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# Warez Trading and Criminal Copyright Infringement

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# 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