FREE CULTURE

HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY

LAWRENCE LESSIG

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About Lessig:

Lawrence Lessig (born June 3, 1961) is an American academic and political activist. He is professor of law at Stanford Law School and founder of its Center for Internet and Society. Lessig founding board member of Creative Commons and is a board member of the Electronic Fronti Foundation and of the Software Freedom Law Center. He is best known as a proponent of reduce legal restrictions on copyright, trademark and radio frequency spectrum, particularly in technolog applications. At the iCommons iSummit 07 Lessig announced that he will stop focusing his attentio on copyright and related matters and will work on political corruption instead. This new work may l partially facilitated through his wiki — “Lessig Wiki” — which he has encouraged the public to use document cases of corruption. In February 2008, a Facebook group formed by law professor Joh Palfrey encouraged him to run for Congress from California's 12th congressional district, the se vacated by the death of U.S. Representative Tom Lantos. Later that month, after forming a "exploratory project", the decision was made not to run for the vacant seat. Despite having decided forgo running for congress himself, Lessig remained interested in attempting to change Congress reduce corruption. To this end, he worked with political consultant Joe Trippi to launch a web base project called "Change Congress." In a press conference on March 20, 2008, Lessig explained that h hoped the Change Congress website would help provide technological tools voters could use to ho their representatives accountable and reduce the influence of money on politics. Source: Wikipedia

Preface

At the end of his review of my first book, Code: And Other Laws of Cyberspace, David Pogue, brilliant writer and author of countless technical and computer-related texts, wrote this:

> Unlike actual law, Internet software has no capacity to punish. It doesn't affect people who aren't online (and only a tiny minority of the world population is). And if you don't like the Internet's system, you can always flip off the modem.[1]

Pogue was skeptical of the core argument of the book—that software, or "code," functioned as kind of law—and his review suggested the happy thought that if life in cyberspace got bad, we cou always "drizzle, drazzle, druzzle, drome"-like simply flip a switch and be back home. Turn off th modem, unplug the computer, and any troubles that exist in that space wouldn't "affect" us anymore.

Pogue might have been right in 1999—I'm skeptical, but maybe. But even if he was right then, th point is not right now: Free Culture is about the troubles the Internet causes even after the modem turned off. It is an argument about how the battles that now rage regarding life on-line hav fundamentally affected "people who aren't online." There is no switch that will insulate us from th Internet's effect.

But unlike Code, the argument here is not much about the Internet itself. It is instead about th consequence of the Internet to a part of our tradition that is much more fundamental, and, as hard this is for a geek-wanna-be to admit, much more important.

That tradition is the way our culture gets made. As I explain in the pages that follow, we come fro a tradition of "free culture"—not "free" as in "free beer" (to borrow a phrase from the founder of th freesoftware movement[2]), but "free" as in "free speech," "free markets," "free trade," "fr enterprise," "free will," and "free elections." A free culture supports and protects creators an innovators. It does this directly by granting intellectual property rights. But it does so indirectly b limiting the reach of those rights, to guarantee that follow-on creators and innovators remain as free possible from the control of the past. A free culture is not a culture without property, just as a fre market is not a market in which everything is free. The opposite of a free culture is a "permissio culture"—a culture in which creators get to create only with the permission of the powerful, or creators from the past.

If we understood this change, I believe we would resist it. Not "we" on the Left or "you" on th Right, but we who have no stake in the particular industries of culture that defined the twentie century. Whether you are on the Left or the Right, if you are in this sense disinterested, then the sto I tell here will trouble you. For the changes I describe affect values that both sides of our politic culture deem fundamental.

We saw a glimpse of this bipartisan outrage in the early summer of 2003. As the FCC considere changes in media ownership rules that would relax limits on media concentration, an extraordina coalition generated more than 700,000 letters to the FCC opposing the change. As William Safi described marching "uncomfortably alongside CodePink Women for Peace and the National Rif Association, between liberal Olympia Snowe and conservative Ted Stevens," he formulated perha most simply just what was at stake: the concentration of power. And as he asked,

> Does that sound unconservative? Not to me. The concentration of power—political, corporate, media, cultural—should be anathema to conservatives. The diffusion of power through local control, thereby encouraging individual participation, is the essence of federalism and the

greatest expression of democracy.[3]

This idea is an element of the argument of Free Culture, though my focus is not just on th concentration of power produced by concentrations in ownership, but more importantly, if becaus less visibly, on the concentration of power produced by a radical change in the effective scope of th law. The law is changing; that change is altering the way our culture gets made; that change shou worry you—whether or not you care about the Internet, and whether you're on Safire's left or on h right. The inspiration for the title and for much of the argument of this book comes from the work Richard Stallman and the Free Software Foundation. Indeed, as I reread Stallman's own wor especially the essays in Free Software, Free Society, I realize that all of the theoretical insights develop here are insights Stallman described decades ago. One could thus well argue that this work "merely" derivative.

I accept that criticism, if indeed it is a criticism. The work of a lawyer is always derivative, and mean to do nothing more in this book than to remind a culture about a tradition that has always bee its own. Like Stallman, I defend that tradition on the basis of values. Like Stallman, I believe those a the values of freedom. And like Stallman, I believe those are values of our past that will need to b defended in our future. A free culture has been our past, but it will only be our future if we change th path we are on right now. xv Like Stallman's arguments for free software, an argument for free cultu stumbles on a confusion that is hard to avoid, and even harder to understand. A free culture is not culture without property; it is not a culture in which artists don't get paid. A culture without propert or in which creators can't get paid, is anarchy, not freedom. Anarchy is not what I advance here.

