

Intellectual Property and Search

Who controls the way we access
information on the web?

Jason Schultz, Staff Attorney



3 Questions

[1]

Who controls our access to online info?

[2]

Should online access to information be more,
less, or equal to offline access?

[3]

What are the competing public policies behind
IP and search?

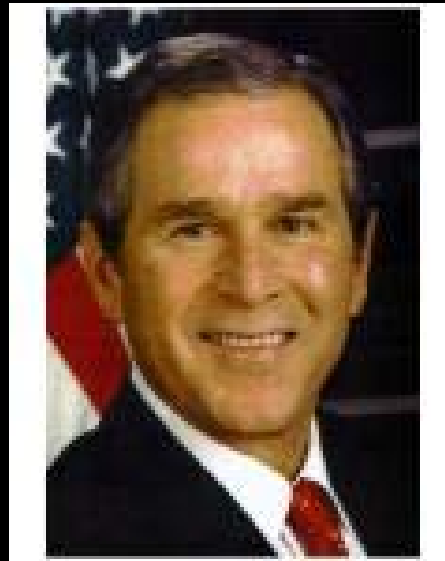
Who controls our access to online info?



Who controls our access to online info?



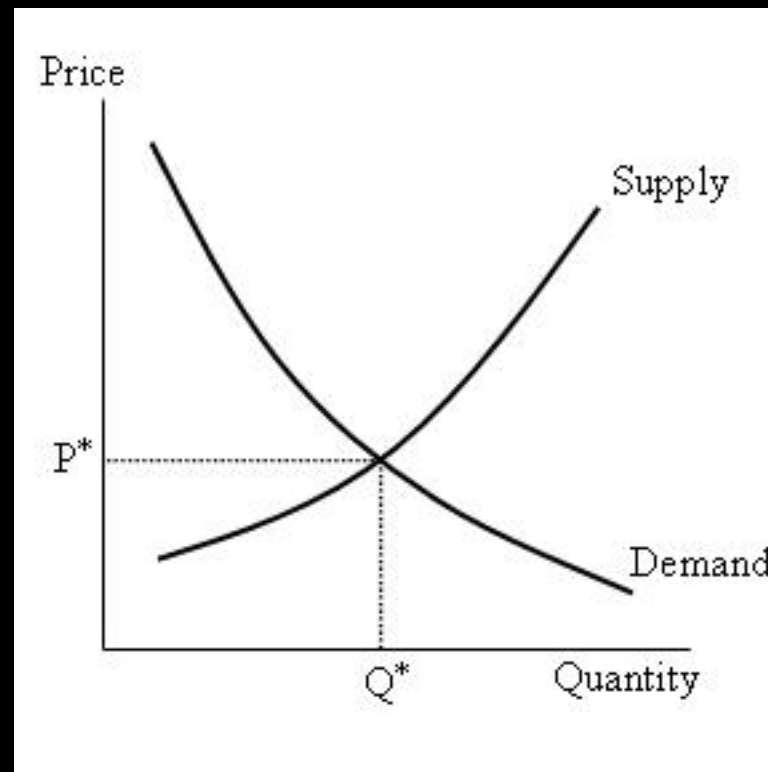
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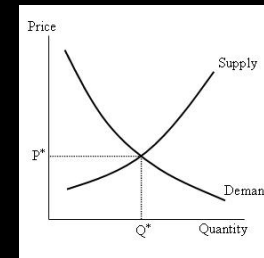
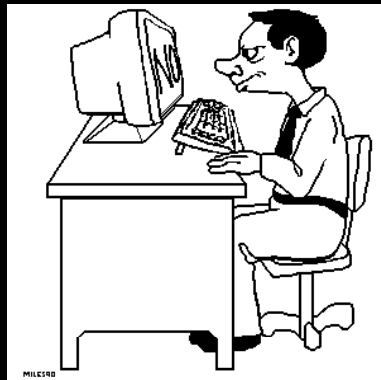
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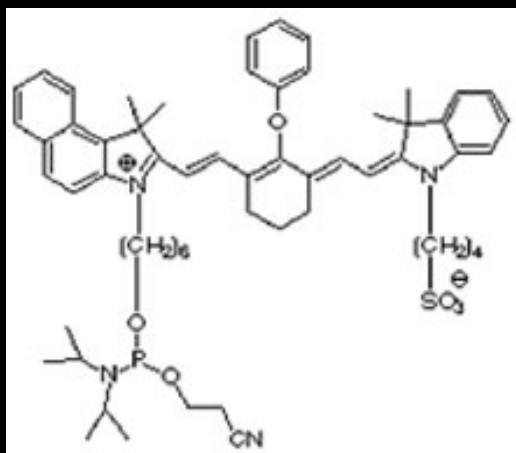
Who controls our access to online info?



