Between Pragmatism and Anarchism:

The American Copyright Revolt since 1998

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[DRAFT: PLEASE DO NOT CITE]

Abstract

Since 1998 questions about whether the United States has constructed an equitable or effective copyright system frequently appear on the pages of daily newspapers. Calls both for stronger and looser copyright systems have grown in volume and furor. Such debate echoes around several important court cases. For example, the U.S. Supreme Court ruled in early 2003 that the foundations of American copyright, as expressed in the Constitution, are barely relevant in an age in which both media companies and clever consumers enjoy unprecedented power over the use of works. Such tensions and conflicts have been narrated through the frameworks of binaries such as "protection vs. piracy" and "property vs. commons." Some accounts of recent copyright battles have emphasized the excessive, often absurd, level of protection and vigilance by copyright holders. Others have explored the influence of scholar-activists in the rise of a reform movement. In contrast, this paper argues that the best way to explain copyright trends and battles in recent years is to examine the struggles that individuals and groups have mounted on behalf of their rights and abilities to control their cultural and information ecosystems. This is a pragmatic analysis – focused on what people can and may do with their culture and the information available to them. The struggle has been about local and private autonomy over what gets sung, played, and made – about who gets to generate the soundtracks of American life in the 21st century.

First Principles

About a year before the U.S. presidential election of 2004 a group of students at Swarthmore College in Pennsylvania posted on a university-provided Web site some information that they considered essential to public debate in a democratic republic. They offered a collection of 15,000 e-mail messages and memos generated by Diebold Election Systems, one of the leading manufacturers of controversial electronic voting machines. The collection of documents from Diebold revealed that in 2002 elections the company's proprietary software had suffered from many alarming problems, ranging from security weaknesses to miscounting to plain failure. Upon learning that Swarthmore students had posted these internal documents on college servers, Diebold sent a "cease-and-desist" letter to Swarthmore, demanding that the college immediately remove the copyrighted material under the "notice and takedown" provisions of the 1998 Digital Millennial Copyright Act (DMCA).[1]

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[1] 17 U.S.C. Section 512(c)(3) and 512(d)(3). Section 512(c)(3) sets out the elements for notification under the DMCA. Subsection A (17 U.S.C. 512(c)(3)(A)) states that to be effective a notification must include: 1) a physical/electronic signature of a person authorized to act on behalf of the owner of the infringed right; 2) identification of the copyrighted works claimed to have been infringed; 3) identification of the material that is

Swarthmore officials complied with Diebold's requests, thus protecting the college from the potential civil judgment that its students would face instead. Diebold underestimated the will and means of this group of students, however. The student group, then called Swarthmore Coalition for the Digital Commons, was well acquainted with the DMCA and copyright law in general. The students were aware of many other stories of corporate copyright intimidation intended to limit criticism. They later changed their group's name by adopting the title of Lawrence Lessig's influential book of 2004, *Free Culture*. The book has since lent its title to

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claimed to be infringing or to be the subject of infringing activity and that is to be removed; 4) information reasonably sufficient to permit the service provider to contact the complaining party (e.g., the address, telephone number, or email address); 5) a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner; and 6) a statement that information in the complaint is accurate and that the complaining party is authorized to act on behalf of the copyright owner. Subsection B (17 U.S.C. 512(c)(3)(B)) states that if the complaining party does not substantially comply with these requirements the notice will not serve as actual notice for the purpose of Section 512.

the entire global movement of copyright critics.[2] So, under the direction of their leader Nelson Pavlovsky, the students sought the aid of the Electronic Frontier Foundation (EFF), which agreed to represent the students in their effort to defend themselves against Diebold. Meanwhile, word quickly spread around Internet sites and communities devoted to fighting copyright expansion – and the collection of memos did, too. Within days one could acquire copies of the memos from peer-to-peer interfaces such as Kazaa, Gnutella, and Freenet. Many other Web sites openly posted the memos and challenged Diebold to try to stamp out every source.[3]

After much adverse publicity, Diebold backed down on its threats to the Swarthmore students. But the students were not done with Diebold. With the help of the EFF, they sued Diebold in federal court, issuing a rather untested claim, "copyright misuse." Less than a year after Diebold shut down the site, Judge Jeremy Fogel wrote in his decision in favor of the Swarthmore students, "no reasonable copyright holder could have believed

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[2] Lawrence Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).

[3] John Schwartz, "File Sharing Pits Copyright against Free Speech," *The New York Times*, November 3 2003.

that portions of the e-mail archive discussing possible technical problems with Diebold's voting machines were protected by copyright." In addition, Fogel ruled that Diebold had "knowingly materially misrepresented" its copyright claims and had misused the DMCA "as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."[4]

By fighting back rather than backing down, the students at Swarthmore did more than foster a better climate for debate and criticism of voting methods in the United States. The very distribution of the Diebold memos accomplished that. By using methods both within the law (via the federal courts) and beyond the law (by facilitating anarchistic distribution of the memos regardless of threats from Diebold and cowardice by the Swarthmore administration), they set an example for activists and citizens' groups in many areas of life to follow. After decades of being shut out of information policy decisions in Washington, D.C., many Americans have banded together as both formal organizations and informal information

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[4] *Online Policy Group, Et Al. V. Diebold Incorporated, Et Al.*, 337 F. Supp. 2d 1195 (2004). Also see Kim Zetter, *Diebold Loses Key Copyright Case* (Wired News, 2004 [cited May 1 2005]); available from http://www.wired.com/news/evote/0,2645,65173,00.html?tw=wn_tophead_2.

networks to push back for greater democratic control of culture and information.

The Diebold case exemplifies what is at stake. Will only powerful institutions, those with adequate legal representation and capital at their disposal, be able to enter debates about important public issues? Or will legal belligerence chill critics who lack resources to defend themselves? Will copyright law act as it was intended – to foster a richer public sphere – or will it work against its expressed aims by retarding speech and criticism? What may citizens do with these powerful new media systems at their disposal? Must citizens be receptors of content or may they speak back in texts rich with reference yet devoid of reverence?

