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Policy

A Copyright Miscellany

There hasn't been a copyright essay in *C&I* since 2015—and I've almost stopped tagging copyright-related items, for a variety of reasons. As part of the gradual shutdown of *Cites & Insights*, I'm clearing out my dusty old Diigo archive. Much (perhaps most) of this piece could be considered nostalgia, but these old items may still have some relevance, if only to remind us that things could be worse. And then there's the time I honestly never thought would happen, since the Mouse has apparently decided not to keep pushing for Eternal Copyright on the Installment Plan...

As usual, broad categories (the last *really* broad), mostly chronological (oldest-first) within a category.

First Sale

Why is it that public libraries find physical books cheaper to buy and circulate than ebooks? Why is it that the DVD.COM portion of Netflix has so many shows and movies that Netflix as a streaming service doesn't? You've already read the answer: the First Sale Doctrine, which applies to physical objects but not, apparently, to digital resources that aren't encased in physical carriers.

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Redbox, Movie Studios, and Subversion of First Sale

This commentary by Fred von Lohmann appeared [February 18, 2010](#) on the Electronic Frontier Foundation (henceforth EFF) *Deeplinks* blog. It's CC-BY, and because it's such an interesting object lesson in the subversion of the doctrine (and brief) I'm quoting the whole thing:

As we've [explained before](#), a number of Hollywood movie studios have been on the war path against Redbox, the kiosk-based DVD rental operation, because Redbox offers DVD new releases for rent at 99 cents

per night. Thanks to the [first sale doctrine](#) in copyright law, Redbox's business is completely legal—the company buys legitimate DVDs to stock their kiosks. Great for consumers, and a great alternative for those who might otherwise opt for an unauthorized alternative online.

But Hollywood wasn't pleased, and took a number of steps to interfere with Redbox's business, which in turn led to lawsuits. Earlier this week, Redbox and Warner Brothers [settled their litigation](#), with Redbox promising not to offer Warner DVDs until 28 days *after* the DVD goes on sale. In other words, no more Warner new releases in the Redbox kiosks. Analysts predict this will be a blueprint for similar settlements with other Hollywood studios.

[The Media Wonk](#) has published [a great recap of what happened](#), detailing how the movie studios put pressure on distributors and retailers and ultimately succeeded in subverting the first sale doctrine:

I'm assuming the studios' were well-advised in their campaign against Redbox, and managed to strong-arm the wholesalers and big-box retailers without actually violating antitrust laws. But it's still worth noting, I think, the extraordinary lengths to which they were willing to go to thwart the plain language and intent of an inconvenient portion of copyright law.

The First Sale Doctrine was promulgated—first by courts and later by Congress—precisely to deny publishers control over the secondary market in copies of works. It evolved to ensure that the practical application of the copyright statute would not be inconsistent with the Constitutional purpose of copyright itself: “To promote the progress of science and useful arts.” It does that by encouraging a robust and innovative market in copies, including a robust secondary market.

Through their many Redbox machinations, the studios have found a way around the plain purpose of the First Sale Doctrine by effectively (if not quite illegally) fixing the price of DVDs in the secondary market.

I don't believe that needs further annotation.

You Bought It, You Own It: Vernor v. Autodesk

Same author, same blog, [February 11, 2010](#). Portions:

You bought it, you own it.

That's a concept we've been fighting to defend for years against erosion at the hands of patent and copyright owners, in contexts as diverse as [printer cartridges](#), [promo CDs](#), and [software](#). The answer should be simple—if you bought it, a copyright or patent owner shouldn't be able to use federal intellectual property law to dictate whether you can resell

it, simply by pointing to boilerplate in a license agreement or label. That's thanks to the "[first sale doctrine](#)" (also known as "exhaustion").

Today EFF, joined by national library associations, the Consumer Federation of America, Public Knowledge, and U.S. PIRG, filed an [amicus brief](#) in [Vernor v. Autodesk](#), the latest battle to raise the question of whether the "[first sale doctrine](#)" will continue to have vitality in a world filled with end-user license agreements that claim that you own nothing, but rather merely "license" it. The appeal pits eBay seller Timothy Vernor against software giant Autodesk. When Mr. Vernor tried to auction four authentic, packaged copies of AutoCAD software, Autodesk sent DMCA takedown notices to block his auctions and threatened to sue him for copyright infringement. Mr. Vernor, assisted by the lawyers at [Public Citizen](#), took Autodesk to court and [won](#).

Autodesk has appealed, arguing that so long as its license agreements recite the right magic words, it can strip purchasers of any ownership in the CD-ROMs on which software is delivered. If that's right, then not only don't you own the software you buy, but any copyright owner can simply recite the magic words and effectively outlaw libraries, used bookstores, and DVD rentals, among other things (eBay also filed an [amicus brief](#) on behalf of Mr. Vernor). That would be bad news not just for consumers looking to save a few dollars, but also for our ability to access older, out-of-print materials. For these materials, often libraries and second-hand sellers are the only hope for continued public access...

I won't quote from "Online Software Reseller Battles Bogus Infringement Allegations" (a [February 11, 2010](#) press release from EFF), but it provides some additional details about this crucial case.

No, you don't own it: Court upholds EULAs, threatens digital resale
Unfortunately, as recounted in this Nate Anderson story on [September 10, 2010](#) at *ars technica*, the Ninth Circuit held that First Sale did *not* apply—because you're forced to sign an End User License Agreement (EULA) to actually use AutoCAD.

Autodesk, the software's developer, forced all users to accept an agreement before using AutoCAD. This agreement made clear that AutoCAD was merely licensed, never sold, and that one's license was non-transferable. Further, a licensee could not rent, lease, or sell the software to anyone else; you couldn't even physically transfer the discs out of the Western Hemisphere (!). Finally, if you upgraded to a new version, the old version had to be destroyed.

The copies Vernor picked up at the architect's sale were old copies that had not been destroyed as required. Vernor believed he was in the clear to resell them, as he had not agreed to any license...

So how does one know when it's a "license" or a "sale"? (In other cases, courts have ruled that simply calling something a "license" doesn't make it so.) In today's ruling, the judges laid out a test:

"We hold today that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."

There's much more to this excellent story, not discussed here.

So what finally happened? As far as I can tell, not much of anything: [Wikipedia's](#) article ends as follows:

On October 1, 2010, Vernor filed a petition for the case to be reheard en banc. Autodesk filed its reply on November 10, 2010. The Ninth Circuit denied the request on January 18, 2011.^[15] The [Supreme Court](#) denied Vernor's petition for [certiorari](#) in October 2011.^[16]

Appeals court upholds first sale doctrine for promo CDs

Jacqui Cheng wrote about a somewhat different first sale case [on January 4, 2011](#) at *ars technica*.

Collect all those promo CDs you managed to pick up at bars and clubs and get ready to make a trip to your local used music shop: the Ninth Circuit Court of Appeals has ruled that it's legal for you to sell those CDs. In the case of *UMG vs. Augusto*, the appeals court upheld a lower court's decision, saying that a mere stamp on the CD label isn't enough to force the recipient into a license agreement, and therefore people can resell the CDs without the record label's permission.

There's more—and a key difference appears to be that the CDs were gifts, with no license being signed. Quoting from the ruling

"Because the record here is devoid of any indication that the recipients agreed to a license, there is no evidence to support a conclusion that licenses were established under the terms of the promotional statement," wrote Judge Canby on Tuesday. "Accordingly, we conclude that UMG's transfer of possession to the recipients, without meaningful control or even knowledge of the status of the CDs after shipment, accomplished a transfer of title."

[I'm skipping the Kirtsaeng saga, a bizarre situation in which one court ruled that physical books *manufactured overseas* were not entitled to First Sale protection, because the Supremes eventually got it right and because it would require more space than I'm willing to provide. If you're interested, [these links should provide](#) at least a [framework](#).]

Various Issues

No core theme here, just a few items that seemed worth noting at the time.

What's Wrong With Paying Homage To A Literary Classic By Writing A Sequel?

That very good question was addressed by Mike Masnick [on August 17, 2009](#) at *techdirt*. Masnick points to a John Bennett post, [a day earlier](#), at *Against Monopoly*—which in turn points to a *New York Times* article, but I don't link to paywalled material. Here's the Bennet post, in full:

The problem of unauthorized book sequels have been with us since the beginning of copyright. Charles McGrath brings us up to date on it [link here](#). By his account, if the originator doesn't object, the sequel writer can get away with it. If not, he can be made to pay or be banned completely. The problem seems to be showing that the sequel is transformative. That obviously is in the eye of the beholder and judges don't seem to be very sympathetic and may not recognize the point. It is clear that the sequel writer wants to capitalize on the popularity of the original but is also paying a form of homage and sends readers back to the original. Unfortunately, author ego gets heavily engaged and appears to prevail in the courts.

It would be hard to write a clarification of copyright that might serve the public interest as well as the originator's. To me it seems that the possible net harm of a sequel, even a bad one, is so small as to warrant allowing them all.

It would be a good move, short of drastically shortening the validity of copyright or abolishing it entirely.

Here's the thing: by any reasonable definition of "transformative," a sequel or prequel should *absolutely* qualify. In fact, unless the character names are trademarked, I don't believe there should even be an issue (but courts apparently disagree): if book and article titles can't be copyrighted (and they can't, as far as I know), why should character names be protected?

Sure, if a sequel patterns itself after the original to such an extent and in such a way that it appears to be authorized, there could be a legal claim—but the claim shouldn't be copyright.

Masnick really doesn't add a lot. He quotes two key paragraphs of the *Times* piece (after referring to *Pride and Prejudice and Zombies*):

Yet the urge to write sequels and prequels is almost always an homage of sorts. We don't want more of books we hate. The books that get re-written and re-imagined are beloved. We don't want them ever to be over. We pay them the great compliment of imagining that they're almost real: that there must be more to the story, and that characters we know so well—Elizabeth Bennet, for one, or Sherlock Holmes, who has probably inspired more sequels than any other fictional being—must have more to their lives. In a couple of quite good sequels recently—"A Slight Trick of the Mind," by Mitch Cullin, and "Final Solution: A Story of Detection," by Michael Chabon—we even get to watch Holmes grow old and discover love of a sort.

Certain books are more than mere texts—words on a page or, these days, an electronic reading device. They're part of our mental furniture. And yet it's their familiarity, their well-wornness, that makes them such tempting targets. If zombies were to turn up, for example, in Mrs. Gaskell's "Cranford," it wouldn't be nearly so funny.

Masnick's comment:

And, then when you think about it, if copyright is designed to encourage more creativity, wouldn't these sorts of re-imaginings of already existing fictional worlds fit that criteria exactly?

I'd think so. But then, to many folks (sometimes including judges), copyright *should* be about protecting revenue, not encouraging creativity. Yeah, I know, the Constitution, but hey, when it's Money vs. Constitution...

A long string of comments. Interesting in their own right. I found it interesting that a writer (wanting to protect their own right to create a series) wasn't sure how to spell "canon"—and added (sp?) rather than, y'know, checking it. Talk of canon, fanfic, etc... There's the following comment, which I'd love to believe was intended as satire...

In modern business we can not afford to foster unfettered creativity and we must aggressively protect those assets that are owned by business. If anyone can create works whether it be creative works or new inventions based on existing intellectual PROPERTY, then those who STEAL these ideas devalue the corporations that we all need to provide jobs and tax income. Perhaps we should re-evaluate our IP laws to address the needs of the true engines that drive our economy and let go of the nostalgic sense of the cowboy creator. Those days are long gone.

Unfortunately, I'm fairly certain it was a serious comment.

As I read through the comments, which are several times as long as the piece itself. I believe they're worth reading—even, or especially, the arguments among commenters.

why, oh why, CC-BY?

Items related to Creative Commons licenses have typically appeared in OA discussions, and may yet again—but this piece, by Bethany Nowviskie posted [May 11, 2011](#) on her blog, offers a thoughtful and worthwhile discussion of why she changed the blog from CC-BY-NC to CC-BY. Portions of that discussion:

The CC-BY-NC license I first adopted permitted attributed use of my content but restricted that use (without further, explicit permission from me) to non-commercial republication venues. CC-BY, on the other hand, means I'm only asking that my name appear in some way attached to my words (or images, or other intellectual property)...

When it comes to scholarly communication, I stand in [Jeffersonian discomfort](#) with the notion of “monopolies of invention” (a subject I’ve [addressed before](#)). In the humanities—where we are constantly and rightly concerned with our ability to reach broad audiences and articulate the public good of investment in the liberal arts—assertions of exclusive ownership may well “produce more embarrassment than advantage to society.” Commercial exploitation? We should be so lucky.

