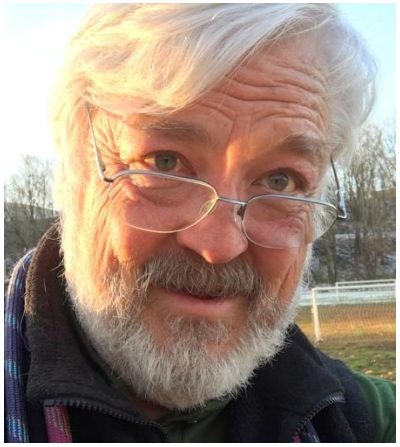
Communication Law & Ethics

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. Article 1, Section 8, Clause 8, says:
- *The Congress shall have 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;"*

Types of intellectual property

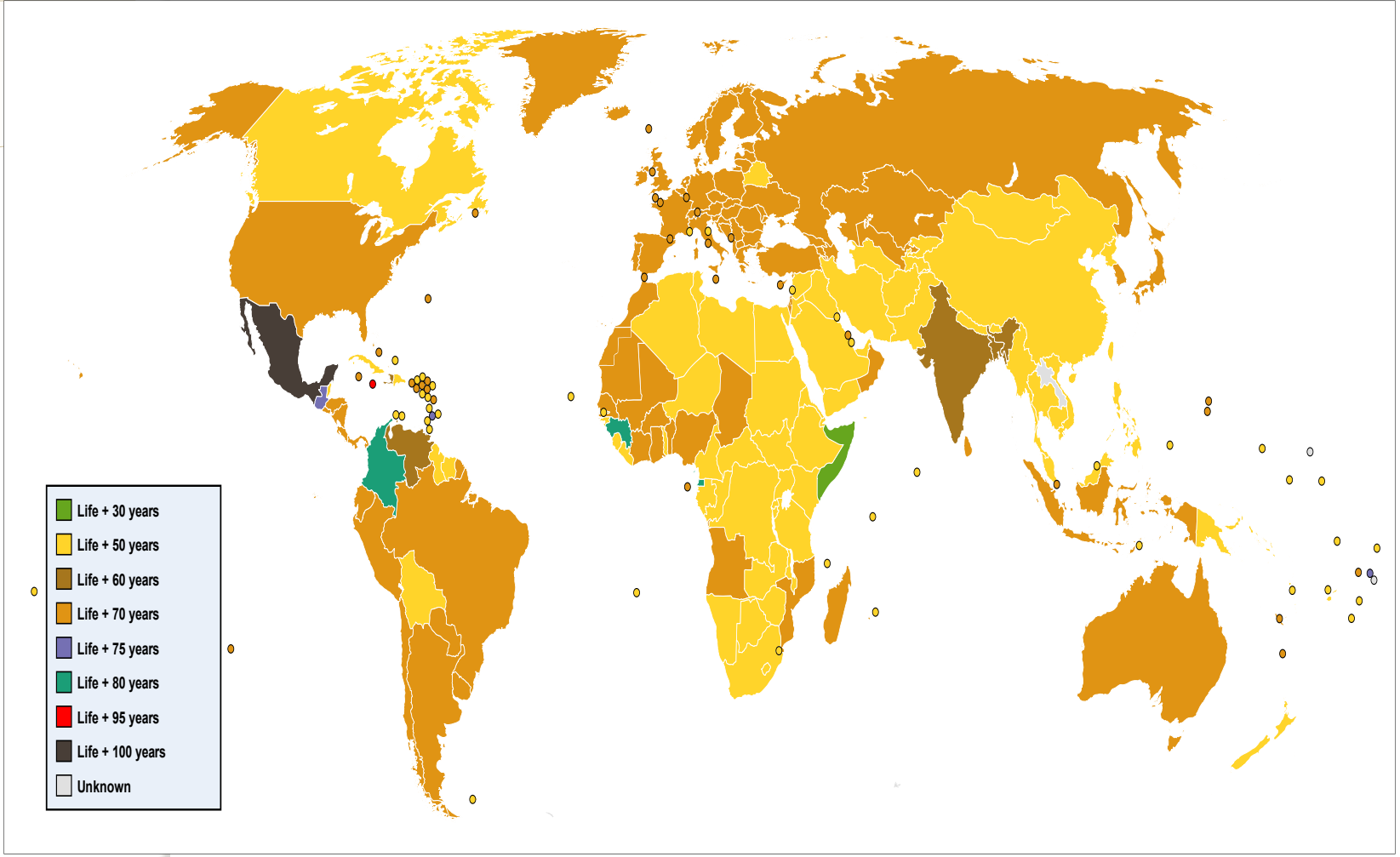
- Copyright, trademark and patents are all considered “intellectual property.”
- **Example from Patent & Trademark office:**
  - Imagine you invent a new type of vacuum cleaner. You might apply for a **patent** to protect the invention itself. You could apply to register a **trademark** to protect the 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.

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).

