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The Challenges of Regulating Warez Trading

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This article analyzes the policy challenges of legally conforming the behavior of warez traders. The article discusses the motivations for warez trading, how criminalizing the behavior may counterproductively encourage it, and why legislators and prosecutors continue to target warez trading despite the counterproductive effects.

Keywords: warez; warez trading; warez traders; copyright infringement; pirates; abandonware; criminal law; criminal copyright infringement; No Electronic Theft Act

This article discusses a group of copyright infringers known as warez traders. Warez (pronounced the same as wares) are copies of infringed copyrighted works (particularly commercial software) with any copy protection mechanisms removed. Warez traders obtain and disseminate warez as an avocation, some spending 60 or more hours per week on this hobby (McCandless, 1997).

As a sociological group, warez traders owe their existence to computer-mediated communication. Electronic networks such as the Internet create the opportunity for traders to find and communicate with each other and to trade infringing files at virtually no cost. This article discusses their unique sociological and psychological attributes and the resulting challenges for conforming warez traders' behavior to legal norms.

SUBCATEGORIES OF WAREZ TRADERS

The generic term warez trading imprecisely lumps together disparate activities. In fact, several subcommunities comprise the warez scene. Warez distributors are fairly large and organized operations optimized to generate high volumes of new warez quickly. These operations allocate among their members several discrete tasks including sourcing new warez, cracking any technological protection devices, testing the cracked warez to make sure they still work, packaging the warez for easy distribution, couriering the warez from site to site, performing systems administration, and managing and overseeing the operations.

Warez collectors collect and trade warez more autonomously. They may be trying to gain admission to a warez distribution group, or they may be enthusiasts who just like to show off trophies (Granade, 2003a; McCandless, 1997).

Warez distributors and collectors do not care about the functional capabilities of the warez they trade; they only care about how others will evaluate the possession or distribution of the warez. As a result, these traders rarely use the warez they possess (McCandless, 1997; Pogue, 1997; Tetzlaff, 2000, p. 109). In contrast, warez downloaders are not traders per se; instead, they obtain warez they want to use. Many warez downloaders just want free software or the latest cutting-edge items (Granade, 2003a; Poole, 2003).

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Finally, abandonware enthusiasts collect and distribute software (especially gaming software) that is no longer published commercially (Granade, 2003b; Saltzman, 2003). Some abandonware traders characterize themselves as archivists or historians, preserving games that would otherwise be lost. Others are just enthusiasts (Costikyan, 2000; Granade, 2003b; Saltzman, 2003). Many abandonware enthusiasts consider their activities less detrimental to copyright owners than is warez trading (because, by definition, the copyright owners have stopped commercializing the work), and on that basis they seek to distance themselves from warez traders (Granade, 2003b).

WHAT MOTIVATES WAREZ TRADERS?

To determine how warez trading can be conformed to legal norms, it is essential to understand their psychology and motivation.

Ego

Fundamentally, almost all warez traders are motivated by ego. For warez distributors, “The whole point . . . is to get the pirate program released and distributed before any other group” (Farnon, 2003). A distributor’s reputation is built by releasing warez fast, ideally before anyone else. The crowning achievement is a 0-day release, a release made before the official commercial release (McCandless, 1997). Fast and error-free distribution of hard-to-obtain or hard-to-crack software evidences the trader’s skills (McCandless, 1997, 2001). In this sense, warez distribution and collection is a game or a competition where the participants use copyrighted works to seek to win fame and respect by playing better than their peers.

Thrill of the Illicit

Many warez traders derive a thrill from doing something illicit (Wagner, 2002). According to one warez site operator, “Deep down everyone is a little scared [of criminal prosecution] but that is also what keeps us going” (Wagner, 2002).

Software Should Be Free

Almost all warez traders believe software should be free, and they view themselves as technology liberators and benefactors for the oppressed, like an Internet Robin Hood (Miller, 2000). Specifically, many warez traders view the software industry as the enemy due to industry tactics perceived to be oppressive (Granade, 2003a, 2003b; McCandless, 1997). With their software-should-be-free philosophy, many warez traders bitterly oppose commercial pirates who infringe copyrighted works for profit because, like software manufacturers, commercial pirates commit the sin of charging consumers for what should be free (McCandless, 1997; Tetzlaff, 2000).

Historically, warez traders believed that to download warez, you must return something (such as uploading software in return) (Tetzlaff, 2000). However, as the community’s self-perception as Robin Hoods matures, many warez traders now routinely distribute warez freely without any expectations of receiving something in return (Granade, 2003b).