So, why did I adopt an NC designation, only to change it? I had had a fuzzy notion about non-commercial use being more in line with the impulses that were driving me toward the “copyleft” approach of Creative Commons in the first place. That is, I wanted my information to be free—so what could be more perfect than asking others to distribute it freely?

On further reflection—prompted in part by the experience of my colleagues in trying to reconcile disparate licenses of well-intentioned contributors to the [Hacking the Academy](#) project—I came to understand that my “non-commercial” requirement was actually weakening the Commons.

First, I realized that I was discouraging or [at least slowing down](#) any possible re-use of my content by requiring that people ask my permission. Yes, there is, as Kathleen Fitzpatrick muses, [something unsettling](#) in deliberately relinquishing control over one’s intellectual property—especially for academics working within a system that almost only rewards individual achievement, and which teaches us to polish our ideas until they are bright and perfect gems, to be carefully and deliberately placed for best effect. But I could only (and that with some difficulty) imagine edge cases in which I would not automatically grant permission for re-use of content I had published here. Which led me to my second conclusion.

More restrictive licenses, for me—for the kind of thing I write and work on, for the paths and audiences I imagine for that work, and for the kind of [#alt-ac](#) scholar I want personally to be—read like progressive degrees of arrogance. This goes beyond an admittedly flip, knee-jerk “we should be so lucky” reaction. Does an NC license imply that I believe my content to be of recognizable commercial value of which I should be in full and solitary control? (Well, I did *blog* it, after all.) No, it’s more the sheer, unthinking presumption I now see in well-meaning “NC” and even viral “SA” (share-alike) restrictions.

I’m just not bright enough to presume to predict financial aspects of future publishing models in the humanities. Limiting my default scope to non-commercial ventures seems presumptuous and naïve. Current presses and projects I admire are struggling, and if any of my content, bundled in some form that can support its own production by charging a fee, helps humanities publishers to experiment with new ways forward—well, that’s precisely why I CC-licensed it in the first place. I also want to minimize my participation in any system that could lead to an

“[orphaned works](#)“ problem. Perhaps there’s a very clear answer to the question of who gives permission on my behalf if I am dead or incapacitated and my heirs are unreachable or unresponsive. My guess, however—since I am no writer of importance—is that, in my absence, any little roadbump on the path to permission will virtually assure my content *not* be republished. If it’s already becoming evident that more restrictive enfranchisements slow down re-use of Creative Commons-licensed content, and that US copyright law is [geared to support](#) the interests of big business—how hard do we expect future small-potatoes humanities editors to try?

That’s quite a bit of it, although there’s more. It strikes me as well-reasoned. I’m a slow learner: I didn’t switch *Cites & Insights* to CC-BY until 2017. Mea culpa.

Tuition is a Movie Ticket, OER are Popcorn

This post, by David Wiley on [November 28, 2012](#) at *iterating toward openness*, deals with a Creative Commons license issue: to wit, if a resource has NC (noncommercial) as part of its license and a non-profit university or college *that charges tuition* uses that resource, does that violate the license? Wiley’s addressing a question by Brian Lamb on a closed list. Portions:

The extremely misguided thinking Brian is referring to (and *not* personally guilty of) goes, “If someone is charges tuition for a course that uses a NC textbook, that violates the terms of the license.” This line of thinking is **completely** wrong. Full stop. Here’s why.

Every person in the world already has permission to use BY-NC-SA materials non-commercially. This group, every person in the world, includes students who enroll in a tuition-charging class. The STUDENT is the user, not the UNIVERSITY. What is the purpose of a textbook? To promote learning. Who learns, the university or the student? The student. Who buys the textbook, the university or the student? The student. The student is the user of the BY-NC-SA material, regardless of who suggests that s/he use it. And if a student wants help exercising their BY-NC-SA rights with regard to an OER, and is willing and able to pay someone to help them exercise those rights more effectively or efficiently than they can on their own, the NC clause doesn’t regulate that. Period.

The mention of “tuition” is a red herring. Tuition has nothing to do with textbooks. When you go to the movie, you have to buy a ticket to get into the theater. But no matter how much the movie theater wishes you would buy their ridiculously overpriced popcorn, they can’t force you to. Likewise, when you take a university course, you have to pay tuition to get into the class. But no matter how much the university wishes you would buy the ridiculously overpriced required textbook, they can’t force you to.

There's more, but that's the essence, and it strikes me as exactly right.

Public Domain and CC0

A few items related to the public domain—including one that sort-of differentiates the two.

Supreme Court weighs legality of putting public domain works back under copyright

This article, by Timothy B. Lee on [October 5, 2011](#) at *ars technica*, discusses a situation that I would have naïvely thought impossible: Congress acting to restore copyright to works *already in the public domain*.

The case also finds Supreme Court justices in very different positions than you might expect: Scalia regarding this restoration as unconstitutional—and Ginsberg finding it perfectly appropriate.

The Supreme Court on Wednesday considered whether Congress violated the Constitution when it took thousands of works by foreign authors out of the public domain. As Chief Justice Roberts described it: “One day I can perform Shostakovich; Congress does something, the next day I can't. Doesn't that present a serious First Amendment problem?”

Previous cases had to do with retroactively *extending* copyright—but not *restoring* it. (Yes, RBG was on the longer-copyright side in those cases as well.) In this case, the Uruguay Round Agreements Act tried to “harmonize” US copyright law with international law by restoring copyright for works by some foreign authors.

The case was tied up in court for years. A lower court originally ruled that the restoration of copyright was unconstitutional, but in June 2010 the United States Court of Appeals for the Tenth Circuit disagreed. It held that the extension was necessary to secure reciprocal copyright protection for American copyright holders overseas, and that this was a compelling government interest sufficient to overcome First Amendment concerns.

Lee's piece notes some of the arguments and thoughts at the hearing. One comment from an attorney challenging the restoration:

“A statute that does nothing but take old works out of the public domain without any impact on prospective incentives, cannot stimulate the creation of anything,” he said.

Lots'o'comments, at least one of which says what I usually believe to be the case when it's argued that the US must extend copyright to “harmonize” with other countries:

Quote:

The United States wanted foreign governments to provide stronger copyright protection and enforcement for American authors, and Verilli claimed that those governments demanded restoration of foreign authors' copyrights in return.

More like: "The media lobbying arm of the United States, for their own benefit, wanted foreign governments to provide stronger copyright protection and enforcement." Naturally, they agreed to reciprocate those efforts here.

I'd go a bit further: isn't there good reason to believe that the lobbying groups are helping to *get* the longer-copyright laws passed?

Unfortunately but almost predictably...see the next item.

Losing our focus

This discussion, by Kevin Smith on January 18, 2012 at *Scholarly Communications @ Duke*, lays it out in the first paragraphs:

Today the Supreme Court issued a decision in the case of *Golan v. Holder* which is a significant defeat, I think, for the public domain in the United States. Reading the opinion has made me wonder if we have really strayed from our fundamental commitments about intellectual property.

The case involved the complex and technical issue of restored copyrights in foreign works —works that were originally created and published abroad. As part of the U.S.'s decision to join the Berne Convention and other international treaties on intellectual property, Congress enacted an amendment to the Copyright Act, now found in section 104A, that restored copyright in foreign works that had risen into the public domain in the U.S. but were still protected in their countries of origin. The effect was to remove works from the public domain after they had already lawfully become the property of every U.S. citizen. Several groups, including musicians, publishers and others who had relied on the ability to freely exploit these public domain works, brought a lawsuit to challenge the constitutionality of this unprecedented alteration in the terms of the copyright bargain.

Smith discusses the situation, and as always he's more eloquent than I could ever be. I will quote a portion (involving Will Cross) related to the Constitutional basis for copyright:

The other principle Will discussed was the incentive purpose that is given as the reason, in the Constitution, for allowing Congress to enact intellectual property laws. This purpose is pretty clearly rejected by the majority, when Justice Ginsberg writes that "Nothing in the text or history of the Copyright Clause, moreover, confines the 'Progress of Science' exclusively to 'incentives for creation.'" It is hard to see how else that clause can be read, and Justice Breyer, in his dissent, provides a

compelling account of why the U.S. enacted copyright in the first place, and why it is supposed to be limited. He goes on to note that “The statute before us, however, does not encourage anyone to produce a single new work.”

It seems clear to me, as it does to Justice Breyer, that the wording of the Constitution’s Copyright Clause was to restrain Congress and direct that laws serve a specific purpose. The majority of the current Court, however, does not see it that way. We really have opposing visions of copyright law at work here, and the deference to any Congressional enactment, no matter how one-sided and counter-productive to new creativity, has made the Constitutional language increasingly ineffective. It is one of those situations where we must hope that, over time, the persuasiveness of the dissent will eventually move it to be the majority view.

Sad.

Elon Musk put SpaceX’s photos in the public domain

This piece, by Jessamyn West [on March 23, 2015](#) at *The Message*, is interesting in several respects—not least of which is an update message at the bottom. Which we’ll get to.

Before discussing this, you need to see the tease:

So why does Flickr say they’re licensed?

I’d be tempted to quote the whole thing—but, try as I might, I can’t find CC license information at all, much less the BY I’d expect.

The situation: SpaceX posted a [bunch of pictures](#) from recent launches on Flickr. (Currently 772 photos, and it’s a remarkable collection.)

Hey, a set of cool (and recent) space photos is now in the public domain! I zipped over to see [SpaceX’s public domain photos](#), but they weren’t public domain. Why?

In the course of reporting on SpaceX’s recent launches, Jason Koebler wondered in February [who owned the rights to their photos](#)? NASA photos, like most photos from other [federal agencies](#), are [public domain](#), free for anyone to use for any reason. SpaceX’s weren’t. Did they legally even have to be?

Digital content that gets shared on platforms like Flickr often does not have a clear path to the public domain. The [White House got a Flickr account](#) in 2009 and had been posting photos with a [Creative Commons Attribution license](#), a pretty open license but not public domain. After being [taken to task for this by the EFF](#) and the [Creative Commons Foundation](#), Flickr created a new copyright indicator for the White House and other U.S. government agency accounts labeled “US Government Works.” The option to search for these items is still pretty buried in the bowels of the [Advanced Search page](#), but it’s there.

If you clicked on either link to the SpaceX collection, you'll find that they *are* explicitly labelled as PD. But that's getting ahead of the story...

The collection ("100+ photos" at the time) went up with a CC-BY license. Then someone asked Elon Musk (on Twitter) "Why not just public domain? What is there to lose?" to which Musk responded: "Just changed them to full public domain."

Which is great. You're a well-off person, why not engender good will by giving some of your content away to an appreciative public? It's good PR with few downsides. But how does that work exactly? More to the point why aren't the photos labeled public domain now, two days later? It's just changing a setting, right? Not quite.

The story that follows is best read in the original, but I was a little gob-smacked by Flickr's reasoning as to why there was *not* a PD option:

the reasons we don't have a PD option: (i) **Unlike CC licenses, you can't take PD back—once it is done, it is done.** I spec'd out a three stage confirmation (including typing out that you understand what it means) but this seemed like too much and we didn't want the support hassle. People are free to use the description field to specify their PD desires. (ii) There are liabilities that we don't want to take on if we allow people to claim something is public domain without actual checking the chain of title—if they don't own it in the first place, we can get in trouble. (This is also true of CC images, but at least that can be changed after the fact and there is less of a chance of the image just "escaping" in the wild.) [Emphasis added.]

To the best of my knowledge—and I've been using CC licenses for a very long time—that bolded phrase is wrong. If it was right, CC licenses would be useless, as a user could never be sure the copyright owner wouldn't "take it back." (The exception—the user doesn't have the *right* to assign something to the public domain—applies equally to any CC license.)

There's more to the story, including several PD images, but that's the heart of it. And whether it was West's story or other stuff that caused it, there's a happy ending, as in the update: "Flickr now allows public domain and CC0 designations." That notice on the flickr blog is dated [March 30, 2015](#), and while West doesn't get a callout, the timing is at least interesting. The key paragraphs in the post:

But we've heard from our community that we're missing two important designations: Public Domain and Creative Commons 0 (CC0). Many members of our community want to be able to upload images that are no longer protected by copyright and correctly tag them as being in the Public Domain, or they want to release their copyright entirely under CC0.

So, starting today we're happy to support these two new options. One of the first accounts on Flickr to change its designation was [SpaceX](#),

which has uploaded more than a hundred gorgeous images of its launches. These extraordinary photos are now available for others to freely use, enhance, and promulgate without restriction under copyright law.

