



MARQUETTE
UNIVERSITY

LAW SCHOOL

Warez Trading and Criminal Copyright Infringement

Eric Goldman

Marquette University Law
School

eric.goldman@marquette.edu

<http://>

eric_goldman.tripod.com



Overview

- ◆ Definition of warez trading
- ◆ Applicable criminal laws
- ◆ Some prosecutions
- ◆ Some policy concerns
- ◆ The bottom line:
 - Warez trading has been criminalized
 - More warez traders will be sent to jail



What is Warez Trading?

- ◆ Warez trading vs. commercial piracy
- ◆ Different types of warez traders
 - Warez distribution groups
 - Warez collectors
 - Warez downloaders
 - Abandonware enthusiasts



Criminal © Infringement

- ◆ Willful copyright infringement committed:
 - for commercial advantage or private financial gain, or
 - by reproducing or distributing, in any 180-day period, works with a total retail value over \$1,000
- ◆ Punishment can be up to 5 years in prison and \$250,000 fine



Prosecution Elements (1)

◆ Valid copyright exists

◆ Infringement

- Uploading, downloading, distribution
- Evidentiary challenges
- First sale doctrine
- Fair use
 - ◆ Nature of the use
 - ◆ Nature of the work
 - ◆ Amount taken
 - ◆ Effect on the market



Prosecution Elements (2)

◆ Willfulness

- Minority view: intent to copy
- Majority view: “voluntary, intentional violation of a known legal duty”
 - ◆ Good faith but incorrect belief of non-infringement
 - ◆ Good faith but incorrect belief of fair use
 - ◆ Ignorance of the law



Prosecution Elements (3)

- ◆ Commercial advantage/financial gain
 - Financial gain: “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works”
- ◆ Retail value
 - \$2,500 for felony, \$1,000 for misdemeanor
 - Price of warez v. manufacturer’s list price



Other Criminal Laws

- ◆ Circumvention
 - Circumventing
 - Trafficking in circumvention devices
- ◆ Hacking/Trespass
 - Unauthorized access to obtain information
 - Unauthorized access and causing damage
- ◆ Theft
- ◆ Trade Secret Misappropriation
- ◆ Copyright Management Information Integrity



Prosecutions

- ◆ Classes of defendants
 - Distribution groups (Fastlane, PWA, DOD, RWZ)
 - Individual traders (Levy, Thornton, Baltutat, Fitzgerald)
 - Movie traders (Spatafore, Gonzalez)
- ◆ 100% conviction rate (so far)
- ◆ Almost all defendants plead guilty
 - 2 jury trials, both lost
- ◆ At least 19 defendants have received jail time
 - High: 46 months
 - Average: 25 months



Policy Concerns

- ◆ Warez traders' contribution to piracy is substantially overstated
 - Counting copies substantially distorts "lost sales"
- ◆ Criminalizing warez trading may have counterproductive motivational effects
- ◆ Congress has criminalized many Americans, not just warez trading
 - Is P2P file sharing for "financial gain"?
 - \$5.56/day of infringement



Predictions

- ◆ Congress wants people to respect the law
 - If a law doesn't work, make it meaner
 - But we do not respect unjust laws
- ◆ Congress wants more scalps
 - The double-edge sword of busting P2P file sharers
 - Meanwhile, warez traders make great targets
 - ◆ Congress hates warez traders
 - ◆ Industry hates warez traders
 - ◆ The average person can distinguish their conduct from warez trading
- ◆ Net Effect: More warez traders will be jailed