

1 Since 1908, the Supreme Court has held that copyright owners have no right to use restrictive
2 licensing terms to prohibit downstream sales of their works. *Bobbs-Merrill Co. v. Straus*, 210
3 U.S. 339 (1908). Moreover, Congress has since amended the Copyright Act to expressly
4 guarantee the right to resell lawfully purchased software. 17 U.S.C. § 109.

5 Autodesk argues that it can bypass these fundamental limits of copyright law by
6 packaging with its software a piece of paper that purports to be a “license agreement.” This
7 expediency, according to Autodesk, converts any subsequent resale of the software—or even
8 the act of giving it away—into copyright infringement that could subject the seller to
9 statutory damages of up to \$150,000 per copy and criminal penalties under the Copyright
10 Act. 17 U.S.C. §§ 504, 506(a)(1). Autodesk, however, cannot alter the scope of its federal
11 rights by recharacterizing the nature of its software sales. Moreover, even if its license
12 agreements could bind an initial purchaser of the software, it could not bind Vernor, who
13 buys only used copies of the software at garage and office sales and has never agreed to
14 Autodesk’s terms. Contrary to Autodesk’s assertions, license agreements do not “run with”
15 products to bind subsequent purchasers who have never agreed to them. Finally, Autodesk
16 has no right to invoke the DMCA—an extraordinary extra-judicial remedy designed to give
17 copyright owners protection against online distribution of pirated works—to enforce ordinary
18 contractual terms. For these reasons, Autodesk’s motion should be denied.

19 **BACKGROUND**

20 Vernor makes the bulk of his income by buying used items at garage sales, office
21 sales, and flea markets and reselling them on eBay. First Amend. Compl. (“FAC”) ¶ 16.
22 During the eight years he has operated an eBay-based store, Vernor has built a reputation as
23 a reliable seller, completing more than 10,000 transactions and accumulating a positive
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1 feedback rating of 99.4 percent. *Id.* The events giving rise to this case began in May 2005,
2 when Vernor purchased an authentic, used copy of Autodesk’s AutoCAD Release 14
3 software (a software package used by architects and engineers for design and drafting) at a
4 garage sale and posted it for sale on eBay. *Id.* ¶ 17. When Autodesk discovered Vernor’s
5 eBay auction, it sent, without warning, a notice of claimed infringement to eBay under the
6 DMCA, claiming that Vernor’s listing infringed its copyright. *Id.* ¶ 18.

8 To take advantage of the DMCA’s safe harbor against claims of secondary liability
9 for copyright infringement, 17 U.S.C. § 512, eBay regularly complies with such notices of
10 claimed infringement. FAC ¶¶ 5-6; *see Dudnikov v. Chalk & Vermilion Fine Arts*, No. 06-
11 1458, --- F.3d ---, 2008 WL 217724, at *2 (10th Cir. Jan. 28, 2008); *Hendrickson v. eBay,*
12 *Inc.*, 165 F. Supp. 2d 1082, 1085 (C.D. Cal. 2001). Section 512 of the DMCA shields
13 Internet Service Providers (“ISPs”) such as eBay from liability for infringing materials
14 posted by their users if they act “expeditiously” to remove allegedly infringing content upon
15 receiving a notice of claimed infringement from a copyright owner, and if they have a policy
16 providing for termination of the accounts of repeat infringers. FAC ¶ 6; *see* 17 U.S.C.
17 § 512(c)(1)(C), (i)(1)(A). When eBay receives a notice of claimed infringement stating that a
18 copyright owner has a good-faith belief that a particular auction on eBay’s system infringes
19 its copyright, eBay automatically terminates the auction without any investigation into the
20 validity of the claim. FAC ¶ 7; *see Dudnikov*, 2008 WL 217724, at *2. If the targeted eBay
21 seller has a record of previous unresolved terminations, eBay also suspends the seller’s
22 account. FAC ¶ 7; *Dudnikov*, 2008 WL 217724, at *2.

25 As Autodesk intended, its notice of claimed infringement caused the automatic
26 termination of Vernor’s auction. FAC ¶¶ 9, 18-19. Believing that the software was authentic

1 and that Autodesk must have made a mistake, Vernor called Autodesk’s counsel Andrew
2 MacKay to complain. *Id.* ¶ 20. Vernor told MacKay that he was selling an authentic, used
3 copy of the software and that he had never agreed to Autodesk’s licensing terms. *Id.* MacKay
4 nevertheless refused to withdraw the notice of claimed infringement, telling Vernor that
5 Autodesk does not allow any resale of its software on eBay or otherwise. *Id.* In a letter that
6 followed, MacKay told Vernor that AutoCAD software is “licensed, not sold” and that
7 AutoCAD licenses are “‘nontransferable,’ meaning that they cannot be sold or transferred by
8 any other means.” *Id.* ¶ 21. MacKay’s letter asserted that a violation of Autodesk’s licensing
9 agreements constituted copyright infringement. *Id.* ¶ 21.
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11 Vernor then submitted a counter notice to eBay contesting the validity of Autodesk’s
12 copyright claim. *Id.* ¶ 22. Under the DMCA, a subscriber who is targeted by a notice of
13 claimed infringement can contest the notice with the ISP by submitting a counter notice
14 stating that the subscriber has a good faith belief that the material was removed as a result of
15 mistake or misidentification of infringing material. *Id.* ¶ 8; 17 U.S.C. § 512(g)(3). The ISP
16 will continue to enjoy a safe harbor from liability if it notifies the party who filed the notice
17 of claimed infringement that it will reinstate the removed material in ten business days unless
18 it receives notice that there is a pending legal action to restrain the subscriber from
19 continuing to post the allegedly infringing content. FAC ¶ 8; 17 U.S.C. § 512(g)(2). When
20 Autodesk did not respond to Vernor’s counternotice within the required period, eBay
21 reinstated the auction and Vernor sold the software to another eBay user. FAC ¶ 22.
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24 In April 2007, Vernor acquired four more copies of AutoCAD Release 14 at an office
25 sale at Cardwell/Thomas & Associates, an architectural firm in Seattle. *Id.* ¶ 23. Soon after
26 the purchase, Vernor put a copy up for sale on eBay. *Id.* ¶ 24. In response, Autodesk filed

1 another notice of claimed infringement. *Id.* Vernor then submitted a second counter notice,
2 and, when Autodesk failed to respond, the listing was again reinstated. *Id.* This pattern was
3 repeated for the next two copies of the software. *Id.* As to each, Autodesk filed a notice of
4 claimed infringement and Vernor filed a counter notice. *Id.* When Vernor listed his final
5 copy in June 2007, Autodesk filed yet another notice of claimed infringement, and this time
6 eBay suspended Vernor’s account for repeat infringement. *Id.* ¶ 25.

