



Copyright Our Problematic
Friend

Agenda

Session	Content	Duration	
Louisa Llama and Their Useful Arts – Copyright History and Basics	<ul style="list-style-type: none">• Copyright History• Legal Intent• Major aspects	10 – 10:30	
Break		10:30 – 10:35	
Morty Moose And Their Totally Non-infringing Journey– Copyright Reality and Problems	<ul style="list-style-type: none">• Current reality and Application of the law• Court Cases	10:35 – 11:05	
Break/Activity (Copyright Assessment)	<ul style="list-style-type: none">• Self-Assessment of your institutional copyright concerns	11:05 – 11:20	
Sally Sloth doesn't like to talk about problems - Archival Issues	<ul style="list-style-type: none">• Acquisition• Access	11:20 – 12:00	
Lunch/Discussion		12:00 – 12:30	
Larry the Lawyer has a big mad – dealing with problematic counsel	<ul style="list-style-type: none">• Dealing with council	12:30 – 1:00	
Clyde the Capybara gets away with it – Liberal fair use	<ul style="list-style-type: none">• Fair Use• Reality of Fair Use	1:00 – 1:30	
Danny Duck Likes to Share – Alternative Rights Frameworks	<ul style="list-style-type: none">• Cultural Property Rights• Access Policies• Acquisition Policies	1:30 – 2:00	
Arnold the Aardvark Goes Offline – Adjournment		2:00	

I AM NOT A
LAWYER



Goals for the Workshop

1

Start a conversation about copyright

2

Discuss systematic issues with the way copyright is understood and administered in the US

3

Encourage participants to think about how to make copyright more equitable for archival collections

- Collecting
- Access
- Use

Workshop Flow

Ask questions

- Hand Raise
- Post in Chat

Be respectful

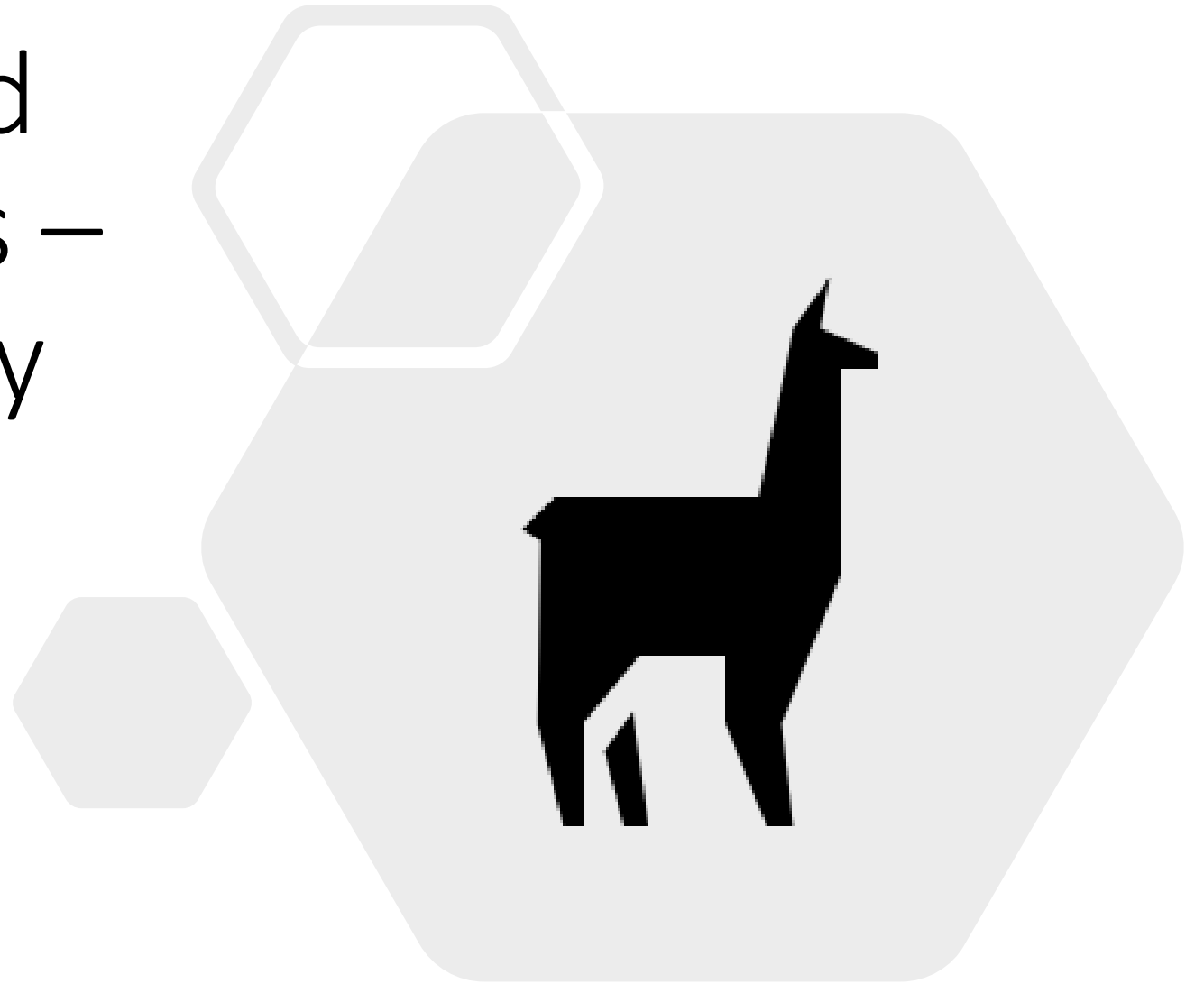
what we collect was often created by some one and they have:

- An emotional connection
- A financial connection
- A cultural connection

Researchers also have:

- An emotional connection
- A financial connection
- A cultural connection

Louisa Llama and Their Useful Arts – Copyright History and Basics



Copyright Origins



Copyright statutes

1

Copyright Act of 1790

- Term of 14 Years with one renewal

2

Copyright Act of 1909

- 28 year term; one renewal
- Governs works published prior to 1978 if their copyright expired before the new act became effective
- Required formalities: copyright notice and registration

3

Copyright Act of 1976 (effective 1-1-78)

- Extended term to life of author + 50 years, no renewal
- Eliminated many formalities (©, registration, renewal)
- 2 minimal requirements
- Incorporated Fair Use and Library Exemptions into Statutory law

Copyright statutes

Copyright Act of 1976

- Author owns copyright from time of work's creation
- All works now protected under federal law
- Ended perpetual copyright for unpublished works

Copyright Term Extension Act of 1998 ("Sonny Bono Act") (CTEA)

- Added 20 years to the term of ALL existing and future copyrights (e.g. life of the author plus 70, 95 years from publication for corporate work for hire)
- Added some mitigation for libraries and archives in section 108 (stay tuned)

Digital Millennium Copyright Act

Music Modernization Act

- Creates licensing, remedies, and copyright extensions for Pre-1972 recordings
 - Before 1923 – Dec 31, 2021
 - 1923-1946, 5 years plus 95 from publication
 - 1947-1956, 15 years plus 95 from publication
 - Others "fixed" prior to 2/15/1972, copyright ends February 15, 2067

