# Communication Law & Ethics

## RU COMS 400 Unit 11

## Intellectual property – Copyright & Trademark

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Class web site:
revolutionsincommunication.com/law

# On Track: Unit 11

- Read the rest of Section 11 on web site
- No assignment / watch Lessig video
- Take quiz 11

Structure of this section:

- Copyright basics & history
- Music & copyright
- Digital media
- Trademarks

# *What is copyright?*

- The US patent and copyright system was established by the Constitution in 1787. In Section 8.8, the Constitution says Congress shall have the power:
- **"… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"**

# How copyright works

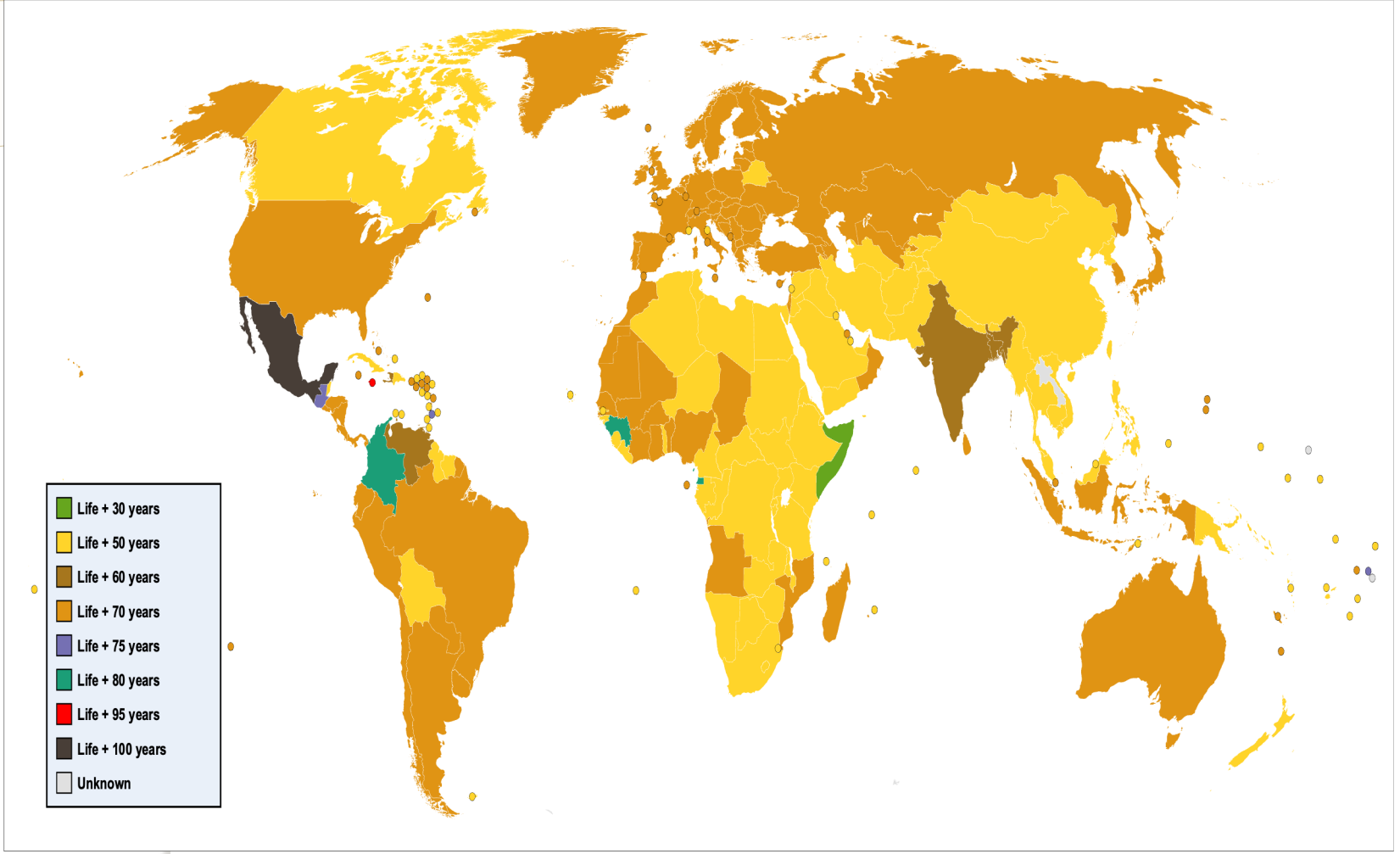
1. **Automatic** -- Any creative work fixed in a medium is automatically copyrighted by the author or (if the author is under contract) the author's employer.
2. **Registration** -- Commercially valuable work is registered with the US Copyright Office of the Library of Congress. The office keeps records but does not enforce the law.
3. **Enforcement** -- Copyright is enforced through civil lawsuits for infringement in the courts or by criminal indictment in major cases. There are also provisions for taking down infringing material from the internet under the Digital Millennium Copyright Act (DMCA).

