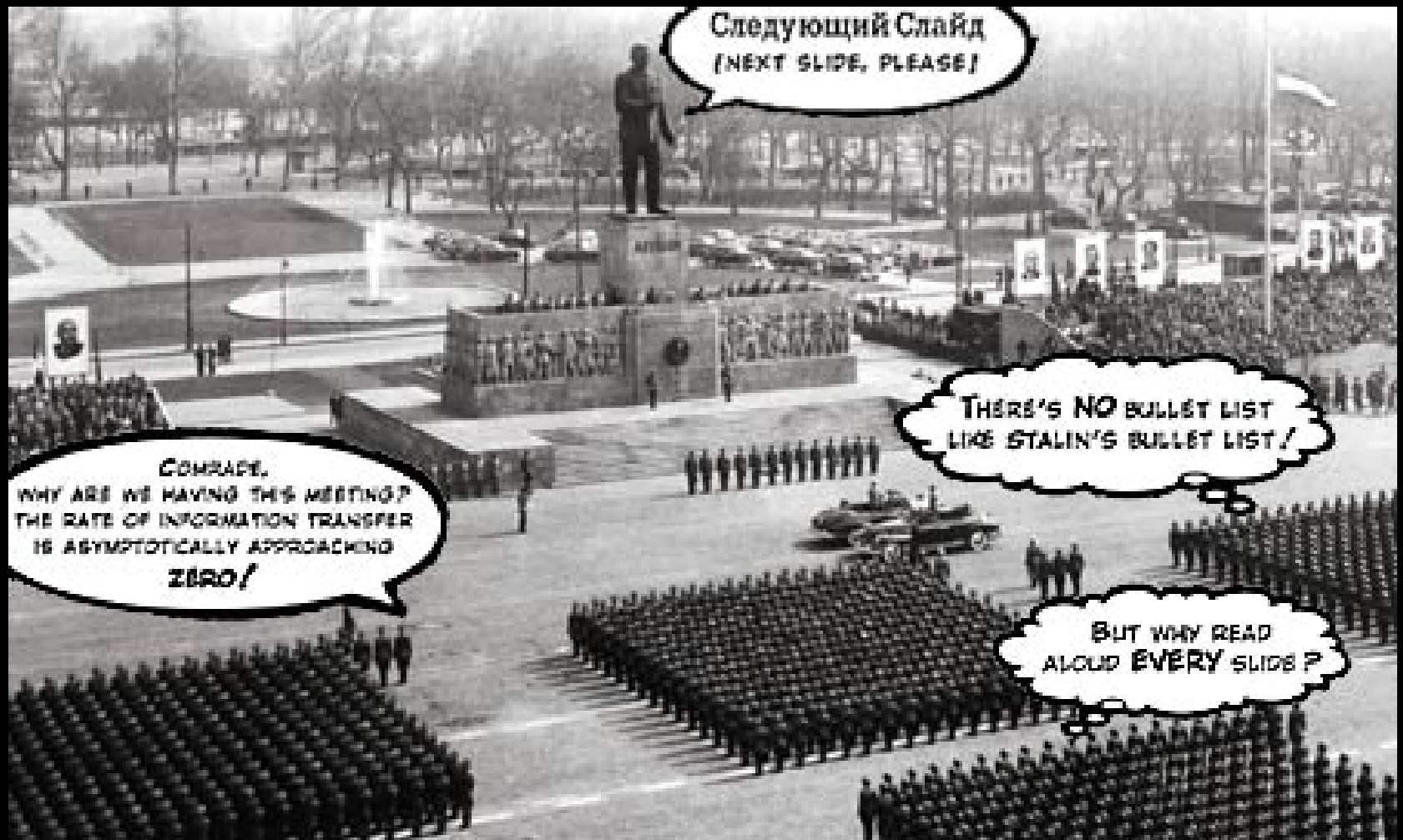


*The History of Intellectual Property
and Policy Shifts – Lessons from the
Ancient History of the 1990s and before*

Justin Hughes
Loyola Law School
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Los Angeles, California

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Homage to Edward Tufte, The Cognitive Style of Powerpoint

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- Broad, *complete* IP policy responses to new technological developments [and it seems to work]
- Policy “tweaks” to respond to technological developments
- Misunderstandings of how technology will develop – and how difficult it is to correct these once there are entrenched players
- Technological developments that we ignore (or ignore as long as possible).

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Complete, big-picture responses where the end result has been good, but we will never be able to prove it is optimal

+ Motion Pictures – inclusion within ©

+ Software– inclusion within ©

+ Sound recordings – the decision to “layer” copyrights instead of creating neighboring rights

+ *outside copyright*, the Bayh-Dole Act

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FINAL REPORT

of the National Commission
on New Technological Uses
of Copyrighted Works

July 31, 1978

Library of Congress / Washington 1979

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“Under the Bayh-Dole Act, inventions created under [federal] contracts and grants normally become the property of the contractors and grantees, provided they follow certain reporting and other requirements. Among these requirements are notifying the funding agency that (1) the invention has been created, (2) the contractor or grantee has elected to retain ownership, (3) a patent application has been submitted, and (4) the government has a royalty-free right to use the invention. “

*Federal Agency Efforts in Transferring and
Reporting New Technology*

General Accounting Office, GABO-03-47 (2002)

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17 USC § 107

. . . . In determining whether the use made of a work in any particular case is a fair use the factors to

- (1) the purpose and character of the use, including whether such use is of a **commercial nature** or is for nonprofit educational purposes;

. . .