The difference between public domain and CC0? Quoting from Creative Commons:

Unlike the Public Domain Mark, CC0 should not be used to mark works already free of known copyright and database restrictions and in the public domain throughout the world. However, it can be used to waive copyright and database rights to the extent you may have these rights in your work under the laws of at least one jurisdiction, even if your work is free of restrictions in others. Doing so clarifies the status of your work unambiguously worldwide and facilitates reuse.

You should only apply CC0 to your own work, unless you have the necessary rights to apply CC0 to another person's work.

So *technically* the SpaceX collection isn't *quite* public domain, but for 99.9999% of all uses it's a distinction without a difference.

And to end this section, the remarkable fact that copyright was *not* extended for another 20 years in 2018 (Disney blinked...), so that the public domain timewall is once again a moving barrier:

A Landslide of Classic Art Is About to Enter the Public Domain

This article is by Glenn Fleishman, on [April 8, 2018](#) at *The Atlantic*, and I find it a bit...odd?...that the section heading is "Technology." The tease:

For the first time in two decades, a huge number of books, films, and other works will escape U.S. copyright law.

It's a well-written piece and not too long, so I'll point to it rather than quoting all that much. The basic situation: because Congress did *not* act in 2018, works published in 1923 entered the public domain on January 1, 2019—and, barring some surprises, those published in 1924 will become public domain on January 1, 2020 and so on. Well, for a while: for works created after 1977 where rights are held by the creator rather than a corporation, the term is life plus 70 years, so there's a big partial interregnum. Pieces:

The Great American Novel enters the public domain on January 1, 2019—quite literally. Not the concept, but the book by William Carlos Williams. It will be joined by hundreds of thousands of other books, musical scores, and films first published in the United States during 1923. It's the first time since 1998 for a mass shift to the public domain of material protected under copyright. It's also the beginning of a new annual tradition: For several decades from 2019 onward, each New

Year's Day will unleash a full year's worth of works published 95 years earlier.

This coming January, Charlie Chaplin's film *The Pilgrim* and Cecil B. DeMille's *The 10 Commandments* will slip the shackles of ownership, allowing any individual or company to release them freely, mash them up with other work, or sell them with no restriction. This will be true also for some compositions by Bela Bartok, Aldous Huxley's *Antic Hay*, Winston Churchill's *The World Crisis*, Carl Sandburg's *Rootabaga Pigeons*, e.e. cummings's *Tulips and Chimneys*, Noël Coward's *London Calling!* musical, Edith Wharton's *A Son at the Front*, many stories by P.G. Wodehouse, and hosts upon hosts of forgotten works, according to research by the Duke University School of Law's Center for the Study of the Public Domain....

As the article notes, there's a *lot* of uncertainty about works published between 1924 and 1963. Most of those works—perhaps as much as 90% of them—did not have their copyrights renewed, which means they're in the public domain *if you can prove there was no renewal*.

The last paragraph's noteworthy:

A Google spokesperson confirmed that Google Books stands ready. Its software is already set up so that on January 1 of each year, the material from 95 years earlier that's currently digitized but only available for searching suddenly switches to full text. We'll soon find out more about what 1923 was really like. And in 2024, we might all ring in the new year whistling Steamboat Willie's song.

And that bit of good news ends this section.

Piracy

A mix of very old and quite recent about definitions and changes related to “piracy,” which as a term related to copying that doesn't remove the original is just a *little* better than “predatory” as applied to journals.

Copyright Warning Bookmark

Brian Herzog posted this on June 17, 2010 at *Swiss Army Librarian*. It recounts an odd incident at Herzog's library. The story itself:

We had sort of an odd situation in my library a little while ago - the story is a bit long, so please bear with me:

As circ staff were checking returned items back in, they found a DVD case with no disc in it (not unusual). They called and left a message for the patron to check their DVD player and please return the missing disc.

The patron called back after we were closed, left a message that she returned the wrong case, and asked we call her at work the next day.

What? *Wrong case?*

When our Head of Circulation called her the next day, the work number the patron gave was for a video reproduction company(!). When she finally spoke with the patron, the patron told her that she had the disc and the library's case, and the one she returned (accidentally) was a color photocopy she'd made of the DVD jacket (which it was, and confirmed in that the barcode and other stickers were no longer stickers).

This set off debate amongst the department heads in my library. It seems, clearly, that this patron worked at a video reproduction company that was checking out DVDs from the library and not just ripping the DVDs, but creating reproductions of the cases too - to who knows what end. Even if they're not mass reproducing them for sale, this activity is still illegal.

But, we have no actual proof of DVD copying, just speculation (maybe she just liked the DVD jacket?), and it'd be a major step to accuse a patron of this or to notify the police (or FBI?). So after some debate, we decided the library's role is to:

- make information and materials available to the public, and
- make the public aware of the copyright limitations of library materials

Our logic is that we can't police patrons and force them to follow intellectual property laws, but it is our responsibility to make sure they are informed of those laws.

Was this the right logic? I'm inclined to believe it was. What makes it more interesting is that when Herzog contacted Carrie Russell, who at the time was a copyright specialist for ALA, Russell's response began:

I usually suggest that the library suspend the patron's borrowing privileges when it is clear they are infringing.

But this presupposes guilt: that it is clear the patron was infringing. The library staff discussed this and concluded—again, correctly I believe—that a suspension was not called for. Instead, they crafted a copyright infringement bookmark to be “kept at the Circ Desk and given to those patrons we suspect need the information most.”

The comments are interesting, but don't add a lot.

Empirical Copyright Research is Hard

This post, by Carlos Ovalle [on April 13, 2010](#) at *copy this blog*, is about a different aspect of “piracy”: how much damage is done by copyright infringement, and is the net effect on society positive or negative?

Various rightsholder associations have touted various Huge Numbers as to the amount of “piracy,” and those numbers typically have one thing

in common: they're SWAGs (Statistical Wild Ass Guess), essentially pulled out of thin air.

Ovalle quotes from a GAO report on the situation:

Three widely cited U.S. government estimates of economic losses resulting from counterfeiting cannot be substantiated due to the absence of underlying studies... no single method can be used to develop estimates. Each method has limitations, and most experts observed that it is difficult, if not impossible, to quantify the economy-wide impacts. Nonetheless, research in specific industries suggest that the problem is sizeable, which is of particular concern as many U.S. industries are leaders in the creation of intellectual property...

...We determined that the U.S. government did not systematically collect data and perform analysis on the impacts of counterfeiting and piracy on the U.S. economy and, based on our review of literature and interviews with experts, we concluded that it was not feasible to develop our own estimates or attempt to quantify the economic impact of counterfeiting and piracy on the U.S. economy.

and specifically points out that RIAA and MPAA numbers are based on, well, wildly questionable assumptions and extrapolations.

Ovalle's final remarks:

That's important when looking at these types of studies- they're not necessarily generalizable. That's pretty much a constraint of ANY study of this type, including the others mentioned that had highly questionable assumptions and equally questionable methodologies. The lack of generalizability doesn't mean that the study isn't useful- you can still plan courses of action at least informed by such studies, and of course you can plan to do additional research.

I think that it's really important that people use real numbers when making arguments about what law and policy should accomplish. The problem is, people don't really seem to have any kind of incentive to do that. Law and policy seem to be made on talking points related to the horrible numbers and other appeals to emotion not based on evidence, and that is a shame.

As far as I know, the situation has not improved. Nor is it likely to.

What the powers-that-be think about DRM, and an explanation of the cloud

This piece, by Mike Shatzkin [on January 16, 2011](#) at *The Shatzkin Files*, certainly doesn't explain the cloud, but never mind. It helps to realize that Shatzkin calls himself "a widely-acknowledged thought leader about digital change in the book publishing industry."

He's very much pro-DRM (I call it "Digital Restrictions Management" although the "R" is technically "Rights"), and he's very much opposed to casual sharing—that is, sharing of books among friends.

What's truly odd about this post is apparent right up front:

[My last post](#) stemmed from a single catalyst: my frustration with what I feel is the tendency of those opposed to the use of DRM to promote the straw horse that people who defend its use must believe that DRM prevents, or even largely discourages, piracy. I know that isn't true of me and I suspected that it wasn't true of most of the powers-that-be in commercial publishing, on the publisher side or the agent side.

So somehow anti-DRM people might be persuaded if they're told "publishers insist on DRM—but not because it prevents or discourages piracy"? That seems to equate to "publishers insist on DRM *because they hate readers*," and that seems odd. I mean, if DRM isn't doing anything but get in the way of readers, what's the point?

The earlier post, linked to above, is actually remarkably clear about this—given Shatzkin's pro-DRM stance:

So here's what I think. I have no idea whether piracy helps sales or hurts them but, whatever it does, I can't see how DRM prevents it. But I do think DRM prevents "casual sharing" (it sure stops me; and I think most people are more like me than they are like my friends who break DRM for sport) and I believe—based on faith, not on data—that enabling casual sharing would do real damage to ebook sales with the greatest damage to the biggest books.

Big general publishers *survive* based on the performance of their biggest books. Agents survive based on the sales of their biggest authors. So the biggest publishers and the biggest agents, if they see it the way I do, would be in favor of DRM even if it does nothing at all to prevent the kind of piracy they attempt to cure with take-down notices.

There are a lot of good reasons to dislike DRM. It can make purchasing or consuming something harder. It is apparently responsible for the lion's share of customer service costs for all ebook vendors. It can foil legitimate use by a legitimate purchaser. And it costs money and adds complications. In general, the more comfortable you are with technology, the more likely you are to be annoyed by DRM.

So: DRM does *not* deter the bad guys—but it stops friends from lending ebooks to friends. That makes it a good thing? Wow...

Anyway: *this* post offers the results of Shatzkin's extensive survey of "top publishing people"—not named, but identified as "Nine very high-level executives in seven different top dozen publishing houses, plus four literary agents with extremely powerful client lists."

For what it's worth, 11 of 13 agreed DRM was necessary to protect sales, *ten* agreed that it wasn't an effective deterrent to piracy, and 12 agreed

that the main function of DRM was to prevent casual sharing. There you have it: big publishers agree that they're inconveniencing you to keep you from sharing the books you love, not to prevent criminal activity. Doesn't that make you feel all warm and fuzzy (especially if you "bought" ebooks from Microsoft—but at least MS is refunding your money)?

To Shatzkin, the "big surprise" is that two of the four agents did *not* agree that DRM was needed to protect ebook sales.

Oh, and the solution—to some publishers—is The Cloud: you won't ever actually *have* something on your own device. Then there's this comment from a publisher, who lets us know how at least one publishing executive feels about libraries:

"The whole world is moving away from download and own, so DRM is a moot point—only the library fanatics and the digerati care. The library folks are freaked out by the fact that they have no place in a world that makes all content accessible to single users anywhere, anytime—and they think that DRM is the enemy of the good. The digerati hate DRM because, well, they believe it is hindering their utopian digital realm."

This may help show why some big publishers go out of their way to establish such special terms on ebooks for libraries: At least some of them hate your guts and want to see you disappear.

The comments are interesting, especially read six years later, now that everybody has all their data and reading material only on the web. At least in ShatzkinWorld. Think I'm kidding?

Nobody's going to the cloud with the purpose of preventing piracy. Going to the cloud is for efficiency and to improve the user experience. We're all going to laugh a few years from now that we didn't have our data if we weren't our *own* computer and our *own* hard drive. We'll expect everything we control to be available from any computer, and that means through the cloud.

Note the giveaway "we all"—because Thought Leaders speak for us all.

Probably why print book sales have declined to almost nothing while ebooks keep setting new sales rec...oh, wait... (Yes, there will probably be another ebooks-and-pbooks piece before C&I shuts down, but you probably already know that ebook sales continue to decline while nasty old shareable print book sales continue to increase.)

I have to say: some of the other commenters are quite sensible. Then there's one that says DRM is a good thing because "it suggests to the user that the content is of value," Barbara Fister commented (intelligently, of course), but Shatzkin's apparent inability to view the world as anything but "business models" hampered a coherent conversation. Oh, and of course Shatzkin was *certain* libraries "will progressively be defunded" whether they're used or not, because, well, The Market. (Shatzkin makes

it very clear that he's a "Yellow Dog Democrat." And I'm just beginning to warm up to "neoliberal," a term I've avoided...) And a bit later, he says "Libraries disproportionately serve those without the means to buy books or devices on which to read ebooks"—based, of course, on zero data. At my public library, *based only on casual observation*, I see a lot more middle-class (which around here probably means \$75K-\$200K household income) than apparently-poor people.

