

# Copyright Law

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## Topics:

- Justifications for copyright law
- Introduction to working with basic copyright tools

## Takeaways from DAY 1 ... there was a lot!

- [1] Focus on **problem solving**, not issue spotting
- [2] Problem solving in the style of **copyright** lawyers
- [3] **“Micro” problems** (case by case) that copyright is meant to solve: focus on individual “works of authorship”; what is a “work of authorship”; has it earned a copyright?; has the copyright been “infringed”?
- [4] **Fluidity and flexibility** rather than reliance on a static set of “rules”; tools include policy thinking as well as classic legal reasoning

## The (conventional) PROBLEMS [plural] defined by copyright law are:

- [1] Creating [new] stuff (?)
- [2] Distributing [new] stuff (?)
- [3] Accessing / using [new] stuff (?)
- [4] Piracy (?)
- [5] Free riding (?)
- [6] Plagiarism (not giving credit) (?)
- [7] Not paying authors/creators (?) / Not paying publishers (?)
- [9] *Limiting* [new] stuff (?)

## LET'S ADD A NEW THEME: "MACRO" PROBLEMS

How are productive *ecologies* and *systems* of knowledge, information, and creativity identified, organized, and regulated (public v private)?

Markets (which may fail to form or function competitively).

Companies and organizations in markets (which may behave corruptly or abusively). Governments (ditto). Schools, universities, libraries, and research organizations (which may not deliver on their promises).

**The SOLUTION [conventionally] offered by copyright law has 3 key "levers" or variables, used both in designing the law and applying it case by case:**

[1] PEOPLE [authors/creators] [readers] [intermediaries]

[2] THINGS ["works of authorship"]

[3] RULES ["rights," "liabilities," "duties"/"obligations"]

## PROBLEMS ↔ SOLUTIONS: THE OVERALL FRAME

How well does copyright law function as a solution to these MACRO problems?

**How does the conventional copyright SOLUTION help us see the virtues and drawbacks of knowledge/information/creative INSTITUTIONS, both as the law is designed and also as it is applied case by case:**

**INSTITUTIONS are:**

- People and things are linked in *patterns* of activity, or groups, a/k/a institutions: firms, markets, organizations, disciplines, traditions, practices, & customs, with rules and rewards that define good behavior and discipline and punishment for bad behavior

**PROBLEMS ↔ SOLUTIONS: QUESTIONS WORTH ASKING**

- When / how / why should those *patterns* be incentivized, encouraged, promoted, and/or protected by the law? E.g.: legal systems that implement the rule of law! libraries! Wikipedia! (?)
- When / how / why should they be punished? E.g.: large-scale, organized piracy rings

## PROBLEMS ↔ SOLUTIONS: CRITERIA

The public policy CRITERIA typically offered to assess © as a solution (or “why do we have or need copyright?”):

**[1] PROGRESS** [the language of *incentives* to produce *more/better*]

Statute of Anne (England) (1710):

- “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”

U.S. Constitution (1789) (Article I, section 8, clause 8):

- “Congress has the power ‘To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’”

What does “progress” mean? “Progress” by whom? For whom?

- Who needs incentives or rewards (economic / legal) to be motivated to produce “intellectual” or “cultural” goods? What sorts of incentives are needed? When are they needed? Is copyright important because it supports investments/ careers for professional creators? For commercial firms (publishers, record labels, film studios, game developers)?
- What costs do these incentives impose on others?

## PROBLEMS ↔ SOLUTIONS: CRITERIA

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### [2] FAIRNESS (or “FAIR COMPETITION”) in MARKETS [the language of *capitalism*]

- Enforcing exclusive rights in copyright is a method of exempting copyright owners from certain sorts of market competition
- An economic argument about the incentives and risks that (should be) associated with property “ownership” and how those are linked to (social welfare) (economic efficiency) as products of the marketplace
- When / how is that “right”? Not “right”?
- What kinds of “intellectual” competition – such as different versions of the same story, even identical versions of the same story – are good (welfare-promoting)? Harmful?
- Why and when are they good? Harmful?
- What other kinds of competition might matter?
- When and by whom should harmful competition be regulated?

## PROBLEMS ↔ SOLUTIONS: CRITERIA

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### [3] SELF-ACTUALIZATION [VIA EFFORT, EXPERTISE, EXPRESSION /FREE SPEECH] [the language of *labor, identity and autonomy*]

- Copyright might motivate individuals to create, might motivate people to distribute or make available things that they create, and might provide opportunities (via the idea/expression distinction, fair use, the public domain, and other access-reinforcing doctrines, including the First Amendment) to access, use, and enjoy creative works
- Cultural creation, circulation, preservation, and consumption are all ways of encouraging and recognizing development of individuals as ... consumers? citizens? autonomous, potentially self-aware and engaged individuals?
- What is the role of the state (the government) in the development of the self?
- What is the relationship between copyright (which regulates private activity) and the FA (which regulates government activity, such as enforcing copyright)?
- Is copyright needed even if people are motivated to do circulate culture for other, non-economic reasons? In what respects?

