

Defending Cybercrime Cases: IP Crimes

CJ341 – Cyberlaw & Cybercrime Lecture #24

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Copyright Review

- Criminal copyright enforcement = federal function
 - ❑ Copyright violations codified in Titles 17 & 18 of USC.
 - ❑ Challenges presented by technology
- 17 USC § 506(a): key criminal statute
 - ❑ Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18
 - ❑ Punishment by imprisonment, fine (18 USC 2319)
 - ✓ Base sentence 0-6 months



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Elements of Copyright Infringement

Prosecution must show:

1. Existence of valid copyright
2. Infringement of the copyright by defendant
3. Defendant acted willfully, either
4. for purposes of:
 - ❑ commercial advantage or
 - ❑ private gain or
 - ❑ by the reproduction or distribution of one or more copies or phonorecords of 1 or more works during any 180-day period which have a retail value > \$1,000



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Defenses to Criminal Copyright Infringement

- No valid copyright
 - ❑ Not registered
 - ✓ Note: Copyright registration not required at time of infringement
 - ❑ Fraud
 - ✓ Copyright registrant was not author
- Gov't must prove validity as element

"For him that doth ill and doth sin with this book, in retribution for what he has done, I send this curse, and for him that would alter this book: may he be annihilated by leprosy, and may his name be erased from the book of the living and may he join the Devil for all Eternity."

13th century book curse adapted from Eike von Repgow, «Sachsenspiegel.»
<http://www.urheberrecht.ch/E/heute/diuh10.php?m=5&s=1>

Authorized Use

- Defeats willfulness element
- Copyright Act does not define authorization
 - ❑ "Apparent authority" as possible defense
 - ✓ Good-faith belief copy permitted



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Statutory Exceptions – No Infringement

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First Sale Doctrine

- Copyright Act §109 distinguishes between *physical copy* and *intellectual property*
- Ownership of *physical copy* of work permits
 - ❑ Lending
 - ❑ Reselling
 - ❑ Disposing
- Does not permit
 - ❑ Reproduction
 - ❑ Public display or performance
- Software is sold by license
 - ❑ Original may be sold only if copies deleted



See <http://www.copyright.com/ccc/viewPage.do?pageCode=cr10-n#saledoctrine>

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Fair Use Reviewed

- 4 factors considered to determine if use complies with Fair Use Doctrine:
 1. Purpose and nature of use
 2. Nature of the copyrighted work
 3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole
 4. The effect of the use upon the potential market or the value of the work



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Copyright Misuse

- Courts tend to look to see whether *copyright owner* has acted against public policy
 - ❑ Defendant can claim owner is using copyright in manner that violates public policy
 - ❑ Renders copyright unenforceable
- Used where owner attempts to *extend rights beyond those granted under Copyright Act*
- *Qad. Inc. v. ALN* (1992)
 - ❑ Defendants copied part of Plaintiffs' software
 - ❑ Raised the affirmative defense of misuse, claiming plaintiff's had copied another company's program and had improperly extended their ownership rights
 - ❑ Court allowed the defense and found *against* Plaintiff based on *their* misuse of copyright



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Counterfeit Labels

- Trafficking in Counterfeit Labels or Computer Program Documentation or Packaging
- 18 USC 2318
- Trafficking = *transferring, transporting or disposing of the materials*
- Prohibits
 1. Trafficking in counterfeit labels affixed or designed to be affixed to a phonorecord, a copy of a computer program, documentation or packaging of a computer program, motion picture or other audiovisual work; and
 2. Trafficking in counterfeit documentation or packaging of a computer program
- Fine + Imprisonment



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Counterfeit Anti-Counterfeit Labels (2007) [1]

- Undercover investigation (2005)
 - ❑ FBI & Rapid Enforcement Allied Computer Team (REACT) Task Force
 - ❑ Operation Remaster
 - ❑ Federal search warrants at 13 locations in CA & TX
- Seized contraband:
 - ❑ 3 CD/DVD replicators
 - ❑ 494,000 pirated music, software & movie disks
 - ❑ 6,135 *stampers* to generate copies of disks (these are molds that create a copy in 3 seconds)



<http://img.photobucket.com/albums/v103/11ptoe221/FBI.jpg>

<http://www.usdoj.gov/criminal/cybercrime/wenSent.htm>

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Counterfeit Anti-Counterfeit Labels (2007) [2]

- Counterfeits included
 - ❑ Adobe Photoshop
 - ❑ Norton Antivirus
 - ❑ Music from many artists
- Counterfeit labels with FBI Anti-Piracy Seal placed on the counterfeits!
- San Jose, CA US Attorneys charged three defendants with massive piracy violations
- Sentences
 - ❑ Yaobin Zhai (34): 37 months prison & \$6.9M restitution
 - ❑ Ye Teng Wen (31) & Hao He (32): 37 months prison & \$125K fines



