

Law and digital libraries

Mostly about copyright.

More and more difficulties are arising in the use of older information; it's much more complex than paper was.

Some issues: multimedia; public domain; downloading.

The most fundamental point: what public policy will best encourage innovation?

Intellectual property protection

Patents, copyright, and trade secrets.

Perhaps databases as well.

Some issues involving related laws: libel/slander, trademarks, etc. (e.g. product disparagement, best known as “veggie libel”).

The traditional economist says: if you can get money for your ideas, there will be more ideas. If you can make them public without fear, you’ll be willing to do that. So copyright is a way of minimizing trade secrecy.

Patents

Patents are about devices or processes. 20 years exclusive use from filing (used to be 17 years from issue). Patents are public, applications public after 18 months (used to be secret until issued).

Patents must be useful, new, and not obvious.

Software patents have proven to be a problem for lack of “prior art,” so that rather familiar ideas get patented (windows, spreadsheets, ...).

The same problem is about to happen with business methods; aside from the relation of those squabbles to e-commerce sites, patents are less important for libraries.

Personally having worked in computer science both before and after software patents became valid, I didn't see any increase in innovation.

Submarine Patents

If patents are secret until issued, and can take years to process, companies face a risk of starting to produce something and having an unexpected patent appear.

Jerome Lemelson is the best known example: some of his patents took more than 40 years to issue, during which time he got to rewrite them (leaving him, and now his estate, with patents that appear to control bar codes).

This problem is going away: patent applications are now to be published after 18 months. Also, a court has held that Lemelson waited too long to assert his rights.

Note that independent invention is not a defense to a patent: first to invent & file wins (complex rules).

Increasing patentable areas

A wider and wider variety of “things” are becoming patentable. Michael Crichton recently let fly in the *New York Times* at a patent which appears to control the idea of testing for a particular medical condition. There has been a lawsuit over a patent on a way of making a peanut-butter-and-jelly sandwich so the jelly won't leak out. Business method patents are becoming a problem, e.g. “one-click” ordering.

There is a popular view that getting a patent requires a high level of ingenuity and inventiveness. This is not real true: the US now has some six million patents, almost none of which are of any commercial value.



US005443036A

United States Patent [19]

Amiss et al.

[11] Patent Number: **5,443,036**

[45] Date of Patent: **Aug. 22, 1995**

[54] METHOD OF EXERCISING A CAT

[76] Inventors: **Kevin T. Amiss**, 255 S. Pickett St., #301, Alexandria, Va. 22304; **Martin H. Abbott**, 10549 Assembly Dr., Fairfax, Va. 22030

[21] Appl. No.: **144,473**

[22] Filed: **Nov. 2, 1993**

[51] Int. Cl.⁸ **A01K 29/00**

[52] U.S. Cl. **119/707**

[58] Field of Search 119/702, 707, 174, 905;
446/485

[56] References Cited

U.S. PATENT DOCUMENTS

3,877,171	4/1975	Sloop et al.	446/485
4,208,701	6/1980	Schock .	
4,231,077	10/1980	Joyce et al. .	
4,757,515	7/1988	Hughes .	
4,761,715	8/1988	Brooks .	
4,926,438	5/1990	Maes et al. .	
4,985,029	1/1991	Hoshino .	
5,056,097	10/1991	Meyers .	

5,194,007 3/1993 Marshall et al. .

OTHER PUBLICATIONS

Carayan et al., "Effects of tianeptine on the Performance of a reaching movement in a cat", *Psychopharmacology*, vol. 104, Issue 3, Berlin, 1991, pp. 328-336.

Levesque et al., "Visual 'cortical-recipient' and tectal-receptient pontine zones play distinct roles in cat visuomotor performance", *Behavioral Brain Research*, vol. 39, Netherlands, 1990, pp. 157-166.

Primary Examiner—Todd E. Manahan

[57] ABSTRACT

A method for inducing cats to exercise consists of directing a beam of invisible light produced by a hand-held laser apparatus onto the floor or wall or other opaque surface in the vicinity of the cat, then moving the laser so as to cause the bright pattern of light to move in an irregular way fascinating to cats, and to any other animal with a chase instinct.

