Florida Law Review

Volume 55 | Issue 3 Article 1

July 2003

The Creative Commons

Lawrence Lessig

Florida Law Review
Founded 1948

Formerly
University of Florida Law Review

VOLUME 55 JULY 2003 NUMBER 3

DUNWODY DISTINGUISHED LECTURE IN LAW

THE CREATIVE COMMONS*

*Lawrence Lessig***

I start with three stories, on the way to two histories that will introduce an argument about increasing control over creativity in our country today.

This is not a happy tale. It's not happy for lawyers in particular. For the story that I want to tell is the story of law captured in a way that undermines some of its most important values and tradition: a tradition that has supported innovation and creativity, has supported the new against the old, but is now increasingly captured by the old to protect itself against the new.

I. THREE STORIES

1. Everyone has heard of the Brothers Grimm. They wrote fairy tales. If you are like I was, you probably think that they wrote wonderful and happy fairy tales—the sort of stories children ought to be raised on. That's a mistake. The Grimm fairy tales are, as the name suggests, quite grim: awful, bloody, moralistic stories that should be kept far from any healthy

* Editor's Note: This is a transcript of the Dunwody Lecture that Professor Lessig delivered at the University of Florida Fredric G. Levin College of Law, April 26, 2002.

** Professor of Law, Stanford Law School. B.A./B.S., 1983, University of Pennsylvania; M.A., 1986, Cambridge University; J.D., 1989, Yale.

childhood. Yet you are likely to believe that these stories are wonderful and happy, because they have been retold to us by an amazing creator called Disney.

Walt Disney took these stories and retold them in just the way our founders imagined that our culture would grow. He took the stories, and retold them in a way that would speak to his time. And most important for my purposes here, he could retell them because these stories lived in the public domain. Their copyright protections had lapsed. And they had lapsed because copyrights, in America at least, are for a "limited time" only. That limitation in turn builds a kind of creative commons: a resource from which anyone can draw and add and build upon because the Constitution guarantees the law's protection will end.

We can think of this "creative commons," this public domain from which others may draw, as a lawyer-free zone. No one can control what you do with material there, meaning you need never speak to a lawyer to draw material from there. The public domain is thus a resource that requires the permission of no one. And it is a resource that creators throughout history have drawn upon freely.

The significance of this resource has changed. Initially the term of copyright was just fourteen years, and if the author lived, possibly twenty-eight. In 1831, the maximum term was extended to forty-two years, and in 1909, to a maximum of fifty-six years. But then beginning in 1962, Congress got into a habit that it has yet to break. In that year, Congress extended the terms of existing copyrights, as it has done eleven times in the past forty years. At first these extensions were brief–one or two years at the most. The most recent extension—the Sonny Bono Copyright Term Extension Act—is not. The Act extended the term of existing copyrights by twenty years. Each of these extensions tolls the public domain. The most recent string of extensions means that the public domain will have been tolled for seventy percent of the past forty years.

This tolling means that material from our recent past is increasingly unavailable for others to build upon. The history of creative work passing into a public domain has effectively been repealed by this practice of tolling by Congress. Something very different will now take its place. Under the current practice, no one can do to the Disney Corporation what Disney did to the Brothers Grimm.

2. In 1936, a one-hit author, Margaret Mitchell, wrote a book about the South. This book, *Gone With the Wind,* told the story of the antebellum South from a very distinctive perspective. This story has been quite popular. Translated into over thirty languages, *Gone With the Wind* is said to have sold more copies than any other book, save the Bible. The book has earned the Mitchell estate millions of dollars, and it continues to be a symbol of the South to many who would retell it.

One woman, Alice Randall, wanted to tell that story a bit differently. She wrote a book called *The Wind Done Gone*. *The Wind Done Gone* tells the story of *Gone With the Wind* but from the perspective of the African slaves. That perspective is quite different from Margaret Mitchell's. From Randall's perspective, the story is not quite as heroic, not quite as apologetic. Indeed, Alice Randall's story is a counter-story to the story that Margaret Mitchell told.

But when Randall's publishers tried to publish this story, they received a letter from the lawyers of the Margaret Mitchell estate. That letter essentially said: This story is ours. We own the copyright. You need our permission to write a derivative. We will not give you the permission to write this derivative.

