Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

N. Rodgers: Hi Augheie?

J. Aughenbaugh: Good morning, Nia? How are you?

N. Rodgers: I'm good. How are you?

J. Aughenbaugh: I'm fine. Thanks.

N. Rodgers: Remember how we talked about Georgia, SCOTUS and copyright and there were lots of weeds to be gotten into?

J. Aughenbaugh: Yes, I do recall that.

N. Rodgers: I think we had a discussion about the fairness and unfairness of publishing and all the other kind of stuff. For our listeners, we have an extra special treat because we went out and got the copyright librarian and to come and talk to us, that's Hilary Miller. She's the Scholarly Communications Librarian at VCU Libraries. She's going to talk to us today more in-depth about, I didn't even know there was a copyright clause to the Constitution. I should have known because this morning when I said Hillary is going to talk about copyright. He goes, ''Oh, like the copyright clause?'' He starts naming off where it is and all that kind of stuff I should have known. Welcome, Hillary, Welcome to the podcast.

Hillary Miller: Thank you. It's good to be here and actually to be back, because we have talked before, post-office specifically. But the reason I got into that was all about noting out over copyright.

N. Rodgers: Yeah, you came and talked to us about stamps. For you who hasn't listened to that episode, it's one of my favorites.

J. Aughenbaugh: It's one of our best bought podcast episodes. It's utterly informative and hilarious.

N. Rodgers: You should go listen because Hillary is awesome. Hillary, I'm about to ruin your awesome here because I have so many questions. Actually, I'm not going to ruin your awesome, I'll enhance your awesome with my questions. Everything the federal government produces is in the open domain and we can all use it all the time, and there's no such thing as copyright, right?

Hillary Miller: Well.

N. Rodgers: Listeners can't see her, but she's laughing. She's doing the actual physical version of LoL.

Hillary Miller: You're part of the way, right? That is often the way that it is described. But there is a lot of context and times when that doesn't quite legally or practically workout and that's why I would say, you're right. You mentioned open winner public domain, which is the term that describes it's things that never get copyright protection. For example, works of the federal government are just not eligible to be protected by copyright. You guys talked about this already. That also is things where copyright protection has expired. It's just past the length of its life and its fallen into the public domain, is sometimes how it's described. But there are some exceptions to the federal government works. In terms of contractors and things, sometimes those works will not be in the public domain. That's basically if the contractor working with the government can secure in their contract the right to keep the copyright for those works. That does happen, but the large swaths of things that the federal government produces do not get copyright protection. There are also some exceptions, and I work on this stuff too, things that the federal government funds sometimes get copyright protection. An example of that is all of the research that is funded out of National Institutes of Health or all these other major government funding bodies. When that research is published in the form of articles, that copyright stays with the author, although it is usually instantly transferred to publishers as well. That's another big area, I would say of government related stuff that does get copyright protection.

J. Aughenbaugh: I'm sorry, go ahead Nia.

N. Rodgers: Sorry, Aughie. If you work on an NIH grant, and you come up with stuff, isn't there the requirement that it does get published somewhere?

Hillary Miller: Yes. That's been over the past 10 or so years becoming more and more common. The NIH started that. Most of the other major federal government funders are picking up on that. That's called Public Access sometimes. What they say is that you have to make that publicly accessible, usually with some delay after when it's published. That's usually so publishers can recoup costs. A standard for NIH would be you have to put up a version of the article within a year of it being published through PubMed Central, is where most of those are gathered. But it's interesting because as opposed to some European models, it's public access, not open access, which would imply that the work is not just protected by copyright but made available under an open license that doesn't just let you look at the thing freely available online, but it actually gives you the rights to download it and share it and build on it. The version we have here is just put it up so it's free for someone to look at.

J. Aughenbaugh: Yeah, I mean, in this case, one of the big issues Nia in regards to copyright laws in general, I mean, if you think about the word copyright, it means the right to copy. Who has the right to copy? Now that seems to be pretty straightforward. ''Oh, hey, I have the right to copy something.'' Well, then there's a whole bunch of context surrounding that. Because just as Hillary pointed out, there's a difference between public access, meaning I can read it, and I can think about it. I might use it in another function versus other kinds of access. Can I look at it and then incorporate it into something that I do. Well, depending on the contract or the terms in which something was produced for the government, you may or may not have the right to do the latter. Does that make sense?

N. Rodgers: So if somebody took a photograph in a government sponsored grant, you can look at the photograph but you might not be able to add it to your book because the copyright belongs to a person, and you have to get permission from them or you have to pay them or combination thereof?