US Constitution Article I, §8

Congress shall have power . . .to **promote** the progress of science and **useful arts**, by securing for **limited times** to authors and inventors the **exclusive right** to their respective writings and discoveries

Constitutional purpose

“It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . .however, this is not ‘some unforeseen byproduct of a statutory scheme.’ It is, rather, “the essence of copyright,” and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.” (Sandra Day O’Connor, *Feist v. Rural Telephone*)

- Assumes that writers will not create without a financial incentive.
- Balances public good and private gain
- But often treated as a PROPERTY right

United States Intellectual Property

Protections for content
creators and inventors



Patents: Tangible
things



Trademarks: Name
or symbol



Copyright: Written
and artistic
expression

Berne Convention for the Protection of Literary and Artistic Works

Signed in 1886 by European nations;

- US signed in 1988

Required US to “harmonize” its law with international law

Eliminated most remaining formalities of notice and registration

Copyright statute

Federal exclusive jurisdiction (17 USC 101-122)

- All suits in Federal court
- States may only address issues peripheral to copyright
- But law that applies is that of the time the work was created, so state law applies until Federal law covers the issue (e.g. pre-1972 sound recordings)

Administered by the Copyright Office

- Certain Laws require rule making processes.
- Copyright Office Under Library of Congress

Judicial Precedent

- Judicial decision set much of our basic understand of Copyright Law

Key resource: www.copyright.gov

- Current version of code, news, cases

Cases, Fair Use,

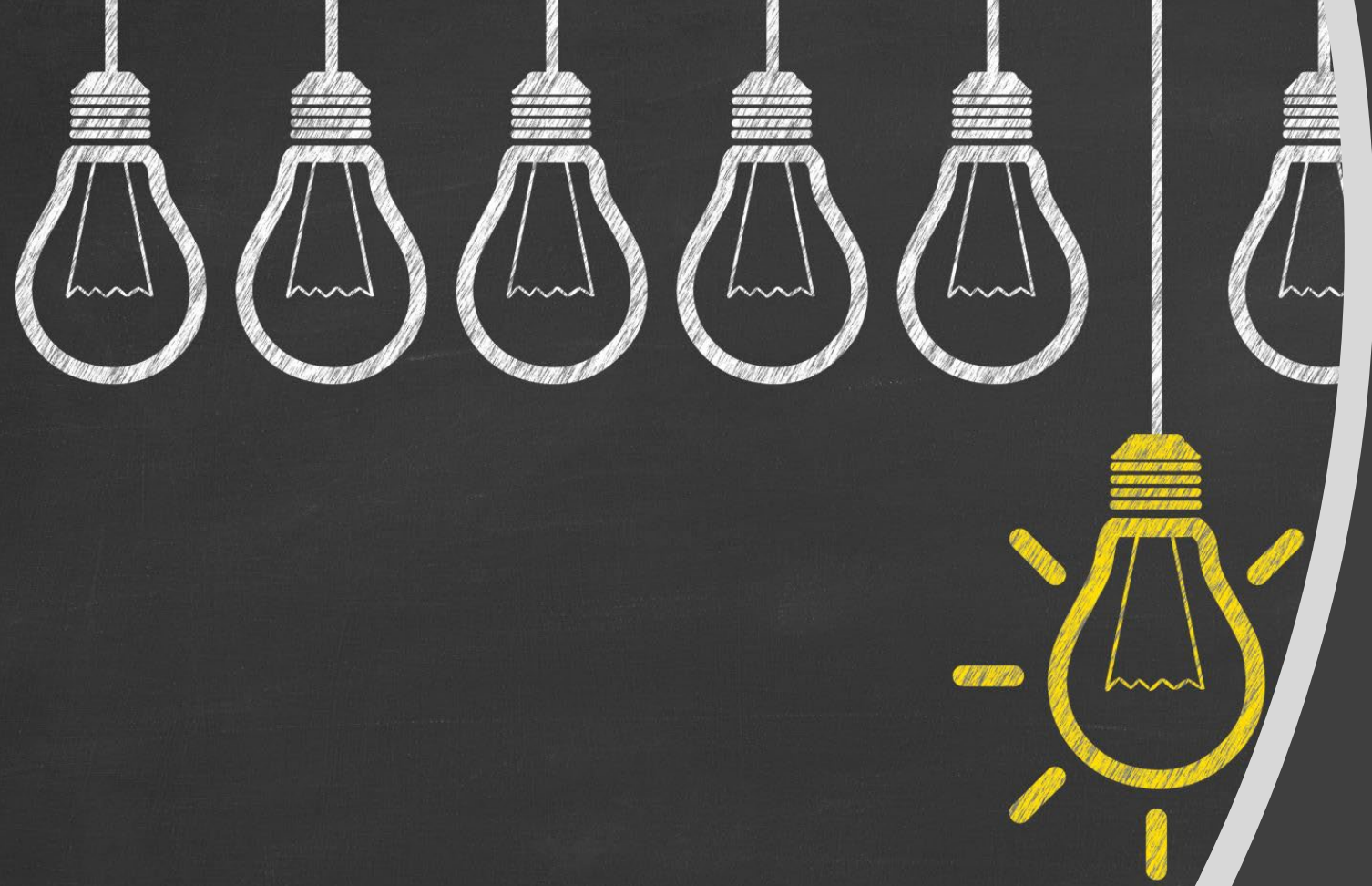
Significant Changes

- Cariou v. Prince
- Associate Press v. Fairey

ALLEN ET AL. v. COOPER, GOVERNOR OF NORTH CAROLINA (States Immune)

Parody

DCMA Exemptions



Intellectual Property

Things to consider

- Archival Issues
- Ethics
- Risk



Constitutional Intellectual Property Rights

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."



Types of Rights

- Copyright
- Patent
- Trademarks, Tradenames
- Trade Secrets



Note on Ownership

Physical ownership is separate
from any form of IP

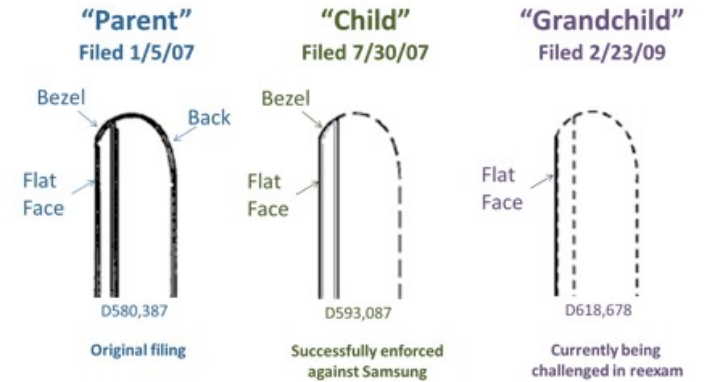
[17 USC 202](#) (copyright)