It might seem odd that the copyright of a book written in 1936 continues today. When the book was first published, the maximum term that the law offered Mitchell was fifty-six years. Under those terms, the copyright should have expired in 1992. But because of Congress's addiction to extending copyright terms, the copyright now lasts until 2031—unless of course Congress extends it again.

Because the copyright continues, the Mitchell estate believed it had the right to control any derivative work that grew from the story. It therefore turned to the law to exercise its control over Randall's content. The Mitchell estate filed a lawsuit, demanding that the publication be stopped, and just to add a little bit of dramatic flare for the copyright lawyers, that the existing published books had to be burned. A federal judge reviewed their claim. After a fifty-page opinion, the judge concluded that Randall's story had to be banned. Months later, and no doubt, thousands of dollars in legal fees later, the Court of Appeals for the Eleventh Circuit reversed, but reversed only after the full of the profit that Alice Randall ever expected to recover from the publication of her book had been expended.

Now you might think, "How is it in the United States in 2001 that we can imagine a federal court actually ordering books to be burned,?" but this is just a little flare of a tradition in copyright law that has allowed speech to be regulated through the courts. And whereas that regulation was small and incidental when the scope of copyright was narrow, now that the scope of copyright is as broad as it is, many people face the struggle that Alice Randall faced. Many people have to ask the question, "Will their publisher defend their rights to publish their book against a claim by someone else that the story is too close to a story protected by copyright law?"

3. Sony is in the pet business; it has created a robot dog that it calls AIBO. The AIBO costs something like $1300. As with any dog, ownership gives you the right to take the dog home and teach it how to behave—at least within limits.

One fan of the AIBO dog learned something about these limits. He took his Sony AIBO dog apart to understand how it worked. He tinkered with the dog. And after tinkering with the dog, he figured out how the code instructed the dog to operate, and he wanted his dog to operate in a somewhat different way. He wanted to teach his dog to dance jazz. On his website, aibopet.com, this fan of the AIBO taught others how to tinker with their pet. And one particular bit of tinkering would enable the AIBO dog to dance jazz.

It is not a crime in the United States to dance jazz. Indeed, in most jurisdictions, it is a completely permissible activity. But when the owner of aibopet.com posted this little hack on his website, he got a letter from the Sony Corporation: "Your site contains information providing the means to circumvent AIBO ware's copy protection protocol constituting a violation of the anti-circumvention provisions of a law called the Digital Millennium Copyright Act."

The Digital Millennium Copyright Act (DMCA) was Congress's effort to give copyright owners one more tool to protect copyrighted material. Copyright law is the first tool. Many copyright owners have now turned to technology as a second. This technology protects copyrighted material from unauthorized use. And this law—the DMCA—protects that technology from unauthorized circumvention. Thus the law (the DMCA) protects the code (the copyright protection technology) and the code protects the law (the copyright).

But the DMCA does not just protect code that protects copyright interests. Instead, the DMCA protects much more. It is impermissible under the DMCA to circumvent a copyright protection system, even if the circumvention itself enables a use of copyrighted material that would be completely permissible under copyright law.

For example, fair use: If a technology locks up copyrighted content such that a "fair use" is not possible, and a company produces a tool to enable the circumvention of that technology to enable that "fair use," the company has, "fair use" notwithstanding, broken the law.

And thus the trouble the AIBO fan caused: Though teaching your dog to dance jazz is certainly a fair use of your dog—even your robot dog—distributing code to enable this fair use is prohibited. Fair use remains free in law only if it remains free from technology.

II. TWO HISTORIES

There is a common phenomenon in constitutional law that we can call inversion, or more precisely, technological inversion. Technological inversion happens when a set of values originally protected by the Constitution get flipped because the technology embedding those values changes. The world becomes the opposite of what it was, not because

politicians have changed the law or the Constitution, but because technologies have changed the interpreted context.

This inversion is noted, and complained about, by both liberals and conservatives alike. Liberals typically complain in the context of the Fourth Amendment: the Constitution says that persons, houses, papers, and affects are protected against unreasonable searches and seizures. In the context in which this text was written, the assumption was that invasions on what we would call people's privacy would primarily be affected through a trespass on someone's property. Trespass, then, was a law presupposed in the background that protected people against the invasions of private and public actors. The Fourth Amendment guaranteed that, at least with respect to federal actors, that background law could not be compromised, except where there was good reason.

