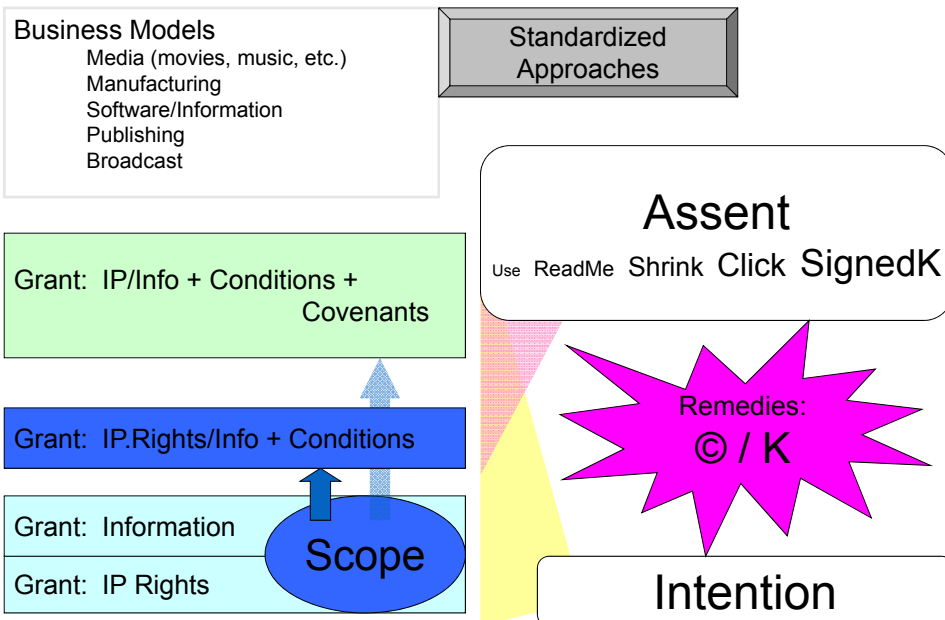


Digital Transactions: Part Three: Assignment 22

Licensing Taxonomy



Software Protection

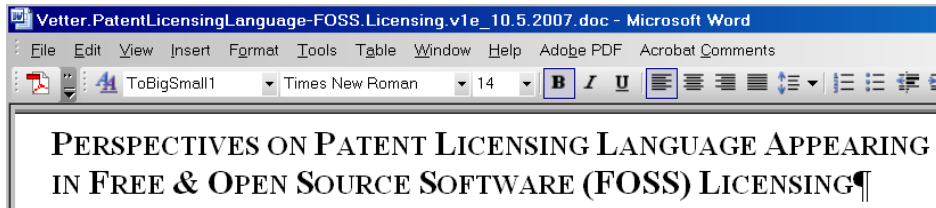
- Regimes
 - Trade Secret
 - Copyright
 - Patent
- Mixed Regimes
 - All may apply
 - Copyright →
 - Anti-Circumvention
 - Digital Rights Expression (or, more typically, DRM for Digital Rights Management)
 - The most potent protection involves strategic use of mixed regimes
- Regimes not covered in this treatment
 - Marks

Trade Secret Misappropriation (UTSA)

- Trade – any type of *valuable information*, very broad
 - formula, pattern, compilation, program, device, method, technique, or process (UTSA §4[preamble])
- Secret – *held secret by reasonable precautions*
 - reasonable efforts under the circumstances to maintain secrecy (UTSA §4(ii))
 - has value from *not being generally known* or *[not] readily ascertainable* (UTSA §4(i))
- Misappropriation – take/use/disclose by . . .
 - *improper means* or against a *duty/promise/agreement*
 - improper means includes
 - various bad acts, or
 - *breach or inducement of a breach of duty*
 - espionage (electronic or other means)

