

FREE CULTURE:

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

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INTRODUCTION

On December 17, 1903, on a windy North Carolina beach for just shy of 100 seconds, the Wright Brothers demonstrated that a heavier than air, self-propelled vehicle could fly. The moment was electric, and its importance widely understood. Almost immediately there was an explosion of interest in this new found technology of manned flight, and a gaggle of innovators began to build upon it.

At the time the Wright Brothers invented the airplane, American law held that a property owner presumptively owned not just the surface of his land, but all the land below, down to the center of earth, and all the space above, to "an indefinite extent, upwards."¹ For many years, scholars had puzzled about how best to interpret the idea that rights in land ran to the heavens. Did that mean that you owned the stars? Could you prosecute geese for their willful and regular trespass?

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

In 1945, these questions became a federal case. When North Carolina farmers Thomas Lee

and Tinie Causby started losing chickens because of low flying military aircraft (the terrified chickens apparently flew into the barn walls and died), the Causby's filed a lawsuit saying that the government was trespassing on their land. The airplanes, of course, never touched the surface of the Causby's land. But if, as Blackstone, Kent, and Coke, had said, their land reached "to an indefinite extent, upwards," then the government was trespassing on their property, and the Causby's wanted it to stop.

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

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

"Common sense revolts at the idea."

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

Or at least, this is how things happen when there's no one powerful on the other side of the change. The Causby's were just farmers. And though there was no doubt many like them who were upset by the growing traffic in the air (though one hopes not many chickens flew themselves into walls), the Causby's of the world would find it very hard to unite and stop the idea, and the technology, that the Wright Brothers had birthed. The Wright Brothers spit airplanes into the technological gene pool; the idea then spread like a virus in a chicken coop; farmers like the Causby's found themselves surrounded by "what seemed reasonable" given the technology that the Wrights had produced. They could stand on their farms, dead chickens in hand, and shake their fists at these new fangled technologies all they wanted. They could call their representatives, or even file a lawsuit. But in the end, the force of what seems "obvious" to everyone else - the power of "common sense" - would overwhelm. Their

"private interest" would not be allowed to defeat an obvious public gain.

Edwin Howard Armstrong is one of America's forgotten inventor geniuses. He came to the great American inventor scene just after the titans Thomas Edison and Alexander Graham Bell. But his work in the area of radio technology was perhaps the most important of any single inventor in the first 50 years of radio. He was better educated than Michael Faraday, who as a bookbinder's apprentice had discovered electric induction in 1831. But he had the same intuition about how the world of radio worked, and on at least three occasions, he invented profoundly important technologies that advanced our understanding of radio.

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

On November 5, 1935, he demonstrated the technology at a meeting of the Institute of Radio Engineers at the Empire State Building in New York City. He turned his radio dial across a range of AM stations, until the radio tuned into a broadcast that he had arranged from 17 miles away. The radio fell

totally silent, as if dead, and then with a clarity no one else in that room had ever heard from an electrical device, it produced the sound of an announcer's voice: "[t]his is amateur station W2AG at Yonkers, New York, operating on frequency modulation at two and a half meters."

The audience was hearing something no one had thought possible:

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

As our own "common sense" tells us, Armstrong had discovered a vastly superior radio technology. But at the time of his invention, Armstrong was working for RCA. RCA was the dominant player in the then dominant AM radio market. By 1935, there were some 1,000 radio stations across the United States, but the stations in large cities were all owned by a handful of networks.

