

COPYRIGHT, FREE AND OPEN SOURCE SOFTWARE AND ASSORTED GRAND CONSPIRACY THEORIES

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“The sound of people thinking too hard.”

Why Are We Here?

- “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

United States Constitution, Article I, Section 8, Clause 8

IP Overview

- **Copyright** – (“works” or “expression”) – the right of an author to prevent others from making certain use of the author’s original works of authorship for a set term.
- **Patent** – (“ideas”) – The right to exclude others from practicing the invention for a limited time in order to stimulate innovation.
- **Trademark** – (“marks”) – A word, name or symbol used to identify goods and distinguish them from those manufactured or sold by others.
- **Trade Secret** – (“secrets”) – Information that has economic value because the holder has taken reasonable precautions to keep the information secret and private.
- Software licensing, including OSS licensing, is primarily concerned with Copyright and Patents.

...and copyright in particular

CONTENT REGULATION



Patron Saint Of Copyright



The Opposing Viewpoint

Web 1.0 Era of Publisher Liability

- At the advent of the Internet, Congress enacted a series of laws to facilitate the growth of the Internet
- Congress recognized that one of the unique opportunities that the Internet provided was to offer interactivity and it enacted laws to encourage companies to experiment with this interactivity
- This has led to E-Bay, Blogging, Social Networking, Search Engines, etc.
- Please note that this relates only to publisher liability, not the author's liability (none of these laws is a blanket right to defame or infringe)

Web 2.0 Era of Publisher Liability

- The era of User Generated Content (or “UGC”) has created a new class of content creators who don’t have history or education of most producers and creators
- Higher value content is being infringed so there is more at stake for the content owner
- Content owners have tried to learn from Napster and they want to protect their own communities and content services
- Content owners have also learned that they don’t want it to get out of control
- As a result, more lawsuits...

Web 3.0 Era?

- “Content” is no longer King
- Traditional publishers become irrelevant
- Technology morphs even faster
- Users are empowered
- A “cut-and-paste” world
- Technology and content in user-generated combinations
- Practically no limits
- How do you give creators incentives to create?

BASICS

Copyright Liability Summary

- Elements of infringement
 - Access + Substantial similarity
- Direct Liability
 - 1st person liability of the active infringer
- 3rd party Liability
 - When you can be held liable for another's infringement
 - Contributory Infringement:
 - “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”
 - Vicarious Infringement:
 - Liability where one “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”
 - Inducement:
 - Liability where one distributes a device with the object of promoting its use to infringe copyright.
 - Indicia of intent:
 - (1) promotion of infringement-enabling virtues of device;
 - (2) failure to filter out infringing uses;
 - (3) business plan depends on high volume of infringement.

Fair Use

- A user may infringe a copyright held by another party for purposes of criticism, comment, news, teaching, scholarship or research.
- 4 Part Test
 - The purpose and character of the use (i.e. commercial v. non-commercial)
 - The nature of the copyrighted work
 - The amount and substantiality of the portion taken vs. the whole
 - The effect of the use on the potential market for the value of the copyrighted work
- Test applied on a case by case basis. Hard to establish hard and fast rules, (see, e.g. music sampling)

DMCA Safe Harbor

- “DMCA” typically refers to either the notice and take-down safe harbor (s. 512) or the anti-circumvention clause (s.1201)
- Section 512(c) provides that a website will not be contributorily infringing for content residing on its system at the direction of users provided:
 - It follows the notice and takedown procedure
 - It does not have actual knowledge that the material is infringing
 - In the absence of actual knowledge, it is not aware of facts or circumstances from which infringing activity is apparent
 - It does not receive a financial benefit directly attributable to the infringing activity
- This only creates a safe harbor. Failure to meet the safe harbor does not create copyright liability.
- Note that this only applies to copyright (you’re on your own for trademark – although cease and desist letters are effectively notice and takedown, but see the anti-counterfeiting cases).