Hillary Miller: Yeah.

N. Rodgers: In order to use that photograph. A lot of people think, ''Oh, I could go to the National Gallery and I can take their catalog and use those pictures. But those pictures are actually owned by the people who took those pictures so you can't just take the catalog and use it like put it into your own stuff without permission.

J. Aughenbaugh: Let's go back to the stamp episode for just a moment. Remember the discussion about the Statue of Liberty?

N. Rodgers: Yes.

J. Aughenbaugh: Okay.

J. Aughenbaugh: The picture that was not the actual Statue of Liberty. It was a picture of a different thing altogether that looked like the Statue of Liberty, right?

Hillary Miller: Yes.

N. Rodgers: There was actually a registered copyright for the Statue of Liberty. If you go to the history of copyrights in the United States, there are actually was a registered copyright for the Statue of Liberty. Okay?

J. Aughenbaugh: Okay.

N. Rodgers: Now and I imagine Hillary is going to get to this. Part of the issue here is the first copyright law passed by Congress said that somebody who created, say for instance, wrote a book, initially, they received copyright protection for 14 years. Which meant that if anybody else wanted to copy it, use it, quote from it, and make money on it, they had to pay a royalty to the owner of that copyright. But then Congress extended copyright protection to 28 years plus a 14-year renewal. Then later, Congress went ahead and extended it to life of the author plus 50 years. If you wrote a book, Nia, could you accrue copyright royalties, but your heirs could.

Hillary Miller: Yeah, I've heard that that's referred to as the Disney rules. The company was trying to protect Mickey Mouse, was trying to protect their copyright on Mickey Mouse. So they encouraged Congress to change to extend copyright over and over. That is what I have heard.

J. Aughenbaugh: Well, no, you're right. There is a lot of lobbying from major players in creative industries on this and actually one step further I'll go. They extended that by 20 more years and that was a decision that went.

N. Rodgers: They offered plus 70?

J. Aughenbaugh: Yes. That went to the Supreme Court in 2003.

Hillary Miller: Yes.

J. Aughenbaugh: This is one of my love RBG, authored the majority opinion in Eldrade v. Ashcroft, which said "Yeah, you can do it 20 more years." Actually because the clause in the Constitution about copyright says limited times, it says that limited is up to the discretion of Congress as long as it's not forever, there's no limit to how long that limit can be. So disappointing. It makes me upset because again, by securing for limited times to authors these exclusive rights, that's the way that we're achieving the purpose of the copyright clause, which is promoting the progress of science and the useful arts. That just means knowledge and useful arts are things you could patent. It's not the purpose so the fact that the limited time can actually have no limit as long as it does eventually. It could be a 100 years, it could be 1,000 years, and apparently that is the interpretation that SCOTUS has made.

N. Rodgers: You called it the Disney rule, but if you look at, for instance, those who do works in entertainment. Music, books, movies, etc, there's a big difference between the corporations, like a Disney or the singer-songwriter who's writing songs and performing them at a bar because that may be their only, if you will, thing that they get paid for. That is their life's work, so it gets really complicated because also in the late '90s, Congress went ahead and said that there are safe harbors for online service providers. For instance, if YouTube goes ahead and somebody posts a video on YouTube where they go ahead and use somebody else's use of work, YouTube can't be sued.

J. Aughenbaugh: Yes. But YouTube will pull it down. I know that the music industry regularly contests videos on YouTube and YouTube pulls them down and then the two people. YouTube then steps out of it and says, "You guys have to work this out amongst yourselves."

N. Rodgers: Yes.

J. Aughenbaugh: The creators, I think, generally just pull the music out because it's easier to strip out whatever it was than it is to try to fight the company. Is that right, Hillary?

Hillary Miller: That's right. Ultimately, that dispute process that YouTube steps back from the copyright owner has the upper hand in that because it can go back with multiple, "No. This is okay. No. It's not okay." It's ultimately the copyright owner who gets to make the final call to say no, and then you get a strike against your account. If you get too many of those, you get kicked off of YouTube. Yeah. It's not necessarily a even fight there.

J. Aughenbaugh: Well, it's never even fight though because if I make a Mickey Mouse doll, and I sell it on Etsy, I will get shut down. I will get shut down by Disney eventually because there someone whose job it is to look at Etsy and make sure that none of the stuff that's being sold on there is competitive in some way.