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8 While his account was suspended, Vernor filed a final counter notice and sent a letter
9 to Autodesk and MacKay contesting their interference with his business. *Id.* ¶ 25-26. Vernor
10 told Autodesk that he was selling an authentic copy of AutoCAD and was entitled to resell it
11 under 17 U.S.C. § 109. *Id.* ¶ 26. Vernor also wrote that he had never installed the software or
12 agreed to any license agreement, and demanded that Autodesk contact eBay to withdraw its
13 notices of claimed infringement. *Id.* MacKay responded by letter, writing: “Please refrain
14 from any further attempts at the unauthorized sale of Autodesk software. If you do not, then I
15 will have no choice but to advise my client to take further action regarding this matter.” *Id.* ¶
16 27. When Autodesk again failed to respond to Vernor’s counter notice, eBay reinstated
17 Vernor’s eBay account on July 5, 2007. *Id.* ¶ 28. Vernor was unable to earn any income on
18 eBay while his account was suspended between June 5, 2007, and July 5, 2007. *Id.*

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20 Vernor then filed suit in this Court, seeking a declaratory judgment that the resale of
21 authentic, used copies of Autodesk software does not infringe Autodesk’s copyright, and
22 injunctive relief against further interference with his business.

23 ARGUMENT

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25 Although Autodesk primarily relies on copyright infringement as a basis for
26 interfering with Vernor’s eBay sales, its brief at various points makes use of doctrines from

1 both copyright and contract law. Only by improperly merging these concepts can Autodesk
2 claim, on the one hand, that a purchaser’s consent to the terms of a license agreement
3 overrides the Copyright Act’s explicit grant of the right to resell copyrighted works, and, on
4 the other, that this rule applies even to those who have *not* consented to the terms of the
5 agreement. Regardless of how Autodesk characterizes its claims, however, it has no right to
6 cancel Vernor’s sale of authentic, lawfully purchased software.
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8 **I. Resale of Lawfully Obtained Copies of Autodesk’s Software Is Not Copyright
9 Infringement.**

10 Autodesk does not claim that Vernor made unauthorized copies of its AutoCAD
11 software. Instead, Autodesk claims that Vernor infringed its right to “distribute” its software
12 under § 106(3) of the Copyright Act, 17 U.S.C. § 106(3). Mot. at 13. More specifically,
13 Autodesk asserts that Vernor infringed its “right to control the downstream distribution of its
14 copyrighted work.” *Id.* However, as the Supreme Court has held, and as the plain language of
15 the Copyright Act dictates, copyright law does not grant copyright owners the right to control
16 downstream distribution of their works. Moreover, the use of a “license agreement” cannot
17 create liability for copyright infringement based on activities that do not violate the
18 Copyright Act. At most, such an agreement can give rise to a claim for breach of contract.
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20 **A. Autodesk’s Claim of a Right to Control “Downstream Distribution” Runs
21 Headlong Into *Bobbs-Merrill* and the First-Sale Doctrine.**

22 Autodesk’s core argument—that it can limit the scope of a purchaser’s distribution of
23 its software by granting only a limited license in that software—was considered and rejected
24 by the Supreme Court in *Bobbs-Merrill Co. v. Straus*. 210 U.S. 339. In *Bobbs-Merrill*, a
25 book publisher attempted to prop up the prices of its novels by limiting the price at which
26 they could be resold. *Id.* at 341. The publisher tried to accomplish that objective by printing a

1 statement below the copyright notice that purported to limit the extent of the license granted,
2 stating: “The price of this book at retail is \$1 net. No dealer is licensed to sell it at a less
3 price, and a sale at a less price will be treated as an infringement of the copyright.” *Id.*

4 Admitting that it knew about the printed statement, Macy’s department store
5 purchased the books from a wholesaler and sold them at retail for 89 cents per copy. *Id.* at
6 342. The publisher then sued for copyright infringement, arguing that Macy’s had exceeded
7 the scope of its granted license. *Id.* at 341-42. The publisher argued that the copyright
8 statute’s grant of the exclusive right to “vend” copyrighted works “vested the whole field of
9 the right of exclusive sale in the copyright owner; that he can part with it to another to the
10 extent that he sees fit, and may withhold to himself, by proper reservations, so much of the
11 right as he pleases.” *Id.* at 349. In other words, the publisher took the position that, because
12 the copyright statute granted it the right to “vend” its books, it necessarily had the right to
13 limit the grant of a license to prohibit or restrict the right of downstream purchasers to vend
14 them.
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17 The Supreme Court disagreed. The Court held that the right to “vend” under the
18 copyright statute granted the right to sell each copy of a copyrighted work *one time*. It did
19 not, however, “create the right to impose, by notice . . . a limitation at which the book shall
20 be sold at retail by future purchasers, with whom there is no privity of contract.” *Id.* at 350.
21 The Court held that Congress did not intend to include in the right to “vend” the “the
22 authority to control all future retail sales.” *Id.* at 351. This rule, called the first-sale doctrine,
23 was strengthened in 1976 when Congress granted an affirmative right to resell lawfully
24 purchased copyrighted works. 17 U.S.C. § 109(a). Today, more than a century of Supreme
25 Court and lower court precedents have recognized the first-sale doctrine. *See Quality King*
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1 *Distribs. v. L'anza Rsch. Int'l, Inc.*, 523 U.S. 135 (1998).¹