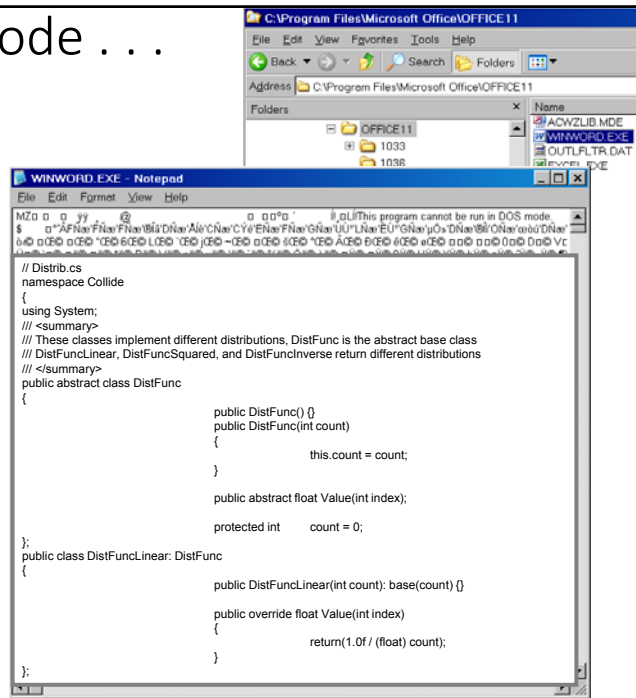
Keeping Secrets in Code and Content .

- Encoded to Disclose



Keeping Secrets in Code . . .

- Encoded for secrecy
- Reasonable Precaution to merely rely on the compiler?

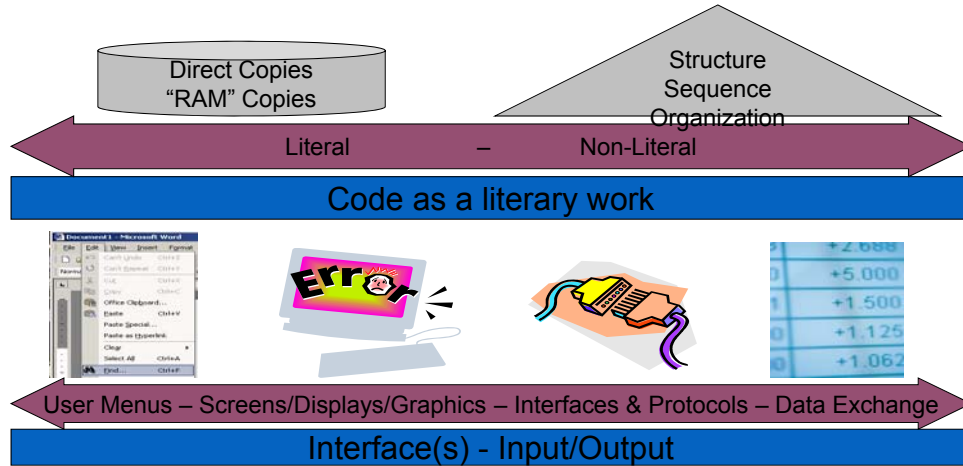


U.S. Software Protection via Copyright

The limited right to exclude others from:

- Reproducing
- Creating derivative works
- Distributing
- Publicly performing or displaying

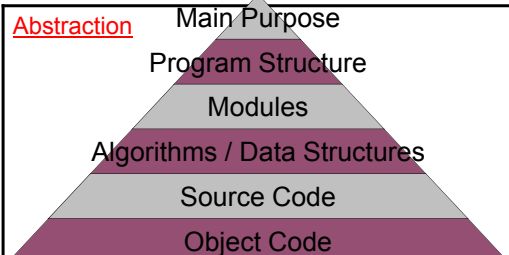
Rights available to a copyright holder



U.S. Software Protection via Copyright

```
#include <iostream.h>
main()
{
    for(;;)
    {
        cout << "Hello World! ";
    }
}
```

```
#include <iostream>
int main()
{
    std::cout << "Hello,
world!\n";
}
```



Filtration

- pure idea
- dictated by efficiency
- required by factors external to the program
- public domain