# Types of intellectual property

- Copyright, trademark and patents are all considered “intellectual property.”
- **Example from Patent & Trademark office:**
  - Imagine you invent a new type of vacuum cleaner. You might apply for a **patent** to protect the invention itself. You could apply to register a **trademark** to protect the brand name of the vacuum cleaner once its being sold on the market. And you might register a **copyright** for the TV commercial you use to market the product.
  - Those are three different types of protection for three separate types of intellectual property: brands, inventions, and artistic works.

# Duration of intellectual property

- **Patents** — Inventions
  - Duration -- 28 years.
  - Example -- The expiration of drug patents is why we have "generic" medicine. After the patent expires, any company can make similar medicines to be sold at lower cost.
- **Trademark** — Brands
  - Duration has no time limit, but trademarks must be defended or they fall into the public domain
  - Rules enforced under the Lanham Act, which prevents false advertising.
- **Copyright** — Creative works
  - Authors -- Life plus 70 years
  - Corporate works (works for hire) – 95 years
  - Works copyrighted 1978 or before – 95 years
  - Some music 110 years (Music Modernization Act, 2019)




# World copyright durations

# The limits of copyright (1)

- **Public Domain** works have fallen out of copyright over time or have never been copyrighted. They are free for anyone to use in any way they like.
  - Anything created 95 years ago, or more, is in the public domain.
  - All government documents, texts of laws, photos and images produced by the US (for example. NASA or the EPA) are in the public domain from the beginning.

- **Creative Commons** or other open source licensing arrangements mean that an author is giving others permission to share and build on an otherwise copyrighted work. In most cases, this will mean that a work is available for non-profit uses with attribution.

# The limits of copyright (2)

- **Fair Use** (US) — Students, authors, pundits, educators and others are free to cite portions of a work under copyright for the purposes of discussion, debate or education. Title 17 Section 107 gives a four part test of fair use:
  1. the purpose and character of the use, including whether the use is commercial or for nonprofit educational purposes;
  2. nature of material itself
  3. percentage used in relation to the work as a whole; and
  4. effect on the market for or value of the original works

# Copyright laws

- **1909 –** New technologies copyrighted
- **1976 --** Brings US into Berne
- **1998 --**
  - **DMCA** Penalties for circumventing copyright protection, and notice & takedown for internet
  - **Sonny Bono Extention Act** extended the duration of copyright protection for an additional 20 years, from 75 to 95 years from publication or 50 to 70 years after death of author.

# Copyright saga of Peter Pan

- Written 1904, 1911 by J.M. Barrie
- Gifted 1929 to Great Ormond St. Hosp. (GOSH)
- Expired EU 1987 (50 yrs after author death)
- In 1988, Parliament extended CDPA indefinitely
- EU extended to 70 yrs after author death
  - That was 2007; Now in public domain in EU
- Jan 1, 2024 US theatrical performance entered public domain
- Play still under copyright by GOSH indefinitely

# More copyright sagas

- Happy Birthday song
  - First published 1912, first © 1935 Summy co.
  - Warner music buys Summy
  - Warner claimed exp. 2030
  - In 2016, filmmaker Jenn Nelson proved that the company did not own the rights
  - Warner made $14m settlement -- the song is now in the public domain.
  - https://www.youtube.com/watch?v=y3whtVeMalo

# New in the public domain 2022-23

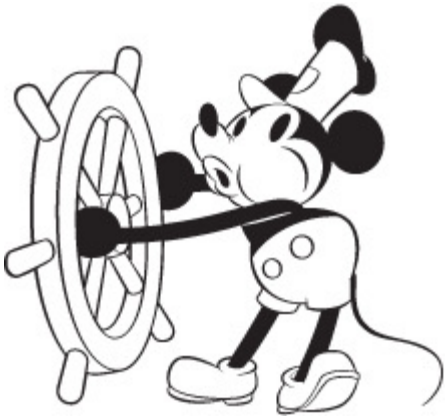
- Winnie the Pooh
- Bambi, Oswald Rabbit
- Books by E. Hemingway, Wm. Faulkner, D H Lawrence, H L Mencken
- Film: Metropolis f
- Recording: I scream you scream we all scream for ice cream