2 Although acknowledging the existence of the doctrine, Autodesk attempts to avoid its
3 impact here by arguing that its grant of a limited “license” to use its software is not the same
4 as a “sale,” and that, where there is no sale, there is no first-sale doctrine. Mot. at 10. The
5 situation in *Bobbs-Merrill*, however, was no different. The publisher there purported to grant
6 a license that excluded certain kinds of resale (“[n]o dealer is licensed to sell it at a less price,
7 and a sale at a less price will be treated as an infringement of the copyright”) just as
8 Autodesk purports to here (“Autodesk . . . grants you a nonexclusive, nontransferable license
9 to use the enclosed program . . .”). LaHaie Decl. Exh. A. In *Bobbs-Merrill*, the Court
10 rejected this attempt at creating a limited license, holding that “a copyright owner cannot,
11 with a printed statement, qualify the title of a future purchaser” by reserving certain rights.
12 *Id.* at 351. If anything, the license in *Bobbs-Merrill* restricted resale more clearly than the
13 license here because it explicitly stated that a prohibited resale would be considered
14 copyright infringement, while Autodesk’s license agreement states only that “[u]nauthorized
15 *duplication* of the Software constitutes copyright infringement.” Mot. Exh. A. (emphasis
16 added).²

17 That is not to say that a copyright owner can never limit the scope of a copyright with
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21 ¹ The current version of the Copyright Act replaces the right to “vend” with the right
22 to “distribute.” 17 U.S.C. § 109(a). “Like the exclusive right to ‘vend’ that was construed in
23 *Bobbs-Merrill*, the exclusive right to distribute is a limited right.” *Quality King Distribs.*, 523
24 U.S. at 144.

25 ² Autodesk may attempt to distinguish *Bobbs-Merrill* on the ground that it did not
26 require the agreement of the original purchaser, while its license here states that the
purchaser agrees to be bound by the license agreement “by opening the sealed software
packet.” Mot. Exh. A. That argument, however, is relevant to breach of contract, not to
copyright infringement. See *Quality King*, 523 U.S. at 143 (noting that *Bobbs-Merrill*

1 a license agreement. A copyright owner may, for example, grant a limited license to make a
2 certain number of copies, and, in that case, exceeding the number of authorized copies could
3 give rise to a claim for infringement. *Bobbs-Merrill* acknowledged this distinction, noting
4 that an owner’s copyright in a work allows it to prohibit a purchaser from making
5 unauthorized *copies*, but not to prohibit resale of the *original copy*. 210 U.S. at 350-51. For
6 this reason, as Autodesk notes, a number of courts have held that making more copies than
7 allowed by a license agreement constitutes copyright infringement. *See, e.g., Wall Data Inc.*
8 *v. L.A. County Sheriff’s Dep’t*, 447 F.3d 769, 774-75 (9th Cir. 2006); *S.O.S., Inc. v. Payday,*
9 *Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989). But the difference between those cases and
10 this one is that a copyright owner generally has a right to prohibit production of unauthorized
11 copies, and thus also has the right to dictate the number of copies that can be made. As
12 *Bobbs-Merrill* made clear, however, the copyright owner has *no* right to prohibit downstream
13 sales, and thus has no right under the copyright law to set limits on the resale right.
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16 Two examples are useful to illustrate this distinction. First, a software company could
17 create a license agreement that allowed purchasers to make up to five copies of its software.
18 In that case, if the purchaser instead made six copies of the software, the owner’s copyright
19 would be implicated. Because the owner of the copyright in the software has the right under
20 § 106 to deny the right to make *any* copies, it follows that it also has authority to give up a
21 portion of that right to allow a limited number of copies to be made. This was the situation in
22 *Wall Data*, 447 F.3d 769. There, the court found infringement for exceeding the scope of a
23 software license because, although the license authorized 3,663 copies, the software was
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recognized “the critical distinction between statutory rights and contract rights”).

1 installed on 6,007 computers. *Id.* at 774-75.

2 A software company could also include in its license agreement a prohibition against
3 starting a competing company. If the licensee then opened such a company, the copyright
4 owner—assuming the purchaser gave valid consent and the contract was not void as a
5 restraint on trade or copyright misuse—could sue for breach of contract. It could not,
6 however, also sue for copyright infringement. The reason is that copyright law gives the
7 software company no right to prohibit competition, and therefore, the company owns no
8 rights to grant in a license agreement. This second example is like the situation in *National*
9 *Car Rental*, where a license agreement prohibited a purchaser from leasing copyrighted
10 software. 991 F.2d 426. As the court noted, the right to lease, as part of the right to distribute,
11 covers only the right to distribute *copies*. *Id.* Because the Copyright Act does not grant an
12 exclusive right to the copyright owner to lease authentic copies of a copyrighted work, the
13 restriction in the license agreement fell outside the copyright owner’s exclusive rights. *Id.* at
14 430-31. Thus, allegations of a lease of the *original* copy, even if prohibited by the license
15 agreement, did not state a claim for copyright infringement. *Id.*