Hillary Miller: Yes. You mentioned about that law about the safe harbors, its Digital Millennium Copyright Act or DMCA. People may be familiar with this if you have ever tried to find, let's say, free versions of movies, or television shows, or something online, and you see at the bottom of the Google page where it says search results have been removed by the DMCA. That's what it's talking about there. The reason that YouTube does that, the reason that Etsy has a process for Disney to shut you down, shut your little mouse stalls down is that's under that law that all your reference, they have to set up a process for copyright owners to request to take down notices and to dispute infringements. Otherwise, they can be sued.

J. Aughenbaugh: So that's why they do it?

Hillary Miller: That's how YouTube protects itself.

J. Aughenbaugh: Okay. That's how I assume iTunes protects itself.

Hillary Miller: Yeah.

J. Aughenbaugh: If we're told that this is the violates copyright, we will pull it down and let those people discuss it amongst themselves.

Hillary Miller: Yes. Because they don't want to get involved in that. They are not usually going to take the risk of standing up for someone's right to fair use, for example, which is a part of copyright law that says there are certain uses people can make up works that do not require permission or payment to the copyright owner because well, they're fair. It's actually one of the really nebulous parts of copyright law because it doesn't tell you what those are. It says here are some factors to help you analyze when something is fair use. Again, the issue there is that you can declare a fair use. You can make the use, the copyright owner can say, I think this is infringement and take you to court. That is also, as we mentioned, this is all found in the Constitution, so these are federal courts. If you are an individual creator, and you're getting sued by a major corporation, and going to federal court, it's really unbalanced.

N. Rodgers: Hillary, could you give us an example of a traditional or standard fair use?

Hillary Miller: Yes. Pretty much everything that your students or students we work with in the libraries do when they're writing research papers, when they are quoting short excerpts of other maybe scholarly works or even creative works. Maybe they're embedding some images or some video because they're providing a contextual scholarly analysis or a critique of the work, that is almost always fair use. The reasons are the purpose of it is noncommercial, it's for research and scholarly purposes to provide a critique of the original work. Usually the amount is pretty small, and that is an important part of fair use. They're just quoting small portions.

N. Rodgers: Yeah, those are I would say are the two drivers behind that. But that's a classic example, and I will say fair use does mention research and commentary, news reporting, educational purposes.

It's basically the way that the first amendment, the right to free speech, is protected within copyright law. Because the idea is that someone should not be able to sue you for writing a bad review of their book that include some excerpts in it. They could shut down anyone's negative speech about their creative work or their work, if they could sue them for infringement.

Hillary Miller: There's a really famous contest, which is about the worst opening line of a book, and it's based on the guy, and I can't remember his name, who wrote It Was A Dark And Stormy Night.

N. Rodgers: Dark and Stormy Night.

Hillary Miller: That guy, and if he could sue because you couldn't use that phrase, it would be tragic because that phrase has come to mean a very specific thing in culture that nobody is making money off of, but it is, I don't know, it would be sad if he could keep people from making it because they're making fun of him. I know he is dead and he wouldn't be covered in copyright. I'm amazed that Machiavelli didn't see this coming and figure out a way to cover his stuff in copyright, considering how brilliant he was with everything else. But I do have just a quick comment for listeners. Just because you can use that work in your research paper, does not mean you should not cite that work in your research paper. Always cite that work and give credit where credit is due. Being able to use it and quote it doesn't mean that you shouldn't give credit. Sorry, I'm a librarian, please cite your source. It's very important that other people be able to go to the original, and one, give that person their due, but also that they see whether you've quoted it properly and all that other stuff. I've heard that argument made, why are citations important? It's all in fair use and I'm like God, no that is not how this works. That's not how code works, that's not how professors work.

N. Rodgers: Although, let me muddy the waters a little bit on this because I love to do this because it people go "What?" It's scholarly practice, to cite materials. If you don't do it, you might fail or you might kid, pulled up to the honor violation for plagiarism or something. But you wouldn't be infringing copyright necessarily, because US copyright law does not provide a right of attribution to creators.

Hillary Miller: Really?

N. Rodgers: If you were quoting from someone and it was a small amount and it was enough to qualify for a fair use, you don't have to cite. Actually, in theory, you could take tiny little sentences from lots of people's books and write your own new book and pass it off as your own, total plagiarism, not copyright infringement.

Hillary Miller: You're probably not going to be appointed to any important office to do that because you can't do. I can put that into, can you go and explain and come up with all the sources.

