

Intellectual Property and Search

Information ownership vs.
information access on the web

Jason Schultz, Senior Staff Attorney

www.eff.org



3 Questions

[1]

Who controls access to online info?

[2]

Should online access to information be

☐ more

☐ less, or

☐ equal

to our offline access?

[3]

What are the competing
public policies
that decide?

Who controls our access to online info?



Who controls our access to online info?



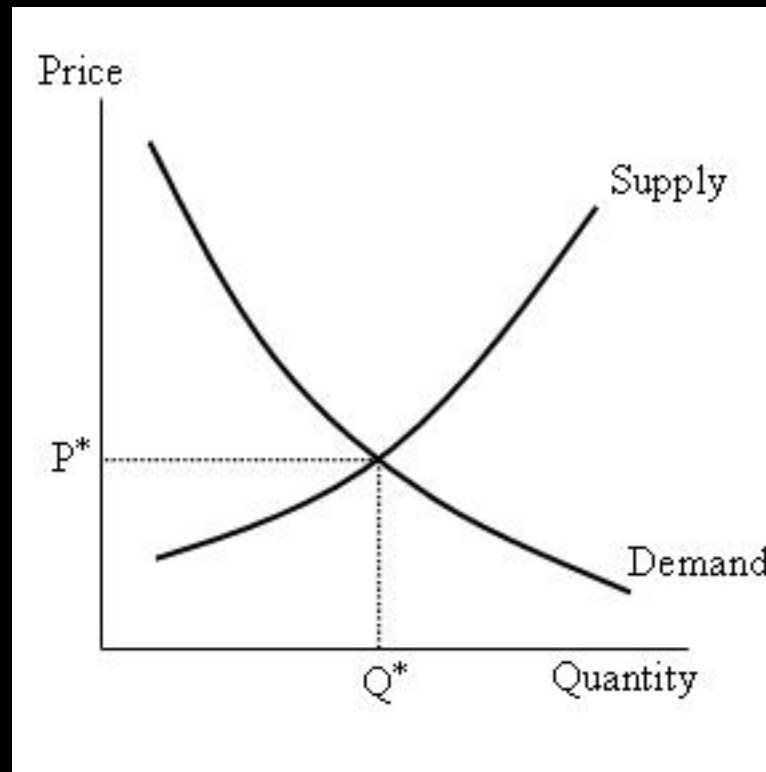
Who controls our access to online info?



Who controls our access to online info?



Who controls our access to online info?



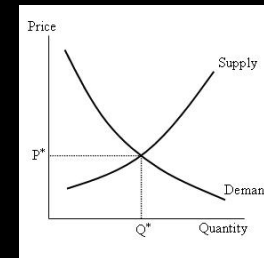
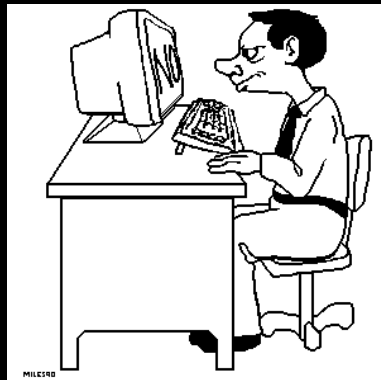
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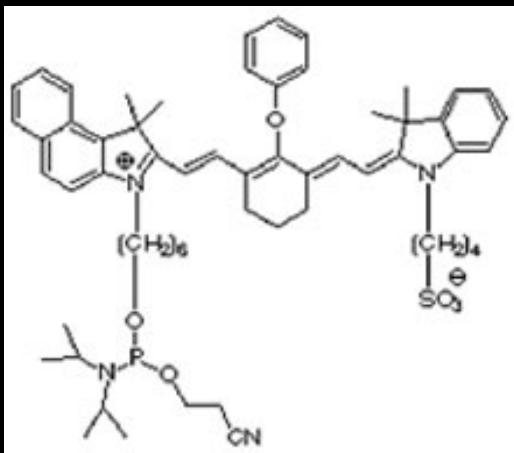
Who controls our access to online info?