18 The alleged infringement in *National Car Rental* is essentially the same as the alleged
19 infringement here. Just as National’s *lease* in violation of a license agreement was not
20 infringement, Vernor’s *sale* in violation of an Autodesk’s license agreement was not either.
21 In both cases, the alleged infringing actions fell outside the scope of the copyright owner’s
22 exclusive rights. Regardless of what the license says, leasing or selling software, like opening
23 a competing company, is not copyright infringement. *National Car Rental* distinguished
24 cases, such as those Autodesk relies on here, that have held that exceeding the terms of a
25 license agreement is copyright infringement, noting that, in those cases, “the conduct claimed
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1 as infringing involved one of the exclusive copyright rights,” such as making copies or
2 broadcasting a copyrighted work on television. *Id.* at 431-32. Thus, “[r]ather than stating a
3 rule that any use exceeding the license is infringing, these cases establish that engaging in
4 one of the acts reserved to the copyright holder under § 106, without a license to do so, is
5 infringing.” *Id.* at 432; *see also Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089-90
6 (9th Cir. 2005) (adopting the reasoning of *National Car Rental* and holding that unauthorized
7 use is not within the rights protected by copyright).
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9 This distinction—between violations of licensing terms that fall within a copyright
10 owner’s rights and violations of terms that do not—is supported by the legislative history of
11 § 109(a), the statutory first-sale provision, which notes that contractual limitations on first-
12 sale rights “could not be enforced by an action for infringement of copyright.” H.R. Rep. No.
13 94-1476, at 62 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5693; *see also United States v.*
14 *Wise*, 550 F.2d 1180, 1187 n.10 (9th Cir. 1977) (“If a vendee breaches an agreement not to
15 sell the copy, he may be liable for the breach but he is not guilty of infringement.”). It is also
16 consistent with the usual meaning of the word “license.” Although the Copyright Act does
17 not define the term, Black’s Law Dictionary defines it as a “revocable permission to commit
18 some act that would *otherwise be unlawful*.” Black’s Law Dictionary (7th ed. 1999)
19 (emphasis added). Making unauthorized copies of a copyrighted work, unless fair use or
20 another exception applies, is typically unlawful, so a purchaser needs a license or other
21 permission to make them. However, a purchaser needs no authorization to take advantage of
22 the statutory right of fair use of a copyrighted work (for example, using excerpts from a
23 copyrighted work for educational purposes or for writing a negative review), 17 U.S.C. §
24 107, and courts have held that a copyright owner could not convert fair use into copyright
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1 infringement by withholding permission to use a work in those ways. *See Davidson &*
2 *Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (holding that parties could contract away
3 fair use rights, but that such a contract would fall outside the scope of copyright); *Bowers v.*
4 *Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003) (same). For the same reason, a
5 copyright owner could not, in a license agreement, specify that copying its software after the
6 term of its copyright had expired or copying uncopyrightable facts would constitute
7 infringement. Similarly, because Vernor’s act of selling an authentic copy of AutoCAD is
8 also not unlawful, he needs no license or permission from Autodesk to do it. Quite simply,
9 Autodesk has no rights to withhold.

11 **B. Autodesk’s Argument Is Foreclosed by the Plain Language of the**
12 **Copyright Act.**

13 Autodesk bases its claim of a right to control downstream distribution of its software
14 on the statutory language in § 109 of the Copyright Act, which grants a right to the “owner of
15 a particular copy” of a copyrighted work to resell that work without permission. 17 U.S.C.
16 § 109(a). Seizing on the word “owner,” Autodesk argues that since its software is “licensed”
17 rather than sold, purchasers are not “owners” of the software and therefore the § 109 rights
18 do not apply. Mot. at 10. The statutory right of resale granted by § 109, however, does not
19 overrule *Bobbs-Merrill’s* recognition of the inherent limits on the distribution right as set
20 forth in § 106(3). The statutory resale right in § 109 applies “[n]otwithstanding the
21 provisions of section 106(3);” it does not expand the right of distribution to encompass
22 restrictions on downstream sales. *See Quality King*, 523 U.S. at 152 (“There is no reason to
23 assume that Congress intended either § 109(a) or the earlier codifications of the doctrine to
24 limit its broad scope”).
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1 In any case, the statutory language cited by Autodesk, far from creating a right to
2 control downstream distribution, actually mandates the *opposite* result here. Autodesk
3 focuses on the word “owner” in § 109 in isolation, apparently believing that this word was
4 meant to limit the right of resale to those who possess full ownership rights in a copyrighted
5 work, including the right to resell that work. But the statute does not say “the owner of the
6 right to resell,” it says “the owner of a *particular copy*.” 17 U.S.C. § 109(a). A “copy,” as
7 defined by the Copyright Act, is a “material object . . . in which a work is fixed.” *Id.* § 101.
8 The “particular copy” of a book, for example, is the paper and binding that make up that
9 copy of that book, along with the printed words inside. The purchaser of a book becomes the
10 owner of that material copy, and thus has the right to read it, sell it, or destroy it without
11 permission of the copyright owner. *See Krause v. Titleserv, Inc.*, 402 F.3d 119, 122 (2d Cir.
12 2005); John A. Rothchild, *The Incredible Shrinking First Sale Rule*, 57 Rutgers L. Rev. 1,
13 48-49 (Fall 2004). However, the purchaser does not become owner of the *copyright* in that
14 book, and thus has no right to make additional copies of the book (at least if those copies do
15 not constitute fair use). *See* 17 U.S.C. § 202 (“Ownership of a copyright, or of any of the
16 exclusive rights under a copyright, is distinct from ownership of any material object in which
17 the work is embodied.”); *Krause*, 402 F.3d at 122; Rothchild, *supra*, at 48-49.

20 The Copyright Act makes clear that there is no difference between books and
21 software in this regard, providing that a “copy” includes fixation of a work not only by
22 printing on paper, but “by any method now known or later developed,” and regardless of
23 whether the purchaser can read the copyrighted material “directly or with the aid of a
24 machine or device” such as a computer. 17 U.S.C. § 101. Thus, when Vernor purchased a
25 copy of AutoCAD at a garage sale, he became the owner of that “particular copy” of the
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1 software, including the compact disc on which the data is stored and the magnetic bits that
2 make up that data. Like the owner of a book, Vernor’s ownership of the particular copy gave
3 him the right to use it, sell it, or destroy it. Like the owner of the book, however, he does not
4 own the copyright in the software, so he cannot make unauthorized copies unless a different
5 statutory exception applies.³

