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