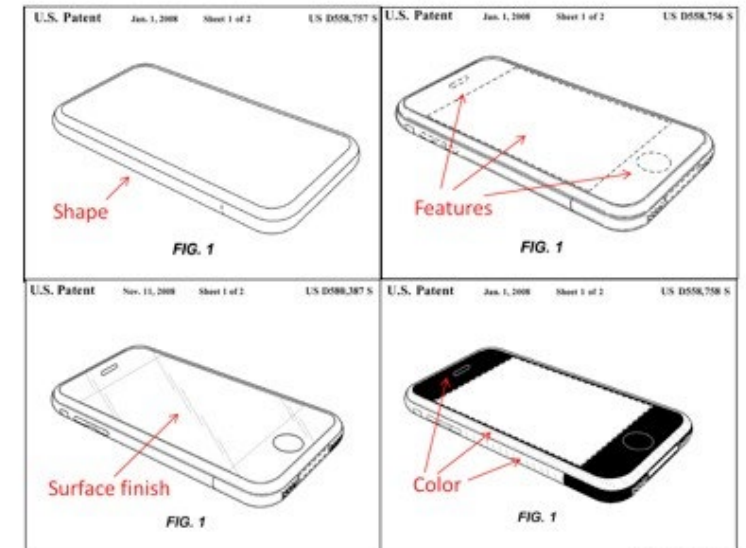
Patents (New and Novel “things”) 20 years

- Exclusive right granted to the inventor or designer of a new product, process or designer.
- Utility Patent
- Design Patent
- Plant Patents

Apple broadens coverage over the next several years
(side views of iPhone designs)



Apple files a suite of iPhone design patents four days before Steve Jobs January '07 announcement



Filed January 5, 2007

Trade Marks and Trade Secrets (forever)



Trade marks

- Initial application and 5th/6th year applications must prove that it has been used.
- Use means using in promotional, technical and other materials related to the mark.

Trade Secrets

- Trade secrets consist of information and can include a formula, pattern, compilation, program, device, method, technique or process.
 - Defend Trade Secrets Act of 2016
- Complements Patents
- Forever or until released or independently discovered

Copyright (Expressions of Ideas)

- Tangible expression of an idea
 - Writings
 - Music
 - Performances
 - Software
- Term of Copyright
 - IT's COMPLICATED





Creator Exclusive Rights

- (1) to reproduce the copyrighted work in [copies](#) or [phonorecords](#);
- (2) to prepare [derivative works](#) based upon the copyrighted work;
- (3) to distribute [copies](#) or [phonorecords](#) of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and [motion pictures](#) and other [audiovisual works](#), to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to [display](#) the copyrighted work [publicly](#); and
- (6) in the case of [sound recordings](#), to perform the copyrighted work publicly by means of a digital audio transmission



Exemptions to Copyright

- Fair Use (17 USC 107)
 - Purpose and character of the use
 - Nature of the work
 - Amount and substantiality to be used
 - The effect on the market
- Reproductions (17 USC 108)
 - May make preservation copies of materials and not violate the law or impact the market

Over the break think about how this history impacts archives?



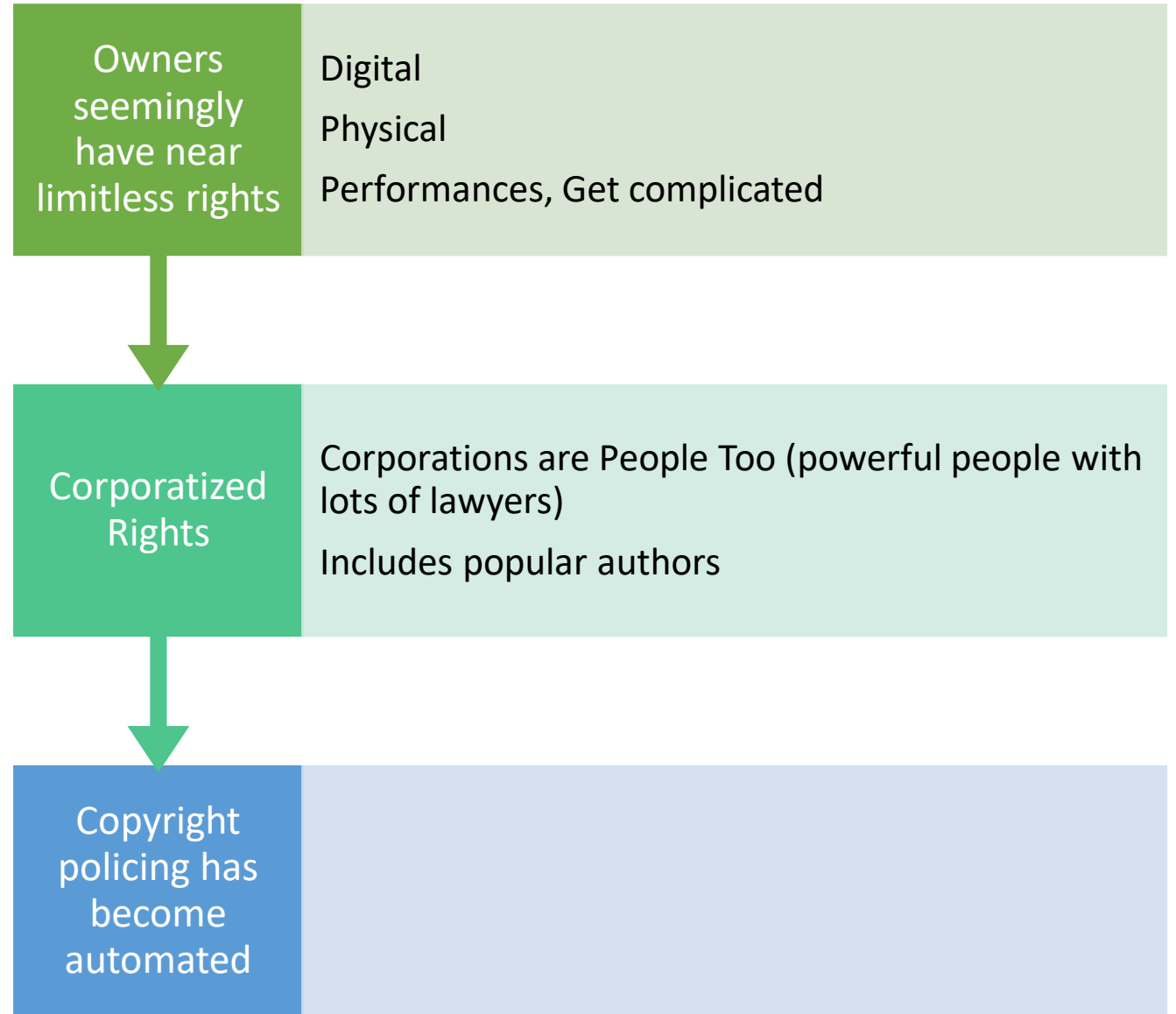
Break

Take 5



Morty Moose And Their Totally Non-infringing Journey– Copyright Reality and Problems

Exclusive Rights



Exterminate, err,
taken notices

Sample Notice

Notice of Copyright Infringement:
Request for Removal of Infringing Material

I, _____, certify that _____
the owner of the following work(s): _____

a _____

The material _____,

a _____

located at _____

infringes _____ listed above.

I have a good faith belief that the use of the work(s) described above in the material(s) listed here is not authorized by the copyright owner, an agent of the copyright owner, or the law.

I request that you expeditiously remove or disable access to the material identified directly above.