4 Claims, 1 Drawing Sheet

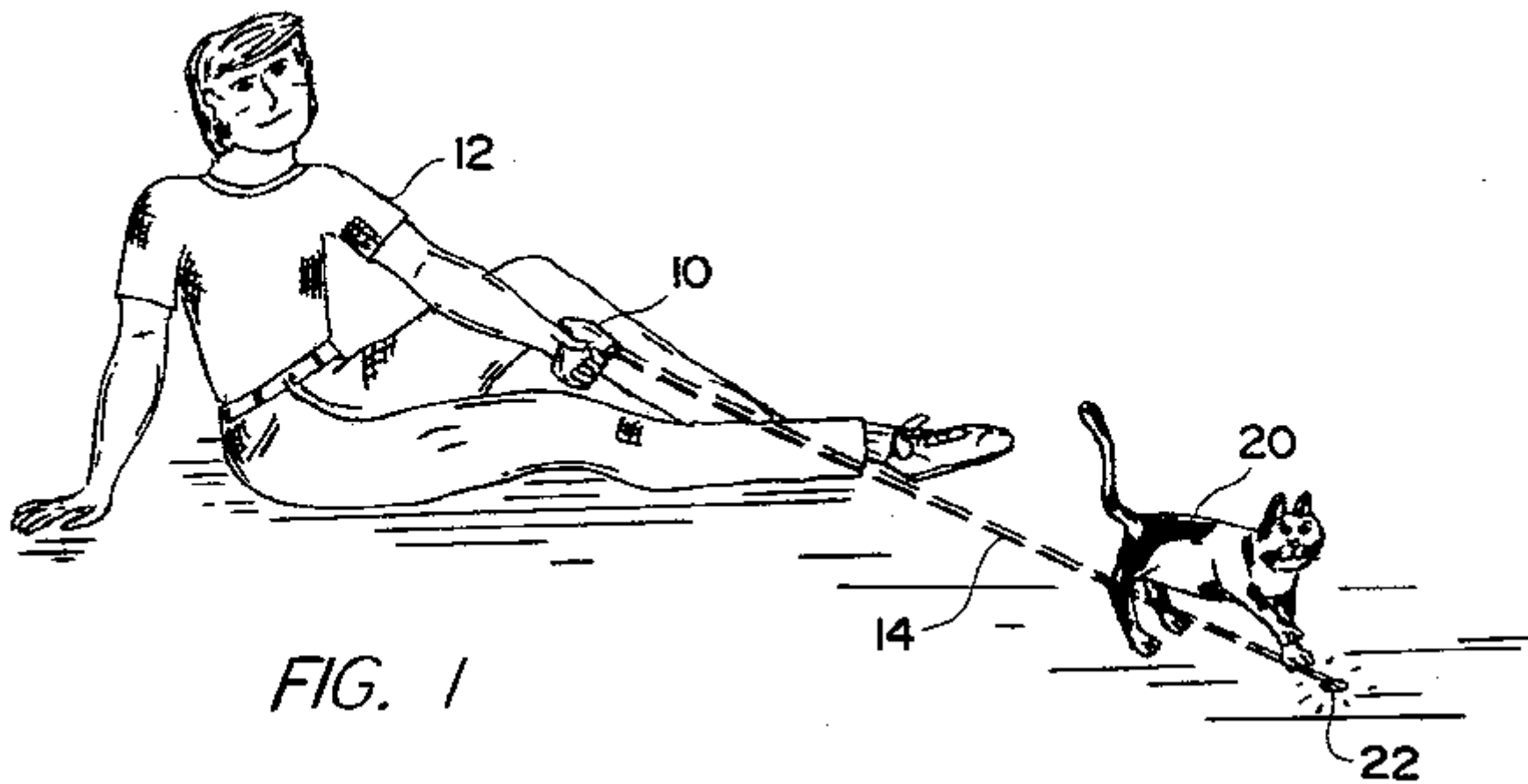


FIG. 1

Trade secrets

If you don't believe you can protect your ideas, you keep them secret (e.g. Microsoft source code).

