

- INTRODUCTION

- Characteristics
 - Public goods, nonexcludability and nonrivalrousness
 - Intangible goods
- Concerns
 - Financial benefit (incentives to create)
 - Attribution
 - Accuracy
 - Control
 - Privacy
- Problems
 - Creates monopoly
 - Less access/higher costs

- SUBJECT MATTER

- Constitutional
 - Federal, not patchwork of state protections
 - Restrictions on Congress
 - **Limited time** for exclusive rights
 - Who can get protection
 - Purpose (**science/useful arts**)
 - Subject matter: **writings of authors**
 - Note: just because Constitution permits Congress to grant copyright protection, it does not mean that Congress HAS to
- Subject matter Broadly defined
 - Author = originator of work
 - Writing = physical form expressing ideas of the mind
 - Promote Progress includes works for commercial purpose
 - Originality: intellectual production, though, or mental conception, not a qualitative judgment of artistic value
- Courts on subject matter: ORIGINALITY
 - *Burrow-Giles Lithographic Co. v. Sarony* (1884): Oscar Wilde photo
 - *∂*'s challenge: photos are not "authorship"
 - Holding: photographs are writings—represent "original intellectual conceptions of the author"
 - Early Congress protected maps/charts, recreations of the real world
 - Define *writings*: "**all forms by which the ideas in the mind of the author are given visible expression**"
 - Reject categorical exclusion of photos: originality threshold met
 - *Goldstein v. California* (1973): doesn't have to be visible
 - Writings includes physical expression of sounds, **any physical rendering**
 - *Bleistein v. Donaldson Lithographic* (1903): circus advertisements
 - *∂*'s challenge, drawn from life to advertise
 - Holding: **low threshold of originality**
 - Shows author's personality, even in unpretentious pictures
 - Commercial purpose does not remove from "useful arts"—value because of consumer demand for copies
 - Ends lower court trend aligning copyright with fine arts
 - Court does not judge artistic quality
- Statutory Subject Matter: **§102**
 - Works of authorship: undefined, nonexhaustive list of categories
 - Literary works (not limited to merit, incl catalogs, directories, computer programs...), musical works, dramatic works including musical accompaniment, pantomimes and choreographic works, pictorial graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, architectural works (added in 1990)

- I.e., in sound recordings: if recording is mechanical then authorship only in performer, but if not, the recording engineer can contribute to arrangement
- 1976 Act left open-ended, courts can determine (new technologies, or new forms, e.g., olograms, yoga poses)
- ORIGINALITY
 - **Independently created by author**
 - Generally requires evidence of independent creation where work has already been done by someone else
 - **Possesses at least some minimal degree of creativity**
 - Don't unduly hamper others, don't restrict building blocks, barriers for expression, frivolous suits, don't need incentives to create unoriginal works
 - Low threshold, but there are limits: *Magic Marketing v. Mailing Services of Pittsburgh*: envelopes with printed messages lack originality
 - Things that lack minimal degree: lists of ingredients/contents, names, titles, slogans, familiar symbols, variations of typefaces/lettering
 - ***Feist Publications v. Rural Telephone Service***: phone book case
 - Compilations can be minimally creative...threshold is low
- FIXATION IN TANGIBLE MEDIUM OF EXPRESSION
 - Embodiment in a copy or phonorecord, by or under authority of the author, sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration
 - Copies: material object, not necessarily physical (i.e., USB drive, machine, sheet music for music)
 - Phonorecord: sounds (can fix musical works and/or sound recordings)
 - Can embody more than one work, i.e., audiobooks embody novel and sound recording
 - Unfixed works (protected by state law)
 - Problem of performance: performer not protected by copyright, only author of musical work
 - Anti-bootlegging state laws...unfixed works of authorship may be ripe for state law protection
 - Anti-bootlegging: §1101 claims: unauthorized fixation and trafficking in sound recordings/music videos, same remedies as for copyright infringement
 - constitutional problems under copyright, i.e., limited times, fixations is const req
 - justified under Commerce clause power
 - Constitutionality unclear
- IDEA/EXPRESSION DISTINCTION
 - **Scope of protection is limited to Expression**
 - All works contain both, a matter of degree (varies with type of work)
 - E.g., ideas of literary work are plot, theme: unprotected
 - E.g., pictorial works ideas: line, color, and perspective are unprotected
 - Overlaps with originality (themes are likely to be unoriginal), though even original ideas can NOT be protected
 - **IDEAS**
 - **Concepts**: organizing principle of work, i.e., writing a novel in the form of a diary.
 - Social cost of monopoly on concept is too high
 - Don't need incentive to write concepts
 - **Methods of Operation**: systems that make a functional work useful (see *Baker, Morrissey, Beardsley*)
 - Don't give patent-type protection under copyright, lower standard
 - **Building Blocks**: fundamental elements of particular kind of work
 - Minimal creativity test failed
 - Other authors rely on these building blocks for other expressions
 - *Baker v. Selden* (1879): accounting forms published in book
 - System is idea, to what extent can forms be expression
 - Holding: system, method, process is distinct from description/explanation
 - §102(b): copyright protection does NOT extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries
 - Policing proper boundaries between patent and copyright
 - The object of patent is use, the object of copyright is explanation

- **MERGER**
 - If the idea can be expressed in **only one or a few ways**, then even that expression is unprotected to avoid giving the author a monopoly on the idea
 - If you can't use the system/idea without the expression, then the expression is *merged* into the idea and is NOT protectable
 - Expression in otherwise protectable forms can merge with unprotectable systems/methods.
 - *Morrissey v. Procter & Gamble* (1967): sweepstakes competition rules
 - Court applies merger doctrine, written rules are merged into idea of a sweepstakes
 - *Continental Casualty v. Beardsley*: insurance system for stock certificates
 - Did not merge with idea, only copyright in the form, only covers verbatim copying (**thin protection**)
- CATEGORIES OF SUBJECT MATTER: Fact, compilations, and derivative works
 - **COMPILATION**: process of selecting, arranging previously existing material, regardless whether those materials are copyrightable subject matter.
 - Factual compilations can be copyrightable (same categories of subject matter, i.e., literary works, sound recordings, &c) **if original in selection or arrangement**
 - *Sem-Torq v. Kmart*: **value of compilation, whole must be greater than sum of its parts**
 - Here, package of signs not protectable, no value as a package
 - *Feist*: info taken from Rural's telephone book w/o paying license
 - Holding: not protected
 - Facts do not meet originality test (independent creation/minimally creative)
 - Alpha arrangement is not minimally creative
 - **Routine selection is not protectable**
 - *Originality replaces sweat of the brow*
 - **Originality, not labor, matters.** Industrious collection of facts irrelevant.
 - Under sweat of the brow, independent collection would not infringe (did their own work)
 - Policy matter: sweat of the brow inefficient: don't require everyone to gather their own facts, allow others to use uncopyrightable elements
 - Copyright only for arrangement/selection that shows sufficient originality (and then, arrangement is protected, but not the underlying facts), §103(b) does NOT enlarge scope of protection for underlying material
 - *Feist* decided on constitutional grounds, but majority says statute has same reqs
 - Consider all elements of each work as a whole: if same in **total concept and feel** of copyrighted work, then infringement of protected work
 - 1976 Act requires:
 - collection/assembly of preexisting material, facts, or data
 - selection, coordination or arrangement of materials
 - creation, by virtue of selection, of an original work
 - 100 Best Restaurants Hypo:
 - protectable elements: are arrangement, selection, terms of selection, descriptive language
 - least protectable: concept, organizing principle, idea to select restaurants suitable for students
 - Evaluating minimal creativity of factual compilations
 - *Matthew Bender v. West* (1998): no copyright in opinions, no copyright in West's selection/arrangement of opinions, as not minimally creative
 - **Total number of available options**
 - **External factors such as conventions, accepted customs**
 - **Prior uses that render certain selections "garden variety"**