N. Rodgers: We would not recommend it, and part of it if you do get sued for a fair use, one of the things that is not really in the law but has been looked at in court cases before is where you acting in good faith. If you were both borderline fair use, navy infringement and you were clearly trying to plagiarize and act in bad faith, that might weigh against you a little bit. But US copyright law is different in that respect. Other nations like France, for example, have these things called moral rights, and that's

even more expansive, is not just the right to be attributed. It can be on the right to push back against the way you are depicted or your work is depicted.

J. Aughenbaugh: To Hillary's point, and you've seen there's sometimes in copyright cases dealing with the use of music or lyrics from songs where an artist is accused by another artist of violating the latter artists copyright, or by the heirs of a copyright owner. One of the defenses that is typically used by the alleged violator is I was not aware of the music or did not know of the lyrics. Now that becomes a rather fact specific if you will, process in a court case. But nevertheless, if you didn't know under US copyright law, that's one of those rare times where it's not ignorance of the law, it's that you're just ignorant of other copyright material.

N. Rodgers: That's actually, that's a good point because it's entirely possible, what copyright protects is the unique way that you express facts or your thoughts or your ideas. But it doesn't protect the underlying ideas or facts. Two people could take the same writing prompt and somehow write the exact same poem or short story, same words and everything, and if they didn't work together, they didn't look at each other's work, so copy from each other, they both get copyright in that work. That's their own unique, original, creative expression. That would be pretty hard to do. But you can see why, like in music and other things lots of copyright cases would come up where someone thinks they're being infringed on because the alleged infringer is just doing work that's really similar to theirs. There are limits to creativity. We're often borrowing ideas from other people and building on them or working on the same underlying facts or cultural concepts.

J. Aughenbaugh: I mean, Nia, you've point out the rather clear behavioral norm within higher education that you should cite your sources, because otherwise it's plagiarism. But in terms of copyright law, if you don't know your source or you actually violating the law.

Hillary Miller: Well, apparently not. Apparently you can write your paper by saying, they say, quote, and then just look at the gap. There's something that you heard from your mom. I'm not sure that that's well anyway. That's a whole different can of worms. We can open that can of worms, but we shouldn't. I'm just side noting for anybody who's thinking they could use that as a defense.

J. Aughenbaugh: No.

Hillary Miller: With the professor. It's not going to fly

J. Aughenbaugh: No.

Hillary Miller: Yes. No says the professor, the scholarly communications librarian is shaking her head now. Just don't try, just cite your source. It's just easier to do and if you don't know how we'll help you to library. Then that brings up a question to me if you don't mind me asking. Last time Aughen and I talked about the SCOTUS ruling in Georgia. We were talking about the government edX doctrine. This idea that if you're working for the government, whatever you're doing when you're doing that job, can't be copyrighted or isn't protected under that. But it seems like to me there are exceptions to that. I guess what I'm thinking is the material itself can be packaged in such a way that it would be copyrighted.

J. Aughenbaugh: Yeah, because, Hillary, one of the points that Nia and I focused on was, if you've ever looked at annotations of law and of court cases, it's a heck of a lot of work and it's got a lot of value to it simply because somebody else, a reputable, if you will, expert has spent a lot of time in this was at the heart of the Georgia case. Because the laws themselves fall under the government edX doctrine. This is the production of laws for the public. The law is not owned by anyone. But one of the things that we got wiggly on at the end was, there's a lot of work that goes into providing annotations of not only laws, but then also of regulations that flow from the laws, but also court cases about the laws.

N. Rodgers: Yes. So things like annotations, when it comes to government works, annotations, introductions, contextual information, all this commentary and stuff. You're right. It can receive copyright protection. It depends on well, and the right that Georgia case made this, I would say a little more complex, or gotten this into the complexities. But it depends on who does that work and do they do the work in a way that adds enough original, creative, copyright-able elements to it, so that it receives copyright protection. In other cases it's been held before, and I think you-all talk about Westlaw maybe, or LexisNexis, who was it that lost a bunch of cases basically saying, no, pagination is not a copyright protect-able. Well, you can't add page numbers to something and get copyright protection for it

Hillary Miller: Well, and Westlaw tried to copyright.

N. Rodgers: Copyright the citations.

Hillary Miller: Citations. That's, yes, exactly what it was.

N. Rodgers: They were like, no, no those are Westlaw citations, and everybody is like dude, that's how we all find the case, that's what we all call this. You can't copyright that. That's like copyrighting the word the.

Hillary Miller: Exactly, or the phone book with the alphabet. This is just the way that the process works. You alphabetize something. You search in this way. You didn't come up with this. Like this is not.