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

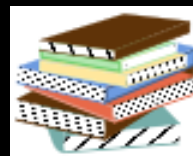


What is intellectual property?



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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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



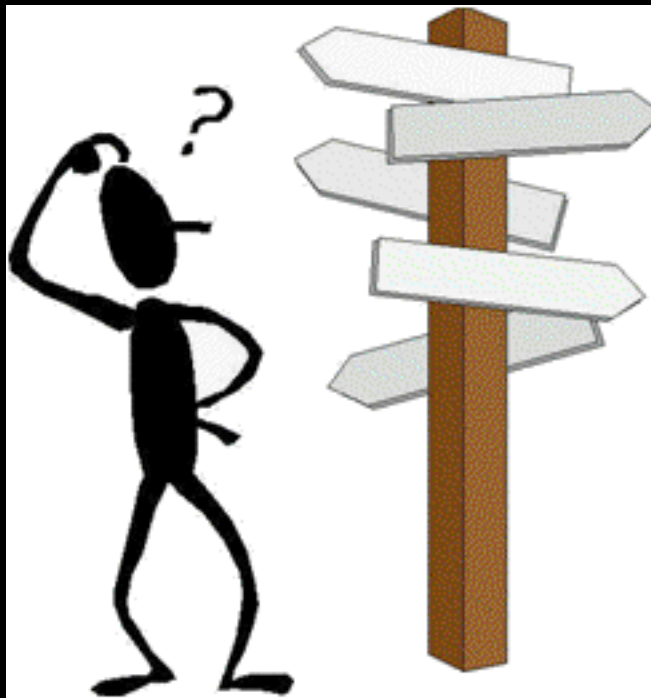
here



super



confuse



hungry



consumer



dummy



food



infringement



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25
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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) 3. VIOLATION OF ARTICLE I, SEC-
its members,) TION 4, OF THE CALIFORNIA CON-
Plaintiffs,) STITUTION ("NO PREFERENCE
vs.) CLAUSE");
COUNTY OF LOS ANGELES;) 4. VIOLATION OF THE "ESTABLISH-
Page 1 of 18) MENT CLAUSE" OF THE FIRST

