

## Software & Internet Law

### Content, Sharing, Copyright

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## Sec. 230 wrap-up

- Speech-enabling technology differs
  - Scale
  - Notice-liability could be too burdensome
- Anonymity can be easier

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## How many “copies” have you made today?

- Have you browsed a website?
- Have you forwarded an email?
- Have you taped or TiVo'd a television show?
- Have you played a song on an iPod or MP3 player?
- Have you used the library's photocopier?
- Have you run a program on your computer?

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## U.S. copyright is as old as the Constitution

Article I, Section 8, clause 8: “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;”

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## Things have changed since the first Copyright Act

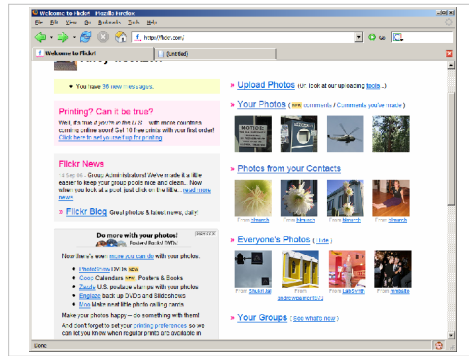
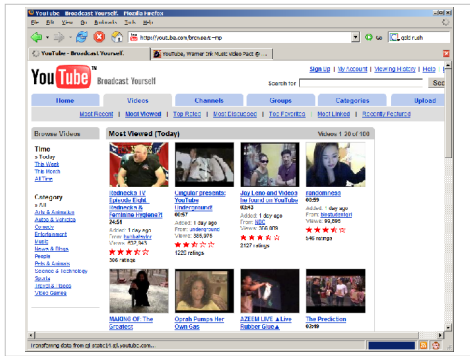
- Copyright has gotten longer
  - 14 years, renewable once -> author's life plus 70 years
- Copyright has gotten wider
  - Right to publish or vend books, charts, and maps -> right to copy, distribute, create derivative works, publicly perform or display
- Copyright infringement has gotten easier / Copyright covers more
  - Manual copying -> digitized copying machines
  - Only printers could copy a book -> anyone can copy with a computer

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## Old Wine in New Bottles?

- Same root principles, different focus
- Translation: How do we interpret the constitutional and statutory language to make sense of the new technology?
- Does the law need to be updated? In which direction, if so?

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## Why copyright?

- “To promote the progress of science and useful arts”
  - Give authors and artists an incentive to create and publish, so the public gets access
  - Locke’s labor theory
  - European moral rights

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## Is any information “property”?

- Excludable?
  - real property can be fenced or locked up
  - IP can be locked as embodied in tangible items
- Rivalrous?
  - real is - my sheep graze on the commons, yours don’t have so much grass
  - IP isn’t - I read your story, my neighbor can enjoy it as much (perhaps more)

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## Copyright Act, Title 17 U.S.Code

### § 102, Subject Matter

- Copyright protection subsists, in accordance with this title, in **original works of authorship fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device
- In **no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery**, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

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## § 106, Exclusive Rights: Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce
- (2) to prepare derivative works
- (3) to distribute
- (4) to perform publicly;
- (5) to display publicly; and
- (6) to perform digitally (sound recording)

- Limitations include Fair Use (§ 107) and First Sale (§ 109)

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§ 107 Limitations on exclusive rights: Fair use

- The fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. [T]he factors to be considered shall include
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

• Direct infringement: (§ 501)

- “Anyone who violates any of the exclusive rights of the copyright owner ... is an infringer of the copyright”

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Playboy v. WebbWorld



Ownership of copyright

Copying

direct proof

circumstantial: access and substantial similarity

striking similarity

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MAI v. Peak



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§ 117. Limitations on exclusive rights: Computer programs

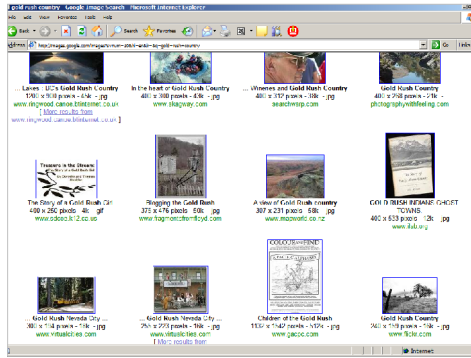
- (a) **Making of Additional Copy or Adaptation by Owner of Copy.**— Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
  - (1) that such 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, 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.

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NotPics

- The owner of NotPics, Inc., a bulletin board service, thinks it has a bullet-proof way to serve up the most popular images without having to take any pictures: Crawl the web for image files and download them in two parts. Then instruct paying subscribers to re-assemble the parts on their own computer. That way, NotPics says, there are no “copies” of the images on its computers.
- Do you agree?

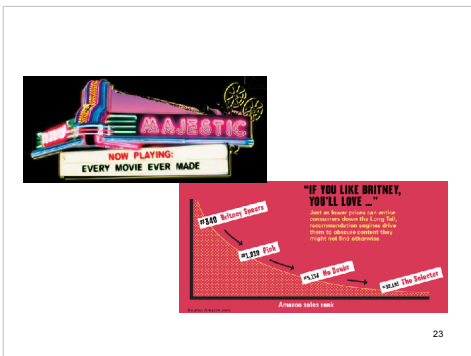
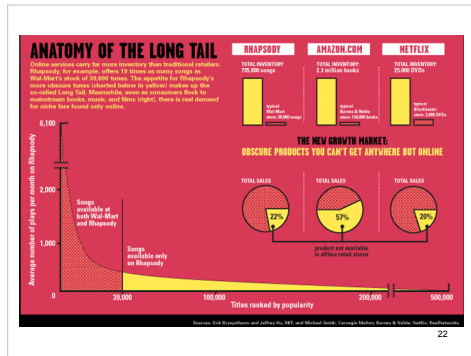
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## Fair Use?

- Four factors:
  - 1) Purpose and character of the use
    - Non-commercial favored
    - Transformative favored (incl. context)
  - 2) Nature of the copyrighted work
    - Use of non-fiction work favored
  - 3) Amount used
    - "only so much as necessary"
  - 4) Effect on the market
    - 1) Substitutive uses disfavored
    - 2) What about market-enabling technologies/uses?

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## Google Print

- Google recently announced a new program, **Google Print**, expanding its search to the library shelves. Google will scan books from libraries (including the New York Public Library) and give the libraries an electronic copy.
- Google will use the scans to add book listings to search results. In response to searches, users will be able to browse the full text of public domain materials, but only a few sentences of text around the search term in books still covered by copyright. Google permits publishers to "opt out" of having their books scanned, but will otherwise scan everything on the shelves.
- Copyright concerns?

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