"It wasn't much good having anything exciting . . . if you couldn't share them with somebody." -*Winnie-the-Pooh*

# Public domain 2024

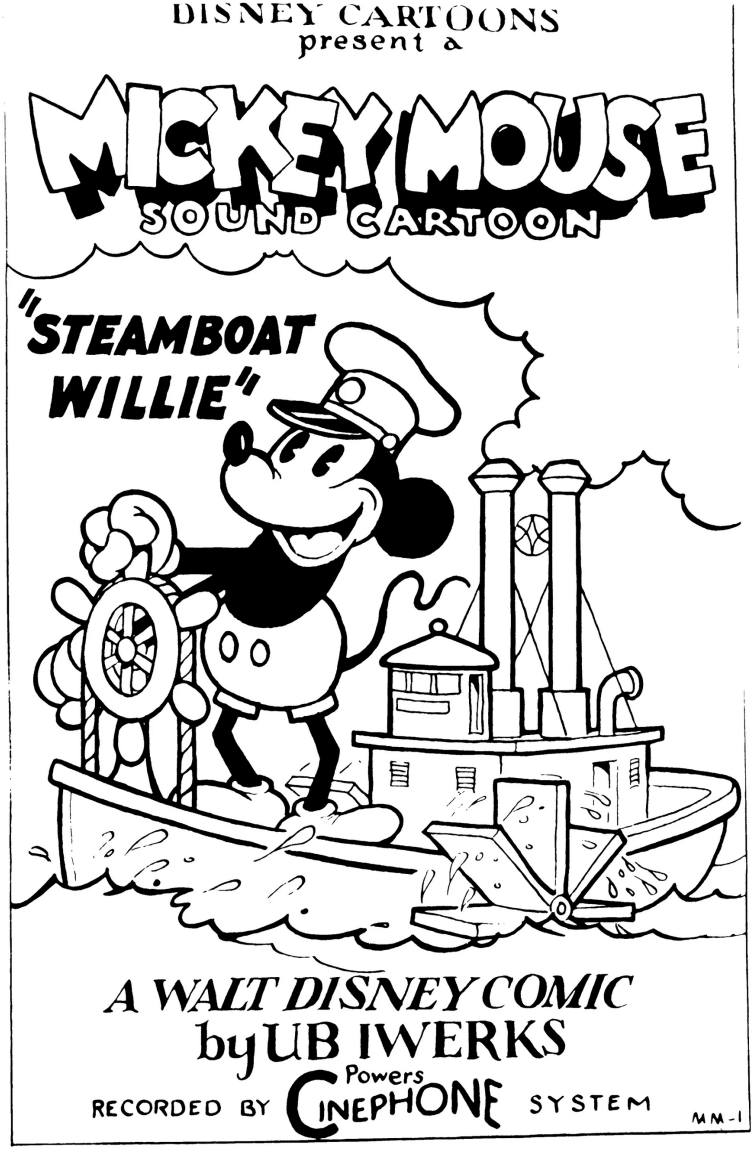
- Millions of cats (Wanda Gag)
- Dark Princess (W. E. B. Du Bois)
- Three penny Opera (Bertol Brecht)
- Lady Chatterly's Lover (DH Lawrence)
- All Quiet on the Western Front (Erich Maria Remarque)
- The Open Conspiracy: Blue Prints for a World Revolution (HG Wells)
- October: Ten Days That Shook the World (film by Sergei Eisenstein)

