*** Lawrence Lessig, Free Culture, Chapter 6 Property pp. 116-147**

CHAPTER TEN: "Property"

Jack Valenti has been the president of the Motion Picture Association of America since 1966. He first came to Washington, D.C., with Lyndon Johnson's administration—literally. The famous picture of Johnson's swearing-in on Air Force One after the assassination of President Kennedy has Valenti in the background. In his almost forty years of running the MPAA, Valenti has established himself as perhaps the most prominent and effective lobbyist in Washington.

The MPAA is the American branch of the international Motion Picture Association. It was formed in 1922 as a trade association whose goal was to defend American movies against increasing domestic criticism. The organization now represents not only filmmakers but producers and distributors of entertainment for television, video, and cable. Its board is made up of the chairmen and presidents of the seven major producers and distributors of motion picture and television programs in the United States: Walt Disney, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios, and Warner Brothers.

Valenti is only the third president of the MPAA. No president before him has had as much influence over that organization, or over Washington. As a Texan, Valenti has mastered the single most important political skill of a Southerner—the ability to appear simple and slow while hiding a lightning-fast intellect. To this day, Valenti plays the simple, humble man. But this Harvard MBA, and author of four books, who finished high school at the age of fifteen and flew more than fifty combat missions in World War II, is no Mr. Smith. When Valenti went to Washington, he mastered the city in a quintessentially Washingtonian way.

In defending artistic liberty and the freedom of speech that our culture depends upon, the MPAA has done important good. In crafting the MPAA rating system, it has probably avoided a great deal of speech-regulating harm. But there is an aspect to the organization's mission that is both the most radical and the most important. This is the organization's effort, epitomized in Valenti's every act, to redefine the meaning of "creative property."

In 1982, Valenti's testimony to Congress captured the strategy perfectly:

> No matter the lengthy arguments made, no matter the charges and the counter-charges, no matter the tumult and the shouting, reasonable men and women will keep returning to the fundamental issue, the central theme which animates this entire debate: *Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation.* That is the issue. That is the question. And that is the rostrum on which this entire hearing and the debates to follow must rest.[1]

The strategy of this rhetoric, like the strategy of most of Valenti's rhetoric, is brilliant and simple and brilliant because simple. The "central theme" to which "reasonable men and women" will return is this: "Creative property owners must be accorded the same rights and pro-

tections resident in all other property owners in the nation." There are no second-class citizens, Valenti might have continued. There should be no second-class property owners.

This claim has an obvious and powerful intuitive pull. It is stated with such clarity as to make the idea as obvious as the notion that we use elections to pick presidents. But in fact, there is no more extreme a claim made by *anyone* who is serious in this debate than this claim of Valenti's. Jack Valenti, however sweet and however brilliant, is perhaps the nation's foremost extremist when it comes to the nature and scope of "creative property." His views have *no* reasonable connection to our actual legal tradition, even if the subtle pull of his Texan charm has slowly redefined that tradition, at least in Washington.

While "creative property" is certainly "property" in a nerdy and precise sense that lawyers are trained to understand,[2] it has never been the case, nor should it be, that "creative property owners" have been "accorded the same rights and protection resident in all other property owners." Indeed, if creative property owners were given the same rights as all other property owners, that would effect a radical, and radically undesirable, change in our tradition.

Valenti knows this. But he speaks for an industry that cares squat for our tradition and the values it represents. He speaks for an industry that is instead fighting to restore the tradition that the British overturned in 1710. In the world that Valenti's changes would create, a powerful few would exercise powerful control over how our creative culture would develop.

I have two purposes in this chapter. The first is to convince you that, historically, Valenti's claim is absolutely wrong. The second is to convince you that it would be terribly wrong for us to reject our history. We have always treated rights in creative property differently from the rights resident in all other property owners. They have never been the same. And they should never be the same, because, however counterintuitive this may seem, to make them the same would be to

fundamentally weaken the opportunity for new creators to create. Creativity depends upon the owners of creativity having less than perfect control.

Organizations such as the MPAA, whose board includes the most powerful of the old guard, have little interest, their rhetoric notwithstanding, in assuring that the new can displace them. No organization does. No person does. (Ask me about tenure, for example.) But what's good for the MPAA is not necessarily good for America. A society that defends the ideals of free culture must preserve precisely the opportunity for new creativity to threaten the old.

To get just a hint that there is something fundamentally wrong in Valenti's argument, we need look no further than the United States Constitution itself.

The framers of our Constitution loved "property." Indeed, so strongly did they love property that they built into the Constitution an important requirement. If the government takes your property—if it condemns your house, or acquires a slice of land from your farm—it is required, under the Fifth Amendment's "Takings Clause," to pay you "just compensation" for that taking. The Constitution thus guarantees that property is, in a certain sense, sacred. It cannot *ever* be taken from the property owner unless the government pays for the privilege.

Yet the very same Constitution speaks very differently about what Valenti calls "creative property." In the clause granting Congress the power to create "creative property," the Constitution *requires* that after a "limited time," Congress take back the rights that it has granted and set the "creative property" free to the public domain. Yet when Congress does this, when the expiration of a copyright term "takes" your copyright and turns it over to the public domain, Congress does not have any obligation to pay "just compensation" for this "taking." Instead, the same Constitution that requires compensation for your land

requires that you lose your "creative property" right without any compensation at all.

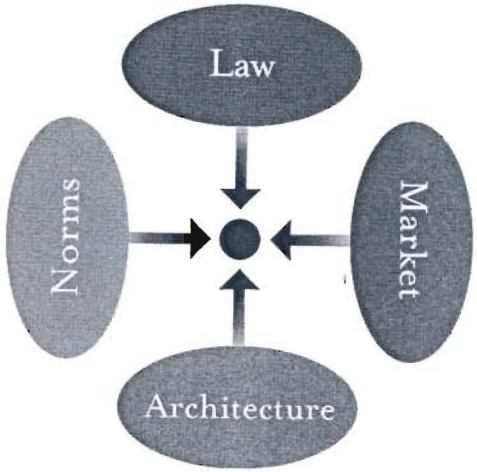
The Constitution thus on its face states that these two forms of property are not to be accorded the same rights. They are plainly to be treated differently. Valenti is therefore not just asking for a change in our tradition when he argues that creative-property owners should be accorded the same rights as every other property-right owner. He is effectively arguing for a change in our Constitution itself.