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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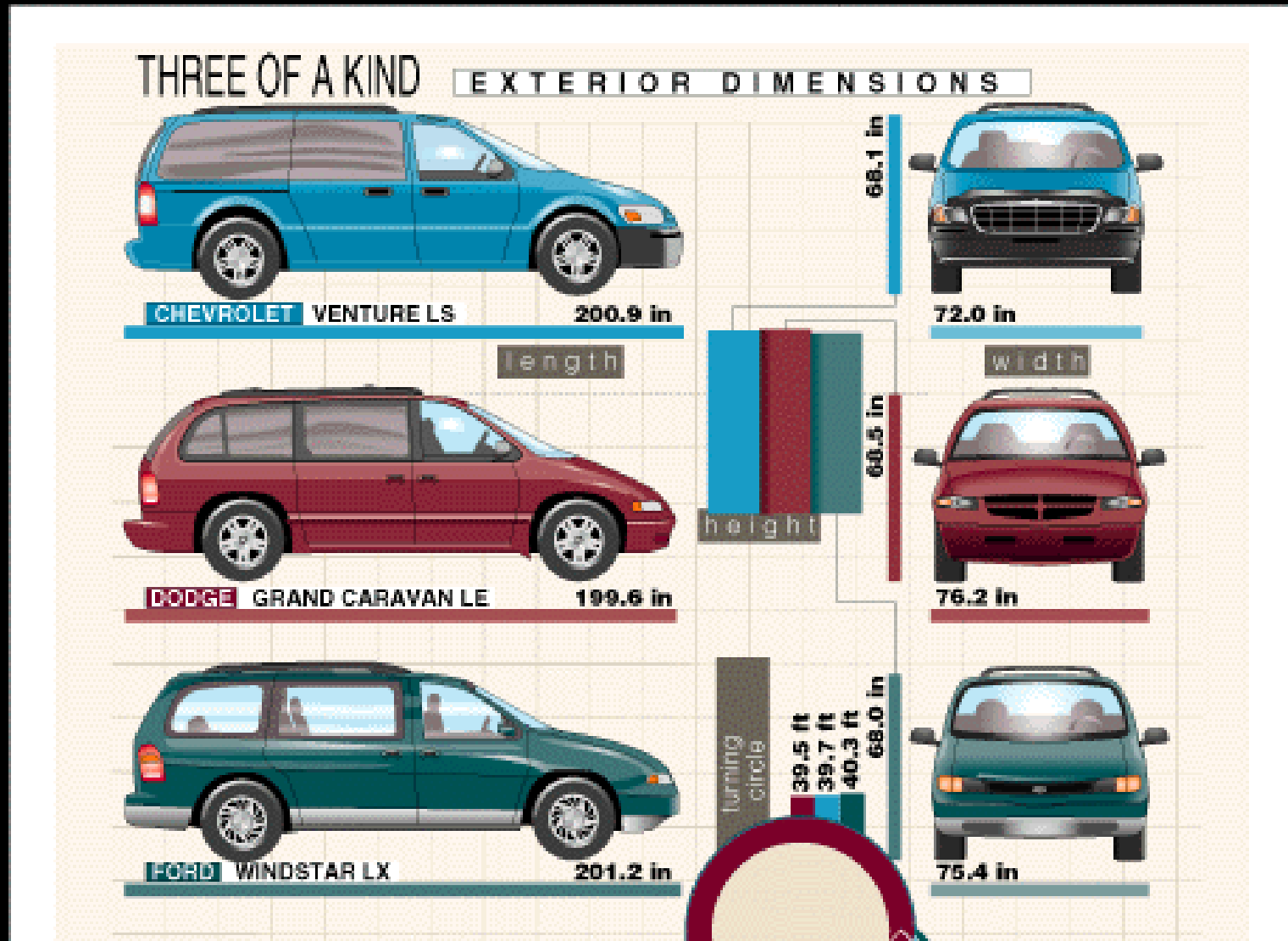
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Are we being diverted or informed?



Are we being diverted or informed?



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

But wait a sec...

If a trademark is only used in a database
and consumers never see it,



can it really confuse anyone?

advertising + information location



Keyword = only information location?



“Use in Commerce” Test

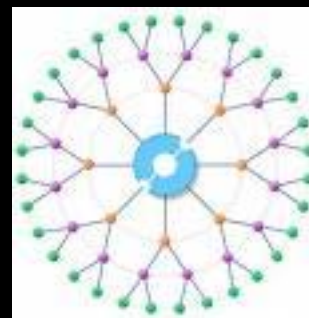
- TM infringement requires use of TM:
 - “in connection with the sale, offering for sale, distribution, or advertising of any goods or services...”
- auction of keywords = connection with sale or good or services?
- Courts split (NY = no; CA = yes)

Break



Copyright threats to Search

- Spiders
- Linking
- Images
- Books



Copyright Theory

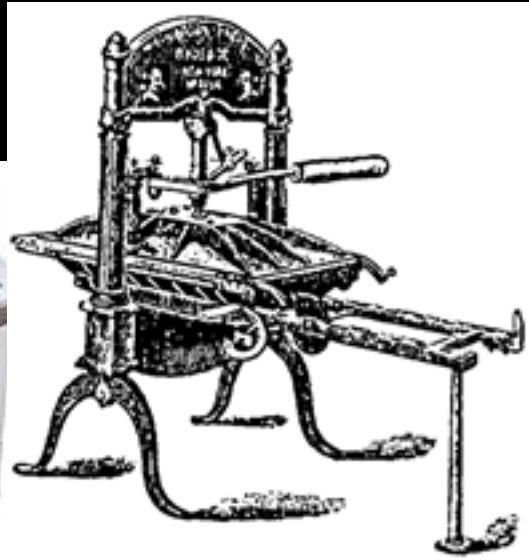
- To promote art and creativity
- Give strong controls over copying of works of art and science for a set term
- Provides incentive to create new works
- Balance with public dissemination and public access to information