Where have all the music pirates gone?

This relatively brief report, by Nate Anderson [on February 2, 2011](#) at *ars technica*, was ahead of the curve in recognizing that cheap streaming and access are the best weapon against "piracy": at some point, it's not worth it, even for CDs (which *cannot* have DRM and still be labeled as CDs).

Remember when music was cool? Back in the days of Napster, it was *music* that defined file-sharing; millions of people raced to listen to the most obscure artists found in the libraries of friends and strangers. But that was back when music came on CD, was sold only by the album, and was a chore to rip to computers and (gasp!) transfer to the new MP3 players.

Now, with iTunes ascendant, DRM vanquished, the album disaggregated, and Pandora and Spotify available on smartphones, it's almost more trouble than it's worth to share music online unless you happen to be the world's biggest cheapskate (and/or a college student).

All of which may explain why a new, rightsholder-funded study of P2P file-sharing shows music being traded far less than films, pornography, TV shows, video games, and computer software. Piracy isn't a problem that industries like to have, but at least it suggests high interest in one's product. When it comes to the 10,000 most popular files being shared online, however, music can only manage to beat out e-books in popularity.

As in: only 290 of the 10,000 most popular files on one version of BitTorrent were music. (The biggest chunk was pornography.)

As always with *ars technica*, the many comments are mostly worth reading.

"Psycho-acoustic" Beatles recordings cost BlueBeat \$950,000

Maybe this report, by Jacqui Cheng on [March 28, 2011](#) at *ars technica*, really belongs in the next section, since the claims of the defendants were (to my mind) fairly humorous. To wit:

[BlueBeat.com](#), the company that tried to sell "remastered" Beatles tracks online before they became officially available, has agreed to pay nearly \$1 million to settle a lawsuit filed by three music labels. The move comes more than a year after a federal judge issued a restraining

order and then an injunction against the company, and does not yet include any attorney's fees or other damages involved in the lawsuit...

Soon after the lawsuit was filed, BlueBeat and MRT came forward with what can only be described as a [bizarre legal defense](#): MRT claimed it was not violating any copyrights, because it actually controlled the copyrights for the music it sells. "I authored the sound recordings that are being used by psycho-acoustic simulation," MRT boss Hank Risan wrote in an e-mail to the RIAA. "Psychoacoustic simulations are my synthetic creation of that series of sounds which b

In fact, MRT attempted to register for copyright protection on the "psycho-acoustic simulations," despite the fact that they were copied from the original Beatles recordings. Judge John Walter was not amused by the legal runaround—calling Risan's defense "technobabble and doublespeak"—and eventually slapped BlueBeat with a [restraining order](#). The order was followed up later with an [injunction that resulted in the tracks being removed](#) from BlueBeat's website.

Note that, at the time, The Beatles didn't sell their tracks online—and BlueBeat was charging \$0.25 per track. What's a "psychoacoustic simulation"? Quoting from the "bizarre" link above:

"Psychoacoustic simulations are my synthetic creation of that series of sounds which best expresses the way I believe a particular melody should be heard as a live performance."

Um... There's a lot more, none of which made much sense...either to *ars technica's* writers or to the court.

Raskally fellows: Are copyright infringers "pirates" and "thieves"?

I'm not going to discuss this fairly long piece, by Asher Hawkins on [April 19, 2012](#) at *ars technica*, in detail. It's good reading and worth reading on its own. Here are the first three paragraphs—and there's quite a bit more:

The habit of relying on metaphors such as "piracy" and "theft" to describe violations of copyright protections can elicit enraged reactions online—"it's *infringement*, not *theft!*" is one common lament. True as that may be, using tough words in the copyright context is a centuries-old practice. Consider the following extracts from a [1704 essay](#) by [Daniel Defoe](#), known for his advocacy for authors' rights long before [Robinson Crusoe](#) was published.

Defoe envisioned a law that would "put a Stop to a certain sort of Thieving which is now in full practice in England, and which no Law extends to punish, viz. some Printers and Booksellers printing Copies none of their own." He went on to condemn "pirating Books in smaller Print, and meaner Paper, in order to sell them lower than the first Impression. Thus as soon as a Book is publish'd by the Author, a raskally Fellow buys it, and immediately falls to work upon it, and if it was a Book of a

Crown, he will contract it so as to sell it for two Shillings... This is down-right robbing on the High-way..."

Such rhetorical flourishes (gotta love that "raskally Fellow" gibe!) weren't confined to unofficial writings about copyright. In 1774, when England's highest court issued a landmark [decision](#) that effectively ended an ongoing slugfest between established bookselling concerns and recently formed rival outfits, one of the judges noted that lower courts often had entered rulings that "not only stopped the sale of the pirated copies, but also obliged the pirate to account for what he had sold."

More than two hundred comments, some worth reading.

Art, AI & Infringement: A Copyright Conundrum

I guess this article, by Timothy Geigner on [October 16, 2018](#) at *techdirt*, is about infringement rather than piracy, and it's sort of a silly-season piece, but worth noting anyway.

I don't want to waste any space with a long introduction, other than to say it's always incredibly frustrating when artists come up with inventive new ways to produce artwork, only to have those efforts met with stupid intellectual property issues. Experimentation is key to the artistic world and we've begun to see how artists are incorporating technology into what they produce. This should be exciting, but all too often that excitement is plagued by legal issues.

A case in point of this would be Canadian artist Adam Basanta, who has come up [with a bonkers and very cool method](#) for both producing machine-generated art and then validating that art for human consumption by comparing it to real-world artwork made by us lowly apes. Let's start with his setup.

Broadly, Basanta's machine has two stages: creation and validation.

Creation happens with a hardware setup that Basanta likens to a Rube Goldberg machine: two computer scanners tipped on their sides and pointed face to face, endlessly scanning each other, and the results —influenced by shifts in the room's lighting, randomized settings and an automatically moving mouse —are interpreted by a computer and turned into colourful abstract pictures.

The second stage is validation. Another computer running a custom-built program automatically checks each image against an online database of real art made by human hands. If the machine-made image is similar to one that has been human-made, the computer dubs it a success and keeps it; if there is no match, the image is deleted forever.

That's the gist, and apparently the saved pieces are good enough to warrant an exhibition and to post on Basanta's website. And at some point an artist,

Amel Chamandy, searched for her name and the name of a wall installation she'd done—and one of the results was a Basanta artwork entitled “85.81%_match: Amel Chamandy ‘Your World Without Paper’, 2009.”

And sued Basanta for copyright infringement and *trademark* infringement on the artist's name.

The trademark claim rests solely on the name of the file including Chamandy's full name. It's a silly argument for trademark infringement as the whole point of including the name is to weigh the new art piece against her specific work, which necessarily involves anyone viewing these pieces being informed that they are not the work of the original author. The whole purpose of the validation process is to show what differentiation remains between the new piece and the human-made example. That's not trademark infringement. It's not really even close.

As for the copyright portion of this, it's important that you not be fooled by the percentage the machine setup notes in the validation process. You might think that an 85% match would mean the two images are very similar and would share a ton of features that would link the two in the viewer's mind. That's not even close to being the case, as you can see just how different the two images are below.

Go look for yourself. I did, and agree with this:

If that looks like copyright infringement to you, you need your head examined. Indeed, the entire setup here is defined by the fact that this is a totally independent creation—and the “validation” process only serves to highlight that there is no copying. Indeed, the idea that independent creation is a [defense against copyright](#) goes back ages, and this is quite obviously an independent creation.

The two works are “similar” in that there are some similar color values. That's about it. If you don't believe me, [go look for yourself](#). Really.

Lots of comments. At least one makes an incredibly strained argument that the computer art is “derivative” and therefore requires permission. That discussion goes on for...well, I didn't read the whole thing, but the thread seems to be at least thirteen layers deep.

And that may be a good place to close this section: with a bizarre infringement case followed by even more bizarre comments from a copyright maximalist who seems to be saying that if you draw *any* inspiration or device from an existing work, then your creation is derivative and must be licensed. That way lies madness.

Remember: the computer-generated art was *in no way* derived from Chamandy's painting: it's the result of a random process. The *only* connection to Chamandy's painting is that there's a similarity—apparently of colors and tones, certainly not of design (well, both are rectangular).

Oh, there's a more recent article on this suit, by Gillian Burrell at *IP Osgoode* on a particularly appropriate date, [April 1, 2019](#): "Randomly Generated Art Draws Copyright and Trademark Infringement Suit." It notes that Chamandy is suing for \$40,000 (CAD, presumably):

Chamandy claims that although her photograph was not republished by Basanta, an unauthorized copy of her work was necessarily made in the process of selecting scanned images for publication on Basanta's website.

So the infringement is the *act of accessing/copying a presumably legal photo* of the artwork. (This is Canada, so rather than Fair Use there's Fair Dealing, with a different set of criteria.)

In data mining, deep-learning algorithms are trained to recognize patterns in large datasets, and since the tool is becoming prevalent in nearly every industry, it raises questions about the copyright attached to the training data. Chamandy's photograph may not have been part of Basanta's training data, but the issues are similar. Does each of the thousands of artists whose art was used by the computer have a claim against Basanta? At the moment, Canada is trying to decide how data-mining will fit into our current regulatory scheme and whether any [ex-emption](#) is required to accommodate it. On one hand, we should protect the interest of rightsholders, but on the other, we cannot discourage the development of artificial intelligence in Canada. A machine-learning algorithm is only as good as the data that it was trained on, so the industry cannot flourish without clear guidelines and reasonable access to data.

Further down the rabbit hole. The fact that Basanta doesn't sell "his" artwork may work in his behalf. Burrell thought it unlikely that the trademark part of the suit could gain traction.

I hate to say it, but [yet another legal commentary](#) seems to suggest that, under Canadian law, the suit *might* have some merit. (Maybe I'm reading it badly, and it's clear that the author hopes that's not true.)

Nostalgia

So far, of 44 items tagged, I've found 18 still worth noting *and* available. Given the time span involved, that's not bad. I had a short section on "c-humor," but of the three items tagged, one is on a site that's now protected, one is on a magazine website that no longer offers free articles—and the third one no longer seemed either funny or very interesting.

The remaining items are all tagged "c-nostalgia" because, in an earlier organizational round, they seemed potentially worth noting *only* as a way of looking back. These items were tagged between December 22, 2010 and May 22, 2012. How many of the 34 are worth even a brief mention at this point? Ten, as it turns out. Read on...

Part way through this, I realize that many of these items have a common theme: copyright extremism, usually on the part of agents for copyright holders—and, in at least some of the cases, the situation now *seems* less extreme than it did back then. Or maybe I'm just old and forgetful...

100 years of Big Content fearing technology—in its own words

This article, by Nate Anderson on [October 11, 2009](#) at *ars technica*, is so wonderful that I'd cheerfully quote the whole thing—but, well, “© 2019 Condé Nast.” (Yeah, I know, that can't be right—but *ars technica* has a standard copyright notice at the foot of every page, and the date's clearly updated automatically.)

Anyway, this one's well worth reading, ten years later or not. The opening paragraphs:

It's almost a truism in the tech world that copyright owners reflexively oppose new inventions that do (or might) disrupt existing business models. But how many techies actually know what rightsholders have said and written for the last hundred years on the subject?

The anxious rhetoric around new technology is really quite shocking in its vehemence, from claims that the player piano will destroy musical taste and the “national throat” to concerns that the VCR is like the “Boston strangler” to claims that only Hollywood's premier content could make the DTV transition a success. Most of it turned out to be absurd hyperbole, but it's interesting to see just how consistent the words and the fears remain across more than a century of innovation and a host of very different devices.

So here they are, in their own words—the copyright holders who demanded restrictions on player pianos, photocopiers, VCRs, home taping, DAT, MP3 players, Napster, the DVR, digital radio, and digital TV.

The first item is John Philip Sousa railing against player pianos and gramophones in 1906:

“From the days when the mathematical and mechanical were paramount in music, the struggle has been bitter and incessant for the sway of the emotional and the soulful,” he wrote. “And now in this the twentieth century come these talking and playing machines and offer again to reduce the expression of music to a mathematical system of megaphones, wheels, cogs, disks, cylinders, and all manner of revolving things which are as like real art as the marble statue of Eve is like her beautiful living breathing daughters.”

And much more, including what Sousa was *really* concerned about: not getting paid for recordings and player rolls of his work.

