

# Copyright<sup>x</sup>

February – April 2015



UNIVERSITY OF CAPE TOWN  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD



UCT Law @ work  
Professional Development Project

# Special events

## 1 April

Litigating Fair Use

*Bruce Rich (senior partner and head of IP & Media, Weil LLP)*

## 8 April

Photography

*Abelardo Morell (photographer) and Gerald Frug (HLS professor)*

**Time:** 16h20 – 17h40 South Africa (14h20 – 15h40 UTC)

**Live streaming at :** <http://copyx.org/live>

**Later available at:** <http://copyx.org/event>

You will be able to ask questions via chat



# Fictional character protection

## Madam & Eve

*Rapid Phase Entertainment CC and others v SABC* 1997 JOL 393 (W)

Author: Bram Van Wiele



# USA

## **“Sam Spade” Test:**

*does the character constitute ‘the story being told,’ or is the character a “chessman” in the game of telling the story?*

## **Development Test (dominant current view):**

*Is the character sufficiently well delineated (developed and distinct)?*



# South Africa

No such thing as fictional character protection.

Problematic?

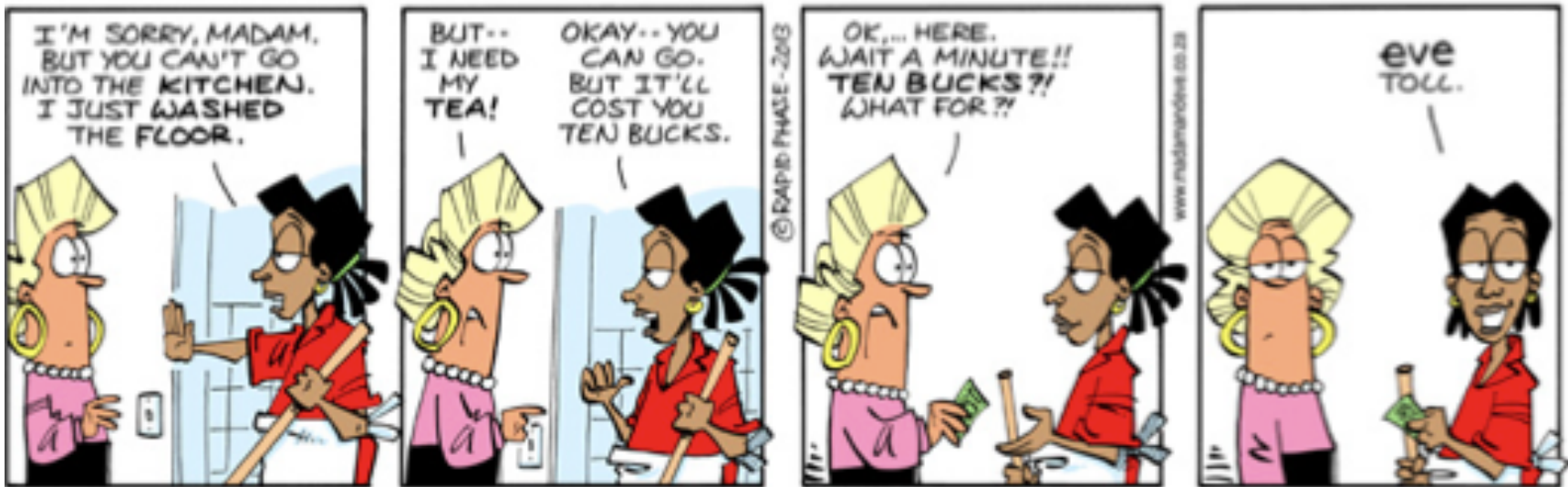
## Discussion:

*Rapid Phase Entertainment CC and others v SABC* 1997 JOL 393 (W)

“Madam & Eve case”



# Madam & Eve



source: [www.madamandeve.co.za](http://www.madamandeve.co.za)