At the very moment when inexpensive communicative technologies, widespread literacy, universal public education, and civil rights allow us to live in the sort of democratic culture that John Dewey could only dream of, expansive copyright laws and an ideology of vigilance and surveillance undermine efforts to foster the richest possible environment for democracy to flourish in America.[5] In his seminal debate with Walter Lippmann concerning the potential for democratic governance in a

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[5] Sonia K. Katyal, "Privacy Vs. Piracy," *International Journal of Communication Law and Policy* 9 (2005).

modern, technocratic nation, Dewey focused on capabilities – on what was possible or reasonable to expect from citizens. In the 1920s, it was hard to imagine that the United States might some day develop its information infrastructure and cultural habits in such a way as to foster real democracy. Dewey had faith and hope. If he had had e-mail, he might have seen the route to that realization.[6]

Copyright is supposed to perform a pragmatic role in the cultural economy of the United States. It was designed to generate confidence among creators, distributors, and investors so that they believe they might reap returns on certain cultural and intellectual endeavors.[7] To foster such confidence, the United States Constitute instructs Congress to create a system of laws that would create limited monopolies. Wary of the censorious and corrupting potential of monopolies (especially state-granted monopolies), the founders explicitly limited the scope and

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[6] John Dewey, *The Public and Its Problems* (New York,: H. Holt and Company, 1927). Also see Walter Lippmann, *The Phantom Public* (New York,: Harcourt, 1925), Walter Lippmann, *Public Opinion* (New York,: Harcourt, 1922).

[7] Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot ; Brookfield, USA: Dartmouth, 1996).

duration of copyright.[8] For most of the ensuing 200 years American courts and Congress maintained that healthy respect for the negative externalities of powerful copyright protection, and thus designed and redesigned the system to work while respecting the rights of citizens to use and build upon works already in circulation.[9]

The system maintained a healthy equilibrium until the mid-1970s, when two disruptive technologies – the photocopier and magnetic audio tape – threatened to lower the cost of copying and distribution to such a level as to allow real democratization of communication. In subsequent years the availability of inexpensive high-quality cassette audio tape, personal tape players such as the Sony Walkman, and home video cassette recorders (VCRs) amplified commercial anxieties and consumer opportunities. From about 1975 through 2005 copyright battles took on a new dimension. For the first time, citizens could control their personal media spaces. They could create and distribute their own or others' work over long distances to many people at low marginal cost. New consumer markets developed. But

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[8] Neil Weinstock Netanel, "Copyright and Democratic Civil Society," *Yale Law Journal* 106, no. 2 (1996).

[9] Siva Vaidhyanathan, *Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

so did extra-market or non-market global discursive and creative communities such as punk rock, hip hop, ska, militant Islam, and computer hacking. While much recent commentary on the relationship among copyright, culture, and technology has focused on the Internet and such formats as MP3, the real global democratic technology involved the nexus of the cassette tape and the battery-powered tape recorder.[10]

In 1998 the U.S. Congress radically revised American copyright laws without much public scrutiny or protest. Copyright was too arcane, too technical, too boring, to break through the headlines about political sex scandals and celebrity murder trials. With the Sonny Bono Copyright Term Extension Act (SBCTEA) and the Digital Millennium Copyright Act (DMCA) the United States abandoned 200 years of moderate, successful copyright traditions. Copyright used to balance the public's interests and

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[10] Peter Lamarche Manuel, *Cassette Culture : Popular Music and Technology in North India*, *Chicago Studies in Ethnomusicology* (Chicago: University of Chicago Press, 1993). Also see Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System* (New York: Basic Books, 2004), Siva Vaidhyanathan, "Remote Control: The Rise of Electronic Cultural Policy," *The Annals of the American Academy of Political and Social Science* 597 (2005).

private needs. Now it only serves large, established copyright holders. Yet while Congress was considering these radical changes, newspapers and thus the public scarcely paid attention to the changes.[11] Only in recent years, with the accumulation of horror stories about copyright abuses and bullying, have we seen sufficient attention paid. As a result, we are finally seeing critical mass of public interest activism. Between the spring of 2001 and the winter of 2003 the following events kept copyright in the news:

• Eric Eldred, a World Wide Web publisher, found that his practice of publishing public domain works on the Internet is thwarted by Congress' radical extension of the duration of protection for works created in the 1930s and after. After both a district court and an appeals court ruled that Eldred's claim that the extension was unconstitutional (in violation of the requirement that copyright last "for limited times"), the Supreme Court considered the merits of his case in October 2002. Then, in January 2003, the Supreme Court ruled 7-2 to uphold the lower court ruling allowing the copyright term extension.[12]

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[11] Jessica Litman, *Digital Copyright : Protecting Intellectual Property on the Internet* (Amherst, N.Y.: Prometheus Books, 2001).

[12] *Eldred V. Ashcroft*, 239 F.3d 372 (2003). Also see Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*.

• The National Writers' Union, led by their president Jonathan Tasini, won a landmark case before the U.S. Supreme Court in 2001. The court ruled that freelance writers who had not explicitly assigned their rights to electronic versions of their work were due compensation from major newspapers and magazines that had sold these rights to electronic databases such as Lexis/Nexis and ProQuest. This case somewhat redressed the balance between creator and publisher in the copyright system, although in most media and in most fields the creator still operates from a very weak bargaining position.[13]

• In the summer of 2001, a federal court issued an injunction against the publication of a novel by Alice Randall called *The Wind Done Gone*. This new novel was a revision and retelling of Margaret Mitchell's *Gone With the Wind*, published originally in 1935. Despite the fact that the original novel should have entered the public domain some time in the 1980s, Congress kept its copyright alive though retroactive copyright extension—the very issue the Supreme Court considered in the Eldred case. Appealing the injunction against the publication of *The Wind Done Gone,* lawyers for the publisher, Houghton Mifflin, argued that the new novel was a parody of the original, and thus the use of similar characters

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[13] *New York Times Co. V. Tasini*, 206 F.3d 161 (2001).

and events constituted “fair use.” The appeals court agreed with the parody argument and allowed the novel to be published.[14]

• Also in the summer of 2001, a federal court freed Martha Graham’s legacy from the hands of her friend a pretend executor, Ronald Protas. The court ruled that Protas only controlled the rights to a single dance, "Seraphic Dialogue," after he claimed to control most of her oeuvre, and had exercised exclusive rights over many of her dances, thus preventing many companies from performing the works. In addition, a court ruled that Protas could not prevent the Martha Graham Dance Company from using its founder’s name.[15]

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[14] *Suntrust V. Houghton Mifflin*, 136 F. Supp. 2d 1357 (2001). Also see Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity,* Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.