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

I thought Armstrong would invent some kind of a filter to remove static from

our AM radio. I didn't think he'd start a revolution – start up a whole damn new industry to compete with RCA.^{iv}

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

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

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

The series of body blows that FM radio received right after the war, in a series of rulings manipulated through the FCC by the big radio interests,

were almost incredible in their force and deviousness.^{vi}

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

Armstrong resisted RCA's efforts. In response, RCA resisted Armstrong's patents. After incorporating FM technology into the emerging standard for television, RCA declared the patents invalid - baselessly, and almost 15 years after they were issued. It thus refused to pay him royalties. For 6 years, Armstrong fought an expensive war of litigation to defend the patents. Finally, just as the patents expired, RCA offered a settlement so low that it would not even cover Armstrong's lawyers' fees. Defeated, broken, and now broke, in 1954, Armstrong wrote a short note to his wife, and stepped out of a 13th story window to his death.

This is how the law sometimes works. Not often this tragically, and rarely with heroic drama, but sometimes, this is how it works. From the beginning, government and governments agencies have been subject to capture. They are more likely captured when a powerful interest is threatened by either a legal or technical change. That powerful interest too often exerts its influence within the government to get the government

to protect it. The rhetoric of this protection is of course always public spirited; the reality is something different. Ideas that were as solid as rock in one age and that left to themselves would crumble in another get support through this subtle corruption of our political process. RCA had what the Causby's did not: the power to stifle the effect of technological change.

There's no single inventor of the Internet. Nor is there any good date upon which to mark its birth. Yet in a very short time, the Internet has become part of ordinary American life. According to the Pew Internet and American Life Project, 58% of Americans had access to the Internet in 2002, up from 49% two years before.^{vii} That number could well exceed two-thirds of the nation by the end of 2004.

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

Instead, this book is about an effect of the Internet beyond the Internet itself: an

effect upon how culture gets made. My claim is that the Internet has induced an important and unrecognized change in how our culture gets made. That change will radically transform a tradition that is as old as the Republic itself. Most, if they recognized this change, would reject it. Yet most don't even see the change that the Internet has induced.

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

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

The focus of the law instead was upon commercial creativity. At first slightly,

but then quite extensively, the law protected the incentives of creators by granting them exclusive rights to their creative work, so that they could sell those exclusive rights in a commercial marketplace.^{viii} This of course is also an important part of creativity and culture. It has become an increasingly important part of creativity and culture in America. But in no sense was this part dominant within our tradition. It was instead just one part, a controlled part, but balanced with the free.

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

This change gets justified as necessary to protect commercial creativity. And indeed, protectionism is precisely its motivation. But the protectionism that justifies the changes that I will describe below is not the limited and balanced sort that has defined the law in the past. This is not a protectionism to protect artists. It is instead a protectionism to protect certain

forms of business. Corporations threatened by the potential of the Internet to change both the way commercial and noncommercial culture gets made and shared have united to induce lawmakers to use the law to protect them. It is the story of RCA and Armstrong; it is the dream of the Causby's.

For the Internet has unleashed an extraordinary power for many to participate in the process of building and cultivating a culture that reaches far beyond their local boundaries. That power has changed the marketplace for making and cultivating culture generally, and that change in turn threatens established content industries. The Internet is thus to the industries that built and distributed content in the 20th century what FM radio was to AM radio, or what the truck was to the railroad industry of the 19th century: the beginning of the end. Digital technologies, tied to the Internet, could produce a vastly more competitive and vibrant market for building and cultivating culture; that market could include a much wider and more diverse range of creators; those creators could produce and distribute a much more vibrant range of creativity; and depending upon a few important factors, those creators could earn more on average from this system than creators do today – all so long as RCA's of our day don't use the law to protect themselves against this competition.

Yet, as I argue in the pages that follow, that is precisely what is happening in our culture today. These modern day equivalents of the early 20th century radio, or 19th century railroads, are using their power to get the law to protect themselves against

this new, more efficient, more vibrant technology for building culture. They are succeeding in their plan to remake the Internet before the Internet remakes them.

It doesn't seem this way to many. The battles around copyright and the Internet seem remote to most. To the few who follow them, they seem mainly about a much simpler brace of questions – whether “piracy” will be permitted, and whether “property” will be protected. The “war” that has been waged against the technologies of the Internet – what Motion Picture Association of America (MPAA) President Jack Valenti calls his “own terrorist war”^{*} – has been framed as a battle about the rule of law, and respect for property. To know which side to take in this war, most think that we need only decide whether we're for property, or against it.