Instead, the free culture that I defend in this book is a balance between anarchy and control. A fre culture, like a free market, is filled with property. It is filled with rules of property and contract th get enforced by the state. But just as a free market is perverted if its property becomes feudal, so to can a free culture be queered by extremism in the property rights that define it. That is what I fe about our culture today. It is against that extremism that this book is written.

Introduction

On December 17, 1903, on a windy North Carolina beach for just shy of one hundred seconds, th Wright brothers demonstrated that a heavier-than-air, self-propelled vehicle could fly. The momer was electric and its importance widely understood. Almost immediately, there was an explosion c interest in this newfound technology of manned flight, and a gaggle of innovators began to build upc it.

At the time the Wright brothers invented the airplane, American law held that a property own presumptively owned not just the surface of his land, but all the land below, down to the center of th earth, and all the space above, to "an indefinite extent, upwards."[4] For many years, scholars ha puzzled about how best to interpret the idea that rights in land ran to the heavens. Did that mean th you owned the stars? Could you prosecute geese for their willful and regular trespass?

Then came airplanes, and for the first time, this principle of American law—deep within th foundations of our tradition, and acknowledged by the most important legal thinkers of our past- mattered. If my land reaches to the heavens, what happens when United flies over my field? Do I hav the right to banish it from my property? Am I allowed to enter into an exclusive license with Del Airlines? Could we set up an auction to decide how much these rights are worth?

In 1945, these questions became a federal case. When North Carolina farmers Thomas Lee ar Tinie Causby started losing chickens because of low-flying military aircraft (the terrified chicker apparently flew into the barn walls and died), the Causbys filed a lawsuit saying that the governme was trespassing on their land. The airplanes, of course, never touched the surface of the Causbys' lan But if, as Blackstone, Kent, and Coke had said, their land reached to "an indefinite extent, upwards then the government was trespassing on their property, and the Causbys wanted it to stop.

The Supreme Court agreed to hear the Causbys' case. Congress had declared the airways public, b if one's property really extended to the heavens, then Congress's declaration could well have been a unconstitutional "taking" of property without compensation. The Court acknowledged that "it ancient doctrine that common law ownership of the land extended to the periphery of the universe But Justice Douglas had no patience for ancient doctrine. In a single paragraph, hundreds of years property law were erased. As he wrote for the Court,

> [The] doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[5]

"Common sense revolts at the idea."

This is how the law usually works. Not often this abruptly or impatiently, but eventually, this is ho it works. It was Douglas's style not to dither. Other justices would have blathered on for pages to reac the conclusion that Douglas holds in a single line: "Common sense revolts at the idea." But whether takes pages or a few words, it is the special genius of a common law system, as ours is, that the la adjusts to the technologies of the time. And as it adjusts, it changes. Ideas that were as solid as rock one age crumble in another.

Or at least, this is how things happen when there's no one powerful on the other side of the chang The Causbys were just farmers. And though there were no doubt many like them who were upset b the growing traffic in the air (though one hopes not many chickens flew themselves into walls), th

Causbys of the world would find it very hard to unite and stop the idea, and the technology, that th Wright brothers had birthed. The Wright brothers spat airplanes into the technological meme pool; th idea then spread like a virus in a chicken coop; farmers like the Causbys found themselves surrounde by "what seemed reasonable" given the technology that the Wrights had produced. They could star on their farms, dead chickens in hand, and shake their fists at these newfangled technologies all the wanted. They could call their representatives or even file a lawsuit. But in the end, the force of wh seems "obvious" to everyone else—the power of "common sense"—would prevail. Their "priva interest" would not be allowed to defeat an obvious public gain.

Edwin Howard Armstrong is one of America's forgotten inventor geniuses. He came to the gre American inventor scene just after the titans Thomas Edison and Alexander Graham Bell. But h work in the area of radio technology was perhaps the most important of any single inventor in the fir fifty years of radio. He was better educated than Michael Faraday, who as a bookbinder's apprentic had discovered electric induction in 1831. But he had the same intuition about how the world of rad worked, and on at least three occasions, Armstrong invented profoundly important technologies th advanced our understanding of radio.

On the day after Christmas, 1933, four patents were issued to Armstrong for his most significa invention—FM radio. Until then, consumer radio had been amplitude-modulated (AM) radio. Th theorists of the day had said that frequency-modulated (FM) radio could never work. They were rig about FM radio in a narrow band of spectrum. But Armstrong discovered that frequency-modulate radio in a wide band of spectrum would deliver an astonishing fidelity of sound, with much le transmitter power and static.

On November 5, 1935, he demonstrated the technology at a meeting of the Institute of Rad Engineers at the Empire State Building in New York City. He tuned his radio dial across a range o AM stations, until the radio locked on a broadcast that he had arranged from seventeen miles awa The radio fell totally silent, as if dead, and then with a clarity no one else in that room had ever hea from an electrical device, it produced the sound of an announcer's voice: "This is amateur statio W2AG at Yonkers, New York, operating on frequency modulation at two and a half meters."