[15] *The Martha Graham School and Dance Foundation, Inc. And Ronald Protas V. Martha Graham Center of Contemporary Dance, Inc. And Martha Graham School of Contemporary Dance*, (2001). Also see Anthony Lin, "Dances by Graham Held 'Work for Hire' in Ownership Case," *New York Law Journal*, August 23 2004, Vaidhyanathan,

• The Federal Bureau of Investigation handcuffed Russian computer programmer Dmitry Sklyarov in the Las Vegas airport after he had given a presentation on the security vulnerabilities in Adobe Corporation's E-book Reader software. The company Sklyarov worked for in Moscow, Elcomsoft, soon faced federal criminal charges in the United States (even though the DMCA is only a United States law) after Sklyarov agreed to testify in exchange for immunity. First Sklyarov, and then Elcomsoft, were accused of violating the Digital Millennium Copyright Act by distributing a program that willfully violated the act by allowing readers to make private copies of e-books. In December 2002, a San Francisco jury found the company not guilty.[16]

Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity.

[16] Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System.*

• The recording industry moved its attention from the distributors of peer-to-peer software to those actually offering copyrighted music files on those networks, filing civil suits against hundreds of individuals.[17]

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[17] William W. Fisher, *Promises to Keep : Technology, Law, and the Future of Entertainment* (Stanford, Calif.: Stanford Law and Politics, 2004), J. D. Lasica, *Darknet : Hollywood's War against the Digital Generation* (Hoboken, NJ: J. Wiley & Sons, 2005), Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity,* Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*, 1st ed. (New York: Doubleday, 2005), Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.

Such tensions and conflicts have been narrated through the frameworks of binaries such as “protection vs. piracy” and “property vs. commons.” Some accounts of recent copyright battles have emphasized the excessive, often absurd, level of protection and vigilance by copyright holders.[18] Others have explored the influence of scholar-activists in the rise of a reform movement.[19] In contrast, this paper argues that the best way to explain copyright trends and battles in recent years is to examine the struggles that individuals and groups have mounted on behalf of their rights and abilities to control their cultural and information ecosystems. This is a pragmatic analysis – focused on what people can and may do with their culture and the information available to them. The struggle has been about local and private autonomy over what gets sung, played, and made – about who gets to generate the soundtracks of American life in the 21st century.

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[18] David Bollier, *Brand-Name Bullies : And Their Quest to Own and Control Culture* (Hoboken, N.J.: J. Wiley, 2005), McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*.

[19] Robert S. Boynton, "The Tyranny of Copyright?," *The New York Times Magazine*, January 25 2004, Dan Hunter, "Culture War," *Texas Law Review* 83 (2005).

Irrational Exuberance

The copyright system used to be brilliant and effective. It attracted massive investment. It generated the rise of the motion picture, recording, and software industries during the 20th century. It filled libraries with books. But these metrics are not as revealing as the fact that until 1998 there did not exist in U.S. history a copyright rebellion – a widespread and somewhat organized set of practices aimed at resisting the power of copyright holders. There was always infringement. But the cost of infringement was built into the price of goods and it was considered either an acceptable leak or a positive social good (when employed for the purpose of education or criticism).[20]

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[20] L. Ray Patterson, *Copyright in Historical Perspective* (Nashville,: Vanderbilt University Press, 1968), L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright : A Law of Users' Rights* (Athens: University of Georgia Press, 1991). Also see Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994), Benjamin Kaplan, *An Unhurried View of Copyright*, *James S. Carpentier Lectures, 1966* (New York,: Columbia University Press, 1967), Vaidhyanathan, *Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity*.

Something changed fundamentally in the 1990s. Policy makers saw copyright as something very much beyond and unlike its traditional role and scope. They saw copyright and the industries that depend on copyright as the source of much future wealth for the United States. And they considered the democratic safeguards that had kept copyright users and future creators satisfied (or, at least unconcerned) with the system. So they advocated policy changes that were meant to maximize the potential revenue from copyrighted goods by minimizing the leaks in the copyright system – even if those very leaks were what made copyright work so well so quietly.[21]

The radical changes of the late 1990s attracted the core of copyright activists who now make so much noise. Generally, these activists lament the erosion of the democratic safeguards that made American copyright

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[21] Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox,* Bruce Lehman, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights," (Washington, D.C.: U.S. Patent and Trademark Office, 1995), Litman, *Digital Copyright : Protecting Intellectual Property on the Internet,* Vaidhyanathan, *Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity*.

such a brilliant and effective system and filled our libraries with books. Copyright can censor. It is a prohibition on what we may reproduce, quote, perform, and distribute. Through both statutes and the common law over the past 200 years, the copyright system developed four democratic safeguards that mitigated the potentially censorious power of its prohibitions:

• The principle of fair use—at its base a legal defense against an accusation of copyright infringement. If you are accused of infringing, you can make an argument that your use of the protected works is “fair” because of some combination of the following four factors: the nature of the original work is important to public discussions or concerns; the nature of your use of it is important because of teaching, research, or commentary; you did not use very much of the original work; your use did not significantly affect the market for the original work. In the public discourse about fair use, it has served as a term representing a collection of uses that consumers could consider "fair," such as recording television shows for later viewing, making cassette tape or MP3 mixes from compact discs, and limited copying for private, noncommercial sharing.

• The principle that after the "first sale" of a copyrighted item, the buyer could do whatever she wants with the item -- including lending, reselling, or burning -- save publicly performing the work or distributing

unauthorized copies of it for sale. The first sale doctrine is what makes the lending library possible.

• The concept that copyright protected specific expression of ideas, but not the ideas themselves. This is the least understood but perhaps most important tenet of copyright. You can't copyright a fact or an idea. Because you can't, anyone may repeat your idea to criticize it or build on it. Journalism, along with many other forms of common expression, depends on this principle.