N. Rodgers: You can't copyright the ABC song. You know what I mean like what's wrong with you? But you can copyright things where you have made a database and you've made the searching. What you're doing when you're doing that, are you copyrighting the way you're getting at the materials since the material itself is not copyright?

Hillary Miller: Here's a couple of layers to that, especially in an online context. You can get copyright in your arrangement of things. Another example might be a cookbook. You cannot copyright the concept of a recipe. You can't stop other people for making the same food with the same amount. You can copyright, the very particular flowery possible way you describe cooking. If you've seen blog posts where they add like five extra paragraphs about how this dish means so much to them and they make it every year and you're like give me the recipe scroll, scroll, scroll. You could copyright a cookbook because you have picked certain recipes to go in it and you have put them in a certain order, and you

have given chapter headings and introductions. There's underlying facts, you can't really do. A database you could, because, but the copyright is limited to your arrangement of the materials or headings or things that you create around that software, is copyrightable because its code. It's a weird case. You can get both patents because software does things. It's an invention that does things. I'm not describing that well. Patents are not an area that are good for me, but it's also code and it's written in its text and that means it's copyrightable. If you make a database and you have a particular way of searching, and all of that is code-based, that gets copyright too.

J. Aughenbaugh: May I interrupt for just a moment, Hillary?

Hillary Miller: Yeah.

J. Aughenbaugh: For those of you who are wondering what the big deal is about the current Supreme Court case of Google versus Oracle. It's about Oracle's copyright of software that basically almost every cell phone uses. That there actually are compatible with other cellphones. It's about software. It's got a huge financial, shall we say consequences or repercussion? Because if the Supreme Court affirms the lower court's ruling, Google's going to owe, according to some estimates, billions of dollars, and it's all about software code.

Hillary Miller: Yeah.

J. Aughenbaugh: You might be thinking well, how is that literary and musical, et cetera. But it's how they wrote it so there could be compatibility amongst various cell phones.

N. Rodgers: Well, and somebody had to do the work. When you write code and then you run it and it doesn't do what you want it to do, so you have to go back and figure out where it's broken. I know people who read code, for fun and pleasure, not really, for their jobs. There's no such thing as fun and pleasure code-reading, as far as I can tell, there's code-writing for fun and pleasure, but they're reading for mistakes. Those people make a lot of money because that is tedious work to figure out where the mistake is, what line in the 7000 lines of code is wrong to make it break, and it's almost always not the line you were thinking according to them. What I'm asking, we were talking about publishers and having some sympathy. I know it pains me to say that as a librarian. Sympathy for publishers in the sense that they are investing some treasure, time and people and whatever, in making things more easily findable. Anybody who's used, I hate to pick on Lex, the old LexisNexis, the newer is much easier to use, but the old one was horrible to use. It was not intuitive, it was not kind and we've all opened databases I think in our professional lives where we've said this doesn't make any sense I don't know how to even use this thing. But that work of making it easier to find stuff seems like that should be rewardable, at least in some way.

Hillary Miller: Yeah. I can sympathize with that because the work of publishing or building websites or databases is huge work. It takes a lot of resources. It takes a lot of really skilled people to do that work and to maintain it. It's not just that everything's on the internet and it's easy to do now it's basically cost nothing. It is not the case. I think two things to draw distinctions between for copyright. Copyright is meant to protect the unique, the original creative works, the creation of those works. It's not meant to

just reward people for working really hard to make new things if that makes sense. The distinction here, so there's a concept in copyright law. It's called "sweat of the brow". Basically, it has been pointed out in a particular SCOTUS case as well, copyright is not meant to reward "sweat of the brow". This was under the example I mentioned before about the phonebook. Someone worked really hard to pull together a lot of facts about people's names and addresses and their phone numbers, and they alphabetized it and that you can't copyright protect facts. The fact that you put something in alphabetical order is not an original unique element because it's the alphabet. They didn't invent the concept of alphabetization, I think, sorry.

N. Rodgers: No. That's good, they're not [inaudible] .

Hillary Miller: Alphabetizing. Yeah, right.