- **Distinguish between unprotectable criteria of selection and protectable selection:** someone else is free to use your criteria to make their own selection
- **FACTUAL COMPILATIONS: Main Points**
 - Protectable if selection/arrangement is creative
 - Creativity in selection & arrangement
 - Non-obvious choice from more than a few options
 - Emphasis on creator's use of judgment
 - **No creativity where selection & arrangement...**
 - **Dictated by industry convention, external factors**
 - **Obvious, routine, garden-variety in light of prior use**
 - **Total number of options available is small**
 - Proposals for separate system of protection, as in EU
- **Maps**
 - Protectable in their interpretation of source materials or pictorial choices (thin protection)
 - *Mason v. Montgomery Data* (1992)
 - Two kinds of minimal creativity: pictorial depiction, and information depicted
 - Creativity in selection of source, interpreting inconsistent sources
- **FACTS: facts alone are NOT copyrightable**
 - **Doctrine of Factual Estoppel**
 - *Nash v. CBS* (2d Cir 1990): Nash's theory of John Dillinger put on TV episode
 - Discovery does not make one the "author" of facts. If presented as fact/theory (Court includes Nash's explanatory hypothesis, as he presents it as a theory of what happened)
 - **Once a work is held up to public as fact, not protectable:** court takes that statement of factual nature as material (i.e., claim aliens told it to you as fact, then can't get copyright protection), author estopped from claiming literary work
 - Court does NOT have to distinguish between fact/hypothesis
 - Social benefit from keeping both in public domain
 - Tension between interpretation of historical and present facts
 - *Wainwright*: interpretation/analysis of present & future prospects of company protected
 - *Hoehling*: analysis of historical record not protected (tension between interpretation of historical and present facts)
 - What appear to be facts may be protectable if they are created by author's judgment
 - *CDN v. Kapes*: retail prices of stamps computed from π's published wholesale prices. Price guide is minimally creative, therefore protectable (judgment, skill, and creativity to come up with pricing)
- **DERIVATIVE WORK:**
 - Process of **recasting, transforming, or adapting one or more preexisting works, which must come within the general categories of subject matter of copyright**
 - See Skyy bottle case: not protectable DW b/c preexisting work was functional object, non-copyrightable
 - Copyright owners have exclusive right to prepare derivative works
 - Have to take more than the ideas, must recast, transform, or adapt the *expression*
 - i.e., idea of Romeo & Juliet as star-crossed lovers story, not derivative
 - but transforming a literary depiction closely as a painting, transforms expression
 - translation, arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement and condensation...not exhaustive list
 - Must recast the **expression** not the **idea**
 - §103: Copyright IN derivative works
 - **Does NOT affect copyright in underlying work**
 - **Extends only to the original contribution of the author of the DW**, and does not imply any exclusive right in the underlying work (protects only the differences)
 - Independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of any copyright in preexisting work.

- Requirement of originality remains, but only look to what the author of the DW contributed
 - **No copyright for unauthorized DWs** (i.e., author of UW can copy an unauthorized DW)
- Standards for copyrightability of DWs
 - Originality (independent creation + minimal creativity)
 - More than **trivial variation**
 - *Alfred Bell v. Catalda Fine Arts* (2d Cir 1951): highly skilled reproductions of public domain paintings
 - Originality requires more than trivial variation: direct copies are not DWs
 - Copyright extends to variations added to underlying paintings in the engravings
 - *Alva Studios, "Hand of God"* case: replica of Rodin
 - No distinguishable variation, only size aspect. court justifies copyright on skill and effort
 - But after *Feist*, effort (sweat of the brow) no longer adequate
 - **Substantial Variation**
 - *L. Batlin & Sons v. Snyder* (2d Cir 1976): uncle sam piggy banks, in public domain, copyrighted new ones, copyright challenged
 - Banks easier to replicate than Rodin? *Alva* does not apply
 - NO COPYRIGHT, easily reproduced
 - New standard: substantial variation (not just distinguishable, as in *Alfred Bell*)
- Higher Originality Standard for reproductions
 - Concerns: exploit work, avoid infringement suits by underlying copyright holder, avoid suits by copyright holders in DWs that were recasting public domain works
 - Fear that DW copyright owner can intimidate others from also reproducing public domain works
 - Must show similarities in the differences, not the similarities, to the work on which π has a DW copyright.
 - Also, don't prevent copyright owner of UW from licensing other DWs for fear of infringing licensee's DW
 - Prophylactic: cuts off problems where second "dw" infringes because the first was not different enough from underlying work.
 - Underlying copyright owner can control which DWs get made, but cannot copy any NEW elements of the DW.
- If UW copyright expires, still retain copyright in DW.
- Translation example: UW author grants exclusive translation rights for translated DW, UW author cannot then himself make a translated DW
- PG&S WORKS (2D and 3D works, §101)
 - Does *not* extend to intrinsic utilitarian function (i.e., of clothing) ...protected in form but not mechanical aspect
 - Aesthetically satisfying and valuable shape of a utilitarian product is insufficient to afford copyright protection
 - Design patents and unfair competition law available for other protections, where copyright is unclear
 - Utility better dealt with in patent (stronger monopoly right)
 - Applied Art
 - Useful articles: **intrinsic utilitarian function**
 - Hard cases, masks &c that have both util and nonutil functions
 - *Masquerade Novelty v. Unique Industries* (3d Cir 1990): Halloween costumes were not useful: painting is not denied protection b/c it evokes emotion, and that is the function of masks
 - *Mazer v. Stein*: statue lamp base is copyrightable
 - Irrelevant factors:
 - Potential availability of design patent
 - Intention of artist to use in commercial application

- Aesthetic value (or lack thereof)
 - Fact that design was mass produced and merchandized commercially
- SEPARABILITY
 - No clear test, but leading approach is extent to which design influenced by aesthetic/utilitarian concerns (protect aesthetic but not utilitarian features)³
 - **Physical** separability: easy case, physical removal possible
 - **Conceptual** separability: easier with 2D (printed design on wrapping paper), but harder for 3D objects (like a chair)
 - *Pivot Point v. Charlene Products* (7th Cir 2004): manikin heads
 - **Process-oriented test**, sculptor used artistic judgment unconstrained by other functional concerns (function does not require particular set of facial features)
 - Dissent: higher level of generality re: utility (manikin had to have a face to be functional, therefore not separable)
 - *Barnhart*: clothes manikins, utilitarian display of clothes, can't conceive of features as separate (**mind of observer** test, dissent)
 - *Kieselstein-Cord*: belt buckle design protectable, **primarily ornamental, utilitarian subsidiary**
 - *Brandir v. Cascade Pacific Lumber* (2d Cir 1987): process oriented approach, process by which article was designed is illustrative
- ARCHITECTURAL WORKS
 - Pre-1990 works, protected under PG&S works (useful article restriction a major bar)
 - Blueprints are protectable but don't give exclusive right to build structure based upon them
 - Post-1990 works, own category, b/c of Berne Convention (too difficult to separate from utilitarian for PG&S protection to cover): Architectural Works Protection Act
 - Own subject matter category
 - Protection for form and arrangement and composition of space and elements
 - No protection for individual standard features and functionally required elements
 - Exclusive rights exceptions
 - §120(a): people can take/distribute pictures
 - §120(b): owner of building can alter/destroy w/o infringing
- CHARACTERS
 - Visual: long protected
 - Verbal:
 - Historically, hesitation about proceeding
 - **Fully delineated test (L. Hand)**
 - Sam Spade "story being told" test (as opposed to "chessmen")
 - Modern trend toward greater protection
 - Difficulty separating protection for character alone from protection for work in which depicted
 - Not a type/category of subject matter, similar to protection of facts, embedded in other works
 - *Nichols v. Universal*, verbal depiction, fully delineated test (less developed character = less protection)
 - *Warner Bros. v. Columbia*: assigning copyright to story does not prevent author from using those characters in other stories
 - D.Hammett and Same Spade: if character constitutes the "story being told" then protectable
 - No protection for "chessmen" characters
 - **Visual depiction: easier case**
 - *Gaiman v. McFarlane* (comic books): **stock characters** have no copyright protection, but visual depiction made it sufficiently distinctive to be copyrightable
 - *All features combine to created a distinctive character*
 - *Anderson v. Stallone* (Rocky): Anderson's story infringed on Rocky movies, Rocky characters ARE the story being told (protected as a group of characters)

- *MGM v. Honda* (Bond, or stock qualities in car ad): story being told test and fully delineated test satisfied
 - Trademark: available to protect visually depicted characters associated with certain goods/services
- GOVERNMENT WORKS: prepared by officer or employee of gov't as part of that person's official duties
 - Federal gov't works NOT protectable under §105; but § 105 does not address state/local (rationale has been extended to state legal works)
 - Policy issues: gov't can't get copyright, but can hold transferred copyright rights (assignment, bequest, &c)
 - Judicial opinions NOT copyrightable
 - People should have free access to law
 - Lawmakers acting in capacity representing the citizenry
 - *Banks v. Manchester* (1888): judicial opinions not copyrighted, publicly owned as judges are paid with public funds
 - No prohibition on copyright works that arise under gov't K or grant
 - State/local? Not covered by copyright statute, but legal materials sometimes copied from other works
 - *Veeck v. Southern Bldg. Code Cong.* (5th Cir 2002): model codes then encoded in state law are *not protectable*
 - Here, however, drafters are NOT in public service
 - Tension: public policy favors public **access**, but still want incentives for businesses to make model codes
 - As model codes, protectable
 - As enacted law, not protectable
 - *County of Suffolk* (2d Cir. 2001): county tax maps copyrightable, balance access/incentive
 - Does gov't entity have adequate incentive to create the work absent copyright protection?
 - Access problem isn't compelling since maps are only used by gov't
 - Commonwealth jurisdictions have Crown copyright
 - Outstanding issues: attorney's briefs filed and published by West, FOIA requests require publicity of documents