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

- **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. These include
  - Anything created 95 years ago, or more
  - Anything before 1978 without copyright registration
  - All government documents, texts of laws, photos and images produced by US agencies
  - Animal "selfies" and images generated by AI

- **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

Two main types of copyright

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

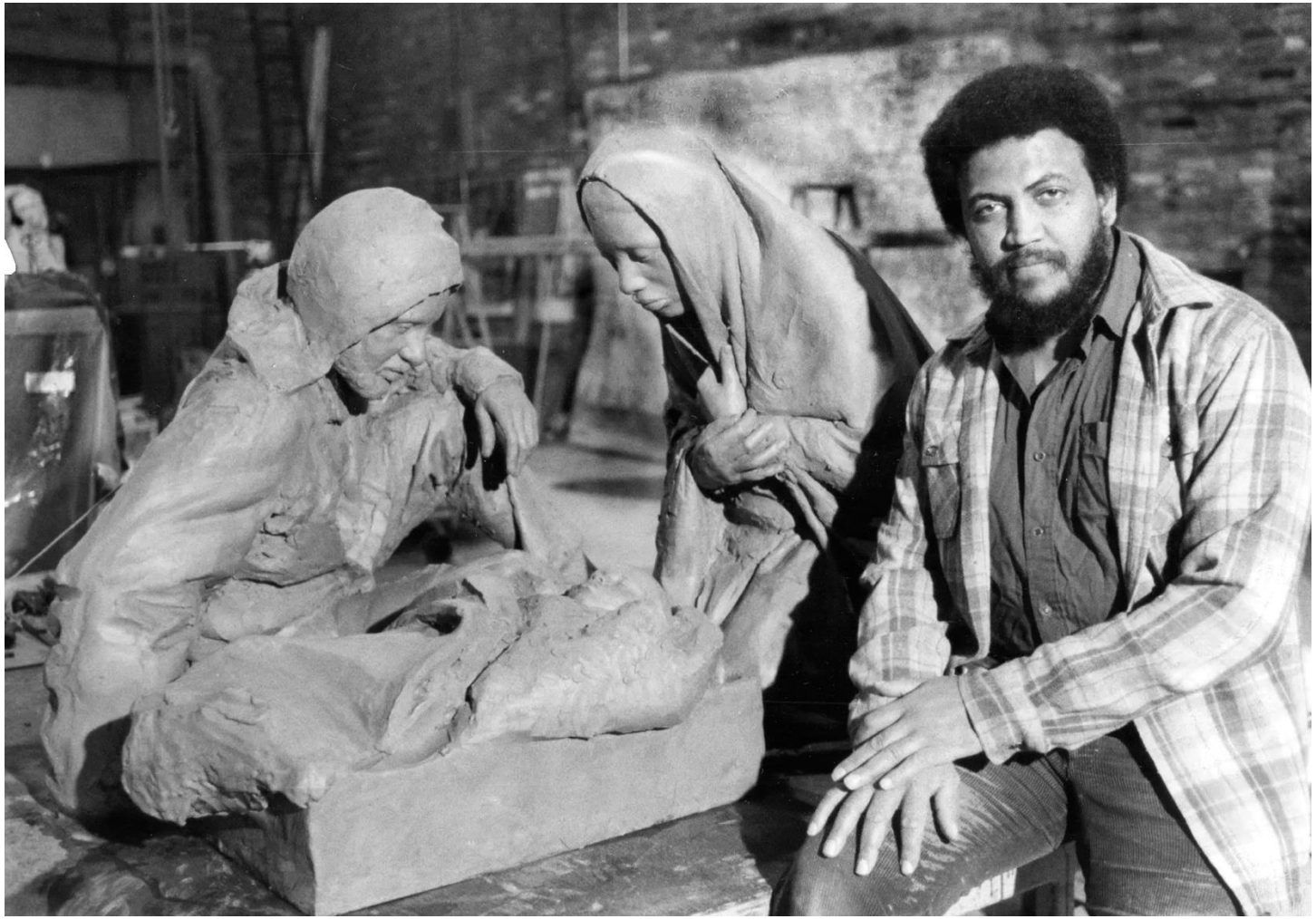
- Basic copyright goes back to 1575 in Britain. Books and maps were copyrighted in the US constitution in 1787.
  - Sheet music was first copyrighted in1831 in the US, and other mechanical reproduction followed
- Performance rights: 1700s, France.
- Today, "rights management" organizations include **ASCAP,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

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.

‘Third World America’

by James Earl Reid, 1985



By McCardle, Baltimore Sun, Fair Use / educational non-profit purpose

Copyright ownership

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 a telephone company and published an independent phone book.

Who can copyright? Monkeys?

Human authorship is required. In 2011, wildlife photographer David J. Slater posted images of macaques taking selfies with his photo equipment.

Wikimedia Commons uploaded the photos. A legal dispute ensued, but the photos were ruled as within the public domain.

Celebes crested macaque

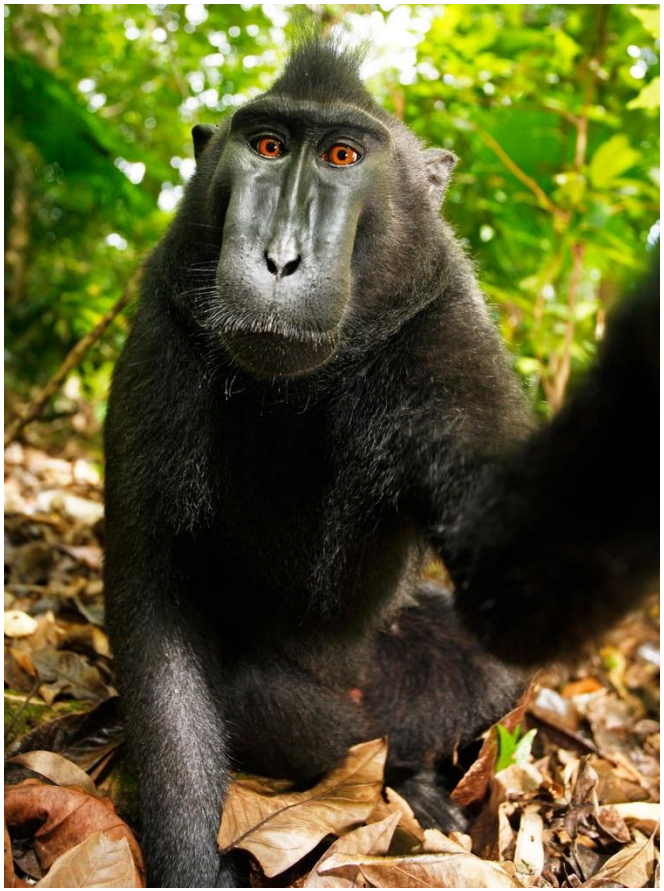
The US Copyright Office said

”Only works created by a human can be copyrighted under United States law, which excludes photographs and artwork created by animals or by machines without human intervention."