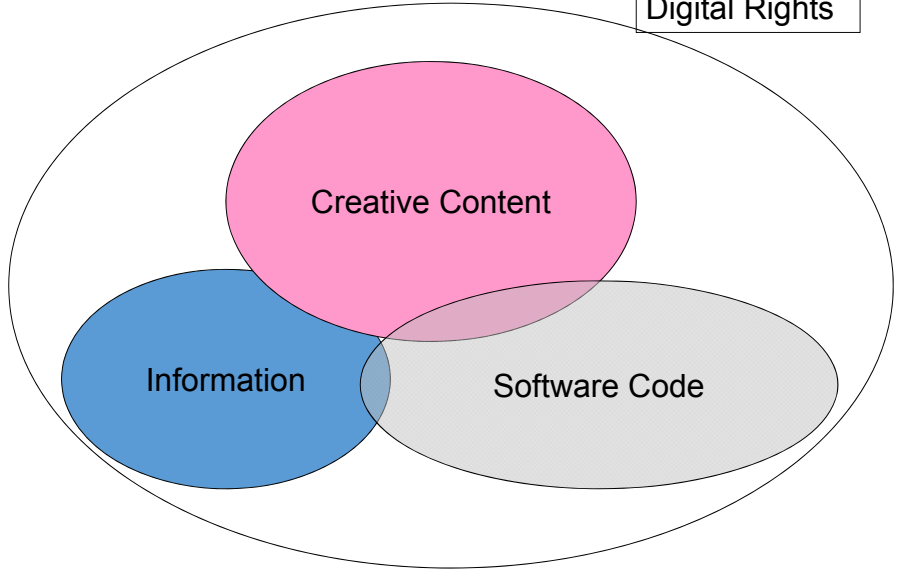
Comparison

- substantial similarity inquiry of what remains
- determine whether defendant copied protected expression

Non-literal infringement of code

U.S. Software Protection via Copyright

Digital Rights



U.S. Software Protection via Contract & Transactions

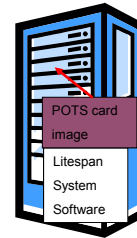


Permissions – Blanket Licenses – Form Contracts – Negotiated Contracts



DSC Comms. v. Pulse Comms. (Fed. Cir. 1999)

- What is a “Litespan 2000” and what does it do?
 - System software
 - Software image for (many) POTS cards
- “owning” under §117?
- Once a licensee, for sure not a “§117 owner”?
 - or . . .
- [reservation to seller] “subject, however, to a license to Buyer to use the Software solely in conjunction with the Material during [its] useful life”
 - Restrictions on copying image to competitive hardware
 - But, another clause allowing customer purchase of competitive hardware



DSC Comms. v. Pulse Comms. (Fed. Cir. 1999)

§117. Limitation on exclusive rights: computer programs

(a) Making of additional copy or adaptation by owner of copy. Notwithstanding the provisions of section 106 [17 USC 106], it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, sale, or other transfer of additional copy or adaptation. Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) Machine maintenance or repair. Notwithstanding the provisions of section 106 [17 USC 106], it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if--

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

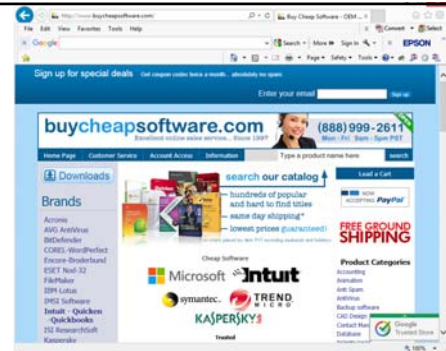
(d) Definitions. For purposes of this section—

(1) the "maintenance" of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the "repair" of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

SoftMan Products Co. v. Adobe Systems, Inc. (C.D. Cal. 2001)

- SoftMan as third-party distributor
 - Unbundling packages and selling components, or educational versions
 - No direct K relationship with Adobe
- Are copies licensed to end users without ownership transfer of the copy?
- Or, are the copies sold to the end-users, even though there is a EULA applicable to the end-users, resulting in the end-users owning a copy?
 - Owners of copies have benefits under the copyright act
- SoftMan doesn't assent to the EULA



Bowers v. Baystate Technologies, Inc. (Fed. Cir. 2003)

- Bowers shrinkwrap licenses Designer's Toolkit (his Cadget (based on Cadkey) and Mr. Ford's Geodraft)
- Baystate also offers CAD design aids, including Draft-Pak
- After obtaining a copy of Designer's Toolkit in 1991, the months thereafter Baystate issued version 3 of Draft-Pak
- Baystate ultimately purchased Cadkey and eliminated Bowers as a distribution vehicle for it
- After Baystate brings declaratory judgment suit, Bowers counterclaims on his patent, copyright, and breach of contract
- Preemption analysis of sec. 301(a) – equivalent to copyright's exclusive rights determined by "extra element" analysis
 - For example, state law TS claim not preempted – breach of confidence is the extra element
- Dissent views . . .



Assignment Twenty-Two Problems

- 22.1 to 22.5