In the last war on drugs in the United States, prohibition, this value was challenged. It was challenged because technologies constructed a way to invade other people's privacy without violating the laws of trespass. This technology was wiretapping. Wiretapping technology made it possible for the state to listen to the private conversations of people in their homes, without actually going into their homes, and so the Supreme Court in 1928, was confronted in a case called *Olmstead* with the question, "Does this text protect people against invasions by the state through technologies such as wiretapping?" In the Supreme Court, Chief Justice Taft said, "No." The Supreme Court said the Fourth Amendment protected against trespasses; trespassing was not at stake in wiretapping; therefore, the Fourth Amendment could not protect against wiretapping.

Justice Brandeis dissented. And his dissent articulated the idea of technological inversion. According to Justice Brandeis, unrestricted wiretapping makes no sense of the values that the framers imbedded. They wrote against one technological background. That technological background has flipped. We should update their protection, Brandeis argued, to take into account the new technology. We should update it, not to change the value the Constitution protected, but instead to assure that the same value the Constitution protected is still protected. Without such a change, Brandeis said, we had this world where much was private and a little chunk was public. With this change, that world was now inverted. Most things private could now be public because of this trick of technology. The private is in turn reduced.

Conservatives have a parallel complaint about technological inversion. The Constitution says that Congress has the power to regulate commerce among the several states. When this text was written, interstate commerce was relatively thin. It thus followed that the capacity of the federal government to regulate interstate commerce was relatively thin. But as technology has changed, interstate commerce has increased. Railroads,

computers, refrigeration cars, highways—all of these technologies have radically expanded the scope of commerce properly called "interstate."

As interstate commerce increases, the plausible scope of "commerce" among the several states increases as well. And thus, while in the framing context, when most activity was state activity, untouchable by the federal government, as more commerce becomes interstate, more activity is in principle reachable by that federal commerce power. This in turn shifts the balance of power away from the states to the federal government. And it is this change in turn that troubles the conservatives.

For, as they argue, echoing Brandeis, this change in constitutional values was not ratified by any constitutional amendment. It is instead solely the product of different technology. Thus, the aim of the conservatives is to find a way to read the constitution to protect these framing values. We should not, they say, let this technological transformation undermine the original values of federalism. We should instead protect these federalist values against unintended transformations caused by technology.

In both cases, it is the same change that is remarked upon by liberals and conservatives alike. Technology changes; that change inverts framing constitutional values. In both cases, these inversions produce a common response. At first, the response is blinders. In both cases, the Court at first ignores the technological change and continues to apply the text just as it always was applied. But after a time, the Supreme Court begins to account for the effect of this technological change, by rebalancing the original practice with one that better preserves original values in a new context. In both cases, initial blinding is replaced by balancing.

III. ONE ARGUMENT

Copyright law is suffering a technological inversion. Copyright law initially imbeds a set of values. The technology within which this law lived has changed. My claim is that change in technology has now inverted those original values.

These values originally protected the public domain. They enabled a vibrant cultural commons. Yet changing technology and changing law is increasingly enclosing that commons. Tools built into the architecture of cyberspace are defeating a tradition of balanced freedom that defined our past. Yet the law has not yet recognized this inversion. We are still in the stage of blinders. Courts and legislators proceed as if everything is the same, while in fact, crucial original values are inverted.

The Framers granted authors a very limited set of rights. The first Copyright Act covered just maps, charts, and books. It gave authors an exclusive right over printing, reprinting, publishing, and vending only. Works were protected for just fourteen years, renewable once, if the author

was alive when the first term expired. And works were only protected if they were registered, if the author deposited copies with an appropriate depository, and if the author was American. Our outrage at China notwithstanding, we should not forget that until 1891, American copyright law did not protect foreign copyrights. We were born a pirate nation.

In the first ten years of this copyright regime, there were some 13,000 titles that were published. Yet there were less than 1,000 copyright registrations. The aim of the original copyright regulation was to control publishers. In 1790, there were 127 publishers. This law was a tiny regulation of a tiny part of early American culture.