# Madam & Eve



Link to the video: <https://www.youtube.com/watch?v=9NWSzbnDuHY>



# Madam & Eve

## Rapid Phase entertainment claims:

- Cartoon strips are literary work (SABC disputes) and artistic works
- SABC infringed © by adapting and reproducing the work





# Madam & Eve

## Court:

- The cartoons are literary works (if “stories” is interpreted broadly), but
  - No evidence that the **stories have been copied**
- The cartoons are artistic works, but
  - **No reproduction** (see definition in CA) has taken place
  - **No adaptation** has taken place

“there has, in the moving pictures produced by [SABC], not been an embodiment of [Rapid Phase entertainment’s] artistic works

**No © infringement**



# Discussion

- Opinion on the judgment?
- In your view, did reproduction or adaptation take place?
- Is there need for character protection in South Africa?
- If yes, which test should be applied? Reservations?
- Would it have made a difference in this case?



# Seminar 3: Authorship & Welfare Theory

26 February 2015



# Overview

## Part I

- Authorship in South African copyright law
- Authorship vs ownership
- Orphan works
- Authorship and ownership: conflict in computer programs
- Whiter shade of pale (case study)

## Part II

- The welfare theory
- Wikipedia (case study)



# Part I



# Authorship in South African copyright law

- Corner-stone of © law
  - Author is de **maker of a work** subject to © (important for subsistence of ©)
  - © law attempts to **incentivise creativity** by protecting and rewarding the author
- Identification of the author
  - **Person who embodies the work in material form**
  - Can be difficult as works can go through many stages before final form
  - Final form on a fact by fact bases but, in general **when ready for utilization or commercial exploitation**



# General rule: person who embodies the work in material form

- Person who creates the material form of the work
- NOT person who conceived the idea
- Creation must involve independent effort and skill
- Fact by fact bases



# Joint authorship

- When two or more persons are engaged in the creation of a work
- Co-authors and co-owners
- Fact by fact bases
- Not much in the Copyright Act
  
- Peter-Ross v Ramesar 2008 (4) SA 168 (C)





# Juristic person

- CA contemplates author CAN be a juristic person (s3(1)(b))
- **“Traditional” works:** author **only natural person** (see term of © & Berne)
- **Other works:** author can be a **juristic person** (e.g. cinematograph films, see *infra*)



# Authorship of computer generated works

- Computer generated work is a work which is **made by the operation of a computer** in circumstances where it is **not** possible to attribute the resultant work directly to the efforts of any **individual** causing the work to be made
- Computer assisted work is **work made by an individual** using a computer as a **tool** or **instrument**
- Computer generated work: person by whom the **arrangements necessary for the creation** of the work were undertaken (s1 definition of “author”)
- Computer assisted work: normal rules



# Designation of author by the CA

- In certain cases the CA designates who the author is (s1, definition of “author”)
- **Photograph**: the person responsible for the **composition** of the photograph
- **Sound recording**: the person by whom the **arrangements** for the making of the sound recording were made
- **Cinematograph film**: the person by whom the **arrangements** for the for the making of the film were made
- **Computer program**: the person who **exercised control** over the making of the computer program (even if independant contractor! *Infra*: conflict with ownership)
- ...



# Designation of author by the CA

- Photograph: the **person** responsible for the **composition** of the photograph



“The person responsible for the **composition** of the photograph”



“The person responsible for the **composition** of the photograph”



Link to the video: <https://www.youtube.com/watch?v=G5Wj51uGnI>



“The **person** responsible for the composition of the photograph”



“The **person** responsible for the composition of the photograph”





“The **person** responsible for the composition of the photograph”

# “Nobody” Can’t Hold a Copyright, Which Means Sometimes, Nobody Holds a Copyright



By *Sherwin Siy*

August 06, 2014 [Copyright Reform, Public Domain](#)



copyright in the photo?

