

Creative Copyright: Open and Closed Licensing

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1

ADMIN

- No class Wednesday, I'm off to Oxford.
- Slides are on the wiki, linked from the course homepage.
- Feel free to email or call with questions.
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- Keep in touch: wendy@seltzer.org

2

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.
- Constitutional: Art VI ¶ 2
 - This Constitution, and the laws of the United States ... shall be Supreme Law of the land
- *Conflict*
- *Field*

3

The Contract Response

Parties often contract about copyright's exclusive rights. Is the state-law claim for breach of contract preempted?

– Yes: When it covers and conflicts with copyright
or

– No: Contracts are bilateral agreements, not "against the world" provisions of statute, so the breach has an "extra element" beyond infringement

Can one contract around fair use and first sale?

4

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

5

Contracting around copyright's limits?

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

6

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?

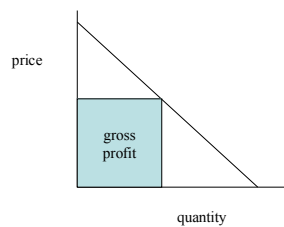
7

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?

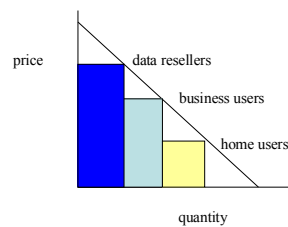
8

One Price Fits All



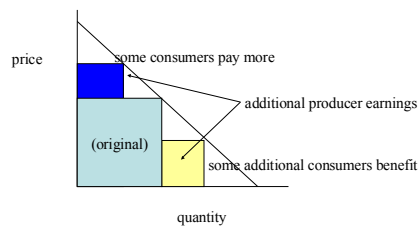
9

Price Discrimination



10

Price Discrimination



11

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?

12

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?

13

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

14

Free and Open Source software

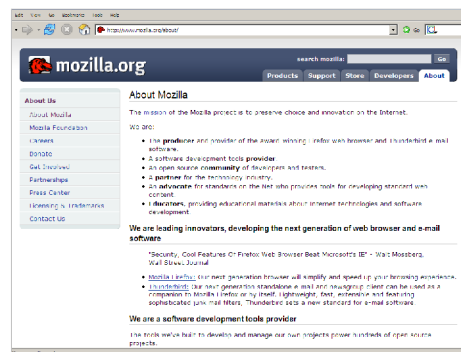
- GNU/Linux operating system
- Apache webserver
- Sendmail email server
- Mozilla web browser
- BIND nameserver
- Major users include: IBM, HP, banks, even law firms



The Apache Software Foundation
http://www.apache.org/



15



Free Software Definition

- "Free software" is a matter of liberty, not price. [free speech, not free beer]
- "Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software. More precisely, it refers to four kinds of freedom, for the users of the software:
 - The freedom to run the program, for any purpose (freedom 0).
 - The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
 - The freedom to redistribute copies so you can help your neighbor (freedom 2).
 - The freedom to improve the program, and release your improvements to the public, so that the whole community benefits. (freedom 3). Access to the source code is a precondition for this.

18

Free Software / Open Source

- Source Code:

- human readable, "best form for making modifications"

```
void CSSdecrypt(key unsigned char *key, unsigned char *data)
{
    int i;
    unsigned char *m = (unsigned char *)0;
    unsigned char *n = (unsigned char *)0;
    for(i=0; i<data; i++)
        m[i] = data[i] ^ key[i];
    CSSdecrypt(m, n);
    CSSdecrypt(key, m);
}
```

- Object Code:

- compiled, executable, much harder to read or modify

```
0000120 6d74 6162 002e 7374 7274 6162 002e 7265
```

19

Source Code

APPENDIX A: C source file fact.c

```
#include <stdio.h>
void main(int argc, char *argv[]) {
    int i, result;
    result = 1;
    for (i = 1; i < 6; i++) {
        result = result * i;
    }
    printf ("Result is: %d\n", result);
}
```

