



copyright alliance

Connecting creators · Protecting creative work

**BEFORE THE
U.S. COPYRIGHT OFFICE**

Software-Enabled Consumer Products

Docket No. 2015-6

COMMENTS OF THE COPYRIGHT ALLIANCE

INTRODUCTION AND BACKGROUND

The Copyright Alliance appreciates the opportunity to respond to the Notice of Inquiry relating to *Software-Enabled Consumer Products* published by the U.S. Copyright Office in the Federal Register on December 15, 2015.

The Copyright Alliance is a non-profit, public interest and educational organization that counts as its members over 15,000 individual creators and organizations across the spectrum of copyright disciplines. The Copyright Alliance represents the interests of authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, game designers and many other independent creators. The Alliance also represents the interests of book publishers, motion picture studios, software companies, music publishers, sound recording companies, sports leagues, broadcasters, guilds, and newspaper and magazine publishers, and many more organizations.

What unites these individuals and organizations is their reliance on the copyright law to protect their freedom to pursue a livelihood and career based on creativity and innovation and to protect their investment in the creation and dissemination of copyrighted works for the public to enjoy. The copyright law is critical not only to their success and prosperity, but also the short and long-term success of the U.S. economy.

Copyright is an essential factor in the contributions of U.S. creative industries to the economy and to jobs. According to the most recent *Copyright Industries in the U.S. Economy* report, the core copyright industries in 2013 added \$1.1 trillion in value to U.S. GDP, accounting for 6.71% of the U.S. economy.¹ These industries employed nearly 5.5 million workers (or 4.03% of the total U.S. workforce) and these employees earned 34% higher compensation than the average U.S. annual wage.²

As with other creative sectors, copyright drives innovation in the software industry, an industry that is flourishing in the digital age under the current legal framework. Between 1997 and 2012, software industry production increased from \$149 billion to \$425 billion; and the software industry's direct share of U.S. GDP increased from 1.7 percent to 2.6 percent (or more than 50 percent).³ Additionally, from 1990 to 2012, business investments in software grew at a rate more than twice that of all fixed business investments.⁴ Direct employment in the software industry also increased from 778,000 jobs in 1990 to 2.5 million jobs in 2014.⁵ Though it is perhaps consumers who have benefited the most from this explosion of software-driven innovation, seeing a wide range of new software products and new products that incorporate software.

While we believe this is an important inquiry for the Copyright Office to undertake, the study falls short by failing to identify the specific problems surrounding software-embedded products. To the extent concerns have been voiced about the scope of copyright protection afforded to embedded software and products that contain embedded software, these concerns seem to be largely hypothetical, with no basis in fact. Important changes in copyright policy and law, such as those being raised in the study, should not receive serious consideration unless there is evidentiary support to validate the concerns raised. Since we have seen little such evidence,

¹ STEPHEN E. SIWEK, INT'L INTELLECTUAL PROPERTY ASS'N, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT (2014).

² *Id.*

³ ROBERT J. SHAPIRO, SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, THE U.S. SOFTWARE INDUSTRY: AN ENGINE FOR ECONOMIC GROWTH AND EMPLOYMENT 4 (2014), <http://www.siiia.net/Admin/FileManagement.aspx/LinkClick.aspx?fileticket=ffCbUo5PyEM%3d&portalid=0>.

⁴ *Id.*

⁵ *Id.* at 2.

the study's attempt to distinguish and categorize different types of software, in order to afford lesser protections to certain types of software or products is both premature and unwarranted.

We are also concerned with the breadth of the study, and the ambiguity of many of the questions. Even though the study notes that “[t]his is a highly specific study not intended to examine or address more general questions about software and copyright protection,” the notice’s uniform focus on “software in everyday products” calls into question this objective. The Copyright Office seems to recognize this scope problem by asking commenters “how to define everyday products”; “whether ‘everyday products’ can be distinguished from other products that contain software, such as general purpose computers”; and “whether there are alternative ways the Office can distinguish between categories of software.” However, if the Copyright Office is looking to refine the scope of its inquiry, there are better questions to be asking.

Attempting to single out a category of software or types of “everyday products” that could potentially receive different treatment under the copyright law is an approach that is likely to result in inadvertent consequences for software developers and consumers. It would also add layers of complexity to a law that some copyright owners and users already criticize for being too complex and unwieldy.