So, thanks to Wikimedia’s recent publication of its **transparency report**, the monkey selfie is back in the news. Some background: in 2011, a British photographer traveling in Indonesia had his camera stolen by a macaque. It took a number of photos of varying quality, including this great little self-portrait. The image quickly went viral, followed by takedown requests by the photographer. Which immediately raised the question—wait—does he own the



“The **person** responsible for the composition of the photograph”

Sherwin Siy:

"As you can tell from the post, I do not believe that you hold a valid copyright in that particular image. This allows us to reproduce the image without first seeking your permission, or listing you as a contributing factor to its creation."



“The **person** responsible for the composition of the photograph”

"The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the deposit copy(ies) state that the work was inspired by a divine spirit."



“The **person** responsible for the composition of the photograph”

**Your opinion?**

*cf. e.g.* Computer-generated works:

The author is the “person by whom the arrangements necessary for the creation of the work were undertaken”



# Authorship vs ownership

! Important to distinguish authorship from ownership

- Author: person who **creates** the work
- Owner: person person who **owns the ©** in the work

- **General rule:**

**Owner** of the © in a work is the **author** of the work (s 21(1)(a))

- Several **exceptions** ! (s 21(1)(b),(c) and (d), s(5)(2) in conjunction with s21(2))



# Ownership exceptions (1)

- “Where a **literary or artistic work** is made by an author **in the course of his employment** by the proprietor **of a newspaper, magazine or similar periodical** under a contract of service or apprenticeship [...] the said proprietor shall be the owner of the copyright in the work **in so far as** the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published [...]” (s21(1)(b))
- “Where a person **commissions** the taking of a **photograph**, the **painting** or **drawing** of a portrait, the making of a **gravure**, the making of a **cinematograph film** or the making of a **sound recording and pays or agrees to pay for it in money or money’s worth, and the work is made in pursuance of that commission**, such person shall [...] be the owner of any copyright [...]” (s21(1)(c))



# Commission?



# Ownership exceptions (2)

- “Where in a case not falling within either paragraph (b) or (c) a work is made in the **course of the author’s employment** by another person under a **contract of service or apprenticeship**, that other person shall be the owner of any copyright [...]” (s21(1)(d))
  - Contract of service: master/servant relationship
  - Contract of work: equal footing

**In course of employment:** employer is owner of ©

**In course of commission:** commissioner is owner of ©





# Joint ownership

- E.g. as a result of joint authorship
- Nothing in CA
- Principles of the law to the ownership of incorporeal movable property apply: common law of **co-ownership**
  
- **Undivided** share of the **whole** copyright
  - **No exploitation** of the © without consent of the co-owner(s)
  - **Enforcement** of © without consent of the co-owner(s)



# Orphan works (1)

- Works of which the author/owner is **not known** (and can't be found)
- Estimated **3 million** orphan works in Europe
- Reasons:
  - **No information on rights and right holders**, or this may be out of date. Registration is no longer a requirement (Berne) and as a result, there are no comprehensive databases or other resources with complete and/or up-to-date information on rights and right holders of protected materials.
  - Right holders may **no longer be identifiable or locatable**. Creators may have died and it may be difficult to identify heirs. Legal persons holding rights may have been dissolved or merged or have sold/licensed the rights to other organisations and there may be no evidence on their successors-in-title.



# Orphan works (2)

- Proposed solutions:
  - limiting the term of protection or introducing cut- off dates
  - various licensing solutions
  - private safe harbour commitments by right holders
  - creative commons licences (see seminar 4)
  - Creating databases such as ARROW
  - ...
- All have their own issues (feasibility, proportionality, efficiency, conflict of laws, ...)