This doesn't work well with things that everyone can see: e.g. the one-click ordering gimmick which Amazon litigated for three years against Barnes & Noble.

You often enforce your rights with contracts: each purchaser must promise not to resell or re-use the ideas.

A strange public policy issue today: can we convince ourselves that modern voting machines are fraud-resistant if we can't see the source code?

Copyright

The logic of copyright: government protects authors' rights to encourage them to create.

Copyright covers “expression” and not ideas (which are patented). Includes language, music, art works, but not everything: type fonts or dress designs, for example.

Copyright holders have exclusive rights to

- reproduce the work
- distribute the work
- perform or display the work publicly
- create derivative works

Copyright now lasts life of author plus 70 years.

Among very aggressive copyright owners: RIAA and MPAA, and the heirs of T. S. Eliot, the Gershwins, Irving Berlin, and Walt Disney.

Old law/new law

Published before 1989	Published now (Berne convention)
95 years from publication (before 1964, 28 years with option to renew for 28 more)	Life of author plus 70 years (was life plus 50 until CTEA)
Works had to be registered	No registration requirement
Work had to contain notice of copyright holder and date	No notice requirement
Must deposit best version with Library of Congress	Same

Fair Use

Important for libraries. Copying is allowed sometimes, depending on four tests:

- Purpose of the use: educational better than commercial.
- Nature of the work: print better than music.
- Amount of the work taken: the smaller the better.
- Effect on the potential market: again, less the better.

The model for fair use is somebody taking handwritten notes in a library, or quoting from a book in a review.

Libraries also have an exemption for preservation (but must not be able to buy another copy)

A recent example

During the 2004 campaign, a California company named “JibJab Media” created a video making fun of both Presidential candidates, based on Woody Guthrie’s song “This land is your land.” Ludlow Music, current publishers of that song, claimed copyright infringement. Jibjab argued that they were doing a parody and were thus protected by fair use.

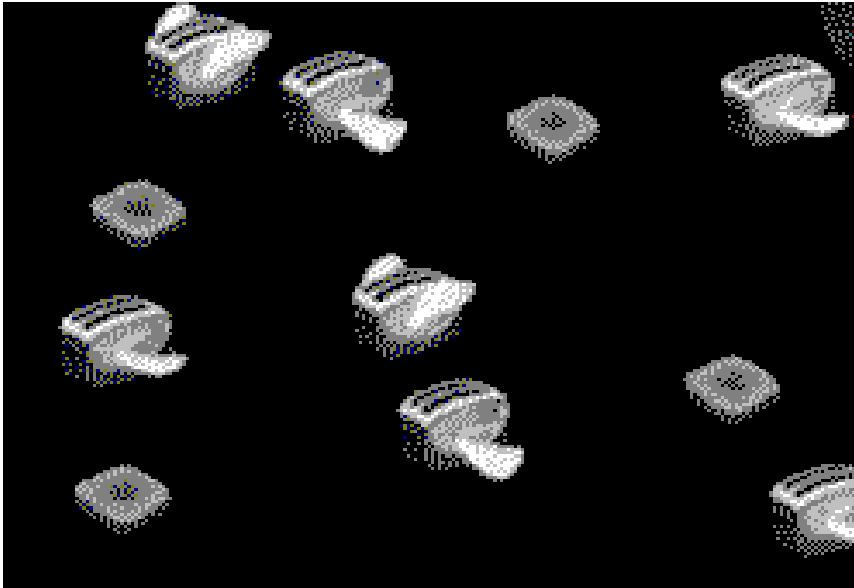
Ludlow objected that they were not parodying the *song* and thus did not deserve protection. The Electronic Frontier Foundation took up the case thinking that they would defend free speech.

EFF, however, found that although Ludlow had published the song in 1956, registering the copyright, and renewed it in 1984 as required, Woody Guthrie himself had published the song in 1945, and thus it should have been renewed in 1973. That wasn’t done: Woody Guthrie had been dead for six years, and Arlo Guthrie did not renew the copyright. Thus *This land is your land* is in the public domain.

P.S.: Woody Guthrie didn’t write the music, although he’s always credited: he took it from A. P. Carter’s “Little Darling Pal of Mine”.

