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

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
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

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

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
Software business practices

**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

**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

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

US: Software cases
- Sold and not licensed
- Licensed and not sold
  - Vernor v. Autodesk (621 F.3d 11103, 9th 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 Entm’t (629 F.3d 928, 9th Cir. 2010)

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, 9th Cir. 2010)
  - Promotion CD

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
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.”

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”

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
Software business practices

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

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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

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Thank you very much for your attention!

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