# Overview

## Part I

- Authorship in South African copyright law
- Authorship vs ownership
- Orphan works
- Authorship and ownership: conflict in computer programs
- Whiter shade of pale (case study)

## Part II

- The welfare theory
- Wikipedia (case study)



# Authorship and ownership

Conflict in computer programs



# Authorship and ownership

## General rule:

- creator of a work is **both author and owner**

## Possible conflict:

- **Computer programs created under commission:**
  - code protected as “**computer program**”
  - databases and preparatory works are protected as “**literary works**”



# Authorship

## Author

in relation to-

- a **literary, musical or artistic work**, means the person who first **makes or creates** the work;
- a **computer program**, the person who **exercised control** over the making of the computer program;

## Exercised Control:

- no need for supervisor to have understanding of technical aspects
- enough “...(setting the) purpose and requirements that the program to be made must satisfy, and evaluating the work of the person that “makes” the program to ensure that the requirements are met...”

(Haupt v Brewers Marketing Intelligence and others (a quo))



# Ownership (employment)

## Employee

- is author of copyright in software
- is author of the copyright in the databases (and preparatory works)

## Employer

- Is owner of the copyright in software
- Is owner of copyright in the databases (and preparatory work)

## CONFLICT when employer “exercises control” over employee?

- Employer is also author of copyright in the software

**no conflict arises**





# Ownership (commission)

## Independent contractor

- is author, hence owner of copyright in software
- is author, hence owner of the copyright in the databases (and preparatory works)

## Commissioner

- Is not the author, neither the owner of any copyright (not in list)

## CONFLICT when commissioner “exercises control” over independent contractor?

- authorship and hence ownership in code vests in commissioner
- authorship and hence ownership in databases (and preparatory materials) vests in independent contractor

**Can't use one without the other !**

**Need for contract !**



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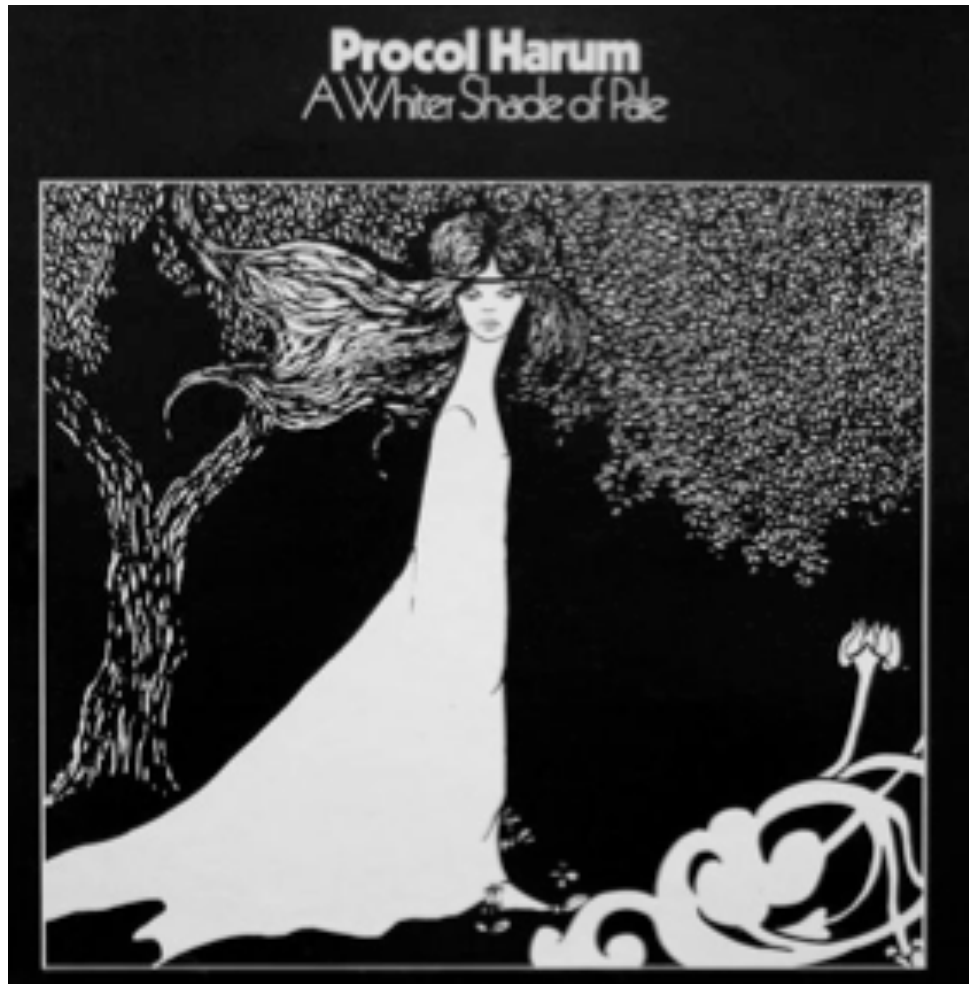
# Whiter shade of pale