Linking Liability

- Generally no liability for linking (Ticketmaster v. Tickets.com is still the controlling case).
- Courts have only imposed liability for linking in very rare circumstances.
 - Flaunting a court order (Lighthouse; Reimeredes)
 - Child Porn
 - International

Linking to Infringing Content Liability (“Leeching”)

- A “leeching” website is one that lists links or inline links to infringing content (usually video), but doesn’t host the content itself
- The studios have sued Project Playlist, Peekvid, youtvpc, showstash, and others.
- Theory is that website solely exists to facilitate copyright infringement and therefore falls within Grokster inducement/contributory infringement rubric
- Akin to European suits against allofmp3.com
- MPAA won a judgment against Showstash in May 2008

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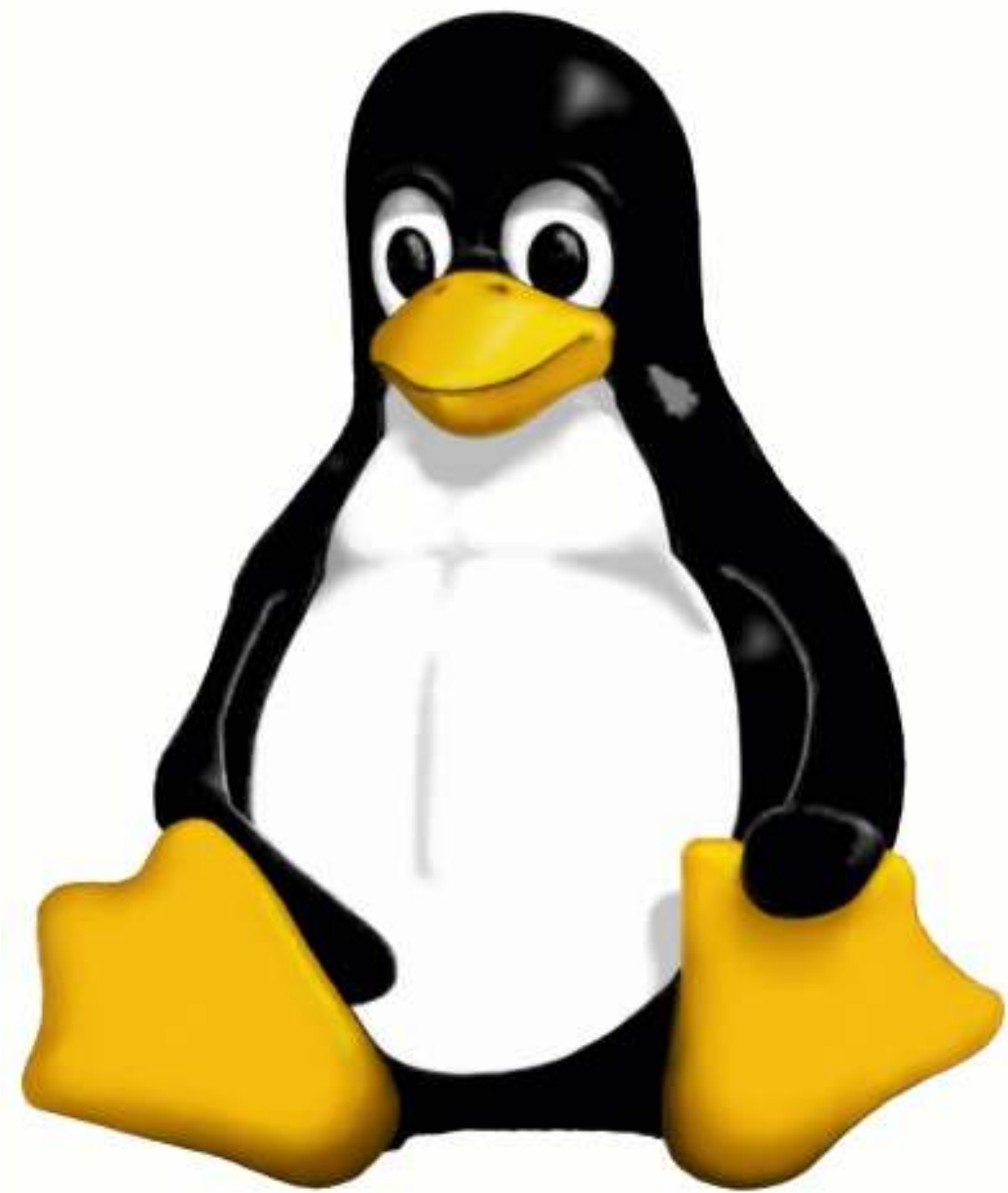
DMCA Anti-Circumvention Provisions

- The DRM/Encryption provision
- Imposes liability for circumventing a technological measure that controls access to a work (or for importing, manufacturing, selling, etc. a device that does this)
- Does not matter that the purpose of the circumvention is permitted (i.e. one can't break DRM for a "fair use"), see, e.g. 321 Studios case

“ A Whole Bunch Of Hippie crap!”