You may contact me at _____,

or _____

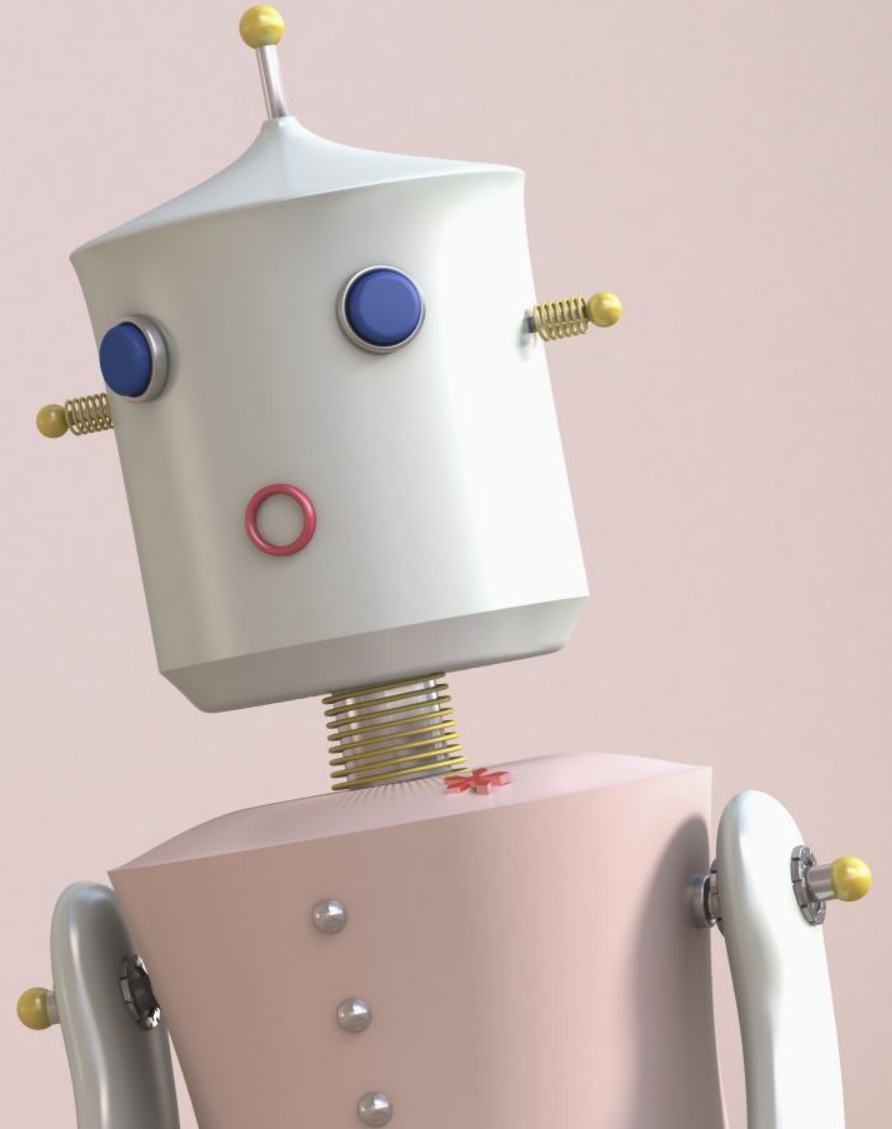
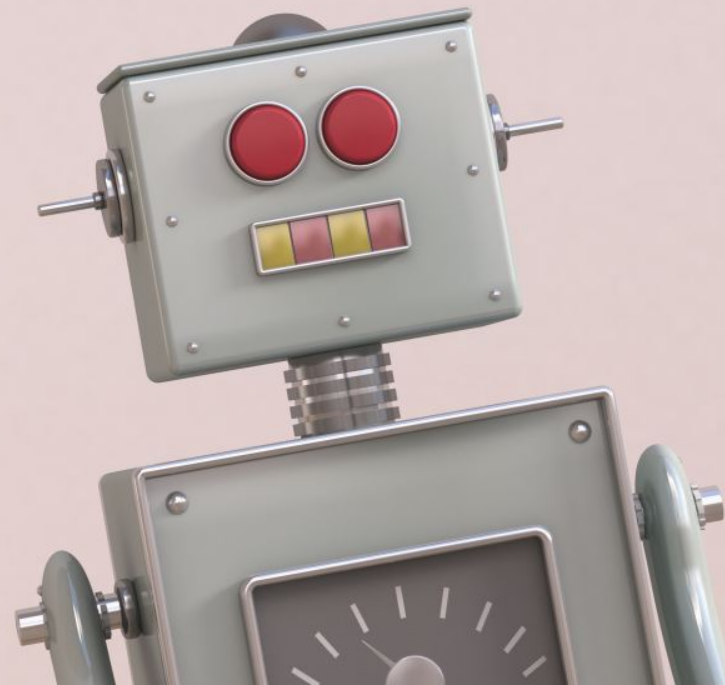
_____; preferably by _____.

Under penalty of perjury, I attest that the information in this notification is accurate and that I am, or am authorized to act on behalf of, the owner of the rights being infringed by the material listed above.

Full Name

Physical or electronic signature

Bots, bots,
bots, bots



What does that mean?

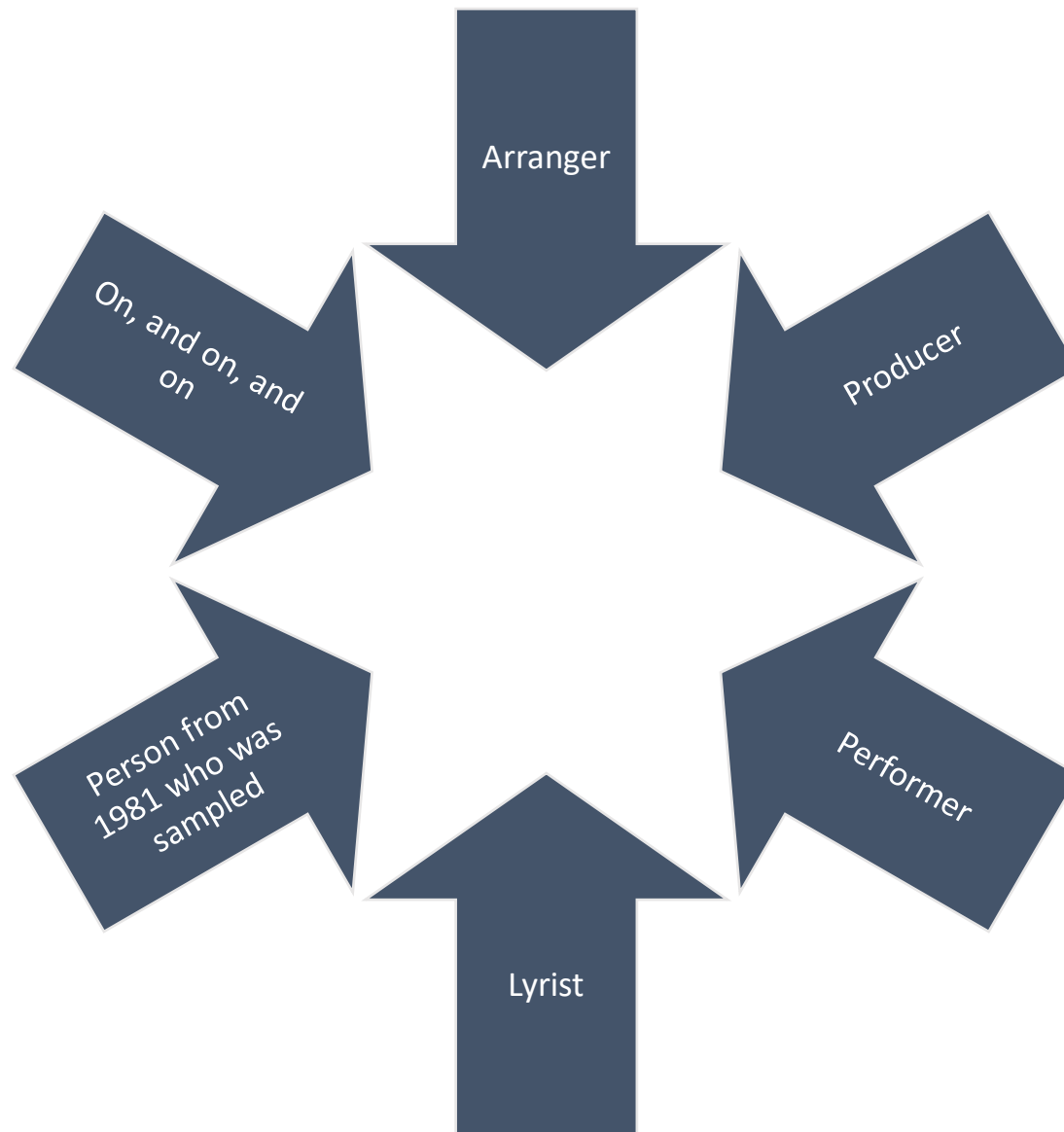
Archives maybe at a disadvantage in terms of copyright