Under copyright law, computer programs are classified as literary works, and are subject to specific provisions under several sections of the law (e.g., sections 109, 117 and 1201, discussed below). The Office now appears to be primed to potentially create a new layer to this classification, by placing some software—embedded software in certain consumer products—into a new subcategory. We question the wisdom of such an approach.

1. The provisions of the copyright law that are implicated by the ubiquity of copyrighted software in everyday products.

Copyright protection is important to all creative works, and software is no exception. Regardless of whether software is intended for use in a general purpose computer, video game console, cell phone, server, consumer product or any of the other myriad of ways that businesses; consumers and others benefit from software today. Copyright protection helps spur the creation and distribution of new software products and services for the public to enjoy.

Like most industries based on creativity and innovation, the success of the software industry depends on a meaningful copyright framework to protect and incentivize creation and distribution. While software is treated in the same manner as other types of copyrightable works, there are a few specific provisions in the copyright law where software is treated differently. The most significant and apparent of these provisions are sections 109 and 117 of Title 17.

a. Software and the First Sale Doctrine

Section 109(a) codified the first sale doctrine, an exception to the copyright owner’s distribution right that allows “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner ... to sell or otherwise dispose of the possession of that copy or phonorecord” without the authority of the copyright owner. This defense applies uniformly across most types of works. However, in the case of computer programs⁶ Congress limited the scope of the first sale defense by vesting copyright owners with the exclusive right to control the rental of their computer programs. In enacting these provisions, Congress was concerned that, “[g]iven the nature of computers and software, the overwhelming rationale for renting a computer program is to make an unauthorized copy.”⁷ This rental right prevents the owner of the particular copy of the computer program from “dispos[ing] of, or authoriz[ing] the disposal of, the possession of that ... computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or ... other act or practice in the nature of rental, lease, or lending,” for the purposes of direct or indirect commercial advantage.⁸

Significantly, for the purpose of this study,⁹ the scope of the rental right is further limited by section 109(b)(1)(B), which makes clear that the rental right does not apply to either:

⁶ We exclude a discussion of phonorecords here because it is outside the scope of the study.

⁷ *Computer Software Rental Amendments Act of 1989: Hearing on S. 198 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary*, 101st Cong. 5 (1989) (statement of Sen. Orrin G. Hatch).

⁸ 17 U.S.C. § 109(b)(1)(A) (2012).

⁹ There is an additional limitation in Section 109(b)(2)(A) that permits “the lending of a computer program for nonprofit purposes by a nonprofit library,” but this provision is not particularly relevant for this study.

- (i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or
- (ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

Section 109 also limits the remedies available against infringers of the rental right, providing that any “violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.”¹⁰

In addition to creating an exception to the copyright owner’s distribution right, section 109(c) creates an exception to the copyright owner’s display right by providing that the owner of a particular lawfully made copy may “display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.”

As discussed in more detail below, the ultimate applicability of section 109 to computer programs was limited by Congress so as not to apply to licensed software.¹¹ Importantly, with regard to software licensing, Congress made clear in section 109(d) that the first sale exceptions “do not ... extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.”¹²

b. Software and Section 117

The other provision of the copyright law that is most implicated by the ubiquity of copyrighted software in everyday products is section 117. Section 117 exempts three types of software uses from the reach of the software copyright owner’s exclusive rights. These uses include:

¹⁰ 17 U.S.C. § 109(b)(4).

¹¹ 17 U.S.C. § 109(d).

¹² When enacting the 1976 Act, Congress narrowed the defense to the “owner” of the copy, and the accompanying reports confirmed that it “does not apply to ... [a]cquisition of an object embodying a copyrighted work by rental, lease, loan or bailment.” H.R.Rep. No. 94-1476, at 80 (1975); S.Rep. No. 94-473, at 72-73 (1975) (emphasis added).

- making a copy or an adaptation “as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.”¹³
- making a copy or adaptation for archival purposes so long as all archival copies are destroyed when the user discontinues legal possession of the software.¹⁴
- making or authorizing the making of a copy of a computer program by the owner or lessee of a machine if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, provided “such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed”; and “with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.”

To limit the scope of these exceptions section 117 provides that:

- Any copy created under section 117 may be “leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.”
- “Maintenance” is limited to “the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine.”
- “Repair” is limited to “restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.”

The exemptions in Section 117 are all carefully created and limited exemptions designed to account for uses of software which might otherwise technically infringe upon a copyright

¹³ 17 U.S.C. § 117(a)(1).