## PROBLEMS ↔ SOLUTIONS: CRITERIA

The public policy CRITERIA typically offered to assess © as a solution (or “why do we have or need copyright?”):

### [4] COLLECTIVE DEVELOPMENT AND ENGAGEMENT [the language of *society and groups*]

- Copyright supports the creation of groups (“professional artists”), firms and organizations (“record labels,” “book publishers,” “software developers”), and larger institutions (“markets”) in which creative things (works) circulate, sometimes for money, sometimes freely, sometimes subject to informal customs or social norms.
- Those collectives are promoted and regulated by many sources of law, economics, politics, and cultural influence, well beyond copyright. What is copyright’s “lane”?
- As an established form of regulation of business (i.e., firms, in markets), what is copyright’s role relative to contract and commercial law, tort law, property law, antitrust law, privacy law, technological systems (encryption; open systems)?
- As a new form of regulation of day-to-day life (because of the rise of cheap consumer tech since the early 1980s), what is copyright’s role relative to ordinary expectations of non-creator citizens, who want to read / listen / watch / play?

# The © solution, translated briefly into legal doctrine:

**The elevator pitch version:** Copyright law offers a **limited** set of **exclusive rights** to **authors/owners** as incentives to produce/distribute (intangible/immaterial) cultural goods (“**works of authorship**”), of types and in ways that make society and culture better (the Constitutional “**progress of science**”). Copyright’s legal and practical logic are principally *economic* and secondarily *creative* and/or *ethical/moral*.

## Why ©, a short summary:

- **The theory:** law and policy make the assumption that exclusivity is needed to overcome “**free riding**” problems and offer **economic incentives** to authors and others in the form of prospects of fixed cost recovery, plus profits; the social / collective benefits of copyright (producing new or more creative goods) exceed its social / collective costs (difficulty / expense of accessing / borrowing from / building on prior goods)
- **The evidence:** **there is little evidence that this economic logic actually works in practice;** © largely is a product of continuous efforts by publishers to obtain concentrated/monopoly profits over markets in cultural goods. *This sounds cynical but is nevertheless true, even if “piracy” is, at times, real.*

## Specific issues that recur:

- What sorts of works of authorship should be covered by ©? Excluded? Who “counts” as a © author?
- What limits on © should apply? When? Why? How?
- When / how should copyright law (courts/Congress/private action – i.e., private ordering) support / encourage “market” transactions in cultural goods (voluntary transfers/contracts/buying and selling/clearing rights/paying for permission)? Or – instead – when / how should the law prefer “non-market” uses (go ahead and use without prior permission or payment)?
- What are the “spillover” benefits and costs of cultural production? The broader, social benefits and costs of rules restricting circulation of cultural goods? Of readers, listeners ... and next gen creators.
- When / why is it better to use general standards? When to use detailed rules?

## Into SOME DETAILS...

**[1] Copyright as statutory**, but with major policy/theory themes, including (primarily)

- Economic arguments (utilitarian / consequentialist)
- Justice / natural right arguments

**[2] Copyright as structural**, giving economic and legal power to

- Authors and owners
- Intermediaries
- Industries (organizations, companies, groups)
- Readers, listeners, users, and consumers

**[3] Copyright as stories**, metaphorical and analogical

- Why copyright here – in this instance? Why *not* ©?
- The *public domain* is a thing (?), a place (?), and a story!

**(Return to)  
Copyright  
Calisthenics**

# MACRO: Thinking INSTITUTIONALLY

## Who BENEFITS from the application of copyright law?

## Who is HARMED?

Magazine

# The Music-Copyright Enforcers

By JOHN BOWE AUG. 6, 2010



**Few things can make Devon Baker cry.**

There was the time her pet hamster, Herschel, died. There was the time she was run over by a car. Neither episode provoked tears. Not even close. And yet, on a recent Thursday, as Baker drove down Highway 60, about 55 miles northwest of Phoenix, she had to wonder, Is today one of those days when I'm gonna cry?

Baker, who has preternaturally white teeth, green eyes, soft brown hair and a friendly way that she's the first to describe as "country," was on her once-a-month, weeklong road trip. She'd flown to Phoenix to meet with bar and

#### RELATED COVERAGE

Letters: The Copyright Enforcers AUG. 26, 2010

- Should some interests (needs? contributions? values? opportunities?) "count" more than others? If so, why?
- Observe how these questions are answered via *stories*. Whose stories are told in this article? Who tells the stories? How are the stories used?