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Live Performances



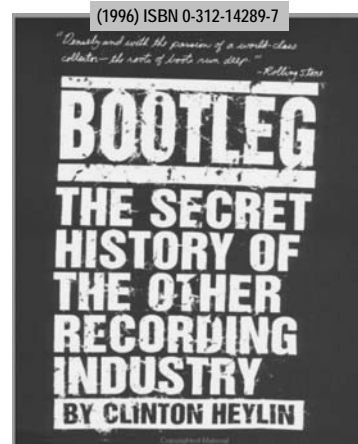
- Unauthorized fixation of and trafficking in sound recordings and music videos of live performance
- 18 USC 2319A protects live performances
- Criminalizes bootleg recordings of live performances
- Up to \$250K fines + 5 years imprisonment
- Greater fines for repeat offenders



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Bootleg Recordings [1]



Bootleg Recordings [2]



- Books by Heylin focus on rock music industry
 - ❑ Origins in Southern CA in 1969
 - ❑ Excerpts available on **GOOGLE BOOKS**
<http://books.google.com/books?id=saWBw9ZG2cgC>
- But Louis Armstrong "gained his interest in tape recording after hearing bootleg recordings of his Carnegie Hall concert in 1947."
<http://tinyurl.com/6ou52x>



<http://tinyurl.com/5ddek2>

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DMCA



- Digital Millennium Copyright Act
- Amended Copyright Act to address digital information and Internet
- §1201
 - ❑ Prohibitions on circumvention of technological measures used to protect copyright systems
 - ❑ Fair use = defense
- §1202
 - ❑ Protects against concealment of copyright infringement caused by tampering with CMI (copyright management information)
 - ❑ E.g., tampering with identification info
- Up to \$500K fine + imprisonment
 - ❑ Enhanced penalties for repeat offenders



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Defenses to DMCA Violations



- Constitutional challenges
- *U.S. v. Elcom* (2002)
 - ❑ Defendant sold the *Advanced eBook Processor*, which permitted removal of use restrictions from Adobe Acrobat PDF files and files formatted for the eBook Reader
 - ❑ Defendant moved to dismiss on constitutional grounds, claiming DMCA violates First Amendment
 - ❑ Court found computer code *is protected speech* at some level, but that DMCA prohibits certain code related to *function*, not *content*, so *no First Amendment fair use right* and DMCA not overbroad
- See <http://digital-law-online.info/cases/62PQ2D1736.htm>

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Copyright Removal & False Application



- Removal of copyright notice or fraudulent use = criminal acts
 - ❑ Fines possible
- Section 506(e) prohibits *false representations on copyright application*
 - ❑ Knowing violations = subject to fine
 - ❑ Key: knowledge – intent to knowingly supply erroneous info



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Economic Espionage Act of 1996



- Goal to protect info guarded by
 - ❑ “Reasonable” secrecy measures &
 - ❑ Maintain *competitiveness* of critical U.S. industries
- Criminalizes *theft of trade secrets*
 - ❑ Previously, Trade Secrets Act dealt only with *civil* litigation

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EEA Cases [1]



US v. Ho (1998).

- Employee sent e-mail to competitor’s company requesting info relating to competitor’s technology
- Employee arrested under terms of EEA



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EEA Cases [2]



US v. Martin (2000).

- Maine chemist and California scientist corresponded via e-mail
- Chemist sent resume and confidential company info to scientist
- Scientist prodded for more info
- On chemist’s last day of work, mistakenly sent correspondence to her *employer* discussing confidential info she had sent to scientist
- Scientist convicted for conspiracy to steal trade secrets



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EEA Cont.



- Insiders / Employees make up most cases
- Situations where EEA red flag might go off
 1. Company *hires* an *employee* who has intimate knowledge of former employer’s IP
 2. Company *buys* a *business* that has employees who recently worked for competitors or other industry employers
 3. Company uses *consultants* who have access to technical and marketing info
- Do not allow employees to breach confidentiality agreements by asking *improper questions*



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EEA Defenses



- Parallel Development
 - ❑ Argue possession of a trade secret was derived through independent work
- Reverse engineering
 - ❑ But beware DMCA violations
 - ❑ Must not disable technological barriers
- General knowledge & skills
 - ❑ Strongest argument – challenges patent or supports no violation trade secrets
- First Amendment rights
 - ❑ Bizarre idea!



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DISCUSSION



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