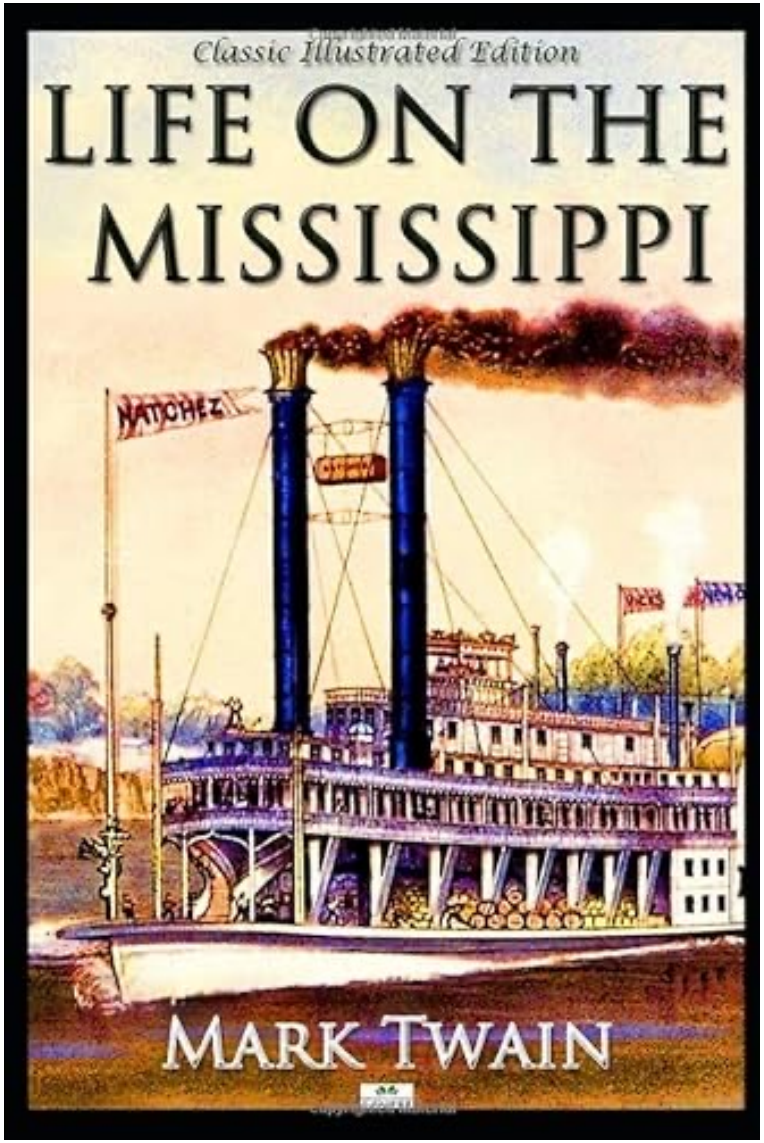
# Steamboat Willie



- Good example of why we need a public domain
- Debuted in Disney short 1928
- Cartoon was a takeoff of Buster Keaton's Steamboat Bill
- That was a takeoff on a popular 1910 song, Steamboat Bill
- The song, the movie and the cartoon built on the mystique and legends of the era of Mississippi steamboats
- As mythologized in Mark Twain's Life on the Mississippi


Joseph m. Schenck
presents
Buster Keaton
and
Ernest Torrence
in
'STEAMBOAT BILL, Jr.'
UNITED ARTISTS
PICTURE


DISNEY CARTOONS
present a
MICKEY MOUSE
SOUND CARTOON
"STEAMBOAT WILLIE"
A WALT DISNEY COMIC
by UB IWERKS
RECORDED BY Powers CINEPHONE SYSTEM
MM-1