# MACRO: Thinking INSTITUTIONALLY

## Who BENEFITS from the application of copyright law?

## Who is HARMED?

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- Should some interests (needs? contributions? values? opportunities?) “count” more than others? If so, why?
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APRIL 28, 2016 7:13am PT by Eriq Gardner

## 'Star Trek' Lawsuit: The Debate Over Klingon Language Heats Up



**Who owns the Klingon language? Does anyone own Klingon? Why / why not?**

(real things v. created [creative] things)

Ideas, “facts,” systems, standards

Creation, access, use, and reuse: why does any of this matter? To whom?

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| Catalan                 | Indonesian       | Serbian (Cyrillic) |
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| Danish                  | Klingon (plqaD)  | Swedish            |
| Dutch                   | Korean           | Tahitian           |
| English                 | Latvian          | Thai               |
| Estonian                | Lithuanian       | Tongan             |
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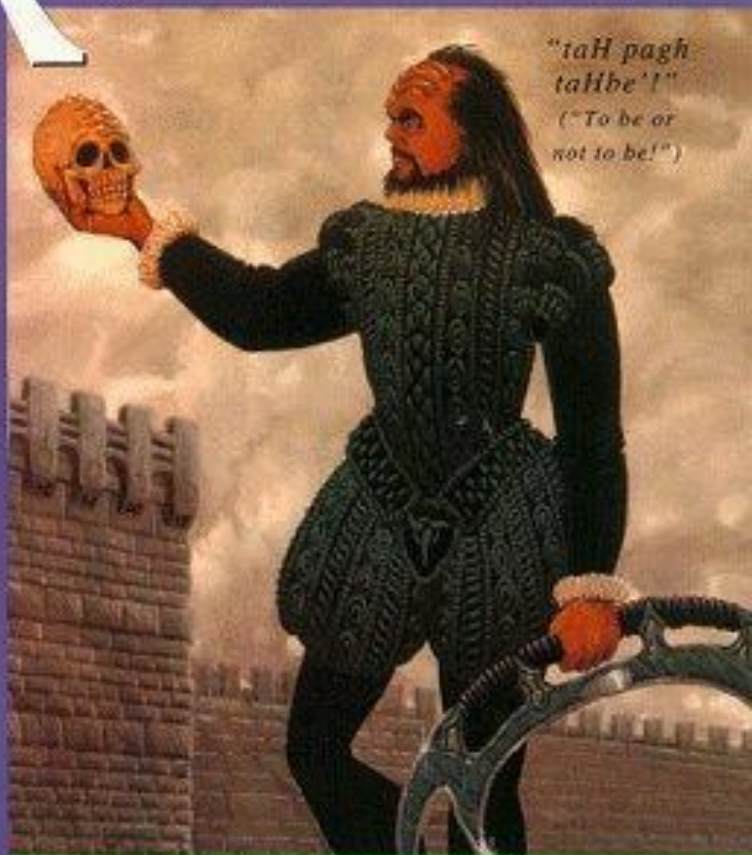
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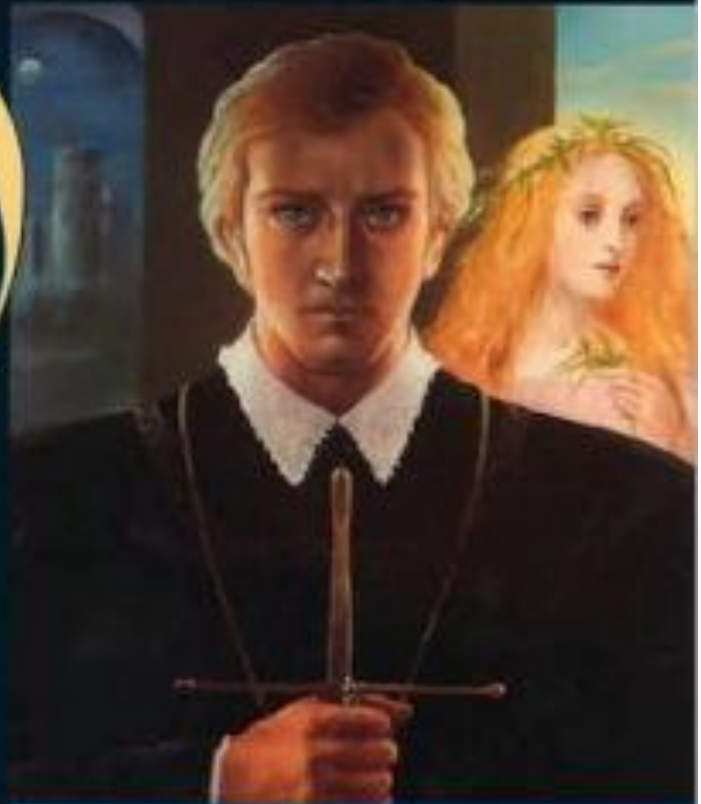
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**Problem creating / problem solving:**

(*Frasier*, broadcast 2002): Frasier's colleague avenges Frasier's unfriendliness by tricking Frasier into believing that Klingon is actually Hebrew. Frasier gives a Klingon blessing during his son's Bar Mitzvah.