Arguing for a change in our Constitution is not necessarily wrong. There was much in our original Constitution that was plainly wrong. The Constitution of 1789 entrenched slavery; it left senators to be appointed rather than elected; it made it possible for the electoral college to produce a tie between the president and his own vice president (as it did in 1800). The framers were no doubt extraordinary, but I would be the first to admit that they made big mistakes. We have since rejected some of those mistakes; no doubt there could be others that we should reject as well. So my argument is not simply that because Jefferson did it, we should, too.

Instead, my argument is that because Jefferson did it, we should at least try to understand *why*. Why did the framers, fanatical property types that they were, reject the claim that creative property be given the same rights as all other property? Why did they require that for creative property there must be a public domain?

To answer this question, we need to get some perspective on the history of these "creative property" rights, and the control that they enabled. Once we see clearly how differently these rights have been defined, we will be in a better position to ask the question that should be at the core of this war: Not *whether* creative property should be protected, but how. Not *whether* we will enforce the rights the law gives to creative-property owners, but what the particular mix of rights ought to be. Not *whether* artists should be paid, but whether institutions designed to assure that artists get paid need also control how culture develops.

To answer these questions, we need a more general way to talk about how property is protected. More precisely, we need a more general way than the narrow language of the law allows. In *Code and Other Laws of Cyberspace*, I used a simple model to capture this more general perspective. For any particular right or regulation, this model asks how four different modalities of regulation interact to support or weaken the right or regulation. I represented it with this diagram:



At the center of this picture is a regulated dot: the individual or group that is the target of regulation, or the holder of a right. (In each case throughout, we can describe this either as regulation or as a right. For simplicity's sake, I will speak only of regulations.) The ovals represent four ways in which the individual or group might be regulated—either constrained or, alternatively, enabled. Law is the most obvious constraint (to lawyers, at least). It constrains by threatening punishments after the fact if the rules set in advance are violated. So if, for example, you willfully infringe Madonna's copyright by copying a song from her latest CD and posting it on the Web, you can be punished

with a $150,000 fine. The fine is an ex post punishment for violating an ex ante rule. It is imposed by the state.

Norms are a different kind of constraint. They, too, punish an individual for violating a rule. But the punishment of a norm is imposed by a community, not (or not only) by the state. There may be no law against spitting, but that doesn't mean you won't be punished if you spit on the ground while standing in line at a movie. The punishment might not be harsh, though depending upon the community, it could easily be more harsh than many of the punishments imposed by the state. The mark of the difference is not the severity of the rule, but the source of the enforcement.

The market is a third type of constraint. Its constraint is effected through conditions: You can do X if you pay Y; you'll be paid M if you do N. These constraints are obviously not independent of law or norms—it is property law that defines what must be bought if it is to be taken legally; it is norms that say what is appropriately sold. But given a set of norms, and a background of property and contract law, the market imposes a simultaneous constraint upon how an individual or group might behave.

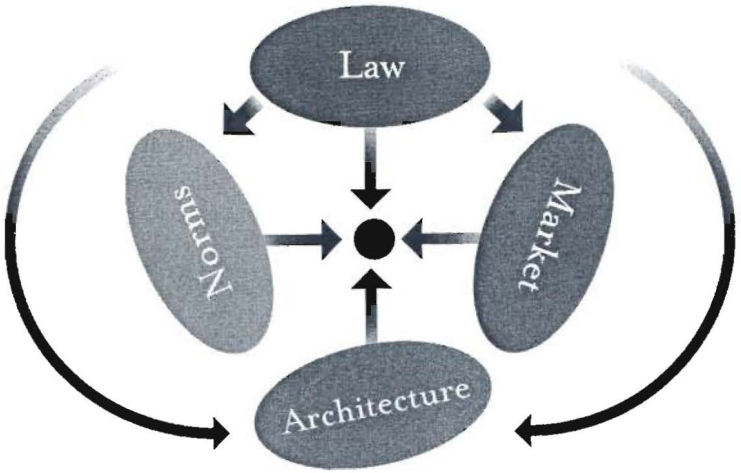
Finally, and for the moment, perhaps, most mysteriously, "architecture"—the physical world as one finds it—is a constraint on behavior. A fallen bridge might constrain your ability to get across a river. Railroad tracks might constrain the ability of a community to integrate its social life. As with the market, architecture does not effect its constraint through ex post punishments. Instead, also as with the market, architecture effects its constraint through simultaneous conditions. These conditions are imposed not by courts enforcing contracts, or by police punishing theft, but by nature, by "architecture." If a 500-pound boulder blocks your way, it is the law of gravity that enforces this constraint. If a $500 airplane ticket stands between you and a flight to New York, it is the market that enforces this constraint.

So the first point about these four modalities of regulation is obvious: They interact. Restrictions imposed by one might be reinforced by another. Or restrictions imposed by one might be undermined by another.

The second point follows directly: If we want to understand the effective freedom that anyone has at a given moment to do any particular thing, we have to consider how these four modalities interact. Whether or not there are other constraints (there may well be; my claim is not about comprehensiveness), these four are among the most significant, and any regulator (whether controlling or freeing) must consider how these four in particular interact.