The list goes on: a UCLA law professor opining in 1972 that “the day may not be far off when no one need purchase books” because of photocopiers; Jack Valenti raising the alarum about evil VCRs—and, worse,

VCRs that skip past commercials!; the campaign “Home Taping is Killing Music”; and more. Good stuff.

Anderson’s conclusion:

Content owners aren’t always wrong to say they’re being unfairly harmed (one thinks of writers like Dickens and Tolkien whose works were reprinted in the US without payment, though it did help fuel a lucrative lecture business for Dickens), and lobbyists and trade groups would be derelict if they didn’t conjure up worst-case scenarios and try to keep them from happening. Unfortunately, though, as we look over the statements above, the total result of this resistance to new technology is clear: it limits (or attempts to limit) innovation.

Copyright expert William Patry put it strongly at the conclusion of his new book, *Moral Panics and the Copyright Wars*, writing, “I cannot think of a single significant innovation in either the creation or distribution of works of authorship that owes its origins to the copyright industries.”

The great irony of these debates is that most new devices become popular only because buyers really want them, which means they open whole new markets that can then be monetized by rightsholders.

No harm, no foul? P2P user says \$1.5M award should be zeroed out

This item, by Nate Anderson on [December 8, 2010](#) at *ars technica*, continues the long saga of Jammie Thomas-Rasset, “the first US citizen to take her file-sharing lawsuit all the way to a verdict.” She’d been hit with damage awards running from \$222,000 to \$1.9 million—but the judge involved in the case made it clear that he wouldn’t allow an award of more than \$54,000.

But what does Thomas-Rasset think she owes? Nothing.

In a filing this week, her lawyers asked the judge to reduce the damage award to zero:

This award violates the Due Process Clause because it bears no reasonable relationship to the actual damages that the defendant caused. While the plaintiffs offered evidence of the harm caused by file sharing in general, they were unable to present evidence of any harm caused by this defendant in particular...

The statutory damages assessed in this case bear no relation to the actual injury that this defendant caused. The plaintiffs complain that this is because the injury they suffered due to distribution of free music on KaZaA cannot be traced to any particular defendant. That may be true, but it does not follow that one defendant can be punished for the harm that KaZaA itself—that file-sharing technology itself—caused. The testimony was clear that the plaintiffs cannot trace and, indeed, made no attempt to trace, the particular

injury that this defendant caused. If this Court agrees that the Constitution requires some proportionality between actual damages and statutory damages imposed to punish and deter, then the complete dearth of evidence of actual damages that the plaintiffs presented in this case requires a take-nothing verdict.

If this all seems old and now irrelevant...well, times have changed. The RIAA wanted the verdict to stand and, mostly, wanted a permanent injunction so she would never share files again.

RIAA: giving music away for free worse than charging for it

OK, so technically this piece—also by Nate Anderson at *ars technica*, but from [November 3, 2010](#)—was *earlier* than the previous item, but it highlights an interesting aspect of the same case.

To wit: the recording industry wanted very high damages because they felt Thomas-Rasset wasn't *taking responsibility for her actions*.

Universal Music Group rep Joan Cho was asked if the statutory minimum of \$18,000 would be acceptable. It would not, Cho argued, due in part to “the lack of acceptance by the defendant for what she'd done.” Another label rep blasted Thomas-Rasset's “avoidance of responsibility,” adding that “the minimum is probably low considering her behavior.”

In his closing statement, recording industry attorney Tim Reynolds banged the point home. Thomas-Rasset “still refuses to accept responsibility,” he told the jury. “The only reason she's not pointing the finger [at someone else] is because she can't.”

It's an interesting story, even at this late remove. Note that even a \$36,000 damage award would be roughly equal to her annual income. Note that she asserted she'd told others that stealing music was wrong.

The theme of Thomas-Rasset's closing statement: this case is a brutal witch hunt. Lawyer Kiwi Camara blasted the recording industry for crucifying Thomas-Rasset in order to get the bogeyman story it wants to frighten others. They “plucked her out to make headline news,” he charged. “They want a big headline.”

But that desire doesn't mean it's fair for the music labels to hack off Thomas-Rasset's head and “put it on a pike” to send a message to others. Millions of college students still share files, and the record labels still dash off letters to universities, asking the infringement to stop. Under what conception of fairness was it right that so many people would get a letter, while Thomas-Rasset would have her life trashed?

Label lawyer Tim Reynolds was having none of it. It's “ludicrous” to suggest the RIAA was mining the case for publicity, he countered. After

all, who was going around giving interviews to the *CBS Early Show* and many others?

In the end, he said that Thomas-Rasset needed to take responsibility, that she was not the innocent victim she claimed, and that in fact “giving music away for free causes more harm” than charging people for it—at least the real pirates help keep the perceived value of music up.

As a link in the article notes, the jury came in with an astonishing \$1,500,000 verdict (the case involved two CDs of music), which comes out to \$62,500 per song.

Judge slams, slashes “unconstitutional” \$675,000 P2P award

An even earlier Nate Henderson *ars technica* piece, this time from [July 9, 2010](#) and dealing with “the other defendant”—Joel Tenenbaum, an admitted music-sharer.

Judge Nancy Gertner knows that Joel Tenenbaum did it. Tenenbaum, the second US target of the RIAA’s five-year litigation campaign to complete a trial, eventually admitted his music-sharing liability on the stand—and Judge Gertner issued a directed verdict against him. But when the jury [returned a \\$675,000 damage award](#), they went too far. Way too far.

In fact, according to Gertner, they trampled the Constitution’s “[Due Process](#)” clause. In a ruling today, the judge slashed the \$675,000 award by a factor of 10, to \$67,500.

The judge followed some of the Thomas-Rasset judge’s reasoning and proposed numbers.

“Weighing all of these considerations, I conclude that the jury’s award of \$675,000 in statutory damages for Tenenbaum’s infringement of thirty copyrighted works is unconstitutionally excessive,” she wrote. “This award is far greater than necessary to serve the government’s legitimate interests in compensating copyright owners and deterring infringement. In fact, it bears no meaningful relationship to these objectives. To borrow Chief Judge Michael J. Davis’ characterization of a smaller statutory damages award in an analogous file-sharing case, the award here is simply ‘unprecedented and oppressive.’”

And, just like Davis, Gertner made clear that she was deferring to Congress and to the jury by even allowing *this* amount to stand. “This amount is more than I might have awarded in my independent judgment,” she said. “But the task of determining the appropriate damages award in this case fell to the jury, not the Court. I have merely reduced the award to the greatest amount that the Constitution will permit given the facts of this case.”

There's more in the story. Here's one wonderful passage (noting that the RIAA, of course, disagreed vehemently):

Gertner points out that large companies have complained for years about “out of control” jury verdicts, and that courts had repeatedly sided with corporations against absurdly large damages on Constitutional grounds. Those protections apply to everyone.

“Reducing the jury’s \$675,000 award, however, also sends another no less important message: The Due Process Clause does not merely protect large corporations, like BMW and State Farm, from grossly excessive punitive awards,” she wrote. “It also protects ordinary people like Joel Tenenbaum.”

Double standard: Unlicensed bar music vs. P2P users

Yet another Nate Henderson *ars technica* article, [on July 11, 2010](#), commenting further on the Tenenbaum verdict. To wit, this from Judge Gertner’s decision:

“The jury’s award in this case also appears egregious in light of the damages typically imposed on restaurants, bars, and other businesses that play copyrighted songs in their establishments without first acquiring the appropriate licenses,” Gertner wrote.

“These defendants are arguably more culpable than Tenenbaum. Unlike Tenenbaum, who did not receive any direct pecuniary gain from his file-sharing, defendants in these cases play copyrighted music to create a more pleasurable atmosphere for their customers, thus generating more business and, consequently, more revenue.”

Yet, in such cases, damage awards are only 2-6x the cost of a public performance license, “a ratio of statutory to actual damages far lower than the ratio present in this case.”

A good point.

5 years later, first P2P case to be tried still chugging along

I’ll just point to this [March 27, 2011](#) Nate Anderson *ars technica* piece on the Thomas-Rasset case. Nothing terribly new but some interesting commentary.

Judge calls \$1.5M file-sharing judgment “appalling,” slashes to \$54,000

Same case, same writer, same venue, [July 22, 2011](#), and even the same judge reducing the penalty to the same \$54,000—but this time on the same Constitutional grounds as in the Tenenbaum case.

The Court concludes that an award of \$1.5 million for stealing and distributing 24 songs for personal use is appalling. Such an award is so

severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. In this particular case, involving a first-time willful, consumer infringer of limited means who committed illegal song file-sharing for her own personal use, an award of \$2,250 per song, for a total award of \$54,000, is the maximum award consistent with due process.

This reduced award is punitive and substantial. It acts as a potent deterrent. It is a higher award than the Court might have chosen to impose in its sole discretion, but the decision was not for this Court to make. The Court has merely reduced the jury's award to the maximum amount permitted under our Constitution.

And, of course, the same posturing by RIAA.

So what finally happened? According to [Wikipedia](#), an appeals court overruled the penalty reduction and reinstated a \$220,000 penalty; the Supremes chose not to accept an appeal of the case; and Thomas-Rasset either did declare bankruptcy or threatened to do so. There's nothing to indicate that she ever paid anything.

And as for the Tenenbaum case: once again from [Wikipedia](#). another court reinstated the astonishing \$675,000 award; an appeals court upheld that decision; the Supremes weren't interested; and Tenenbaum declared bankruptcy.

I guess RIAA could say "*That'll learn them!*" after bankrupting a college student and an American Indian. Oh, and maybe count the \$0 damages received and probable \$millions in bad will against the legal costs of pursuing the cases so hard and for so long.

And that's enough of RIAA for now. Let's look at some other Copyright Nostalgia®. [Just kidding. I have neither a registered trademark nor a trademark, nor even the claim of any intellectual "property" in the phrase "copyright nostalgia." Just thought it would be amusing. A search for that phrase turns up [an Instagram account](#).]

FCC gives Hollywood control over your home theater

This report, by Matthew Lasar on [May 7, 2010](#) at *ars technica*, has to do with Selectable Output Control (SOC)—basically, the ability to shut down high-def analog output from an HDTV.

Remember high-def analog output? No?

After almost two years of deliberation, the Federal Communications Commission [has granted](#) Hollywood and cable companies permission to shut down analog streams to HDTV equipped home theaters. The geek term for this is "selectable output control" (SOC)—until now forbidden by the FCC. The Motion Picture Association of America [requested](#) a waiver on the SOC ban in May of 2008, arguing that without it, Hollywood studios could not securely offer consumers pre-DVD released movies on television.

“We conclude that the service that MPAA proposes would serve the public interest and that providers of first-run theatrical content are unlikely to offer the service absent the ability to activate SOC,” the agency’s [Order](#), released on Friday, explains. “While a waiver of the SOC prohibition will prevent consumers who rely on unprotected audiovisual outputs from accessing this service, we are convinced that in the absence of a waiver the service will not be offered at all.”

Early adopters of HDTV may have had analog connections rather than HDMI. Allowing SOC means (or meant) that studios could offer very early pay-per-view HDTV versions of theatrical movies, and those versions would not pass through analog connectors. That could only happen for 90 days or until a disc version was available (whichever came first); digital output couldn’t be restricted to proprietary devices; there would be a two-year review; and studios had to provide instructions to access closed captions.

Apparently pay-per-view of new movies was immediately going to become “the most valuable offering on pay TV.” Did that happen? Did SOC matter? Since by the time we got an HDTV, the only video outputs (or high-res inputs) were HDMI in any case, and since we’ve never paid-per-view, I don’t recall. Checking [the Ultimate Source](#), I see this:

Events distributed through PPV typically include [combat sports](#) events (including [boxing](#) and [mixed martial arts](#), and sports entertainment such as [professional wrestling](#)), and concerts. In the past, PPV was often used to distribute telecasts of feature films, as well as adult content such as [pornographic films](#), but the growth of [digital cable](#) and [streaming media](#) caused these use cases to be subsumed by VOD instead, leaving PPV to focus primarily on live event programs.

The Entertainment Industry’s Dystopia of the Future

This commentary, by Richard Esguerra on [April 14, 2010](#) at the EFF’s *Deeplinks*, notes and comments on comments by the MPAA and RIAA (and others) regarding a proposed “Joint Strategic Plan” for “intellectual property” enforcement. (I’ve gotten to be uncomfortable enough with the notion that copyright is a property right that I sometimes scare-quote “intellectual property.”)