• The promise that copyright would only last—as the Constitution demands—"for limited times," thus constantly replenishing the public domain. The public domain allows for low-cost scholarship, research, and revision of formerly copyrighted works. The reason that bookstores are filled with high-quality yet affordable scholarly editions of Mark Twain's Adventures of Huckleberry Finn and John Stuart Mill's On Liberty is that they are in the public domain. The reason there is no annotated scholarly edition of Ralph Ellison's Invisible Man is that it is not.

Copyright, when well balanced, encourages the production and distribution of the raw material of democracy. It is supposed to be an economic incentive for the next producer, not a guarantee for the established. But the new rhetoric of copyright, in the wake of the infamous

Department of Commerce “White Paper” of 1995 no longer reflects that subtle dynamic. The general message delivered by copyright maximalists is something close to “if some copyright is good, more is better.”[22]

So in general critics of the corrupted copyright system share an agenda that would restore those democratic safeguards. They have been fighting for a hacker magazine’s (and thus everyone’s) First Amendment right to describe certain illegal algorithms and create hyperlinks to other pages that describe of offer these algorithms. And they have been playing defense in the halls of the Capitol against legislation that would create a new and dangerous property rights in facts and data and other, more odious legislation that would require all producers of electronic hardware and software to include anti-copying devices in their products. In addition, they have engaged in disobedience, both civil and uncivil. Pranks, hacktivism, satire, and unmasked outrage have all played a part in the copyright rebellion.

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[22] Lehman, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights." Also see Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox,* Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

Paracopyright

Inspired by the vision outlined in the “White Paper” and influenced by the motion picture and recording industries, Congress in 1998 added a power to copyright holders that went far beyond the general right to exclude others from making copies of works without payment and authorization. Over and above real copyright, these new rights restrict a variety of uses and regulate access to the work itself. This new mode of regulation, what Peter Jaszi has called “paracopyright,” has been the source of much anger and consternation, and has served as the locus for much of the copyright rebellion.

Consider the action that the Church of Scientology took in the summer of 2002 against the search engine Google.com. The Church of Scientology used a "notice and takedown" letter (authorized under the DMCA) to persuade Google.com to block links to a Norwegian site that includes some criticism of the wealthy cult. Back in the 20th century, if someone accused you of copyright infringement, you enjoyed that quaint and seemingly archaic notion of due process. You would be warned and perhaps sued. And if you wanted to defend yourself in court, you could appear at a hearing, present evidence and arguments, and have a judge render a ruling based on statute and precedent. We no longer have those rights in the digital world. The DMCA puts the burden of proof against an accusation of copyright infringement on the accused. And it makes the owner of every

Internet service provider, search engine, and content host an untrained copyright cop. The default action is censorship.[23]

The conflict between Scientology and Google is just one in a string of DMCA-supported copyright abuse. The collection of evidence of the "chilling effect" on Web site authors has grown into a major concern among activists for Free Culture.[24] Besides limiting due process and empowering private parties to enforce censorship through the "notice and takedown" provision, the Digital Millennium Copyright Act has another major provision that upends more than 200 years of democratic copyright law. It forbids the circumvention of electronic access controls that protect works—even those portions of works that might be in the public domain or subject to fair use. It puts the absolute power to regulate access to information in the hands of the companies that distribute the material.

More to the point of intellectual freedom, in the spring of 2001 the music industry prevented a computer scientist from presenting a scholarly paper

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[23] Matt Loney, *Google Pulls Anti-Scientology Links* (C-Net News, 2002 [cited May 1 2005]); available from http://news.com.com/2100-1023-865936.html?tag=cd_mh.

[24] *Chilling Effects Clearinghouse* [Web page] (2005 [cited May 1 2005]); available from http://www.chillingeffects.org/.

at a conference because the paper dealt with encryption algorithms that the recording industry hoped to use to protect its digital content. The Recording Industry Association of America sent a "cease and desist" letter to Princeton professor Edward Felten, accusing him of violating the provision of the DMCA that makes it illegal to "make available" any technology that might be used to circumvent access controls to digital material. The Felten case is merely the best known of several efforts the content industries have made to prevent researchers from discussing certain technologies and algorithms.[25]

The Digital Millennium Copyright Act is the legal backbone behind the move to install "digital rights management" (DRM) technologies to digital content. As a result of putting the power of the United States government behind encryption and other similar technologies that govern users' ability to use the work, the DMCA grants an alarming amount of power to allow or deny access to a work with the producer or publisher of that work. The producer may prohibit access for those users who might have hostile intentions toward the work. This power could exclude critics and scholars. Most likely it could exclude parodists and satirists as well. The anti-

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[25] Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.

circumvention provision shifts the site of setting terms of use from the user (and the courts in the case of likely infringement) to the producer. The producer has no incentive to grant access to any user who might exploit the work for fair use—including scholarship, teaching, commentary, or parody. Under this regime, a user must agree to terms of a contract with a monopolistic provider before gaining access. One must apply to read, listen, or watch.

The absurdity of digital rights management, and thus the DMCA, has never been clearer.[26] As technology advocate and novelist Cory Doctorow has argued that DRM does not work, it bad for society, bad for business, and bad for individual artists. Rights management systems involve futile commitments of resources to the installation and re-installation of DRM systems, largely because they break so easily. As Doctorow writes, "DRM systems are usually broken in minutes, sometimes days. Rarely, months. It's not because the people who think them up are stupid. It's not because the people who break them are smart. It's not because there's a flaw in the algorithms. At the end of the day, all DRM systems share a common

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[26] *Unintended Consequences: Five Years under the Dmca* [Web page] (Electronic Frontier Foundation, September 24, 2003 2003 [cited May 1 2005]); available from http://www.eff.org/IP/DMCA/?f=unintended_consequences.html.

vulnerability: they provide their attackers with ciphertext, the cipher and the key. At this point, the secret isn't a secret anymore."[27]

Doctorow's assessment matches the record. Every effective digital rights management scheme released commercially to the public since 1998 has been cracked or easily evaded. So they have had no positive effects, in the sense that they have spectacularly failed to limit the unauthorized distribution of digital materials, what the copyright industries call "piracy." But the very presence of such "electronic fences" in the digital environment has had two negative effects.[28]

First, and perhaps most significantly for the long-term prospects of the copyright system, DRM schemes have frustrated consumers and put them in an oppositional and rebellious position in relation to the firms that distribute protected products such as copy-protected compact discs and electronic books. Copyright users have few qualms about cracking and evading limits on products that they have purchased or materials that they

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[27] Cory Doctorow, *Microsoft Research Drm Talk* [Web page] (2004 [cited May 1 2005]); available from http://www.craphound.com/msftdrm.txt.