Most culture thus remained free of any copyright regulation. You could take a book and write an abridgement without any regulation of copyright law. You could translate the book without any regulation of copyright law. You could take the book and turn it into a play without any regulation of copyright law. You could physically write out every word in that book and give it to your friends without any regulation of copyright law. The culture was free in a sense that is increasingly being demanded in debates about culture today: there was a freedom to Disnify culture, as Disney did to the Brothers Grimm; a freedom to tell counter-stories as Alice Randall did; and a freedom to tinker with the content that one finds without fear of committing a federal crime, as the fans of the AIBO wanted.

We could say, following a recent Apple ad campaign, that in our past, there was a freedom to "Rip, Mix, and Burn" culture. Regulation protected against unfair competition, but that regulation left people to develop their culture as they wished.

That past has now changed. It first changed because the law has changed. We've moved from the protection of maps, charts, and books to protecting essentially any creative work reduced to a tangible form. We no longer grant an exclusive right covering just printing, reprinting, publishing, or vending; because of an unfortunate transformation in the 1909 statute, the law now covers any "copy"—which means turn on your computer and you've engaged the jurisdiction of copyright. We have abandoned the requirement that a work is protected only if registered and adopted a rule that protects work whether registered or not. We have moved from a world that says only if you have deposited the work will you get any protection to a world where you get protection whether you deposit or not. Copyright law now protects automatically regardless of the will of any creator.

More important than these changes in law are the changes effected by technology. Think about the life of a book. I can take a book and I can sell it to my friend, I can give it away, I can burn it, I can take a chapter and Xerox it, I can read it aloud, I can sleep on it: I can do all of these things because the technology of a book is crude. The publisher can't control what I do with a printed book because there is no way to control pages

separated from the publisher. And not only can they not control what I do physically with the book, the law, copyright law, affirmatively limits the ability of the publisher to do anything to the book, once the book is sold.

But compare then a book in cyberspace. I have a number of books in my Adobe eBook Reader. One is *Middlemarch*—a work that is in the public domain. Even though this uncopyrighted book is in some senses free, it's not free in the Adobe eBook Reader. The publishers of this eBook have set the permissions on the reader to control what I can do with the book. Permission is granted to me to read this book aloud using a technology to read *Middlemarch* aloud. The permissions also say I may copy ten text sections into the computer's clipboard memory every ten days. They allow me to print ten pages everyday using my computer. And here is the most embarrassing example: my most recent book, *The Future of Ideas*. My publisher released it stating I'm not allowed to copy any text sections into the memory, I'm not allowed to print any pages, and don't try to use your computer to read my book aloud, it's an offense of copyright law. Freedoms I would have with a real book get erased when this book is made virtual.

Now what makes these protections possible? In part what makes it possible is just the code built into the Adobe eBook Reader. The technology gives the publisher a control over an eBook that no publisher could ever have had over a regular book. And because of this control, the use of an eBook is regulated, as opposed to the original vision of copyright where it wasn't the use that was regulated, as Ray Patterson has reminded us over and over again since his extraordinary book in 1968, but the publishing of copyrighted works by commercial entities.

Technology is thus both increasing copyright's reach, and, because of the scope of copyright regulation, its significance as well. The reach of copyright is expanded by technology, both directly and indirectly. Indirectly, since every copy of a copyrighted work is potentially within the reach of the copyright act, and every act on a digital network produces a copy. Directly, in that the technology enables a control over these copies that before would have been impossible. In real space, reading a book was not a regulated act, since reading a book did not produce a copy. But in cyberspace, reading a book both produces a copy, and can be controlled by the technology that makes that copy.

The significance of copyright's regulation is far greater than the framers of copyright imagined, but it's not just over original works that we should be concerned. Here's the second example, Microsoft's vision of movie making. The greatest change that the Internet and digital technologies would enable is the expansion of the range of creators, people who can use media to create and express their ideas. Now it turns out, not surprisingly once you think about it, that the ability to create is increasing, as the opportunity for broad-based creativity is expanded by digital

technology. To make movies is a skill, it must be taught. And in south L.A., USC has launched a program to go into schools and teach kids how to make film. They give them digital technologies, they give them a library of existing content, they give them cameras, and they force them into this process of learning how to express themselves using images. The logic of expressing yourself with images is different from words. You can't qualify everything you say with digital images; the person's either in the screen shot or not. There's a logic and power and order that becomes extraordinarily hard to manipulate, but becomes a form of expression. It turns out, those who write well don't necessarily direct well, and those who direct well turn out to have skills that can be translated into this modern economy in a way that is extraordinarily valuable to them.

