



# Lecture 10

Law 115

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# Agenda

- Hand back papers
- Extra credit assignment
- Gizmocracy Contract
- Open Source Software
- Guest Speaker: Rights of Publicity (Jerry Chiang)

# ECCEC Extra Credit



1. Attend ECCEC or look on the ECCEC web site
2. Identify one example of potential intellectual property infringement or an example of an image or work that probably required a license to use
3. Write a paragraph explaining the type of intellectual property involved and applying what you have learned in this class to explain how/if rights were obtained for use
4. Turn it in during class on April 10, 2014

# Gizmocracy Contract



# Open Source Software





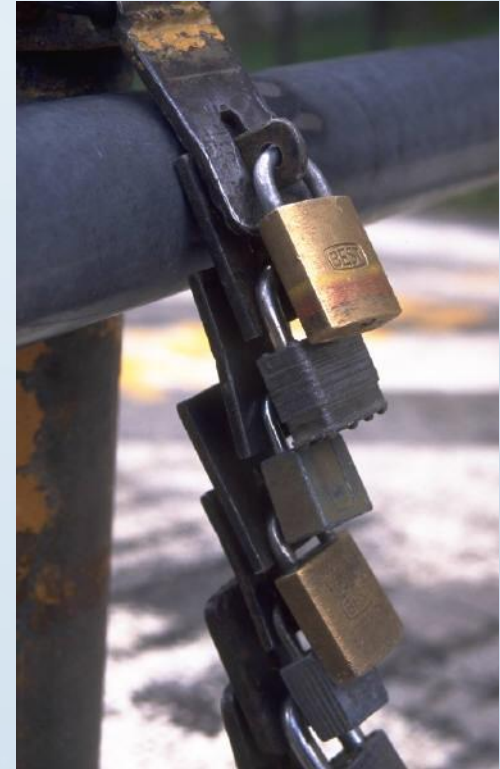
# Source Code vs. Object Code



# What is Proprietary Software?

**Strategy:** Prevent free riding by controlling access to source code through

- Restrictive licenses
- Technical measures
- Statutory frameworks
- Court action



# What is Open Source Software?

Source refers to the software in source code form

Open refers to the freedom to

- View the source code
- Run the software for any purpose
- Modify the software in any way
- Distribute the software and any modifications





# What is Open Source Software?

- Copyleft
- Libre software
- Community software
- Public software
- Free software (free as in “freedom”)
- FOSS or FLOSS
- Open culture



# What is Open Source Software?

<b>Proprietary Software</b>	<b>OSS</b>
Source code is a trade secret	Source code is shared
Code distributed in object code form only	Both source code and object code distributed
Limited derivative works rights licensed	More freedom to make derivative works
Often costs money, but can be free	Often costs money, but can be free

# OSS Timeline

- 1984 Stallman starts GNU project to create “free” UNIX
- 1985 Stallman creates Free Software Foundation
- 1989 Bill Joy releases UNIX version under Berkeley Software Distribution (BSD) License
- 1991 Free Software Foundation publishes GPL 2.0
- 1991 Linus Torvalds starts Linux kernel, uses GPL 2.0
- 1998 Netscape licenses Communicator under open source license (Mozilla, Firefox)
- 1998 Open Source Initiative formed
- 2007 Free Software Foundation publishes GPL 3.0
- 2008 Jacobsen v. Katzer enforces Artist License

# Who Uses OSS?



But a lot of people still do not use OSS

- The average PC/tablet user
- Some people worried about who stands behind code and total cost of ownership (reliability)
- Some developers and users who are worried about IP contamination (reports that Linux reads on multiple patents)