Fairuse isn't prioritized as much as it should be

Potential push to have that sort of power

Online platforms are not really a safe space for archival materials

Audio Rights - Layers of rights





What does this
mean?

Fair use, beyond 30 sec, is
hard justify in the current
legal environment

Music modernization act
creates a system that
encourages paying for rights



Remix Culture



Music



Food



“Criticism”



Reaction Videos



Dancing

What Does that mean?

Strict control of copying is not valued

Remix culture polices nonattribution

Cultural contexts are often lost due to remixing, and sharing

BIPOC individuals often have their content stolen and not attributed.

Break

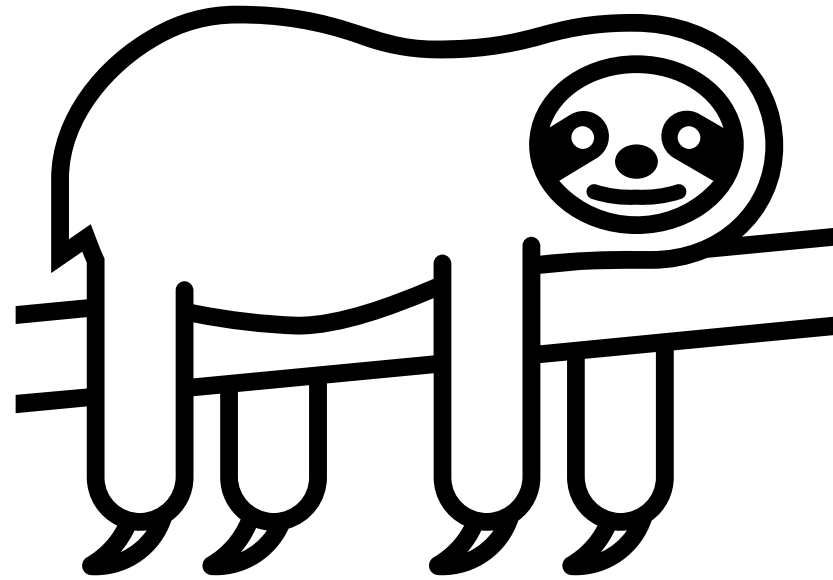
Copyright Assessment

Organizational Copyright Assessment

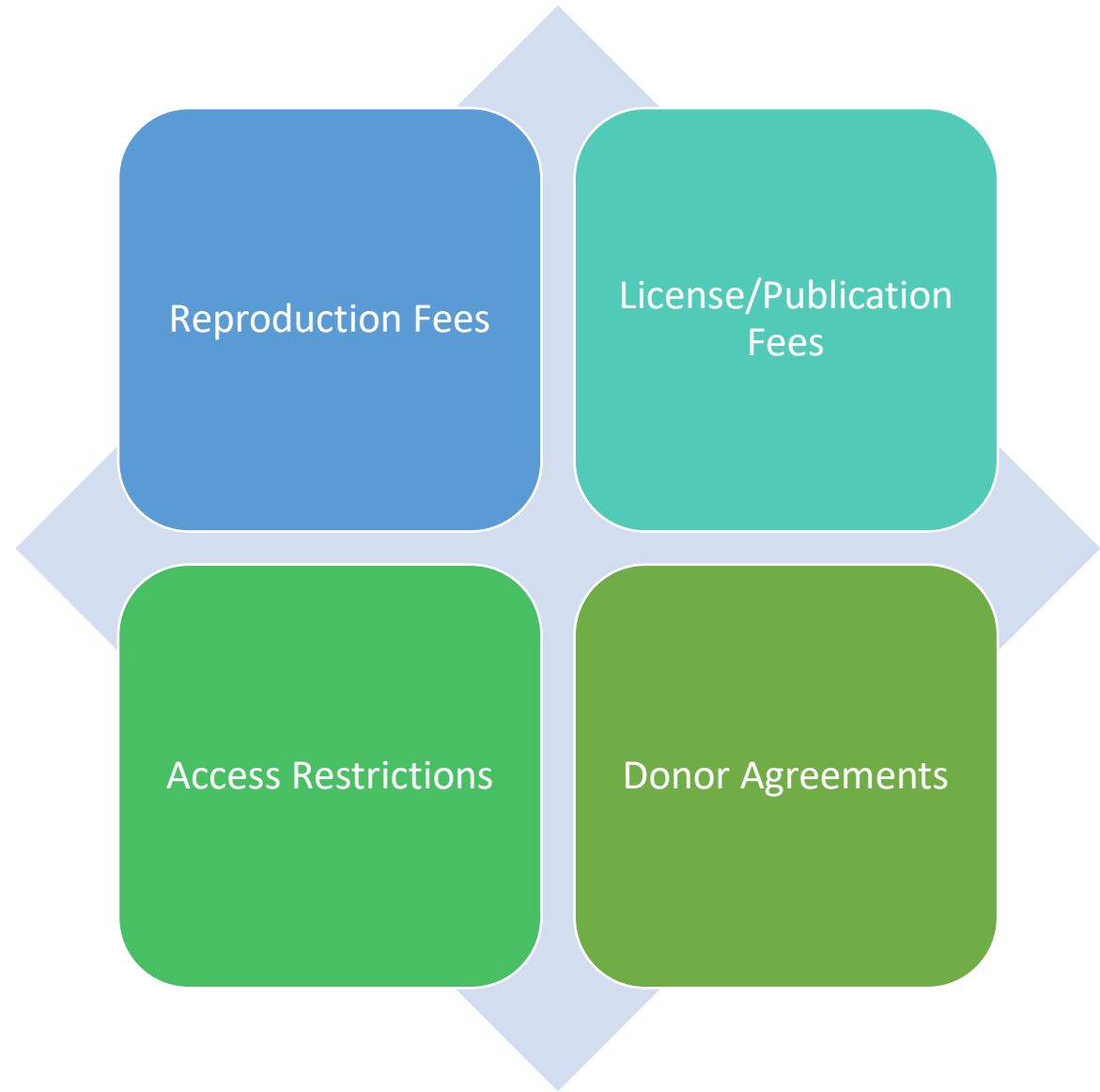
- Can you quickly identify your current copyright policies?
 - Donation
 - Reproduction
 - Publication
- Do you think your organization is risk adverse or risk tolerant in terms of copyright decisions?
- What would you do if you were sued?