"Because copyright law is limited to 'original intellectual conceptions of the author', the [copyright] office will refuse to register a claim if it determines that a human being did not create the work. The Office will not register works produced by nature, animals, or plants."

”A photograph taken by a monkey" is an example of something that cannot be copyrighted.

21 August 2014



Celebes crested macaque

How long can copyright last?

- ** **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

Copyright history

- On May 31, 1790, the first US copyright law is enacted under the new Constitution. Modeled from Britain's Statute of Anne, the new law gives limited protection for books, maps, and charts for only fourteen years with a renewal period of another fourteen years.
- Photos are protected by 1865, but reproductions of photos are not protected until the 1884 Supreme Court decision in *Burrow-Giles v. Sarony*

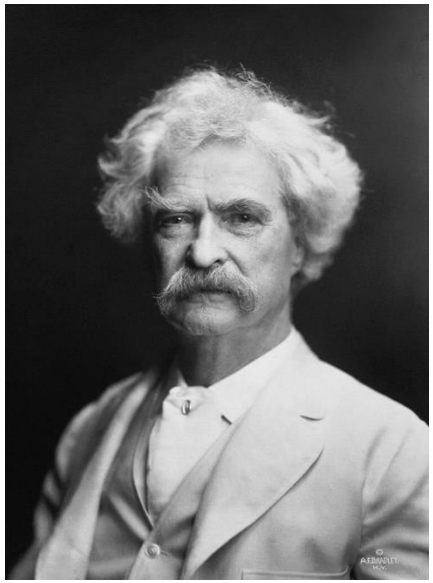
Copyright history

Burrow-Giles v Sarony, 1884

”By posing … Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories,” Sarony was the "author" of "an original work of art" and thus within the "class" of things for which the Constitution intended Congress to grant him exclusive rights under the copyright laws.

Mark Twain on 28-year copyright

"... I do not like to use the harsher term, "Thou shalt not steal." But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land. Always talk handsomely about the literature of the land. Always say what a fine, a great monumental thing a great literature is. [Yet} In the midst of their enthusiasm, they turn around and do what they can to crush it, discourage it, and put it out of existence. – 1906



Music & copyright

"Copyright laws amended in 1831 to include sheet music, which became possible to mass produce with lithography. But infringement complaints were rarely heeded.

Early 19th century songwriters like Stephen Foster (Camptown Races, Beautiful Dreamer, Old Kentucky Home) found it difficult to make a living.

Royalty rates were low and there was no copyright enforcement.

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

Music & copyright

- The court said "player" pianos did not infringe on sheet music in White Smith v Apollo 1908
- Copyright Act of 1909 – reforms White-Smith
  - New technologies CAN be copyrighted
- Also begins compulsory music licensing