Sense of Community

The warez scene is a community, and many participants form tight friendships. Many warez traders are social misfits in the physical world, but online they find kindred spirits. As one warez trader said, “[Warez traders] want to belong. They have been shunned by everyone, and thus turn to cyberspace for acceptance” (Farnon, 2003).

A COMPARISON OF WAREZ TRADERS AND HACKERS OR CRACKERS

Warez traders share many common attributes with hackers and crackers. Most obviously, every major warez distribution group has at least one cracker who disables any copy protection technologies in the warez. In addition, both groups tend to be overwhelmingly male, although the stereotypical hacker or cracker is a teenage boy (Thomas, 2002, p. xiv), whereas many warez traders are older, married, and working in professional information technology jobs (Goldman, 2003, p. 395). In addition, hackers or crackers and warez traders both crave attention, although hackers or crackers may care more about proving their smarts and about emancipation from their parents (Thomas, 2002, p. xvi) than about just boosting their ego. Finally, both hackers or crackers and warez traders share the information-wants-to-be-free ethos and negatively react to fences around digital properties (Jordan & Taylor, 1998, p. 760).

A COMPARISON OF WAREZ TRADERS AND PEER-TO-PEER FILE TRADERS

Warez distributors and collectors regularly trade music and movie files in addition to software, although to be attractive, traded music and movies must be rare. A file that anyone can obtain from a peer-to-peer network is not interesting to these warez traders, whereas a prerelease copy of a movie or song can be a juicy trophy. As a result, warez traders have little in common with the vast majority of peer-to-peer file traders who want movies and music for personal enjoyment, not for trophies. Peer-to-peer file traders most closely resemble warez downloaders, the principal difference being that warez downloaders may be more intrepid and willing to risk downloading software with harmful viruses or lacking technical support or documentation (risks inapplicable to content files such as music or movies). Because peer-to-peer file traders have different motivations than do most warez traders, peer-to-peer file traders may be comparatively more responsive to legal regulation.

THE COUNTERPRODUCTIVE NATURE OF CRIMINALIZING WAREZ TRADING

Criminal copyright law assumes that criminals are rational actors who will curtail behavior in response to threatened punishment. However, warez traders may not be motivated by this threat system. Although warez traders have codes of ethics, they are indifferent to externally imposed rules in which they do not believe. Instead, criminal threats stroke warez traders’ egos by making their actions appear more impressive (Tetzlaff, 2000, p. 115).

Criminalizing warez trading may also reinforce the warez traders’ self-perception as do-gooders fighting unjust laws. As copyright laws become more stringent, warez traders’ self-perceived moral justification for their actions may increase accordingly.

Criminal sanctions also deepen warez traders' social bonds to each other. In an us-versus-them world (where *them* refers to software companies, the government, or any form of authority), warez traders already perceive themselves as outcasts. Criminalization further reinforces their status as outlaws having more in common with each other than with the rest of society. Once socialized into this community, warez traders have trouble leaving it because it becomes the only place where they feel that they belong.

CONCLUSION

During its consideration of the No Electronic Theft Act (the most recent major amendment to U.S. criminal copyright laws), Congress targeted warez traders as the cause of rampant Internet piracy. In truth, warez traders probably have a falsely exaggerated effect on piracy. However, warez traders make good legislative targets because of their quasiguerrilla tactics: They operate stealthily, behind the Internet's opaque veil, and are impossible to spot offline. In addition, when online, warez traders exude cockiness and invincibility that legislators may interpret as a challenge to their power and authority.

However, no quantum of stiffened criminal penalties will eradicate warez trading. Warez trading is about ego, prestige, and reputation, and so long as intangible assets are fenced off, a group of enthusiasts will seek recognition for breaching the fences. Increased criminal penalties may counterproductively make warez trading more attractive.

Despite this obvious policy deficiency, legislators continue to seek tougher and more pervasive criminal infringement laws. Copyright owner lobbyists have convinced legislators that Internet piracy is cataclysmic. But with Internet piracy increasing, rather than decreasing, legislators feel that they have failed to find a legislative solution that gets infringers to respect the criminal copyright laws that industry lobbyists have persuaded them are so desperately needed.

These dynamics put prosecutors in a bind. On one hand, to respond to Congress' frustration, prosecutors feel they need to deliver high-profile criminal copyright convictions. On the other hand, if prosecutors pursue behavior that average citizens commit every day, they will create mass panic and will undercut popular support for their mission.

By targeting warez traders, prosecutors walk this fine line. Congress thinks warez traders contribute significantly to piracy, so busts of warez traders satisfy Congress. Most citizens can distinguish a warez trader's behavior from their own. As a result, prosecutors will likely continue to prioritize warez trader prosecutions despite the policy deficiencies of doing so.

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