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7 Autodesk would have the Court rewrite the statute’s “owner of a particular copy”
8 language to mean, in essence, “owner of full rights in a particular copy.” Under Autodesk’s
9 interpretation, the right to sell without permission would thus apply only to those who
10 already have obtained permission to resell, either through an unrestricted sale or a license
11 agreement’s grant of permission. That definition of “owner,” however, would reduce the
12 important federal right granted by § 109 to a tautology. Congress could not have intended
13 § 109 to mean that the owners of particular copies may resell those copies only if they
14 already have the right to resell them. Moreover, Autodesk’s reading of § 109 flies in the face
15 of the statute’s provision that software may be resold “without the permission of the
16 copyright owner.” 17 U.S.C. § 109(a). Because purchasers are not, in Autodesk’s view,
17 “owners,” a purchaser of software pursuant to a license agreement would have no right to
18 resell the software unless the right to do so was affirmatively granted by the copyright owner.
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21 ³ The court in *Adobe Sys. Inc. v. Stargate Software Inc.* erred by, among other things,
22 misapplying this distinction between ownership of a copyright and ownership of a particular
23 copy. 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002). The court thought that the “particular
24 copy” at issue was just the software’s packaging and blank media, which the court
25 characterized as “almost worthless.” *Id.* “The true economic value of the product,” the court
26 wrote, “is derived from the intellectual property embodied within it.” *Id.* *Stargate Software*
was wrong to hold that the relevant “particular copy” for purposes of § 109 is only the blank
media on which the copyrighted work is transcribed. If it were, the particular copy of a book
would be a cover and blank pages, and a particular copy of a movie would be a blank roll of

1 Therefore, a license that was silent on the subject of resale would prohibit it by default, and a
2 purchaser could resell the software only by obtaining explicit permission. The right granted
3 by § 109 would not be a right at all, but merely the whim of the copyright owner.

4 **C. Autodesk Cannot Change the Nature of a Transaction By Characterizing**
5 **It As a “License.”**

6 Even assuming that that Autodesk is correct that a “license” can create copyright
7 liability where there otherwise would be none, a purchaser would not be liable for copyright
8 infringement if the purported “license” was in fact a sale. As Autodesk seems to
9 acknowledge, its characterization of its agreement as a license is just that—a
10 characterization. Mot. at 2. When dealing with federal rights, however, merely labeling a sale
11 as a “license” cannot change the nature of the underlying transaction. *In re DAK Indus., Inc.*,
12 66 F.3d 1091, 1095 n.2 (9th Cir. 1995) (“[T]he fact that the agreement labels itself a license
13 does not control [the] analysis.”). Courts look beyond labels to “the economic realities of the
14 agreement.” *Id.* at 1096; *see also U.S. v. Atherton*, 561 F.2d 747, 750 (9th Cir. 1997) (“The
15 ‘sale’ embodied in the first sale concept is a term of art. The sale is not limited to voluntary
16 sales of a copyrighted work for a sale price that takes into account both the value of the
17 materials upon which the copyrightable idea is affixed together with the idea itself.”);
18 *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1389 (C.D. Cal.
19 1993) (noting that courts use a “functional” approach to determining whether a sale has
20 occurred).⁴

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24 film. In that case, the right granted by § 109 would be meaningless.

25 ⁴ The terms “license” and “sale” are not mutually exclusive because *all* transfers of a
26 copyrighted work involve the transfer of a nonexclusive license in that work. *See* Lothar
Determann & Aaron Xavier Fellmeth, *Don’t Judge a Sale by Its License: Software Transfers*

1 Courts have rejected similar efforts to redefine the nature of a transaction merely by
2 attaching an inaccurate label. In *Softman Prods. Co. v. Adobe Systems, Inc.*, for example, the
3 defendant had purchased a packaged set of Adobe software, divided the set, and resold the
4 individual software titles in violation of a “license agreement” specifying that the software
5 must be resold together. 171 F. Supp. 2d at 1087-88. The court nevertheless refused to accept
6 Adobe’s characterization of the transaction as a “license,” which the copyright owner used in
7 a sense more akin to a lease, noting that the transaction more closely resembled a typical
8 retail transaction than a lease. *Id.*; see also *Krause*, 402 F.3d at 124 (holding that formal title
9 in a software copy is not a prerequisite for ownership under the Copyright Act); *Step-Saver*
10 *Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Novell v. Network Trade*
11 *Center*, 25 F. Supp. 2d 1218 (D. Utah 1997); *Arizona Retail Sys., Inc. v. Software Link, Inc.*,
12 831 F. Supp. 759 (D. Ariz. 1993); *Sagent Tech., Inc. v. Micros Sys., Inc.*, 276 F. Supp. 2d
13 464 (D. Md. 2003).

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16 Similarly, the Supreme Court has rejected the attempts of patent owners to expand
17 their rights by characterizing a “sale” as a “license.” In *Bauer & Cie. v. O’Donnell*, a patent
18 owner sold a patented product with the notice: “This [package] is licensed by us for sale and
19 use at a price not less than one dollar (\$1). Any sale in violation of this condition, or use
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Under the First Sale Doctrine in the United States and the European Community, 36
23 U.S.F.L. Rev. 1, 7 (Fall 2001) (“[T]he gravamen of a software transfer is the license itself
24 and therefore such a transfer can involve either a sale or a lease of a software copy, but it
25 must always involve a license in some form.”). The Copyright Act does not recognize a
26 “license” as an independent method of distribution; the right of distribution encompasses the
right to distribute copies “by sale or other transfer of ownership, or by rental, lease, or
lending.” 17 U.S.C. § 106(3) (emphasis added). Nevertheless, courts often use the word
“license” in defining the nature of a transaction, using it to mean something like the word
“lease.” See Determenn & Fellmeth, *supra* at 7.