-Anonymous Outside Consul

FREE AND OPEN-SOURCE SOFTWARE



What is Open Source Software?

- OSS is subset of 3rd party code
 - Distributed under a specific type of license (covering copyright and patents).
 - Special Issue: Pedigree
- No single “official” definition of OSS, but key distinction:
 - Proprietary software: one “owner” of the copyright in control of development, distribution and conditions of use.
 - OSS: shared ownership of the copyright and control of development, distribution and conditions of use.
- OSS is not public domain or freeware (although, under some circumstances, it could be)
 - Public domain means that a work is no longer within its term of copyright protection (e.g. Shakespeare)
 - “Freeware” is fully licensed software with a no-cost license fee
- Literally, software licensed under an Open Source Initiative (OSI) approved license.
 - Open Source Initiative has approved over 70 “Open Source” licenses.

What is true “open source software”?

- Dozens of licensing models, but “true “open source software share 10 characteristics
- 1. Free Redistribution
 - The license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall not require a royalty or other fee for such sale.
- 2. Source Code
 - The program must include source code, and must allow distribution in source code as well as compiled form. Where some form of a product is not distributed with source code, there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost preferably, downloading via the Internet without charge. The source code must be the preferred form in which a programmer would modify the program. Deliberately obfuscated source code is not allowed. Intermediate forms such as the output of a preprocessor or translator are not allowed.
- 3. Derived Works
 - The license must allow modifications and derived works, and must allow them to be distributed under the same terms as the license of the original software.
 - <http://opensource.org/docs/osd>

What is true “open source software”?

- 4. Integrity of The Author's Source Code
 - The license may restrict source-code from being distributed in modified form only if the license allows the distribution of "patch files" with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.
- 5. No Discrimination Against Persons or Groups
 - The license must not discriminate against any person or group of persons.
- 6. No Discrimination Against Fields of Endeavor
 - The license must not restrict anyone from making use of the program in a specific field of endeavor. For example, it may not restrict the program from being used in a business, or from being used for genetic research.
 - <http://opensource.org/docs/osd>

What is true “open source software”?

- 7. Distribution of License
 - The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties.
- 8. License Must Not Be Specific to a Product
 - The rights attached to the program must not depend on the program's being part of a particular software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program's license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.
- 9. License Must Not Restrict Other Software
 - The license must not place restrictions on other software that is distributed along with the licensed software. For example, the license must not insist that all other programs distributed on the same medium must be open-source software.
- 10. License Must Be Technology-Neutral
 - No provision of the license may be predicated on any individual technology or style of interface.
 - <http://opensource.org/docs/osd>

Why does “open source software” exist?

- Possible answers
 - Psychological answer: the need for community
 - Political science answer: the desirability of communal ownership
 - Philosophical answer: freedom is the highest value
 - Economic answer: cheap costs of goods (no R and D costs)
 - Business answer: great pricing and speed to market (but lose any sustained competitive differentiators)