Parody is also fair use, but...

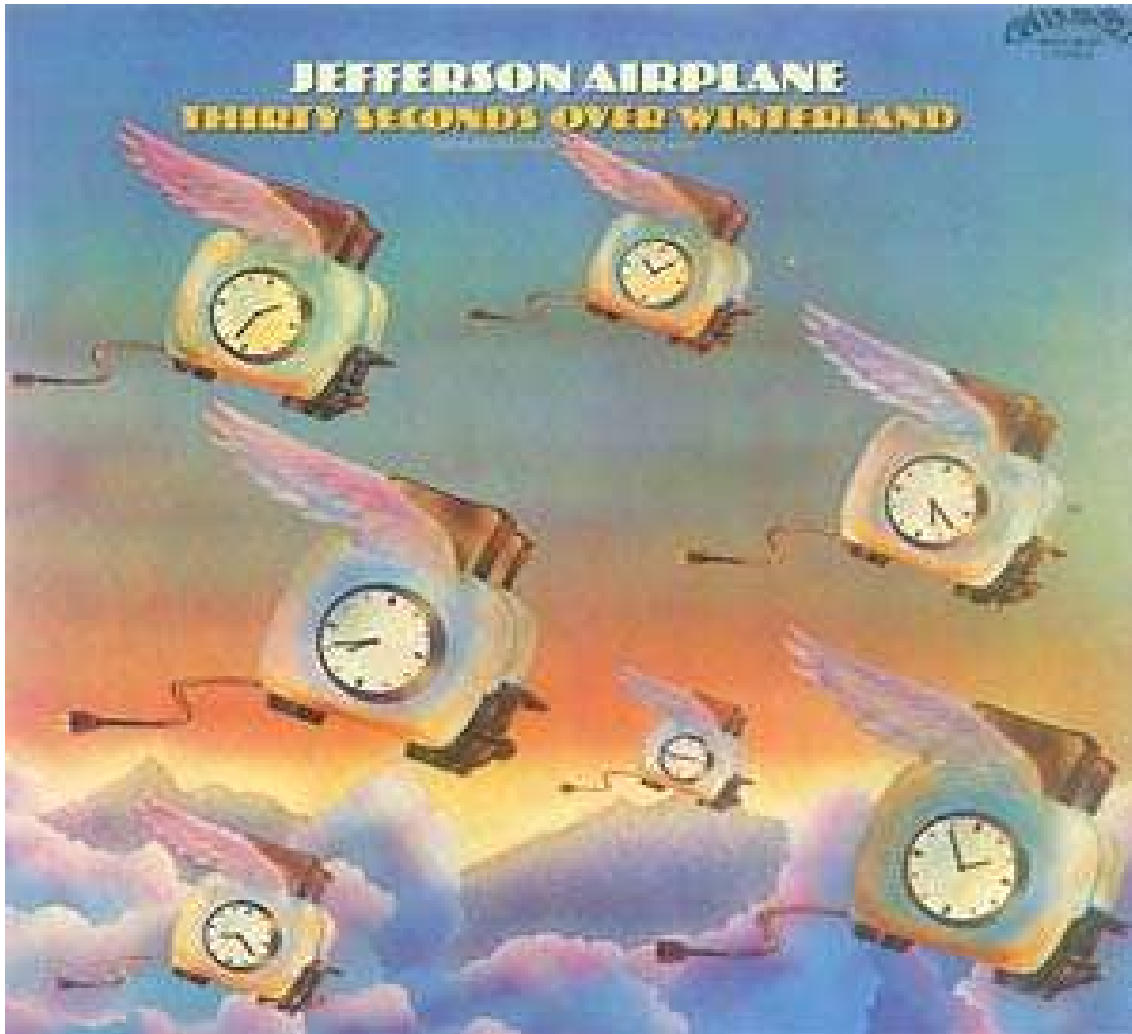
If you are old enough, you'll remember the flying toasters screensaver.



And then somebody made a parody, in which Opus the penguin (licensed from Berk Breathed) shot down the toasters. In the resulting lawsuit, it was held that this was commercial and not fair use...

There's no justice in the world..