1 when so sold, will constitute an infringement of our patent. . . . A purchase is an acceptance
2 of this condition.” 229 U.S. 1, 8 (1913). The Court refused to accept the notice’s
3 characterization, noting that the product was purchased for a one-time price and that the
4 patent owner was entitled to no royalties or any other profit from subsequent use or sale of
5 the product. *Id.* at 16. The Court concluded: “[T]o call the sale a license to use is a mere play
6 upon words.” *Id.*⁵
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8 Like the software contract at issue in *Softman*, the “license agreement” here creates a
9 sale, not a limited transfer of ownership more akin to a lease. Other than the purported
10 restriction on resale rights, the relevant transaction bears all the hallmarks of a sale.
11 AutoCAD software is sold in sealed boxes with the license agreement inside and no
12 indication on the outside of the box that the software is not for sale. FAC ¶ 10. The software
13 can be purchased in a variety of stores, including online stores. The listing for the software
14 on the website for computer-maker Dell, for example, advertises AutoCAD as a “retail box.”
15 [http://accessories.us.dell.com/sna/products/Accessories/productdetail.aspx?cs=19&sku=A09](http://accessories.us.dell.com/sna/products/Accessories/productdetail.aspx?cs=19&sku=A0971487)
16 [71487](http://accessories.us.dell.com/sna/products/Accessories/productdetail.aspx?cs=19&sku=A0971487). Shoppers add the software to a “shopping cart” and click “check out” when ready to
17 purchase. *Id.* The software’s listing on the website of computer-supply company CDW looks
18 very similar, but includes an option, as an *alternative* to purchasing the software, to “lease” it
19 for a monthly fee. <http://www.cdw.com/shop/products/default.aspx?EDC=1276927>. Even
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23 ⁵ In contrast, the court in *MAI Systems Corp. v. Peak Computer, Inc.* characterized as
24 a license a strict contractual arrangement that allowed only three employees permission to
25 access the software, which was installed and maintained on clients’ computers by the
26 copyright owner. 991 F.2d 511, 517 (9th Cir. 1993); *see Storage Tech. Corp. v. Custom
Hardware Eng’g & Consult., Inc.*, 421 F.3d 1307, 1317 (Fed. Cir. 2005) (noting that the
court in *MAI Systems* rested its decision on the “severe, explicit restrictions” in the
agreement there).

1 Autodesk's own website offers no indication that the software is not for sale, instead offering
2 a menu of "purchase options" and a link to "buy online" from the Autodesk online store.
3 <http://usa.autodesk.com/adsk/servlet/index?id=8314527&siteID=123112>.

4 Unlike a typical lease, a purchaser of AutoCAD pays the full price up front, and the
5 license agreement provides no obligation to make future payments. LaHaie Decl. Exh. A.
6 The software does not have to be returned to Autodesk at the end of a license period and
7 there is no prohibition on destroying it. *Id.* The license does not provide a limitation on the
8 duration of use or a provision for eventual license renewal. *Id.* AutoCAD's license is thus
9 indistinguishable from the license at issue in *Softman*. As the court held there, "a single
10 payment for a perpetual transfer of possession is, in reality, a sale of personal property and
11 therefore transfers ownership of that property, the copy of the software." *Softman*, 171 F.
12 Supp. 2d at 1086; *see also Krause*, 402 F.3d at 124-25 (finding ownership despite the
13 presence of a purported "license" where the purchaser had the right "to possess and use a
14 copy indefinitely without material restriction, as well as to discard or destroy it at will").⁶

15 Autodesk relies on a few district court cases in which the courts appear to have
16 uncritically accepted a software company's characterization of a sale as a "license." These
17 cases are inconsistent with Ninth Circuit precedent and unpersuasive in light of *Softman*. The
18 court in *Stargate Software*, for example, distinguished *Softman* on the ground that it involved
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22 ⁶ Autodesk puts great weight on a settlement agreement between itself and the
23 software's original purchaser, Cardwell/Thomas & Associates, but that agreement only
24 further undermines its position. Mot. at 2. The contract refers to the "acquisition" by
25 Cardwell/Thomas of ten packages of AutoCad, a term that sounds more like a purchase than
26 a lease. LaHai Decl. Exh. B at 1. And although the settlement prohibits unauthorized copies,
it says nothing about distribution of authentic, lawfully purchased copies. *Id.* at 2. Nothing in
the agreement indicates that Cardwell/Thomas did not own the software but instead had

1 splitting packaged software and reselling individual pieces rather than reselling a complete
2 package, but did not explain why this distinction was legally relevant. 216 F. Supp. 2d at
3 1058; *see also supra* note 4. The court appeared to be concerned about the fact that the
4 defendant had purchased software intended for educational use and resold it to commercial
5 users, thereby frustrating Adobe’s efforts to segment the market and charge different prices
6 to different sorts of users, *id.* at 1052, a concern that was also at issue in *Adobe Systems, Inc.*
7 *v. One Stop Micro*, 84 F. Supp. 2d 1086, 1092 (N.D. Cal. 2000). Whether this kind of price
8 discrimination is legitimate or economically valuable has been debated, *see* William F.
9 Fisher, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. Rev. 1,
10 10-37 (2007), but *Stargate Software* erred to the extent it overrode the statutory first-sale
11 right based on its views about the relative wrongfulness of the reseller’s actions under those
12 circumstances. In any case, the concern about circumvention of price discrimination policies
13 that appeared to drive the court in *Stargate Software* is absent here. Vernor bought a full
14 commercial version of the software, not one that was limited to educational use.
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17 **II. Autodesk’s License Agreement Does Not Impose Liability for Breach of**
18 **Contract on Vernor for Reselling Autodesk Software.**

19 Although Autodesk characterizes its claims as copyright infringement, many of the
20 cases it relies on are actually about the enforcement of license agreements as *contracts*. *See,*
21 *e.g., ProCD v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (noting that software licenses
22 are treated “as ordinary contracts accompanying the sale of products”). These cases cannot
23 help Autodesk here for several reasons. First, Autodesk’s anticompetitive attempt to restrict
24 the secondary market with its license agreement is a form of copyright misuse that renders
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entered into an arrangement akin to a lease.

1 the agreement unenforceable. Even if Autodesk’s license could be enforced in some
2 circumstances, it is not enforceable against Vernor, who never agreed to enter a contract with
3 Autodesk. Finally, even if Autodesk did have a cause of action against Vernor for breach of
4 contract, it has no right to invoke the Digital Millennium Copyright Act to enforce that
5 claim.

6
7 **A. The License Agreement Constitutes Copyright Misuse and Is Therefore
Unenforceable.**

8 Under the doctrine of copyright misuse, courts refuse to allow copyright owners to
9 enforce their rights when the owners are exercising those rights to the detriment of the public
10 interest. *See Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1079 (N.D. Cal. 2007). The Ninth
11 Circuit and other courts have recognized that the use of “unduly restrictive licensing
12 agreements” is one form of misuse. *Id.*; *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516
13 (9th Cir.1997); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir.1990).