*Original author: William Fisher, Revised by: Kim Meyer, Last revised: 9 February 2014*

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# Whiter shade of pale



Date: 9 Feb 2014; <http://www.last.fm/music/Procol+Harum/Whiter+Shade+Of+Pale+%2812-15%29/+images/76708008>. This image is licensed under the [Creative Commons Attribution-Share Alike 3.0 Unported](#) license.



# Whiter shade of pale



Date: 9 Feb 2014: <http://www.haikudjour.com/?p=523>. This image is licensed under the [Creative Commons Attribution-Share Alike 3.0 Unported](#) license.



# Whiter shade of pale



Author: Gab Archive/Redferns. Date: 9 Feb 2014; <http://www.guardian.co.uk/music/2012/may/31/procul-harum-whiter-shade-of-pale>. This image is licensed under the [Creative Commons Attribution-Share Alike 3.0 Unported](https://creativecommons.org/licenses/by-sa/4.0/) license.

Dave Knights, Gary Brooker, Robin Trower, BJ Wilson and Matthew Fisher.



# Whiter shade of pale (1967)

The image displays a musical score for the song "Whiter shade of pale" (1967). It includes guitar chords, piano accompaniment, and vocal lines with lyrics. The chords are: C, C/B, C/A, C/G, F, F/E, Dm, Dm/C, G, G/F, Em, G7, C, F, G, F, G7. The piano part is marked *mf*. The vocal part includes the lyrics: "go, leave," "son," "turned cart - wheels 'cross the floor," "though in truth we were at sea," "and the truth is plain to see,".

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# Whiter shade of pale



Date: 9 Feb 2014; <http://www.dailymail.co.uk/property/article-2023668/Our-2m-Pracol-Haven-Whiter-Shade-Of-Pale-writer-sells-house-bought-27k-1971.html>. This image is licensed under the [Creative Commons Attribution-Share Alike 3.0 Unported](#) license.

Caption: Wintershall, home for 40 years to Gary Brooker, writer of A Whiter Shade Of Pale, is on the market for £2million





# Whiter shade of pale



Matthew Fisher, 2006

Author: AP. Date: 9 Feb 2014. <http://www.telegraph.co.uk/culture/music/music-news/5941449/Pr-ocul-Harum-organist-Matthew-Fisher-wins-share-of-A-Whiter-Shade-of-Pale-royalties.html>.  
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# UK Joint authorship law

- UK law requires that an author's contribution be "**original**," "**significant and skillful**," and the product of the author's "**skill and labour**" in order to give rise to joint authorship rights.
- Each author's ownership **share** is determined based upon the **proportional quantity and quality** of that author's contribution to the whole. (*cf.* US an SA)
- UK copyright law does **not** grant a joint author the right **to unilaterally license** the work. (*cf.* US)

What result would be generated by applying this standard to the case?



