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**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON**

TIMOTHY S. VERNOR,

Plaintiff,

v.

AUTODESK, INC.,

Defendant.

No. 2:07-cv-01189-JLR

**SECOND AMENDED  
COMPLAINT**

**NATURE OF THE ACTION**

1. Plaintiff Timothy S. Vernor earns his living selling used items on eBay, an Internet auction site. Defendant Autodesk, Inc., acting through its counsel, wrongly represented to eBay that Vernor’s sale of an authentic, used copy of Autodesk’s software infringed Autodesk’s copyright. Autodesk’s misrepresentation caused eBay to suspend Vernor’s eBay account, causing him to lose his primary source of income for a month. Vernor seeks declaratory and injunctive relief

1 to prevent Autodesk from engaging in further unjustified interference with his  
2 business, and damages for lost sales.

3  
4 **PARTIES**

5 2. Plaintiff Timothy S. Vernor is an individual domiciled in Seattle,  
6 Washington.

7 3. Defendant Autodesk, Inc. is a Delaware corporation with its primary  
8 place of business in San Rafael, California.

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10 **SUBJECT MATTER JURISDICTION**

11 4. This Court has subject-matter jurisdiction over Vernor's federal  
12 claims under 28 U.S.C. §§ 1331 and 1338. The federal claims arise under the De-  
13 claratory Judgment Act (28 U.S.C. § 2201), the Copyright Act (17 U.S.C. § 501),  
14 and the Digital Millennium Copyright Act (17 U.S.C. § 512). This Court has sup-  
15 plemental subject-matter jurisdiction over Vernor's state-law claims under 28  
16 U.S.C. § 1367(a). The Court also has subject-matter jurisdiction over Vernor's  
17 state-law claims under 28 U.S.C. § 1332(a)(1), because Vernor and Autodesk are  
18 citizens of different states and the matter in controversy exceeds \$75,000 exclusive  
19 of interest and costs.  
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**FACTS**

The eBay Auction Site

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4 5. eBay is a virtual Internet marketplace where members can sell goods  
5 and services in an auction-style or fixed-price format. It is by far the largest site of  
6 its kind on the Internet, with more than one hundred million registered users. Each  
7 product for sale on eBay has its own web page, called a “listing” or “auction,”  
8 which describes the product and allows potential purchasers to bid on or purchase  
9 the product.  
10

11 6. As an Internet Service Provider (“ISP”), eBay is ordinarily immune  
12 under the Communications Decency Act (“CDA”) from secondary liability for the  
13 acts of its users. 47 U.S.C. § 230. This statutory immunity under the CDA contains  
14 an exception for intellectual property offenses (such as copyright infringement).  
15 *Id.* § 230(e)(1). Nevertheless, the Digital Millennium Copyright Act (“DMCA”)  
16 provides ISPs safe harbor from liability for “infringement of copyright by reason  
17 of the storage at the direction of a user of [copyrighted] material that resides on a  
18 system or network controlled or operated by [the ISP].” 17 U.S.C. § 512(c)(1). To  
19 qualify for protection from copyright liability under this provision, an ISP must act  
20 “expeditiously” to remove material that is claimed to be infringing after receiving  
21 a notice of claimed infringement from the copyright owner. *Id.* § 512(c)(1)(C).  
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1 The ISP must also implement “a policy that provides for the termination in appro-  
2 priate circumstances of subscribers and account holders of the service provider’s  
3 system or network who are repeat infringers.” *Id.* § 512(i)(1)(A).  
4

5 7. To protect itself from secondary liability for claims of copyright in-  
6 fringement, eBay automatically terminates a listing whenever a copyright owner  
7 submits a DMCA notice of claimed infringement regarding that listing. eBay does  
8 not independently review the validity of the notice of claimed infringement and  
9 trusts the copyright owner’s honesty that a particular auction infringes its copy-  
10 right. eBay also notes the termination on the record of that eBay seller, and, to im-  
11 plement the requirement of 17 U.S.C. § 512(i)(1)(A) that it have a policy to termi-  
12 nate the accounts of repeat infringers, suspends the accounts of users whose auc-  
13 tions have been terminated multiple times. The precise number of auctions that  
14 must have been terminated before the seller’s account is suspended, and the length  
15 of the suspension, varies depending on the circumstances of the case. If an eBay  
16 seller is reinstated after a period of suspension, and another one of that seller’s  
17 auctions is terminated, the seller’s account is permanently suspended, and eBay  
18 will not reinstate the account absent the request of the copyright owner or a court  
19 order declaring that the seller has not infringed the copyright owner’s rights.  
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1           8.       The DMCA provides a mechanism for a subscriber to an ISP who is  
2 targeted by a notice of claimed infringement to contest the notice with the ISP.  
3 Under 17 U.S.C. § 512(g), a subscriber to an ISP can submit a “counter notice” to  
4 the ISP stating “under penalty of perjury that the subscriber has a good faith belief  
5 that the material was removed . . . as a result of mistake or misidentification of the  
6 material.” *Id.* § 512(g)(3). An ISP continues to enjoy safe harbor from liability if,  
7 after receiving a counter notice from a subscriber, it notifies the person who filed  
8 the notice of claimed infringement that it will reinstate the removed material in ten  
9 to fourteen business days unless it first receives notice of a pending legal action to  
10 restrain the subscriber from continuing to post the material. *Id.* § 512(g)(2). How-  
11 ever, nothing prevents a copyright owner from continuing to terminate eBay auc-  
12 tions by submitting notices of claimed infringement against future auctions until  
13 the targeted user’s account is terminated, even if the targeted auctions are identical  
14 to another auction that has already been reinstated pursuant to a counter notice.  
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18           9.       Autodesk, acting through counsel, has submitted multiple DMCA  
19 notices of claimed infringement against various auction listings and, based on that  
20 experience, fully understood eBay’s procedures regarding the DMCA and the con-  
21 sequences of submitting a notice of claimed infringement.  
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Autodesk's Restrictive Licensing Terms