• OWNERSHIP

- §201(a): **vests initially in the author(s)—creates expression, not just idea**
 - *Lindsay v. RSM Titanic* (SDNY 1999): creation may be separate from fixation
 - Not author if fixation into tangible expression is only **rote and mechanical**, another's idea
 - If the person doing the fixation is contributing intellectual modification, then he may be a co-author
- Collaborative: all collaborators may be owners
- **Work made for hire §201(b):**
 - 2 types—employee or contracted
 - Prepared by **employee within scope of his employment**
 - “employee” construed according to common law of agency
 - Skill, source of resources, location of work, duration of relationship between parties, right to assign more work, discretion over work, method of payment, hiring assistants, regular business of hiring party, employee benefits, tax treatment
 - *Aymes v. Bonelli* (2d Cir 1992): core factors include benefits and tax treatment
 - Hiring party's right to control manner/means of creation
 - Skill required
 - Provision of employee benefits
 - Tax treatment of hired party (balancing burdens and benefits of hiring party)
 - Whether hiring party has the right to assign additional project to the hired party

- Also potentially relevant: source of tools, location of work, extent of discretion over when/how long to work, part of hired party's regular business, whether hiring party is a business
 - *Reid*: must prove 3 things
 - Work is of the type that individual was hired to perform
 - Created substantially within the authorized time and space limits of the job
 - Driven by a purpose to serve the interests of the employer
 - Work **specially ordered or commissioned** for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in writing that the work shall be considered a work made for hire
 - Limited to **enumerated categories** (i.e., not literary works) AND must be a **written agreement**
 - Enumerated categories: Collective work, motion picture or AV work, translation, supplementary work, compilation, instructional text, test, answer material for test, atlas
 - Termination of transfer right depends on author having transferred the copyright
 - **Hiring party is author**, and unless the parties have expressly agreed otherwise in a written instrument signed by them, hiring party **owns all rights**
 - Other countries separate ownership (economic rights) and authorship (i.e., moral rights): similar to inventorship and ownership in patent law.
 - Affects duration (life + 70, so special term provisions)
 - *CCNV v. Reid* (1989): homeless statute, fixation. NOT a WMFH b/c not employee and no written agreement, not in enumerated categories
 - CCNV had right to control preparation, but Court says this would apply to commissioned works, categories meant to be separate
 - Actual exercise of control: hiring party needs to know at outset whether he can exercise control / own the copyright
 - Author is the person who translates an idea into a fixed, tangible expression, CCNV only came up with idea and Reid contributed most if not all the expression of the figures
 - Entitled to copyright in expression, not the idea
 - *Martha Graham School & Dance Foundation v. Martha Graham Center of Contemporary Dance* (2d Cir 2004): even where hiring party doesn't exercise control over creative nature of output, court still deems this an employment relationship
 - Graham was on employment relationship with center, creating dances was w/in scope of employment (her own creativity explains why Center didn't exercise control over the works, strengthens argument for employment relationship)
 - Exception for teachers/professors writings: not WMFH
- JOINT WORKS
 - §201(a): joint authors are co-owners of copyright, work prepared by two or more authors **with the intention that their contributions be merged** into inseparable or interdependent parts of a unitary whole
 - default rule: **equal undivided fractional co-ownership**
 - own the whole work, not just part that you contributed
 - duty to account to others for profits from use
 - free to license, but only **non-exclusive license**, and must share proportion with co-author
 - must meet statutory guidelines, can't contract joint-authorship
 - this could extend life of copyright to death of young co-author
 - impact on right of termination
 - Each author must make **independently copyrightable contribution**
 - Unless nature of work/creative process means that contributions can't stand alone
 - i.e., comic books, in *Gaiman*
 - *Aalmuhammed v. Lee* (9th Cir 2000): sues over Malcolm X film, contributed to religion of Islam in film
 - Author has artistic control: here only Lee had control (**higher mastermind test**)— court just discouraging overreaching contributors

- Don't discourage authors from seeking consultants at risk of co-ownership
- All authors have to intend to be co-authors:
 - *Thomson v. Larson* (2d Cir 1998): RENT case, helped writer at request of producers. Must contribute expression, not just ideas. Court found no intent to joint authorship.
 - Objective evidence relevant to whether parties intended
 - Decision making authority shared
 - Billing matters: if you purport to grant exclusive rights in contract, that shows intent to be the sole owner
 - Written agreements between the parties
 - Written agreements with third parties
 - Subjective intent can be deceptive, however, but objective indicia will also be apparent to other collaborators
 - Non-joined collaborator can make claims to independently copyrightable elements and sue for infringement (court ducks this issue)
- Joint work status affects 3rd parties: need permission from both authors
- FOREIGN AUTHORS: rights are territorial, depend on US law
 - Until 1891, no copyright for foreign authors
 - Berne convention and TRIPs: extend national treatment to foreign authors, impose minimum standards
 - Treaties are not self-executing, depend on statute
 - Unpublished works: protected regardless of author's origin
 - Published works (first published means w/in 30 days of first publication):
 - If US, US copyright
 - If US but published in nation w/which US has treaty
 - Excludes only Afghanistan, Eritrea, Ethiopia, Iran, Iraq, San Marino, and maybe some others
- TRANSFER OF OWNERSHIP
 - Distinguish **transfer of material object** in which work is embodied, NOT transfer of copyright, and vice versa
 - *Forward v. Thorogood* (1st Cir 1993): ownership of physical tapes does not give π ownership in copyright
 - Reversal of traditional common law approach, pre1976
 - Physical possession creates presumption in π 's favor, but case rests on **intent**: band never intended to transfer copyright, just the material object
 - **Divisibility**: §201(d), can be transferred in whole or in part (i.e., distribution/display)
 - Owner of any exclusive right can sue to enforce
 - Owner of nonexclusive right can not bring infringement action
 - **Writing**: §204(a), transfer of copyright is not valid unless an instrument of conveyance, note, or memorandum is in writing and signed by the owner of the rights conveyed or his authorized agent
 - *Effects Associates v. Cohen* (9th Cir 1990): special effects contract, custom not to have contract is *not* a defense
 - Intent of parties was for footage to go into the movie
 - Writing requirement strict, but writing can be minimal (one line pro forma statement adequate)
 - Writing requirement helps artists, can't inadvertently transfer rights (but writing can come later to validate an oral agreement)
 - Courts can imply exclusive contract from conduct of parties (i.e., if you sell rights to a tshirt company you know they are going to make tshirts)
 - *David v. Blige*: **retroactive licensing**, require co-owners to account to each other, so can't exploit work in a way that diminishes the value for the other owner.
 - The most that a single owner can grant to a transferee is a non-exclusive license.
 - **Scope of transfer**: *Cohen, Boosey, Rosetta*
 - State contract law governs license interpretation
 - Broad grant of rights in future, language expressly granting/withholding rights to **unknown future media** are generally enforceable
 - License provides for any use that falls "reasonably" within the medium described in the license, acc. 2d Cir.

- *Cohen*, (9th Cir 1988) purchase price doesn't reflect new media use: is recording on videocassette "by means of television?"
 - TV means where broadcaster has control, not library/timeshifting
 - K grants to copyright owner any rights NOT expressly granted*
 - Protect authors from unwilling transfer
- *Boosey*, (2d Cir 1998) any form in motion picture covers laserdiscs.
 - Rejected *Cohen*, favors grantees in that *if* the language could reasonably include new media, the burden is on author to explicitly exclude
 - ASCAP condition did not explicitly prevent Disney from using new media
- *Rosetta*, (SDNY 2001) book form includes eBook version? No.
 - K language conveying rights is more narrow, new media gives new uses (hypertext &c, breakthrough medium)