The audience was hearing something no one had thought possible:

> A glass of water was poured before the microphone in Yonkers; it sounded like a glass of water being poured… . A paper was crumpled and torn; it sounded like paper and not like a crackling forest fire… . Sousa marches were played from records and a piano solo and guitar number were performed… . The music was projected with a live-ness rarely if ever heard before from a radio "music box."[6]

As our own common sense tells us, Armstrong had discovered a vastly superior radio technolog But at the time of his invention, Armstrong was working for RCA. RCA was the dominant player i the then dominant AM radio market. By 1935, there were a thousand radio stations across the Unite States, but the stations in large cities were all owned by a handful of networks.

RCA's president, David Sarnoff, a friend of Armstrong's, was eager that Armstrong discover a wa to remove static from AM radio. So Sarnoff was quite excited when Armstrong told him he had device that removed static from "radio." But when Armstrong demonstrated his invention, Sarnoff wa not pleased.

> I thought Armstrong would invent some kind of a filter to remove static from our AM radio. I didn't think he'd start a revolution— start up a whole damn new industry to compete with RCA.[7]

Armstrong's invention threatened RCA's AM empire, so the company launched a campaign smother FM radio. While FM may have been a superior technology, Sarnoff was a superior tactician. As one author described,

> The forces for FM, largely engineering, could not overcome the weight of strategy devised by the sales, patent, and legal offices to subdue this threat to corporate position. For FM, if allowed to develop unrestrained, posed … a complete reordering of radio power … and the eventual overthrow of the carefully restricted AM system on which RCA had grown to power.[8]

RCA at first kept the technology in house, insisting that further tests were needed. When, after two years of testing, Armstrong grew impatient, RCA began to use its power with the government to stall FM radio's deployment generally. In 1936, RCA hired the former head of the FCC and assigned him the task of assuring that the FCC assign spectrum in a way that would castrate FM—principally by moving FM radio to a different band of spectrum. At first, these efforts failed. But when Armstrong and the nation were distracted by World War II, RCA's work began to be more successful. Soon after the war ended, the FCC announced a set of policies that would have one clear effect: FM radio would be crippled. As Lawrence Lessing described it,

> The series of body blows that FM radio received right after the war, in a series of rulings manipulated through the FCC by the big radio interests, were almost incredible in their force and deviousness.[9]

To make room in the spectrum for RCA's latest gamble, television, FM radio users were to be moved to a totally new spectrum band. The power of FM radio stations was also cut, meaning FM could no longer be used to beam programs from one part of the country to another. (This change was strongly supported by AT&T, because the loss of FM relaying stations would mean radio stations would have to buy wired links from AT&T.) The spread of FM radio was thus choked, at least temporarily.

Armstrong resisted RCA's efforts. In response, RCA resisted Armstrong's patents. After incorporating FM technology into the emerging standard for television, RCA declared the patents invalid—baselessly, and almost fifteen years after they were issued. It thus refused to pay his royalties. For six years, Armstrong fought an expensive war of litigation to defend the patents. Finally, just as the patents expired, RCA offered a settlement so low that it would not even cover Armstrong's lawyers' fees. Defeated, broken, and now broke, in 1954 Armstrong wrote a short note to his wife and then stepped out of a thirteenth-story window to his death.

This is how the law sometimes works. Not often this tragically, and rarely with heroic drama, but sometimes, this is how it works. From the beginning, government and government agencies have been subject to capture. They are more likely captured when a powerful interest is threatened by either legal or technical change. That powerful interest too often exerts its influence within the government to get the government to protect it. The rhetoric of this protection is of course always public spirited; the reality is something different. Ideas that were as solid as rock in one age, but that, left to themselves, would crumble in another, are sustained through this subtle corruption of our political process. RCA had what the Causbys did not: the power to stifle the effect of technological change.

There's no single inventor of the Internet. Nor is there any good date upon which to mark its birth. Yet in a very short time, the Internet has become part of ordinary American life. According to the Pew Internet and American Life Project, 58 percent of Americans had access to the Internet in 2002, up from 49 percent two years before.[10] That number could well exceed two thirds of the nation by the

end of 2004.

As the Internet has been integrated into ordinary life, it has changed things. Some of these chang are technical—the Internet has made communication faster, it has lowered the cost of gathering dat and so on. These technical changes are not the focus of this book. They are important. They are n well understood. But they are the sort of thing that would simply go away if we all just switched th Internet off. They don't affect people who don't use the Internet, or at least they don't affect the directly. They are the proper subject of a book about the Internet. But this is not a book about th Internet.

Instead, this book is about an effect of the Internet beyond the Internet itself: an effect upon ho culture is made. My claim is that the Internet has induced an important and unrecognized change that process. That change will radically transform a tradition that is as old as the Republic itself. Mos if they recognized this change, would reject it. Yet most don't even see the change that the Internet ha introduced.

We can glimpse a sense of this change by distinguishing between commercial and noncommerci culture, and by mapping the law's regulation of each. By "commercial culture" I mean that part of o culture that is produced and sold or produced to be sold. By "noncommercial culture" I mean all th rest. When old men sat around parks or on street corners telling stories that kids and others consume that was noncommercial culture. When Noah Webster published his "Reader," or Joel Barlow h poetry, that was commercial culture.

At the beginning of our history, and for just about the whole of our tradition, noncommerci culture was essentially unregulated. Of course, if your stories were lewd, or if your song disturbed th peace, then the law might intervene. But the law was never directly concerned with the creation spread of this form of culture, and it left this culture "free." The ordinary ways in which ordina individuals shared and transformed their culture—telling stories, reenacting scenes from plays or T participating in fan clubs, sharing music, making tapes—were left alone by the law.