14
15 A copyright owner commits misuse when it leverages its copyright to “secure an
16 exclusive right or limited monopoly not granted by the Copyright Office.” *Practice Mgmt.*
17 *Info. Corp.*, 121 F.3d at 520. The Copyright Act represents a careful balance struck by
18 Congress between the interests of copyright owners and the interests of the public in the
19 exchange and development of ideas. Rothchild, *supra* at 9-10, 103. By granting a limited
20 monopoly to copyright owners, the Act encourages those owners to create new works. *Id.* at
21 103. At the same time, however, the Act imposes fundamental limitations on the copyright
22 monopoly to ensure that the public interest will be protected. *Id.* One of the most important
23 of these limitations on copyright is the first-sale doctrine. *Id.* at 9. The doctrine reflects
24 Congress’s judgment that the right to control downstream sales is not a necessary incentive
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1 to promote the creation of new works and thus causes more harm to free expression than
2 good. *See Brilliance Audio, Inc. v. Hights Cross Comms., Inc.*, 474 F.3d 365, 373-74 (6th
3 Cir. 2007) (“Once a copyright holder has consented to distribution of a copy of that work,
4 [the copyright] monopoly is no longer needed because the owner has received the desired
5 compensation for that copy.”). Here, by leveraging its AutoCAD software to impose
6 restrictive license agreements that cut off the right of resale, Autodesk is attempting to
7 expand its limited monopoly to secure a right specifically denied it by the Copyright Act.
8 Autodesk’s actions therefore constitutes classic copyright misuse.
9

10 Moreover, “misuse often exists where the patent or copyright holder has engaged in
11 some form of anticompetitive behavior.” *Video Pipeline, Inc. v. Buena Vista Home Entm’t,*
12 *Inc.*, 342 F.3d 191, 204 (3d Cir. 2003); *see Practice Mgmt.*, 121 F.3d at 520-21 (holding that
13 conditioning a license on a promise not to use competitors’ products constituted misuse);
14 *Lasercomb*, 911 F.2d at 979 (holding that licensing agreements that included a provision
15 prohibiting the development of competing goods constituted misuse). For this reason, too,
16 Autodesk’s prohibition of the secondary market is misuse. A key interest behind the first-sale
17 doctrine is the law’s traditional aversion to restraints on trade. *See Parfums Givenchy*, 832 F.
18 Supp. at 1388-89; Rothchild, *supra* at 79-80. By creating a secondary market, the first-sale
19 doctrine promotes both competition and the distribution of copyrighted works. Rothchild,
20 *supra* at 79-80. Conversely, by eliminating the right of resale, Autodesk eliminates the need
21 to compete with used versions of its own products, thus forcing consumers to buy new copies
22 at higher prices. *Id.* Many companies would undoubtedly like to achieve the effect that
23 Autodesk believes it has achieved here. Book publishers, for example, would make more
24 money if they could eliminate used bookstores by including a no-resale agreement in the
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1 front cover of books. No court, however, would countenance such an anticompetitive
2 scheme. Nor should this Court countenance Autodesk's attempt to "use[] its copyright . . . to
3 control competition in an area outside [its] copyright." *Lasercomb*, 911 F.2d at 979.⁷

4 **B. Even if Autodesk's License Agreement Is Binding on the Original**
5 **Purchaser, It Does Not Justify Use of the DMCA to Terminate Vernor's**
6 **Auctions.**

7 Autodesk stresses that Cardwell/Thomas & Associates, the initial purchaser of the
8 software at issue, agreed to the terms of the license agreement. Mot. at 2. It does not contend,
9 however, that *Vernor* ever agreed to those terms. Nor could it. The AutoCAD license
10 agreement specifies that the purchaser agrees to be bound "by opening the sealed software
11 packet." LaHai Decl. Exh. A. Vernor, who purchased the software already used, did not and
12 could not have unsealed the software packet. FAC ¶ 15. Nor did Vernor install the software
13 on his computer or take any other action that could constitute consent. *Id.* Moreover, the
14 license agreement specifies that the licensee could reject the terms only by returning the
15 software within 15 days of purchase. LaHai Decl. Exh. A. Vernor, who purchased the
16 software long after the 15 days had expired, could not possibly have taken advantage of this
17 provision.⁸

19
20 ⁷ Because of this anticompetitive conduct, the complaint states a claim for unfair
21 competition. Autodesk is correct that it has an interest in enforcing its copyright, but it has no
22 legitimate interest in leveraging that copyright to restrict the secondary market at the public's
23 expense. Autodesk has no right to control the secondary market, and its effort to do so
constitutes an unfair method of competition and a restraint on trade. *See* Wash. Rev. Code §
19.86; Cal. Bus. & Prof. Code § 17200.

24 ⁸ Although Vernor may have been aware of the license terms, Mot. 2-3, mere
25 awareness of contractual terms is not the same as *agreement* to those terms. *Softman*, 171 F.
26 Supp. 2d at 1087. In *Softman*, the defendant, like Vernor, had never installed the allegedly
infringed software and therefore was never forced to agree to the license. *Id.* The plaintiff
argued that the purchaser had notice of the terms, which were printed on the outside of the