Copyright Theory

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

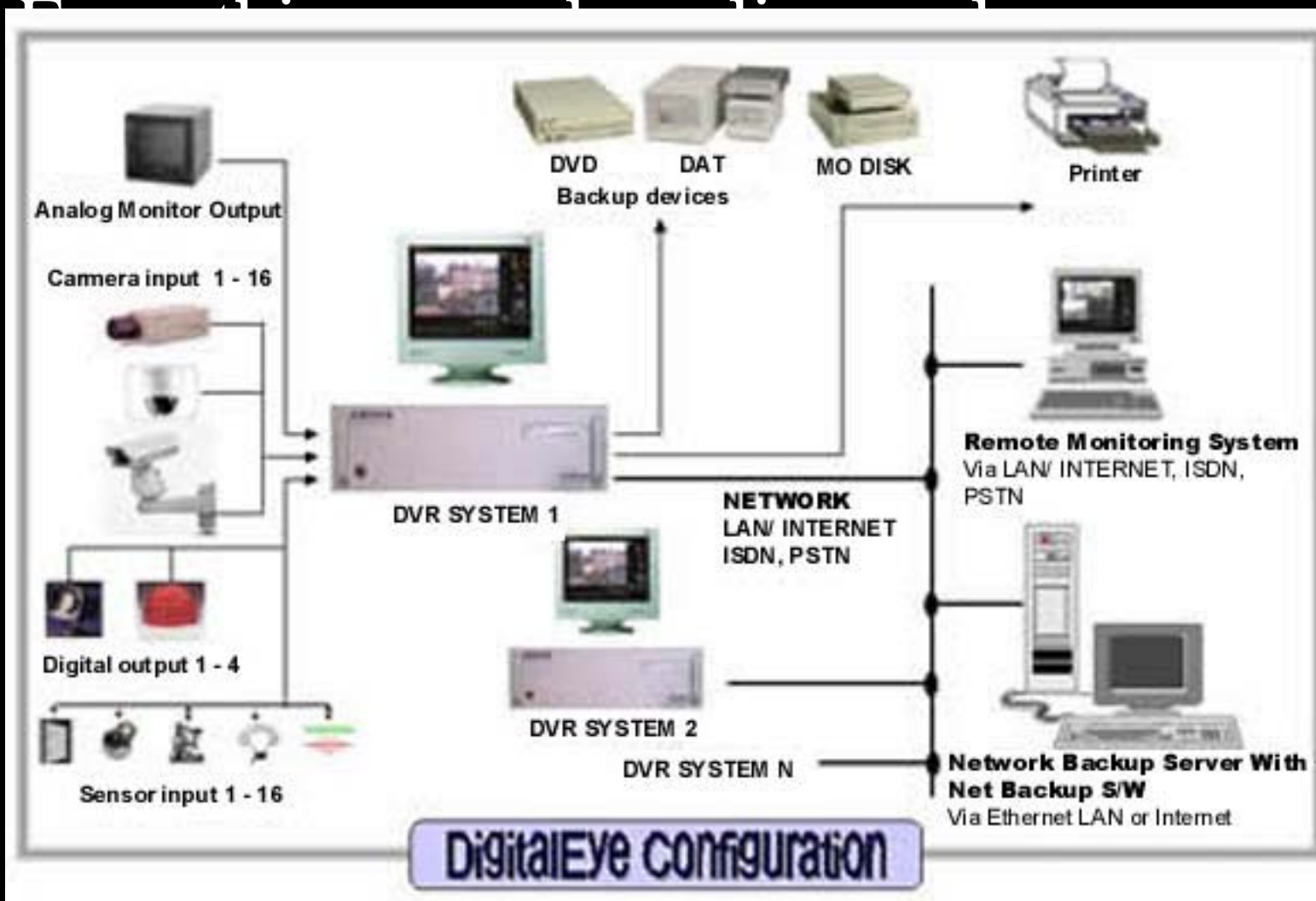
Copyright on the Web

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