[28] Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.

consider to be parts of their culture. Digital rights management and the frustration it has generated have undermined the social norms that a healthy copyright system needs to function. As a result, the copyright industries that fought for the DMCA in 1998 have done more harm to the principles of copyright than their opponents have. In fact, critics of excessive copyright such as Lawrence Lessig have been clear about their belief in real copyright as an engine of free expression. Alas, the motion picture industry, the recording industry, and Congress gave up on real copyright in favor of paracopyright in 1998.[29]

The second effect has been censorious and monopolistic. The DMCA has prevented non-infringing, socially beneficial uses of copyright material. It has restricted researchers like Ed Felten from doing their jobs without fear and mobilized many academics to join the "Free Culture Movement" and engage with its intellectual branch, Critical Information Studies.[30] It has driven librarians to call for exceptions and exemptions from its restrictions

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[29] Christopher May, "Digital Rights Management and the Breakdown of Social Norms," *First Monday* 8, no. 11 (2003). Also see Hunter, "Culture War."

[30] Siva Vaidhyanathan, "Critical Information Studies: A Manifesto," (New York: 2005).

so they could deal with technological failure that might prevent access to their collections.[31]

In the private sector, the DMCA has enabled the rise of "technology cartels" among firms that sign on to licensing terms that tether digital files to particular digital rights management schemes – thus cutting competing technology firms (and non-firms, such as Open Source software projects) out of certain markets. At it prevents people who use Open Source software from legally using digital content they have lawfully acquired.[32] The DMCA even encouraged (ultimately futile) attempts to limit

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[31] *Dmca: The Digital Millennium Copyright Act* [Web page] (American Library Association, 2005 [cited May 1 2005]); available from http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/dmcadigitalmillenium.htm. Also see Nancy C. Kranich, *Libraries & Democracy : The Cornerstones of Liberty* (Chicago: American Library Association, 2001).

[32] *Universal City V Reimerdes*, 111 F. Supp. 325 (2001). Also see Dan L. Burk, "Anticircumvention Misuse," *UCLA Law Review* 50 (2003), Vaidhyanathan, "Remote Control: The Rise of Electronic Cultural Policy."

competition in after-market goods such as printer cartridges and garage door openers.[33]

The DMCA is the fulfillment of a Robber-Baron-era (or, at least pre-New Deal) proprietarian ideology, one that fundamentally relies on private ownership and strict privacy rights in spite of the negative public externalities they create. In a political and legal environment in which the DMCA represents the clearest statement of such values, it has been difficult to assert a different vision of a good information ecosystem, of information justice.[34]

The Public's Domain

The case of Eldred v. Ashcroft, inspired by the efforts of independent publisher Eric Eldred, who wanted to use the powerful distribution technology of the World Wide Web to offer public domain works in usable form, ended in disappointment for the Free Culture movement. Even

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[33] *Chamberlain Group, Inc. V. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1040 (2003), *Lexmark International Inc. V. Static Control Components Inc.*, 387 F.3d 522 (2004). Also see Burk, "Anticircumvention Misuse."

[34] Julie E. Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"," *University of Michigan Law Review* 97, no. 2 (1998).

though the ruling in Eldred v. Ashcroft was a blow to efforts to immediately open up more democratic breathing space in copyright, the decision itself offers seeds that might grow into something good. Justice Stephen Breyer wrote in his dissent: “It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who won existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.” This is the key to any public interest movement: show that narrow special interests are getting away with everything and the public interest is suffering. In her majority opinion, Justice Ruth Bader Ginsburg herself aided the public’s rhetorical cause even while ruling against its interests. While dismissing the notion that excessive copyright expansion has severe First Amendment implications, she invoked two of the classic democratic safeguards of American copyright: the idea/expression dichotomy and fair use. Because of these two concepts, Ginsburg concluded, the court need not take the censorious power of copyright seriously. Ginsburg’s expression of faith in the power of the idea/expression dichotomy and fair use does not recognize that both these rights are under attack in Congress and lower courts. The motion picture, music, publishing, and software industries are trying to expand their control over the machines in your home to limit the uses you might make of material you have lawfully purchased. Ginsburg made one more statement that public interest advocates can take to heart and use for their purposes. While dismissing

the petitioners' First Amendment concerns, she wrote, "But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[35]

As a matter of fact, the 1998 Digital Millennial Copyright Act did just that. By outlawing technologies that could break through access controls around digital materials, Congress created a whole new technological regime and a new set of powers for copyright holders to use against scholars, librarians, students, and artists. This shift in the locus of enforcement from human relations to hard technology has certainly "altered the traditional contours of copyright protection." As Yale Law professor Jack Balkin has argued, these words could be used to render the most pernicious parts of the Digital Millennium Copyright Act unconstitutional. In the wake of this decision, if Congress and later courts are going to take Ginsburg's words seriously, they must take fair use and the idea/expression dichotomy seriously. They cannot take them for granted, as so many have in recent years.

The Eldred decision, in the words of University of Buffalo law professor Shubha Gosh, "deconstitutionalizes" copyright, pushing it father into the realm of policy and power battles and away from the principles that have

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[35] *Eldred V. Ashcroft*.

anchored the system for two centuries. That means public interest advocates and activists must take their battles to the public sphere and the halls of Congress. They can't appeal to the founders' wishes or republican ideals. They will have to make pragmatic arguments in clear language about the effects of excessive copyright on research, teaching, art, and journalism. Because of both the publicity and the result of Eldred v. Ashcroft, the Free Culture movement grew in volume and determination.