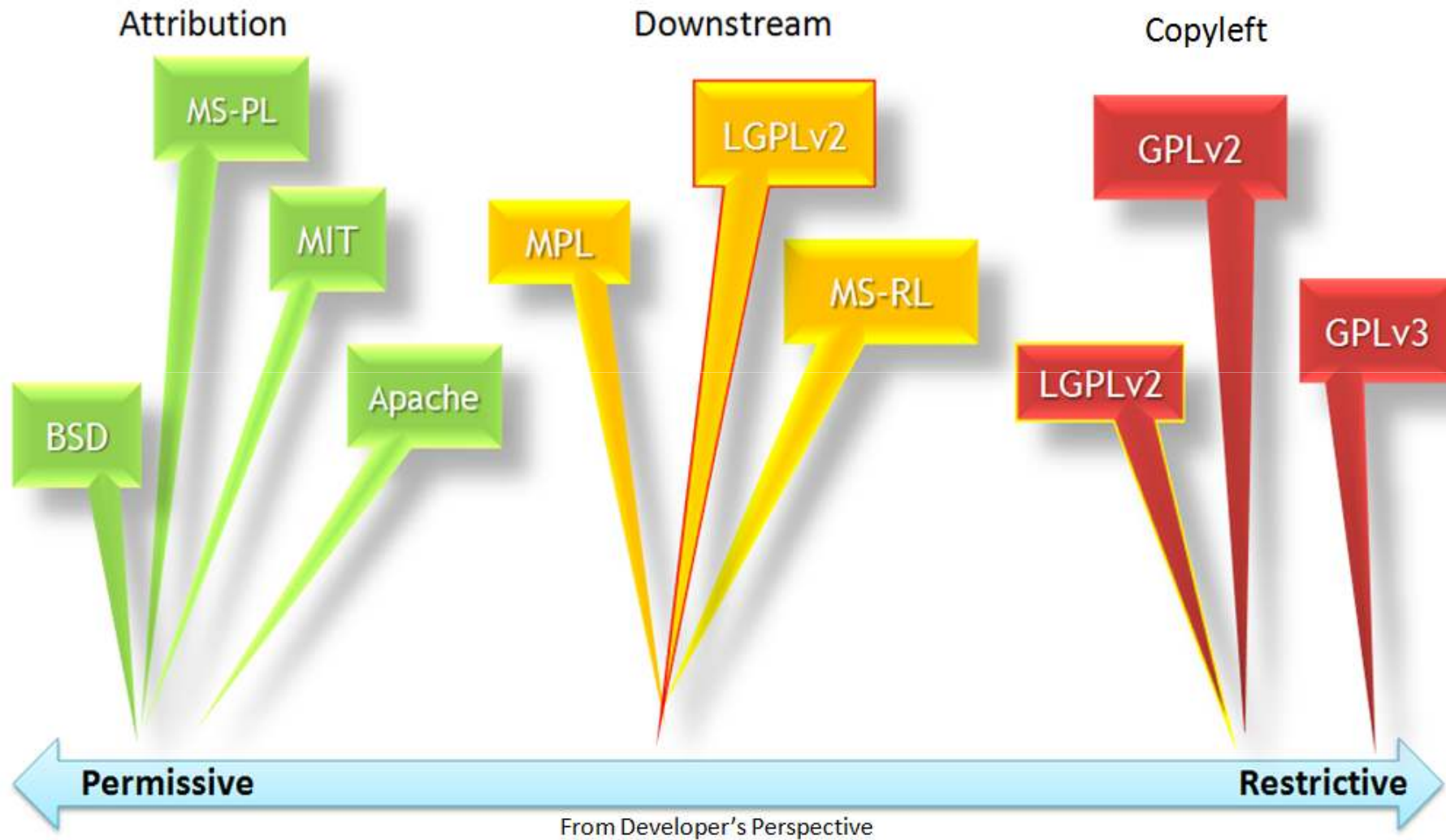
The Make/Buy/Open Source Decision

“Companies that use open source often make a purely black or white decision: either a product is open source or it is not. Much greater benefits can be obtained by using a more subtle approach. A company can use open source for certain features and use closed, in-house developed or commercially licensed software for other features if the [OSS] license implications are properly managed. **The ultimate goal should be to ensure the product offers the most value.**”

	Make	Buy	Open
Differentiator	Green	Orange	Red
Baseline	Orange	Green	Orange
Commodity	Red	Orange	Green

Source: Arnoud Engelfriet, “The Best of Both Worlds,” *Intellectual Asset Management* (2006)

OSS Licensing Continuum



Why can some “open source” software be a problem for traditional software business?

- Can threaten “proprietary” business model (selling software licenses to platforms, tools and applications we develop)
- 3rd-party code licensed under strong copyleft licenses arguably:
 - (1) Donates to the community any proprietary code combined with it in a unified derivative work.
 - (2) Grants implied licenses to key patents in developer’s portfolio

IP Wars

- Patents vs. Trade Secret
- Patent vs. Copyright
- Copyright vs. Trademark



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