Who controls our access to online info?



What is intellectual property?



$$\sigma = \sqrt{\frac{\sum (x_i - m)^2}{n-1}}$$

Patents

What is intellectual property?



Copyrights



What is intellectual property?



Trademarks

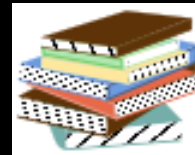


What is intellectual property?



Trade Secrets

What is intellectual property?



Primary IP for Search Providers



Trade Secret + Patent + Trademark

Primary IP threats to Search Providers



Copyright

+



Trademark

Trademark Protection

- Promotes investment in brand names/logos



- Prevents consumer confusion



v.



Trademark Threats to Search

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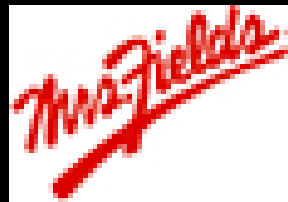
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Keywords v. Trademarks



Keywords v. Trademarks



example

consumer



hungry



driving



freeway



road sign



exit



super duper weenie



cash



Food



hunger



competitor



consumer



dummy



super



road sign



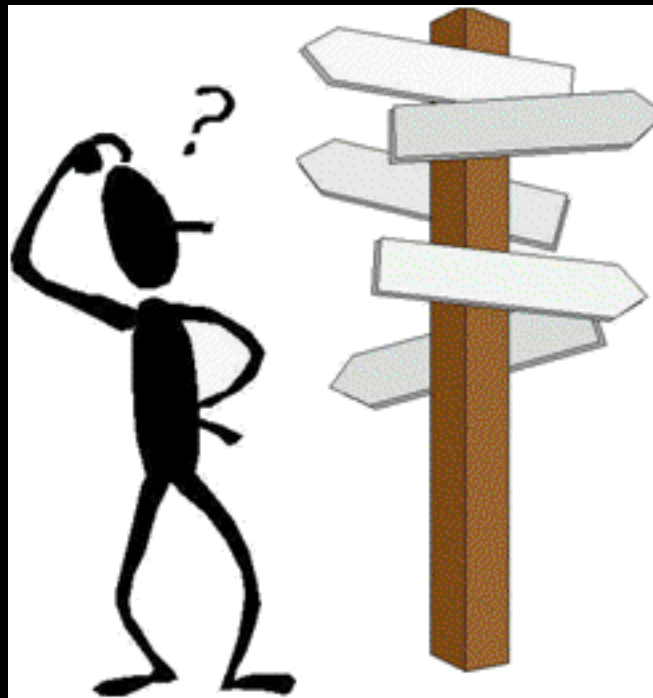
here



super



confuse



hungry



consumer



dummy



food



infringement



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23 Attorneys for Plaintiffs

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28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

DAVID HOROWITZ,) No.)
DAVID R. HERNANDEZ,)
RICK DE CASTRO,) COMPLAINT FOR:
MARIANN GEISER,)
SAMUEL S. MURRAY,) 1. WASTE OF TAXPAYER FUNDS
GREG BELLUOMINI,) (CODE OF CIVIL PROCEDURE SEC-
DON HAGNER,) TION 526a);
MICHAEL SANDERS and)
DAVID C. STOLINSKY, individually and on) 2. ULTRA VIRES EXPENDITURE OF
behalf of similarly situated taxpayers of the) TAXPAYER FUNDS (COMMON
County of Los Angeles; and PILGRIM LU-) LAW);
THERAN CHURCH, on behalf of itself and)
its members,) 3. VIOLATION OF ARTICLE I, SEC-
Plaintiffs,) TION 4, OF THE CALIFORNIA CON-
stitution ("NO PREFERENCE)
CLAUSE");
vs.) 4. VIOLATION OF THE "ESTABLISH-
COUNTY OF LOS ANGELES;) MENT CLAUSE" OF THE FIRST
Page 1 of 18

COMPLAINT



Initial interest confusion

- Using a trademark to confuse and “lure” a consumer to a different vendor
- Consumer buys knowingly from second vendor but not without initial deception
- Illegal in several U.S. jurisdictions
- Judged on how likely consumers would be confused by competitor’s use of trademark

So do keywords confuse people?