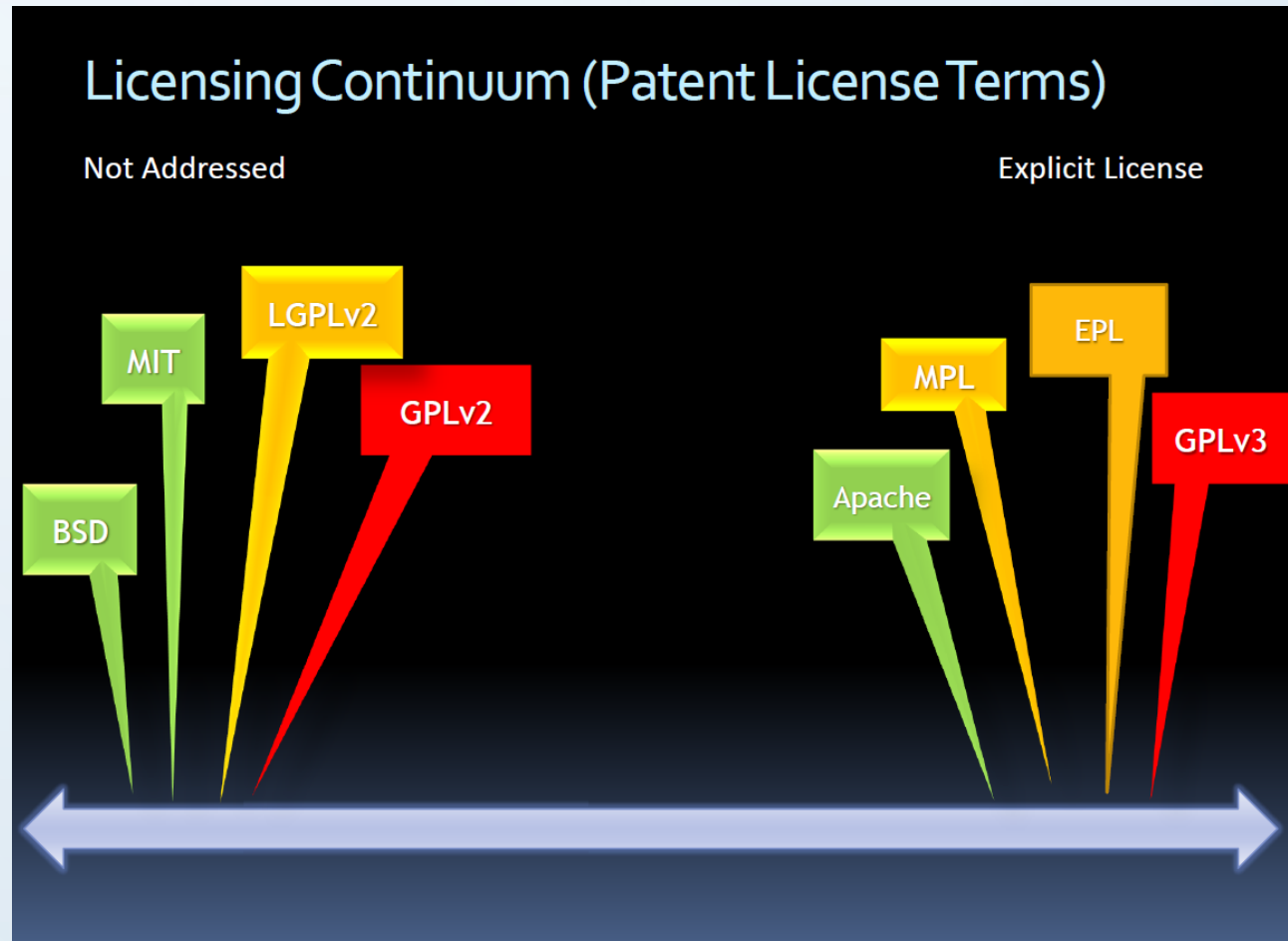
Stephen Fry on Free Software: <http://youtu.be/Wugzc58Qrl8>

# Copyright, Patent, and FOSS

- Copyright + Licensing makes it work
  - Copyright gives control over use
  - License gives permission to use
  - “To stay free, software must be copyrighted and licensed.”  
Debian GNU/Linux Group
- FOSS and proprietary software share one thing in common:  
copyright on code plus license of code



# Popular OSS Licenses



# Popular OSS Licenses

## BSD Key terms:

- License grant: unlimited use, modification, distribution
- No warranties; disclaimer of consequential damages
- No endorsement
- Attribution



# Popular OSS Licenses



## GPL Key terms:

- Unlimited right to run program, access to source code, right to distribute verbatim copies
- May create derivatives IF you agree to make works derived from or containing the program “free”
  - “Free” means derivative works right licensed forever to all newcomers
  - “Free” means derivative works right licensed at “no charge”
  - Exception to the condition: derivative work is not published or distributed
- License is “viral,” i.e. all derivatives licensed under GPL
- No warranties; disclaimer of consequential damages

