

## Preemption

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<http://wendy.seltzer.org/brooklaw/07copyright/>

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## Copyright's control

- Over reproduction, derivatives, distribution, public performance and display:
  - § 106
- Over technologies of access and “copying”:
  - secondary liability
  - § 1201
- What effects on fair use and technological innovation?

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- Chamark Vacuum introduces a new vacuum that “sucks even more.” The vacuum is cheap, but requires special disposable filters, available only from Chamark. A microchip in the filter contains software to run a “filter dirty” program. When the chip indicates “dirty,” the vacuum won't run until a new filter is installed.
- StaticLink sees big business in providing generic filters to replace Chamark's expensive ones. The microfiber filter is easy to duplicate, and after some time, StaticLink reverse engineers the microchip as well. Its cheaper filters sell like hotcakes.
- Chamark sues, invoking DMCA §1201

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## *Chamberlain v. Skylink*

- Chamberlain makes garage door openers (GDOs) with rolling-code software, and GD remotes.
- Skylink makes replacement remotes.
- Chamberlain claims 1201(a)(2) violation for trafficking in devices enabling unauthorized “access” to its GDO software.

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## *Chamberlain v. Skylink*

- What's the controlled “access”?
- Is any infringement alleged?



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- “A plaintiff alleging a violation of § 1201(a)(2) must prove:
- (1) ownership of a valid copyright on a work,
  - (2) effectively controlled by a technological measure, which has been circumvented,
  - (3) that third parties can now access
  - (4) without authorization, in a manner that
  - (5) infringes or facilitates infringing a right protected by the Copyright Act, because of a product that
  - (6) the defendant either
    - (i) designed or produced primarily for circumvention;
    - (ii) made available despite only limited commercial significance other than circumvention; or
    - (iii) marketed for use in circumvention of the controlling technological measure.

A plaintiff incapable of establishing any one of elements (1) through (5) will have failed to prove a prima facie case.”

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### *Lexmark v. Static Control*

- Printer company v. toner cartridge remanufacturer
- Lexmark claims Static's microchip circumvents access controls limiting access to copyrighted printer software
- But the program is available, unencrypted, to anyone who buys a printer

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### *Contrast Corley with Lexmark and Chamberlain*

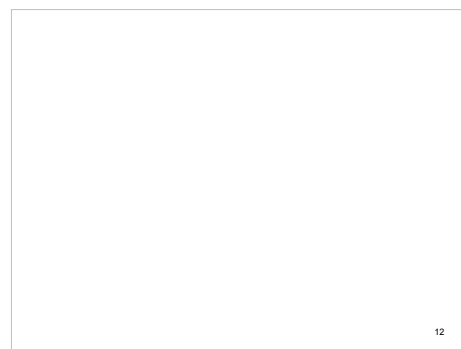
- Why do courts reach different conclusions on circumvention?

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### *Code is finer-grained than law*

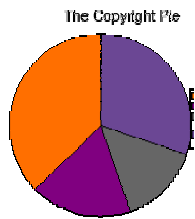
- Code can prevent uses law couldn't practically reach (even if earlier law technically prohibited them)
- This preemptive power stops many potential fair use challenges, preventing judicial review of whether a use is fair or foul

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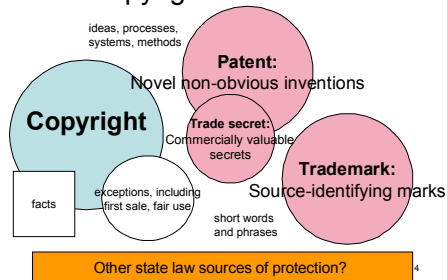
## Hardy's copyright pie



- Copyright
- Contract
- Technological limitations on copying
- Technological protection measures

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## Copyright in Context



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## Copyright in Context

- **Copyright:** original works of authorship fixed in a tangible medium of expression
  - Not: processes, systems, or methods
    - **Patent:** novel and non-obvious inventions
    - **Trade secret:** commercially valuable secrets
  - Not: short words and phrases
    - **Trademark:** source-identifying marks
  - Not: facts, first sale, fair use
    - Can copyright-holders fill these gaps?

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## To what extent can proprietors fill the gaps?

- Does copyright specify just one mode of protection, or does it “preempt the field”?
  - Is there a “gap” or a deliberate choice to leave matters in the public domain?
- State law sources of protection
  - Misappropriation
  - Rights of publicity
  - Contract

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## Preemption, in general



Sears, Roebuck & Co.  
v. Stiffel Co.



Kewanee Oil Co.  
v. Bicon Corp.



Bonito Boats, Inc.  
v. Thunder Craft Boats, Inc.



Goldstein v. California

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## Preemption

- **Statutory:** 17 U.S.C. § 301
  - All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106...and come within the subject matter of copyright ... are governed exclusively by this title.
    - Conflict preemption
    - Field preemption
- **Constitutional:** Art VI ¶ 2
  - This Constitution, and the laws of the United States ... shall be Supreme Law of the land

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## Is it preempted?

- New York wants to “increase incentive to creative works by protecting them for 150 years”
- Tennessee wants to prohibit even non-profit lending of sound recordings
- California wants to protect “actors’ improvisation on the movie set” against copying

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## INS v. AP



**AP** Associated Press

- INS “free rides” off AP’s news reporting by rewriting factual news stories for West Coast papers
- Does copyright prohibit this action?
- What’s “hot news”?

