

OWNERS' RIGHTS INITIATIVE

BEFORE THE UNITED STATES COPYRIGHT OFFICE

REPLY COMMENTS OF THE OWNERS' RIGHTS INITIATIVE ON THE ROLE OF COPYRIGHT LAW WITH RESPECT TO SOFTWARE-ENABLED CONSUMER PRODUCTS

In the opening round of comments in this inquiry, the associations representing manufacturers attempted to minimize the impact copyright law has on the secondary market for software-enabled products. They used phrases such as “remarkably little evidence,”¹ “scant (if any) real evidence,”² “non-existent problem,”³ and “largely hypothetical,”⁴ notwithstanding the fact that the Owners’ Rights Initiative (ORI) in its written testimony for the June 2, 2014, hearing on the First Sale Doctrine before the House Subcommittee on Courts, Intellectual Property, and the Internet provided specific examples relating to the practices of companies such as NetApp, Cisco, Oracle, IBM, Palo Alto Networks, and EMC. ORI repeated these examples in its opening round comments in this inquiry.

Additionally, ORI quoted Cisco’s response in its Frequently Asked Questions (FAQs) to a question by a customer who had been approached by a third party hardware

¹ BSA | The Software Alliance Comments

² Global Intellectual Property Center, U.S. Chamber of Commerce Comments

³ Id.

⁴ Copyright Alliance Comments

reseller who is not a Cisco-authorized channel partner. Significantly, Cisco's defense of its restrictions on the transferability of embedded software was not in response to a *rarely* asked question, or an *occasionally* asked question, but to what Cisco itself admitted was a *frequently* asked question. Thus, Cisco itself has conceded that this is not a "non-existent" or "hypothetical" problem.⁵

Indeed, ORI members regularly encounter manufacturers' license restrictions on maintenance and transferability. AscdiNatd (the Association of Service and Computers International/North American Association of Telecom Dealers) represents 400 companies that buy, sell, lease and provide services on information technology and communications products manufactured by companies such as IBM, HP, Oracle, Cisco, Dell, Avaya, Nortel, Siemens, Brocade and EMC. UNEDA (United Network of Equipment Dealers Association) is an alliance of more than 300 used network equipment dealers. The hundreds of companies in these associations routinely deal with the challenges created by manufacturers' license restrictions. For these businesses and their customers, the problems posed by license restrictions are neither non-existent nor hypothetical.

To the extent that the manufacturers are relying on the distinction between consumer products and business products to suggest that license restrictions are a non-existent problem with respect to consumer products, ORI's opening comments explained that this is a meaningless distinction in a world where individuals run businesses out of their homes on their laptop computers, where over 200 million Americans own smart phones that can operate millions of apps, and where an Internet of things is emerging in which a wide range of products have network connectivity that allow them to collect and

⁵ HP's FAQs also discuss the fees it charges for "software license transfers" for its server software. <http://www.hp.com/software/releases/releases-media2/slt/americas/faq.html#12>.

exchange data. Several rights holder organizations, in their effort to minimize the software license problem, cited the Internet Policy Task Force's statement that it did not hear evidence of software licenses purporting to restrict the resale of "a functional product, other than a computer or related equipment."⁶ But "computers and related equipment" are an enormous part of the U.S. economy. Further, the Auto Care Association stated that the assertion of copyright over software embedded in automobile parts "affects daily our members and the consumers they serve by making motor vehicle repair more expensive and legally risky."⁷ While the manufacturers no doubt will also attempt to dismiss the Auto Care Association's concerns on the grounds that automobiles are not everyday consumer products, a Copyright Office study on the role of copyright on software-enabled products that does not encompass computers and automobiles will be of little value.

We look forward to participating in the public meeting the Copyright Office will hold on this important issue.

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⁶ U.S. Department of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages* 64 (2016), available at <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>.

⁷ Auto Care Association Comments.