The Parody Parasol

The one users' right that has grown stronger in recent years involves the use of copyrighted material for parody. Building on the 1994 Supreme Court case of Campbell v. Acuff Rose, in which the court ruled in favor of hip hop group 2 Live Crew after it issued a parody of Roy Orbison's classic "Oh, Pretty Woman," and the 2002 case involving *The Wind Done Gone*, a revision of the *Gone with the Wind* story, many copyright rebels have sought refuge under the parody parasol. Simply stated, parody is fair use.[36]

Yet when two Web cartoonists calling themselves Jib Jab released a satirical version of Woody Guthrie's song "This Land is Your Land," Guthrie's musical executors considered the work to be beyond the rather

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[36] *Campbell V. Acuff-Rose Music*, 510 U.S. 569 (1994), *Suntrust V. Houghton Mifflin*.

narrow legal definition of parody. Parody is supposed to target the original work, not some third party or society in general. This is the legal definition between parody and satire. In this case, Jib Jab had used the song to make fun of the two men running for president in 2004. They had rewritten the words to the song and placed alternating stanzas in the mouths of caricatures of George W. Bush and John Kerry. Emboldened by their misunderstanding of parody, yet willing to fight instead of relent to the pressure of a cease-and-desist letter, Jib Jab asked the EFF to take its case. After some quick exploration about whether this case could serve to expand the definition of legally protected parody, EFF lawyers instead pursued the idea that "This Land is Your Land" is in the public domain. Research on both its origin (based on an older Carter Family song in the public domain) and the fact that Guthrie never renewed his copyright on the song proved that this song is our song.[37]

The Peer-to-peer Paradox

No copyright phenomenon has generated as much attention, anxiety, and excitement as "peer-to-peer." The nature of peer-to-peer technology is widely misunderstood and the rhetoric surrounding it has been inflated and heated. Since the rise of Napster, a relatively centralized method of

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[37] McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*.

resolving information inquiries, popular accounts of the workings of peer-to-peer functions have described them as being substantially new and profound. Yet at their most basic level, most common procedures on the Internet are already peer-to-peer. Every Web page search involves a resolution of an inquiry through an index, and then a link to a server on which the desired file sits. Searches through commercial services such as Google.com work in ways very much like the original Napster: a centralized index that links seekers to files held on third-party servers. The services we commonly call "peer-to-peer networks" (Napster, Kazaa, Gnutella, Grokster, etc.) are merely methods of resolving information queries laid over the network of networks we already use: the Internet. The rise of such resolution interfaces represents a return to the early state of the Internet, when individuals generated and distributed content as well as consuming it.[38]

However, recent moral panics about peer-to-peer distribution of copyrighted files have reached into the educational realm and disrupted

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[38] Andrew Oram and Safari Books Online., *Peer-to-Peer : Harnessing the Power of Disruptive Technologies*, 1st ed. (Beijing ; Cambridge [Mass.]: O'Reilly, 2001). Also see Siva Vaidhyanathan, *The Anarchist in the Library : How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System* (New York: Basic Books, 2004).

reputable software engineering experiments that might yield better tools if allowed to flourish or fail outside the threat of civil judgments or state-imposed restrictions. Jesse Jordan, a student at Rensselaer Polytechnic Institute (RPI) in Troy, New York, settled a lawsuit in 2003 for $12,000 after the Recording Industry Association of America filed suit against him for creating an indexed search engine for public folders on computers hooked up to the RPI computer network. Such a system would have been very helpful to those using the powerful university computer network. Often members of university communities host many volumes of reports, data sets, commentaries, reviews, teaching materials, and other libraries of data in remote corners of the network. Standard search engines only scan the indexed portions of the official sites and servers operated by university offices. But sometimes the best information sits on a connected computer on the edge of the network, virtually invisible to most researchers. Jordan's system might have opened up many more interesting files to the RPI community. Jordan himself copied no files. He issued no encouragements to students or faculty to post copyrighted materials. Yet the very act of experimenting with creative media technologies resulted in a lawsuit and forced a settlement.[39] Educators and students have learned

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[39] Tim Goral, "Recording Industry Goes after Campus P-2-P Networks: Suit Alleges $97.8 Billion in Damages," *Professional Media Group LCC*

much from anecdotes such as Jordan's. As a result, scholars hesitate to invent or deploy innovative peer-to-peer indexes and resolution processes that might spread data and processing power among a series of underused computers rather than centralizing such functions on one expensive computer.

As I write this, the U.S. Supreme Court is considering its ruling in a major case concerning peer-to-peer interfaces and the liability that companies that distribute such software might face. Media companies have asked the Court to reconsider and revise its decision in Sony and to create a notion of "inducement" as a cause for contributory infringement. In other words, if the court revises its standard from Sony, courts may hold software designers liable for the infringement that their work allows once it leaves their firms. Holding engineers responsible for the infringement others commit is a frightening prospect for many – not only technologists but artists and educators as well.[40]

2003. Also see Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*.

[40] *Metro-Goldwyn-Mayer Studios Inc. V. Grokster Ltd.*, 380 F3d 1154 (2004). Also see *In Re Aimster Copyright Litigation*, 334 F. 3d 643 (2003), *A&M Records, Inc. V. Napster, Inc.*, 239 F. 3d 1004 (2001).

Almost every act of teaching relies on the substantial replication and revision of others' copyrighted works. Lectures, group projects, and assignments all rely on copying, distribution, and performance of copyrighted works. Teachers necessarily and consciously induce such copying. Many of the basic tools of teaching such as distributing photocopies, performing copyrighted works in class, and viewing film and video in class, would usually constitute copyright infringements. Yet Congress acknowledges that these functions are central to the mission of adequately educating students who live in an increasingly media-saturated society.

New technologies made media education and study more dynamic, effective, and accessible. For example, the proliferation of video cassette recorders (and such ancillary products as inexpensive video cameras and editing machines) truly unleashed the potential for media education. We copy and thus potentially infringe with video technology. But we have done so under the presumed protection of fair use. But such fair uses would have been impossible without the video recorder, the video camera, and without the confidence in technological experimentation set free by the U.S. Supreme Court's ruling in *Sony Corp. v. Universal City Studios, Inc.* Media education and scholarship never would have developed as an important field in college and university curricula and an increasingly

important element of secondary education in the United States without such technology.[41]

Newer digital technologies are even more promising for educators and students. The costs of production and reproduction have fallen. Media studies are no longer unidirectional fields, with information flowing from the front of the classroom to the back. Digital technology has become democratized to such a degree that the walls among instructor, student, creator, and audience have eroded. Every media student has the potential to build on the work of those who came before and comment critically on her media environments by answering in a multimedia, intertextual, dynamic manner, only because U.S. law has facilitated technological experimentation that has in turn generated a flurry of curricular initiatives.