Esguerra cites and comments on several proposals, most or all of which seem both dystopian and unsurprising. I’ll quote the last one:

Federal agents working on Hollywood’s clock

The planned release of a blockbuster motion picture should be acknowledged as an event that attracts the focused efforts of copyright thieves, who will seek to obtain and distribute pre-release versions and/or to undermine legitimate release by unauthorized

distribution through other channels. Enforcement agencies (notably within DOJ and DHS) should plan a similarly focused preventive and responsive strategy. An interagency task force should work with industry to coordinate and make advance plans to try to interdict these most damaging forms of copyright theft, and to react swiftly with enforcement actions where necessary.

This is perhaps the most revealing of the proposals: big Hollywood studios deputizing the FBI and Department of Homeland Security to provide taxpayer-supported muscle for summer blockbuster films. Jokes have been made about SWAT team [raids](#) on stereotypical file-sharers in college dorm rooms—but this entertainment industry request to “interdict...and to react swiftly with enforcement actions” brings that joke ridiculously close to reality.

No additional comment required.

The SOPA Opera

A few items (starting with 13, probably dropping some) about a legislative nightmare and odyssey that I never got around to covering in 2011-2012, when most of the action was taking place: the [Stop Online Piracy Act](#), introduced as H.R. 3261 in October 2011 and largely abandoned in 2012 (although the MPAA was apparently trying to accomplish the same ends through different means as recently as 2015).

The link in the previous paragraph is to *Wikipedia's* article, a very long (9,600 words, *not* including “See Also” and 210 references) and fairly good piece. Maybe I should just refer you to that link—where you’ll find that Go Daddy initially favored SOPA and, surprisingly, that Darrell Issa opposed it.

And here we are: after rereading each of the 13 items (actually, 12: one was a 404), I’ve concluded that none meets the test of time. Go read the *Wikipedia* article.

Why wait? Six ways that Congress could fix copyright, now

We’ll close this nostalgic roundup with this Matthew Lasar piece from [February 29, 2012](#) at *ars technica*—an evergreen that works just as well now as it did seven years ago.

It’s based on a Public Knowledge “[Internet Blueprint](#)”—but the page (linked to) announcing the blueprint points to a site that’s now gone. That leaves the *ars technica* article. Here are the six key points—or, rather, five key points and a “finally”:

- Shorten copyright terms
- Stop abuses of the DMCA
- Cracking DRM

- Stop copyright bullying'
- Make "fair use" fairer

Finally, Public Knowledge wants legislation requiring the US Trade Representative to publicly disclose any copyright or intellectual property-related proposals it makes to drafts of trade agreements. And any USTR advisory groups, which general include plenty of people from the "industry," should include "representatives of the public interest unaffiliated with industry."

It's unfortunate that the piece scare-quotes fair use, which is part of the copyright law. Meanwhile, here's the discussion of the first point:

The current copyright protection time window is quite large: life of the creator plus a whopping 70 years (or 95 years total for corporate authorship). It's hard to believe that when the Republic was young, copyright lasted 14 years, renewable by another 14.

"Continually expanding the term of copyright comes at a cost," the new [Blueprint contends](#). "By giving an author a monopoly on an expression, it prevents other people from building on that expression to create new works."

The Public Knowledge reform proposal isn't particularly radical, though—it would reduce most copyright terms to life of the author plus 50 years, or "a flat 50 years if the author was an employee."

I think "isn't particularly radical" is an understatement. The good news, of course, is that copyright is *still* life+70 or 95 years, with the result that the public domain wall, frozen for so many years, is starting to move.

Closing Comment

Some of you already know that I believe Founders' Copyright is reasonable—that is, 14 years, renewable once. I've also commented on PermaCopyright: copyright for as long as you want it, with periodic fees, *if* you can demonstrate that your work is 100% original—and if you're wrong, you forfeit the fees and the work goes into the public domain.

Since I'm fairly certain that 100% of music and films and at least 99% of written works fail the "100% original" test, PermaCopyright works together with Founders' Copyright just fine: real-world works would be protected for up to 28 years. (There should be some modest fee for the renewal.)

I also believe that the current statutory penalties are absurd, particularly for nonprofit/non-monetary infringement. In such cases, I believe the statutory penalty should be *at worst* a citation-level situation, not even a misdemeanor, with a fine roughly equal to twice the cost of the item infringed.

Not that anybody cares...

The Back

Catching Up?

The first section of this snarkfest catches up with audio magazines, roughly a year of them. As always, I wondered whether I should intersperse those items with (older) non-audio-related snark, so some readers wouldn't get too bored.

I decided against that, this time around, because I believe that—among the apparently-dwindling number of *Cites & Insights* readers—there are likely to be three groups:

- Those who couldn't care less about the audio stuff and just want to avoid it.
- Those who find it at least mildly interesting, and can probably cope with several pages at once.
- Those—perhaps the largest group—who don't read THE BACK anyway.

So I'll start with the AudioFollies, then add some from the slowly dwindling set of items tagged “back” in my Diigo account.

AudioFollies

Catching up with about a year's worth of ~~audities~~ oddities in *Sound & Vision* and *Stereophile*—now somewhat easier since S&V is bimonthly.

No deep significance here. If you think vinyl always sounds better than digital or that tube amps are inherently superior, that's for you to decide. If you think \$200,000 is a plausible price for a turntable or that a CD drive and digital/analog conversion stack should plausibly be priced at over \$100,000—well, I might question your priorities, but for all I know you're simultaneously giving \$millions to Planned Parenthood, ACLU, FeedAmerica, Americans United, The Nature Conservancy and your local no-kill animal shelter, so who am I to judge?

But when you say “*anyone with ears* can tell how superior this \$50,000 piece of gear is to this \$10,000 piece of gear,” you're fair game for snark.

Defining the Internet of Things

This interview with Dave Evans, “former chief futurist for Cisco and co-founder of the Silicon Valley IoT startup, Strinigy,” appeared in the June 2018 *Sound & Vision*—and it's only one page (and one column of another) but, frankly, a bit terrifying. [Here's a slightly extended version.](#)

What I find terrifying isn't the technolust of the whole thing—that Evans *really believes* that your coffeepot and lights should all be connected to the internet. It's not the vapidness of asserting that having your “smart home” turn off the lights, lock the front door, adjust the temperature and set the alarm system when it's time to go to bed” is “a much better experience” than doing it yourself. It's not even the vaguely Orwellian celebration of the cloud, of “television watching you while you watch it” and “One could imagine smart programming that recognizes that children are also watching TV and automatically avoids inappropriate shows”—and, of course, automatically feeding info on what you're doing to other places so they can “help” you Buy More Stuff.

Nope. What terrifies me is what's *not* mentioned anywhere in the interview: hacking and security. Especially with open APIs, how difficult will it be for somebody else to unlock your door, turn off the alarm, set your oven to its highest temperature and the like? We already know that most early IoT crap has crappy security; if this guy's helping Define the Future, we can reasonably assume it won't get better.

As to Stringify? It had an app (guess the name!) to Make it Easy to do chains'o'things on the IoT. Comcast bought it. It shut down the app this year. The website is now a 404. The security risks? Who knows? Meanwhile, at my house, we use a programmable thermostat that's not connected to anything except the HVAC and power source; we lock the doors, turn off lights, and deal with home security all on our own.

What Price Serenity?

Let's jump to *Stereophile*, also June 2018, and Michael Fremer's “Analog Corner.” He devotes the first half to a glowing review of the SMC Audio AC Nexus eight-outlet passive “power conditioner.” It's basically a fancy eight-outlet powerstrip, with fancy outlets (Fremer makes a point of saying that each duplex outlet retails for \$260) and a fancy power inlet.

It costs \$20,000. But of course you want to use a good power cord with it, and one audio store bundles it with a high-end power cord for a low, low \$28,000.

It's *passive*—it doesn't rebuild a clean 60Hz/120V power output or anything of the like—but Fremer avows that it makes a difference that “Even my personal troll would hear” (Fremer/s a strong “if you can't hear the difference, you're either deaf or not listening” advocate.)

And here's the kicker: while Fremer found that the device gave him a “butter-textured sweetness of sound”—and, in the end, decided it was “too smoothed-over for me, too romanticized.”

Rogers High Fidelity 65V-1

Same issue, and this time I [can link to](#) Herb Reichert's glowing review—but you also need to read John Atkinson's [measurements](#) and commentary.

It's fair to say Reichert is one of the most doctrinaire reviewers at *Stereophile*: he knows what kind of electronics he wants, and seems to hear accordingly. In this case, it's a \$4,000 tube integrated amp that claims to put out one watt at 0.5% distortion and ten watts if you don't mind 3% distortion. And it's a single-ended tube amp (SET), which for one group of audiophiles is the important thing.

You get a sense of Reichert's sheer objectivity when he notes that the Rogers uses EL34 tubes and notes "I've never experienced an EL34 amp I didn't like." He admits that SETs almost universally don't handle bass very well and require extremely sensitive loudspeakers, but who cares?

Let's ignore the rest of the review itself and drop down to the measurements sidebar, where we find some graphs that look as though something had gone terribly wrong with the testing equipment. Mediocre in all respects, the results called out John Atkinson's full powers of stating awful results so they don't make the reviewer look stupid: so we get "channel separation was modest"—as was the signal-to-noise ratio. Then we get to the measured power output...

Stereophile's standard is clipping power: that point at which total harmonic distortion (THD) reaches 1.0%. The Rogers reached a whopping 270mW at clipping: that is, just over *one-quarter watt*. For \$4,000.

Changing to other impedances and modes did get up to six watts—at 3% THD, not 1%. He notes "The Rogers 65V-1 is undoubtedly a low-power, high-distortion design"—so much so that he wondered whether the review sample was faulty. (He concluded that it wasn't.)

His conclusion:

Its measured performance indicates that the Rogers 65V-1 really should be used only with high-sensitivity loudspeakers, but even then, its high output impedance means that its sonic signature will be different with every speaker, and its distortion signature may well fatten the sound. But props to Roger Gibboni for the useful iPad app.

Aqua Acoustic Quality Formula xHD

Another equipment review in the June 2018 *Stereophile*, this time by Jason Victor Serinus—and the device being reviewed is a digital-to-analog converter (DAC). Worth noting: Serinus *owns* \$24,000 and \$36,000 DACs, so for his taste, the \$17,000 price would seem somewhat of a bargain. (For comparison, *Stereophile's* Recommended DACs start at \$399 for Class A and \$2,195 for Class A+, a special better-than-the-best category.)

It's quite a device. It may take *500 hours* of break-in before it sounds as good as it should. Serinus found that the DAC "smoothed over" the edges of recording. But that was apparently OK: "Thanks to the Formula xHD's ability to smooth over digital's rough edges, I don't hesitate to recommend that it be auditioned by anyone with \$17,000 to spare, and whose systems suffers from bright or harsh sound, or who values, above all else, the warmth

and bloom often ascribed to analog sources.” My annotation: “Aarrgh!”—which is another way of saying that good audio equipment should reproduce accurately, not “smooth over” things to make soothing music.

Notably, the measurements were at best questionable, with Atkinson noting that some of them were “flaws that should have been avoided.” A follow-up by a different reviewer found the device “too opaque for a perfectionist DAC at any price.” And yet it’s listed in Class B of Recommended components, where the next most expensive device is \$2,499 and another, which includes a preamp and headphone amp, goes for \$995.

BorderPatrol P21 EXD

The July 2018 *Stereophile* includes this Ken Micallef review of a power amplifier, which you might reasonably compare to the Rogers amplifier review a bit earlier—except that this one’s just an amplifier and is a wee bit more expensive. [Here’s the link](#) for the review, and one [for the measurements](#) (yes, once again you need to read both).

This amp claims 20W output, and it’s a push-pull rather than single-ended tube design, allowing for more power and better bass. Another rave review, and apparently a more neutral sound. So far, so good...

But the measurements weren’t great. The amp’s impedance gives it a “very audible” non-flat power curve into a simulated speaker load (also true of the Rogers); while channel separation was solid, signal/noise ratio was mediocre. It *did* very nearly reach its rated power output at 1% THD—but even at one or two watts, there was considerable distortion in the bass and treble. John Atkinson says bluntly “This is poor performance.” He concludes

While its low distortion at powers of a few hundred milliwatts will mean it will work best with very sensitive speakers, overall, I was disappointed by the BorderPatrol P21 EXD’s measured performance, especially considering that, as reviewed, it costs \$14,450. Modern tube amplifiers can do [better than this](#), or perform about the same for a [lower price](#). The question is: Did KM like the sound of the P21 EXD *because* of its measured performance or *despite* it? I don’t know the answer to that question.