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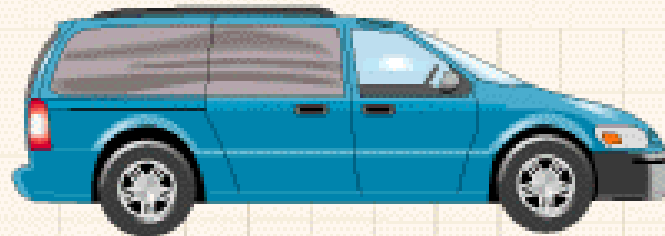
Are we being diverted or informed?



Are we being diverted or informed?

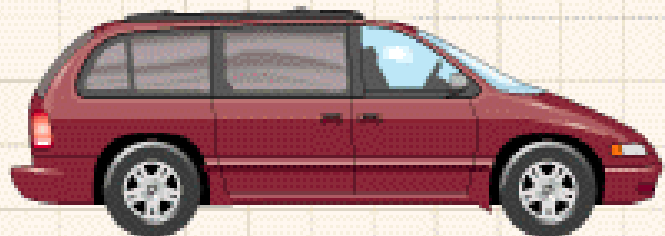
THREE OF A KIND

EXTERIOR DIMENSIONS

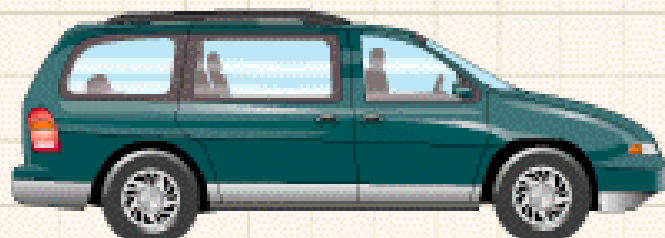


CHEVROLET VENTURE LS 200.9 in

length



DODGE GRAND CARAVAN LE 199.6 in



FORD WINDSTAR LX 201.2 in



68.1 in
72.0 in

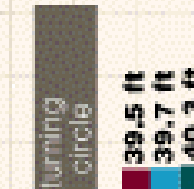
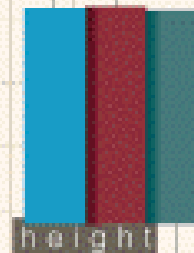
width



60.5 in
76.2 in



68.0 in
75.4 in



Is it pro or anti-competitive?

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GEICO v. Google

- Eastern District of Virginia, August, 2005
- Nominative Use
- Survey Says:
 - 67.6% expected to reach GEICO via sp links
 - 69.5% thought that the sponsored links were either for GEICO or affiliated with GEICO
 - 20.1% said that to purchase insurance from GEICO, they should click on sponsored links.


GEICO v. Google

- The Court says
 - “Serious doubts about survey accuracy as to actual users' experiences with and reactions to the Sponsored Links.”
 - None of the control group was confused when Nike ads were displayed in response to a GEICO keyword.
 - use of the trademark as a keyword, without more, not causing a likelihood of confusion.

GEICO v. Google

- Bottom Line:
 - Advertisers can use “GEICO” keyword
 - But cannot put “GEICO” in header or language of advertisements
 - Google liable for ads with GEICO in text or header, so must affirmatively filter

American Blinds v. Google

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american blind [Advanced Search](#)
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[American Blind](#) Sponsored Link
www.AmericanBlinds.com Get Free UPS Ground Shipping w/Your Order Today - Get info & Shop Now!