• FORMALITIES

- 1909 Act: July 1, 1909 – Dec. 31, 1977
 - **State Common Law from Creation to Publication.** Publication ends state protection.
 - Exclusive right to first publication
 - If satisfy **formalities**, federal copyright protection from **general publication to expiration**
 - Every copy bears copyright notice
 - Specified content, form, and location of notice
 - Error/omission leads to forfeiture of copyright
 - Formalities on publication starts clock running on limited term of protection
 - If do not satisfy formalities, public domain (easy to put things in public domain, burden on copyright owner to notify public not to infringe)
 - **Publication** is the trigger that requires formalities
 - **General publication:** tangible copies of work distributed to the public in such a manner that allows public to exercise dominion and control over the work (*MLK* case)
 - **Limited publication:** *Martin Luther King*: classic case, communicates contents of work to a select group for limited purpose
 - Expansive concept: *Oscars* case, statuettes are limited publication, implied restrictions on further transfer
 - No right of further distribution/copying
 - Performance is generally not publication, *Ferris v. Foreman*.
 - Wrt *Martin Luther King*, widely publicized speech, but not publication, not permitting unrestricted copying by general public
 - Not publication if author doesn't surrender control over the work
 - Publication if performance is attempt at economic exploitation
- 1976 Act: Jan. 1, 1978 – Feb. 28, 1989
 - **Fixation**, not publication, is the dividing line. State protection for unfixed works only.
 - No formalities required. Notice requirement in order to maintain copyright.
 - Publication is transfer/distribution to "the public" (limited publication does not count)
 - Mere performance/display is not publication (some can qualify, but statute is silent on this line)
 - Put notice on every published copy, but looser requirements (i.e., where it would reasonably come to attention).
 - Errors/omissions are not strictly fatal
 - Opportunity to cure omission and preserve copyright
 - If within 5 years of publication you register copyright with the Copyright Office, and you use reasonable effort to add notice to distributed copies, then omission/mistake is cured.
- Berne Convention Amendments, Mar. 1, 1989 – present
 - Use of notice is *optional* on published copies
 - Incentives to still use notice
 - Protect against claims on innocent infringement
 - Cheapest, easiest way to notify public
 - Deterrent effect against potential infringers, notice to them that you might be willing to be litigious
 - Entitlement, not reward for fulfilling formalities
- Deposit and Registration (both 1909 and 1976 Acts, but failure to comply does not affect copyright)

- §407: deposits of copies in Library of Congress is mandatory (if not, then fines, but not loss of copyright)
- §411: registration is not mandatory. Copyright Office allows for electronic registration (\$45 fee)
 - Cursory review, not like PTO.
 - Failure to register does not affect copyright validity
 - **Must register in order to sue for infringement** (can register after infringement happens)
 - Most copyrights aren't litigated, can still license and collect royalties w/o registration
 - Would have been inappropriate formality under Berne: can't require non-US works to register
 - Jurisdictional req? if not registered, then courts have no juris.
 - Incentives to register promptly
 - If register w/in 5 years of publication, prima facie evidence of copyrightability of the work and of the truth of facts stated in the certificate (author, &c)
 - Remedies in infringement suits: can get **attorney's fees and statutory damages** (\$750-30K) only if registered before infringement started (presume that infringer could have gone to Copyright Office to find out) or if registered w/in 3 months of first publication
 - Registration is effective as of the date that all materials are received at the Office
 - Circuit split: need certificate for claim to go forward, or sufficient if certificate is being processed
- DURATION, RENEWAL, AND TERMINATION OF TRANSFERS
 - Works copyrighted after Jan. 1, 1978
 - Generally: Author's life + 70 years (§302(a))
 - For joint works, life of *last* surviving author
 - If no notice of author's death, then shorter of 95 years from publication or 120 years from creation = presumption that author has been dead at least 70 years (good faith reliance is a *∂* to infringement)
 - **Works for hire**: shorter of 95 years from publication or 120 years from creation
 - All terms run to the end of the calendar year (Jan. 1 of the following year).
 - Pre-1978 works
 - Term still author's life + 70
 - Not copyrighted and not in public domain in 1978
 - Created but unpublished: protected by state common law
 - Acquired federal copyright on Jan. 1, 1978
 - Protection until at least Dec. 31, 2002 (not published by 12/31/02, and author died before 1933, then public domain as of 1/1/03)
 - If published before Dec. 31, 2002, protected to Dec. 31, 2047
 - §302(e) presumption of author's death, §302(d) records
 - if published in 1913 or before, subject to this exception
 - Duration/Renewal
 - 1909 Act: 28 year copyright term, renewal possible for another 28 (56 years total)
 - 1976 Act: any work that is protected as of Jan. 1, 1978 gets renewal term of 47 years (so 75 years total, same as works made for hire under 1976 Act)
 - Sonny Bono Copyright Extension Act: any work protected as of Oct. 27, 1998, adds 20 years (increase to 95 years total)
 - SUMMARY:
 - If in **initial term** on Jan. 1, 1978: 28 years + 47 years renewal = 75 years total
 - If in **renewal term** on Oct. 27, 1998, add 20 years = 95 years total
 - Statute grants *new estate* at end of initial term to (renewal rights all revert to author...)
 - Author if living
 - Surviving spouse/children
 - If no surviving spouse/children, then executor of author's will
 - If no will, then author's next of kin
 - Order is mandated by statute, cannot be waived
 - Assignability
 - Renewal beneficiary can validly assign expectancy

- If expectancy fails, assignee takes nothing (if author dies before renewal term, then assignee gets nothing, the new estate goes as per statutory hierarchy)
 - Strong presumption against assignment of renewal term, so look for express language
- **Renewal and Derivative works**
 - *Stewart v. Abend* (1990): no survivors of author, left to trust, which assigns to *∅*. Stewart & Hitchcock rerelease film, but have to deal with Abend, since film uses author's story during the renewal term.
 - Derivative work owner can keep using film, carve out right for DW owner
 - Renewal term holders might hold out. This rule allows authors to have 2nd bite at apple, gives author/heirs stronger rights at renewal time.
 - Congressional solution:
 - If renewal is made pursuant to application with copyright office after 1992, then *Abend* rule applies
 - If renewal occurs *automatically* after 1992, then owner of derivative work can continue to use the derivative work
 - Infringing use of DW w/o permission from UW copyright owner
 - Including where lack of permission is due to renewal of copyright in underlying work (*Abend*)
 - Including where DW has entered public domain by expiration of copyright, but underlying work has not (*Russell v. Price*: can infringe by using DW where DW's copyright has expired by copyright of UW has not)
- Policy concerns
 - Automatic renewal:
 - Don't want to give protection that is so long that it unduly interferes with public access
 - Don't want authors to lose copyright for failure to renew (but if no interest in renewing, harder to get into public domain)
 - Very few protected works are still in print
 - Re-registration refreshes the registry in Copyright office
 - Fixed term from publication/creation or indefinite term to author's death
 - Author will always have copyright in lifetime
 - Fixed term determined how? Actuarial rates?
 - New media and increased public access, extends commercial life of work (some works don't get commercial success until much later)
 - Orphan works problem, how to locate the copyright owner?
 - Mitigation of remedies proposal: if diligent search for copyright owner, then later copyright owner sues, there may be lower damages...but what constitutes "reasonably diligent search"?
 - *Eldred v. Ashcroft* (2003): upholds Sonny Bono Extension: if Congress adds time to works going forward, then Congress also has the power to extend protection of works already in place (parity with new works, still a limited time under Constitution, historical practice of Congress to give same extension to unexpired copyrights in existing works)
 - Congress not evading time limit requirement
 - Proper exercise of power, under rational basis review
 - Harmony with EU
 - Economic incentive of longer copyright term
 - Doesn't alter contours of protection, so no 1A problem
 - (*Eldred* part of general attack on copyright expansion, in light of internet more people have potential use for public domain works)
 - Upheld by 9th Cir in *Kahle v. Gonzales* (2007)
 - Breyer argued for stricter review: strike down extension if
 - Benefits to private, not public
 - Threatens to undermine expressive values in Copyright Clause
 - If not Clause-related objective (here, extension arguably gave no added incentive to authors of existing works)
- Termination of Transfer
 - Post 1978, §203
 - Any copyright right (NOT WMFH) executed by author after 1/1/78 (not by will: inter vivos)
 - For joint works, majority of authors who made the grant (i.e., for 2, both must agree)