# Next Generation Issues

- Proliferation (more than 70 OSI approved licenses)
- License comprehension
- License compatibility
- Software patents

# Guest Speaker: Rights of Publicity (Jerry Chiang)





# Right of Publicity

Jerry Chiang

Guest Lecture

March 27, 2014

Experience Hendrix, L.L.C. & Seattle University School of Law

# Right of Publicity Agenda

- Right of Publicity Overview
- Right of Publicity in Washington State
- Right of Publicity Examples
- Right of Publicity Case Study
- Questions & Answers

# What is Right of Publicity?

[Chrysler Commercial](#)

## Other Examples of Right of Publicity



# Definition?

Based on the video and the preceding examples, how would you define right of publicity?



# Right of Publicity in a Nutshell

Right of publicity is the right to commercialize one's name, image, and likeness. Celebrity (living or deceased) endorsements and merchandising are examples of such commercialization. The right of publicity, however, is not limited to celebrities. Ordinary people enjoy this right as well.

# Brief History of Right of Publicity

Right of publicity stems from a notion about privacy, that we all have the “right to enjoy life – the right to be let alone” (from the Samuel Warren & Louis Brandeis *Harvard Law Review* article published in 1890)

# Further Developments

Professor William Prosser expanded on the Warren and Brandeis concept of right to privacy into four categories:

- Protection against intrusion into one's private affairs;
- Avoidance of disclosure of one's embarrassing private facts;
- Protection against publicity placing one in a false light in the public eye;  
and
- Remedies for appropriation, usually for commercial advantage, of one's name or likeness

# Prosser on Privacy and Publicity

- “The interest protected ‘in permitting recovery (for a privacy invasion)’ is clearly that of reputation, with the same overtones of mental distress as defamation! . . . By contrast, the State’s interest in permitting the proprietary interest of the individuals is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feeling” (see Prosser, “Privacy”, 48 *California Law Review*, p. 406)

# Why Do We Care?

- “The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” (*Martin Luther King, Jr. Center for Social Change, Inc.*)



# Right of Publicity Law

Right of publicity is a state-specific property right. Unlike laws relating to copyright and trademarks, which are federal (Copyright Act, Lanham Act) laws governing the right of publicity vary from state to state. Some states only recognize common law (judge made/case law) right of publicity; others have passed laws (statutory) to govern right of publicity.

# State of Right of Publicity Law

The right of publicity is recognized by a majority of the states in the US, though the scope of the right and its transferability (such as post-mortem publicity right) vary by state. Until Congress passes a federal right of publicity law, the application of right of publicity will not be uniform and will require a state-specific analysis.

# States with Right of Publicity Laws (Statutory)

California

Illinois

Kentucky

Nebraska

New York

Pennsylvania

Rhode Island

Texas

Virginia

Wisconsin

Florida

Indiana

Massachusetts

Nevada

Ohio

Oklahoma

Tennessee

Utah

Washington

# Washington's Right of Publicity Statute

- RCW 63.60 – Washington Personality Rights Act
- Washington State recognizes that “every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness” (63.60.010)
- This right is “freely transferable, assignable, and licensable, in whole or in part, by any otherwise permissible form of inter vivos or testamentary transfer” (63.60.010)

# Washington's Right of Publicity Statute

- This property right “does not expire upon the death of the individual or personality” and this right exists “whether or not it was commercially exploited by the individual or the personality during the individual’s or personality’s lifetime” (63.60.010)
- This property right exists during the person’s lifetime and 75 years after her death (63.60.040)

# Personality Right Infringement

Using an “individual's or personality's name, voice, signature, photograph, or likeness, on or in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations” without permission constitutes an infringement. An infringement may occur whether or not the use is for profit or not for profit. (63.60.050)

# Personality Right Enforcement

An individual or personality whose personality right is being infringed may sue for injunctive relief, damages and profits, and reasonable attorney's fees. (63.60.060)