¹⁴ 17 U.S.C. § 117(a)(2).

owner's exclusive rights but are both necessary to the operation and maintenance of software and not harmful to a copyright owner's interests.

c. Software and other provisions

There are several other provisions in the copyright law that are implicated by software contained in everyday products.

- Section 202 of the Act provides that the “[t]ransfer of ownership of any material object ... does not of itself convey any rights in the copyrighted work embodied in the object.” This provision makes clear that when a person purchases a CD, DVD, general purpose computer, video game console, cell phone, server, consumer product, or other product containing software, they do not, by virtue of such ownership, own any of the rights enumerated in §106 in the software that is contained within the product.
- While section 1201 of Title 17 is implicated by software contained in everyday products, pursuant to the instructions in this Federal Register notice, we will submit any comments we have on this section in our response to the request for comments regarding the Office's Section 1201 Study.
- The fair use doctrine, as delineated in section 107, does not contain any language that would be specifically implicated by the ubiquity of copyrighted software in everyday products. Nevertheless, some courts have held that under certain circumstances reverse engineering of copyrightable software may qualify as a fair use when the user decompiles the software's object code for the sole purpose of extracted unprotected elements as a preliminary step in making an interoperable system or work.¹⁵ The current state of the law allows for the freedom to provide a closed or open ecosystem, and for consumers to choose products accordingly.

The intersection between copyright protection and interoperability of software was most recently examined in litigation between Google and Oracle. The lower court *Copyrightability Decision of Google v. Oracle* “interpreted Section 102(b) to preclude copyrightability for any

¹⁵ See e.g., *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

functional element ‘essential for interoperability.... regardless of its form.’”¹⁶ The Federal Circuit reversed, holding that “Google’s interoperability arguments are only relevant, if at all, to fair use—not to the question of whether the API packages are copyrightable.”¹⁷ The court also noted that this case was factually distinguishable from *Sega*¹⁸ and *Sony*,¹⁹ two earlier cases that the lower court had relied on to support its reasoning regarding interoperability:

[B]ecause the defendants in those cases made intermediate copies to understand the functional aspects of the copyrighted works and then created new products. This is not a case where Google reverse-engineered Oracle’s Java packages to gain access to unprotected functional elements contained therein... Instead, Google chose to copy both the declaring code and the overall SSO of the 37 Java API packages at issue.²⁰

The Federal Circuit’s decision in the *Oracle v. Google* case in our opinion takes the correct approach to interoperability issues in the context of copyright law, consistent with prior decisions, and no reconsideration of the doctrine is warranted. To the extent reverse engineering and interoperability are relevant at all, they would seem to be relevant only to the circumvention of technological protection measures used to prevent reverse engineering in the context of Section 1201. We therefore withhold any further comments at this time.

2. Whether, and to what extent, the design, distribution, and legitimate uses of products are being enabled and/or frustrated by the application of existing copyright law to software in everyday products

Strong and balanced copyright law protection is necessary to incentivize software companies to develop new products and services that are widely available through various platforms, such as general use computers, video game consoles, mobile devices, and online cloud platforms. When one considers that the cost of developing a software product can cost \$100 million or more (to say nothing of other costs, like marketing and enforcement) the importance

¹⁶ (*Copyrightability Decision*), 872 F.Supp.2d 974 (N.D. Cal. 2012).

¹⁷ *Oracle Am., Inc., v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

¹⁸ *Sega*, 977 F.2d at 1522–23.

¹⁹ *Sony*, 203 F.3d at 606–07.

²⁰ *Oracle*, 750 F.3d 1339.

of copyright protection cannot be understated.²¹ Without effective copyright protection, these valuable software products could easily be infringed, thereby greatly diminishing the incentive to make them widely available to the public.

a. Licensing enables a broad range of benefits to producers, distributors, and users of software-related products

Licensing plays an essential role in the software development and distribution ecosystem. Importantly, more often than not, these licenses provide benefits to consumers beyond what can be realized through sales of software. Through licensing, software companies are able to meet the needs of a variety of different customers—whether the general public or discrete customer groups—while also protecting themselves against misuse of their rights. This has resulted in consumers now having unprecedented choice, convenience, and access to new high-tech products that simplify their lives.