- Subject to termination in **5 year window starting 35 years after the grant** is signed
 - By **notice** served **2-10 years in advance of termination date**
- By party determined by statute
 - Author (majority if a joint work)
 - Surviving spouse/children (spouse gets 50%, kids/grandkids split 50%)
 - Estate
 - Where right is divided (kids &c) need majority—if divided, dissenters are bound
 - In order to REgrant, again, need majority, not all
- Only inter vivos grants are subject to termination (can't terminate bequests made in wills), though you CAN bequeath a termination interest in a will for a copyright that is already transferred
- If interest in termination is divided, then majority is required to terminate and the minority is bound
- Terminated rights revert to terminating parties
- Only affects copyright rights under US law (i.e., not TM)
- Terminated grantee retains the right to continue using already-prepared derivative works under the terms of original grant (*Abend*)
- Promises not to terminate or retransfer after termination are **void** (notwithstanding any agreement to the contrary...), doesn't want termination right to be alienable
 - *Marvel Characters*: broad view of "agreement to the contrary", statutory purpose of protecting authors, who can't agree to make future grants
- EXCLUSIVE RIGHTS, LIMITATIONS, AND INFRINGEMENT (§106)
 - Exclusive rights: exclude others but NOT an affirmative right
 - What is the subject matter?
 - Work, display, performance, distribution: what is the right at issue?
 - Does that right attach to the subject matter?
 - Is there a statutory limitation on the right under the circumstances?
 - Infringement litigation: Overview
 - Two questions: 1) did ∂ 's activity come w/in rights under §106? 2) is ∂ 's work impermissibly copied from π 's?
 - Usually no question that ∂ has used the work. Ask if ∂ 's activity falls within the scope of the copyright owner's rights
 - Sometimes there is no question that ∂ 's activity comes within scope of the copyright owner's rights, but ask whether the work copied improperly from the copyrighted work
 - Elements:
 - Ownership of a valid copyright
 - Subject matter, originality, formalities, initial ownership, transfers, duration
 - Registration certificate is prima facie evidence of validity of copyright
 - If no certificate, or if certificate issued more than 5 years after publication, then must shore up with evidence in court
 - Infringement
 - ∂ copied from copyrighted work (question of fact, copied) ∂ 's mental state irrelevant
 - ∂ 's copying amounted to **improper appropriation**
 - copied protected **expression**, not merely ideas
 - audience perceives **substantial similarity**
- THE RIGHT TO REPRODUCE: COPIES
 - Independent creation does not constitute infringement
 - Mental state of ∂ is irrelevant (need not be conscious or intentional copying)
 - Statute does not define "reproduce a work"
 - Need not be exact duplicate, nor copy the entire work (substantial part)
 - Fixed in tangible medium of expression: definition excludes purely evanescent or transient reproductions (such as those captured momentarily in RAM—don't make internet user an infringer every time he looks at image online)
 - But loading onto permanent memory IS copying. *MAI v. Peak*, turning on computers loads the operating system onto RAM, violating the reproduction right
 - According to Copyright Office, if work is stored in the computer such that the computer user can perceive the work, it constitutes a copy
 - *Cartoon Network* and DVR: temporary buffers in servers: 2d Cir says this is NOT a copy

- Direct evidence rare: admission that attempt to copy ideas, not expression, common with computer programs: CIRCUMSTANTIAL evidence
 - **Access + substantial/probative similarity: infer copying**
 - Access is a question of fact
 - Can use speculative evidence (such as, Cole Porter hiring stooges to follow another composer, *Arnstein*) but tortured chains of events are too speculative
 - E.g., π sent sheet music to publisher, who ended up publishing ∂ 's song. Shorter chain of access (*Gaste v. Kaiserman*)
 - Widespread dissemination of π 's work provides access (*Harrisongs*)...not dispositive but can support jury verdict.
 - Substantial similarity
 - Verbatim copying not required
 - Look at all elements (even nonprotected, can still be probative of fact of copying even if not actionable)—likely precludes possibility of independent creation
 - Coincidence/convention. i.e., likely that maps will be similar b/c of physical reality, to no inference of copying
 - Artistic convention also undermines the inference
 - Striking similarity
 - Similarities are so striking as to preclude the possibility of independent arrival at the same result (tension with doctrine of independent creation)
 - i.e., 300pp word for word
 - i.e., same mistakes
 - But, 3rd prior source: both π and ∂ could have copied from same source, then π doesn't meet burden
 - Inference of copying is **rebuttable**
 - access: dissemination not wide enough
 - convention, coincidence, prior source
 - direct attack, independent creation (i.e., *Gibb*, BeeGees can't write music)
 - ∂ has to prove that she hadn't encountered the work, to rebut access
- IMPROPER APPROPRIATION
 - Π must prove:
 - Copied protected elements of work
 - That audience will perceive substantial similarity between the π 's and ∂ 's **expression.**
 - RELEVANT AUDIENCE. (*See Barney case*)
 - NOT about similarity between work as a whole, but will audience confuse the protected element
 - Easy case, verbatim copying. *Nichols*: expressive fragment (chapter, para) excised.
 - Comprehensive non-literal similarity (generality from expression/idea)
 - *De minimus* not enough (i.e., quilt on air for a few seconds was enough, *Ringgold v. BET*)
 - No plagiarist can excuse the wrong by showing how much he didn't copy
 - More than fragment, but not literal, abstract of the whole, *Nichols* (high level of generality: play about Irish/Jewish families was highly general, not copying since expressive details are different)
 - Not a bright line rule: upon any work a great number of patterns of increasing generality will fit well, as more and more of the incident is left out. *See SAT v. Princeton Review case*
 - At what level of generality should author lose protection?
 - *Nichols*, Cohens Versus Kelly's plot: disputing families and quarrel is not protected
 - *Rosenthal*: underlying policy consideration—balance competition and protection
 - Doesn't matter if ∂ can who how much he did NOT pirate, if there is pirated expression. *Steinberg*: Moscow on the Hudson poster, can protect appearance of buildings that aren't copied from reality.

- *Bubble Blowing Santas*: ∂ has access at trade shows. So few ways to express a bubble blowing Santa, all are unprotected by merger argument. Can only have expression in decorations.
- Two tests:
 - Protected Expression
 - No literal copying: hardest case
 - Protection extends beyond literal copying
 - Hard to draw line between protected/unprotected (abstractions, level of generality)
 - Case by case basis
 - Audience test, “substantial similarity”
 - Will intended audience perceive works as similar
 - Difficult to apply in context: hard test
 - Protection for work’s concept and feel (?)
- THE RIGHT TO REPRODUCE: PHONORECORDS
 - Definitions
 - Phonorecord: material object in which sounds, other than those accompanying a motion picture of other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; includes the material object in which the sounds are fixed
 - Sound recording: fixation of series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture of other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied
 - Pre-1972: protected under state law.
 - EU: Term = life of author + 70 (US conforms)
 - EU proposal to extend to 95 years from date of production (same as work made for hire, in US)
 - Musical work
 - **Compulsory license** to make and distribute phonorecords (but not copies) thereof. Different copyrights in the MW and SR. (Must get license to play SR, but compulsory license to cover a MW).
 - Phonorecords must have been **distributed to the public** under authority of author in US
 - Can avoid trigger by only performing live, or distributing abroad, or only sheet music and not phonorecords
 - Arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work w/o express consent of copyright owner. §115(a)(2). Copyright owner retains control over fundamental character of the work.
 - Comp license only where there is already a first distribution...copyright owner has control over who is the first to record/release the song
 - Harry Fox Studio: online application form to make cover version of any song by any of their copyright holders. Voluntary, not §115 compulsory.
 - *Newton v. Diamond*: Beastie Boys copied 6 sec snippet of song...particular way in which the sequence was performed in the sound recording, method of playing was different: expression protected in the sound recording. (copied from performance did NOT infringe musical work)
 - Dissent says, those recognizable performance elements *actually* came from the musical work as written...evidentiary disagreement as to what extent the expression derives from the SR or from the MW.
 - IF you license a SR, you can take expression from it. IF you license MW, then you can only take expression that is in the MW, not in another SR of that MW.
 - Infringement analysis: imitation/substantial similarity not okay
 - Can NOT dub, but can mimic
 - Hard to determine infringement of protected expression, since recording usually based on preexisting MW.
 - All copies will look so much alike, can’t tell if what was infringed was the SR or underlying MW.
 - Audio Home Recording Act: applies to MW and SR

- If you make/distribute/import a digital audio recording device (DARD), you must include technology to prevent serial copying
 - Portable mp3 players did not qualify as DARDs
 - Royalties paid into copyright office—any copyright holder who shows up for the proceeding is entitled to a share of the proceeds
 - LIMIT on infringement actions: No action may be brought alleging infringement under copyright based on the manufacture, importation, or distribution of DARD, recording medium, or analog recording device...or based on noncommercial use by a consumer of such a device or medium for making digital or analog musical recordings: NO suits for *private home taping*
- THE RIGHT TO DISTRIBUTE
 - Summary
 - Applies to all works, independent of other rights
 - Transfer of ownership, rental/lease/lending, import
 - May include digital transmission (though tendency is to read the right broadly, includes downloading copies, but not merely posting online?)
 - **First Sale Doctrine:** §109(a) limit on distribution right
 - Notwithstanding §106(3), the **owner of a particular copy/phonorecord lawfully made**, or any person authorized by such owner, is entitled, w/o the authority of the copyright owner, to sell or otherwise dispose of possession of that copy or phonorecord
 - Otherwise, huge costs for rental companies &c (used book sales, video rentals, libraries)
 - EXCEPTION to general limitation: can't rent phonorecords embodying MW or SR (or computer software) §109(b)
 - Computer software rental not precluded IF program is embedded in a machine that cannot be copied during ordinary operation
 - Video game rental not precluded
 - Material objects must be transferred
 - Performance/display is not "distribution," would render other sections superfluous
 - Digital files and first use: aren't disposing of your copy when you share
- THE RIGHT TO PREPARE DERIVATIVE WORKS
 - Overlap with reproduction right
 - Potentially very expansive right
 - Must copy protected expression to infringe
 - *Balanchine*: new copies that vary or depart from the original work: recast, transformed or adapted. Must infringe: factual copying and substantial similarity. (here, choreographic material may be conveyed in still photography, so used same expression)
 - To infringe, must take expression from the underlying work and transform it (can overlap with reproduction rights, but makes a difference if there are different owners)
 - Transformation must amount to original expression,
 - *Lee v. A.R.T.*: i.e., framing/putting on a tile doesn't change the work (unless frame is part of artist's expression)
 - must be **minimally creative to violate DW right** of copyright owner: **if not minimally creative, then no original expression**
 - Not limited by first sale (can't use your own copy to make a derivative work)
- MORAL RIGHTS
 - **Attribution**: identify author, anonymity, prevent incorrect attribution
 - **Integrity**: prevent work from being presented in manner/context that is harmful to author, prevent alteration/distortion
 - **Disclosure**: right of author to determine when the work is completed, whether or not to disclose to public
 - **Withdrawal**: right to terminate public exploitation of a work or require modifications
 - National laws:
 - In EU, **inalienable** rights (can't be transferred, only inherited)
 - In US, not recognized, focus is on production incentives
 - VARA §106A: most express moral rights protection, narrow and limited to fine arts
 - Berne: requires attribution and integrity
 - TRIPs: member states have to comply with Berne (TRIPs more enforceable, monetary ramifications)