In the first years of this program, the teachers were astonished at the quality of films that these children were able to produce, and they decided they wanted to make these films available to others. They had little snippets of other films in them or a little music integrated into these films. But of course, as they were quickly reminded by the university's counsel, there would be no way to make these works available to anyone else. Why? Because to make these works available requires the permission of the copyright owners of these other films or music, and these permissions could not practically be secured.

I was recently told of an example of this by a documentary filmmaker who was making a film about education. Jon Else was shooting across a classroom and he captured inadvertently the image of a television. On the screen you could barely make out an episode of the Simpsons.

Else knows Matt Groening, the creator of the Simpsons. He called Matt Groening to ask permission. Groening referred him up the permission chain, and eventually he was referred to a lawyer. To use the three seconds in the background, Else was told he would have to pay $10,000.

These controls make little sense when applied to commercial creators. They make no sense when they restrict the ability of schools to post films their students have made, or the ability of independent directors to make their films available on the Internet. The rules that govern this space were written for the large companies that control this space; they make no sense when applied to the large number of new creators this space enables.

These controls increasingly mean that the ability to take what defines our culture and include it in an expression about our culture is permitted only with a license from the content owner. Free culture is thus transformed into licensed culture. The freedom to remake and retell our culture thus increasingly depends upon the permission of someone else. The freedom to Disnify is undermined. The freedom to counter-tell stories is weakened. The freedom to tinker, especially for the technologist to tinker, is threatened.

This change in turn is the product of a change in how the law responds to changes in technology. Technology has been changing the way content is distributed since the birth of the printing press. In the United States, the law has been responding to changes in the technology of distribution since the turn of the last century. But until the Internet, the law's response to this change has been consistent and appropriately conservative.

Consider the example of "piano rolls." In the early 1870s, Henri Fourneuaux invented the player piano, which recorded music on a punch tape as a pianist played the music. The result was a high-quality copy (relative to the poor quality of phonograph recordings at the time) of music, which could then be copied and played any number of times on other machines. By 1902, there were approximately seventy-five thousand player pianos in the United States, and about one million piano rolls had been sold.

Authors of sheet music complained that their content had been "stolen"—or, we might say, "Napsterized." But the Supreme Court disagreed. Though the content the piano player played was taken from sheet music, it was not, the Court held, a "copy" of the music that it, well, copied. Piano roll manufacturers (and record companies, too) were therefore free to "steal" the content of the sheet music to make money with their new inventions.

Congress responded quickly to the Court's decision by changing the law. But the change did not give copyright holders perfect control over their copyrighted material. In granting authors a "mechanical reproduction right," Congress gave authors the exclusive right to decide whether and on what terms a recording of their music could be made. But once a recording had been made, others had the right (upon paying two cents per copy) to make subsequent recordings of the same music—whether or not the original author granted permission. The effect of this compromise, though limiting the rights of original authors, is to expand the creative opportunity of others. New performers had the right to break into the market, by taking music made famous by others and rerecording it, after the payment of a small compulsory fee.

The same story marked the birth of cable TV. Cable TV was born by stealing the content of others and reselling that content to consumers. Suppliers of cable services would set up an antenna, capture the commercial broadcasts made by television stations, and then resell those broadcasts to their customers. The copyright holders did not like this "theft." Twice they asked the Supreme Court to shut it down. Twice the Court said no. Again it fell to Congress to strike a balance between cable TV and copyright holders. And Congress again followed the model set by player pianos: cable TV had to pay for the content it broadcast, but the content holders did not have an absolute right to grant or deny the right to broadcast its content. Instead, cable TV got a compulsory licensing system

to guarantee that cable operators would be able to get permission to broadcast content at a relatively modest level. Thus content holders, or broadcasters, could not leverage their power in the television broadcasting market into power in the cable services market. Innovation in the latter field was protected from power in the former.