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. . .

	Large scale	Small scale
Commercial	Pre-network, traditional piracy	[Didn't <u>happen/matter</u>]
Private/non-profit	[Didn't <u>happen</u>]	[Didn't matter]

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	Large scale	Small scale
Commercial	Pre-network, traditional piracy	[Didn't <u>happen/matter</u>]
Private/non-profit	P2P systems	[Didn't matter]

A&M Records v. Napster (9th Circuit, 2001)

Trial court

“a host user cannot be said to engage in a personal use when distributing the file to an anonymous requester.” [PAGE 924 BOT]

“Napster users get for free something they would ordinarily have to buy.”

Ninth Circuit

“Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”

TRIPS Agreement (1995)

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a **commercial scale**. . . . Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a **commercial scale**.

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17 USC 512 (a) **Transitory Digital Network Communication**

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process . . . ;

(3) the service provider does not select the recipients of the material ;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained . . .

(5) the material is transmitted through the system or network without modification of its content.

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Prior definition in 17 U.S.C. 121 (from 1996)

(4) “specialized formats” means—

(A) braille, audio, or digital text *which is exclusively for use* by blind or other persons with disabilities; and

(B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

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NEW definition in 17 U.S.C. 121 (2018)

“(1) ‘**accessible format**’ means an alternative manner or form that gives an eligible person access to the work *when* the copy or phonorecord in the accessible format *is used exclusively by the eligible person* to permit him or her to have access as feasibly and comfortably as a person without such disability as described in paragraph (3);”

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Oscar Wilde No. 18

*Burrow-Giles Lithographic Co. v.
Sarony (1884)*



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The Garcia Photo and the Fairey Poster

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Photographed images do not seem to be statements about the world so much as pieces of it, miniatures of reality that anyone can make or acquire.

Susan Sontag
On Photography (1977)

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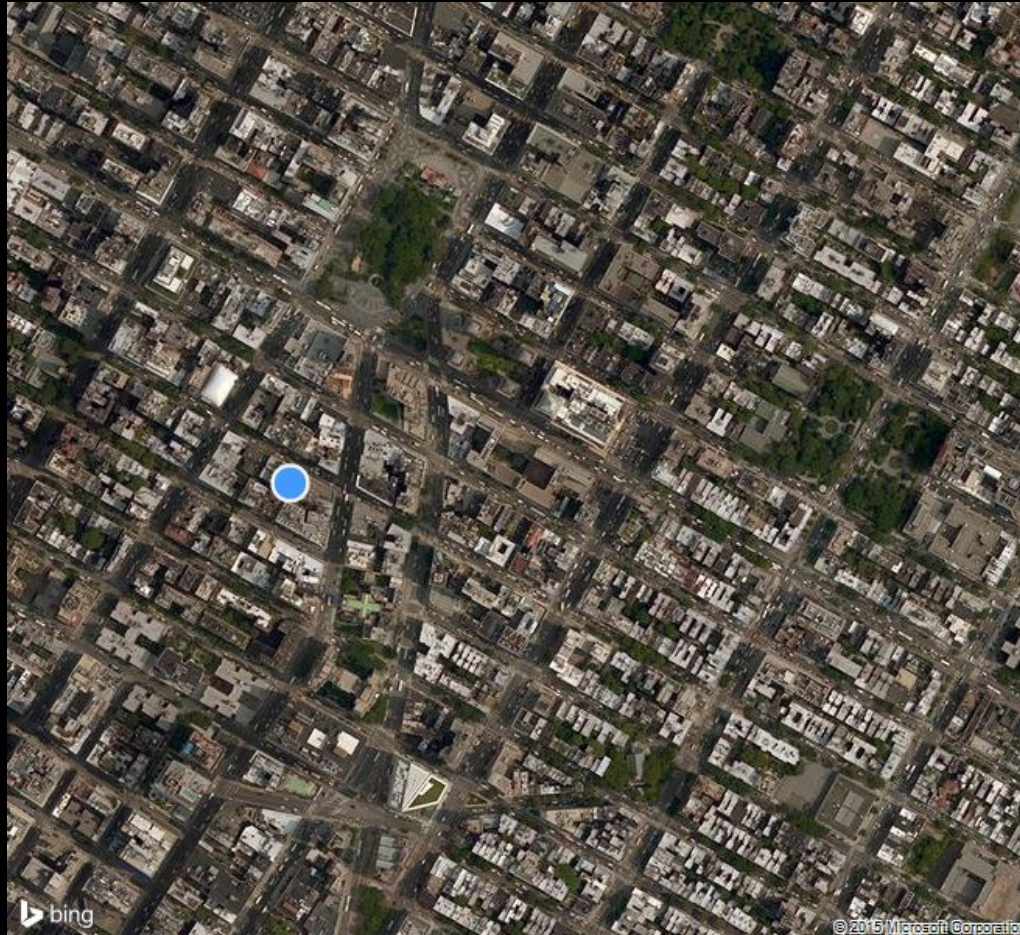


2008 Satellite Photo of Nantucket Island on Google Maps

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*“It’s a poor sort of memory
that only works backwards”*

The White Queen to Alice

Lewis Carroll

Through the Looking Glass (1872)