- **Visual Artists Rights Act:**
 - single copies/limited editions (<200) of work of visual art
 - excludes maps, posters, charts, tech drawings, diagrams, **merchandising**, or **works made for hire**
 - e.g., *Pollara v. Seymour*, does not cover banner made for purpose of drawing attention (does NOT depend on medium used)
 - VARA rights are non-transferrable, retained even if author transfers away all over her copyright interest in the work
 - Rights to:
 - Claim **authorship** and prevent **misattribution**
 - Integrity: Prevent **distortion, mutilation**
 - Prevent **destruction** if work is of “recognized stature”
 - *Martin v. Indianapolis*, author needed expert testimony to establish “recognized stature”
 - Waiver has to be express, in writing, and specifically identify the works involved and the uses for which author waives right
 - Does not apply to most *reproductions* of works
 - Last for life of author
 - Subject to fair use analysis
- Integrity rights embodied in protection against unauthorized DW
 - *Gilliam v. American Broadcasting* (1976, predates 1976 Act)
 - w/in scope of VARA, but VARA doesn’t cover motion pictures (nor was VARA enacted at the time)
 - show altered, cuts made: Monty Python wants to prevent recasting of works that violates the integrity of the work (economic right being used to vindicate moral right)
 - ABC should have secured rights to script, need copyright right to make a DW of the script
- **Lanham Act:** unfair competition §43(a), false designation of origin
 - Imposes liability for false designation of origin or false representation
 - *Daystar*: 20CFox makes WWII documentary, failed to renew copyright
 - Daystar issues video copies, sued under false designation of origin
 - SCOTUS: origin of goods means the source of *physical copies*, not of work embodied therein...no different treatment for communicative products (in tension with copyright)
- **State law** protects attribution and integrity
 - *Wojnarowicz v. American Family Ass’n* (SDNY 1990): protected materials prepared for lobbying org (further than VARA): rights of reproduction
 - ∂ must **distort** the work and **attribute** the resulting work to the artist
 - 1A defense rejected, the statute restricts *deceptive* speech...to criticize &c, you must label as such
- Overview of US Moral Rights
 - VARA
 - Can’t modify w/o owner’s consent (right to DW)
 - Lanham Act: can’t present distorted work to public as the author’s
 - State laws, esp in NY/CA, protect fine art, overlap with VARA, sometimes more broad
- THE RIGHT TO PUBLICLY PERFORM AND DISPLAY
 - Public performance §106(4): not every kind of subject matter (**literary, musical, dramatic, choreographic, pantomimes, motion pictures, and other audiovisual works**). PAY ATTENTION to what kind of work is involved
 - i.e., no general public performance right in sound recordings
 - for profit/not for profit irrelevant: no general exclusion
 - §110 carves out some limitations for certain kinds of nonprofit performances, but not blanket
 - **Perform:** recite, render, play, dance, or act, either directly or by means of any device or process, or in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.
 - Public:

- At a place **open to the public** OR where a **substantial number of persons outside a normal circle of family + social acquaintances is gathered**. (nature of the place, open to public even if only one person there OR the semi-public gathering of persons)
- To transmit or communicate a performance to a place in clause 1 or to the public, by means of any device or process, **whether or not the members of the public capable of receiving the performance receive it in the same place/time** (includes limited segment of public, i.e., only cable subscribers still counts as public)
- Private performances are exempt.
- *Aveco*: renting to customers who watch videos on premises
 - Indirect infringement by π , for customer's direct infringement.
 - ∂ argues, not public b/c viewing rooms are small.
 - Court holds the rooms ARE public b/c *anyone* can rent them.
- Hypo: hotel rental—similar to *Aveco*, but home-like nature of hotel room is more private. Console version: doesn't matter if public sees it at different places/times.
 - Cal. Court on this console issue: IS a transmission to public, b/c of the nature of the relationship between the transmitting/receiving parties was a public relationship. This was a public, arms-length transaction, not a home viewing with houseguests.
 - BUT 2d Cir rejects this relationship test. Look to who is capable of receiving the transmission (*Cartoon Network*, recorded programs on DVR, makes new copies for each recipient)
- Collective licensing organizations: ASCAP/BMI/CSAC
 - License *nondramatic performance of musical works* (not sound recordings)
 - Copyright in musical works, not sound recordings, give **non-exclusive rights of public performance** to the organization (i.e., copyright owners can still license directly), and power to sublicense.
 - Sublicensors pay fee to access any/all of the songs in the repertoire.
 - Depends on license, can be flat fee or percentage of revenue
 - Org then pays copyright owners based on complicated **statistical sampling of use**.
 - Most music covered, but be sure that if you only have ASCAP license, you only use ASCAP songs.
 - Orgs then sue individuals that play music w/o license. Scout establishments.
 - Question: digital exploitation might lend itself to collective licensing solutions, as well.
- SOUND RECORDINGS
 - No public performance right, except for digital audio transmission.
 - Musical work copyright owners can still get paid for performance.
 - Decrease in value of SR copyright if access to performances would substitute for purchase of phonorecords? Celestial Jukebox problem.
 - Exclusive right of copyright owner of SR to perform the copyrighted work publicly *by means of a digital audio transmission*.
 - §114(d) limitations—**3 categories of digital audio transmissions**
 - Radio broadcasters licensed by FCC don't have to pay
 - Subject to compulsory license: some kinds of DAT performances are subject to exclusive right, but statutory license available
 - Non-interactive transmissions: user can't choose what to hear. I.e., web-radio (Pandora unclear).
 - Must meet conditions: must comply with SR performance complement: can not during any 3 hour period transmit 3 selections from any phonorecord or 4 songs by the same featured recording artist
 - Compulsory license fees set by copyright royalty board (ongoing controversy regarding rates)
 - All other digital audio transmission public performances are subject to §106 rights
 - No collective licensing entity exists for sound recordings.
 - Copyright owners have argued that temporary storage in the course of streaming is reproduction
- PUBLIC DISPLAY

- Enumerated categories of subject matter
 - Literary, musical, dramatic, choreographic, pantomimes, pictorial, graphic, or sculptural
- Public: same definition as performance, above
- Display: show a copy, directly or by means of film, slide, tv, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially
- First Sale limitation §109: doesn't affect public displays that are public by virtue of transmission by an owner of lawful or authorized copy
 - Without authority of copyright owner, owner of a copy may display the copy directly or by projection of no more than one image at a time
 - I.e., **non-transmitted displays** are okay (views present at the place where the copy is located)
- Covers Internet postings: who is making the display matters
 - *Perfect 10 v. Google*: Google didn't "display" by linking framed images: only websites that HOST the content are found to have displayed
- **§110 limitations on exclusive rights: some for performance and/or display**
 - §110(1) Performance of a work in the course of **face-to-face teaching** activities by instructors or pupils, in a classroom or similar place devoted to instruction (doesn't apply where audience is NOT limited to members of a particular class) lawful copy, and person knew or had reason to believe
 - §110(2) **distance education** limitation (complicated)
 - §110(3) exempts for places of **worship**
 - §110(4) performance of nondramatic literary or musical work **w/o purpose of direct or indirect commercial advantage** and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if (a) there is not direct or indirect admission charge, or (b) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, (except where the copyright owner has served notice of objections under conditions)
 - §110(5)(a): not infringement to communicate transmission embodying a performance/display of a work by public reception of the transmission on a **single receiving apparatus of a kind used in private homes**, unless (a) charging or (b) further transmitted to public
 - *Chicken Delight*: ordinary radio: not a performance to turn on receiving radio
 - §110(5)(b): limit for businesses that receive broadcasts on more than a single homestyle receiving apparatus. Fairness in Music Licensing Act: if under a certain size limit, business doesn't have to pay for performing music.
 - Legislative bargain to get Sonny Bono term extension
 - Violates TRIPs, goes too far in exempting small businesses based on size (here, US pubs stopped paying for Irish music, irritated EU). But EU has other trade violations w/in WTO, so letting it go, balancing the harms.
 - **Overview of broadest limitations:**
 - 110(4): nonprofit nondramatic performances
 - 110(5)(a): homestyle receiver exception
 - 110(5)(b): broad reception limit for size, violates TRIPs
 - 110(1): classroom performances & displays