10. Autodesk previously sold software titled "AutoCAD Release 14." The AutoCAD software was sold sealed in a shrink-wrapped box. Inside the box is a document that purports to be a "Software License Agreement." There is no indication of the existence or terms of the license agreement on the outside of the software box.

11. The license agreement states:

BY OPENING THE SEALED SOFTWARE PACKET(S), YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS LICENSE AGREEMENT. THESE ARE THE ONLY TERMS UPON WHICH AUTODESK SOFTWARE PRODUCTS ARE LICENSED. IF YOU DO NOT AGREE TO THESE TERMS, YOU MAY, WITHIN FIFTEEN (15) DAYS, RETURN THIS ENTIRE PACKAGE, INCLUDING THE UNOPENED SOFTWARE PACKET(S), TO THE LOCATION WHERE YOU ACQUIRED IT FOR A FULL REFUND.

12. The agreement further provides that the licensee may not "modify, translate, reverse-engineer, decompile, or disassemble the Software," "rent, lease, or transfer all or part of the Software, Documentation, or any rights granted hereunder to any other person without Autodesk's prior written consent," or "use or transfer the Software outside of the country" in which the software was purchased.

13. Autodesk interprets its license agreement to prohibit all resale of authentic copies of its products. By prohibiting resale of its software, Autodesk does

1 not have to compete with lower-cost used copies of its software and is thus able to  
2 keep the price of its software artificially high.

3  
4 14. The agreement is ambiguous. However, to the extent that it could be  
5 construed as a prohibition against resale of an authentic copy of Autodesk's soft-  
6 ware, the agreement is unconscionable. It also conflicts with and is unlawful under  
7 the Copyright Act, which provides that, notwithstanding the copyright owner's ex-  
8 clusive right of distribution, "the owner of a particular copy . . . lawfully made un-  
9 der this title, or any person authorized by such owner, is entitled, *without the au-*  
10 *thority of the copyright owner*, to sell or otherwise dispose of the possession of  
11 that copy." 17 U.S.C. § 109 (emphasis added).

12  
13 15. Vernor has never agreed to AutoCAD's licensing terms. Nor has he  
14 ever opened a sealed AutoCAD software packet or installed a copy of the Auto-  
15 CAD software.

#### 16 Autodesk's Interference With Vernor's eBay Sales

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18 16. Vernor is an eBay seller who, for the past seven years, has made his  
19 living selling used items on eBay—including comic books, video games, software,  
20 and collectibles—under the name Happy Hour Comics. During that time, he has  
21 built up a reputation as a reliable seller, completing more than 10,000 transactions  
22 and accumulating a positive feedback rating of 99.4 percent.

1 17. Defendant Autodesk, Inc. is a software company that makes com-  
2 puter-aided design software for architects and engineers. In May 2005, Vernor  
3 purchased an authentic, used copy of Autodesk's AutoCAD Release 14 software at  
4 a garage sale and posted it for sale on eBay. Vernor's eBay listing did not contain  
5 any content (such as writing or pictures) to which Autodesk owned a copyright.  
6

7 18. Autodesk, acting through its attorney, Andrew S. MacKay, filed a  
8 notice of claimed infringement with eBay under the DMCA.  
9

10 19. After receiving the notice of claimed infringement, eBay sent Vernor  
11 an email notifying him that, as a result of Autodesk's notice, his auction had been  
12 terminated. eBay notified bidders on the auction that the auction had been termi-  
13 nated and that their bids were canceled.  
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15 20. Vernor contacted MacKay by telephone to determine why his auc-  
16 tion had been terminated. Vernor informed MacKay that the software was an au-  
17 thentic, used copy and that he had never agreed to Autodesk's licensing terms.  
18 MacKay responded that Autodesk did not allow any resale of its software products  
19 on eBay or otherwise, and that such resale constituted copyright infringement.  
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21 21. On May 25, 2005, MacKay sent a letter to Vernor asserting that  
22 AutoCAD software is "licensed, not sold" and that AutoCAD licenses are "'non-  
23 transferable,' meaning that they cannot be sold or transferred by any other means."  
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1 MacKay again asserted that violation of Autodesk's licensing agreements consti-  
2 tuted copyright infringement.