The focus of the law was on commercial creativity. At first slightly, then quite extensively, the la protected the incentives of creators by granting them exclusive rights to their creative work, so th they could sell those exclusive rights in a commercial marketplace.[11] This is also, of course, a important part of creativity and culture, and it has become an increasingly important part in Americ But in no sense was it dominant within our tradition. It was instead just one part, a controlled pa balanced with the free.

This rough divide between the free and the controlled has now been erased.[12] The Internet has s the stage for this erasure and, pushed by big media, the law has now affected it. For the first time our tradition, the ordinary ways in which individuals create and share culture fall within the reach the regulation of the law, which has expanded to draw within its control a vast amount of culture an creativity that it never reached before. The technology that preserved the balance of our history- between uses of our culture that were free and uses of our culture that were only upon permission- has been undone. The consequence is that we are less and less a free culture, more and more permission culture.

This change gets justified as necessary to protect commercial creativity. And indeed, protectionis is precisely its motivation. But the protectionism that justifies the changes that I will describe belo is not the limited and balanced sort that has defined the law in the past. This is not a protectionism protect artists. It is instead a protectionism to protect certain forms of business. Corporatio threatened by the potential of the Internet to change the way both commercial and noncommerci culture are made and shared have united to induce lawmakers to use the law to protect them. It is th story of RCA and Armstrong; it is the dream of the Causbys.

For the Internet has unleashed an extraordinary possibility for many to participate in the process

building and cultivating a culture that reaches far beyond local boundaries. That power has change the marketplace for making and cultivating culture generally, and that change in turn threaten established content industries. The Internet is thus to the industries that built and distributed conte in the twentieth century what FM radio was to AM radio, or what the truck was to the railroad indust of the nineteenth century: the beginning of the end, or at least a substantial transformation. Digit technologies, tied to the Internet, could produce a vastly more competitive and vibrant market f building and cultivating culture; that market could include a much wider and more diverse range creators; those creators could produce and distribute a much more vibrant range of creativity; an depending upon a few important factors, those creators could earn more on average from this syste than creators do today—all so long as the RCAs of our day don't use the law to protect themselv against this competition.

Yet, as I argue in the pages that follow, that is precisely what is happening in our culture toda These modern-day equivalents of the early twentieth-century radio or nineteenth-century railroads a using their power to get the law to protect them against this new, more efficient, more vibra technology for building culture. They are succeeding in their plan to remake the Internet before th Internet remakes them.

It doesn't seem this way to many. The battles over copyright and the Internet seem remote to mos To the few who follow them, they seem mainly about a much simpler brace of questions—wheth "piracy" will be permitted, and whether "property" will be protected. The "war" that has been wage against the technologies of the Internet—what Motion Picture Association of America (MPAA president Jack Valenti calls his "own terrorist war"[13] —has been framed as a battle about the rule law and respect for property. To know which side to take in this war, most think that we need onl decide whether we're for property or against it.

If those really were the choices, then I would be with Jack Valenti and the content industry. I, too am a believer in property, and especially in the importance of what Mr. Valenti nicely calls "creativ property." I believe that "piracy" is wrong, and that the law, properly tuned, should punish "piracy whether on or off the Internet.

But those simple beliefs mask a much more fundamental question and a much more dramat change. My fear is that unless we come to see this change, the war to rid the world of Intern "pirates" will also rid our culture of values that have been integral to our tradition from the start.

These values built a tradition that, for at least the first 180 years of our Republic, guarantee creators the right to build freely upon their past, and protected creators and innovators from eith state or private control. The First Amendment protected creators against state control. And a Professor Neil Netanel powerfully argues,[14] copyright law, properly balanced, protected creato against private control. Our tradition was thus neither Soviet nor the tradition of patrons. It instea carved out a wide berth within which creators could cultivate and extend our culture.

Yet the law's response to the Internet, when tied to changes in the technology of the Internet itsel has massively increased the effective regulation of creativity in America. To build upon or critique th culture around us one must ask, Oliver Twist¬like, for permission first. Permission is, of course, ofte granted—but it is not often granted to the critical or the independent. We have built a kind of cultur nobility; those within the noble class live easily; those outside it don't. But it is nobility of any for that is alien to our tradition.

The story that follows is about this war. Is it not about the "centrality of technology" to ordinar life. I don't believe in gods, digital or otherwise. Nor is it an effort to demonize any individual group, for neither do I believe in a devil, corporate or otherwise. It is not a morality tale. Nor is it call to jihad against an industry.

It is instead an effort to understand a hopelessly destructive war inspired by the technologies of th

Internet but reaching far beyond its code. And by understanding this battle, it is an effort to ma
peace. There is no good reason for the current struggle around Internet technologies to continue. The
will be great harm to our tradition and culture if it is allowed to continue unchecked. We must come
understand the source of this war. We must resolve it soon.

Like the Causbys' battle, this war is, in part, about "property." The property of this war is not
tangible as the Causbys', and no innocent chicken has yet to lose its life. Yet the ideas surrounding th
"property" are as obvious to most as the Causbys' claim about the sacredness of their farm was
them. We are the Causbys. Most of us take for granted the extraordinarily powerful claims that th
owners of "intellectual property" now assert. Most of us, like the Causbys, treat these claims
obvious. And hence we, like the Causbys, object when a new technology interferes with this propert
It is as plain to us as it was to them that the new technologies of the Internet are "trespassing" upo
legitimate claims of "property." It is as plain to us as it was to them that the law should intervene
stop this trespass.