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## NBA v. Motorola



SportsTrax reports basketball scores in real time to pagers

Misappropriation?:

- Is misappropriation preempted?
- Is this misappropriation?

(T)he elements central to an INS claim are:

- (i) the plaintiff generates or collects information at some cost or expense,
- (ii) the value of the information is highly time-sensitive,
- (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it,
- (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff,
- (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

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## Misappropriation

- The NFL says “use of ... any pictures, descriptions, or accounts of the game without the NFL's consent, is prohibited.”
- Can NFL prevent someone from reporting scores from an ongoing football game?

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## The Contract Solution

- Not the “against the world” provisions of statute, but bilateral agreements
- Is that an “extra element”?
- Can one contract around fair use and first sale?

## Contracting around copyright's limits?

- Vault v. Quaid
- ProCD v. Zeidenberg
- Adobe v. Softman

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## Vault

- Vault's PROLOK: "[y]ou may not ... copy, modify, translate, convert to another programming language, decompile or disassemble" the program.
- Quaid reverse engineers, and builds RAMKEY (which unlocks PROLOK)
  - Copyright infringement?
  - License violation?
  - License enforceable?

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## ProCD

- ProCD sells SelectPhone with "clickwrap" license: You may only use the application program and listings for non-commercial purposes.
- Zeidenberg re-sells access to phone lists.
  - Copyright infringement?
  - License violation?
  - License enforceable?

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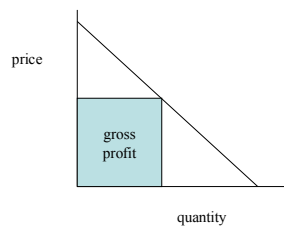
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## Uses of Contract

- Is K "equivalent" to ©?
- "The license is the product"
- Limit liability
- Protect investment
- Price discrimination
  - differentiate among users willing to pay for different levels of use
  - prevent arbitrage

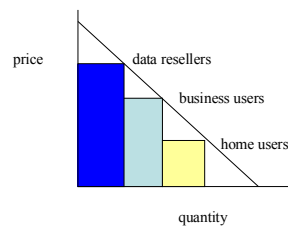
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One Price Fits All

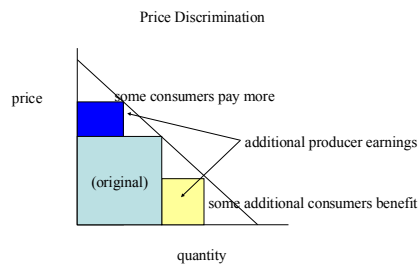


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Price Discrimination



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## The Market

- Does the market work?
- How many click-wraps do you read?
  - If the license is the product, are you an informed consumer?
- Should some policy goals be non-waivable?

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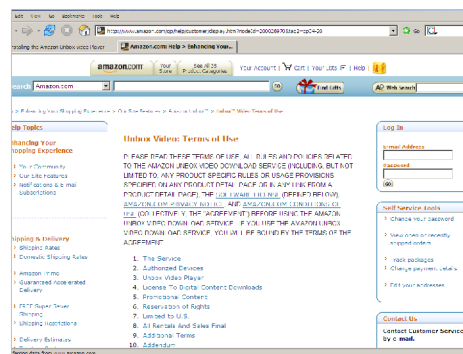
## Squashing arbitrage

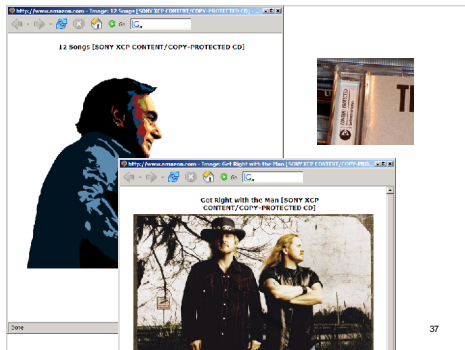
- Macrosquish offers an Academic Version of its popular office suite for less than half the retail price. Can Bernie BigCo, CEO, send Sam Student to buy a copy and pay him \$5 more than the academic cost as a delivery fee?
- Does it matter what the license agreement says? When a purchaser sees it?

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- What if the license says “Licensee must not criticize Macrosquish products”?
- “Licensee must not build products that compete with Macrosquish software”?

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## The SonyBMG Rootkit

- You buy Van Zant's "Get Right with the Man" and put it into your PC. A dialog pops up saying "the CD will automatically install a small proprietary software program onto YOUR COMPUTER." (Even before you click "Accept," the CD has installed several files.) You just want to hear the music. Have you agreed to let Sony add kernel-level drivers to your computer?

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## Copyright

- **What is protected?**
- How do you get protection?
- What rights does it convey?
- What infringes?
- What defenses are available?
- What is the source of law?
- What is the policy behind it?

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## ADMIN

Exam: 8 hour take-home, available any time during the exam period (April 30-May 10).

Practice exams linked on the website.

Open book, closed Google/Lexis/Westlaw.

Meetings: In-person before April 23

By email/phone/wiki/skype before April 30

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