Assume that different entities own rights to *Frasier* and to *Star Trek*. Should the *Frasier* producers have licensed the use of Klingon?

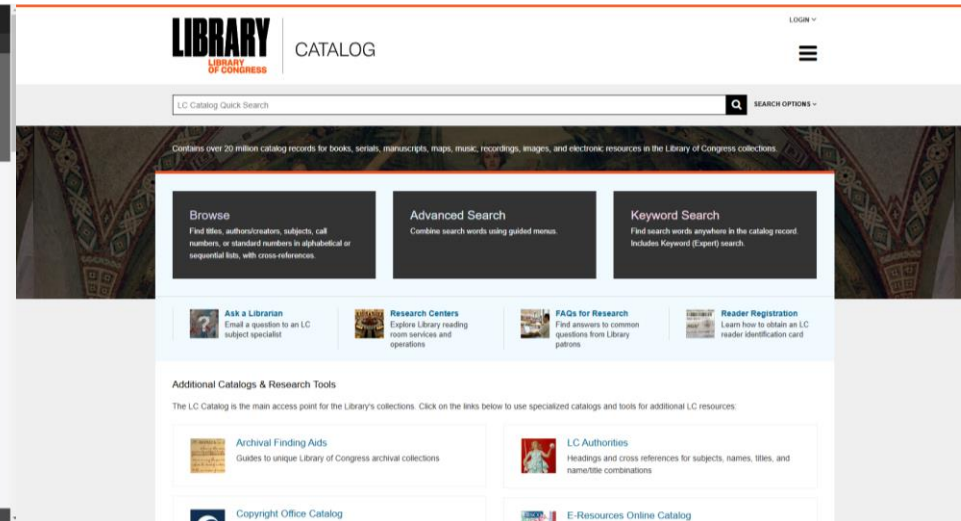
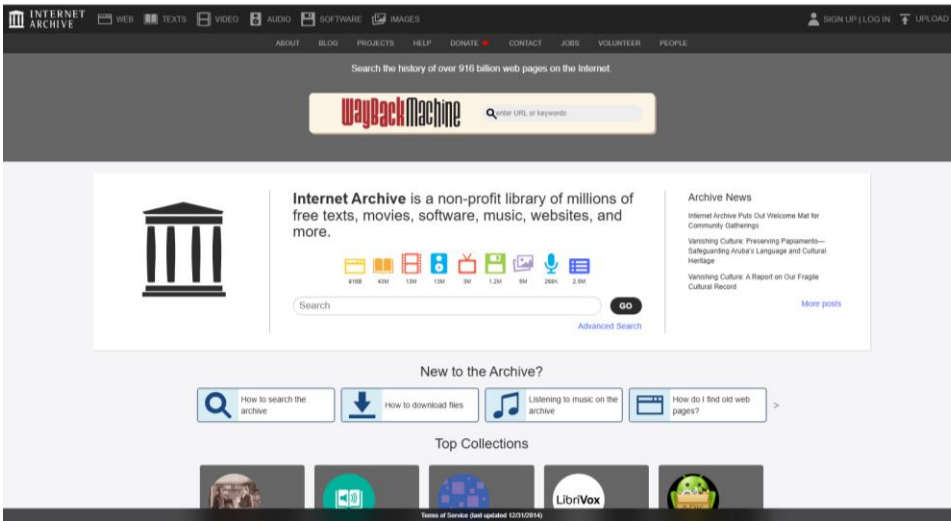


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# LIBRARIES!



## Compare

- The **Internet Archive** (founded 1996; funded and operated as a nonprofit organization by private philanthropy; relies on voluntary contributions) with
- The **Library of Congress** (founded 1800; funded and operated by the US Government; relies on a combination of voluntary contributions and mandatory copyright deposits)

Should copyright law and public policy treat these institutions as equivalent (equivalent rights to reproduce, distribute, make © works of authorship available) or as different (if so, why)? Should either institution be exempt in any ways from © rules governing private for-profit organizations?



The End