In the very same year that this balance was struck, 1976, Universal and Disney filed a lawsuit against yet another technology that enabled people to use content in a way the copyright owner could not control. This was the VCR—said by Jack Valenti, the head of the Motion Pictures Association of America (MPAA), to be the Boston Strangler of the American film industry. Worse, it was a *Japanese* Boston Strangler of the American film industry. This technology would Napsterize American film, these companies complained, and thus they asked the Supreme Court to stop this Napsterization. Eight years later, the Supreme Court again said no. More significantly, and for the first time, the Court articulated a fundamental "separation of powers" reason why the answer was no. As the Court explained, when major technological changes change the way in which copyrighted material gets distributed, it is not the Court's job to restrike a balance between copyright owners and the public. The only question the Court should ask is whether there is a "potential for a substantial noninfringing use" of the technology. If it can be used for good, then the Court would not even consider all the ways in which it can be used for bad. So long as it has a good use, the bad uses are for Congress to worry about.

This principle explains the Court's treatment of the VCR, cable TV, and piano rolls. The pattern says fit the law to the new technology, so that the new technology can flourish. Adjust the law to the new ways in which content gets distributed so that content gets distributed in its most efficient, productive, innovative way, and let Congress later assure that content owners get paid for their product.

That was the past. But that pattern has been changed in the last five years. Now we require, through legislative and judicial action, that technology fit itself to the last generation's law. Now we increasingly require that these new innovators fit their technology to how last century's business model worked for content.

Here are two examples. You've heard of the Napster case. It is an unfortunate context within which to consider these issues, because you are likely to think that the only issue Napster raises is whether your kids get to get Britney Spears' music for free. Were that the only issue Napster raised, then I would be on the side of the Recording Industry Association of America (RIAA). But that's not at all what was at stake in the Napster case.

The issue in the Napster case was whether the rule of the past that I just described would remain the rule that would guide innovation. Whether

technology advances and then law balances copyright, or whether the law stops the technology from advancing, in the name of current owners of copyright.

After the Ninth Circuit upheld an injunction against Napster, the case went back down to Judge Patel to determine how Napster would comply with the injunction. Napster came back to Judge Patel and said, "we have a technology to guarantee that 98% of the exchanges across our network comply with the copyright law. It's almost impossible for us to guarantee 100% because we can only track this on the basis of titles of files, and once we block a certain title, then people just rename the title. But we are willing to work to guarantee 98% compliance." Judge Patel said 98% was not good enough. Napster would only be allowed to turn their system on when they could guarantee 100% compliance with copyright laws.

What if the Xerox Corporation would have been told that they could only release the Xerox machine when they could guarantee that 100% of the copies made on their Xeroxes were compliant with copyright regulation? There would have been no Xerox. What if manufacturers of the VCR had been told that they could only release the VCR when 100% of the copies made on that device were compliant with copyright regulation? There would have been no VCR. There would have been no cable television, there would have been no piano roll technology, there would have been none of these new technologies if each new technology had to assure the law that it would fit last generation's business model perfectly.

Here's another example. One of the most extraordinary innovations that the Internet enabled was something called "net radio." With net radio, one could stream radio content across the Internet and thereby make the audience as big as the Internet. This was extremely valuable for niche radio stations—classical music stations, or alternative music stations—where the audience in any particular geographic region is relatively small. Once a station could reach the whole Internet, then the audience is large enough to support niche radio.

But radio, of course, distributes copyrighted material, and there was an inevitable concern about copyright. Congress took up this inevitable concern and established a regime to decide how much net radio would have to pay to distribute copyrighted material. This regime was an arbitration process that would set the rate for net radio.

After many months of process, the arbitration panel decided. And not surprisingly (for the pessimists at least) they decided on a regime that would effectively end net radio. The panel chose a price that made net radio too costly. And more significantly, they imposed a data collection burden on net radio that would bury any net radio provider.[1]

1. The net radio station was required to collect the following data: The name of the service;

So why did this panel impose these requirements? Well, the panel was selecting a position between the two sides. One side was the RIAA. The aim of the RIAA was clear. In testimony during the hearings, one of the economic experts hired by the RIAA confessed that their aim was to reduce the number of net radio stations to just a few. Their aim, in other words, was to recreate the concentrated market for distribution that defined the old world. But now it is not the economics of the old world pushing us to that concentrated, segmented, easily controlled market. It is instead restraints imposed by law. And these restraints were being used to protect the old against the new. The law was being used to protect the past against the future. This is dinosaurs controlling evolution.

Why is this happening? Well there is a boring story about the corruption of the political process. I don't want to talk about that story. For there is a much more invidious and important reason that explains this fundamental change. This has to do with an ambiguity around the word "property."