So, for example, consider the "freedom" to drive a car at a high speed. That freedom is in part restricted by laws: speed limits that say how fast you can drive in particular places at particular times. It is in part restricted by architecture: speed bumps, for example, slow most rational drivers; governors in buses, as another example, set the maximum rate at which the driver can drive. The freedom is in part restricted by the market: Fuel efficiency drops as speed increases, thus the price of gasoline indirectly constrains speed. And finally, the norms of a community may or may not constrain the freedom to speed. Drive at 50 mph by a school in your own neighborhood and you're likely to be punished by the neighbors. The same norm wouldn't be as effective in a different town, or at night.

The final point about this simple model should also be fairly clear: While these four modalities are analytically independent, law has a special role in affecting the three.[3] The law, in other words, sometimes operates to increase or decrease the constraint of a particular modality. Thus, the law might be used to increase taxes on gasoline, so as to increase the incentives to drive more slowly. The law might be used to mandate more speed bumps, so as to increase the difficulty of driving rapidly. The law might be used to fund ads that stigmatize reckless driving. Or the law might be used to require that other laws be more



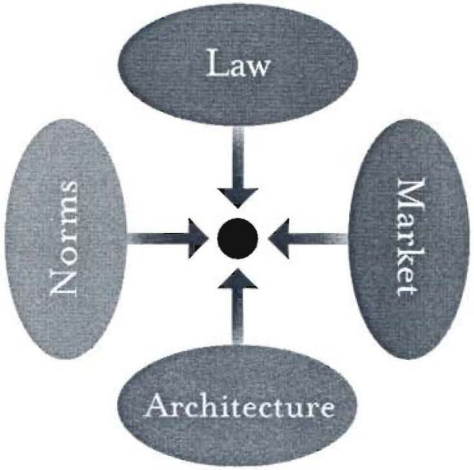
strict—a federal requirement that states decrease the speed limit, for example—so as to decrease the attractiveness of fast driving.

These constraints can thus change, and they can be changed. To understand the effective protection of liberty or protection of property at any particular moment, we must track these changes over time. A restriction imposed by one modality might be erased by another. A freedom enabled by one modality might be displaced by another.[4]

Why Hollywood Is Right

The most obvious point that this model reveals is just why, or just how, Hollywood is right. The copyright warriors have rallied Congress and the courts to defend copyright. This model helps us see why that rallying makes sense.

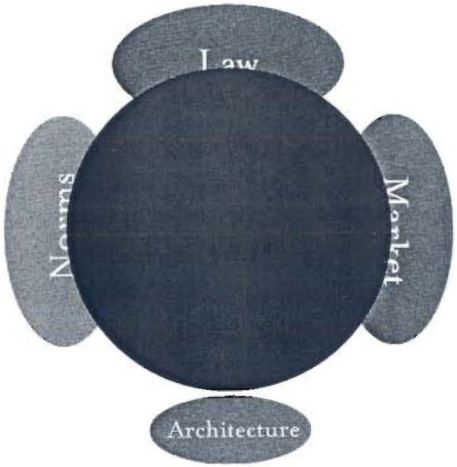
Let's say this is the picture of copyright's regulation before the Internet:



There is balance between law, norms, market, and architecture. The law limits the ability to copy and share content, by imposing penalties on those who copy and share content. Those penalties are reinforced by technologies that make it hard to copy and share content (architecture) and expensive to copy and share content (market). Finally, those penalties are mitigated by norms we all recognize—kids, for example, taping other kids' records. These uses of copyrighted material may well be infringement, but the norms of our society (before the Internet, at least) had no problem with this form of infringement.

Enter the Internet, or, more precisely, technologies such as MP3s and p2p sharing. Now the constraint of architecture changes dramatically, as does the constraint of the market. And as both the market and architecture relax the regulation of copyright, norms pile on. The happy balance (for the warriors, at least) of life before the Internet becomes an effective state of anarchy after the Internet.

Thus the sense of, and justification for, the warriors' response. Technology has changed, the warriors say, and the effect of this change, when ramified through the market and norms, is that a balance of protection for the copyright owners' rights has been lost. This is Iraq



after the fall of Saddam, but this time no government is justifying the looting that results.

Neither this analysis nor the conclusions that follow are new to the warriors. Indeed, in a "White Paper" prepared by the Commerce Department (one heavily influenced by the copyright warriors) in 1995, this mix of regulatory modalities had already been identified and the strategy to respond already mapped. In response to the changes the Internet had effected, the White Paper argued (1) Congress should strengthen intellectual property law, (2) businesses should adopt innovative marketing techniques, (3) technologists should push to develop code to protect copyrighted material, and (4) educators should educate kids to better protect copyright.

This mixed strategy is just what copyright needed—if it was to preserve the particular balance that existed before the change induced by the Internet. And it's just what we should expect the content industry to push for. It is as American as apple pie to consider the happy life you have as an entitlement, and to look to the law to protect it if something comes along to change that happy life. Homeowners living in a

flood plain have no hesitation appealing to the government to rebuild (and rebuild again) when a flood (architecture) wipes away their property (law). Farmers have no hesitation appealing to the government to bail them out when a virus (architecture) devastates their crop. Unions have no hesitation appealing to the government to bail them out when imports (market) wipe out the U.S. steel industry.

Thus, there's nothing wrong or surprising in the content industry's campaign to protect itself from the harmful consequences of a technological innovation. And I would be the last person to argue that the changing technology of the Internet has not had a profound effect on the content industry's way of doing business, or as John Seely Brown describes it, its "architecture of revenue."

But just because a particular interest asks for government support, it doesn't follow that support should be granted. And just because technology has weakened a particular way of doing business, it doesn't follow that the government should intervene to support that old way of doing business. Kodak, for example, has lost perhaps as much as 20 percent of their traditional film market to the emerging technologies of digital cameras.[5] Does anyone believe the government should ban digital cameras just to support Kodak? Highways have weakened the freight business for railroads. Does anyone think we should ban trucks from roads *for the purpose of* protecting the railroads? Closer to the subject of this book, remote channel changers have weakened the "stickiness" of television advertising (if a boring commercial comes on the TV, the remote makes it easy to surf), and it may well be that this change has weakened the television advertising market. But does anyone believe we should regulate remotes to reinforce commercial television? (Maybe by limiting them to function only once a second, or to switch to only ten channels within an hour?)