# Result under UK law

- At trial, Justice Blackburne determined that Fisher through his “**skill and labor**” made a “**distinctive and significant**” contribution to the song in the form of the organ solo, and therefore declared **Fisher co-author** of “A Whiter Shade of Pale.”
- Blackburne: “[I]t is abundantly clear...that Mr. Fisher’s instrumental introduction... is sufficiently **different from what Mr. Brooker had composed** on the piano to qualify in law, and by a wide margin, as an **original contribution** to the Work.”
- Blackburne, observing that the question of apportionment is a “highly subjective one,” awarded Fisher a **40 percent interest** in the song. “His contribution to the overall work was on any view substantial but not, in my judgment, as substantial as that of Mr. Brooker. As between the two it seems to me that Mr. Brooker should be accorded the greater share.”



# Appellate history

- 20 Dec. 2006: Justice Blackburne of the Chancery Court issued his ruling in favor of Fisher.
- 4 Apr. 2008: The Court of Appeals overturned Justice Blackburne’s ruling on the basis of acquiescence and laches, reasoning that Fisher’s delay in asserting his claim was “unconscionable.”
- 30 Jul. 2009: The House of Lords overturned the Court of Appeals and affirmed Justice Blackburne’s decision.



# Discussion

## Joint Authorship Standards

- Do you think the outcome of the case under UK law was fair?
- What do you think makes a particular part of a creative work “significant”? “Distinctive”? What is “skill”? What is “labor”? Do these terms provide an objective, consistent, and clear standard for determining joint authorship?
- Should the intent of the co-authors matter in determining whether joint authorship exists? What are the benefits of requiring intent? What are the drawbacks?



# Discussion

## Apportionment of Authorship Shares

- Do you favor equal apportionment of copyright interests among joint authors, as exemplified by US law? Or do you think it's preferable for each author to get a portion of the proceeds that tracks his or her qualitative and quantitative contributions to the work as a whole?
- Do you think it is ever possible to objectively apportion copyright interests among joint authors?
- How would you apportion the copyright interests among Brooker, Reid, and Fisher? Explain your reasoning.



# Discussion

## Policy

- How might each system affect the behavior of musicians (or other artists) working in collaboration? What kinds of incentives does each system create?
- Is it beneficial and desirable to encourage creative collaboration?
- Can you suggest ways to structure a legal system that would best promote collaboration among authors of creative works?



# Part II





# The welfare theory

“greatest happiness of the greatest number”

- **Prospective** in orientation (looks forward in time)
  - craft the law in a way that will induce people to behave in the future in ways that create happiness or welfare (*cf.* fairness theory)
- **Collective** (benefit for society as a whole, not an individual)