And thus, when geeks and technologists defend their Armstrong or Wright brothers technolog
most of us are simply unsympathetic. Common sense does not revolt. Unlike in the case of th
unlucky Causbys, common sense is on the side of the property owners in this war. Unlike the luck
Wright brothers, the Internet has not inspired a revolution on its side.

My hope is to push this common sense along. I have become increasingly amazed by the power
this idea of intellectual property and, more importantly, its power to disable critical thought by polic
makers and citizens. There has never been a time in our history when more of our "culture" was
"owned" as it is now. And yet there has never been a time when the concentration of power to contr
the uses of culture has been as unquestioningly accepted as it is now.

The puzzle is, Why? Is it because we have come to understand a truth about the value ar
importance of absolute property over ideas and culture? Is it because we have discovered that o
tradition of rejecting such an absolute claim was wrong?

Or is it because the idea of absolute property over ideas and culture benefits the RCAs of our tim
and fits our own unreflective intuitions?

Is the radical shift away from our tradition of free culture an instance of America correcting
mistake from its past, as we did after a bloody war with slavery, and as we are slowly doing wi
inequality? Or is the radical shift away from our tradition of free culture yet another example of
political system captured by a few powerful special interests?

Does common sense lead to the extremes on this question because common sense actually believ
in these extremes? Or does common sense stand silent in the face of these extremes because, as wi
Armstrong versus RCA, the more powerful side has ensured that it has the more powerful view?

I don't mean to be mysterious. My own views are resolved. I believe it was right for common sen
to revolt against the extremism of the Causbys. I believe it would be right for common sense to revo
against the extreme claims made today on behalf of "intellectual property." What the law demand
today is increasingly as silly as a sheriff arresting an airplane for trespass. But the consequences
this silliness will be much more profound.

The struggle that rages just now centers on two ideas: "piracy" and "property." My aim in th
book's next two parts is to explore these two ideas.

My method is not the usual method of an academic. I don't want to plunge you into a comple
argument, buttressed with references to obscure French theorists—however natural that is for th
weird sort we academics have become. Instead I begin in each part with a collection of stories that s
a context within which these apparently simple ideas can be more fully understood.

The two sections set up the core claim of this book: that while the Internet has indeed produce
something fantastic and new, our government, pushed by big media to respond to this "somethin

new," is destroying something very old. Rather than understanding the changes the Internet mig permit, and rather than taking time to let "common sense" resolve how best to respond, we a allowing those most threatened by the changes to use their power to change the law—and mo importantly, to use their power to change something fundamental about who we have always been.

We allow this, I believe, not because it is right, and not because most of us really believe in thes changes. We allow it because the interests most threatened are among the most powerful players i our depressingly compromised process of making law. This book is the story of one more consequen of this form of corruption—a consequence to which most of us remain oblivious.

Part 1
"Piracy"

Since the inception of the law regulating creative property, there has been a war against "piracy." Th precise contours of this concept, "piracy," are hard to sketch, but the animating injustice is easy capture. As Lord Mansfield wrote in a case that extended the reach of English copyright law to inclu sheet music,

> A person may use the copy by playing it, but he has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use.[15]

Today we are in the middle of another "war" against "piracy." The Internet has provoked this wa The Internet makes possible the efficient spread of content. Peer-to-peer (p2p) file sharing is amo the most efficient of the efficient technologies the Internet enables. Using distributed intelligence, p2 systems facilitate the easy spread of content in a way unimagined a generation ago.

This efficiency does not respect the traditional lines of copyright. The network doesn't discrimina between the sharing of copyrighted and uncopyrighted content. Thus has there been a vast amount sharing of copyrighted content. That sharing in turn has excited the war, as copyright owners fear th sharing will "rob the author of the profit."

The warriors have turned to the courts, to the legislatures, and increasingly to technology to defe their "property" against this "piracy." A generation of Americans, the warriors warn, is being raised t believe that "property" should be "free." Forget tattoos, never mind body piercing—our kids a becoming thieves!

There's no doubt that "piracy" is wrong, and that pirates should be punished. But before we summo the executioners, we should put this notion of "piracy" in some context. For as the concept increasingly used, at its core is an extraordinary idea that is almost certainly wrong.

The idea goes something like this:

> Creative work has value; whenever I use, or take, or build upon the creative work of others, I am taking from them something of value. Whenever I take something of value from someone else, I should have their permission. The taking of something of value from someone else without permission is wrong. It is a form of piracy.

This view runs deep within the current debates. It is what NYU law professor Rochelle Dreyfu criticizes as the "if value, then right" theory of creative property[16] —if there is value, then someo must have a right to that value. It is the perspective that led a composers' rights organization, ASCA to sue the Girl Scouts for failing to pay for the songs that girls sang around Girl Scout campfires.[1 There was "value" (the songs) so there must have been a "right"—even against the Girl Scouts.

This idea is certainly a possible understanding of how creative property should work. It might we be a possible design for a system of law protecting creative property. But the "if value, then righ theory of creative property has never been America's theory of creative property. It has never take hold within our law.

