

## Brief Notes

**Robert Onslow**  
**Barrister, 8 New Square**

### **Second-hand Software; Software licensing in the economic downturn, 23<sup>rd</sup> June 2009 at Lovells.**

- Voluntary licences  
Revocable at will or on reasonable notice
- Contractual licences  
Revoked on termination or perpetual
- Position of licensee where licensor assigns copyright  
s.90(4) Bona fide purchaser without notice
- Position of purchaser of copyright  
Assignment of copyright preserves existing licences
- Position of purchaser of a second hand licence

s.16 CDPA 1988 - "without the consent of the copyright owner"

- Thomas v Sorrell (1673) Vaughan 330 at 351 Ex Ch "*A dispensation or licence properly passeth no interest, but only makes an action lawful which without it had been unlawful*"
- Voluntary licences may be licences to the world
- Licensor cannot identify its licensees. Follows that the identity of licensees does not matter

- May pass with an item of property such as CD's or manuals.
- May be prevented from passing by clear words on the goods. In the absence of such words, possession of the CD's/manual/EULA are sellable items
- If the words are on the EULA in the unopened pack, the licence has not yet activated - sellable item
- Consistent with *Beta Computers v Adobe Systems* where Scottish Court held that the sale did not take place until the terms became known to the purchaser
- Purchaser could get a refund before opening the shrink wrap. Far from being a "No quibble refund". More a case of "sue for refund"
- Also consistent with *Microsoft v Computer Futures* 1998, assumption was that, before being opened, the goods could be traded - but after opening the packaging, the thing became very different - Microsoft could assert trade mark rights to restrain selling the individual parts
- US Courts  
Treat as sale of goods
- I.e. that copy on the CD sellable even once opened.  
*Softman v Adobe* 2001 - breaking up case
- In that case the EULA was only visible once the software had been installed

- Although the pack was opened, the software was not installed - so the EULA was not yet binding

- Contractual licences:

Personal to the named licensor

These are legal documents

No property is involved

Here restrictions on assignment are binding. As are sublicensing provisions

- Liquidators may be in a special position

But a licence is not company "property"

- For the rest of us, the entire company business may be built on a very narrow licence - non transferable even to the point of upgrading to a different machine

We have all had experience where these licences are used to blackmail users into large sums of money

- Stiffing - and if anyone knows an answer let me know

- Clearly a licence which is narrow is not going to be a sellable item

A related question is what to do with unused seats on the next annual renewal

- Contract may permit licensee to pay less and take less seats, or it may not

- But resale of seats is more commonly prohibited by the contract
- Enterprise wide software, has to be remembered that licence without maintenance and support is nil
- Also remember that a licence without activation passwords is also useless

For further information, please contact Robert at [Robert.Onslow@8newsquare.co.uk](mailto:Robert.Onslow@8newsquare.co.uk)

Profile

[http://www.8newsquare.co.uk/Members\\_of\\_Chambers/Members\\_of\\_Chambers\\_frameset.htm](http://www.8newsquare.co.uk/Members_of_Chambers/Members_of_Chambers_frameset.htm)

End of note.