The software industry has relied for decades on a licensing model for the distribution, maintenance, and updating of its software products and services to and for its customers. Today, licenses govern most software transactions. The software licensing model permits a wider range of users to access and use software on different platforms and in different ways. A software developer need not reduce or degrade the function of its product in order to provide it at a reduced price appropriate for a particular market of users. Rather, the publisher can simply vary the rights of using it. For example, OEM licenses bundle software with or installed upon specific hardware, such as a scanner or desktop computer, and require the software to be used and distributed only with that hardware. Often, the hardware manufacturer was granted a deep discount as part of the OEM license terms.

Because software is virtually always licensed and not sold, the first sale defense does not apply: someone who purchases a software license is not the “owner of a particular copy” under section 109 of the Copyright Act, they are an “owner of a license to use a copy” of the software. Although the first sale defense does not apply to licensed software, consumers usually enjoy the

²¹ See Superannuation, *How Much Does It Cost To Make A Big Video Game?* KOTAKU (Jan. 15, 2014), <http://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649> (stating that the cost of developing video games frequently exceeds \$50 million dollars, and modern blockbuster games can cost upwards of \$100 million).

same benefits they would have under the first sale doctrine.²² As stated in its recent “White Paper on Remixes, First Sale, and Statutory Damages” report, the Department of Commerce does not advise “amending the law to extend the first sale doctrine to digital transmissions of copyrighted work,” because “innovative business models and licensing terms provide some of the benefits traditionally provided by the first sale doctrine.”²³

b. Concerns related to software licensing restrictions impacting a lawful owner of physical everyday consumer products are largely hypothetical, and already being solved by the market

Some fear the practice of licensing software in everyday consumer products will prevent consumers from reselling the physical products that they own. If these complaints had any validity there would be a multitude of examples that the complainants could highlight to demonstrate the magnitude of the problem. To the contrary, we are unaware of any examples that would support these complaints.²⁴ To the extent a few such examples may actually exist, the complainants inability to identify prominent examples leads us to doubt that the problem is significant enough to warrant dramatic reforms to the copyright law. Until we find ourselves confronted with significant examples of embedded software licensors actively preventing downstream consumers from reselling products that they own, it is prudent to consider this problem as no more than theoretical posturing. This is the same conclusion that the Internet

²² Professor Raymond Nimmer explains that “the rationale of the first sale rule – that the copyright owner obtained full compensation for the sale of the particular copy – does not work” when the copy is conveyed by license. RAYMOND A. NIMMER, *LAW OF COMPUTER TECHNOLOGY* § 1.110 (2009) (noting that “[i]f a copyright owner transfers a copy for ten dollars limiting the transferee's use or redistribution of the copy to educational purposes, it cannot be said that this limited transfer yields a full return equivalent to the sale of the copy such that the transferee should be free to redistribute it in any manner that it pleases. In fact, a sale with no use or redistribution restrictions would yield more than the ten dollars.”).

²³ DEPT’ OF COMM., *WHITE PAPER ON REMIXES, FIRST SALE, AND STATUORY DAMAGES* 4 (2016).

²⁴ At least 26 years ago Congress identified the embedded software issue when, in 1990, it considered the Software Rental Act. During a July 1990 House IP Subcommittee hearing on the Senate bill and two similar House bills (HR 2740 and HR 5297), Chairman Kastenmeier noted that “computer programs found in various places—automobiles, personal computers, telefaxes, charter airplanes, apartment houses and condominiums” and Representative Synar also referred to “computer programs which may be contained as a component of another machine, such as a program which drives a mechanized robot or runs a microwave or a household kitchen utensil.” The fact that Congress identified the issue 26 years ago (and there have not been any incidents of abuse over that time) demonstrates that the potential problem alleged here has been largely a fiction. *Computer Software Rental Amendments of 1990: Hearing Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on Judiciary*, 101st Cong., 2d Sess. 2. 16 (1990) (statements of Rep. Robert Kastenmeier and Rep. Michael Synar).

Policy Task Force reached in its White Paper, saying it has seen “insufficient evidence to show that there has been a change in circumstances in markets or technology” that would warrant any changes in the first sale doctrine.²⁵ The Task Force specifically looked at issues relating to sales of consumer devices and products with embedded software.²⁶

There are many reasons that this apparent problem does not exist. First and foremost, many software licenses for embedded software allow the licensee to transfer the software to another party. For example, most, if not all, major car manufacturers permit licensed software embedded within their automobiles to be distributed in conjunction with the sale of the car itself. The following companies include such language in their respective licensing agreements:

- Mercedes-Benz embedded software licenses;²⁷
- Ford Sync End User License Agreement;²⁸
- Toyota Terms and Conditions of Your Safety Connect Telematics Service;²⁹

²⁵ DEPT’ OF COMM., *supra* note 23, at 4.