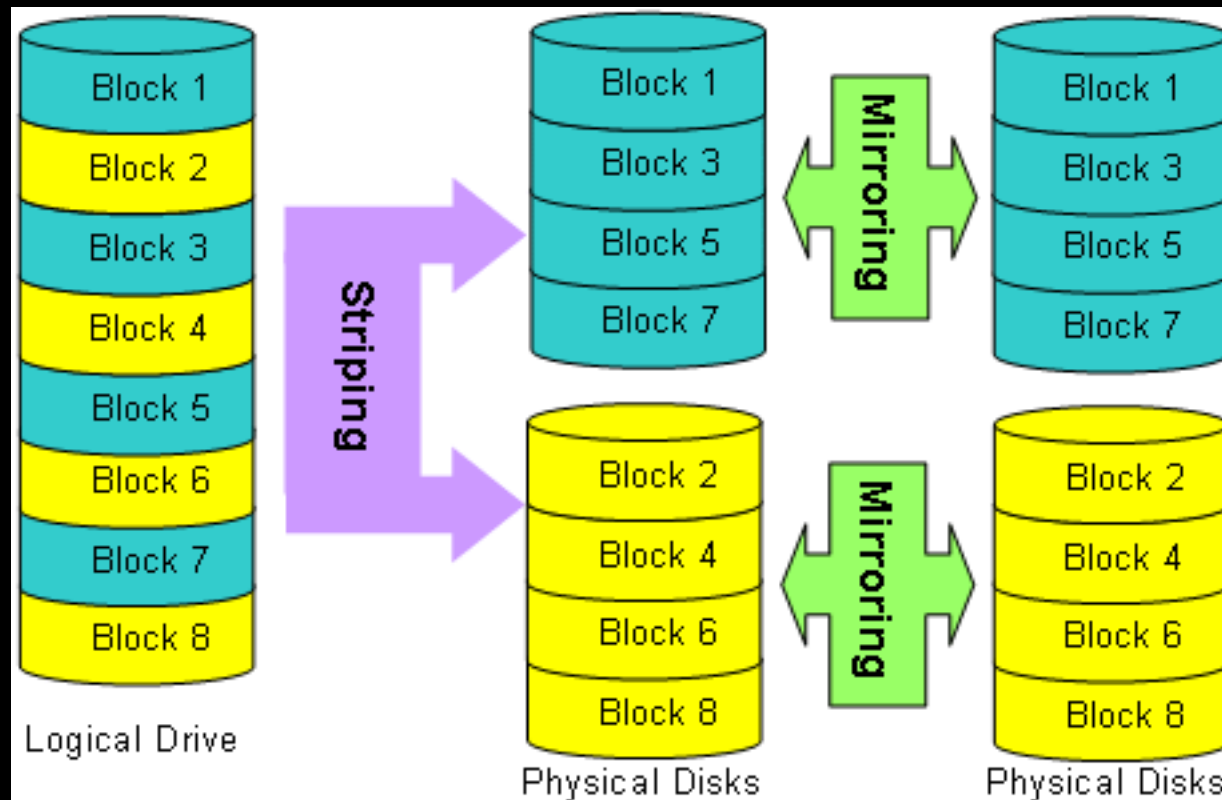


Everything you do online makes a copy

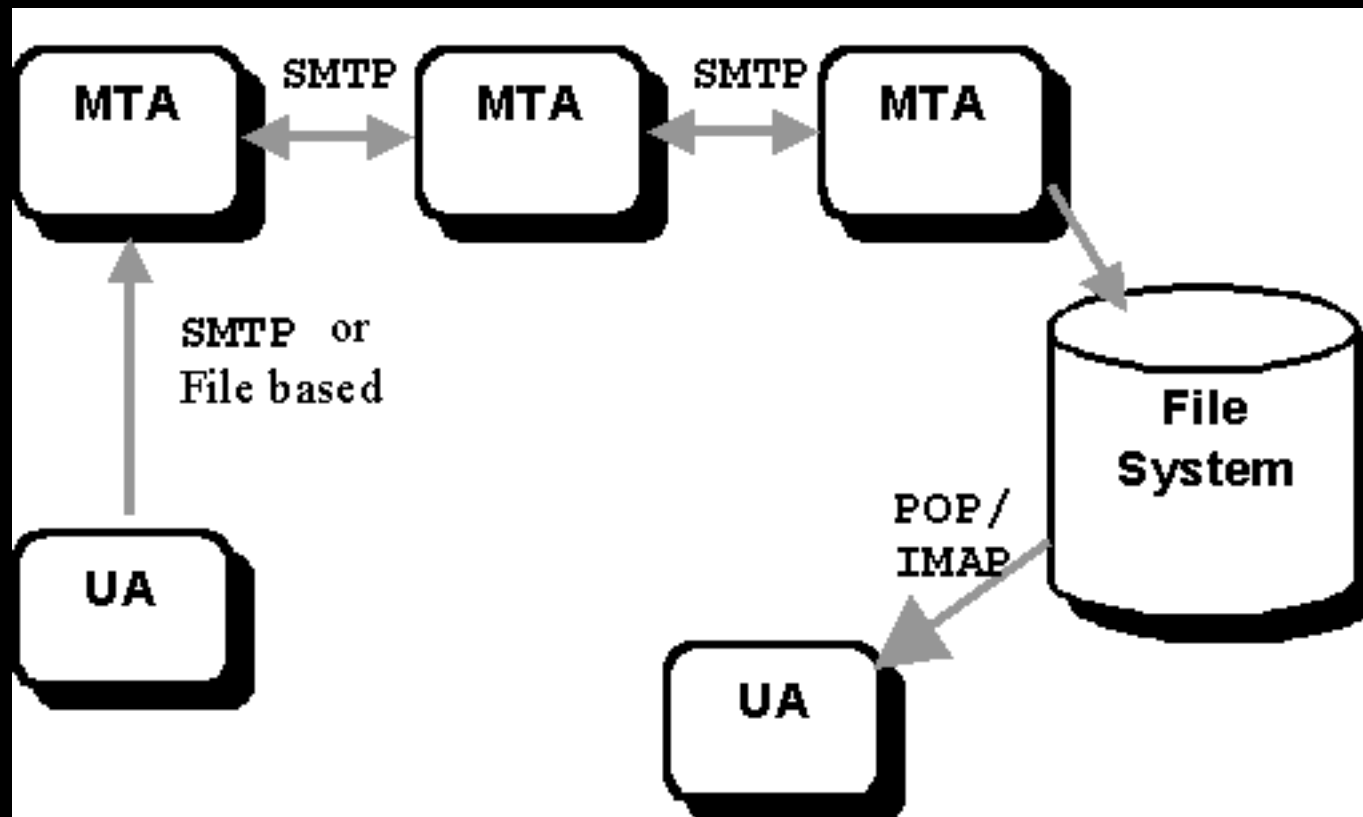




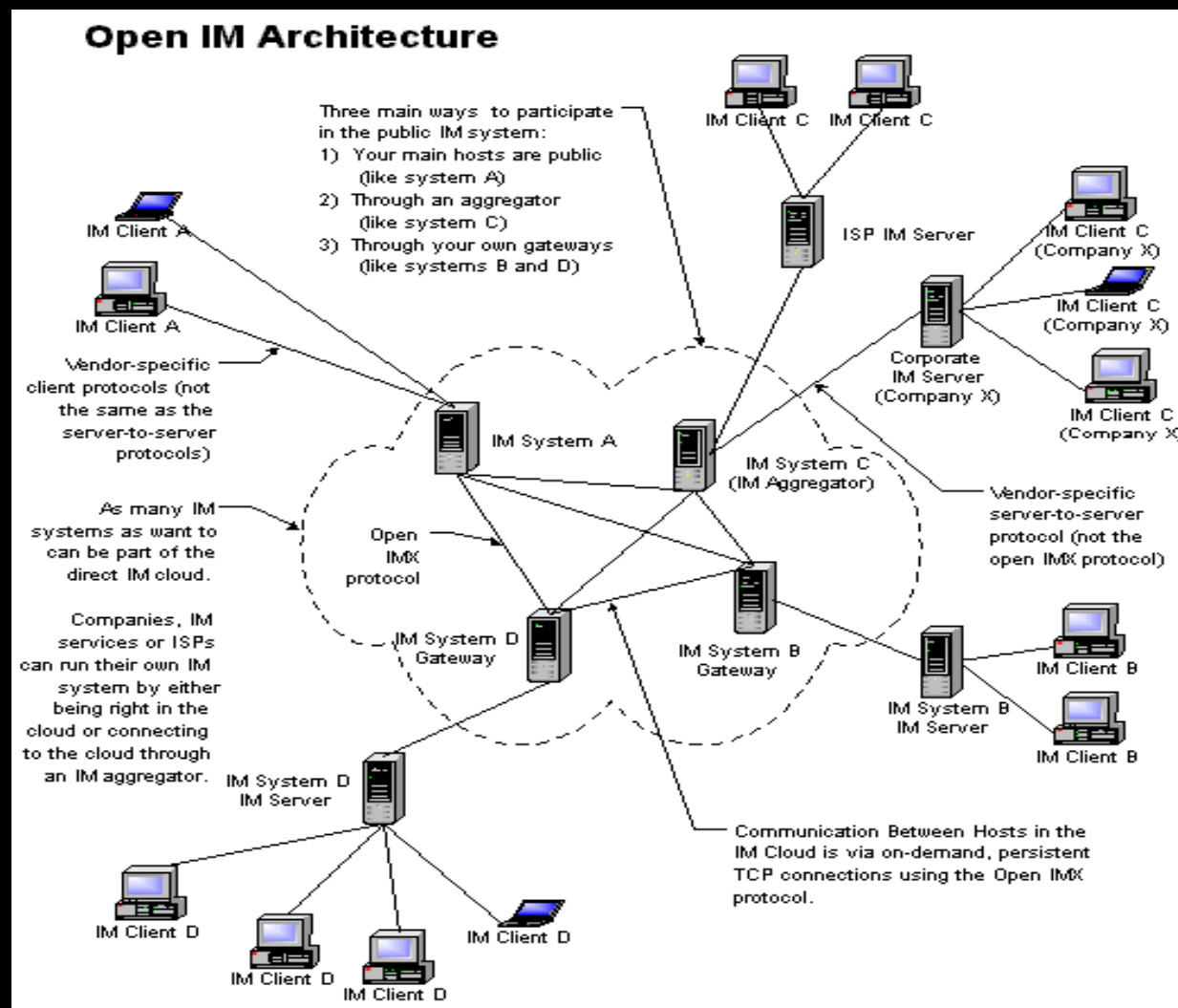
Everything you do online makes a copy



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

- (1) Implied permission/Opt-out
- (2) Linking, not hosting (for the most part)
- (3) Fair Use
- (4) 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 robots.txt
 - Covers spidering, caching, indexing and linking
- Opt-out respected and legally required under certain circumstances (DMCA Safe Harbors)