The obvious answer to these obviously rhetorical questions is no. In a free society, with a free market, supported by free enterprise and free trade, the government's role is not to support one way of doing

business against others. Its role is not to pick winners and protect them against loss. If the government did this generally, then we would never have any progress. As Microsoft chairman Bill Gates wrote in 1991, in a memo criticizing software patents, "established companies have an interest in excluding future competitors."[6] And relative to a startup, established companies also have the means. (Think RCA and FM radio.) A world in which competitors with new ideas must fight not only the market but also the government is a world in which competitors with new ideas will not succeed. It is a world of stasis and increasingly concentrated stagnation. It is the Soviet Union under Brezhnev.

Thus, while it is understandable for industries threatened with new technologies that change the way they do business to look to the government for protection, it is the special duty of policy makers to guarantee that that protection not become a deterrent to progress. It is the duty of policy makers, in other words, to assure that the changes they create, in response to the request of those hurt by changing technology, are changes that preserve the incentives and opportunities for innovation and change.

In the context of laws regulating speech—which include, obviously, copyright law—that duty is even stronger. When the industry complaining about changing technologies is asking Congress to respond in a way that burdens speech and creativity, policy makers should be especially wary of the request. It is always a bad deal for the government to get into the business of regulating speech markets. The risks and dangers of that game are precisely why our framers created the First Amendment to our Constitution: "Congress shall make no law . . . abridging the freedom of speech." So when Congress is being asked to pass laws that would "abridge" the freedom of speech, it should ask—carefully—whether such regulation is justified.

My argument just now, however, has nothing to do with whether the changes that are being pushed by the copyright warriors are "justified." My argument is about their effect. For before we get to the question of justification, a hard question that depends a great deal upon your values, we should first ask whether we understand the effect of the changes the content industry wants.

Here's the metaphor that will capture the argument to follow.

In 1873, the chemical DDT was first synthesized. In 1948, Swiss chemist Paul Hermann Müller won the Nobel Prize for his work demonstrating the insecticidal properties of DDT. By the 1950s, the insecticide was widely used around the world to kill disease-carrying pests. It was also used to increase farm production.

No one doubts that killing disease-carrying pests or increasing crop production is a good thing. No one doubts that the work of Müller was important and valuable and probably saved lives, possibly millions.

But in 1962, Rachel Carson published *Silent Spring*, which argued that DDT, whatever its primary benefits, was also having unintended environmental consequences. Birds were losing the ability to reproduce. Whole chains of the ecology were being destroyed.

No one set out to destroy the environment. Paul Müller certainly did not aim to harm any birds. But the effort to solve one set of problems produced another set which, in the view of some, was far worse than the problems that were originally attacked. Or more accurately, the problems DDT caused were worse than the problems it solved, at least when considering the other, more environmentally friendly ways to solve the problems that DDT was meant to solve.

It is to this image precisely that Duke University law professor James Boyle appeals when he argues that we need an "environmentalism" for culture.[7] His point, and the point I want to develop in the balance of this chapter, is not that the aims of copyright are flawed. Or that authors should not be paid for their work. Or that music should be given away "for free." The point is that some of the ways in which we might protect authors will have unintended consequences for the cultural environment, much like DDT had for the natural environment. And just

as criticism of DDT is not an endorsement of malaria or an attack on farmers, so, too, is criticism of one particular set of regulations protecting copyright not an endorsement of anarchy or an attack on authors. It is an environment of creativity that we seek, and we should be aware of our actions' effects on the environment.

My argument, in the balance of this chapter, tries to map exactly this effect. No doubt the technology of the Internet has had a dramatic effect on the ability of copyright owners to protect their content. But there should also be little doubt that when you add together the changes in copyright law over time, plus the change in technology that the Internet is undergoing just now, the net effect of these changes will not be only that copyrighted work is effectively protected. Also, and generally missed, the net effect of this massive increase in protection will be devastating to the environment for creativity.

In a line: To kill a gnat, we are spraying DDT with consequences for free culture that will be far more devastating than that this gnat will be lost.

Beginnings

America copied English copyright law. Actually, we copied and improved English copyright law. Our Constitution makes the purpose of "creative property" rights clear; its express limitations reinforce the English aim to avoid overly powerful publishers.

The power to establish "creative property" rights is granted to Congress in a way that, for our Constitution, at least, is very odd. Article I, section 8, clause 8 of our Constitution states that:

> Congress has the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

We can call this the "Progress Clause," for notice what this clause does not say. It does not say Congress has the power to grant "creative property rights." It says that Congress has the power *to promote progress*. The grant of power is its purpose, and its purpose is a public one, not the purpose of enriching publishers, nor even primarily the purpose of rewarding authors.

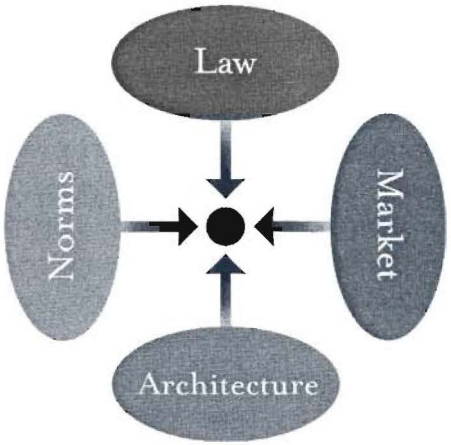
The Progress Clause expressly limits the term of copyrights. As we saw in chapter 6, the English limited the term of copyright so as to assure that a few would not exercise disproportionate control over culture by exercising disproportionate control over publishing. We can assume the framers followed the English for a similar purpose. Indeed, unlike the English, the framers reinforced that objective, by requiring that copyrights extend "to Authors" only.