3           22. Vernor filed a counter notice with eBay under the DMCA, contest-  
4 ing the termination of his auction. Pursuant to 17 U.S.C. § 512(g), eBay then told  
5 Autodesk that it had fourteen days to notify eBay that it had initiated a legal action  
6 against Vernor or the auction would be reinstated. When Autodesk did not respond  
7 within the required period, eBay reinstated the auction and Vernor sold the soft-  
8 ware to another eBay user.  
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11           23. On April 27, 2007, Vernor purchased four authentic, used copies of  
12 Autodesk's AutoCAD Release 14 software at an office sale by the architectural  
13 firm Cardwell/Thomas & Associates.  
14

15           24. Soon after the office sale, Vernor listed the first of the four copies of  
16 AutoCAD for sale on eBay. Autodesk, acting through MacKay, again filed a no-  
17 tice of claimed infringement against the listing. Vernor again submitted a counter  
18 notice to eBay and, when Autodesk did not respond, the listing was eventually re-  
19 instated. This pattern was repeated for the next two copies of the software. As to  
20 each, Autodesk filed a notice of claimed infringement and Vernor filed a counter  
21 notice.  
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1 permanent termination of his eBay account and loss of his primary source of in-  
2 come.

3 34. There is thus a real and actual controversy between Vernor and Au-  
4 todesk regarding whether Vernor's resale of authentic, used copies of AutoCAD  
5 software infringes Autodesk's copyright.  
6

7 **SECOND CLAIM FOR RELIEF**  
8 **UNFAIR AND DECEPTIVE PRACTICES**

9 35. Autodesk's license agreement prohibiting transfers of its software is  
10 unconscionable and unlawfully restricts rights guaranteed by the Copyright Act.  
11 The provision allows Autodesk to unfairly limit competition by sellers of used  
12 products in the secondary market, thereby harming consumers by artificially in-  
13 flating the price of Autodesk's products.  
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15 36. Autodesk's copyright in its software does not give it the right to pro-  
16 hibit resale of its lawfully acquired products. Autodesk's enforcement of its li-  
17 cense agreement by submitting DMCA notices of claimed infringement, and by  
18 continuing to submit notices of claimed infringement despite counter notices sub-  
19 mitted by Vernor, was an abuse of Autodesk's copyright and of the DMCA.  
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21 37. Autodesk's use of and enforcement of its license terms are unfair  
22 methods of competition, unfair or deceptive practices, and unlawful restraints of  
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1 trade under the Washington Consumer Protection Act, Wash. Rev. Code § 19.86,  
2 and/or the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200.

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4 **DEMAND FOR RELIEF**

5 Vernor demands judgment as follows:

- 6 1. Actual damages and punitive damages;
- 7 2. Treble damages under the Washington Consumer Protection Act,  
8 Wash. Rev. Code § 19.86.090;
- 9 3. Attorneys' fees and expenses under the Copyright Act, 17 U.S.C.  
10 § 505, the California Code of Civil Procedure, Cal. Civ. P. Code  
11 § 1021.5, and the Washington Consumer Protection Act, Wash. Rev.  
12 Code. § 19.86.090;
- 13 4. A declaratory judgment that  
14 a. Vernor's resale of authentic, used copies of AutoCAD software  
15 is lawful, protected by 17 U.S.C. § 109, and does not infringe  
16 Autodesk's copyright or other rights;  
17 b. Autodesk's "Software License Agreement" is unenforceable or  
18 unenforceable as to Vernor; and  
19 c. Autodesk has no right to interfere with Vernor's sale of authen-  
20 tic, used copies of Autodesk software;  
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- 5. An injunction
  - a. prohibiting Autodesk from further interfering with Vernor's re-sale of Autodesk software, and
  - b. requiring Autodesk to rescind their DMCA notices of claimed infringement with eBay; and
- 6. Such other relief as the Court finds appropriate.

Dated this 20<sup>th</sup> day of November 2007.

/s/ Michael E. Withey  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2007, 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:

NONE

I hereby certify that I have caused this document to be served via ABC Legal Messenger to the following:

Registered Agents, Inc.  
1780 Barnes Blvd. SW Building G  
Tumwater, WA 98512

DATED this 20<sup>th</sup> day of November, 2007.

/s/ Michael E. Withey  
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