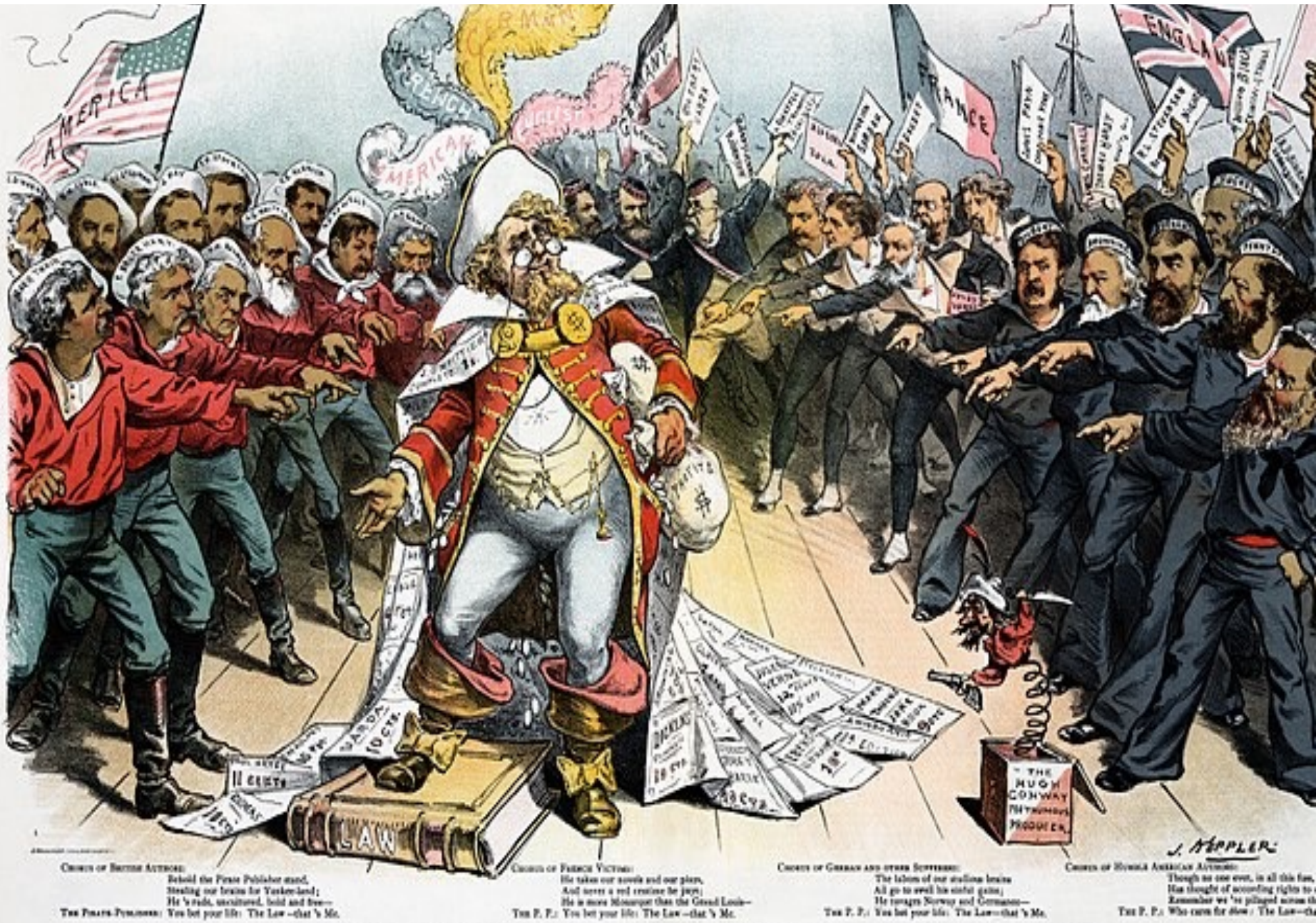

Classic Illustrated Edition
LIFE ON THE MISSISSIPPI
NATCHEZ
MARK TWAIN


STEAMBOAT BILL
1910
WORDS BY
REN SHIELDS
MUSIC BY
LEIGHTON BROS.
F.A. MILLS

# International copyright

- **Berne Convention** -- European nations in 1886 formed an international copyright treaty,  the Berne Convention for the Protection of Literary and Artistic Works, also called the International Copyright Act.
- Registrations for authors are automatic
- US joined (formally) in1989
- Foundation is French law
  - Concern for author's "moral rights" along with property rights

# Cartoon against copyright piracy, in favor of Berne Convention, 1900, Puck Magazin




THE PIRATE PUBLISHER.—AN INTERNATIONAL BURLESQUE THAT HAS HAD THE LONGEST RUN ON RECORD.

# Two main types of copyright

1. **Mechanical** (reproduction)
2. **Performance** (music, theatrical, etc)

- Basic copyright goes back to 1575 in Britain. Books and maps were copyrighted in the US constitution in 1787.
  - Sheet music was first copyrighted in1831 in the US, and other mechanical reproduction followed
- Performance rights: 1700s, France.
- Today, "rights management" organizations include **ASCAP, BMI and SESAC** allow performance under compulsory licensing

# Music & copyright (US history)

- "Player" pianos did not infringe on sheet music

White Smith v Apollo 1908

- Copyright Act of 1909 – reforms White-Smith
  - New technologies CAN be copyrighted
  - Begins compulsory music licensing


Tin Pan Alley (w 28th St. NYC) was the center for commercial sheet music late 1800s to 1930s