Instead, in our tradition, intellectual property is an instrument. It sets the groundwork for a rich creative society but remains subservient to the value of creativity. The current debate has this turne around. We have become so concerned with protecting the instrument that we are losing sight of th value.

The source of this confusion is a distinction that the law no longer takes care to draw—t distinction between republishing someone's work on the one hand and building upon or transformi that work on the other. Copyright law at its birth had only publishing as its concern; copyright la today regulates both.

Before the technologies of the Internet, this conflation didn't matter all that much. The technologi
of publishing were expensive; that meant the vast majority of publishing was commercia
Commercial entities could bear the burden of the law—even the burden of the Byzantine complexi
that copyright law has become. It was just one more expense of doing business.

But with the birth of the Internet, this natural limit to the reach of the law has disappeared. The la
controls not just the creativity of commercial creators but effectively that of anyone. Although th
expansion would not matter much if copyright law regulated only "copying," when the law regulat
as broadly and obscurely as it does, the extension matters a lot. The burden of this law now vast
outweighs any original benefit—certainly as it affects noncommercial creativity, and increasingly
it affects commercial creativity as well. Thus, as we'll see more clearly in the chapters below, th
law's role is less and less to support creativity, and more and more to protect certain industries again
competition. Just at the time digital technology could unleash an extraordinary range of commerci
and noncommercial creativity, the law burdens this creativity with insanely complex and vague rul
and with the threat of obscenely severe penalties. We may be seeing, as Richard Florida writes, th
"Rise of the Creative Class."[18] Unfortunately, we are also seeing an extraordinary rise of regulatio
of this creative class.

These burdens make no sense in our tradition. We should begin by understanding that tradition a b
more and by placing in their proper context the current battles about behavior labeled "piracy."

Chapter 1 Creators

In 1928, a cartoon character was born. An early Mickey Mouse made his debut in May of that year, i a silent flop called Plane Crazy. In November, in New York City's Colony Theater, in the first widel distributed cartoon synchronized with sound, Steamboat Willie brought to life the character th would become Mickey Mouse.

Synchronized sound had been introduced to film a year earlier in the movie The Jazz Singer. Th success led Walt Disney to copy the technique and mix sound with cartoons. No one knew whether would work or, if it did work, whether it would win an audience. But when Disney ran a test in th summer of 1928, the results were unambiguous. As Disney describes that first experiment,

> A couple of my boys could read music, and one of them could play a mouth organ. We put them in a room where they could not see the screen and arranged to pipe their sound into the room where our wives and friends were going to see the picture.
> The boys worked from a music and sound-effects score. After several false starts, sound and action got off with the gun. The mouth organist played the tune, the rest of us in the sound department bammed tin pans and blew slide whistles on the beat. The synchronization was pretty close.
> The effect on our little audience was nothing less than electric. They responded almost instinctively to this union of sound and motion. I thought they were kidding me. So they put me in the audience and ran the action again. It was terrible, but it was wonderful! And it was something new![19]

Disney's then partner, and one of animation's most extraordinary talents, Ub Iwerks, put it mo strongly: "I have never been so thrilled in my life. Nothing since has ever equaled it."

Disney had created something very new, based upon something relatively new. Synchronized sour brought life to a form of creativity that had rarely—except in Disney's hands—been anything mo than filler for other films. Throughout animation's early history, it was Disney's invention that set th standard that others struggled to match. And quite often, Disney's great genius, his spark of creativit was built upon the work of others.

This much is familiar. What you might not know is that 1928 also marks another importa transition. In that year, a comic (as opposed to cartoon) genius created his last independently produce silent film. That genius was Buster Keaton. The film was Steamboat Bill, Jr.

Keaton was born into a vaudeville family in 1895. In the era of silent film, he had mastered usi broad physical comedy as a way to spark uncontrollable laughter from his audience. Steamboat Bi Jr. was a classic of this form, famous among film buffs for its incredible stunts. The film was class Keaton—wildly popular and among the best of its genre.

Steamboat Bill, Jr. appeared before Disney's cartoon Steamboat Willie. The coincidence of titles not coincidental. Steamboat Willie is a direct cartoon parody of Steamboat Bill,[20] and both are bu upon a common song as a source. It is not just from the invention of synchronized sound in The Ja Singer that we get Steamboat Willie. It is also from Buster Keaton's invention of Steamboat Bill, J itself inspired by the song "Steamboat Bill," that we get Steamboat Willie, and then from Steambo Willie, Mickey Mouse.

This "borrowing" was nothing unique, either for Disney or for the industry. Disney was alway parroting the feature-length mainstream films of his day.[21] So did many others. Early cartoons a filled with knockoffs—slight variations on winning themes; retellings of ancient stories. The key success was the brilliance of the differences. With Disney, it was sound that gave his animation i spark. Later, it was the quality of his work relative to the production-line cartoons with which h competed. Yet these additions were built upon a base that was borrowed. Disney added to the work o others before him, creating something new out of something just barely old.

Sometimes this borrowing was slight. Sometimes it was significant. Think about the fairy tales the Brothers Grimm. If you're as oblivious as I was, you're likely to think that these tales are happ sweet stories, appropriate for any child at bedtime. In fact, the Grimm fairy tales are, well, for u grim. It is a rare and perhaps overly ambitious parent who would dare to read these bloody, moralist stories to his or her child, at bedtime or anytime.