Sally Sloth doesn't
like to talk about
problems

Archival Issues



Let's think
about
these



Donor/Purchase Agreements

Place for asking for various license to copyright

- Reproduction Rights
- Publication Rights
- Breathing Room

Acknowledging archival work that may violate copyright

- Preservation
- Access
- Reproduction

Problems with Acquisition

- Are we asking for too many rights?
- Does the donor really have any rights to the material?
- Who is being left out of the conversation?



Access Restrictions

1

Limit Risk due to
copyright issues

2

Conform to a donor
agreement

3

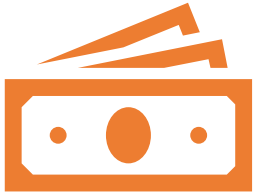
Protect PII

Problems with Restrictions

May limit research

Perceived risk is often
far greater than actual
risk

Reproduction Fees



Recoup cost of
reproduction



Preserve “value” of
archival collections



Minimize copyright
issues

Problems with Reproduction Fees

Limit access and research

Cost is something to be consider,
but how much does reproduction
really cost

Risk is minimal when archives is
not responsible for reproduction

Licensing/Publication
Fees

Control mechanism

Revenue Stream

Stick it to those pesky
textbook publishers

Problems with Licensing/Publication Fees

Ethically are these really ours to profit from

Creates a barrier to a type of access that only those with resources can bypass

Buying into exclusive right perpetuates a system that promotes profits over people.

Discussion

Lunch/Discussion

Considering the Mornings discussion, what could you do to improve your relationship with copyright?



Larry the Lawyer has a big mad

Deal with problematic counsel

What does a lawyer do?

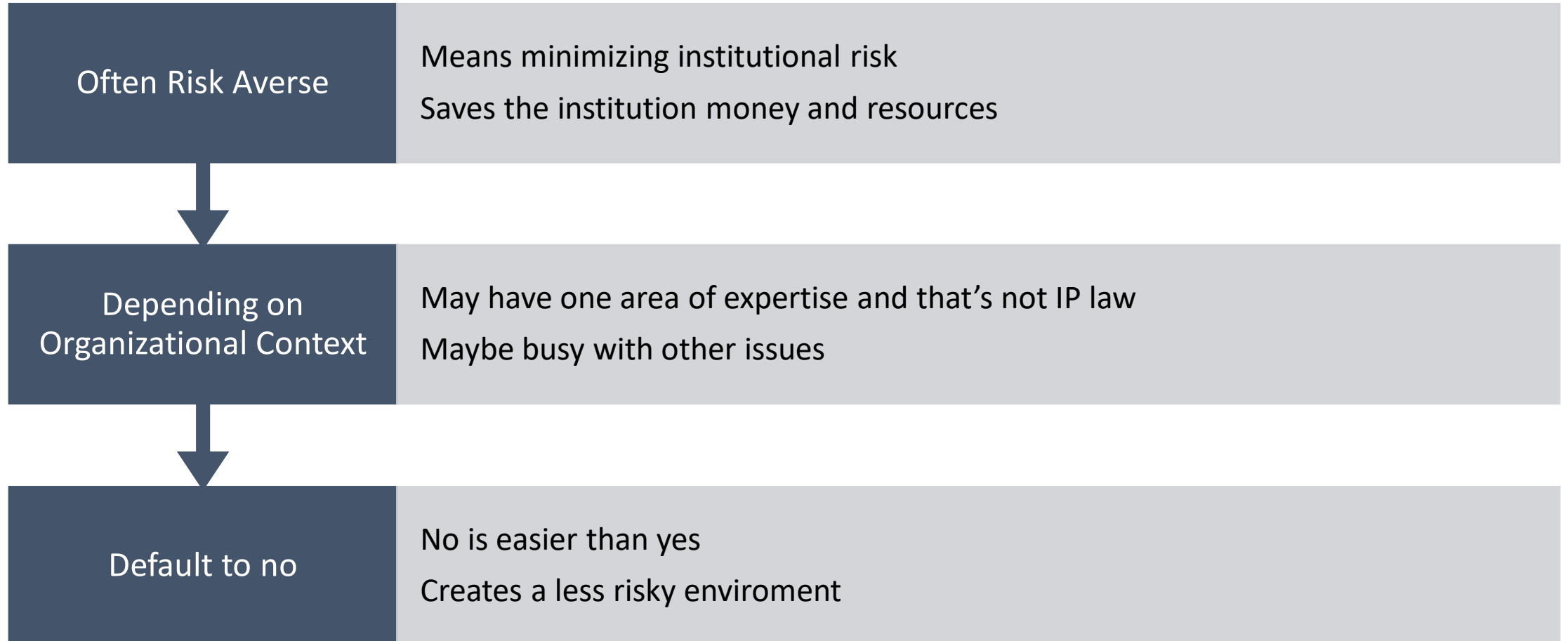


Evaluate Risk

Provide
Advice on
Limiting Risk

Defend/Help

To that end



So what does this mean for archivist

1

Do your research

2

Come with a plan

3

Come with a policy

1. Do your research

What do other lawyers/judges say

- Read blogs
- Read court cases

What is in the Literature

- Library
- Archives
- Education

Anatomy of A Court Case

(Slip Opinion)

OCTOBER TERM, 2019

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALLEN ET AL. *v.* COOPER, GOVERNOR OF NORTH
CAROLINA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 18–877. Argued November 5, 2019—Decided March 23, 2020

Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U. S. 627, precluded Congress from using its Article I powers—including its authority over copyrights—to deprive States of sovereign immunity. But the court held that Congress could accomplish its objective under Section 5 of the Fourteenth Amendment. The Fourth Circuit reversed, reading *Florida Prepaid* to prevent recourse to both Article I and Section 5.

Held: Congress lacked authority to abrogate the States' immunity from copyright infringement suits in the CRCA. Pp. 4–17.

(a) In general, a federal court may not hear a suit brought by any person against a nonconsenting State. But such suits are permitted if Congress has enacted “unequivocal statutory language” abrogating

Anatomy of a Court Case

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 18–877

FREDERICK L. ALLEN, ET AL., PETITIONERS *v.* ROY
A. COOPER, III, GOVERNOR OF NORTH
CAROLINA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[March 23, 2020]

JUSTICE KAGAN delivered the opinion of the Court.

In two basically identical statutes passed in the early 1990s, Congress sought to strip the States of their sovereign immunity from patent and copyright infringement suits. Not long after, this Court held in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999), that the patent statute lacked a valid constitutional basis. Today, we take up the copyright statute. We find that our decision in *Florida Prepaid* compels the same conclusion.