# Performing rights

- **ASCAP music industry rights pool**
  - American Society of Composers Authors Publishers
- **Began 1914, became a monopoly**
- **Raised rates for radio 1930s**
- **BMI created by NBC and CBS 1941**
  - Broadcast Music Inc
- **BMI challenges ASCAP monopoly**
  - **Licenses new music** – blues, jazz, country, folk, rock & roll – changes culture
- **SESAC** – Society for European Stage Authors and Composers, founded 1930

# Performance rights and politics

- Compulsory performance licenses were intended to make radio play easy radio
- Universal licensing means that politiciansplay songs at campaign rallies
- Musicians with different politics often object
- Do musicians have "moral rights?" Is there a trademark brand confusion issue?
- Example: Long list of musicians who dont want their songs played at Trump rallies includes Queen, Rolling Stones, Elton John, Neil Young, REM, Prince, George Harrison, Earth Wind & Fire, etc

# Copyright ownership

- ** **WHO OWNS A COPYRIGHT?**: Community for Creative Non-Violence v. Reid, 1989 — A sculptor commissioned to do a work concerning a homeless man by the community for creative non-violence was not an employee of the group and, absent a specific contract, was the owner of the copyright to his work even if CCNV paid for his time and the copy of the sculpture. This is the case that defined the "work for hire" doctrine.
- ** **WHAT CAN BE COPYRIGHTED:** Fiest Publications v. Rural Telephone Service, 1991 — Only original arrangements of facts can be copyrighted, not facts themselves. Fiest was competing with own telephone book.

# Copyright Duration

- ** **COPYRIGHT DURATION:** Eldred v. Ashcroft Jan. 2003 — In oral arguments, petitioners argued that the 1998 Sonny Bono Copyright Term Extension Act, which extended the term of subsisting and future copyrights by 20 years exceeds Congress's power under the Copyright Clause and violates the First Amendment. Some have argued that Disney has pushed the extension. In the majority opinion, Justice Ginsberg said Congressional power to extend copyright terms was not limited.
- Notable dissents by Bryer, Stevens

# Music & video piracy

# Music & video piracy

- Illegal sharing of copyrighted music became possible in late 1990s
  - MP3 compression, server technology
- Response Digital Millennium Copyright Act (DMCA) 1998.
- Criminalizes circumventing technologies
- Required server admins to take down infringing work after receiving "cease & desist" letter

# Music piracy (2)

- Despite DMCA, new services like Napster and Limewire shared music in early 2000s
- Recording Industry Association of America (RIAA) claimed major impact on music industry profits
- Four cases changed the law:
  - Sony v Universal City Studios 1984
  - A&M Records v Napster 2001
  - MGM Studios v Grokster 2005
  - Cartoon Network v CSC Holdings 2008.

# Sony v. Universal City Studios, 1984

- Universal sued Sony to block the spread of VCRs. Warned of movie industry collapse.
- US Supreme Court said that even though 100 percent of the material was often copied, the purpose -- non-commercial "time shifting" for home viewing – was legal and legitimate.
- This ruling was central to the arguments in A&M v. Napster

# A&M Records v. Napster (2001)

- Court considered Fair Use test
  - Purpose & character of use not transformative
  - Nature involved creative works at heart of copyright protection
  - Whole works are transferred, which can be OK (under Sony v Universal City), but ...
  - Effect on profits  very negative

# MGM Studios v Grokster 2005

- If VCRs and other copying technologies are legitimate under Sony v Universal City Studios, but music sharing on a fixed server is not under A&M, what about P2P file sharing software?
- The court distinguished between technology with some legitimate uses and technology that was clearly focused on sharing copyrighted music.
  - "Inducement test."
  - Anyone who distributes a device (or software) with the object of promoting its use to infringe copyright, is liable for the resulting acts of infringement by third parties.

# Cartoon Network v CSC 2008

- At issue: Cablevision's "remote DVR" technology allowing pause record replay content
- CSC included Turner, Disney, Fox, Paramount and others
- Court found a difference between a "set top" DVR in an individual home, and a "remote" DVR operated by Cablevision
- The decision went to CSC

# Free speech and parody

- **Rosemont Enterprises v. Random House**, 1966 — When an author began researching a book about the mysterious billionaire Howard Hughes (the model for Mr. Burns in the Simpsons), Hughes bought up magazines that had previously published articles about him. He then tried to stop the research by suing the author. But the courts ruled that copyright laws cant be used to keep public figures out of public eye.
- **Time Inc. v. Bernard Geiss,** 1968, involved the use of sketches based on Zapruder film of Kennedy assassination. The sketches were not a copyright infringement because no one can prevent public discussion of controversial issues.