²⁶ *Id.* at 50-51.

²⁷ MERCEDES-BENZ, LICENSE AGREEMENT SUPPLEMENT, http://moba.i.daimler.com/bai-cars/ba/foss/content/en/assets/FOSS_licences.pdf.

²⁸ Here is the relevant language from Ford’s End User License Agreement:

SOFTWARE Transfer: You may permanently transfer your rights under this EULA only as part of a sale or transfer of the DEVICE, provided you retain no copies, you transfer all of the SOFTWARE (including all component parts, the media and printed materials, any upgrades, and, if applicable, the Certificate(s) of Authenticity), and the recipient agrees to the terms of this EULA. If the SOFTWARE is an upgrade, any transfer must include all prior versions of the SOFTWARE.

FORD, FORD SYNC END USER LICENSE AGREEMENT, *available at* <https://www.ford.com.au/servlet/Satellite?c=DFYArticle&cid=1249080829442&pagename=wrapper&site=FOA>.

²⁹ Here is the relevant language from Toyota’s Terms and Conditions agreement:

You cannot transfer your Service Plan to another vehicle. If you sell your Car or terminate your lease during the term of the Service Plan, you must cancel your Services by contracting us by phone. If you sell your Car or terminate your lease and do not notify us by phone, you will remain responsible for all charges for your Service Plan. The new owner of your Car cannot assume the remaining period of Service under your Service Plan. *There is no charge to cancel your Service Plan.* We reserve the right to cancel your Service Plan once notified of the sale of your Car, by you, Additional Subscribers, a dealer or new owner.

TOYOTA, TERMS AND CONDITIONS OF YOUR SAFETY CONNECT TELEMATICS SERVICE 1–2 (2010) (emphasis added), *available at* <http://www.toyota.com/safety-connect/img/safetyconnect-terms.pdf>.

- OnStar.³⁰

Moreover, if a software company ever prevented owners of an everyday product from reselling their goods on the secondary market, it would not be long before the manufacturer of that product found a different software provider to partner with. Neither the software developer or product provider would survive very long if it garnered a reputation for such anti-consumer behaviors.

Markets are self-correcting to a degree, limiting the ability for companies to engage in anti-consumer behavior. A prime example of this occurred recently when beverage system manufacturer Keurig introduced a new model coffee maker that would not allow unlicensed coffee pods to be used with its products.³¹ Keurig’s decision resulted in not only consumer backlash, but also a significant drop in its stock price. Not surprisingly, Keurig retracted its decision. This is just one story of many in which the market pushed back against an anti-consumer behavior, resulting in a retraction of the offending behavior. In fact, now, the trend seems to be more toward the creation of more “open” products, that allow for third party add-ons for, or interaction with, their products. Many industries believe that this approach gives them a competitive advantage with consumers.

3. Whether, and to what extent, innovative services are being enabled and/or frustrated by the application of existing copyright law to software in everyday products

We are experiencing an unprecedented era of innovation that in large part is due to new software innovations. Consumers benefit tremendously from access to a wide range of new software products and new products that incorporate software — the likes of which have never been seen before. The value of these new high-tech products to consumers is derived from the wide availability of software and content, and the ease by which these products can be accessed and used.

³⁰ ONSTAR, REMOTELINK END USER LICENSE AGREEMENTS 5 (2015), *available at* https://www.onstar.com/content/dam/onstar-web/temp-footer/Onstar_RemoteLink_EULAs_USE.pdf (“If you sell or transfer your Vehicle, you must notify us by pressing the blue OnStar button in your Vehicle or by calling us at 1-88-4-ONSTAR and you must stop using Services for that Vehicle.”).

³¹ *See, e.g.,* Megan Geuss, *Keurig says it was wrong to force users to buy single-serving pods* (May 7, 2015, 5:36PM), <http://arstechnica.com/business/2015/05/keurig-stock-drops-10-percent-says-it-was-wrong-about-drm-coffee-pods/>.

From augmented reality to the Internet of Things, emerging technologies are melding software and hardware in ways that promise unprecedented new applications. Copyright plays a significant role in this innovation boom. It is a critical driver of technological innovation and economic competitiveness. It encourages software developers to invest in research and product development for the benefit of consumers. It also encourages product manufacturers to invest in embedded software products that will improve their products and provide new benefits to their customers.

