” the software (the computer program - a literary work) without a license.

To suggest that “software” is either licensed or sold presents a false dichotomy, because software may be licensed and sold, either separately or concurrently (17 U.S.C. § 202). Plus, the Copyright Act does not refer to “software” at all, so some clarity is needed at the inception. Example 1 (referring to Example 1 at pp. 9-10 of the Proposed Update) also uses this term — “copyrighted software,” which immediately presents an ambiguity. Nothing in the Copyright Act refers to “software.” The more precise term is “literary work” — a term which includes “computer programs” as defined in § 101.

The term “software” in the “computer program” sense has no more copyright significance than the term “book”. Both are literary works, and can refer either to the copy or the copyright. “Gone With The Wind” may refer to the literary work of authorship or to a book by that title — a “copy” (as defined in § 101), which is to say, a material object in which the intangible work is fixed. By the same token, “Adobe Acrobat Standard X for Windows” may refer to the literary work (Copyright Reg. no. TX0007357858) or the material object in which the work is “fixed” (such as a DVD onto which the work was fixed prior to distribution, or a computer hard drive, onto which the work was fixed by downloading it directly from Adobe). So, if a license from Adobe results in the fixation of the work onto a DVD or onto a hard drive, the owner of the DVD or hard drive is entitled by Congress to make certain uses of the work (e.g. § 117) or dispose of copies of the work e.g. § 109) without the copyright holder’s consent. And, the right to operate the program (non-public performance of the work) is not within the § 106 grant.

As Section 202 of the Copyright Act makes clear, whether one licenses the copyright is largely irrelevant to who owns the copy, and whether one owns a copy is largely irrelevant to who has the exclusive right to license § 106 uses of the work. But Example 1 blurs that point, suggesting that “use” is controlled by the license. No one needs a license to read a book, watch a movie, listen to music or operate a computer program like the one I am using to craft this comment. That holds true even if the book being read is an illegal copy, The copyright holder has the exclusive right to prevent public performances, but has absolutely no power, under the Act, to control non-public performances.

Accordingly, if a copyright holder’s “license” states that the owner of the copy may not redistribute it pursuant to § 109, or may not install it onto a computer pursuant to § 117, the license is attempting to unlawfully enlarge the scope of the copyright monopoly. Similarly, any “license to use the software” that is not limited to § 106 rights is a Sherman Act violation. Looking at Example 1, again, a license that purports to impose a territorial limitation on where the work may be performed non-publicly is an attempt to gain exclusive control over conduct that Congress carved out from the exclusive right grant, and intended to be left to the non-exclusive freedom of the public. Where Example 1 gives the green light to licenses that “permit use only in specified portions of the United States and in specified foreign countries,” the losing parties in *Kirtsaeng* could (as Microsoft and Adobe are currently doing) simply lace their copies with a limiting “license” nullifying § 109, which is intended to protect secondary markets and ensure wide dissemination beyond the control of the copyright holder, including gifts and lending.

“Copyright protection has never accorded the copyright owner complete control over all possible uses of his work.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). “An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.” *Id.* at 447 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 154-

155 (1975)). Any “license” that purports to gain control over uses that the Copyright Act excluded from the § 106 grant must be condemned as *per se* unlawful. *Kimbel v. Marvel Entertainment, LLC*, No. 13-720, 576 U.S. __ (June 22, 2015). Licensing agreement that purport to extend the scope of the author of a computer program's limited exclusive rights must be scrutinized under *Kimbel*, where the Supreme Court was asked to overrule a 1960s-era patent case (*Brulotte v. Thys Co.*, 379 U.S. 29 (1964)), which had held that patent holders cannot agree to be paid royalties for use of an invention after the patent expires. The Court instead re-validated *Brulotte*. The instruction is equally applicable to copyrights, which are likewise limited by both statute and by Article I, Section 8 of the U.S. Constitution. (Even more so for copyrights, given the expressive elements — speech beyond the scope of the copyright holder's exclusive rights is protected by the First Amendment; an FTC/DOJ rule that allows its private abridgment by “licensing” is itself an abridgment.) Private agreements that effectively extend the rights of the owner of intellectual property beyond the limits established by Congress are *per se* unlawful.

It warrants noting, also, that a state contract claim cannot be enforced where the license covers the same matter as the Copyright Act, resulting in the private alteration of the scope of the copyright. See 17 U.S.C. § 301. Again, given the fundamental First Amendment right at state, the government should not lend its aid to enforce private agreements that would suppress constitutionally protected speech that does not infringe the copyright. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

For the above-stated reasons, I urge the FTC and DOJ to carefully review the Proposed Update with respect to copyrights, avoid the use of ambiguous terms such as “software” and, instead, use the language of the Copyright Act (“work” of authorship, “literary work,” “copy,” etc.), and to be mindful of the very limited scope of the copyright holder's rights (including the express limitations and exceptions to § 106 specified in §§ 107-122, and the preservation of the non-exclusive right to perform or display works non-publicly from licensing encroachment).

The first recorded end-user license agreement to be litigated was in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). There, the Supreme Court condemned the leveraging of exclusive rights into broader control than the copyright grant envisioned by using a self-serving private claim of right tagged on to the exercise of the exclusive right. The following year, Congress enacted the codification of the first sale doctrine, which is now found in §§ 109 and 202: “Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.” H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909) (quoted in *Platt & Munk Co. v. Republic Graphics*, 315 F.2d 847, 851–52 (2nd Cir. 1963)). That public policy would become a dead letter, and § 109 would become superfluous, if software publishers could sell copies of their works or authorize reproductions via download, and yet retain perpetual control over the copies they no longer own by use of “reseller agreements,” “end-user license agreements,” or

requiring a “product key” to access the work that serves as a proxy for controlling uses beyond the scope of the copyright.

Thank you for your consideration.

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