• FAIR USE

- Broad: covers all subject matter categories and all exclusive rights
- Affirmative Defense: π does not have the burden of establishing that the use was not fair, but ∂ has burden of showing that she is entitled to the exception
 - Unspecific, covers any of copyright owner's exclusive rights
 - Case-by-case consideration of §107 factors, *Campbell*. Bright line rules are apocryphal
- Why have fair use?
 - 1A, don't restrict speech
 - use own expression w/o worrying about infringement, don't discourage creation of new works
 - provide breathing space to borrow from copyrighted works

- focus on transformativeness of the use
- Statutory factors:
 - Purpose and character of use
 - Nature of copyrighted work
 - Amount and substantiality or portion copied in relation to *ð*'s purpose
 - Harm to potential markets for the copyrighted work
- Weigh all **4 factors** together in light of purposes of copyright and fair use
 - **Purpose and character of use/Transformativeness**
 - Transformativeness: adds something new, alters the work with **new expression, meaning, or message**
 - Not necessary, but important
 - The more transformative, the less significant the other factors are
 - *Sony*: recording TV programs is not transformative (but still found fair use)
 - **Parody**:
 - Comments on the original work
 - Not just to get attention
 - Usually humor, but not required. *SunTrust*: The Wind Done Gone is parody.
 - No *per se* deference to parody
 - Parody often shades into satire
 - Must target original and not just the general style/genre (Kennedy's concurrence in *Campbell*)—don't enable *ð*s to claim parody post hoc
 - *Campbell*: transforms original in content (though content change not required by lower courts in other cases)
 - SATIRE takes original work and recasts it to comment on something broader, political/social. **Satire** may be less transformative (but think about substance of borrowing)
 - A Leader Like Barack: transformative in content/purpose, but didn't comment on original
 - Breathing space for new works is in tension with preference for parody over satire. Less likely to get licenses for parodies than for satires, since you need the specific work for parody
 - Whereas satire is using the specific work to get attention: focus on risk of market substitution, the extent of borrowing is less critical. *Campbell* fn14.
 - **Commercial** nature (or nonprofit educational, spectrum)
 - Not dispositive: **no presumption** that all commercial uses are unfair, but **weighs against fair use**
 - Spectrum of commerciality (i.e., selling parody on its own account, using parody to advertise another product, parody performed by students one time—Law Revue)
 - Bad Faith may weigh against fair use:
 - *Harper & Row*, knowingly used to “scoop”
 - *Campbell*, being denied license is NOT evidence of bad faith
 - **Nature of copyrighted work**
 - Fiction/factual-functional
 - Fiction closer to core of copyright, more protection
 - Published/unpublished
 - Right of first publication can only be exercised once. Can't use fair use to publish first.
 - *Harper&Row v. Nation*: publishing important excerpts from memoirs prior to publication not fair use
 - **Amount and substantiality of portion used in relation to copyrighted work as a whole:** qualitative and quantitative aspects
 - *Harper & Row*: 300-400 words only, but “the heart of the work,” most important and moving parts
 - Taking more than is reasonable for the purpose is NOT fair use
 - Parody must comment/criticize the work by conjuring it

- Amount and quality in relation to purpose, may also give purchase on distinction between parody/satire
 - **Effect on potential market/value**
 - Arguably most important, but still have to look at all 4
 - Market for original work and for derivative versions
 - **Consider actual effects, and potential effects if the use were widespread**
 - Can't assume harm just b/c the use was commercial
 - **Displacement** by ∂ 's use, not disparagement by ∂ 's use
 - Core of copyright protection
 - *Campbell*: possible harm to market for parody versions, nonparody rap versions, original
 - successful criticism is rejected by Court...don't want to make it infringement to comment/critique)
 - no cognizable market for parodies? Authors unlikely to license.
 - Can always find harm by lack of licensing fees: courts recognize this harm ONLY in markets that are **traditionally or reasonably likely to be developed**
 - Context of **parody or commentary**, where market is harmed by disparagement, this does not weigh against fair use (ex., bad book review)
 - Potential uses for copyrighted works where transaction costs to get permission would be higher than whatever the copyright owner would use...so what constitutes fair use might change over time.
 - Market effect weighs strongly against fair use...always financial harm from not getting paid. Courts do, however, try to avoid circularity by looking mainly at markets that copyright owner is already in
 - Disavowed presumption: if use has no demonstrable effect on potential markets for or value of the work, then the use need not be prohibited to protect author's incentive
 - NEW WORKS/NEW TECHNOLOGIES
 - End User Copying: easier for copyright owner to find the manufacturer of the technology, than to find the end users making copies: secondary liability context
 - Fair use can apply where the *use* has been transformed, and there's little harm to market
 - *Arriba*: thumbnail searches transform use, don't displace market for originals
 - *Sony v. Universal* (1984): VCRs, taping television broadcasts (time shifting): non commercial, doesn't harm market solely to timeshift (at the time, market for prerecorded versions was minimal)
 - No liability so long as machine is capable of substantial, noninfringing use
 - ∂ has burden to show substantial noninfringing use: time-shifting (Mr. Rogers didn't mind), time shifting is noncommercial, nonprofit activity
 - Productive use:
 - Majority: broad view (doesn't have to be identifiable new work)
 - dissent: nonproductive/purely consumptive uses are not fair use, as they add no public benefit. Time shifting is stealing for personal use, and therefore commercial
 - audience for reruns, purchase copies, lost advertising (less of an issue back then)
 - *Napster*, end users engage in **repeated and exploitative copying**, not for sale, but still constitutes commercial use...resembles a barter system
 - Commercial, harmed market for sound recording sales
 - *BMG v. Gonzales*, *Grokster*: also not fair use
 - *Note*: in *Napster* and *Sony*, factors 2 and 3 get little attention (clearly nature of work is copyright core, and published, and copied in its entirety...but doesn't matter in *Sony* b/c need entirely to fulfill purpose, therefore reasonable)
 - Blurry line between new works and new forms of dispensing old work (i.e., GoogleBooks)
 - *Perfect 10 v. Amazon.com*: image search engine produces thumbnails
 - Google claims fair use, creating new USE if not a new work...different from photo's original purpose. Transformative?
- SECONDARY LIABILITY
 - CONTRIBUTORY INFRINGEMENT

- *Gershwin*: with **knowledge of infringing activity, induce, cause, or materially contribute** to the infringing conduct of another
- Objective standard of knowledge: ***∂* knew or should have known** (basic tort notion)
- Copyright owner has right to do and authorize enumerated activities in §106
- *Fonovisa v. Cherry Auction*: swap meet organizer, participants trade in infringing copies
 - *∂* had notice of activity: objective knowledge met, provided support services
- VICARIOUS LIABILITY
 - *∂* had **right/ability to supervise infringing activity** OR
 - had **direct financial interest** in such activity
 - employer/ee: *Shapiro*
 - have to show financial benefit *from the infringing activity*, not just benefit in general (directness of benefit attenuated)
 - cut of sales, or drawing in more customers
 - origins in respondeat superior
 - NO knowledge requirement
 - Not about actions of *∂*, but nature of relationship between VL *∂* and infringer
 - *Cherry Auction*: had right/ability to control vendors
 - *Sony v. Universal*: contributory claim
 - Advertised that machines could serve this purpose
 - But no infringement if used for unobjectionable purposes, merely need to be capable of substantial noninfringing uses (too many technologies can be used for both)
 - Dissent: secondary liability attaches if virtually all the use is infringing, even if dual. More concerned with *actual* use, not *capable* use (would remand for factual findings about use)
 - BUT use changes over time, i.e., Edison dismissed use of sound recordings for music and entertainment, Valenti though VCR would ruin movie industry b/c of ticket sales
 - Because of new technologies, go after suppliers
 - Decentralized productive activity more common now, control over dissemination tech might have disproportionate effect on users for purposes that copyright wants (flourishing of works of authorship)
 - Options if secondary liability does not attach:
 - Direct liability (hard to find actual users, though it worked for peer-to-peer file sharing)
 - Lobbying for legislature to enact statutory bans, w/o common law condemning technologies that have some noninfringing use
- Dual Use Technology
 - Fair use may not be the best way to figure out if personal use by end users is infringement, but the only exception available
 - Sale is not contributory infringement if
 - Product is widely used for legitimate, unobjectionable uses
 - Merely **capable of substantial or commercially significant noninfringing uses**
 - *Sony* dissent: no liability if significant portion of product's use is noninfringing
 - *Abdallah*, sale of time loaded audio cassettes failed *Sony* test b/c *∂* knew customers were using to infringe.
 - The **Napster exception**: *Sony* test doesn't apply where *∂* had **actual knowledge of infringement** (9th Cir)...Napster had more control over what users posted.
- INDUCEMENT
 - Object of promoting use to infringe
 - Shown by clear expression or other affirmative steps taken to foster infringement
 - "Classic" instance is advertisement or solicitation; message to infringe is preeminent proof
 - not exclusively by communication of message
 - but *Not* only by failure to take affirmative steps to prevent, or making more money from more infringement
 - *Grokster*: capable of noninfringing use is NOT a blanket immunity from secondary liability...***Sony* shield is not absolute**
 - **Distribution with intent to contribute to infringement** (to promote use to infringe)
 - Inducement claim: *Gershwin* and contributory infringement: with knowledge of infringing activity, *∂* induced, caused, or materially contributed to that activity