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20

Object Code

APPENDIX C: binary file fact.o (produced by: gcc -c fact.c;
dumped by: od -x fact.o)

```
00000000 7445 4c46 0102 0100 0000 0000 0000 0000
00000020 0001 0002 0000 0001 0000 0000 0000 0000
00000040 0000 0234 0000 0000 0034 0000 0000 0028
00000060 0008 0001 002e 7368 7374 7274 6162 002e
00000100 7465 7874 002e 726f 6461 7461 002e 7379
00000120 6d74 6162 002e 7374 7274 6162 002e 7265
00000140 6c61 2e74 6578 7400 2e63 6f6d 6d65 6e74
00000160 0000 0000 9de3 bf88 f027 a044 f227 a048
00000200 9010 2001 d027 bfe8 9010 2001 d027 bfec
...
```

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21

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2. You may **modify** your copy, and distribute modified copies under the same terms with notice of changes under this GPL
3. You may distribute **modified object code (binaries)** iff you make source code available

[link](#)

22

GPL's "viral" licensing

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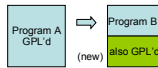
23

Viral or Antibiotic?

- Sysco Cistems writes embedded networking software. A programmer finds that someone else has written the function she needs, so she incorporates that code into her program. Sysco sells the product without including source code or any reference to third-party code.
- What liability if the code is copyrighted?
- What liability if the code is copyrighted and licensed under the GPL?
- What options does Sysco have in each case?

24

GPL



Source code must be made available to anyone to whom the program is given or sold

25

GPL



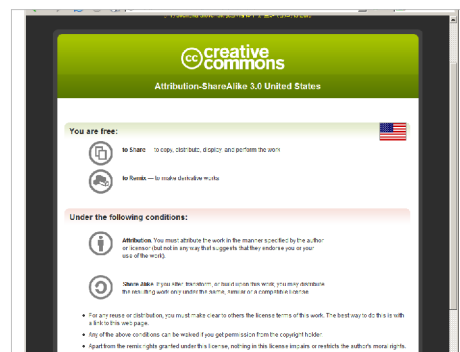
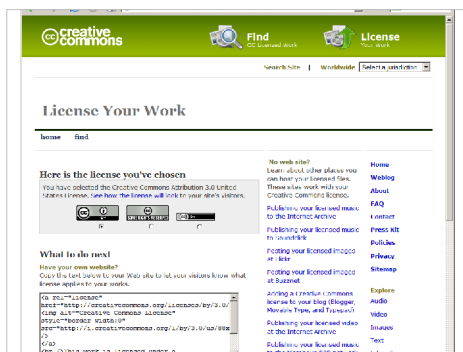
Source code must be made available to anyone to whom the program is given or sold

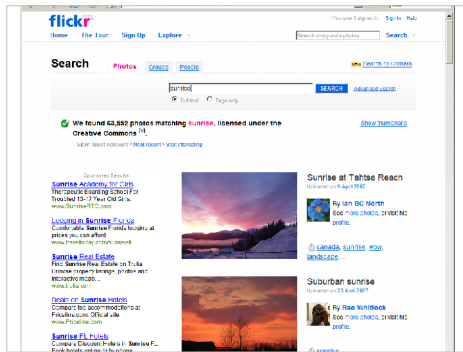
26

Creative Commons

- “Some rights reserved”
- With a Creative Commons license, **you keep your copyright** but allow people to **copy and distribute your work** provided they **give you credit** — and only on the conditions you specify here. For those new to Creative Commons licensing, we’ve prepared **a list of things to think about**. If you want to offer your work with no conditions, choose the **public domain**.

27





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?

33

What's next?

- How will the music industry come to terms with the Internet?
- How about movies, TV, book publishers...?
- Will technologists be able to develop Betamax-type products, or will they be tied up in inducement suits?
- Will creators embrace alternatives? Will Congress?

34

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35