Disney took these stories and retold them in a way that carried them into a new age. He animate the stories, with both characters and light. Without removing the elements of fear and dang altogether, he made funny what was dark and injected a genuine emotion of compassion where befo there was fear. And not just with the work of the Brothers Grimm. Indeed, the catalog of Disney wor drawing upon the work of others is astonishing when set together: Snow White (1937), Fantas (1940), Pinocchio (1940), Dumbo (1941), Bambi (1942), Song of the South (1946), Cinderella (1950 Alice in Wonderland (1951), Robin Hood (1952), Peter Pan (1953), Lady and the Tramp (1955 Mulan (1998), Sleeping Beauty (1959), 101 Dalmatians (1961), The Sword in the Stone (1963), an The Jungle Book (1967)—not to mention a recent example that we should perhaps quickly forge Treasure Planet (2003). In all of these cases, Disney (or Disney, Inc.) ripped creativity from th culture around him, mixed that creativity with his own extraordinary talent, and then burned that m into the soul of his culture. Rip, mix, and burn.

This is a kind of creativity. It is a creativity that we should remember and celebrate. There are som who would say that there is no creativity except this kind. We don't need to go that far to recognize i importance. We could call this "Disney creativity," though that would be a bit misleading. It is, mor precisely, "Walt Disney creativity"—a form of expression and genius that builds upon the cultur around us and makes it something different.

In 1928, the culture that Disney was free to draw upon was relatively fresh. The public domain 1928 was not very old and was therefore quite vibrant. The average term of copyright was just arou thirty years—for that minority of creative work that was in fact copyrighted.[22] That means that f thirty years, on average, the authors or copyright holders of a creative work had an "exclusive right" control certain uses of the work. To use this copyrighted work in limited ways required the permissio of the copyright owner.

At the end of a copyright term, a work passes into the public domain. No permission is then needed to draw upon or use that work. No permission and, hence, no lawyers. The public domain is a "lawye free zone." Thus, most of the content from the nineteenth century was free for Disney to use and bui upon in 1928. It was free for anyone— whether connected or not, whether rich or not, wheth approved or not—to use and build upon.

This is the ways things always were—until quite recently. For most of our history, the publi domain was just over the horizon. From until 1978, the average copyright term was never more tha thirty-two years, meaning that most culture just a generation and a half old was free for anyone build upon without the permission of anyone else. Today's equivalent would be for creative work fro the 1960s and 1970s to now be free for the next Walt Disney to build upon without permission. Ye today, the public domain is presumptive only for content from before the Great Depression.

Of course, Walt Disney had no monopoly on "Walt Disney creativity." Nor does America. The norm

of free culture has, until recently, and except within totalitarian nations, been broadly exploited ar
quite universal.

Consider, for example, a form of creativity that seems strange to many Americans but that
inescapable within Japanese culture: manga, or comics. The Japanese are fanatics about comics. Son
40 percent of publications are comics, and 30 percent of publication revenue derives from comic
They are everywhere in Japanese society, at every magazine stand, carried by a large proportion
commuters on Japan's extraordinary system of public transportation.

Americans tend to look down upon this form of culture. That's an unattractive characteristic of our
We're likely to misunderstand much about manga, because few of us have ever read anything close
the stories that these "graphic novels" tell. For the Japanese, manga cover every aspect of social lif
For us, comics are "men in tights." And anyway, it's not as if the New York subways are filled wit
readers of Joyce or even Hemingway. People of different cultures distract themselves in differe
ways, the Japanese in this interestingly different way.

But my purpose here is not to understand manga. It is to describe a variant on manga that from
lawyer's perspective is quite odd, but from a Disney perspective is quite familiar.

This is the phenomenon of doujinshi. Doujinshi are also comics, but they are a kind of copyc
comic. A rich ethic governs the creation of doujinshi. It is not doujinshi if it is just a copy; the arti
must make a contribution to the art he copies, by transforming it either subtly or significantly.
doujinshi comic can thus take a mainstream comic and develop it differently—with a different sto
line. Or the comic can keep the character in character but change its look slightly. There is no formu
for what makes the doujinshi sufficiently "different." But they must be different if they are to
considered true doujinshi. Indeed, there are committees that review doujinshi for inclusion with
shows and reject any copycat comic that is merely a copy.

These copycat comics are not a tiny part of the manga market. They are huge. More than 33,00
"circles" of creators from across Japan produce these bits of Walt Disney creativity. More tha
450,000 Japanese come together twice a year, in the largest public gathering in the country,
exchange and sell them. This market exists in parallel to the mainstream commercial manga marke
In some ways, it obviously competes with that market, but there is no sustained effort by those wh
control the commercial manga market to shut the doujinshi market down. It flourishes, despite th
competition and despite the law.

The most puzzling feature of the doujinshi market, for those trained in the law, at least, is that it
allowed to exist at all. Under Japanese copyright law, which in this respect (on paper) mirro
American copyright law, the doujinshi market is an illegal one. Doujinshi are plainly "derivativ
works." There is no general practice by doujinshi artists of securing the permission of the mang
creators. Instead, the practice is simply to take and modify the creations of others, as Walt Disney di
with Steamboat Bill, Jr. Under both Japanese and American law, that "taking" without the permissio
of the original copyright owner is illegal. It is an infringement of the original copyright to make
copy or a derivative work without the original copyright owner's permission.