[American Blinds and Wallpaper](#)
Offering wallpaper, curtains, framed art, lighting, paint, **blinds** and shutters, area rugs and home accents.
www.decoratetoday.com/ - [Similar pages](#)

[AMERICAN BLIND SKIING FOUNDATION](#)
ABSF is a non-profit totally volunteer organization that provides **blind** children and adults opportunities to build confidence and independence through ...
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[AMERICAN BLIND SKIING FOUNDATION](#)
ABSF logo, ABSF **American Blind** Skiing Foundation ... Guides and **blind** skiers should meet in the back room of the rental building on the top floor just past ...
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[American Blind and Wallpaper Factory](#)
American Blind and Wallpaper Factory is the place to find thousands of wallpaper books, window coverings, draperies, custom framed art, area rugs, lighting, ...
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American Blind says Google's sale of its brand name as a keyword is trademark ... **American Blind** and Wallpaper Factory filed a complaint against the search ...
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American Blinds v. Google

- Northern District of California (ongoing)
- Descriptive Use
- No ruling yet on issue of confusion

Three additional notes

- Pop-up/Adware
 - 1-800-Contacts v. WhenU
 - “use” of mark in internal databases
- Opt-in v. opt-out
- International cases
 - France (opt-in)
 - Germany (opt-out)

Copyright threats to Search

- Spiders
- Caching
- Indexing
- Linking
- Image index
- Book project

Copyright Theory

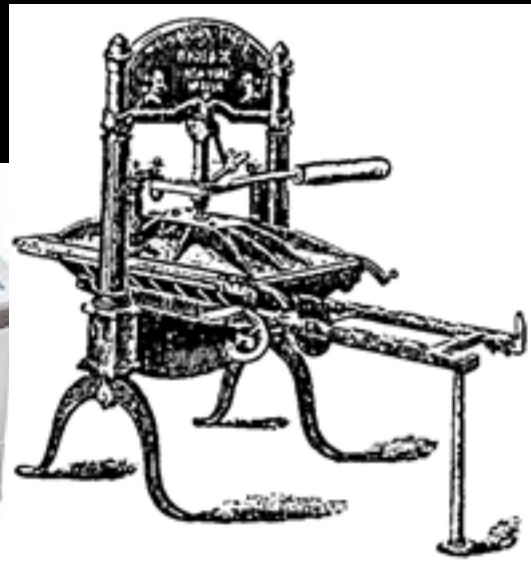
- To promote art and creativity
- Give strong controls over copying of works of art and science for a set term
- Provides incentive to create new works
- Balance with public dissemination and public access to information

Copyright Theory

- Copyright owner gets to control most “copying” of her work
 - Reproduction
 - Distribution
 - Derivative Work
 - Display
 - Performance