The design of the Progress Clause reflects something about the Constitution's design in general. To avoid a problem, the framers built structure. To prevent the concentrated power of publishers, they built a structure that kept copyrights away from publishers and kept them short. To prevent the concentrated power of a church, they banned the federal government from establishing a church. To prevent concentrating power in the federal government, they built structures to reinforce the power of the states—including the Senate, whose members were at the time selected by the states, and an electoral college, also selected by the states, to select the president. In each case, a *structure* built checks and balances into the constitutional frame, structured to prevent otherwise inevitable concentrations of power.

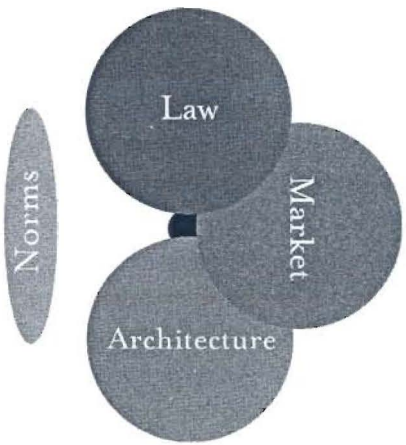
I doubt the framers would recognize the regulation we call "copyright" today. The scope of that regulation is far beyond anything they ever considered. To begin to understand what they did, we need to put our "copyright" in context: We need to see how it has changed in the 210 years since they first struck its design.

Some of these changes come from the law: some in light of changes in technology, and some in light of changes in technology given a

particular concentration of market power. In terms of our model, we started here:



We will end here:



Let me explain how.

Law: Duration

When the first Congress enacted laws to protect creative property, it faced the same uncertainty about the status of creative property that the English had confronted in 1774. Many states had passed laws protecting creative property, and some believed that these laws simply supplemented common law rights that already protected creative authorship.[8] This meant that there was no guaranteed public domain in the United States in 1790. If copyrights were protected by the common law, then there was no simple way to know whether a work published in the United States was controlled or free. Just as in England, this lingering uncertainty would make it hard for publishers to rely upon a public domain to reprint and distribute works.

That uncertainty ended after Congress passed legislation granting copyrights. Because federal law overrides any contrary state law, federal protections for copyrighted works displaced any state law protections. Just as in England the Statute of Anne eventually meant that the copyrights for all English works expired, a federal statute meant that any state copyrights expired as well.

In 1790, Congress enacted the first copyright law. It created a federal copyright and secured that copyright for fourteen years. If the author was alive at the end of that fourteen years, then he could opt to renew the copyright for another fourteen years. If he did not renew the copyright, his work passed into the public domain.

While there were many works created in the United States in the first ten years of the Republic, only 5 percent of the works were actually registered under the federal copyright regime. Of all the work created in the United States both before 1790 and from 1790 through 1800, 95 percent immediately passed into the public domain; the balance would pass into the pubic domain within twenty-eight years at most, and more likely within fourteen years.[9]

This system of renewal was a crucial part of the American system of copyright. It assured that the maximum terms of copyright would be

granted only for works where they were wanted. After the initial term of fourteen years, if it wasn't worth it to an author to renew his copyright, then it wasn't worth it to society to insist on the copyright, either.

Fourteen years may not seem long to us, but for the vast majority of copyright owners at that time, it was long enough: Only a small minority of them renewed their copyright after fourteen years; the balance allowed their work to pass into the public domain.[10]

Even today, this structure would make sense. Most creative work has an actual commercial life of just a couple of years. Most books fall out of print after one year.[11] When that happens, the used books are traded free of copyright regulation. Thus the books are no longer *effectively* controlled by copyright. The only practical commercial use of the books at that time is to sell the books as used books; that use—because it does not involve publication—is effectively free.

In the first hundred years of the Republic, the term of copyright was changed once. In 1831, the term was increased from a maximum of 28 years to a maximum of 42 by increasing the initial term of copyright from 14 years to 28 years. In the next fifty years of the Republic, the term increased once again. In 1909, Congress extended the renewal term of 14 years to 28 years, setting a maximum term of 56 years.

Then, beginning in 1962, Congress started a practice that has defined copyright law since. Eleven times in the last forty years, Congress has extended the terms of existing copyrights; twice in those forty years, Congress extended the term of future copyrights. Initially, the extensions of existing copyrights were short, a mere one to two years. In 1976, Congress extended all existing copyrights by nineteen years. And in 1998, in the Sonny Bono Copyright Term Extension Act, Congress extended the term of existing and future copyrights by twenty years.

The effect of these extensions is simply to toll, or delay, the passing of works into the public domain. This latest extension means that the public domain will have been tolled for thirty-nine out of fifty-five years, or 70 percent of the time since 1962. Thus, in the twenty years after the Sonny Bono Act, while one million patents will pass into the public domain, zero copyrights will pass into the public domain by virtue of the expiration of a copyright term.

The effect of these extensions has been exacerbated by another, little-noticed change in the copyright law. Remember I said that the framers established a two-part copyright regime, requiring a copyright owner to renew his copyright after an initial term. The requirement of renewal meant that works that no longer needed copyright protection would pass more quickly into the public domain. The works remaining under protection would be those that had some continuing commercial value.

The United States abandoned this sensible system in 1976. For all works created after 1978, there was only one copyright term—the maximum term. For "natural" authors, that term was life plus fifty years. For corporations, the term was seventy-five years. Then, in 1992, Congress abandoned the renewal requirement for all works created before 1978. All works still under copyright would be accorded the maximum term then available. After the Sonny Bono Act, that term was ninety-five years.

This change meant that American law no longer had an automatic way to assure that works that were no longer exploited passed into the public domain. And indeed, after these changes, it is unclear whether it is even possible to put works into the public domain. The public domain is orphaned by these changes in copyright law. Despite the requirement that terms be "limited," we have no evidence that anything will limit them.