1 Autodesk nevertheless argues that the restrictions of the license agreement “run with”
2 its software, binding all future purchasers who come into possession of it. But as Autodesk’s
3 own cases make clear, a party cannot be bound to a contract without giving assent. *See*
4 *ProCD*, 86 F.3d at 1450. The requirement of privity in contract law ensures that only those
5 who have notice of a contractual term and have agreed to that term are bound by it. In
6 *ProCD*, for example, the court not did not suggest that privity was not needed, but instead
7 devoted much of its opinion to determining whether the purchaser had given the required
8 assent. *Id.* Indeed, a system in which contractual obligations were binding regardless of
9 whether the purchaser had agreed to those obligations would be unworkable. Because used
10 copyrighted goods are not always accompanied by all the original packaging and licensing
11 materials, anyone purchasing a piece of used software under Autodesk’s system would be
12 forced to, in Autodesk’s words, “trace the chain of title” to ensure that each previous owner
13 had the authority to sell it and to learn what other sorts of contractual agreements might have
14 attached to the product along the way. Unlike real property, for which transfer of titles are
15 recorded, there is no practical way for a purchaser of consumer goods to obtain this
16 information. Such costly burdens on the stream of commerce are the basis for the common
17 law’s hostility to restrictions on the free alienation of property. *See* Thomas F. Merrill &
18 Henry E. Smith, *Optimal Standardization in the Law of Property, the Numerous Clauses*

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22 software’s box. *Id.* The court held that “[r]eading a notice on a box is not equivalent to the
23 degree of assent that occurs when the software is loaded onto the computer and the consumer
24 is asked to agree to the terms of the license.” *Id.* Similarly, the Supreme Court in *Bobbs-*
25 *Merrill* held that a contract between a publisher and the initial purchaser of a book was not
26 binding on a downstream purchaser who never agreed to the contract, despite the
downstream purchaser’s admission that it had notice of the terms. 210 U.S. 339. In any case,
Autodesk’s license cannot bind Vernor when its terms specify a particular means to express

1 *Principle*, 110 Yale L.J. 1, 26-34 (2000); Zachariah Chafee, *The Music Goes Round and*
2 *Round, Equitable Servitudes and Chattels*, 69 Harv. L. Rev. 1250, 1261 (1956).⁹

3 Finally, even assuming that Autodesk had a cause of action for breach of contract
4 against Vernor, it had no right to invoke the takedown provisions of the Digital Millennium
5 Copyright Act as a remedy. The DMCA's takedown provisions, by their plain language,
6 cover only claims of *copyright* infringement. 17 U.S.C. § 512. The DMCA provides an
7 extraordinary remedy for copyright owners, giving them the power to achieve what in effect
8 is equivalent to a temporary restraining order without the need to obtain approval of a judge.
9 If Cardwell/Thomas & Associates breached the terms of Autodesk's license agreement,
10 Autodesk has a cause of action against the firm for breach of contract. However, the DMCA
11 was not designed, and cannot legally be used, to enforce a breach of contract claim. *See* 17
12 U.S.C. § 512(c)(3)(ii).
13

14
15 **III. Vernor Has Standing to Bring this Claim.**

16 Finally, Autodesk argues that Vernor lacks standing to bring this claim because he
17 does not have a reasonable fear of being sued. Autodesk misunderstands the nature of
18 Vernor's claims. Autodesk did not merely *threaten* to interfere with Vernor's online business
19 using the DMCA; it actually *did* interfere, terminating five separate auctions and causing
20 Vernor to lose his account for a month. FAC ¶¶ 18-28. Because Autodesk told Vernor that it
21 does not allow any sales of its software on eBay, *id.* ¶¶ 20-21, and because it has submitted

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assent and Vernor did not comply with those terms.

24 ⁹ In this case, for example, Autodesk claims that a settlement contract it entered into
25 with Cardwell & Associates, the original purchaser, further establishes the limit on resale
26 rights. It would have been impossible for Vernor to know, however, when purchasing
AutoCAD software at a garage sale, office sale, or flea market, what agreements the prior

1 notices of claimed infringement on all of Vernor’s past AutoCAD sales, *id.* ¶¶ 18-28, Vernor
2 has a reasonable fear that it will do so again. *Id.* ¶¶ 30-34.

3 Disclaiming responsibility for its actions, Autodesk asserts that any injury Vernor
4 suffers from termination of his sales or his account would “be a result of eBay policies.”
5 Mot. at 17. But Autodesk did not just invoke eBay’s policies to terminate Vernor’s auctions,
6 it invoked the DMCA. FAC ¶ 18. The DMCA provides that, in order to take advantage of its
7 statutory immunity, ISPs like eBay must act “expeditiously” to remove allegedly infringing
8 content upon receiving a notice of claimed infringement. 17 U.S.C. § 512(c)(1)(C), (i)(1)(A).
9 Given that Autodesk demanded termination of Vernor’s auctions under the DMCA, it cannot
10 claim surprise that those demands were honored. Moreover, the DMCA also provides that, in
11 order to take advantage of statutory immunity, an ISP must have a policy providing for
12 termination of the accounts of repeat infringers. 17 U.S.C. § 512(c)(1)(C), (i)(1)(A). The
13 DMCA gives Internet service providers like eBay a strong incentive to comply with these
14 statutory terms to avoid the risk of vicarious liability for copyright infringement. *Id.* As
15 Autodesk has shown, by repeatedly sending notices of claimed infringement and ignoring
16 counter notices, it can effectively shut down Vernor’s business using the DMCA. Autodesk
17 had used the DMCA process before, and it understood the impact its actions would have on
18 Vernor’s account. FAC ¶ 9. The termination of Vernor’s eBay auctions and the suspension of
19 his account are therefore the direct and intended result of Autodesk’s actions.
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23 Finally, Autodesk argues that Vernor has not alleged how or where he will acquire
24 future copies of the software. Vernor did allege, however, that he currently possesses two
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owner had entered into.

1 authentic, used copies of AutoCAD that he wishes to sell on eBay. FAC ¶ 29. These copies
2 are not hypothetical and in themselves are enough to make the case ripe for a declaratory
3 judgment. In addition, Vernor alleged that he occasionally finds copies of AutoCAD
4 software at garage sales, which he intends to purchase for the purpose of resale. *Id.* Vernor's
5 requested relief as to these copies is neither as broad nor as vague as Autodesk makes it out
6 to be. Vernor asks only for declaratory and injunctive relief protecting his ability to sell
7 authentic, used copies of Autodesk's software without interference. Given Autodesk's past
8 actions regarding such authentic software, Vernor's request is reasonable.
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12 Respectfully submitted,

13 /s/ Gregory A. Beck

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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