We are lawyers. As lawyers, we are licensed to use this word "property." After three years of law school and passing a bar exam, we get to call ourselves "lawyers." And as lawyers, we have learned certain truths about "property." We know that property is a bundle of rights; these rights are constantly balanced against public interest concerns; they are architected to assure that balance. We understand that your property right to your house is limited by easements and access requirements; we understand that your property right in a copyright is limited by fair use, and, in theory, for "limited times."

But what we lawyers forget is that ordinary people think about "property" differently. They are not inculcated in the way that we are. They have a much simpler conception of property. "Property," ordinary people think, is "absolute and mine forever." If you say to ordinary people, "What do you think of the idea of fair use of your property, or only having your property for limited times?," they are likely to think, "Well, that's weird. You don't have a fair use right to my car, nor are you able to say after a limited time the state can come in and take away my house."

---

the channel of the program (AM/FM stations use station identification); the type of program (Archived/Looped/Live); date of transmission; time of transmission; time zone of origination of Transmission; numeric designation of the place of the sound recording within the program; duration of transmission (to nearest second); sound recording title; the ISRC code of the recording; the release year of the album per copyright notice and in the case of compilation albums, the release year of the album and copyright date of the track; featured recording artist; retail album title; the recording Label; the UPC code of the retail album; the catalog number; the copyright owner information; the musical genre of the channel or program (station format); the name of the service or entity; the channel or program; the date and time that the user logged in (the user's time zone); the date and time that the user logged out (the user's time zone); the time zone where the signal was received (user); Unique User identifier; the country in which the user received the transmissions.

That's what "property" means to ordinary people. So when we lawyers speak of "intellectual property," it is extremely easy for Jack Valenti-types to get ordinary people to think that the rights one should have in "intellectual property" should be the same as one has for "ordinary property." There's no difference, Valenti argues, between the absolute, perfect, and perpetual control the law gives you over a car, and the absolute, perfect, and perpetual control that Disney deserves for Mickey Mouse. There thus emerges an equivalence in our culture between "property" and "intellectual property" because we are a property-loving nation.

But it is obvious that our tradition has always treated these two forms of "property" differently. The same Constitution that says if the state takes away your house, it must pay you compensation, also says if the federal government gives you a copyright, it must, after a "limited time," take that right away from you and give it to the public. That requirement is built into the very text of the Constitution, revealing that from the founding we have understood this kind of "property" to be very different from the way Valenti understands it.

"Property talk" confuses this debate. In the current political context, to question extremes within intellectual property is to open yourself up to the charge of being a communist. I've been so charged more times than I can count. But this simplistic binary thinking has no connection to our tradition. Our tradition has always recognized a difference, and always understood the importance of avoiding extremism in intellectual property. Yet we have forgotten this tradition today. And instead, the expansion of this property is an expansion in the power of the past to control our future.

This control is our modern structure of regulation. It affects how culture develops in a way that is inconsistent with our past. And we who believe in our tradition have an obligation to do something to recreate this sense of balance. This is our job. We have an obligation to teach the world something that the modern rhetoric has confused: that innovation and creativity always exist in a context of balance. That there are private homes and public roads. Private yards as well as city parks. We have controlled spaces and a common space. These resources coexist; and it's that mixture that is the surprising inspiration for innovation and creativity. Much more than the extremism of total state control and extremism of total propriety control, our tradition protects both together: the freedom to code, to tinker with this reality, the freedom to speak in a way that is consistent with the ideals of the past, the freedom to build culture without the permission of the culture owners.

We lawyers are in part responsible for this change in understanding. We are the agents of those who work to effect change in the legal system. And we do it unapologetically because we work for our clients.

But we are also a profession. We don't just work for clients. We speak for a tradition that's richer than our clients: not richer in money, but richer in values. When our profession becomes tied to a single perspective, however legitimate, we lose the credibility to carry on the tradition that, in my view, is as important as any tradition of freedom in our history. We lawyers speak for a past that knew what free culture was. Not the tradition that celebrated the power to steal Britney Spears' music, but the ability of people to build on the past without apology. This is who we are. And to the extent that we allow the world to believe that we are bought, as many believe that Congress is bought, our authority as articulators of this most important principle of freedom will be corrupted.