Contract

Broadcast Flags

- "Digital Broadcast Content Protection" 47 CFR 73.9002(b) and following:
- *"No party shall sell or distribute in interstate commerce a Covered Demodulator Product that does not comply with the Demodulator Compliance Requirements and Demodulator Robustness Requirements."*

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

The Contract Solution

- Not the "against the world" provisions of statute, but bilateral agreements
- Recall off-line contract law
  - offer and acceptance
  - battles of the forms

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Shrinkwrap, Clickwrap, Browsewrap

- Vault v. Quaid
- Bowers v. Baystate
- ProCD v. Zeidenberg
- Specht v. Netscape

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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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Bowers v. Baystate

- Claims of copyright, patent, and contract violations

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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?
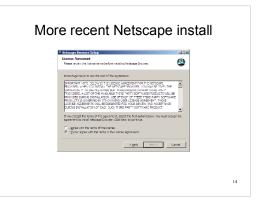 - License enforceable?

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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
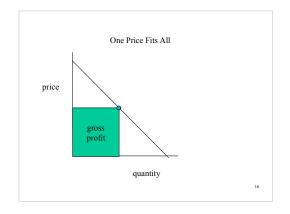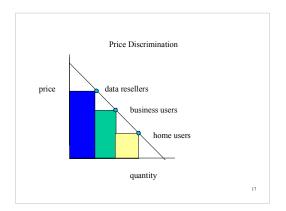
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Specht

- Netscape offers SmartDownload software for download, with hyperlinked license agreement: All disputes must be arbitrated.

- Plaintiffs bring class action lawsuit for privacy violations.
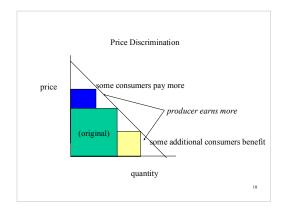 - Is there a license agreement?
  - License violation?

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More recent Netscape install

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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

price

gross profit

quantity

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Price Discrimination

price

data resellers

business users

home users

quantity

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Price Discrimination

price

some consumers pay more

producer earns more

(original)

some additional consumers benefit

quantity

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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?

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?

- What if the license says "Licensee must not criticize Macrosquish products"?

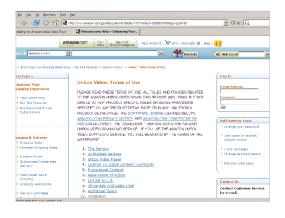- "Licensee must not build products that compete with Macrosquish software"?

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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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NS4.REGISTER.COM 216.21.226.97

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