# Personality Right Exemptions

In general, the uses of a name, voice, signature, photograph, or likeness in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest, including, without limitation, comment, criticism, satire, and parody are exempt from the personality right statute. (63.60.070)

# Some Specific Exemptions

These following activities do not constitute infringement:

- Single and original works of fine art, including but not limited to photographic, graphic, and sculptural works of art that are not published in more than five copies;
- A literary work, theatrical work, musical composition, film, radio, online or television program, magazine article, news story, public affairs report, or sports broadcast or account, or with any political campaign when the use does not inaccurately claim or state an endorsement by the individual or personality;

# Some Specific Exemptions

- An advertisement, commercial announcement, or packaging for the authorized sale, distribution, performance, broadcast, or display of a literary, musical, cinematographic, or other artistic work using the name, voice, signature, photograph, or likeness of the writer, author, composer, director, actor, or artist who created the work, where such individual or personality consented to the use of his or her name, voice, signature, photograph, or likeness on or in connection with the initial sale, distribution, performance, or display thereof; and
  - The advertisement or sale of a rare or fine product, including but not limited to books, which incorporates the signature of the author.
- (63.60.070)

# Right of Publicity & First Amendment

Right of publicity does not operate in a vacuum – it is constrained in its exercise by how it affects the freedom of speech as guaranteed by the First Amendment to the U.S. Constitution

# Real Life Applications of Right of Publicity

The following cases will showcase how right of publicity can come into play and how courts will decide whether a person's right of publicity has been infringed.

# Some Sample Cases

- No Doubt v. Activision Publishing, Inc.
- No Doubt filed this lawsuit against videogame publisher Activision Publishing, Inc. based on the *Band Hero* videogame featuring computer-generated images of the members of No Doubt. No Doubt licensed the likeness of its members for use in *Band Hero*, but argued that Activision used them in objectionable ways outside the scope of the license. Activision responded by arguing that its use of the band's likeness was protected by the First Amendment.

## No Doubt

- The court recognizes that video games are expressive works entitled to as much First Amendment protection as other expressive works such as literature. The court also recognizes the rights of No Doubt to control the commercial exploitation of its members' likeness. Ultimately the court uses a balancing test between the First Amendment and the right of publicity based on the question of whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.

# No Doubt

- Another way to look at this balancing test is whether the literal and imitative or the creative elements predominate in the work.
- Court found that nothing in the creative elements of *Band Hero* elevates the depictions of No Doubt to something more than “conventional, more or less fungible, images” of its members that No Doubt should have the right to control and exploit. Accordingly, such literal depiction is not entitled to First Amendment protection.



## Hart v. Electronic Arts

- Former college football player (Hart) brought suit against Electronic Arts, alleging misappropriation of likeness and identity of player for commercial purpose in connection with several college football-related video games.
- Court looked at whether EA's use of Hart's image is protected by the First Amendment. Court decided that there are sufficient elements of EA's own expression found in the game (such as the ability to change the player's uniform, throwing distance and ability, etc.) to merit First Amendment protection.

## Comedy III Productions, Inc. v. Gary Saderup, Inc.

- Plaintiff was the owner of the rights to the comedy act known as The Three Stooges. The defendant was an artist who sold lithographs and T-shirts bearing a likeness of The Three Stooges reproduced from a charcoal drawing the artist had created. The owner sued for violation of the right of publicity. The court, applying the balancing test, found there was no significant transformative or creative contribution in the literal reproduction of the Three Stooges. Therefore, the artist's use was not protected by the First Amendment.

## Winter v. DC Comics

- In this case, plaintiffs sued DC Comics for two villainous half-worm, half-human characters named the Autumn Brothers, which were based on the musician brothers Edgar and Johnny Winter.
- Applying the transformative test, the court held that the Winter brothers' claim was barred by the First Amendment. The court found that the comic depictions were not just conventional depictions but contain “significant expressive content other than plaintiffs' mere likeness.”

# Celebrity Attributes

Based on a series of cases involving Bette Midler, Tom Waits, Vanna White, courts have decided that even an attribute of a celebrity's identity can be protected. "What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person." See *Midler*.

# Case Study

## Bavarian Beer Commercial

# Questions & Answers & Discussion

- Any questions?
- Why is this topic relevant in your field of study?