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

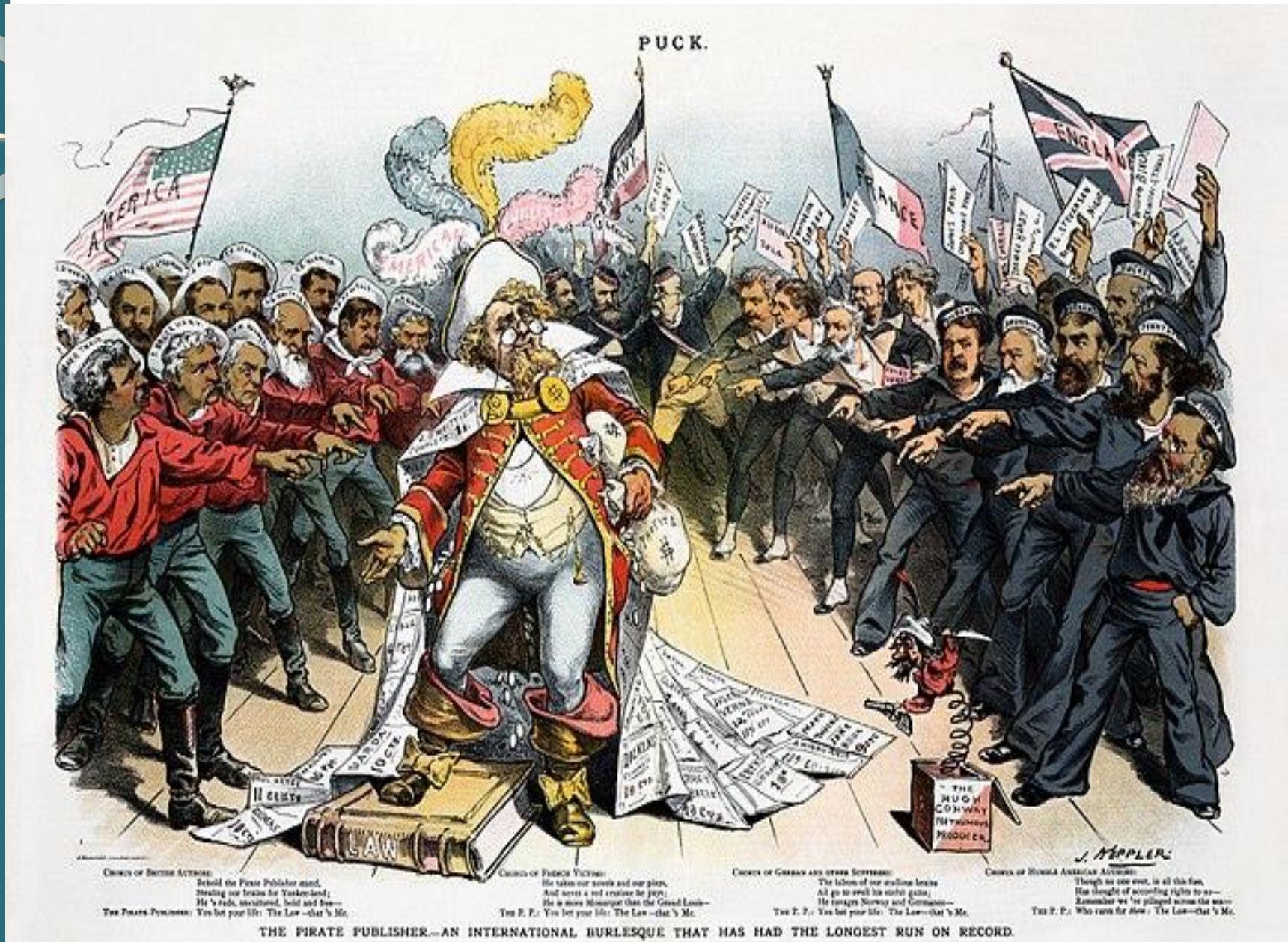
Performance rights

- **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

International Comm Law



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

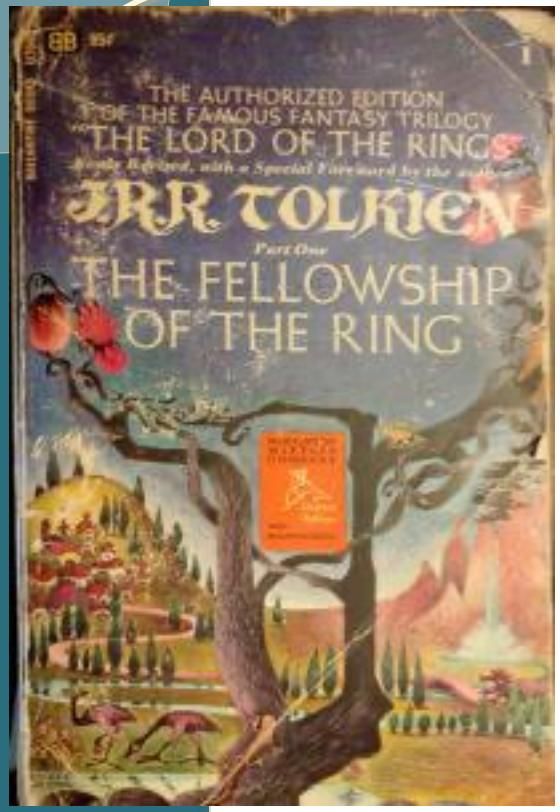
International controversy

"You take the uncompleted books of living authors, fresh from their hands, wet from the press, cut, hack, and carve them … Now, show me the distinction between such pilfering as this, and picking a man's pocket in the street." — Charles Dickens, "Nicholas Nickleby"

Dickens' complaints were heard in Britain. In 1875, a Royal Commission on British copyright law advised a copyright treaty with the US to provide reciprocal protection of British and US authors.

Cornerstone of Int'l Comm Law

- 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.
- US resists "tax on knowledge"
- US doesn't join until 1976 / 1989



The authorized edition

- In 1965, Ace Books published an edition of the Hobbit and Lord of the Rings. Tolkien and his publishers vigorously protested, but when the legal options ran out, US publisher Houghton Mifflin printed paperback editions of Tolkien's books in 1973 and included this plea on the back cover:
- *"This paperback edition and no other has been published with my consent and cooperation. Those who approve of courtesy (at least) to living authors will purchase it and no other."*

Copyright & technology

- MP3 audio compression allowed copying & exchange of music files late 1990s.
- Change in technology led to dozens of copyright suits