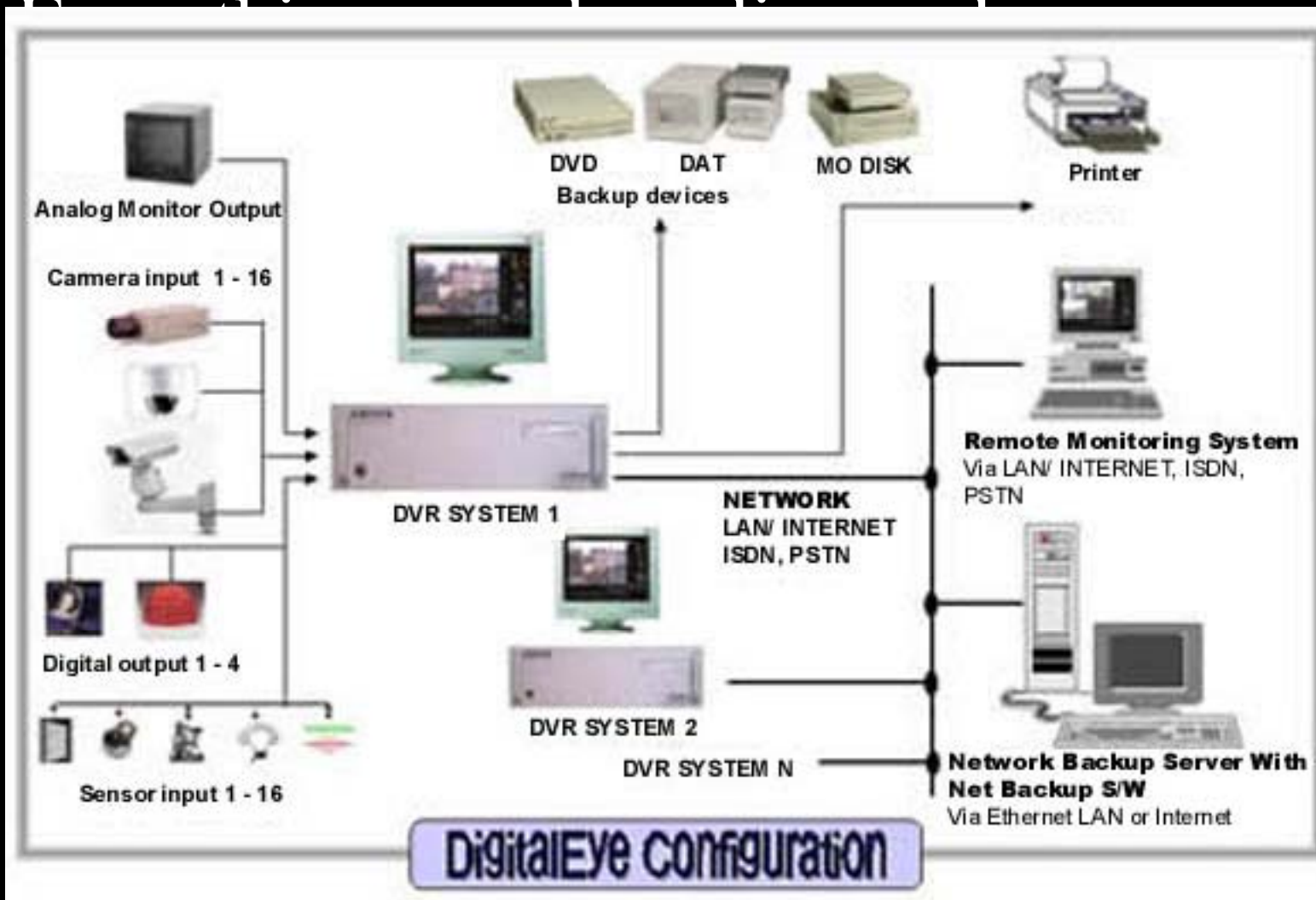
Copyright on the Web

- Before the web, only machines and businesses made most copies

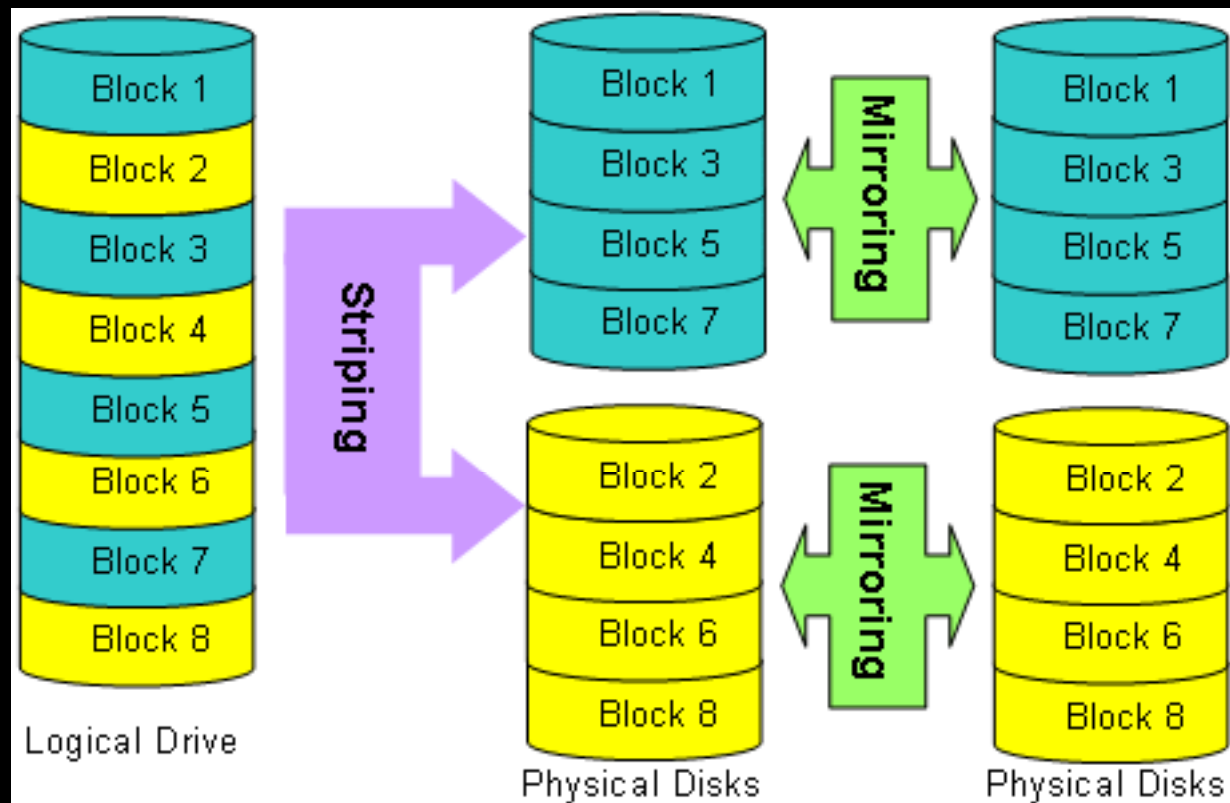


Everything you do online makes a copy

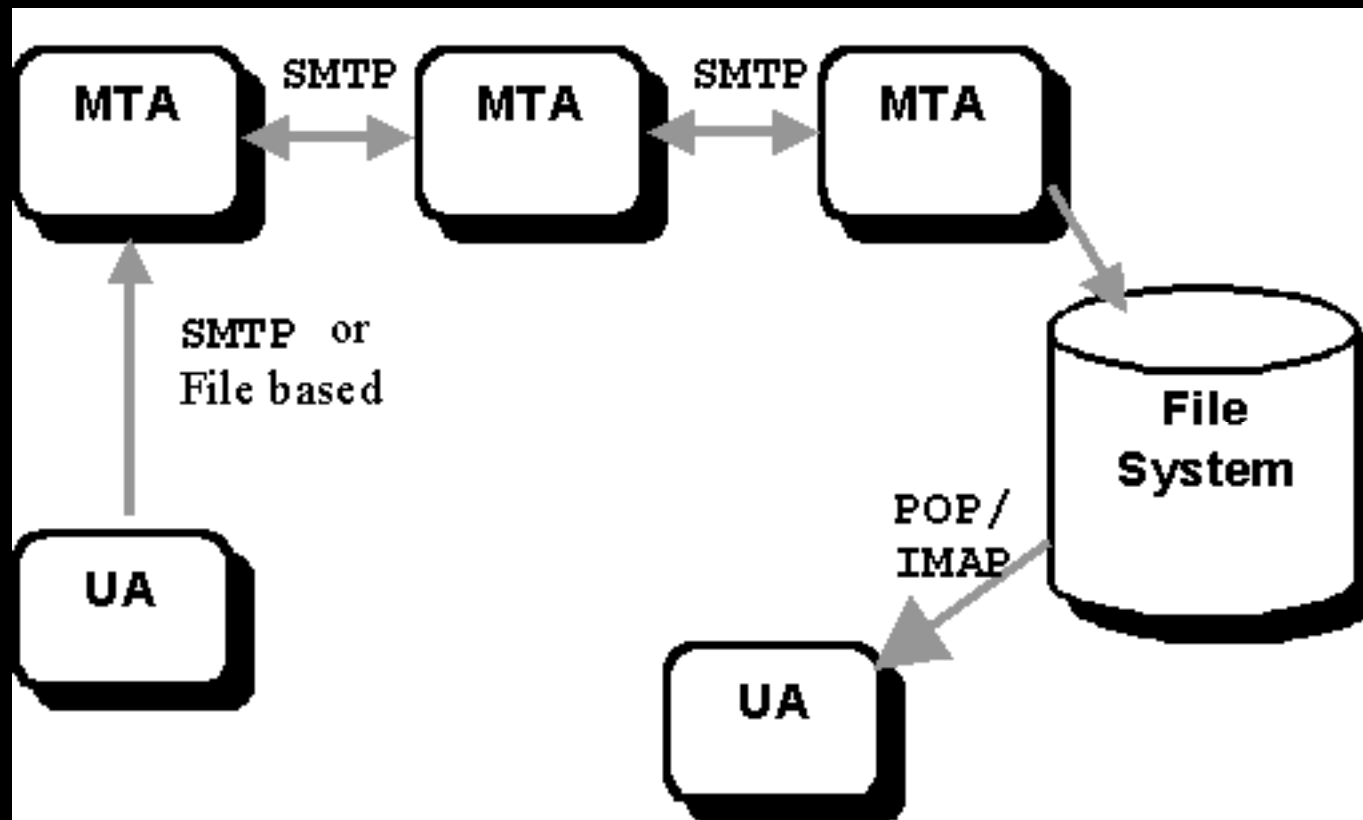




