


# Software business practices

 UPPSALA  
UNIVERSITET

**Software business practices:  
license versus sale**

Assoc. Prof. *Sanna Wolk*  
Academy of Intellectual Property,  
Marketing and Competition Law  
Uppsala University, Sweden

---

---


---

---

---

---

---

 UPPSALA  
UNIVERSITET

**Software business practices**

**Part 1 of 3 — Where Software Business Is Today**  
Technology changes everything

- Society, business practices and the law
- Computer technology is a recent example of this

/ Sanna Wolk

---

---


---

---

---

---

---

 UPPSALA  
UNIVERSITET

**Software business practices**

**Part 1 of 3 — Where Software Business Is Today**  
From hardware to software

1930-50s	Development of digital computers
1960s	Computers are used in different areas
1970s	Personal computers
1980s	Separation of hardware and software
1990s	Internet expand the software industry
2000s	Software is the central component
2010s	Real-time (remote) software

/ Sanna Wolk

---

---

---


---

---

---

---

# Software business practices

 UPPSALA UNIVERSITET

## Software business practices

**Part 1 of 3 — Where Software Business Is Today**

Software distribution - a single software market

- Mass distribution
- Globalised
- Digitalised
- Has shifted from physical to digital distribution

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

## Software business practices

**Part 1 of 3 — Where Software Business Is Today**

Consuming software

- Broadband has changed our consumer patterns
  - A big challenge for the gaming industry
- Face-to-face contact has been increasingly replaced by Internet consuming

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

## Software business practices

**Part 1 of 3 — Where Software Business Is Today**

Software transfers

- Software licensees are used in many different kinds of transfers
  - Third-party developers and enterprise customers
  - Consumers and users

/ Sanna Wolk

---

---

---

---


---

---

---

---

# Software business practices

 UPPSALA UNIVERSITET

## License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**

- Software transfers are globalised and digitalised
- Software license agreements are subject to local laws
  - Discrepancy between laws
- Copyright laws/practice in EU and US

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

## License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**

Software is said to be "licensed rather than sold"

- Whether software is licensed or sold affects e.g.
  - (1) The validity of post-transfers use restrictions in license agreements
  - (2) Applicable laws
  - (3) The rights of intermediaries and subsequent transferees

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

## License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**

Software is said to be "licensed rather than sold"

- Avoid the American first-sale doctrine
- Avoid Sec. 117
  - Making of Additional Copy or Adaptation by Owner of Copy
- Ability to induce different use restrictions
- So, is software licensed or sold?

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
US: Software cases

- **Sold** and not licensed
  - Softman Prod. V. Adboe (171 F. Supp 2d 1075, N.D. Cal. 2001)
- **Licensed** and not sold
  - Vernor v. Autodesk (621 F.3d 11102, 9<sup>th</sup> Cir. 2010)
    - "a software user is a licensee rather than a owner of a copy 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."
  - See also MDT Indus. LLC v. Blizzard Enrm't (629 F.3d 928, 9<sup>th</sup> Cir. 2010) / Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
US: Software cases

- **Sold** and not licensed
  - UMG Recordings v. Augusto (628 F.3d 1175, 9<sup>th</sup> Cir. 2010)
  - Promotion CD

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
US: conclusion

- The "licensed" view dominates today as long as the requirements in Vernor v. Autodesk are met:
  - *specifies that the user is granted a license,*
  - *significantly restricts the user's ability to transfer the software, and*
  - *imposes notable use restrictions*

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
EU: Software case  
-Oracle v. UsedSoft (CJEU 3 July, 2013, C-128/11)  
- Issue: Making available programs to the public v. the right of distribution of the program copy (resale)  
- Art. 4(2) of the Computer Program Directive (2009/24/EC), states that:  
"The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof."  
/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
EU: Software case  
- Oracle v. UsedSoft (CJEU 3 July, 2013, C-128/11)  
- The "principle of the distribution right applies not only where the copyright holder markets copies of his software on a material medium such as a CD-ROM or DVD but also where he distributes them by means of downloads from his website"  
- "Where the copyright holder makes available to his customer a copy ... that rightholder ...thus exhausts his exclusive distribution right"  
- "Such a transaction involves a transfer of the right of ownership of the copy"  
/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
EU: conclusion  
- "Sale" as long as the requirements in Oracle v. UsedSoft are met  
- Not limited in time  
- One-time fee  
- "Leased" if  
1. Limiting software transfers in time, and  
2. Require recurring fees  
/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 2 of 3 — Where © Laws/Practice Are Today**  
EU and US: comparison

- It is a quiet clear difference between EU and US law
  - In EU perpetual software transfer, against single payment, has been considered sale
  - Under American law the same software transfer should properly be considered as licensed
  - However, these differences are not completely static

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### License v. Sale

**Part 3 of 3 — Where Are We going?**

- Digital content and software via the Internet
  - Distribution or reproduction when downloading software?
    - Should rules applicable to the purchase of software on a CD or a DVD differ from those applicable to the purchase of software through an online channel?
  - Hardware connection?
    - Digital camera and other products where software is the main component
  - Is remote software the future?
    - Hosting software is a booming business model

/ Sanna Wolk

---

---

---


---

---

---

---

---

 UPPSALA UNIVERSITET

### Thank you very much for your attention!

Assoc. Prof. Sanna Wolk  
Academy of Intellectual Property,  
Marketing and Competition Law  
Uppsala University, Sweden  
Phone: +46 709 62 62 82  
E-mail: sanna.wolk@jur.uu.se  
Web: www.wolk.se

Co-chair of the Copyright Committee  
of the International Association for the  
Protection of Intellectual Property (AIPPI)

---

---

---

---

---

---

---

---