The effect of these changes on the average duration of copyright is dramatic. In 1973, more than 85 percent of copyright owners failed to renew their copyright. That meant that the average term of copyright in 1973 was just 32.2 years. Because of the elimination of the renewal requirement, the average term of copyright is now the maximum term. In thirty years, then, the average term has tripled, from 32.2 years to 95 years.[12]

Law: Scope

The "scope" of a copyright is the range of rights granted by the law. The scope of American copyright has changed dramatically. Those changes are not necessarily bad. But we should understand the extent of the changes if we're to keep this debate in context.

In 1790, that scope was very narrow. Copyright covered only "maps, charts, and books." That means it didn't cover, for example, music or architecture. More significantly, the right granted by a copyright gave the author the exclusive right to "publish" copyrighted works. That means someone else violated the copyright only if he republished the work without the copyright owner's permission. Finally, the right granted by a copyright was an exclusive right to that particular book. The right did not extend to what lawyers call "derivative works." It would not, therefore, interfere with the right of someone other than the author to translate a copyrighted book, or to adapt the story to a different form (such as a drama based on a published book).

This, too, has changed dramatically. While the contours of copyright today are extremely hard to describe simply, in general terms, the right covers practically any creative work that is reduced to a tangible form. It covers music as well as architecture, drama as well as computer programs. It gives the copyright owner of that creative work not only the exclusive right to "publish" the work, but also the exclusive right of control over any "copies" of that work. And most significant for our purposes here, the right gives the copyright owner control over not only his or her particular work, but also any "derivative work" that might grow out of the original work. In this way, the right covers more creative work, protects the creative work more broadly, and protects works that are based in a significant way on the initial creative work.

At the same time that the scope of copyright has expanded, procedural limitations on the right have been relaxed. I've already described the complete removal of the renewal requirement in 1992. In addition to the renewal requirement, for most of the history of American copyright law, there was a requirement that a work be registered before it could receive the protection of a copyright. There was also a requirement that any copyrighted work be marked either with that famous © or the word *copyright*. And for most of the history of American copyright law, there was a requirement that works be deposited with the government before a copyright could be secured.

The reason for the registration requirement was the sensible understanding that for most works, no copyright was required. Again, in the first ten years of the Republic, 95 percent of works eligible for copyright were never copyrighted. Thus, the rule reflected the norm: Most works apparently didn't need copyright, so registration narrowed the regulation of the law to the few that did. The same reasoning justified the requirement that a work be marked as copyrighted—that way it was easy to know whether a copyright was being claimed. The requirement that works be deposited was to assure that after the copyright expired, there would be a copy of the work somewhere so that it could be copied by others without locating the original author.

All of these "formalities" were abolished in the American system when we decided to follow European copyright law. There is no requirement that you register a work to get a copyright; the copyright now is automatic; the copyright exists whether or not you mark your work with a ©; and the copyright exists whether or not you actually make a copy available for others to copy.

Consider a practical example to understand the scope of these differences.

If, in 1790, you wrote a book and you were one of the 5 percent who actually copyrighted that book, then the copyright law protected you against another publisher's taking your book and republishing it without your permission. The aim of the act was to regulate publishers so as to prevent that kind of unfair competition. In 1790, there were 174 publishers in the United States.[13] The Copyright Act was thus a tiny regulation of a tiny proportion of a tiny part of the creative market in the United States—publishers.

The act left other creators totally unregulated. If I copied your poem by hand, over and over again, as a way to learn it by heart, my act was totally unregulated by the 1790 act. If I took your novel and made a play based upon it, or if I translated it or abridged it, none of those activities were regulated by the original copyright act. These creative activities remained free, while the activities of publishers were restrained.

Today the story is very different: If you write a book, your book is automatically protected. Indeed, not just your book. Every e-mail, every note to your spouse, every doodle, *every* creative act that's reduced to a tangible form—all of this is automatically copyrighted. There is no need to register or mark your work. The protection follows the creation, not the steps you take to protect it.

That protection gives you the right (subject to a narrow range of fair use exceptions) to control how others copy the work, whether they copy it to republish it or to share an excerpt.

That much is the obvious part. Any system of copyright would control competing publishing. But there's a second part to the copyright of today that is not at all obvious. This is the protection of "derivative rights." If you write a book, no one can make a movie out of your book without permission. No one can translate it without permission. CliffsNotes can't make an abridgment unless permission is granted. All of these derivative uses of your original work are controlled by the copyright holder. The copyright, in other words, is now not just an exclusive right to your writings, but an exclusive right to your writings and a large proportion of the writings inspired by them.

It is this derivative right that would seem most bizarre to our framers, though it has become second nature to us. Initially, this expansion was created to deal with obvious evasions of a narrower copyright. If I write a book, can you change one word and then claim a copyright in a new and different book? Obviously that would make a joke of the copyright, so the law was properly expanded to include those slight modifications as well as the verbatim original work.

In preventing that joke, the law created an astonishing power within a free culture—at least, it's astonishing when you understand that the law applies not just to the commercial publisher but to anyone with a computer. I understand the wrong in duplicating and selling someone else's work. But whatever *that* wrong is, transforming someone else's work is a different wrong. Some view transformation as no wrong at all—they believe that our law, as the framers penned it, should not protect derivative rights at all.[14] Whether or not you go that far, it seems plain that whatever wrong is involved is fundamentally different from the wrong of direct piracy.

Yet copyright law treats these two different wrongs in the same way. I can go to court and get an injunction against your pirating my book. I can go to court and get an injunction against your transformative use of my book.[15] These two different uses of my creative work are treated the same.

This again may seem right to you. If I wrote a book, then why should you be able to write a movie that takes my story and makes money from it without paying me or crediting me? Or if Disney creates a creature called "Mickey Mouse," why should you be able to make Mickey Mouse toys and be the one to trade on the value that Disney originally created?

These are good arguments, and, in general, my point is not that the derivative right is unjustified. My aim just now is much narrower: simply to make clear that this expansion is a significant change from the rights originally granted.