One of the best examples of the creative use of the technology liberated by *Sony* comes from the Media Education Foundation, established in 1991 at the University of Massachusetts at Amherst. Under the direction of Professor Sut Jhally and with assistance from students and the public, the Foundation has been collecting video clips of copyrighted media messages and images and assembling them into annotated and narrative videos for

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[41] *Sony Corp. V. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

classroom use. The videos produced by the Foundation have had a profound effect on media education at all levels. Without the strong and clear message sent by Sony, the Media Education Foundation would not have been able to produce videos examining the sexist images promoted by MTV or the troublesome relationship between musicians and the major recording companies. None of the concerned companies would have cleared their images for use in a critical educational video.[42] Sony made such productions – and many of the recent advances in higher education in general -- possible.

The Fair Use provisions of the Copyright Act, as delineated by Sec.107, did not by themselves grant the confidence sufficient to spark technological experimentation and curricular initiatives such as the use of video cameras and editing in the classroom or teacher-produced media education videos. Only in the wake of *Sony* did such innovation emerge. In recent years, as digital technologies and powerful networks have granted remarkable creative tools to scholars, teachers, and students, the climate of panic and

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[42]*Media Education Foundation: About* [World Wide Web page] (Media Education Foundation, [cited February 15 2005]); available from http://www.mediaed.org/about. Also see Kembrew McLeod, *Freedom of Expression[a] : Overzealous Copyright Bozos and Other Enemies of Creativity*, 1st ed. (New York: Doubleday, 2005).

fear induced by the uncertainties of fair use in the new digital environment has generated a chilling effect. University and school administrators are cautious about or vehemently against experimenting with new methods of distribution, even for educational or research purposes.[43] For example, Professor Henry Jenkins at the Massachusetts Institute of Technology uses – as most media studies teachers do – clips and quotes from copyrighted works in his courses. On advice from MIT lawyers, the university has not allowed Jenkins to post the essential clips on its open courseware servers – only on server space closed to readers who are not registered MIT students. However, MIT allows students from Harvard University to take courses at MIT. Such material is inaccessible to Jenkins' students from Harvard. This situation has frustrated Jenkins and prevented him from teaching his course as effectively as he might under a more relaxed and confident legal environment.[44]

Many scholars use peer-to-peer technology in their work. Some seek a song or video clip that is out of print and unavailable in their libraries, so they use the vast publicly generated library of files as an efficient index and

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[43] Andrea L. Foster, "Justice Department Wants Colleges to Do More to Stop File Sharing," *The Chronicle of Higher Education*, July 30 2004.

[44] Henry Jenkins, e-mail correspondence to Siva Vaidhyanathan, February 23 2005.

virtual library. Others are curious about the function of such systems and their effects on culture and the culture industries. Still others are fascinated by the software itself and strive to understand and perhaps improve it. One of the most exciting scholarly proposals is “Edutella,” an open-source project that builds upon metadata standards to generate similar standards for peer-to-peer applications. This project will make searching using peer-to-peer interfaces more precise and effective, thus unleashing the distributed nature of the Internet to store essential documents redundantly and dependably. Maintaining central servers is costly for educational institutions so many information experts see distributed information as way to make educational resources available to teachers and researchers who do not have access to large libraries or servers.[45] Other similar initiatives include “OAI-P2P,” an effort to link all data in open archives via a peer-to-peer search interface that would link all the metadata attached to all the content in all the databases, and “Bibster,” an effort to exchange bibliographic metadata across many institutions.[46]

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[45] Wolfgang Nejdl et al., "Edutella: A P2p Networking Infrastructure Based on Rdf" (paper presented at the WWW2002, Honolulu, May 7-11 2002).

[46] Benjamin Ahlborn, Wolfgang Nejdl, and Wolf Siberski, "Oai-P2p: A Peer-to-Peer Network for Open Archives," (2002). Also see Peter Haase et al., "Bibster--a Semantics-Based Bibliographic Peer-to-Peer System," *Web*

Such scholarly peer-to peer experiments are benign and potentially valuable. Yet there mere suggestion that researchers employ peer-to-peer technology invites scrutiny and suspicion. Henry Jenkins at MIT could solve his content distribution problem by deploying a search engine like the one Jordan developed at RPI. But without clear legal guidance that would enable Jenkins and MIT lawyers to allow such experimentation confidently, Jenkins will not even try. More interesting than what scholars do with peer-to-peer technology is what they might not do if the current mood of panic fails to ebb. Many other uses of distributed computing or peer-to-peer indexing and resolution have yet to be imagined in the educational context. Yet, like the democratization of video production twenty years ago, there is no way for anyone to predict the externalities (positive and negative) that might flow from granting confidence to scholars, teachers, and students.

The Anarchy of Cultural Practice

While peer-to-peer has attracted the most attention, the most important element of the copyright rebellion comes from creative communities such as Free and Open Source Software (FOSS) advocates and digital music and

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Semantics: Science, Services and Agents on the World Wide Web 2, no. 1 (2004).

video producers who have built impressive new works from the elements of culture and information that flow by them every day. Yochai Benkler calls this phenomenon “peer production.” In every one of these cases, people release their work to a wider audience of contributors and creators, who then add incrementally to the project, thus building large things out of many small pieces. The GNU-Linux operating system is the best known of such peer-produced projects. The Internet itself – or at least its core protocols – represents another.[47]

Inspired by the power of the GNU General Public License (GPL), legal language that travels with many Free and Open Source software projects, locking open further contributions so that the entire project remains out of proprietary hands, Lawrence Lessig, James Boyle and others developed a licensing system for other kinds of content. The Creative Commons project leverages the cultural power and political statements of the Free and Open Source community to demonstrate through its application to music, video, and text that many creators would prefer to have their work shared and altered as long as they retain credit and no one captures it. In this way,

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[47] Yochai Benkler, "Coase’s Penguin, or, Linux and the Nature of the Firm," *Yale Law Journal* 112, no. 3 (2002).

