A Comparative Analysis of Online Distribution of Software in the United States and Europe: Piracy or Freedom of "First Use"?  
*Research project*

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*Abstract:*

This paper provides an understanding of the current copyright laws regarding software licensing in the United States and Europe. The concept of copyright under both the U.S. and EU legal regimes is to convey on the copyright owners the exclusive right to distribute their copyrighted software. In case of sales transactions, that right is expressly limited to statutory copyright law.

Sections 109 and 117 of the U.S. Copyright Act are the respective core provisions to apply to software transactions. It is not an infringement for the owner of a copy of a work obtained at an authorized sale to sell or otherwise dispose of the possession of that copy. In addition, the owner of a copy of a computer program may, *inter alia*, create another copy of that program provided that the copy is made either 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, or for archival or back-up purposes. Under U.S. case law the crucial question is whether a licensee of software can be deemed as an "owner" of a copy of the software and as such trigger the first sale immunities. The paper shows the different approaches taken by different courts on the so-called "sale versus license debate".

Article 4(c) of the Council Directive on the Legal Protection of Computer Programs ("EC Software Directive") contains the European version of the first sale doctrine, the Community exhaustion doctrine. The first sale of a copy of a computer program by the copyright owners or with their consent shall exhaust the distribution right of that copy within the European Communities (EC) or European Economic Area. Contrary to the sale versus license debate in U.S. case law, European courts—with no greater argument—deemed the licensee of a particular software subject to exhaustion. The courts have been more concerned to apply the doctrine of exhaustion in a way as to further the implementation of the fundamental freedom of free movement of goods and services in the EC.

On the basis of a transatlantic copyright analysis the paper will discuss, in a second step, the existence of a digital first sale doctrine (as called in the United States) or digital Community exhaustion doctrine (as known under EC law). The paper debates whether the first sale/exhaustion privilege is to apply also in the event of online-transmissions of software, i.e., when no tangible data carrier embodying the target software changes hands. In today's world, copies of copyrighted works, including software, are bought with increasing frequency by electronically downloading them through networks, mostly the Internet, with no tangible copy of the target software provided. However, digital transmissions of copyrighted works over the Internet fit neither comfortably within the narrow concepts of first sale nor exhaustion. In discussing whether online distribution of software shall render sections 109 and 117 of the U.S. Copyright Act or Article 4(c) of the EC Software Directive applicable, the paper concludes that in the absence of persuasive case law in either jurisdiction on this matter, U.S. governmental authorities tend to protect software copyright owners, whereas the existence of a digital Community exhaustion doctrine may be based on the ground of free movement of information.

The project is co-sponsored by the Stanford-Vienna Transatlantic Technology Law Forum and the Forum on Contemporary Europe (Freeman Spongli Institute for International Studies).