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

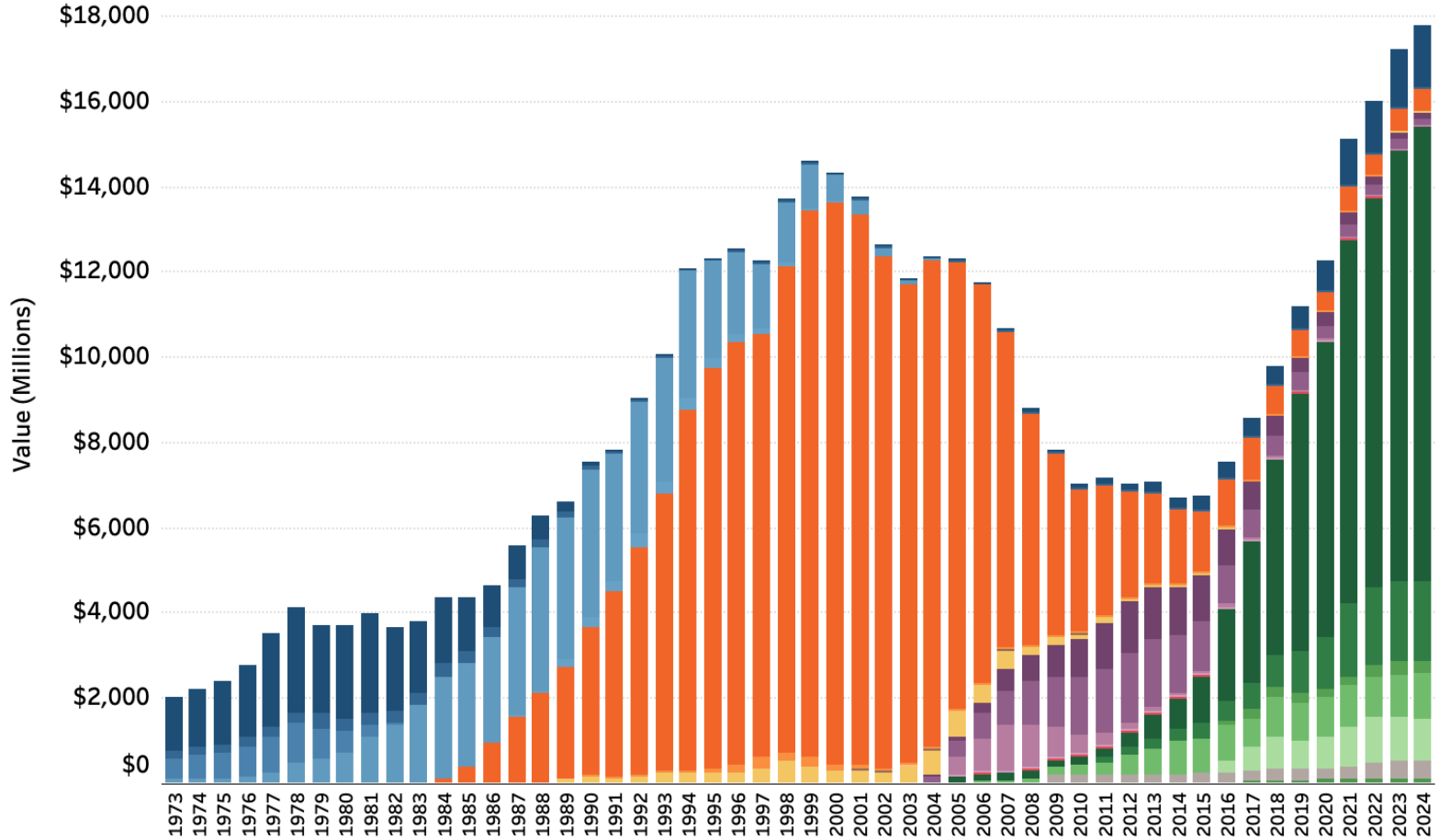
- At issue: Cablevision's "remote DVR" technology allowing pause record replay content
- CSC included Turner, Disney, Fox, Paramount and others
- Court found a difference between a "set top" DVR in an individual home, and a "remote" DVR operated by Cablevision
- The decision went to CSC

Music Modernization Act 2019

- Blanket licensing system for digital providers
- Brings older pre - 1972 songs into copyright system
- Now includes producers, mixers and sound engineers in royalty system
- Allows rational streaming service royalties

U.S Recorded Music Revenues by Format

1973 to 4048, Format(s): All
Source: RIAA



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, music 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

- 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.**

Music Parody & copyright

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

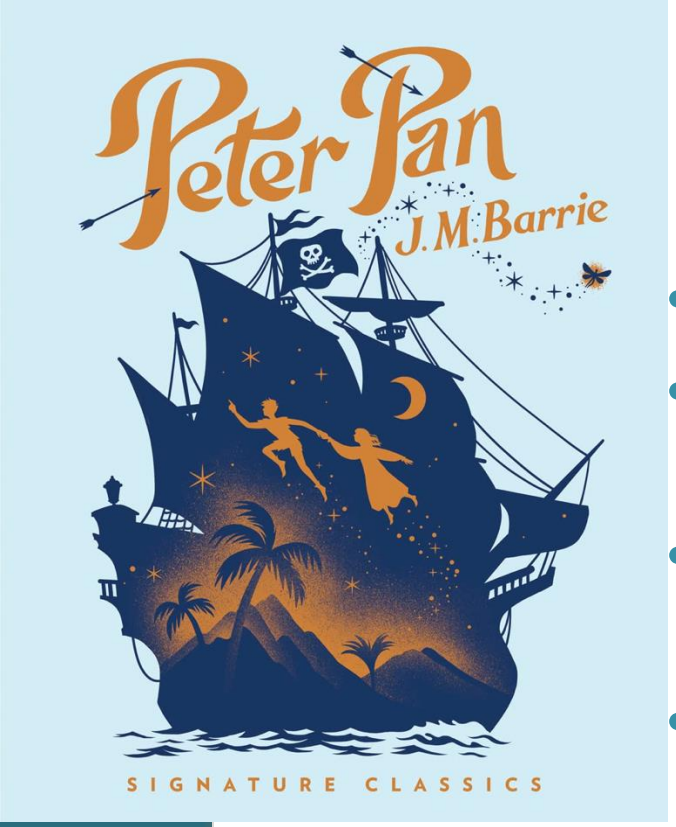
Music copyright lawsuits

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

Public domain



Copyright saga 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 UK copyright by GOSH indefinitely

More copyright sagas

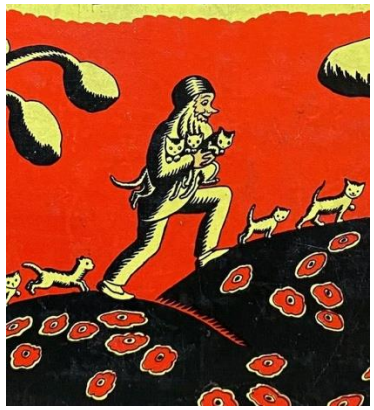
- Happy Birthday song
  - First published 1912, first © 1935 Summy co.
  - Warner music buys Summy
  - Warner claimed exp. 2030
  - In 2016, filmmaker Jenn Nelson proved that the company did not own the rights
  - Warner made $14m settlement -- the song is now in the public domain.
  - https://www.youtube.com/watch?v=y3whtVeMalo