The original toaster image was on a Jefferson Airplane album



So, observing that there was money to be made, the band sued too. They lost for failure to have complied with the registration requirement in effect when the album was published in 1973.

The artist who actually drew the toaster picture was Bruce Steinberg, who got nothing out of this.

My thanks to a previous student, Monica Smith, who provided the screensaver.

Compulsory licensing

In a few circumstances, you have a right to copy/perform something in exchange for paying a fee.

- Recording a piece of music that somebody else has already recorded (see Harry Fox Agency)
- Cable television rebroadcasts
- Jukeboxes

Industry has fought this very hard.

The TEACH Act

This act legalized the use of copyrighted materials for distance learning. The use must be part of a class, supervised by an instructor, and limited to enrolled students. The institution has to have copyright policies.

Dramatic and musical works are now allowed in this context and they can even be digitized for the purpose BUT they can't be retained, even for a whole semester. And works sold to the educational market do not get the exception.

Everything becomes more legalistic: e.g. we don't actually check that each person entering a Rutgers class is an enrolled student, but online you must.

Right of first sale

A purchaser of a book or record can give it or sell it to somebody else.

Or, a library can lend it.

Digital publishers don't want this to happen: thus they usually claim that they are not selling but only licensing whatever it is, under some contract (eg all Microsoft software is only licensed and is not transferable).

By claiming that they are not “publishing” digital publishers also avoid the requirement to deposit two copies of their work with the Library of Congress.

Why is digital such a problem?

Any digital transmission is held to involve copying. Thus it has not been possible to come up with equivalents of lending or even in-library reading that don't appear to be making reproductions.

Once upon a time there was a rule that a copy had to be legible to the human eye: no longer (as a result of a computer software case).

Perhaps the silliest current situation: MIT built a music-transmitting system within the campus based on analog transmission over the TV cables, to avoid the digital arguments.

Personal use

Sony v. Universal: use of VCRs for “time-shifting” is OK.

By extension, you can make a copy of a CD you own so that you can have one in your car and one at home (RIAA would probably object).

Also important: a device can be sold, even if it can be used for copyright infringement, so long as it has a substantial non-infringing use.

Groups such as CPB and the NFL joined Sony, with Fred Rogers arguing for time-shifting.

The case took from 1976 to 1984; by the time the Supreme Court ruled, it was clear that motion picture attendance wasn't really suffering.

Need for explicit permission

New York Times v. Tasini

(also Disney against Peggy Lee)

If you don't have an explicit permission to copy something, then you have to go back and get it.

In particular, agreements to permit publishing something don't give the publisher the right to move it to a new technology. Peggy Lee got videocassette royalties for writing and performing in *The Lady Is a Tramp*; the *New York Times* has to get permission to put freelance articles into their online databases.

Retroactive extensions

Eldred v. Ashcroft. The CTEA (copyright term extension act) lengthened copyright in existing works from 75 to 95 years. Larry Lessig argued for Eric Eldred, a republisher, that you couldn't imagine that retroactive extensions of the copyright term could encourage more work to be written in 1925.

This is about Mickey Mouse: it's worth several hundred million a year to Disney to keep Mickey in copyright, and the first Mickey Mouse cartoon dates from 1928.

Court found the extension legitimate: Congress has power to set a term, and can change it.

Lessig is now trying again: *Kahle v. Ashcroft*.

Administrative requirements

Until 1988, copyright required *notice and registration*: books had to say on the back of the title page the date and the name of the copyright holder, and forms had to be filed with the Copyright Office.

All of this was repealed, meaning that you can be staring at a book and have no idea when it might go out of copyright or who might own the copyright.

Lessig has arranged for a bill to be introduced (the Public Domain Enhancement Act, or Eldred Act) that will require reregistration after fifty years, not to collect money but just to get into the public domain the works no one cares about anymore.

DMCA

Digital Millennium Copyright Act. Prohibits circumvention of anti-copying technology.

Has been a big issue in the computer industry; used to attack people who wrote DVD-decoding and PDF-decoding programs.

More and more information is going to be available only with digital-rights-management technology, and DMCA prohibits breaking it.