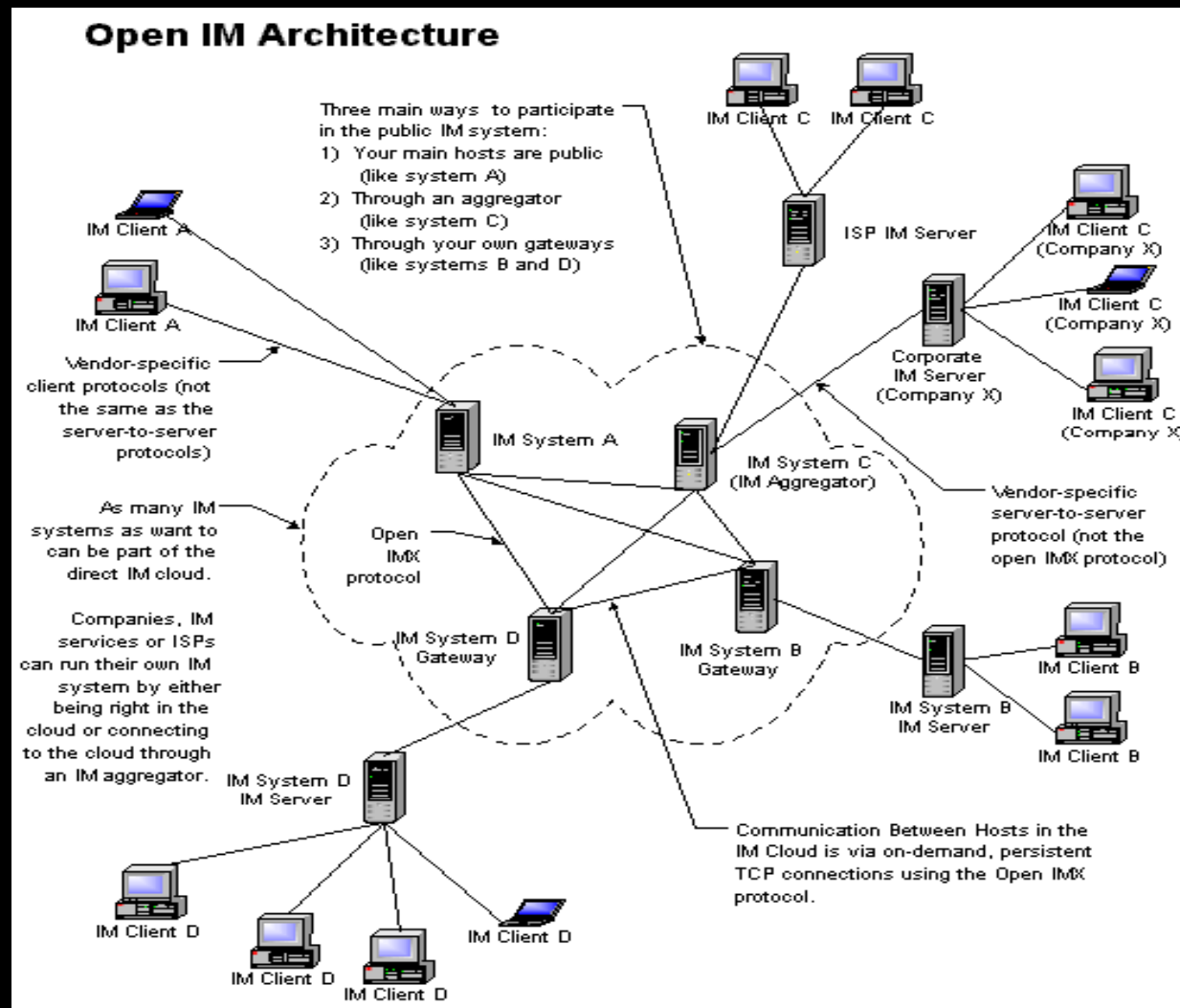
Everything you do online makes a copy



Everything you do online makes a copy



Everything you do online makes a copy



Copyright on the Web

- Every computer/device is a copy machine
- Every copy is potentially illegal
 - Must either have permission or fair use
 - If not, may face damages of up to \$150,000 per work infringed
- Search engines copy, index, and distribute information to millions of people