And there’s the price: \$14,450, for a poorly-performing amp. Which Micallef just *loves*. The manufacturer commented. He doesn’t deny the crappy measurements; instead he ends with this:

I suspect that Ken likes the amp not because he likes harmonic distortion or high output impedance or any of the other measurement issues John mentions, but because he likes the hear-through and microdynamic capabilities that are the exclusive preserve of triode amplifiers that operate without global negative feedback.

To me, that’s bafflegab—especially since Micallef explicitly denies that the amp has a tube sound, much less one that’s unique to triode amps without

global negative feedback. But, of course, I'm neither in the market for \$14,450 power amps or tube amps in general.

Tidal Audio Akira

Just a brief note about this [John Atkinson review](#) of a loudspeaker in the November 2018 *Stereophile*. These are *serious* speakers—58" high, 11.5" wide, 22" deep, 348 pounds heavy. And \$215,000/pair expensive.

They appear to be first-rate speakers; for that price, they should be. What caught my eye, though, was this paragraph:

As expensive as the Akira is, it is actually a scaled-down development of Tidal's flagship loudspeaker, La Assoluta, which Janczak described to me as "a pretty huge, 1100-lb tour de force" that costs \$550,000/pair. The goal, he said, was to design "something ultimate but with modest dimensions." Modest? Only in comparison with La Assoluta!

Oh, if you're wondering, here's how he sums up the speakers:

The Akiras are the best-looking, best-built, best-sounding speakers I have had in my listening room—as they should be at the price.

I wonder how many pairs of La Assolutas have been built or sold...

(John Atkinson has done all the measurements in *Stereophile* and was its editor from 1986, when he took over from founder J. Gordon Holt, until April 2019, when he turned the editorial reins over to long-time contributor Jim Austin and became the first Technical Editor.)

Nothing Is What I Want

This [charming op-ed](#) by Jon Iverson appeared in the November 2018 *Stereophile*, and speaks eloquently to an issue that I believe affects many reviews (and reviewers) at that magazine: should audio equipment *reproduce accurately* or *make pretty music*? Those aren't always the same thing...

I recently experienced an alarming audiophile episode. John Atkinson wanted to send me BorderPatrol's Digital to Analogue Converter SE, so that I could write the [Follow-Up](#) published in the November issue. But he wouldn't tell me anything about Herb Reichert's [original review of the product](#), which had not yet been published. Instead, he said, cryptically, "If this is a 'great' DAC, I'll have to hang up my measurements." I took this to mean Herb liked it, but JA's test rig did not...

After discussing his own experience—the gear did make some music sound, y'know, prettier—he concludes that:

[O]ut of a sense of wanting to hear the artists' intent—out of *respect* for those intentions—I don't want to second-guess and further alter their final sonic creation. If at all possible, I want to hear something as close as possible to the master tape. I realize that my room and speakers add

unavoidably huge variables to this, but why pile even more variables on top of that?

There's more—it's a good read—including the note that when he goes to a fine restaurant, he doesn't pull out a bottle of Sriracha sauce. (The long and frequently argumentative comments are a mixed bag...as I'd expect. I hadn't read them before, since I read the print magazine—and I didn't finish them now.)

As you may have guessed, I'm in the camp that says components should *first* be accurate—and let me choose my coloration, if that's my preference. Especially since colorations that make some recordings Pretty will make some other recordings far less interesting and less real.

Snake Oil: A Short History

[This article](#), by Jim Austin in the December 2018 *Stereophile*, is fascinating and worth reading even if you don't care about audio—and, thanks to the remarkable tendency of *Stereophile* to post most content freely online, you can read it.

The audio hook is there, mostly in the first four paragraphs, ending with this paragraph, one that also helps to explain why placebos can be such effective medicine:

Unless you're a trained listener making an effort to maintain a consistent state of mind, *any* tweak, new component, or new accessory is virtually guaranteed to focus your attention more closely on the music, or some aspect of the music. Alter your focus—your attention—even a little, and what you hear will change, even if nothing has changed in what you're listening to. Using brain imaging, scientists have determined that such changes in perception are real, in the sense that they alter signals in the brain's hearing centers—primitive, pre-cognitive parts. You don't just *think* you hear it, you *do* hear it—even if it does nothing to the electrons in your wires or the pressure waves in your listening room.

The history is fascinating. Actual snake oil—fatty extracts from *Enhydryis chinensis*, the Chinese water snake—is heavy in an Omega-3 fatty acid with strong analgesic properties. It's real medicine, in other words—but most “snake oil” remedies sold in the Good Old Days didn't contain any actual snake oil.

On the other hand...when one brand of snake oil, found by the government to contain no actual snake oil, was analyzed, it *did* contain capsaicin and camphor, both of which have legitimate analgesic uses. So even the fake snake oil may have been real medicine.

If either of these amplifiers is RIGHT...

Just a quick note about the cover feature in the January 2019 *Stereophile*, which is composed of three parts: an “[As We See It](#)” op-ed from John Atkinson (yes, he was still the editor, but “As We See It” is always op-eds); [a](#)

[glowing review](#) of the \$15,995/pair Cary Audio CAD-805RS amplifier (which itself glows, since it uses tubes), or at least glowing if you don't read the measurements sidebar; and [a very positive review](#) of the \$5,000 Cambridge Audio Edge A integrated amplifier (solid-state). Just comparing the writing style of the two reviews is fascinating.

A key paragraph from the op-ed:

The large, heavy, inefficient, single-channel Cary is intolerant of low impedances, suffers from hum, and delivers only a limited amount of power, with a level of distortion that the late John Crabbe, for whom I worked at *Hi-Fi News* from 1976 to 1982, would have dismissed with a snort. The two-channel Cambridge delivers respectably high power even into low impedances, with vanishingly low levels of distortion and noise. And, as befits a 21st-century amplifier, it offers a full array of digital inputs, including a USB port and a Bluetooth antenna. These models represent polar opposites in amplifier design, but they can't both be right. Only one can be telling the truth—the other must be lying.

The rest of that title, which also appeared on the magazine's cover in 1984, is “the other must be wrong.”

Again, interesting and lengthy comments, at least in some cases.

Pro-Ject Audio Systems Pre Box S2 Digital

I'll close this set of audio follies with something that's a little different, after looking at digital/analog converters that cost as much as \$30K and are acclaimed as good values. [This review](#), by Ken Micallef in the April 2019 *Stereophile*, is for a little box (4.1" x 1.4" x 4.8", weighing 0.8 pounds) that combines a digital/analog converter with multiple digital inputs of various types with a headphone amplifier.

It's a neat little device with a small display screen. It *can't* use much power: if you're using the USB input, it doesn't even need a power supply and if you're not, the power supply can't provide more than five watts.

And it's flexible as all get out: you get your choice of eight filters for the conversion step; you can choose to have it run with the lowest possible distortion or with a more, I dunno, musical option; and it does MQA decoding (which will excite those who know and care what it is).

The measurements were pretty much impeccable, and distortion with the “more distortion” setting was so low that John Atkinson never bothered to test it with the “less distortion” option. Atkinson says it “offers almost state-of-the-art measured digital performance”; Micallef thought it sounded great.

Oh, and the price? \$399. Of course, it's only *almost* state of the art.

Everything Else: 2014

We've caught up with tagged items to September 2014...

Audio Equipment Manufacturer Threatens Amazon Reseller With ‘Mandatory Jail Time’

This odd item by Tim Cushing [appeared September 16, 2014](#) at *techdirt*. It’s about First Sale rights and “legal” nonsense—or, charitably, what “NEW” means.

The core: some person saw a really good sale on Velodyne headphones, purchased a pair, and listed the pair for sale on Amazon at a higher price; sold them; made a little profit.

And got this email, which I’m copy-and-pasting without change:

Hello,

This is a notice to inform the entity “20YearsUSAF” dealer and seller on Amazon.com and other internet selling locations to be discovered, of our engagement representing Velodyne Acoustics Inc, a privately owned company located in Morgan Hill, CA.

We are forthwith enlisted our services to protect price integrity by seeking public fractures and selling contract terms and illegal selling of products by unauthorized distributors and dealers on the internet in the USA and overseas.

This is a notice of legal prosecution for illegal selling of Velodyne Acoustics, Inc. products and goods. You will be pursued and prosecuted unless you withdraw all products for sale by Velodyne immediately as of 9/13/14. “20YearsUSAF” selling will cease and desist for 2014-2019, under this name or other alias names or entities to be discovered by our agency. **Discovery of “20YearsUSAF” using other alias identity to continue selling after this notice will compound fines and may incur mandatory jail sentencing of offenders.** Continued unauthorized selling under this business name or alias name, as identified through discovery and witnesses, will put this business and its owners at risk of fines and legal prosecution.

Continue selling carries the penalty and minimum of \$250,000 fine.

Sock and Bruster Internet Policing Services Inc. LPC, Legal Prosecution and Collection Agency

The sentence/paragraph beginning “We are forthwith enlisted our services” is remarkable. Not English, but remarkable. “Seeking public fractures” makes sense only if “Sock and Bruster” sends goons out to break people’s arms.

There’s a long thread on Amazon’s forum site about this, a thread I didn’t read in full. The story here is good enough. A couple of excerpts:

The legal threats following that are for remedies that don’t exist. Counterfeit goods may be illegal but reselling legitimate products isn’t. Velodyne can’t ban anyone from selling its products for a half-decade. It can

prevent unauthorized resellers from listing themselves as “authorized” but that’s it...

On the other hand, Velodyne *can* refuse to honor warranty if a buyer doesn’t have a receipt from Velodyne or an authorized reseller—which made “20YearsUSAF” labeling the item as “NEW” slightly problematic, since it might not be warranted as a new product. (The seller stopped using that term.)

Another email followed, even a bit more bizarre:

Since you bought the headphones from Velodyne, then you are an authorized dealer who signed a contract on selling policy. You are using an alias to hide your identity to perform illegal activity, and will be prosecuted as such. With the new laws, we finally have the clout to clean up these sales. There are new laws in place and more laws coming soon to protect Manufacturers from unauthorized selling.

My advice is to find another way to make a living, quickly.

I’ve purchased quite a few things from manufacturers without them calling me “an authorized dealer,” and the “contract” claim appears to be nonsense. As to the “new laws”? Your guess is as good as mine.

There’s more, including another message that seems to blame this person for “undercutting” Velodyne’s prices by *paying the price Velodyne advertised on its site* and reselling the headphones for more (50% more, according to the Amazon stream: apparently Velodyne put some items at sale for 1/3 of list).

After a bit more commentary, the article closes:

If Velodyne has the suspicion that one or more of its authorized sellers are violating their contractual agreements, it needs to keep it to itself until it has enough supporting evidence. Then it needs to realize that outside of counterfeit goods, its legal remedies won’t include jail time or anything outside of civil lawsuits. By rushing to judgement, it has made potential purchasers wary of dealing with it—not just for potential interference in perfectly legal resale, but in terms of any negative reviews that might be greeted with similar threatening emails.

Sixty-eight comments, several times as long as the story. It becomes clear early on that the last sentence is on the money—that some people (including one Velodyne owner) have written off the company. As you’d expect, at least one person actively looked for ways to make Velodyne right and the seller wrong.

One commenter was peeved enough about the wording of the emails to complain to the California Bar on unauthorized practice of law—and they responded (in part)

The State Bar of California is in receipt of your letter regarding Marta Thoma Hall. Although the State Bar can take certain limited action

against non-lawyers under section 6126 of the Business and Professions Code, our primary jurisdictional authority is over California attorneys.

We contacted Velodyne regarding your complaint that Ms. Hall was issuing legal notices to third-party resellers on Amazon.com and eBay.com from Sock and Bruster Internet Policing Services Inc. LPC, Legal Prosecution and Collection Agency, a fictitious agency. It is the State Bar's understanding that Ms. Hall is no longer in her former position at Velodyne; therefore, it is unlikely that Ms. Hall will continue to send these legal notices.

We are interested in the information provided and we will keep your complaint on file; however, we are closing your matter at this time without prejudice. Should we require additional information in the future, we will contact you.

Ten Simple Rules for Writing a PLOS Ten Simple Rules Article

How could I *not* tag this article by Harriet Dashnow, Andrew Lonsdale and Philip E. Bourne, which I had tagged on October 24, 2014 as coming from *PLOS Computational Biology*?

Let me elaborate on that confusing sentence. [Here's the link](#) as stored in Diigo. You might click on that and get the article. When I did so in mid-July 2019, I got the article...for five seconds, after which I was routed to a single-page PDF that seems somewhat less desirable.

