

# Introduction to Software Copyright

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# IANAL

- Especially, I am not *your* lawyer

# Why care about copyright?

- (Almost) all software is copyrighted
- Free/Open Source Software licenses rely on copyright to enforce their conditions

# But first, some legal education

- Hierarchy of courts in the Federal system
  - Supreme Court
  - Courts of Appeals (Circuit Courts)
  - District Courts

# Legal basis for copyright

- Article I, Section 8 of the Constitution
  - The Congress shall have Power...  
To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries
- Title 17, *United States Code*
  - Revision in 1976 made copyright of future works exclusively Federal territory

# What *is* copyright?

- A set of rights in a work *exclusively* reserved to the copyright holder (17 U.S.C. 106)
  - Make copies of the work
  - Prepare derivative works
  - Distribute copies of the work
  - Make public performances of the work
  - Publicly display the work
- The copyright holder can authorize others to exercise these rights

“A man's got to know his limitations”  
—Dirty Harry

- Fair use
- First Sale Doctrine
- Limitations for computer programs
- Idea vs. expression

# Fair use (17 U.S.C. 107)

- Allows others to exercise these rights without permission for “for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research”
  - Purpose and character of use
  - Nature of the work
  - Amount and substantiality of the portion used
  - Effect on the market or value of the work



# First Sale Doctrine (17 U.S.C. 109, 202)

- The owner of a legal copy is free to transfer or re-sell it
  - Proprietary software often restricts this via end-user license agreements (contract law)
  - Commercial rental or lending of software is restricted by subsection (b)

# Limitations for computer programs (17 U.S.C. 117)

- Copies (such as in RAM) needed in order to use the program
- Archival copy of a program

# Ideas vs. expression

- Copyright protects expression of an idea, not the idea itself
  - *Baker v. Selden* (1879), 17 U.S.C. 102(b)
  - How this applies to software is currently playing out in *Oracle v. Google*
- Patents protect an idea

# What is eligible for copyright? (17 U.S.C. 102, 201)

- Original works of authorship
  - They don't have to be very creative
    - But *Feist Pub. v. Rural Telephone Service* (1991) held “sweat of the brow” insufficient to establish copyright
  - Certain types are listed—software is considered to be a “literary work”
- This applies to source code and object code: *Apple v. Franklin* (Third Circuit, 1983)
- Fixed in a tangible medium of expression
- Exclusions: ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries

# What is eligible for copyright? (17 U.S.C. 103, 201)

- Compilations
- Derivative works
- These are protected only to the extent of the new material

# Derivative Works

- *Whelan v. Jaslow* (Third Circuit, 1986) established sequence, structure, and organization test
- *Computer Associates v. Altai* (Second Circuit, 1992) rejected SSO and established abstraction-filtration-comparison test
- *Apple v. Microsoft* (Ninth Circuit, 1994) rejected look-and-feel claims (but not wholly on copyright grounds)
- *Lotus v. Borland* (First Circuit, 1995) held that menu hierarchy was not copyrightable

# How to obtain a copyright

- Just write something!
- Addition of a © symbol unnecessary
  - But notice reduces some defenses to infringements (17 U.S.C. 401)
- Registration is unnecessary
  - But you generally cannot sue without registration (17 U.S.C. 411)
  - Registration allows for recovery of statutory damages (17 U.S.C. 412)

# How long does copyright last?

- Life of the author plus 70 years (17 U.S.C. 302)
- Works for hire, anonymous, or pseudonymous works: 95 years from publication, or 120 years from creation, whichever comes first
- Basically forever for software



# Remedies for infringement

- Exercising any of the §106 rights without authorization is *infringement* (not theft!)
- Injunctions (17 U.S.C. 502)
- Impoundment (17 U.S.C. 503)
- Damages (17 U.S.C. 504)
  - Actual damages
  - Statutory damages: up to \$30,000 per infringement, \$150,000 if willful

# Free/Open Source software licenses

- *Jacobsen v. Katzer* (Federal Circuit, 2008) found terms in free software licenses (Artistic License, specifically) are conditions which must be observed to avoid infringement
- *Not* based in contract

# Stallman's four freedoms

- Freedom to run the program
- Freedom to make and distribute copies
- Freedom to modify the program
- Freedom to distribute your modifications

# Creative Commons

- Multiple licenses, not just one “CC” license

- BY

- BY-SA

- BY-ND

- BY-NC

- BY-NC-SA

- BY-NC-ND

} Free cultural works

} Non-free

# Popular Free Software licenses

- “New” BSD license (FreeBSD, MIT, X)
- Apache license
  - Permissive, license is not required to be applied to derivative works (like CC BY)
- GNU General Public License
  - “Copyleft” license, must be carried forward to derivative works (like CC BY-SA)