For example, Princeton student John Halderman found that holding down the shift key let you copy CDs that were copy-protected with SunComm MediaMax; they threatened to sue him under DMCA. Recently Lexmark is trying DMCA to stop competitive printer cartridges.

End-User License Agreements

EULA. This is the text that comes with every software download and requires you to click “I agree” (sometimes after reading it).

Can be very restrictive, e.g. prohibit you from criticizing the product without permission (Microsoft FrontPage).

Everybody has these agreements to limit warranty claims, but lots of other stuff goes in (limits on resale, and so on).

Digital Rights Management

DAT (digital audio tape) devices have hardware to prohibit you from making a copy of a copy of a tape. DVD players must implement copy restrictions as well. Should your computer have a general way people can send you files you can't copy?

Microsoft has invented Palladium (now called Secure Digital Computing Architecture). Every machine would have a co-processor not programmable by you which controlled all input/output, and would limit uses.

The studios know enough not to give Microsoft control.

Not clear what would become inaccessible.

Facts and Feist

Traditionally, facts and ideas are not suitable for copyright, (although “hot news” can be protected for a while, *International News Service v. Associated Press*, 1918). Until 1991 you could protect a compilation of facts under a rule called “sweat of the brow”. In the case *Feist v. Rural Telephone* white-pages directories were held not copyrightable. Yellow pages are; baseball box scores are; horse racing forms are not; radiator parts catalogs are not.

The database industry is trying to get a new law to protect data. Issue: would such a law have any fair use exceptions?

Europe

Europe has always had the Berne convention: was a term of life plus 50 and went to life plus 70 (1993 in UK).

In general, even more protection: their extension was retroactive, so people like Thomas Hardy and Conan Doyle went back into copyright (albeit both of them are now out again).

Europe protects the images of public buildings, type fonts, databases, and page layouts.

Other countries

In general, less developed countries don't want intellectual property laws.

In the 18th century, Ireland was a pirate country.

In the 19th century, the US was the pirate country: we did not pay royalties to foreign authors until 1891.

Today, of course, countries like China are known for piracy; diplomatic efforts are made with more or less success.

And the extreme is Afghanistan: among the many laws this country does not have is a copyright law.

Libel, slander

In one case, a court held that a libel in a newspaper was being repeated in the online database and had to be changed; thus the database doesn't reflect what was actually published that day. Depending on your point of view, this could be good or bad.

“product disparagement” is a relatively new basis for lawsuits; remember the Alar-on-apples scare? The apple growers sued CBS (60 Minutes); later the beef industry sued Oprah Winfrey over BSE (“mad cow”).

Moral rights

From Europe (particularly France); various rights that can not be sold, e.g. the right to be identified as the author of a work, or the right to object to its destruction or alteration.

The US now has this only for visual works as a result of the destruction of a Noguchi sculpture in lower Manhattan in 1980.

Also, in an unusual case, Monty Python won a case objecting to the editing of their shows by ABC.

Michael Snow v. Eaton Centre: a sculptor won damages when a department store, at Christmas, tied red ribbons around the necks of the 60 geese in his work.

Napster and downloading

The music industry fights all unpaid use of music.

ASCAP tried to collect royalties from the Girl Scouts for singing campfire songs (“public performance”).

This is long-term: they attacked, in turn, radio, sound movies, television, and so on.

The Audio Home Recording Act was supposed to make home recording OK and get some royalties from the devices; the industry is unhappy, although it has so far failed to force equipment makers to limit copying.

Napster: are they responsible for what their users do?

There is a lot of freely available music (see etree.org).

Napster lost; its successors either move offshore (KaZaa) and/or have no central database.

MGM v. Grokster

Recently the Supreme Court found against Grokster, which had tried to avoid responsibility by claiming that it did not have a central registry and that its service was used for legal as well as illegal activities.

Grokster, however, had widely advertised that its system could be used for downloading music, and the Court felt that active encouragement of law violations was a problem.

However, the Court fell far short of what MGM wanted, which was to have the Sony decision overturned so that they could generally go after all technology makers whose equipment or software could be used for copyright infringement.