- Grokster supplied product intending that it be used for infringement.
 - Steps to promote that use
 - **Advertised** as such (similar to Napster), even unused ads are evidence of ∂ 's awareness of infringing uses (slam dunk)
 - **Targeting known demand** for infringing capability
 - **Business model** further complement of direct evidence of unlawful objective (gets more money when users infringe)
 - **No steps to curtail infringement**: didn't attempt to install filters
- Injunction remedy: enjoin dissemination (b/c prior ads/activities plus future dissemination = inducement), so can only disseminate if install filters
- Statutory safe harbors
 - ISPs: copyright owners claim secondary liability against YouTube, e.g., instead of end users
 - Contributory infringement, with notice from copyright owner as knowledge
 - §512: Safe harbors for certain kinds of online activities: online ISPs who store material on networks at the user's discretion
 - Eligibility:
 - Adopted and implemented policy to terminate users who are repeat infringers
 - *Corbin v. Amazon*, mere notice from a copyright owner is not enough
 - Safe harbor conditions: ISP storage for uses, no liability except limited injunctive relief
 - No actual or constructive knowledge that material is infringing, unless act to remove upon knowledge (don't ignore red flags)
 - No financial benefit directly attributable to infringement, where there is right/ability to control
 - Upon knowledge of claimed infringement, respond to remove (notice and take down)
- ENFORCEMENT
 - Procedure
 - Whether the copyright is registered
 - For US works, registration is prerequisite to infringement suit
 - Might be jurisdictional (maybe one day just a formality)
 - WHEN to sue
 - Civil actions: suit must commence **w/in 3 years of accrual**
 - Claim accrues when a reasonable person in π 's shoes would have discovered the infringement
 - Disagreement among courts if there is an active infringement prior to 3 years when that act is part of something that is a continuing course of conduct (repeated acts of infringement)
 - Does the fact that ∂ sold one copy within the last three years allow π to sue, or are these separate acts of infringement (what you can recover for).
 - WHERE to sue
 - Exclusive federal courts jurisdiction
 - Other suits involving copyright (i.e., breach of licensing contract) can be brought in state court
 - DCMA, Technological Protection Measures
 - Access controls, Rights controls
 - Act bans, device bans
 - Device designed for circumvention
 - Device with only limited commercially significant purpose other than circumvention
 - Device marketed for circumvention
 - *Sony* rule does not apply (another exception to *Sony*, along with *Grokster*)
 - NO Fair Use: no act ban on circumvention of rights controls...no constitutional right to *optimally convenient* fair use.
 - Injunctive relief (problems)
 - ∂ contributed own work, see *Stewart v. Abend*, if the court finds that ∂ 's infringed and enjoins, then they can't use their own expression in the film if it can't be separated in a meaningful way
 - e.g., attempt at fair use fails
 - *eBay*: injunctions (patent) should account for the 4 traditional factors

- courts can use discretion to withhold injunctive relief were ∂ had contributed her own expression...so far, not widely used, but parallel from patent is possible
- Damages
 - §504: infringer liable either for copyright owner's **actual damages** + additional profits of infringement, or **statutory damages**
 - **Statutory Damages**
 - Copyright owner may elect to collect statutory damages instead
 - ∂ entitled to jury trial to determine amount (*Feltner*):
 - ∂ be careful...Feltner appealed verdict, got a jury trial, and they gave higher damages
 - *BMG v. Gonzales* (7th Cir): if copyright owner is **seeking only the minimum amount of statutory damages, then no need for jury trial** (statute requires a minimum, can't be zero, so can be done by summary judgment)
 - Minimum \$750 – Maximum \$30,000 as court/jury considers just
 - Don't get one award for each copy, but one amount for multiple infringements of single work
 - Single work: blurry. But probably elements of compilation are the same work.
 - LIMITS: (same limits apply to awarding attorney's fees)
 - unregistered copyright owners are NOT entitled to seek statutory damages
 - Notice function, §412
 - Infringement of **unpublished** work commenced before effective date of registration
 - Infringement commenced after first publication and before effective date of registration, unless registration is made w/in 3 months of first publication
 - Not limited to US works, like §411
 - Policy
 - Cost of bringing a case mitigated
 - Hard to know exact damages, uncertainty would otherwise discourage suits
 - Repeat players, like record industry, use this
 - Deterrence: if all a ∂ had to pay was licensing fee, then they would just risk being sued and not pay upfront
 - **Willful Infringement** (statutory damages)
 - Raises ceiling of statutory damages up to \$150,000 (note, this is per work, can get very high)
 - *Thompson*, record industry going after peer-to-peer sharers (\$220,000!)
 - **Knew or should have known, "reckless disregard"** of π 's copyright (*Wild Oats*)
 - On the contrary, **innocence (unaware of infringement) lowers the minimum to \$200**
 - Attorney's fees
 - Where copyright owner entitled to statutory damages, court can use discretion to grant atty's fees.
 - *Fogarty*: court must treat prevailing π s and ∂ s the same, no preference to giving fees to successful π s but not ∂ s
 - Criminal liability: limited to willful infringement that is also:
 - For purposes of commercial advantage or private financial gain
 - Reproduction or distribution of multiple works/copies with total retail over \$1000 in any 180 day period
 - Dissemination of pre-release work on a computer network
 - Actual Damages—copyright owner's losses due to infringement
 - **Lost Sales**: if direct competition between π and ∂
 - Didn't necessarily lose one sale for each infringing sale (i.e., knockoff bags, work infringes but different market, like 2LiveCrew)
 - Π gets profits it would have had on sales
 - **Lost licensing fees**: have to prove that you have lost a fee
 - License to 3rd parties
 - Present evidence that another would have licensed but for infringement (*Cream*, theme from Shaft in beer commercial)
 - Must be likely: *Frank Music*, Hollywood revue in Vegas, Court didn't find it likely that another company would not have licensed a full production of the show. Problem of proof.
 - License fees that ∂ would have paid
 - Easiest to establish (*Davis*, eyewear in Gap ads)

- Copyright owner suffers economic harm to extent of the theoretical license
 - If this is all π can prove, and it's a small amount, may opt for statutory damages.
- Not exclusive, other forms
 - Fair market value (If not commercially exploited, then hard to show exact damages)
 - Distorted market share (hard to show how much damage to reputation costs, e.g.)
- Some speculation and uncertainty are tolerated in calculating the *amount* of damages, but not the *fact* of damages (don't allow award where FACT of damage itself is uncertain)
- **Infringer's profits**
 - §504(b): copyright owner can recover infringer's profits attributable to infringement that are not captured in the damages
 - not looking at harm to copyright owner, but benefit to infringer (give up ill-gotten gains of infringement)
 - **Allocation of burdens of proof**
 - π : prove infringer's gross revenue
 - ∂ : prove deductible expenses and the elements of profit that were attributable to factors other than the copyrighted work
 - What are the profits?
 - Direct and indirect profits attributable to infringement
 - E.g., *Frank Music*, π argued all hotel/casino revenues should be included, draw of promotional value
 - Indirect revenues must be **reasonably related to the infringement**
 - Indirect expenses can be deducted, but ∂ must establish the connection between the expenses and the revenues
 - How to apportion the profits
 - Attributable to infringement
 - Infringer must prove what elements are from other factors
 - If ∂ can't prove, strict reading of statutes would give all profits to copyright owner:
 - But courts have discretion, reject literal interpretation of burdens of proof
 - SOME rational basis to apportionment, **court must apportion indirect profits in a reasonable/just way**
 - Unclear if this applies to direct profits as well, or just to indirect profits