N. Rodgers: They are not [inaudible] , they didn't come up with the alphabet.

Hillary Miller: Yeah. They set in that case, copyright is not meant to reward "sweat of the brow", it's about the creative elements or expression that you create or add to something. Even, I would say the example with the people who are doing the work of the coding, which is actually super creative field, you have to be really creative in the way that you write and design things, but it's not that really hard work that goes into it that is protected by copyright. It's those creative elements. The work that publishers do, if it were purely just to compile and make better digital versions of government documents and put them into a database in a really good way that makes it easily searchable, again, what they're limited to in copyright protection is the software, maybe the design of how they arranged the materials, if they did add in some more annotations or commentary or things like that, but it's limited. The copyright protection for some things like that, you might say is thin, is the way it's described some times because it's just so close to just being facts.

J. Aughenbaugh: Hillary, can we go back to something distinction that you made earlier in the podcast? The reason why I bring this up is because a lot of the work that I do requires me to use this and that is public versus open access. What I'm having in mind is PACER, which is public access to court electronic records.

Hillary Miller: Yes.

J. Aughenbaugh: Now a huge debate among the scholarly community that I work in, constitutional law scholars, judicial politics scholars is being able to access court documents which today almost exclusively are available electronically. It's in many courthouses now, it's much more difficult to get hard copy access than it is to get electronic. But with PACER, you have to pay a fee. Could you go into that in a little bit more depth?

Hillary Miller: Yeah.

J. Aughenbaugh: This idea of public versus open access, I think, is not one that many people understand the difference.

Hillary Miller: Yes. When I talk about open access, I will say there's a very specific definition in my field, scholarly communication or in libraries, which is about not just can you get to it, is it accessible in terms of looking at it, but does it come with extended rights to use the thing. The most common way that happens is in addition to your work being copyrighted, you attach an open license to it. Creative Commons is the most popular set of open licenses. What that does is it just proactively tells people, yes, you can access this work but you also get the rights to make a copy of it, and edit the work, and share it with others, and in some cases, even make a commercial use to it depending on which license you pick. Under public access, there are things like PACER, they guarantee, in a sense, that you have access to the documents. But similar to it being short of open access, it doesn't necessarily mean that that access is going to be free of cost. It doesn't necessarily mean that that access is going to be easy in some cases. We're talking about things in the public domain, just because something is in the public domain does not mean that the creator or whoever controls access to that work is under an obligation to make that work available to you or everyone online or available in a usable format or available for free. PACER is an example, but I'll say libraries and archives do this sometimes too or have done in the past with physical copies, the thing may be in the public domain but we control access to it. In some very restrictive archives, you have to request permission to look at the document. You might have to pay money for someone to make a physical copy or make a copy of a physical object for you that's in the public domain. In the best of cases, I would say that is truly because it costs money to do that work and they need that money to continue maintaining the public domain database or collection or whatever. The PACER is an interesting example you brought up because they have been sued multiple times like class action lawsuits claiming that they are overcharging generally based on the way they calculate their billing, but also that they are using fees that they get inappropriately and actually unlawfully. They're not just collecting the fees that they need to build the database and make things available, they're using it for all kinds of other purposes that aren't related to that.

J. Aughenbaugh: Yeah, because the underlying logic of, for instance, a library charging you to go ahead and copy materials, is the same that you would see with the Freedom of Information Act, right?

Hillary Miller: Yes.

J. Aughenbaugh: Yes, the public part of the Freedom of Information Act has access to the material, but the government agency to maintain the data, and be able to copy it, and provide it incur costs, so they should be able to go ahead and cover their costs. I understand that. But part of the difficulty, for instance, with PACER, and I'm familiar with some of the lawsuits that you just mentioned, Hillary, is this idea that there are, for instance, court people who might want access to court documents that because of the cost, won't be able to access those documents. Then they go into court and they're at a disadvantage with whoever they are suing or whoever sued them because the opposition, the other litigant, actually was able to afford the cost that is charged by the PACER system for the documents. That's part of why I asked the question. Nia, you've got something on your mind?

N. Rodgers: I do. I'm torn because again, I understand why an agency would need to cover its costs. But like Hillary, I'm aggravated by the idea that they don't have to give you things in a usable format. What leaps to mind to me is the census. If you ask for raw data from the census, they won't give you data with

people's identifying information. There's no way you can get that, that's protected under about 57,000 laws. Anybody who's thinking that the census data that they just filled out can be gotten, it can't. But there are broad swaths of data that they can get. How many people live in an area, what the educational attainment of those folks is in general, that sort of thing. If you e-mail the census bureau and you say, "I would like the 2010 census, please." They say, ''Sure.'' They send it to you on disks with some horrible software that you have to download, like it's not your friend. They meet the letter of the law by saying, ''We gave you the data.'' But it's like somebody handing you, when you say, "I'd like a skein of yarn," and they give it to you all unwound and say, ''Good luck with that.'' They just give you a pile of yarn and you have to turn it into something useful. I guess, part of me understands why publishers who are turning that into something useful or something easy to use would want some financial.