New in the public domain 2023

- Winnie the Pooh
- Bambi, Oswald Rabbit
- Books by E. Hemingway, Wm. Faulkner, D H Lawrence, H L Mencken
- Film: Metropolis
- 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

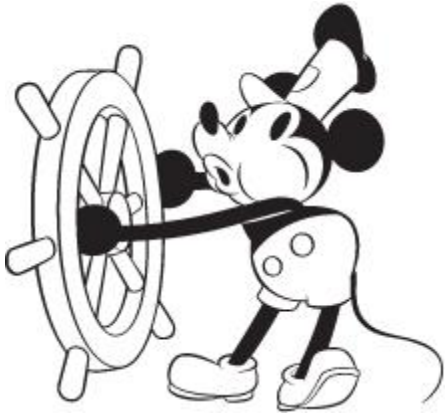


- Millions of cats (Wanda Gag)
- Dark Princess (W. E. B. Du Bois)
- Three penny Opera (Bertol Brecht)
- Lady Chatterly's Lover (DH Lawrence)
- All Quiet on the Western Front (Erich Maria Remarque)
- The Open Conspiracy: Blue Prints for a World Revolution (HG Wells)
- October: Ten Days That Shook the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

Public domain 2025

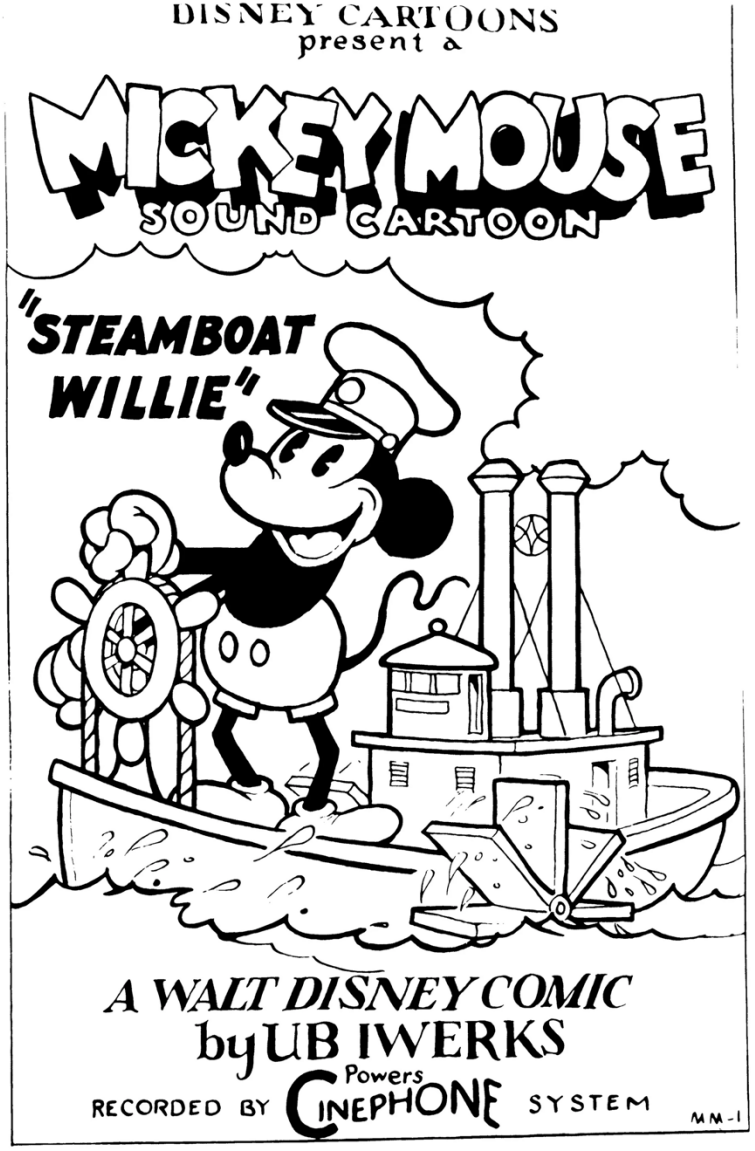
"Public Domain Day 2025 Montage"
by Jennifer Jenkins, CC BY 4.0