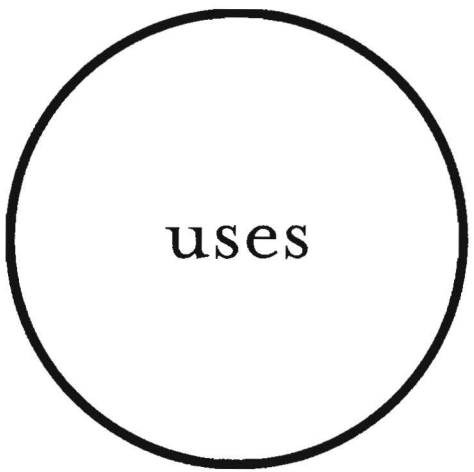
Law and Architecture: Reach

Whereas originally the law regulated only publishers, the change in copyright's scope means that the law today regulates publishers, users, and authors. It regulates them because all three are capable of making copies, and the core of the regulation of copyright law is copies.[16]

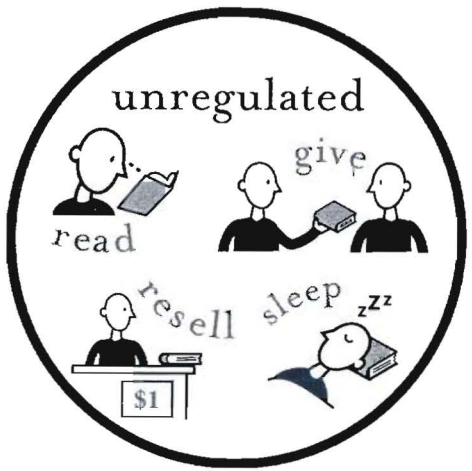
"Copies." That certainly sounds like the obvious thing for *copy*right law to regulate. But as with Jack Valenti's argument at the start of this chapter, that "creative property" deserves the "same rights" as all other property, it is the *obvious* that we need to be most careful about. For while it may be obvious that in the world before the Internet, copies were the obvious trigger for copyright law, upon reflection, it should be obvious that in the world with the Internet, copies should *not* be the trigger for copyright law. More precisely, they should not *always* be the trigger for copyright law.

This is perhaps the central claim of this book, so let me take this very slowly so that the point is not easily missed. My claim is that the Internet should at least force us to rethink the conditions under which the law of copyright automatically applies,[17] because it is clear that the current reach of copyright was never contemplated, much less chosen, by the legislators who enacted copyright law.

We can see this point abstractly by beginning with this largely empty circle.



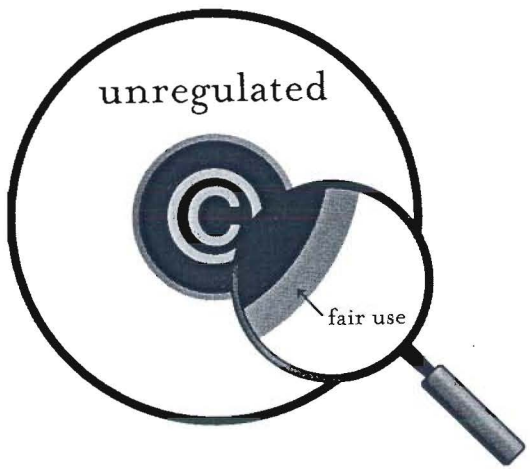
Think about a book in real space, and imagine this circle to represent all its potential *uses*. Most of these uses are unregulated by copyright law, because the uses don't create a copy. If you read a book, that act is not regulated by copyright law. If you give someone the book, that act is not regulated by copyright law. If you resell a book, that act is not regulated (copyright law expressly states that after the first sale of a book, the copyright owner can impose no further conditions on the disposition of the book). If you sleep on the book or use it to hold up a lamp or let your puppy chew it up, those acts are not regulated by copyright law, because those acts do not make a copy.



Obviously, however, some uses of a copyrighted book are regulated by copyright law. Republishing the book, for example, makes a copy. It is therefore regulated by copyright law. Indeed, this particular use stands at the core of this circle of possible uses of a copyrighted work. It is the paradigmatic use properly regulated by copyright regulation (see first diagram on next page).

Finally, there is a tiny sliver of otherwise regulated copying uses that remain unregulated because the law considers these "fair uses."

These are uses that themselves involve copying, but which the law treats as unregulated because public policy demands that they remain unregulated. You are free to quote from this book, even in a review that is quite negative, without my permission, even though that quoting makes a copy. That copy would ordinarily give the copyright owner the exclusive right to say whether the copy is allowed or not, but the law denies the owner any exclusive right over such "fair uses" for public policy (and possibly First Amendment) reasons.



In real space, then, the possible uses of a book are divided into three sorts: (1) unregulated uses, (2) regulated uses, and (3) regulated uses that are nonetheless deemed "fair" regardless of the copyright owner's views.

Enter the Internet—a distributed, digital network where every use of a copyrighted work produces a copy.[18] And because of this single, arbitrary feature of the design of a digital network, the scope of category 1 changes dramatically. Uses that before were presumptively unregulated are now presumptively regulated. No longer is there a set of presumptively unregulated uses that define a freedom associated with a copyrighted work. Instead, each use is now subject to the copyright, because each use also makes a copy—category 1 gets sucked into category 2. And those who would defend the unregulated uses of copyrighted work must look exclusively to category 3, fair uses, to bear the burden of this shift.

So let's be very specific to make this general point clear. Before the Internet, if you purchased a book and read it ten times, there would be no plausible *copyright*-related argument that the copyright owner could make to control that use of her book. Copyright law would have nothing to say about whether you read the book once, ten times, or every

night before you went to bed. None of those instances of use—reading—could be regulated by copyright law because none of those uses produced a copy.

