

"Licensing" vs. "Buying" Information: Legal and Policy Implications

The *Digital Dilemma* (citation below) captures the “Report of the Committee on Intellectual Property Rights and the Emerging Information Infrastructure and Computer Science and Telecommunications Board Commission on Physical Sciences, Mathematics, and Applications of the National Research Council”. An important excerpt from that report for purposes of this project briefing follows:

The difference between selling a work and licensing it is significant. The sale of a physical copy of a work has been the dominant model for transferring IP to the consumer for more than 200 years. Sales involve the complete transfer of ownership rights in the copy. Copyright law explicitly anticipates the sale of intellectual property products and, by the ‘first sale rule,’ constrains a copyright holder’s rights in copies of the work that have been sold. For example, the purchaser is free to lend, rent, or resell the purchased copy. In that sense, copyright law follows IP products into the marketplace and promotes the continued dissemination of information.

Licensing, however, constitutes a limited transfer of rights to use an item on stated terms and conditions. Licenses are governed by contract law and, as such, are essentially a private agreement between two parties. That agreement can involve a wide range of terms and conditions . . . and need not incorporate any public policy considerations, beyond some basic limits on what constitutes an enforceable contract.

Contracting has benefits; for example, it may enable distribution of some information products that would otherwise not come to market. But there are also drawbacks, particularly the possibility that the terms of a license may be far more restrictive than the provisions for access normally granted under copyright’s first-sale doctrine. To the extent that highly restrictive licensing replaces the sale of copyrighted works, society may be the loser, especially if the public policy goals embodied in copyright law are omitted from contracts.

The issue’s significance is underscored by the proposed Uniform Computer Information Transactions Act (UCITA), which would validate mass market licenses for information, making the license terms enforceable if the consumer has given some sort of token assent (e.g., by clicking a mouse or installing the software). Such proposals seek to establish more validity for shrink-wrap and click-wrap agreements currently regarded as questionable. There is promise in the potential to reduce the overhead for making things available through licensing (just a mouse click) and reduce uncertainty by establishing whether the agreement is enforceable – additional information products may appear in the marketplace as a result. The peril lies in the possibility noted above that licensing could become a replacement for sale of all manner of copyrighted works, without provision for the public policy goals embodied in copyright law (pages 34-35).

The Digital Dilemma: Intellectual Property in the Information Age (2000), Washington, D.C.: National Academy Press.

Resources on Copyright, Piracy, Licensing, and UCITA

American Library Association (ALA) Washington Office, Copyright Issues & UCITA
<http://www.ala.org/washoff/copyright.html> and <http://www.ala.org/washoff/ucita>

Association of American Universities (AAU) - Intellectual Property Issues
<http://www.aau.edu/ipissues.html>

Association of Research Libraries (ARL) - Licensing Issues & Copyright and Intellectual Property
<http://www.arl.org/scomm/licensing/index.html> and <http://www.arl.org/info/frn/copy/copytoc.html>

Business Software Alliance
<http://www.bsa.org/>

CopyFair(sm) - A Resource On Use of Copyrighted Works For The Higher Education Community
<http://www.umd.edu/CopyFair>

Copyright and Fair Use, Stanford University Libraries
<http://fairuse.stanford.edu/>

EDUCAUSE Policy Initiatives, Intellectual Property and Copyright
<http://www.educause.edu/policy/copyright.html>

LIBLICENSE – Licensing Digital Information, Yale University Library
<http://www.library.yale.edu/~llicense/index.shtml>

Licensing Resources, University of Texas System General Counsel
<http://www.utsystem.edu/ogc/intellectualproperty/licsrcs.htm>

National Association of State Universities and Land-Grant Colleges (NASULGC) - Copyright Issues
http://www.nasulgc.org/Washington_Watch/Intell_property.htm

National Initiative for a Networked Cultural Heritage (NINCH) – Licensing Issues
<http://www-ninch.cni.org/ISSUES/Licensing.html>

Recording Industry Association of America, Anti-Piracy Campaign
<http://www.riaa.com/Protect-Campaign-1.cfm> and <http://www.soundbyting.com>

Software Licensing Constituent Group, EDUCAUSE
<http://www.educause.edu/memdir/cg/licensing.html>

The Software & Information Industry Association (SIIA) – Government Affairs Issues
<http://www.spa.org/govt/issues.asp>

Software Publishers Association (SPA) Anti-Piracy, a Division of SIIA
<http://www.spa.org/piracy/default.asp>

UCITA, Americans for Fair Electronic Commerce Transactions (AFFECT)
<http://www.ucita.com/>

UCITA Overview, The National Conference of Commissioners on Uniform State Laws (NCCUSL)
http://www.nccusl.org/uniformact_overview/uniformacts-ov-ucita.htm

U.S. Copyright Office Joint Study on Section 104 of the Digital Millennium Copyright Act
http://www.loc.gov/copyright/reports/studies/dmca/dmca_study.html