1

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, GORSUCH, and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined except for the final paragraph in Part II–A and the final paragraph in Part II–B. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined.

¹The CRCA served as the model for the Patent and Plant Variety Protection Clarification Act (Patent Remedy Act), passed two years later (and repudiated by this Court in *Florida Prepaid*, see *supra*, at 1). Using the same language, the latter statute provided that a State “shall not be immune, under the [E]leventh [A]mendment [or] any other doctrine of sovereign immunity, from suit in Federal court” for patent infringement. §2, 106 Stat. 4230. And so too, the statute specified that in such a suit, a State will be liable, and subject to remedies, “in the same manner and to the same extent as” a private party. *Ibid.*

2. Come With a Plan

1

Know what you will be asking for

- Policy Review
- Forgiveness or Permission
- Stick to your purpose

2

Have drafts ready for review

3

Have a back up plan

- Know where they may have problems, and explain your reasoning
- Have an alternate ready

Policy Examples



Borrow
Liberal



Adapt for
local issues

Important Policies to have

Acquisition Policies

- Who owns copyright
- Reproduction issues
- Digital preservation and access
- Publication issues

Reproduction Statements

- Statement about copyright law
- Copies are for research purposes

Copyright Statements for Collections

- In public domain
- Owned by third party
- Owned by archives
- Unknown status

Access Statements

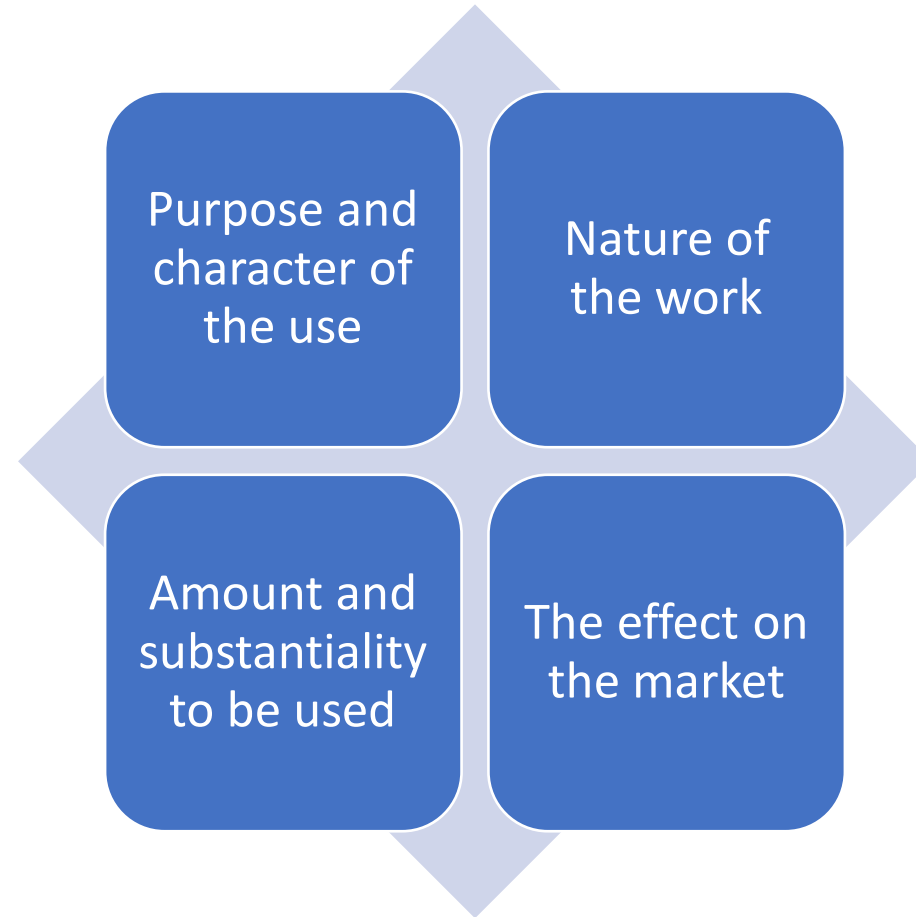
DCMA Takedown Notice

Clyde the Capybara
gets away with it

Liberal fair use



Fair Use Refresher



17 USC 108

Limited exceptions for preservation

- For purpose of preservation
- *Or deposit for research use at another archives*
- Limited number of copies
- If unused replacement not available on commercial market at a fair price
- Copies do not leave the premises

Limitations of §108

Limited number of
copies

Does not include
digital preservation or
online Access

Copyright Clearance

- Expensive
- Minimal ROI
- Just go with fair uses



Fair Use Check List

Type of Use	Likelier Yes	Likelier No
Purpose	Nonprofit Transformative use, creativity	Commercial No new work, or to supersede original
Nature	Reference, nonfiction Published	Fiction, Art Unpublished
Amount	Small amount (relative to whole original)	Complete work heart of work
Market	Doesn't hurt market of original	Hurts market or potential market of original

Liberal Application of Fair Use

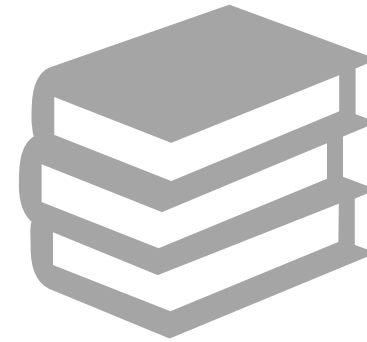


- Let yourself lean towards fair use/access
- Document your decisions
- Have a DCMA Take Down Notice
- Be willing to push back against automated requests

Checklist - Purpose



We are all educational
institutions



Or serve an educational function

Checklist - Nature

Here's it's more
tricky

Text, Images
(lower resolution)
should be good

Audio, Full Video,
Dance maybe
problematic

Checklist - Amount

You can limit the amount, but why would you

- Research is limited by the amount available online
- Saying some one should “come to the archive” is problematic
- Digitization is often considered transformative

Education typically trumps most issues with amount

- For once education wins

Except for

- Textbooks
- Major Motion Pictures
- Authors Paper

Checklist – Effect on the Market



Most archival access will
have 0 effect on the
market



Archives are important
but we don't make a lot
of money



Danny Duck Likes to Share

Alternative Rights Frameworks

Creative Commons

- Alternative Licensing structure
- Allows for reuse, sharing, transformation and for profit work



License Types

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CC BY-NC-ND: This license allows reusers to copy and distribute the material in any medium or format in unadapted form only, for noncommercial purposes only, and only so long as attribution is given to the creator.