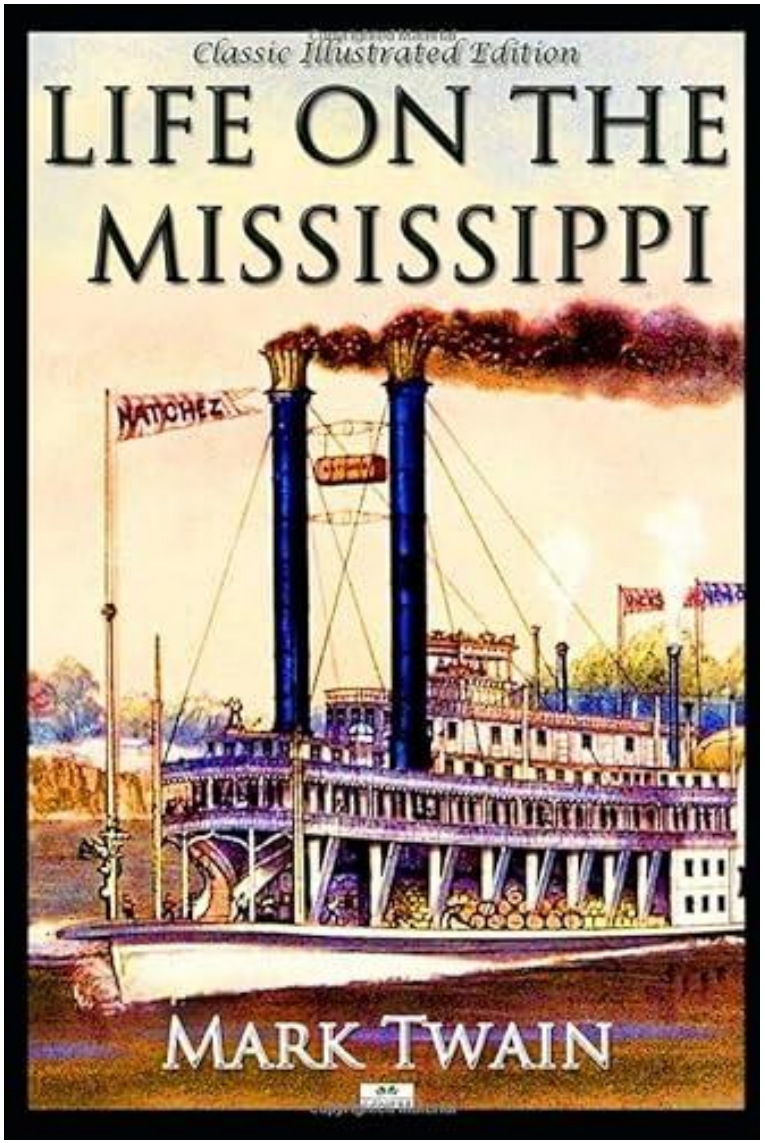
Steamboat Willie

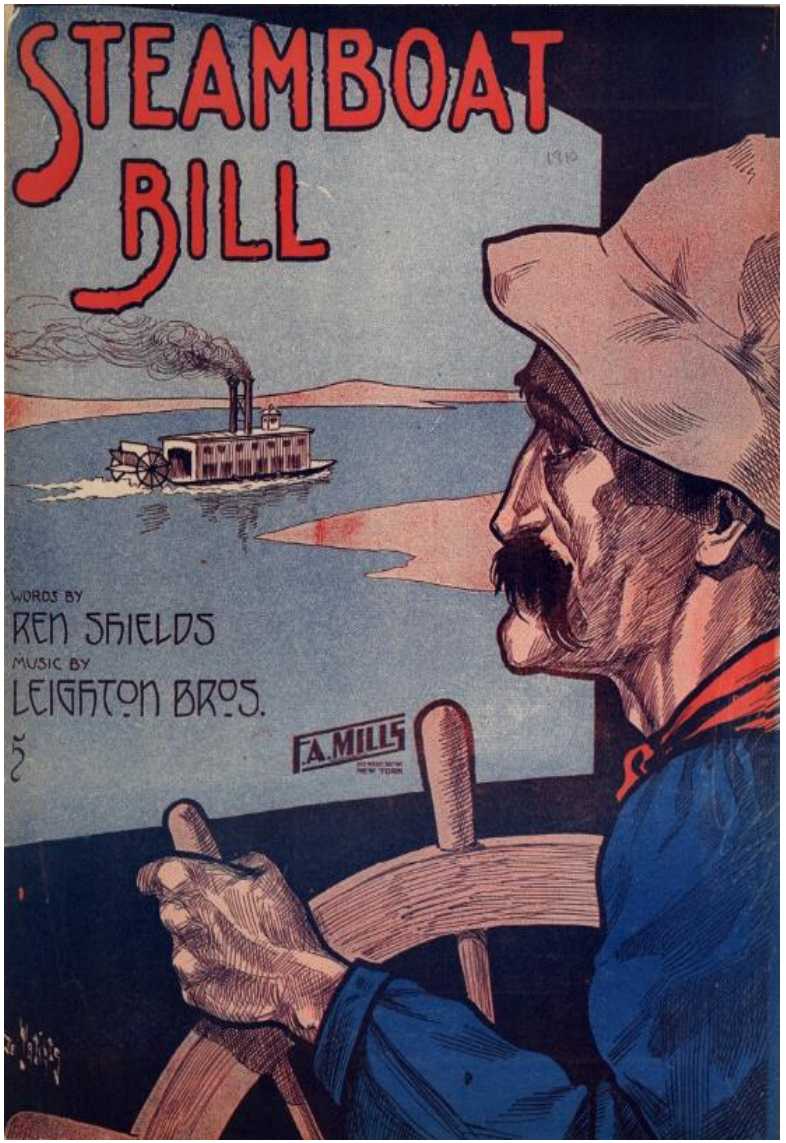


- Good example of why we need a public domain
- Debuted in Disney short 1928
- Cartoon was a takeoff of Buster Keaton's Steamboat Bill
- That was a takeoff on a popular 1910 song, Steamboat Bill
- The song, the movie and the cartoon built on the mystique and legends of the era of Mississippi steamboats
- 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
WORDS BY
REN SHIELDS
MUSIC BY
LEIGHTON BROS.
F.A. MILLS

Woody Guthrie

This song is Copyrighted in U.S., under Seal of Copyright #154085, for a period of 28 years, and anybody caught singin' it without our permission will be mighty good friends of ours, cause we don't give a darn. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do.

But "This land is your land" is still (2020) under copyright.

Woody Guthrie

"Our control of this song has nothing to do with financial gain," Ms. Nora Guthrie said in an interview at the time, as the 2016 presidential campaigns were kicking into high gear.