Downloading economics

Oberholzer & Stumpf: “We find that file sharing has no statistically significant effect on purchases of the average album in our sample.”

This work was done by monitoring downloads, and then seeing whether sales dropped for those albums which were seeing a lot of downloads.

The recording industry claims surveys show a loss of \$700M/yr to downloading; they criticize Oberholzer & Stumpf for studying top recordings, not more obscure disks.

Reality may be that those who download instead of buy are balanced by those who download, like what they hear, and then buy.

Downloading OK in Canada

Judge Konrad von Finckenstein of Canada's Federal Court ruled March 31, 2004 that downloading was analogous to using a copying machine in a library and he didn't see anything wrong with it. The record companies had sued hundreds of people in the US and wished to do the same in Canada, demanding that 5 Canadian ISPs give them the real names of 29 users; the court refused to make such an order.

There will be an appeal, and apparently the original case was badly prepared, so the court above might rule differently. Perhaps easiest for them would be to refuse the subpoenas on the grounds that the case was inadequate but then to go no further.

Downloading OK in France?

One French court (in Montpellier) has ruled that downloading music or movies for private use is legal. The decision is being appealed, and there are other French courts (e.g. In Pontoise) that have upheld judgments against French file-sharers. The first judgment on the appeal (by a court in Paris) supported the right to download music for yourself and even to share it with others.

This decision is based on French law; it won't have any application in other European countries.

A more publicized French action is a proposed law which would force music downloads to be “open format” (to avoid the proprietary restrictions of the iPod and others).

Economics again

What is more important is that legal music downloads are growing enormously. In South Korea, money paid for legal downloads exceeds money paid for CDs. Apple is now selling some 8 million iPods each quarter. In the first half of 2005, \$790M was spent buying downloaded music, up from \$290M in 1H 2004. Apple has now sold one billion tracks.

Even the ringtone business is booming: some \$3B/year.

What encourages writing?

The real questions are about what public law would encourage the most creativity.

MPAA, for example, claims that only if old movies can be protected will anyone go to the expense of restoring them.

In 1789, France abolished copyright, there was rampant piracy, and a lot of publishers went bankrupt.

On the other hand, read Titmuss, *The Gift Relationship*, showing that blood transfusion supplies work better if the donors are not paid.

Is more property good?

Oversimplifying somewhat, early in the history of aviation the Wright brothers had half the important patents, and Glenn Curtiss had the other half. Neither would license the other, and so nobody in the US could build a state of the art airplane.

When the US entered World War I, people realized that American pilots would be shot down and killed because of this. The Navy forced cross-licensing on the two companies.*

* And just by the way, the assistant secretary of the Navy in 1917 was Franklin D. Roosevelt.

Is more property good?

Oversimplifying again, when Louis Daguerre invented photography, he sold his French patent to the government and they made it available free. He kept and sold his UK patent to somebody who tried to collect license fees for its use. In the 1849 there were 36 photographers in Paris and about 10 or so in London, a city twice the size (it's hard to count the ones in London because Daguerre's agent sued everyone who advertised). By the way, nobody made any money out of the license in the UK: the lawsuits against the photographers and against Fox Talbot, who had a different patent on a different process, consumed all the money. In 1851 the collodion process replaced both daguerrotypes and talbotypes for photography.

Is more property good?

Europe allows type fonts to be protected; the US does not. There are companies in the US that make their business selling duplicates of well-known fonts. Since the US does allow trademarks of font names, this is why you see “Swiss” or “Geneva” as a font name when you expect to see “Helvetica”. Arial is another Helvetica (well, actually not, same widths, mucked-up design).

So you would expect that all type font innovation would take place in Europe, if the economists were right.

But in fact the US leads: type font design today is tied to new kinds of printers, and the printers appear first in Silicon Valley, so the type designers are in California (e.g., Charles Bigelow, designer of Lucida).