Linking, not hosting

- Linking to copyrighted works generally not an infringement, unless
 - You knew the link leads directly to infringing material; and
 - You kept on linkin’
- Solution:
 - Take links out of index upon complaint

Fair Use

- Traditionally a defense for
 - Personal non-commercial use
 - VCR/Tivo/iPod
 - Educational/First Amendment activity
 - Teaching
 - Parody/Criticism
 - Transformative Uses
 - Creative (remixing)

Image Search



[Web](#) [Images](#) [Groups](#) [News](#) [Froogle](#) [Local](#) [New!](#) [more »](#)

wolves

Search

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Images

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Wolves.jpg

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wolves-10.jpg

1152 x 900 pixels - 162k
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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 sells “all natural” adult images on web
- Third party sites copy and re-post images
- Google spiders images from all available sites and puts results in Google Image Search with links to original location + framing of original page
- P10 sends complaints but can’t keep up

Perfect 10 v. Google

- P10 sues Google for
- making and showing thumbnails; and
- Helping 3rd P sites infringe by linking to them and “displaying” them via frames
 - thumbnails substitute for cell phone pix
 - Google can block sites and filter

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

Perfect 10 v. Google

- Court says:
 - Thumbnails are fair use
 - useful search tools
 - Picture worth 1000 words
 - No evidence of use for cell phones
 - Linking is not illegal b/c Google didn't know and couldn't control 3rd P sites

Google Book Search



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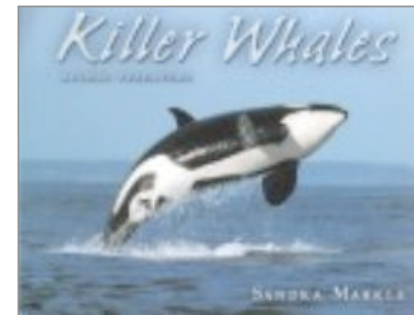
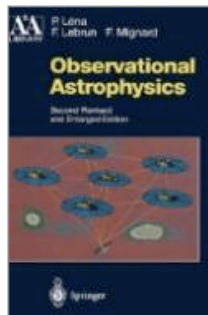
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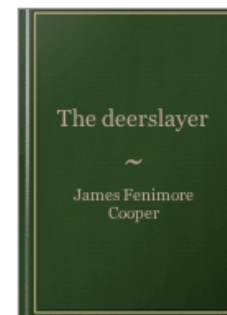
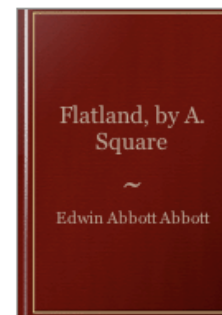
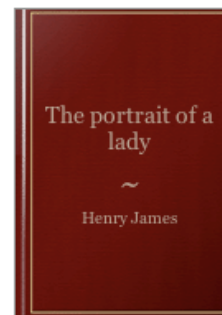
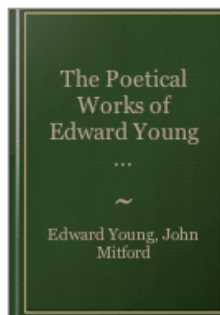
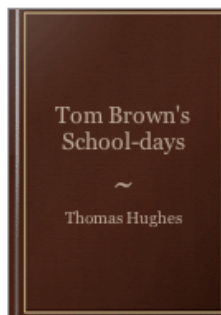
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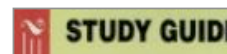
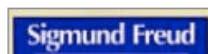
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by The Contracting Parties to the General Agreement on Tariffs and Trade

63 references to gatt in this book

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... CONTRACTING 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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Author's Guild v. Google

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 - We link to where you can buy/borrow
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 - 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, President, Author's Guild

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, publisher, O'Reilly Media, Inc.

Info ownership vs. info access

- Who owns access to the words in a book?
- What laws should govern this access?
- What's best for the consumer?
 - Market for creativity
 - Market for innovation
 - Market for education
- What's best for the Internet?

More information

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