

Appeals court ruling threatens used software sales

September 11 2010, By MICHAEL LIEDTKE , AP Technology Writer

(AP) -- A federal appeals court has sided with the computer software industry in its effort to squelch sales of second-hand programs covered by widely used licensing agreements.

Friday's ruling by the 9th Circuit of Appeals raised worries that it will embolden [music labels](#), movie studios and [book publishers](#) to circumvent the so-called "first-sale" doctrine in an attempt to boost their sagging sales.

The doctrine refers to a 102-year-old decision by the U.S. Supreme Court that determined copyright holders can't prevent a buyer from reselling or renting a product after an initial sale, as long as additional copies aren't made.

It's a legal principle that allows used book and music stores to operate, as well as DVD subscription services such as [Netflix Inc.](#)

But a three-judge panel in the 9th Circuit concluded the first-sale doctrine didn't apply to used [software](#) programs that online merchant Timothy Vernor peddled in his store on eBay. Vernor had bought the unopened software, made by [Autodesk Inc.](#), at garage and office sales, without ever agreeing to the [licensing agreement](#) imposed on the original buyer.

That contract made it clear the rights to install Autodesk Inc.'s software were being licensed rather than sold, according to the 9th Circuit's

interpretation.

Without a definitive sale, the first-sale doctrine is moot, the appeals court reasoned in its decision overturning a lower federal court in Washington state.

Autodesk, which is based in San Rafael, said it was pleased with the decision. The Software & Information Industry Association had filed documents supporting Autodesk's position in the case.

The ruling sets the stage for even more legal skirmishes over the definitions of a sale and a license, said Corynne McSherry, an attorney for the Electronic Frontier Foundation, a group fighting to set the boundaries of digital copyrights.

"I am sure there are going to be others (in the media) trying to find the magic words that prevent a buyer of intellectual property from being considered the owner," McSherry said.

Another round in the 3-year-old battle pitting Vernor against Autodesk seems assured. Vernor's attorney, Gregory Beck of Public Citizen, said he intends to ask a full panel of 11 judges in the 9th Circuit to review Friday's decision before considering a possible appeal to the U.S. Supreme Court.

For the moment, Beck and another attorney involved in the case, Sherwin Siy of Public Knowledge, said they expect the 9th Circuit's decision to have a chilling effect on the used software market.

That's something that [eBay](#) Inc. had hoped to avoid. The e-commerce company, based in San Jose, Calif., filed a brief in support of Vernor's legal arguments citing the protections under the first-sale doctrine.

Many other popular software programs already installed on home and office computers are covered by licensing agreements using similar language to Autodesk's programs, Beck said.

"That means the infrastructure already is in place for other software makers to say their customers don't really own those programs," he said.

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