J. Aughenbaugh: Compensation.

N. Rodgers: Yeah, compensation. Thank you. But then I look at the costs of the packages of some of the publishers and I think, now, you just need to sit down because all you're doing is repackaging the work of other people and you're making far too much money to do that. But I suppose that's probably an argument for another day. We'll invite you back Hillary to talk about the big publisher packages someday when none of our jobs depend on that, in our retirement. But I do want to ask you in our last few minutes because I know you have to go soon. But I'm imagining that because this is copyright, and therefore, it involves the law. There has to have been some crazy stuff that people have attempted to copyright. I know for instance, there are people who tried to copyright Bibles. There's a part of me that's like, you can't copyright the Bible, that cat is out of the bag.

Hillary Miller: No, you can copyright the Bible.

N. Rodgers: You can?

Hillary Miller: Yes.

J. Aughenbaugh: Yes.

Hillary Miller: You can copyright your own translation of the Bible. Again, your annotations and commentary in your own version of the Bible, maybe it's not even your translation, maybe it's your particular remix of the Bible, who knows?

N. RODGERS: Jefferson style where I take out mentions of Jesus. I think, didn't he cut that? I'm pretty sure he cut those out of his Bible or one of his Bibles, which would be a mess. You can't do that because paper was really valuable in his day.

HILLARY MILLER: Yeah.

N. RODGERS: Okay. So I could remix the Bible. Oh, all right.

HILLARY MILLER: Yeah. But I would say, again, this is probably a case where the copyright may be a little bit thin, right? Because maybe there are only three accepted interpretations of a particular term in Greek. You pick one and if someone else picks the same one, you can't say, "You copied me." You both copied from the same original source, right? So you only get protection in your unique aspects of the translation. You can't stop other people from translating the Bible.

N. RODGERS: Okay.

HILLARY MILLER: Yeah.

N. RODGERS: I'm assuming that with music at least, there's only so many notes.

HILLARY MILLER: Yes.

N. RODGERS: So what you're copyrighting is your order of them?

HILLARY MILLER: Yes, and all sorts of other aspects of music. This is a really interesting one. Maybe we'll get to talk about this in the future. I have seen people posing the question, what would happen if an artificial intelligence program were set to run to write every single possible melody, to write every possible combination of notes.

N. RODGERS: Wow.

HILLARY MILLER: Does the person who designed the AI get copyright in all of that? Can they stop people? Anyway, totally theoretical copyrights. This is a question that we're starting to get into with new technology. It's like if you design the AI and it starts producing things that are copyrightable, can you be a copyright troll and just sit on all of that and force other people to pay you for it? Maybe. We don't know.

N. RODGERS: Although, one could argue that you didn't make it, the AI made it and the AI owns control. Which eventually the AI would come to life and destroy you. I've seen this movie.

J. AUGHENBAUGH: But Nia, if you own the patent, under US Patent Law.

N. RODGERS: Then everything that the patent produces is mine? Yeah. It's an ugly question.

HILLARY MILLER: Yeah. It hasn't been answered yet. I would say the closest thing we have to answering that is not related to AI, but is related to that monkey who took a picture of himself with a camera. The photographer said, "Well, I was there." So I get the copyright. I think Peter or someone else said, "No, the monkey gets the copyright." The court was like, "No. No one gets the copyright. It was taken by a monkey. I'm sorry."

N. RODGERS: It was a happy accident.

HILLARY MILLER: Yes.

N. RODGERS: Well, but then that becomes into an argument of sentience and all of that.

HILLARY MILLER: Right.

N. RODGERS: That's a giant can of worms which we shall not open today because there is not sufficient beer to cover that topic.

HILLARY MILLER: Yeah.

N. RODGERS: Are there any sort of weirdo cases that you think, really, but it's also funny.

HILLARY MILLER: Yeah.

N. RODGERS: Your copyright conventions when you're all sitting around after everything's over and you're having your margaritas and you're hanging out.

HILLARY MILLER: I did find one example that I wanted to share while I was doing some prep work for this because I thought maybe as a hook for this, I wanted to find times where the Federal Government has been sued or involved in copyright cases. There are some, so the thing with this, if you want to sue the Federal Government, you have to go to a very specific court.