The U.S. business and entertainment software industries are among the fastest-growing and most important industries of the U.S. and world economies. In the past 20 years, business software has become a critical part of the operations of all industries.³² From 1997 to 2012, software industry production grew from \$149 billion to \$425 billion.³³ Software usage has also had a tremendous effect on the productivity of other industries – accounting for \$101 billion in production by other industries.³⁴

This success and innovation isn't limited to business software. The video game industry is one of the fastest growing, most innovative sectors in the U.S. economy as evidenced by the 135 million games sold and more than \$23.5 billion in revenue generated in 2015, as compared to \$2.6 billion in revenue less than two decades earlier.³⁵ Significantly, in 2013, digital games sales surpassed physical sales for the first time, and purchases of digital full games and add-on content, mobile apps, subscriptions and social network gaming generated approximately \$7.2 billion (53 percent of revenue).³⁶ The video game industry has also made significant advances in the manner by which gamers access and experience video games by developing new ways of making games available to them across a multitude of consumer platforms and devices. The

³² SHAPIRO, *supra* note 3 at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ Press Release, Entertainment Software Ass'n, U.S. Video Game Industry Generates \$23.5 Billion in Revenue for 2015 (Feb. 16, 2016), available at <http://www.theesa.com/article/u-s-video-game-industry-generates-23-5-billion-in-revenue-for-2015/>.

³⁶ *Id.*

industry also continues to enhance the gaming experience through technologies such as advanced controllers incorporating haptic feedback and virtual, augmented, and mixed reality technologies.

Today, more products are moving toward an approach that combines hardware with software to improve the functionality of traditional and newer product lines. Often, the software component is one of the most valuable aspects of the product. As is the case with stand-alone business and entertainment software, embedded software is also susceptible to illegal copying and modification and copyright law also plays an important role in protecting that software, as well as incentivizing its creation and distribution.

4. Whether, and to what extent, legitimate interests or business models for copyright owners and users could be undermined or improved by changes to the copyright law in this area.

The software industry was built on and depends on a licensing business model. The industry owes much of its success to this model, and any change in the copyright law to make the first sale defense applicable to licenses would upend long standing distribution practices relied on by the software industry, and cause significant problems that could jeopardize the future availability of software to those markets.³⁷

If undue restrictions are placed on the ability of software companies to license, the manner in which these companies license or the ability of these companies to enforce their licenses, it will be more challenging for them to recoup the investment they made to develop new software products and update existing ones and to widely distribute their software products to the public on and in the variety of platforms that so many consumers enjoy today.

³⁷ See *Vernor v. Autodesk*, 621 F.3d 1102, 1114–15 (2010). Extending the first sale defense to licensed content would also be contrary to the foundation of the first sale defense set forth in the *Bobbs-Merrill* case. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) In several parts of the decision the Court in *Bobbs-Merrill* clearly restricts the application of its decision to “one who has sold a copyrighted article, *without restriction*” and those who “*made no decision as to the control of future sales.*” See *Id.* at 350 (emphasis added) (stating that “[i]n this case, the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those *who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.*” (emphasis added). The court notes that “[t]here is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.” Thus, the Court’s language make it clear that it did not intend for the first sale defense to extend to licensed works.

Overriding software licenses could also have far-reaching, adverse effects well beyond typical harms associated with inadequate copyright protection. For example, a change in the enforceability of licenses under the copyright law might force software companies to alter the availability or scope of warranties and support services. If software licenses are not respected, competitors could much more easily steal the underlying software code to create and sell cheap imitations.

It is therefore essential that copyright law not be changed to upset basic tenets of freedom of contract. Nothing in the law should restrict the rights of parties to enter freely into licenses or any other contracts with respect to the use of software and other types of copyrighted works—whether those works are embedded into new products or not. This is especially important now that more products embed software; it is almost certain that software developers will use critical contractual terms to prevent widespread unauthorized distribution.

CONCLUSION

In closing, we would like to thank the Copyright Office for giving us the opportunity to submit comments on this study, and to reiterate our concerns with both the need for and breadth of the study and the ambiguity of many of the questions. The primary focus of this study should not be on how to categorize software or products that contain software, but rather on the relationship between both the software and the product in which it is embedded and the between the copyright owner and the end-user.

Please let me know if we can provide any additional information or answer any questions regarding our views in this submission.

Respectfully submitted,

Keith Kupferschmid
Chief Executive Officer & President
Copyright Alliance
1224 M Street, NW, Suite 101
Washington, D.C., 20005