Acquisition Policies

- Try to share ownership
 - Liberal reproduction and access exemptions from famous creators
 - Share and ensure ownership for less famous
 - It's ok to ask for all rights after their death
- Always share oral history ownership
- Talk to creators about the important of sharing and research

Access Policies

Open access to the widest spectrum

- Physical
- technical

Digitization is considered a transformative work (Google V American Writers Association)

Embrace Remix culture

- Help provide context to collections
- Empower others to speak on the behalf of archives

Sometime it's ok if something isn't accessible especially when it may cause harm

Cultural Property Rights



UN Declaration on the Rights of Indigenous Peoples, 2007

States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. (Article 11)



25 CFR Chapter II - INDIAN ARTS
AND CRAFTS BOARD, DEPARTMENT
OF THE INTERIOR (Standards for
products)



25 U.S.C. §§ 1301-130 Indian Civil
Rights Act



25 U.S.C. 3001 Native
American Graves
Protection and
Repatriation Act

Federal Grant
Recipients must
return cultural
items
Kennewick Man

Defining Cultural Groups



Nationalities (Regions)



Religions



Race and Ethnicities



Associations (Long Histories)

Fraternal and Sororal
Unions
ETC

Defining Cultures and Heritage

Heritage

- Tangible Culture
- Intangible Culture
- Natural Heritage

Culture

- Abstract
- Learned Behaviors and Patterns
- Attitudes
- Values
- Knowledge
- Material Objects
- Shared

Whose Property?

Tribe

- Ceremonies, oral traditions
- Esoteric knowledge, may be specific to initiates
- “to be an Indian is to have non-Indians control your documents from which other non-Indians write their versions of your history.” *William T. Hagan*

Others

- Recordings (fixed)
- May have created the record with direct participation of tribal members (photographs, recordings)
- May have created the record independent of tribal members (descriptions, using their own words)
- Participation may not have been voluntary, informed, or with consent of tribe

Western legal parallels



Copyright



Trademarks, tradenames



Trade secrets

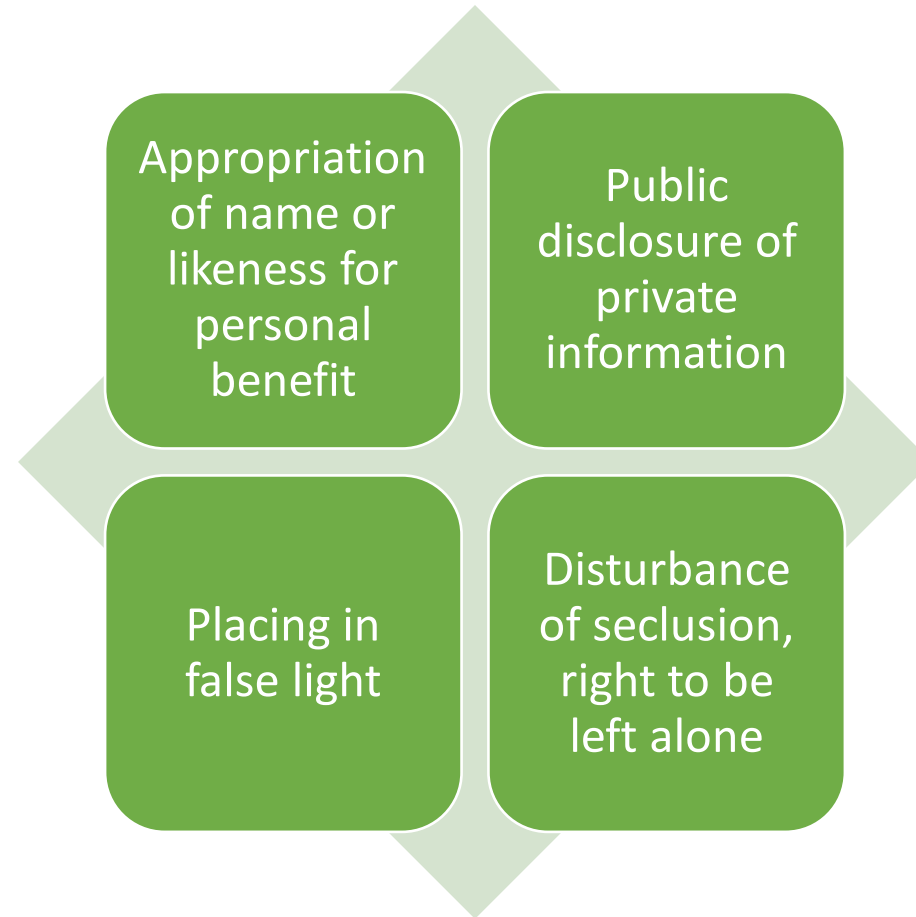


**Intellectual property as held by
a group**

IP cannot be held collectively

IP is for a limited period of time, not
indefinitely

Privacy Parallels



Archives and Cultural Property



Be aware that your archives may hold records that contain information some groups believe they should control

Become familiar with what's sensitive



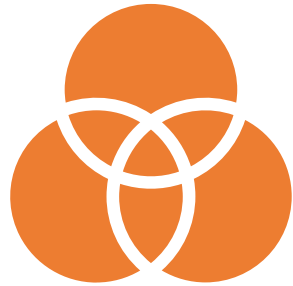
Make conscious decisions about how you will provide access to those materials

Balance competing ethical and legal systems

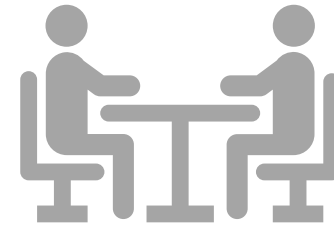


Be prepared for objections from those groups

Archives and Cultural Property



What steps should archives take when dealing with cultural property rights?



What kind of frame work could we have to deal with cultural property rights issues?

- Informed Consent
 - Must be documented
 - Must be appropriate
 - Explains Risk, Data Protection, Rights of Person, Research purpose

Anthropological,
Ethnographical,
and Sociological
Records

Negotiation and Access (Local Contexts)



What do you think of the traditional knowledge labels?

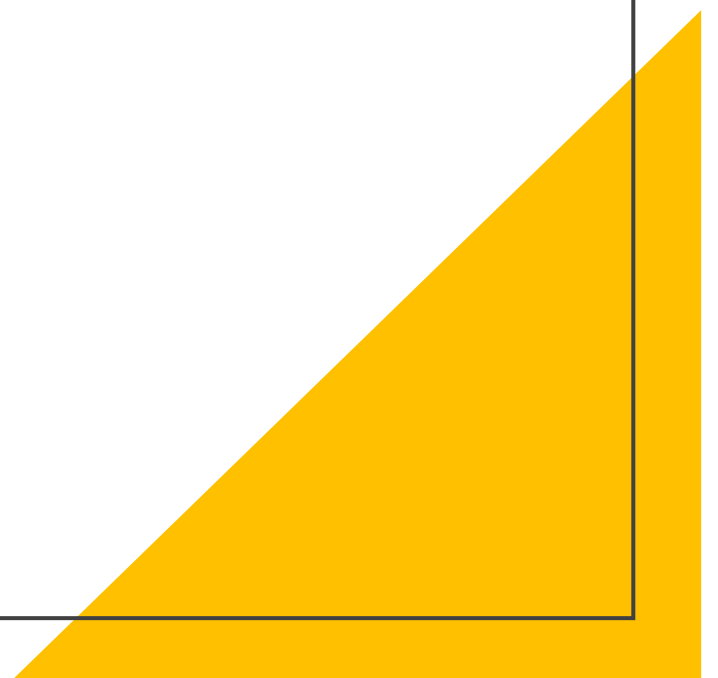


Would this approach or similar work for an archive?

How would it be a difficulty process?

How could you see an administrator reacting to this?

Discussion



Arnold the Aardvark Goes Offline

Adjournment