Search engine strategies

- Search relies on three strategies
 - Implied permission/Opt-out
 - Fair Use
 - Blind hope

Implied permission/Opt-out

- Theory
 - You made it publicly available
 - You meant us to index it
 - You can opt out via notification or robot.txt
 - Covers spidering, caching, indexing and linking
- Opt-out respected and legally required under certain circumstances

Fair Use

- Traditionally a defense for
 - Personal non-commercial use
 - Educational/First Amendment activity
 - Transformative Uses
 - Creative (remixing)
 - Functional (thumbnails)
- K: Does use reduce sales of original work?

Image Search



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wolves

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Images

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wolves.jpg

525 x 700 pixels - 73k

[www.canislupusdesign.com/
images/wolves.jpg](http://www.canislupusdesign.com/images/wolves.jpg)



white.jpg

800 x 600 pixels - 324k

www.ualberta.ca/~jzgurski/wwolf.html



Wolves.jpg

400 x 316 pixels - 24k

[www.angelfire.com/md3/
strongfist1/cgp/Wolves.jpg](http://www.angelfire.com/md3/strongfist1/cgp/Wolves.jpg)



3-little-wolves.jpg

800 x 600 pixels - 59k

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Wolves-large.jpg

600 x 399 pixels - 47k

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wl-wolves big.jpg

507 x 400 pixels - 83k

www.holmbergphoto.com/wolves.html



wolves-10.jpg

1152 x 900 pixels - 162k

www.ctrl-c.liu.se/.../wolves/wolves-10.jpg



born free wolves moon.jpg

240 x 340 pixels - 90k

[www.magicnevin.com/
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Copyright Issues in Image Search

- Capturing image
- Making thumbnail
- Storing thumbnail
- Displaying thumbnails in response to keyword searches
- Providing Link to original picture page

Perfect 10 v. Google

- P10 says:
 - “Pirates” are stealing our images
 - Google is spidering them and sending traffic to these infringing sites
 - Notice is not enough; wack-a-mole
 - Affirmatively filter our images out
 - Thumbnails substitute for cell phones

Perfect 10 v. Google

- Google says:
 - We spider everything
 - We can't tell who's infringing until you notify us of the specifics
 - It's a fair use to make an image directory
 - Image search is important public resource
 - Go sue the bad guys, not us

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by The Contracting Parties to the General Agreement on Tariffs and Trade

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...TING PARTIES, and the membership of the Agreement.
2. **GATT** is a multilateral treaty embodying reciprocal rights and obligations designed to achieve certain objectives. These objectives are set out in the preamble to the Agreement where the CONTRACTING PARTIES

Page 7

¹ Article XXXIII provides that governments possessing full autonomy in the conduct of their external commercial relations may accede to the **GATT** " on terms to be agreed between such governments and the CONTRACTING PARTIES ". Countries acquiring full

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Author's Guild v. Google

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 - You make money
 - We want money
 - Pay us

Author's Guild v. Google

- Google says:
 - We had to copy books to make an index
 - No one sees > a few lines at a time
 - We link to where you can buy/borrow the book
 - Book search is important to public access
 - This will help you sell books

Who's information is it?

“It's not up to Google or anyone other than the authors, the rightful owners of these copyrights, to decide whether and how their works will be copied.”

- Nick Taylor, Author's Guild president

Who's information is it?

“A search engine for books will be revolutionary in its benefits. Obscurity is a far greater threat to authors than copyright infringement, or even outright piracy.”

– Tim O'Reilly

Some Competing Policies

- Incentives for creativity
- Freedom to innovation in search space
- Healthy information markets
- User control/autonomy
- Public domain/public access to knowledge
- Public/Private governance

More information

www.eff.org



privacy fair use innovation free speech

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