I Binged the title (well, part of it: ["Ten Simple Rules for Writing" PLOS] and the first page of results included [this article](#), from *PLOS Computational Biology* but accessed at PMC. So you're probably better off with this link.

The article is...delightful. I was unaware that there had been a series of Ten Simple Rules articles, and that didn't matter at all. The lead paragraph—*before* the introduction because it's the first of many interjections by "PB," who I confidently assume to be Philip E. Bourne:

[PB: When I read the title of this article I laughed out loud—how many times has that happened to you when reading professional articles? Laughter is good whatever the context. When I started the series in 2005, I had no idea it would be so successful. This article, which I had no part in writing, only adding commentary shown in italics, is in my mind a celebration of that success. My commentary is simply to provide a historical perspective to explain some aspects of why the collection is the way it is and, of course, to make a few personal observations which, after all, is what the collection is meant for: Thanks to HD and AL for making this happen and for including me as an author (see [Rule 4](#)) and to all those that have contributed over the past nine years.]

All I can say is: *read it*. Even if, like me, you never plan to submit an article to a PLoS journal, much less a Ten Simple Rules article. It's too good to excerpt, except for the first rule:

Rule 1: Have Ten Rules.

and yes, *of course* there's a figure for that rule.

While the article doesn't provide a link to the series, my Bingfu enabled me to [find the collection](#). It's impressive and probably helpful.

[And that's it for 2014: Three others now seemed stale or pointless.]

Catching Up: 2015

Ten Simple Rules to Win a Nobel Prize

Yes, that's right: this article, by Richard J. Roberts [on April 2, 2015](#) at *PLoS Computational Biology*, is another Ten Simple Rules piece. And quite a wonderful read.

I won't quote either the ten rules or their expansions (although I certainly could, because OA); I will quote Philip E. Bourne's preface:

When receiving a draft of the article "Ten Simple Rules for Writing a PLOS Ten Simple Rules Article" [1], not only had we come full circle in terms of professional development, but also I knew the series was a success. Since that article was published in October 2014, two more articles have been published, and this will be the third: a total of 44 in all. Rule 2 in what I shall affectionately call the 102 article [1] suggested you need a novel topic and suggested winning a Nobel Prize was such a topic. As I hinted in my editorial comments to the 102 article, I would take up the challenge in soliciting such an article. Rich Roberts was the first person to come to mind, partly because he is a good sport, partly because we share an interest in open (to be interpreted here as candid) science, and of course because he won the Nobel Prize in Physiology or Medicine (with Phillip Sharp) in 1993 for work on gene structure.

At first he was reluctant and slightly insulted, making me think I should write "Ten Simple Rules for How Not to Insult a Nobel Laureate." The rationale is that we should not be encouraging scientists to think about science through awards but through having fun and the desire to do their best science. That should be enough. The result is exactly that—having a bit of fun and making some important points all at once. I hope you enjoy it as much as I did.

I'm guessing that some Nobel Laureates don't write quite as well and engagingly as Roberts does. In any case, it's a fine read.

Can a Futures Market Save Science?

The headline for [this November 9, 2015 piece](#) by Ed Yong at *The Atlantic* is a little silly, but the experiment is at least intriguing.

You read a scientific paper, look at the results, and ask yourself: *Are these real?* Do they reflect something genuine about the world, or are they statistical flukes? This ability to critically analyze publications

girds all of science. It is the essence of the peer-review process. And, apparently, it's harder than it looks.

Caveats: The field involved is psychology, which may have more trouble with scientific reproducibility than most. And this was one experiment involving 41 published studies and 92 study participants.

Here's how it worked. Each of the 92 participants received \$100 for buying or selling stocks on 41 studies that were in the process of being replicated. At the start of the trading window, each stock cost \$0.50. If the study replicated successfully, they would get \$1. If it didn't, they'd get nothing. As time went by, the market prices for the studies rose and fell depending on how much the traders bought or sold.

The participants tried to maximize their profits by betting on studies they thought would pan out, and they could see the collective decisions of their peers in real time. The final price of the stocks, at the end of two-week experiment, reflected the probability that each study would be successfully replicated, as determined by the collective actions of the traders. If it was \$0.83, that meant the market predicted an 83 percent chance of replication success. If that final price was over \$0.50, Dreber's team considered it to be a prediction of success; if it was under, it was a prediction of failure.

In the end, [the markets correctly predicted](#) the outcomes of 71 percent of the replications—a statistically significant, if not mind-blowing score.

Worth noting: these were effectively team scores; the participants could see the real-time betting and modify their own bets. That's significant, because when asked to make predictions singly, the participants were right 58% of the time: basically the same as a coin flip.

As for actual replicability, that turned out to be roughly 56%: again, a coin-flip.

Still Not Significant

OK, so this post, by Matthew Hankins [on April 21, 2013](#) at *Probable Error*, is obviously pre-2015—but I picked it up from a November 16, 2015 item at *boingboing*.

What to do if your p-value is just over the arbitrary threshold for 'significance' of $p=0.05$?

You don't need to play the significance testing game —there are better methods, like quoting the effect size with a confidence interval —but if you do, the rules are simple: the result is either significant or it isn't.

So if your p-value remains stubbornly higher than 0.05, you should call it 'non-significant' and write it up as such. The problem for many authors is that this just isn't the answer they were looking for: publishing so-called 'negative results' is harder than 'positive results'.

The solution is to apply the time-honoured tactic of circumlocution to disguise the non-significant result as something more interesting. The following list is culled from peer-reviewed journal articles in which (a) the authors set themselves the threshold of 0.05 for significance, (b) failed to achieve that threshold value for p and (c) described it in such a way as to make it seem more interesting.

As well as being statistically flawed (results are either significant or not and can't be qualified), the wording is linguistically interesting, often describing an aspect of the result that just doesn't exist. For example, "a trend towards significance" expresses non-significance as some sort of motion towards significance, which it isn't: there is no 'trend', in any direction, and nowhere for the trend to be 'towards'.

That's the intro. The remainder of the post is some 500 phrases with related p -values, beginning with

(barely) not statistically significant ($p=0.052$)

a barely detectable statistically significant difference ($p=0.073$)

and ending with

well-nigh significant ($p=0.11$)

Some of the phrases sort-of admit the lack of statistical significance; quite a few push very hard to avoid that admission, e.g.,

a clear tendency to significance ($p=0.052$)

a clear trend ($p<0.09$)

a clear, strong trend ($p=0.09$)

an established trend ($p<0.10$)

an evident trend ($p=0.13$)

Lots of comments, some arguing that the limit for significance is itself arbitrary and therefore close should be good enough, including one that may be unmaking its own case:

If "significance" is defined as 0.05, then it seems logical that 0.06 would be "almost significant," just like 0.06 is almost 0.05. Just like scoring 99% on a test is like almost getting 100%. It's like those carnival games where you pound the giant hammer on the scale, and if you pound it hard enough, the ball hits the bell and you win the prize. If someone pounds the hammer but the ball just barely runs out of energy before hitting the bell, then I think most people would say that the contestant almost won the prize.

Which is another way of saying the contestant *did not* win the prize. As to the point that the limit is (somewhat) arbitrary, the author notes that *in all cases* the study authors used the standard level of significance—then wanted to fudge it when they didn't hit the numbers.

Catching Up: 2016

It's 2016 already, how are websites still screwing up these user experiences?!

Here's a true evergreen—by Troy Hunt [on January 4, 2016](#) on Hunt's blog. The sad part is that it is an evergreen: if anything, things are getting worse.

We're a few days into the new year and I'm sick of it already. This is fundamental web usability 101 stuff that plagues us all and makes our online life that much more painful than it needs to be. None of these practices —*none of them* —is ever met with “Oh how nice, this site is doing that thing”. Every one of these is absolutely driving the web into a dismal abyss of frustration and much ranting by all.

And before anyone retorts with “Oh you can just install this do-whacky plugin which rewrites the page or changes the behaviour”, no, that's entirely not the point. Not only does it not solve a bunch of the problems, *it shouldn't damn well have to!* How about we all just agree to stop making the web a less enjoyable place and not do these things from the outset?

Allow me to totally lose my cool for a bit and tell you just what's wrong with the web today:

What follows are a set of site issues, each with a discussion and illustration. Since the article's worth reading on its own, I'll just quote the issues:

- Surveys and other crap—anything that takes over my screen
- The back button—let it do its job!
- Multi-part articles—you can fit it all on one page
- Passwords—let me have whatever I want
- Full screen and popover ads—die a fiery death
- Delayed popover ads—evil personified
- Implausible ads—ban them
- EU cookie warnings—this is just plain stupid
- Scroll hijacking—that's not how websites work!
- Bait headlines—how desperate are you?!
- Auto-play—never, ever do this!
- Paywalls—no!
- Mobile app—no, I don't want it, I just want to read the damn website!
- Mobile sites—that's not what I wanted to share

- Company email—I'll decide what my company email is, not you
- Blocking ad blockers—how much do you really want to piss people off?!

Nearly 300 comments. Quite a few mention other irritants.

Worshipping the Flying Spaghetti Monster is not a real religion, court rules
I must admit that this story, reported [on April 14, 2016](#) by David Kravets at *ars technica*, bugs me.

A Nebraska inmate who has professed his allegiance to the divine Flying Spaghetti Monster lost his bid demanding that prison officials accommodate his Pastafarianism faith.

A federal judge dismissed the [suit](#) (PDF) Tuesday brought by Stephen Cavanaugh, who is serving a 4- to 8-year term on assault and weapons charges at the Nebraska State Penitentiary. US District Judge John Gerard ruled that “FSMism” isn’t a religion like the ones protected under the Constitution.

“The Court finds that FSMism is not a ‘religion’ within the meaning of the relevant federal statutes and constitutional jurisprudence. It is, rather, a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education. Those are important issues, and FSMism contains a serious argument—but that does not mean that the trappings of the satire used to make that argument are entitled to protection as a ‘religion,’” the judge [ruled](#). (PDF)

A paragraph from the ruling:

This is not a question of theology: it is a matter of basic reading comprehension. The FSM Gospel is plainly a work of satire, meant to entertain while making a pointed political statement. To read it as religious doctrine would be little different from grounding a “religious exercise” on any other work of fiction. A prisoner could just as easily read the works of Vonnegut or Heinlein and claim it as his holy book, and demand accommodation of Bokononism or the Church of All Worlds. 6 See, Kurt Vonnegut, *Cat’s Cradle* (Dell Publishing 1988) (1963); Robert A. Heinlein, *Stranger in a Strange Land* (Putnam Publ’g Grp. 1961). Of course, there are those who contend—and Cavanaugh is probably among them—that the Bible or the Koran are just as fictional as those books. It is not always an easy line to draw. But there must be a line beyond which a practice is not “religious” simply because a plaintiff labels it as such. The Court concludes that FSMism is on the far side of that line.

Now that it’s up to courts to decide what’s a valid religion and what isn’t, can we expect suits to declare a variety of other faiths as Not Really Religions? What makes Pastafarianism less legitimate than any other faith—

e.g. Scientology or Bokomonism? I find it...bemusing...that there are 666 reader comments. Or at least there were when checked on July 15, 2019.

Think Tank: The Library Of Congress Has Too Many Librarians, So We Should Reject New Nominee To Run It

Here's one that may be even better now than when Mike Masnick posted it, on July 1, 2016 at *techdirt*. For starters, here's Masnick's take on Carla Hayden's nomination:

We were both surprised and happy when President Obama [nominated](#) the obviously well qualified Carla Hayden to be the new Librarian of Congress to succeed James Billington, whose tenure was considered such a disaster that staffers [literally celebrated when he left](#):

He adds some of Hayden's qualifications and continues with the basis for the headline:

But, of course, some are unhappy about this. But with such a supremely qualified nominee, the attacks have been weird and getting weirder. We recently wrote about a [laughable complaint](#) that Hayden was "pro-obscenity" because she fought against mandatory porn filters on all computers in libraries. And now someone has ^{pointed} out a complaint from Hans von Spakovsky from the Heritage Foundation, claiming that Hayden [is unqualified for the position... because she's a librarian](#). Really.

But the library's enormous staff (3,244) already numbers countless credentialed librarians—the institution is hardly in need of another. That's why the post of librarian of Congress has long been filled not by librarians, but by first-rank scholars and historians of national reputation. The librarian of Congress is in effect the nation's "scholar-in-chief."

He goes on to dissect this to some extent. It's a good dissection. And, as expected. Dr. Hayden is turning out to be a *great* Librarian of Congress.

Masthead

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