# Free speech and parody

- The Wind Done Gone April, 2001 — Alice Randall's book was a parody of the once-popular 1930s novel and movie about the Civil War called Gone With the Wind. In the novel, white Southerners experience discrimination.
- Court said: Copyright does not immunize a work from comment and criticism." An ongoing issue is the extent to which prior restraint (in the form of a temporary injunction) should be used in copyright cases such as this one.

# Parody and Fair Use

- Campbell v. Acuff-Rose Music — 1994 — The musical group 2LiveCrew created a parody of Pretty Woman. The song was Roy Orbison's 1960s classic Pretty Woman," and the company run by Orbison's heirs (Acuff-Rose) sued Luther Campbell of 2LiveCrew. The US Supreme Court, said that parodies are protected under the Fair Use doctrine provided that the parody has **substantial transformative value.**

# Music Parody & copyright

- Weird Al – Coolio's gangster's paradise, Don McLean's American pie
- Weird Al pays royalties to rights mgmt. organizations

# Music copyright lawsuits

Skidmore v Led Zepplin 2020

Music infringement suits have also been filed over
Happy Birthday
We Shall Overcome
My Sweet Lord
Blurred Lines
Got to Give it Up

And many others

# Trademark & Redskins case

- Lanham Act, trademarks could not be "disparaging, scandalous, contemptuous, or disreputable."
- 1992, prominent Native Americans sued saying trademark disparages Native Americans
- 2006, second lawsuit filed.
- 2015, PTO responds, agreeing that it is disparaging
- 2016 PTO upheld in federal court
- 2017, Mattal v Tam, US Supreme Court overturns section of the Lanham Act that prohibited disparagement, saying trademark approval not govt speech
- 2019 – Iancu v Brunetti – "Fuct" clothing label
- "Legally, the team won. Culturally speaking, Native American petitioners believe they did." – USA Today
- 2020 Redskins name changed to Commanders

# Music Modernization Act 2019

- Blanket licensing system for digital providers
- Brings older pr—1972 songs into copyright system
- Now includes producers, mixers and sound engineers in royalty system

# Thank you

# DMCA issues

- **fter the DMCA,** web sites with allegedly infringing materials could be taken down without much in the way of judicial procedure or due process. According to an article on the Electronic Frontier Foundation site, copyright claimants are increasingly misusing the Digital Millennium Copyright Act (DMCA) to demand immediate takedowns without providing any proof of infringement. "Service providers fearful of monetary damages and legal hassles often comply with these requests without double-checking them despite the cost to free speech and individual rights." However, the DMCA has "safe harbors," as noted above and as tested in the Viacom case:
- **Viacom v. YouTube (Google)** – 2012 – Viacom is the parent company of Paramount and MTV, among many other media companies, and started take-downs and lawsuits against YouTube in 2007. Some 160,000 YouTube videos were violating Viacom copyrights, the company said. YouTube responded that the DMCA's safe harbor provisions meant that it did not have to act as the policeman, which made it harder for Viacom to sue a lot of people at once. In April 2012, a federal district court said YouTube "is protected from liability except where the company actually knew of (or was willfully blind to) specific instances of infringement of material at issue in the case, or facts of circumstances indicating such specific infringement." (See April 5, 2012 EFF article by Corynne McSherry)
- Sapient v. Geller — Jan. 2008 — Brian Sapient, a member of the "Rational Response Squad," posted a YouTube video, but Geller issued a "take down order" under the DMCA. This led to a suit, but the courts threw it out. Clearly, copyright infringement claims cannot stave off serious criticism.
- Online Policy Group v. Diebold Inc — Oct., 2004 — In the ongoing debate over the security of electronic voting machines, a California court found Diebold Inc. guilty of deliberately misrepresenting its copyright claims under the DMCA as it attempted to silence criticism. In his decision, Judge Jeremy Fogel wrote, "No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were proteced by copyright .. . the Court concludes as a matter of law that Diebold knowingly materially misrepresented that Plaintiffs infringed Diebold's copyright interest." See links from the Electronic Frontier Foundation.

# Music Parody

- Campbell v. Acuff-Rose Music 1994
- 2 live crew (Campbell) created a parody of "Pretty Woman"
- Roy Orbison's estate (Acuff Rose) sued
- US Supreme Court, said that parodies are protected under the Fair Use doctrine provided that the parody has **substantial transformative value.**

# Thank you