Typefont copying

In the United States, the name of a typefont can be trademarked, but the design itself is public. Thus some companies just copy the designs of others. Here are samples of sans-serif fonts:

The quick brown fox PQRS

Helvetica (Max Miedinger, 1957)

The quick brown fox PQRS

Gill Sans (Eric Gill, 1927-1930)

The quick brown fox PQRS

Futura (Paul Renner, 1928)

Helvetica v. Arial

Helvetica is a font by *Max Miedinger*, extremely popular (tax forms and NYC subway signs). Arial is an imitation; same letter widths and almost the same shapes (note top of "t"). Apple licensed the original; Microsoft uses the copy.

quart

The real thing

quart

The copy, by Robin Nicholas, 1982. (This box is New Century Schoolbook).

And so much for morality.

Software companies are known for decrying piracy. From the Microsoft website: “Software piracy threatens to rob our cultural pioneers of their incentive to keep bringing us the best in everything they do.” But it’s clear this is about law, not morality. Microsoft is repeating the same process by using something called “Segoe UI” in place of Frutiger and “Book Antiqua” in place of Palatino. Frutiger was designed by Adrian Frutiger and Palatino by Herman Zapf.

You can tell a font is a copy when it has the exact same letter widths. This is necessary so that documents created for one font will not have different page breaks when typeset in the copy. An honest “inspired-by” but redesigned font will not have this property.

Is more property good?

Dramatists have complete control over their works: they can choose who is allowed to perform them, and the more successful ones do pick and choose which theatre companies they will allow to do them.

Songwriters are subject to a compulsory license. If you think you can sing “My Way” better than Frank Sinatra, you are free to make and sell your own CD, as long as you pay 2 cents per disk to Paul Anka (the songwriter). For a current song it’s 7 cents, see the Harry Fox website.

Would anyone looking at the relative health of the market for straight plays and pop songs say that music is suffering?

Larry Lessig

Larry Lessig is a Stanford law professor devoted to the idea that society depends on the ability to build on earlier works; he doesn't go quite as far as Plato (who said that creativity was just remembering), but he would like a larger and more readily usable trove of past books, music, etc.



See his book *Free Culture* (available online for free).

Lessig has started “Creative Commons” which provides legal forms for those who wish to make their works public (sort of like GPL).

Also, he keeps hoping Congress will do something reasonable (or the courts).

How to make your work public

You are free:

- * to copy, distribute, display, and perform the work
- * to make derivative works
- * to make commercial use of the work



Under the following conditions:

by

Attribution. You must attribute the work in the manner specified by the author or licensor.

- * For any reuse or distribution, you must make clear to others the license terms of this work.
- * Any of these conditions can be waived if you get permission from the copyright holder.

Your fair use and other rights are in no way affected by the above.

This is a human-readable summary of the Legal Code (the full license).

And back to “This land is your land.” Woody Guthrie put on the sheet music, “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 ourn, cause we don’t give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that’s all we wanted to do.”

Orphaned books

Perhaps 90% of the books published are out of print but not out of copyright. Reproducing them costs nobody revenue but is illegal.

Suggestions have been made to alleviate the problem: compulsory licensing, forcing re-registration of copyright after some number of years, and so on.

ALA is currently surveying its members asking for examples of the “orphan works” problem.

Problem: the entertainment industry is very strong in Congress, and they oppose any relaxations of copyright.

Media taxes, etc.

Public lending right: The UK pays authors about 4 pence when one of their books is borrowed from a library. Canada and Australia have similar schemes.

Blank tape/disk taxes: Germany collects €0.0614 per hour of tape, getting about 20 M € in 2002, which is paid to composers. The US taxes DAT tapes but not other tapes. The Netherlands taxes CD-Rs (with confusingly different rates for “audio” and “data” CD-R).

The hard disk business is about \$20B per year, and something like 10-12B CD-Rs are sold per year. The music business is \$12B/yr or so; the artist gets perhaps 10%, so the tax on disks to raise that money is not out of the question, although stiff.

Conclusions

Books before 1923 are fair game.

Books before 1964 are fair game if not renewed (the Million Book project has built an online file of the copyright renewal records)

Essentially all music is in copyright.

Most movies still are, although some old movies have slipped into the public domain for failure to renew (the best example is *It's a Wonderful Life*, recaptured via the music).

Getting permissions is an incredible pain; fortunately lots of what libraries do counts as “fair use” (but no music unless the Canadian judgment is matched in the US).