N. RODGERS: Okay.

HILLARY MILLER: The Federal Claims Court. So I encourage people to go look at the decisions coming out of that related to copyright. So this happens more than you might think.

N. RODGERS: Wait. Wait. Wait. Wait. Wait.

J. AUGHENBAUGH: Pause.

N. RODGERS: I'm sorry. What is it federal?

J. AUGHENBAUGH: Claims Court.

N. RODGERS: Is that just for copyright or?

HILLARY MILLER: No. No.

J. AUGHENBAUGH: No. No. No. No. Congress created it after the New Deal because prior to the New Deal, if you sued the Federal Government, because you claimed the government harmed you in any way, Congress actually had to pass individual laws to compensate you.

N. RODGERS: Wow.

J. AUGHENBAUGH: So it was only then that they went ahead and they bureaucratized, if you will, the suing of the Federal Government, by creating a special court known as the Federal Claims Court.

N. RODGERS: Okay. That's for all losses?

J. AUGHENBAUGH: That's right. Including violations of the Copyright Act.

HILLARY MILLER: Yes. That is because the Federal Government in the US Code has waived their sovereign immunity for copyright infringement claims. So they've said, "Yes. You can sue us for this." which good for them for opening that door, I guess. So I was looking through some of these and some things you might expect, like most recent years, a lot of lawsuits related to software copyright, related to defense and intelligence agencies. The couple of cases related to the post office, as we talked about, where the Artists Rights were. They sued the government for putting their works on a postage stamp and they won. Then there was this really interesting one, and I'd love to get thoughts on how common this is for non-copyright cases. I found one called, "Hail the USA," that was dismissed last year, very quickly. Where this guy was suing the government. Mainly I think he was claiming that the IRS was running some kind of financial fraud by collecting taxes from him, which they obviously tossed that out. But the reason it was copyright related is he also sued them for copyright infringement because they used his name in the process of collecting these taxes. I was so glad that I came across this and I want to ask like, how common is this? I mean, there's only one place to go to sue the Federal Government. So if I just hang out on this website, am I going to find a lot of zany, weird quickly-dismissed lawsuits?

N. RODGERS: Aughie is laughing.

HILLARY MILLER: I think he is.

N. RODGERS: I'm guessing you are going to find a lot of zany.

J. AUGHENBAUGH: I have told students over the years, if you want to see how creative/crazy Americans actually are, you got to look at the docket for the Federal Claims Court because the government gets sued for all kinds of alleged injuries. It just blows your mind. It is funny stuff. But these are people who claim that they've been harmed.

HILLARY MILLER: To the government's credit, it was a short decision, but it answered him point by point.

J. AUGHENBAUGH: Yes.

HILLARY MILLER: I thought the copyright one was a little weak, to be honest though.

J. AUGHENBAUGH: You think? You think it was a little weak?

HILLARY MILLER: No. I thought the government's answer to it was a little weak, actually.

J. AUGHENBAUGH: Oh, okay.

HILLARY MILLER: So they said, "He claimed that we infringed on his name. Upon further questioning, he did admit that his name was not copyrighted. We reference here that registration of a copyright is required to seek this kind of damages." As if the fact that he hadn't registered his name was the reason when in fact, you cannot copyright names or short phrases. So clearly it was right for dismissal, but I think they missed a little bit of finer points of Copyright Law there. Here's me, critiquing the US Federal Claims Court for the way that they handle these cases.

N. RODGERS: I love it. Are you saying you can't copyright a name?

HILLARY MILLER: No. It's too short. You can't copyright words or phrases. You could trademark your name and people do. Obviously celebrities do that.

N. RODGERS: Okay. But that's different. Trademarking is different than copyrighting. We will invite you back for that.

HILLARY MILLER: If your name is your business, yeah, you can trademark it.

J. AUGHENBAUGH: We need to bring Hillary back just to discuss trademarks because there is a whole bunch of Supreme Court case law in this and it is some crazy, funny, weird stuff that touches upon the First Amendment, etc. We need to bring her back for trademarks.

HILLARY MILLER: I would love to talk about that because people frequently confuse the two as well. They think, I need to get a copyright for this, I need to infringe this, when it's all trademark.

N. RODGERS: Awesome. Well then we will have you back. Wonderful. Thank you so much for joining us today, Hillary. This has been a lot of fun.

HILLARY MILLER: Thank you so much. This has been so much fun. I love getting to nerd out about copyright, so I'm very excited to come back.

N. RODGERS: Yay.

J. AUGHENBAUGH: Thanks, Hillary.

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