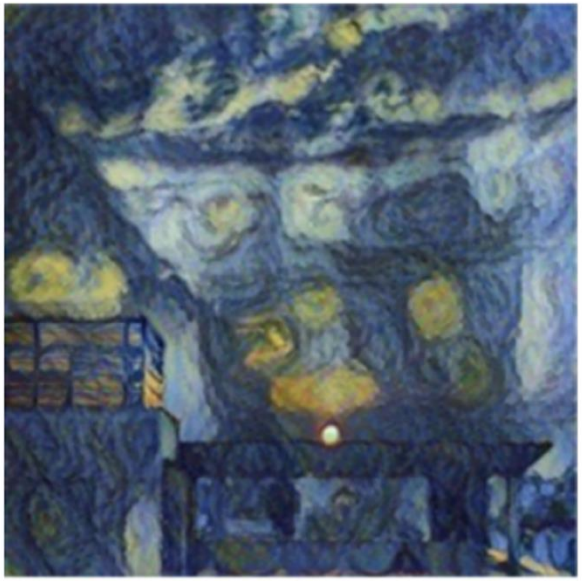
"It has to do with protecting it from Donald Trump, protecting it from the Ku Klux Klan, protecting it from all the evil forces out there."

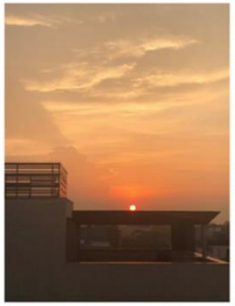
Why "This land is your land" is still (2020) under copyright.

Pepe and the DMCA

- Ohio cartoonist Matt Furie was fed up. The "alt-right" had stolen his creation, Pepe the Frog, and turned it into an icon of hatred and white power. So, in the summer and fall of 2017, his attorneys began sending a series of cease-and-desist letters to people on the far right who were infringing his copyright. They also issued Digital Millennium Copyright Act takedown requests to Reddit and Amazon, notifying them that the use of Pepe by the alt-right on their platforms is copyright infringement, and that they would have to start taking down posts and books that misused the icon. "The message is to the alt-right is clear—stop using Pepe the Frog or prepare for legal consequences," said Motherboard magazine.

AI and copyright





Mr. Sahni's Original Photograph (base image)

Vincent Van Gogh's *The Starry Night* (style image)

- US Copyright office turns down Sahni's AI mix as lacking in originality (Dec. 2023).
- Ongoing lawsuits NYT v Microsoft, etc. for LLM "training" on Times text.
- Many other lawsuits under way

“A recent entrance into paradise”

Thaler v Perlmutter 2025

Copyright office decision on AI is upheld in federal appeals court

Stephen Thaler, artist listed the Creativity Machine as the work's sole author. He was just the work's owner.

Thaler argued:

(1) Definition of "Author" is not confined to human beings.

(2) The human-authorship requirement wrongly prevents copyright law from protecting works made with AI.

(3) The Copyright Act's "work made-for-hire" provision allows him to be considered the author of the work at issue because the Creativity Machine is his employee.

(4) He is the work's author because he made and used the Creativity Machine in its creation.

Thaler v Perlmutter 2025

Shira Permutter, Director of US Copyright Office, denied a copyright for the work

She argued that the Constitution's reference to "authors and inventors" requires human authorship of all copyrighted material.

Thaler v Perlmutter 2025

130 F.4th 1039, 1041 (D.C. Cir. March 18 2025).

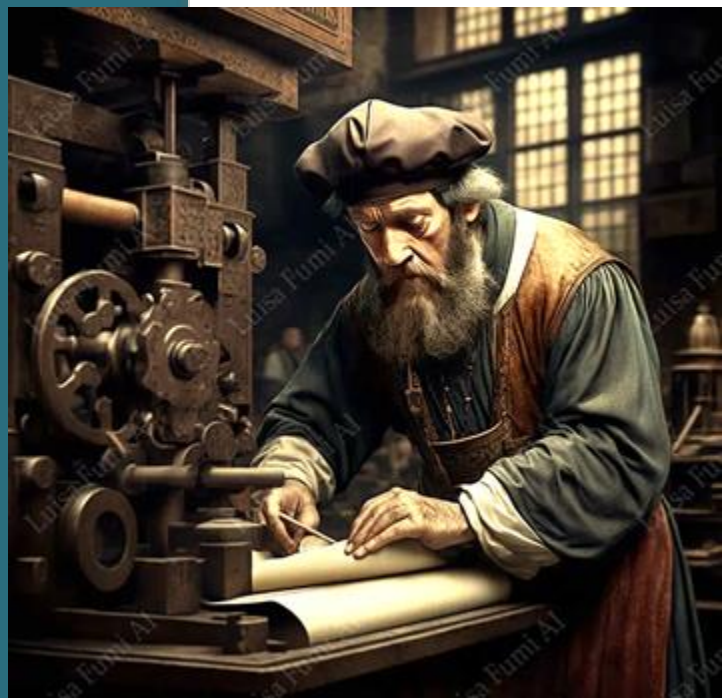
Copyright office decision on AI is upheld in federal appeals court
https://media.cadc.uscourts.gov/opinions/docs/2025/03/23-5233.pdf

Stephen Thaler, artist, argued: (1) The natural meaning of "author" is not confined to human beings. (2) The human-authorship requirement wrongly prevents copyright law from protecting works made with AI. (3) The Copyright Act's work made-for-hire provision allows him to be considered the author of the work at issue because the Creativity Machine is his employee. (4) He is the work's author because he made and used the Creativity Machine in its creation.

Shira Permutter, as Director of US Copyright Office, denied a copyright for the work

Ethical issues with AI images

"Illustration of a 1940 newsroom" Nieman Reports, June 2023



AI Gutenberg

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

Thank you