But the same book as an e-book is effectively governed by a different set of rules. Now if the copyright owner says you may read the book only once or only once a month, then *copyright law* would aid the copyright owner in exercising this degree of control, because of the accidental feature of copyright law that triggers its application upon there being a copy. Now if you read the book ten times and the license says you may read it only five times, then whenever you read the book (or any portion of it) beyond the fifth time, you are making a copy of the book contrary to the copyright owner's wish.

There are some people who think this makes perfect sense. My aim just now is not to argue about whether it makes sense or not. My aim is only to make clear the change. Once you see this point, a few other points also become clear:

First, making category 1 disappear is not anything any policy maker ever intended. Congress did not think through the collapse of the presumptively unregulated uses of copyrighted works. There is no evidence at all that policy makers had this idea in mind when they allowed our policy here to shift. Unregulated uses were an important part of free culture before the Internet.

Second, this shift is especially troubling in the context of transformative uses of creative content. Again, we can all understand the wrong in commercial piracy. But the law now purports to regulate *any* transformation you make of creative work using a machine. "Copy and paste" and "cut and paste" become crimes. Tinkering with a story and releasing it to others exposes the tinkerer to at least a requirement of justification. However troubling the expansion with respect to copying a particular work, it is extraordinarily troubling with respect to transformative uses of creative work.

Third, this shift from category 1 to category 2 puts an extraordinary burden on category 3 ("fair use") that fair use never before had to bear. If a copyright owner now tried to control how many times I could read a book on-line, the natural response would be to argue that this is a violation of my fair use rights. But there has never been any litigation about whether I have a fair use right to read, because before the Internet, reading did not trigger the application of copyright law and hence the need for a fair use defense. The right to read was effectively protected before because reading was not regulated.

This point about fair use is totally ignored, even by advocates for free culture. We have been cornered into arguing that our rights depend upon fair use—never even addressing the earlier question about the expansion in effective regulation. A thin protection grounded in fair use makes sense when the vast majority of uses are *unregulated.* But when everything becomes presumptively regulated, then the protections of fair use are not enough.

The case of Video Pipeline is a good example. Video Pipeline was in the business of making "trailer" advertisements for movies available to video stores. The video stores displayed the trailers as a way to sell videos. Video Pipeline got the trailers from the film distributors, put the trailers on tape, and sold the tapes to the retail stores.

The company did this for about fifteen years. Then, in 1997, it began to think about the Internet as another way to distribute these previews. The idea was to expand their "selling by sampling" technique by giving on-line stores the same ability to enable "browsing." Just as in a bookstore you can read a few pages of a book before you buy the book, so, too, you would be able to sample a bit from the movie on-line before you bought it.

In 1998, Video Pipeline informed Disney and other film distributors that it intended to distribute the trailers through the Internet (rather than sending the tapes) to distributors of their videos. Two years later, Disney told Video Pipeline to stop. The owner of Video Pipeline asked Disney to talk about the matter—he had built a busi-

ness on distributing this content as a way to help sell Disney films; he had customers who depended upon his delivering this content. Disney would agree to talk only if Video Pipeline stopped the distribution immediately. Video Pipeline thought it was within their "fair use" rights to distribute the clips as they had. So they filed a lawsuit to ask the court to declare that these rights were in fact their rights.

Disney countersued—for $100 million in damages. Those damages were predicated upon a claim that Video Pipeline had "willfully infringed" on Disney's copyright. When a court makes a finding of willful infringement, it can award damages not on the basis of the actual harm to the copyright owner, but on the basis of an amount set in the statute. Because Video Pipeline had distributed seven hundred clips of Disney movies to enable video stores to sell copies of those movies, Disney was now suing Video Pipeline for $100 million.

Disney has the right to control its property, of course. But the video stores that were selling Disney's films also had some sort of right to be able to sell the films that they had bought from Disney. Disney's claim in court was that the stores were allowed to sell the films and they were permitted to list the titles of the films they were selling, but they were not allowed to show clips of the films as a way of selling them without Disney's permission.

Now, you might think this is a close case, and I think the courts would consider it a close case. My point here is to map the change that gives Disney this power. Before the Internet, Disney couldn't really control how people got access to their content. Once a video was in the marketplace, the "first-sale doctrine" would free the seller to use the video as he wished, including showing portions of it in order to engender sales of the entire movie video. But with the Internet, it becomes possible for Disney to centralize control over access to this content. Because each use of the Internet produces a copy, use on the Internet becomes subject to the copyright owner's control. The technology expands the scope of effective control, because the technology builds a copy into every transaction.

No doubt, a potential is not yet an abuse, and so the potential for control is not yet the abuse of control. Barnes & Noble has the right to say you can't touch a book in their store; property law gives them that right. But the market effectively protects against that abuse. If Barnes & Noble banned browsing, then consumers would choose other bookstores. Competition protects against the extremes. And it may well be (my argument so far does not even question this) that competition would prevent any similar danger when it comes to copyright. Sure, publishers exercising the rights that authors have assigned to them might try to regulate how many times you read a book, or try to stop you from sharing the book with anyone. But in a competitive market such as the book market, the dangers of this happening are quite slight.

Again, my aim so far is simply to map the changes that this changed architecture enables. Enabling technology to enforce the control of copyright means that the control of copyright is no longer defined by balanced policy. The control of copyright is simply what private owners choose. In some contexts, at least, that fact is harmless. But in some contexts it is a recipe for disaster.

Architecture and Law: Force

The disappearance of unregulated uses would be change enough, but a second important change brought about by the Internet magnifies its significance. This second change does not affect the reach of copyright regulation; it affects how such regulation is enforced.

In the world before digital technology, it was generally the law that controlled whether and how someone was regulated by copyright law. The law, meaning a court, meaning a judge: In the end, it was a human, trained in the tradition of the law and cognizant of the balances that tradition embraced, who said whether and how the law would restrict your freedom.

There's a famous story about a battle between the Marx Brothers and Warner Brothers. The Marxes intended to make a parody of