# Wikipedia

*Original author:* Ana Enriquez

Last revised: 6 March 2013

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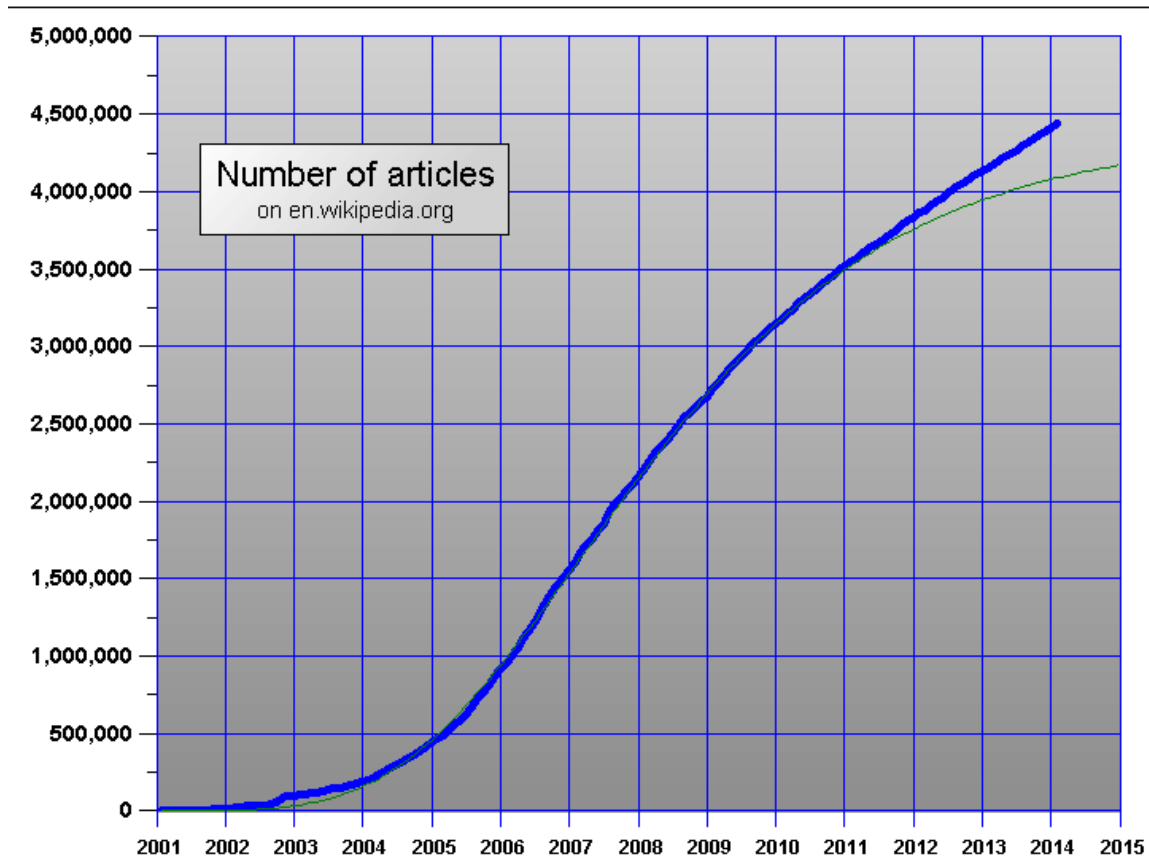


# Wikipedia

- free online collaboratively edited encyclopedia
- launched in January 2001
- the most popular reference work on the Internet
- sixth most popular website of any kind
- 285 languages have their own versions of Wikipedia



# Wikipedia



# Articles

- **anyone** can edit a Wikipedia entry
- by clicking the "Save page" button, you agree to **the Terms of Use**, and you irrevocably agree to release your contribution under **the CC-BY-SA 3.0** License and the **GFDL**
- **edits** are tracked in a "history" page associated with each article
- "talk" page to facilitate **communication** among Wikipedia **editors**.



# User accounts & community

## User accounts

- users **can** create accounts (not requires for editing)
- with an account, a Wikipedia editor (Wikipedian) can/gets:
  - track her contributions
  - a “watchlist” to show her the most recent edits to pages she’s interested in
  - a talk page where other Wikipedia editors can leave her messages
- ...

## Community

- well developed
- strict rules and dispute resolution processes
- Wikipedians award each other “barnstars” to recognize achievements
- WikiProjects to tackle specific topics or tasks



# Core rules & criticisms

## Core rules

- written from **neutral** point of view
- information is **verifiable**
- **original** research is **not** allowed

## Criticisms

- inaccurate
- biased
- explicit photographs



# Questions

- **Why** do you think people **contribute** to Wikipedia?
- Have **you** ever participated in a creative project that you **weren't paid for and didn't get compensated** for later? **Why** did you participate?





# Let's meet some Wikipedians



# WIKIPEDIA



# Discussion (1)

- What is the **value** of an **open educational resource** such as Wikipedia?
- How can we design a **legal system** that **facilitates the creation and maintenance** of such resources? (automatic protection, licenses, ...)



# Discussion (2)

We've all heard the common **criticisms** of Wikipedia—inaccuracy, vandalism, self-promotion, etc.

- **Does Wikipedia really have these problems?**
- Do similar works produced more **conventionally** avoid them, and how is that connected to the **incentive** provided by copyright?



**Thank you for your attention and participation.**

**Any questions?**