Yet this illegal market exists and indeed flourishes in Japan, and in the view of many, it is precisel
because it exists that Japanese manga flourish. As American graphic novelist Judd Winick said to m
"The early days of comics in America are very much like what's going on in Japan now… . America
comics were born out of copying each other… . That's how [the artists] learn to draw—by going in
comic books and not tracing them, but looking at them and copying them" and building from them.[2

American comics now are quite different, Winick explains, in part because of the legal difficulty
adapting comics the way doujinshi are allowed. Speaking of Superman, Winick told me, "there a
these rules and you have to stick to them." There are things Superman "cannot" do. "As a creator, it
frustrating having to stick to some parameters which are fifty years old."

The norm in Japan mitigates this legal difficulty. Some say it is precisely the benefit accruing to th Japanese manga market that explains the mitigation. Temple University law professor Salil Mehra, fo example, hypothesizes that the manga market accepts these technical violations because they spur th manga market to be more wealthy and productive. Everyone would be worse off if doujinshi we banned, so the law does not ban doujinshi.[24]

The problem with this story, however, as Mehra plainly acknowledges, is that the mechanis producing this laissez faire response is not clear. It may well be that the market as a whole is better o if doujinshi are permitted rather than banned, but that doesn't explain why individual copyright owne don't sue nonetheless. If the law has no general exception for doujinshi, and indeed in some cas individual manga artists have sued doujinshi artists, why is there not a more general pattern blocking this "free taking" by the doujinshi culture?

I spent four wonderful months in Japan, and I asked this question as often as I could. Perhaps th best account in the end was offered by a friend from a major Japanese law firm. "We don't hav enough lawyers," he told me one afternoon. There "just aren't enough resources to prosecute cases lik this."

This is a theme to which we will return: that regulation by law is a function of both the words on th books and the costs of making those words have effect. For now, focus on the obvious question that begged: Would Japan be better off with more lawyers? Would manga be richer if doujinshi artist were regularly prosecuted? Would the Japanese gain something important if they could end th practice of uncompensated sharing? Does piracy here hurt the victims of the piracy, or does it hel them? Would lawyers fighting this piracy help their clients or hurt them? Let's pause for a moment.

If you're like I was a decade ago, or like most people are when they first start thinking about the issues, then just about now you should be puzzled about something you hadn't thought through before

We live in a world that celebrates "property." I am one of those celebrants. I believe in the value o property in general, and I also believe in the value of that weird form of property that lawyers ca "intellectual property."[25] A large, diverse society cannot survive without property; a large, divers and modern society cannot flourish without intellectual property.

But it takes just a second's reflection to realize that there is plenty of value out there that "property doesn't capture. I don't mean "money can't buy you love," but rather, value that is plainly part of process of production, including commercial as well as noncommercial production. If Disne animators had stolen a set of pencils to draw Steamboat Willie, we'd have no hesitation in condemnin that taking as wrong— even though trivial, even if unnoticed. Yet there was nothing wrong, at lea under the law of the day, with Disney's taking from Buster Keaton or from the Brothers Grimm. Ther was nothing wrong with the taking from Keaton because Disney's use would have been considere "fair." There was nothing wrong with the taking from the Grimms because the Grimms' work was the public domain.

Thus, even though the things that Disney took—or more generally, the things taken by anyon exercising Walt Disney creativity—are valuable, our tradition does not treat those takings as wron Some things remain free for the taking within a free culture, and that freedom is good.

The same with the doujinshi culture. If a doujinshi artist broke into a publisher's office and ran o with a thousand copies of his latest work—or even one copy—without paying, we'd have no hesitatio in saying the artist was wrong. In addition to having trespassed, he would have stolen something value. The law bans that stealing in whatever form, whether large or small.

Yet there is an obvious reluctance, even among Japanese lawyers, to say that the copycat com artists are "stealing." This form of Walt Disney creativity is seen as fair and right, even if lawyers particular find it hard to say why.

It's the same with a thousand examples that appear everywhere once you begin to look. Scientis

build upon the work of other scientists without asking or paying for the privilege. ("Excuse m Professor Einstein, but may I have permission to use your theory of relativity to show that you we wrong about quantum physics?") Acting companies perform adaptations of the works of Shakespea without securing permission from anyone. (Does anyone believe Shakespeare would be better sprea within our culture if there were a central Shakespeare rights clearinghouse that all productions Shakespeare must appeal to first?) And Hollywood goes through cycles with a certain kind of movi five asteroid films in the late 1990s; two volcano disaster films in 1997.

Creators here and everywhere are always and at all times building upon the creativity that we before and that surrounds them now. That building is always and everywhere at least partially dor without permission and without compensating the original creator. No society, free or controlled, ha ever demanded that every use be paid for or that permission for Walt Disney creativity must always b sought. Instead, every society has left a certain bit of its culture free for the taking—free societi more fully than unfree, perhaps, but all societies to some degree.

The hard question is therefore not whether a culture is free. All cultures are free to some degre The hard question instead is "How free is this culture?" How much, and how broadly, is the cultu free for others to take and build upon? Is that freedom limited to party members? To members of th royal family? To the top ten corporations on the New York Stock Exchange? Or is that freedom sprea broadly? To artists generally, whether affiliated with the Met or not? To musicians generally, whethe white or not? To filmmakers generally, whether affiliated with a studio or not?

Free cultures are cultures that leave a great deal open for others to build upon; unfree, permission, cultures leave much less. Ours was a free culture. It is becoming much less so.