thousands of creators have enlisted in the copyright revolt buy building something new rather than destroying something old.[48]

Another, more radically tinged element of the copyright revolt relies on twisting copyright horror stories into public lessons. The activist group Downhill Battle has taken on such projects as distributing video files of the civil rights documentary "Eyes on the Prize" after copyright clearance problems stifled its digital re-release. Downhill Battle's most influential prank involved the distribution of an underground album called "The Grey Album." Produced by an artist who calls himself DJ Danger Mouse, the "Grey Album" is a brilliant combination of the lyrical track from hip hop star Jay-Z's "Black Album" with musical samples from the 1968 album, "The Beatles," commonly known as "The White Album." On the first Tuesday in February 2004, Downhill battle encouraged hundreds of Web site editors to distribute the illicit files of the "Grey Album" as a challenge to lawyers for EMI, the Beatles' publisher. EMI had forced DJ Danger Mouse to cease distributing the album himself. As a result of Grey

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[48] *Creative Commons* (2005 [cited May 1 2005]); available from http://creativecommons.org.

Tuesday, the album was a major hit, and was even reviewed in *The New York Times*.[49]

Prospects

If the music and film industries continue to tighten the reins on use and access, they will strangle the public domain and the information commons. This trend presents a much greater threat to American culture than just a chilling effect on scholarship and creativity. Shrinking the information and cultural commons starves the public sphere of elements of discourse, the raw material for decision-making, imagination, and humor. In addition, these industries will fuel the growing outrage about these and other examples of copyright holders using their new legal powers to stifle criticism and undermine legitimate uses of their material. Loud protests have emerged from communities of software producers, artists, writers, librarians, and media activists. Activist organizations such as the Electronic Frontier Foundation and publicknowledge.org are struggling to accurately define the "public interest" in copyright and debating how best to articulate the issues to a diverse public. At one point, Napster had 77 million registered users, more than twice the number of users that American Online enjoys. That means there were 77 million

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[49] Sam Howard–Spink, "Grey Tuesday, Online Cultural Activism and the Mash–up of Music and Politics," *First Monday* 9, no. 10 (2004).

potential infringers walking our streets. And there are few Americans who have not wondered about the intrusive power of that video mattress tag—the FBI warning at the start of every rented videotape.

But we can't have the conversation that would lead us to that best possible copyright system as long as we continue to work within the limited rhetorical frameworks that we have inherited. We make a grave mistake when we choose to engage in discussions of copyright along the terms of "property." Copyright is not "property" as commonly understood. It is a specific state-granted monopoly issued for particular policy reasons. While technically, such terms describe real property as well, the public understanding of property is more fundamental, more exclusive, more natural, and precedes specific policy choices the state may make about its regulation and dispensation. When we engage in "property talk," we can't compete with the content industries. It's impossible to have a clear and reasonable discussion about what sort of copyright system might be best for the United States and the world as long as those who hold inordinate interest in copyright maximalization can cry "theft" at any mention of fair use or users' rights. This is the "property-talk trap": You can't argue for theft.

Two rhetorical strategies have emerged out of the concern about the "property talk trap." Most prominent is "commons talk." A growing

number of activists and law professors are pushing for an appreciation of the "information commons." Sparked by a brilliant paper by Duke law professor James Boyle titled "A Politics of Intellectual Property: Environmentalism For the Net?," this movement toward preservation and expansion of an information commons resembles the environmental movement 40 years ago.[50] With some good luck and hard work, these activists hope to build a similar level of public concern and awareness about how information operates in society, and the need for it to be commonly owned and shared. The best defense of the information commons can be found in a new book by activist David Bollier called *Silent Theft: The Private Plunder of our Common Wealth*. In this sober and lucid book, Bollier considers issues as wide ranging as private exploitation of federal pharmaceutical research funds, the commercialization of public space, and the enclosure of the "academic commons." It is essential reading for anyone concerned with the future of "the public" and its potential survival.[51] In addition, Lawrence Lessig argues persuasively for a

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[50] James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?," *Duke Law Journal* 47 (1997).

[51] David Bollier, *Silent Theft : The Private Plunder of Our Common Wealth* (New York: Routledge, 2002).

commons on several "layers" of communication in his important book *The Future of Ideas*.[52]

The second rhetorical strategy involves focusing on uses and users of copyrighted material—everyone who reads, writes, watches, photographs, listens, and sings. This is a more pragmatic approach, intended to warn people that the harmless acts they have taken for granted for years, such as making a mixed tape or CD for a party or "time-shifting" television programs and skipping commercials, are threatened by these recent changes in law and technology.

In addition to promulgating a healthy vision of an information commons and emphasizing the practical ramifications of extreme copyright, Free Culture advocates must confront several other trends and issues. They must link their efforts to other democratic efforts such as the privacy and media reform movements. There is strong continuity among these areas of policy and practice. One of the reasons the digital environment has fostered such a strong level of vigilance and mania to restrict the use of copyrighted material in any form is that it also fosters an environment of

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[52] Lawrence Lessig, *The Future of Ideas : The Fate of the Commons in a Connected World*, 1st ed. (New York: Random House, 2001).

surveillance.[53] Minor infringements that used to cause no concern in the analog world – sharing music among friends, for instance – now attract the attention of lawyers. And Free Culture advocates must recognize that the massive consolidation among media firms in the 1990s increased their political power both in the United States and around the world, thus allowing them to dictate copyright laws globally.[54]

Six years after the U.S. Congress passed the 1998 Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension Act, it should be clear that they were both tremendous mistakes and failures. They have done much harm and no good. The Internet is ripe with unauthorized digital content of all kinds. Peer-to-peer systems are fulfilling the role of a disorganized global digital library. Street corners from Manhattan to Mexico City to Manila to Moscow to Mumbai are filled with pirated discs. And laws and technological locks have done little to change that. However, these laws have stifled legitimate and harmless users of digital materials, especially scholars, librarians, and researchers.

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[53] Katyal, "Privacy Vs. Piracy."

[54] Robert Waterman McChesney, *The Problem of the Media : U.S. Communication Politics in the Twenty-First Century* (New York: Monthly Review Press, 2004).

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