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

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

These values built a tradition that – for at least the first 180 years of our Republic – guaranteed creators the right to build freely upon their past, and protected

creators and innovators from either state or private control. The First Amendment protected creators against state control. And as Professor Neil Netanel powerfully argues,^{xi} copyright law, properly balanced, protected creators against private control. Our tradition was thus neither Soviet, nor the tradition of patrons. It was instead one that carved out a wide berth within which creators could cultivate and extend our culture.

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

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

It is instead an effort to understand a hopelessly destructive war inspired by the technologies of the Internet but reaching far beyond its code. And in understanding this battle, it is an effort to map peace.

There is no good reason for the current struggle around Internet technologies to continue. There will be great harm to our tradition and culture if it is allowed to continue unchecked. We must come to understand the source of this war. We must resolve it soon.

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

And thus, when geeks and technologists defend their Armstrong or Wright Brothers technology, most of us are simply unsympathetic. "Common sense [does not] revolt." Unlike the unlucky Causby's, common sense is on the side of the property owners in this war. Unlike the lucky Wright Brothers, the Internet has not inspired a revolution on its side.

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

The puzzle is why?

Is it because we have come to understand a truth about the value and importance of absolute property over ideas and culture? Is it because we have discovered that our tradition rejecting such an absolute claim was wrong?

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

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

Does common sense lead to the extremes on this question because common sense actually believes in these extremes? Or does common sense stand silent in the face of these extremes because, as with Armstrong versus

RCA, the more powerful side has ensured that it has the more powerful view?

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

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

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

The two sections will then set up the core claim of this book: That while the Internet has indeed produced something fantastic and new, our government, pushed by big media to respond to this "something new," is destroying something very old. Rather than understanding the changes the Internet might permit, and rather than taking time to let "common sense" resolve how best to respond, we are allowing those most threatened by the

changes to use their power to change the law – and more importantly, to use their power to change something fundamental about who we have always been.

We allow this, I believe, not because it is right. And not because most of us really believe in these changes. But instead because the interests most threatened are among the most powerful players in our depressingly compromised process of making law. This book is the story of one more consequence of this form of corruption – a consequence to which most of us remain oblivious, but of which we must become aware.

"PIRACY"

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

A person may use the copy by playing it, but he has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use.^{x11}

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

This efficiency does not respected the traditional lines of copyright. The network doesn't discriminate between the sharing of copyrighted and uncoprighted content. This has produced a vast amount of "sharing" of copyrighted content. That sharing in turn has excited the war, as content owners fear the sharing will "rob the author of the profit."

The warriors have turned to the courts, to the legislatures, and increasingly, to technology, to defend "their property" against this "piracy." A generation of Americans, the warriors warn, is being raised to believe that "property" should be

"free." Forget tattoos, never mind body-piercing: Our kids are becoming *thieves!*

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

The idea goes something like this:

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

This view runs deep within the current debates. It is what NYU Law Professor Rochelle Dreyfuss calls the "if value, then right" theory of creative property^{xiii} – if there is value, then someone must have a right to that value. It is the perspective that led a composers' rights organization, ASCAP, to sue the Girl Scouts for failing to pay for the songs that girls sang around Girl Scout campfires.^{xiv} There was "value" – the songs – so there must be a "right" – even against the Girl Scouts.

This idea is certainly a possible understanding of how creative property should work. It might well be a possible design for a system of law protecting creative property. But the "if value, then right" theory of creative property has never

been America's theory of creative property. It has never taken hold within our law.

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

The source of this confusion is a distinction that the law no longer takes care to draw — the distinction between republishing someone's work on the one hand, and building upon or transforming that work on the other. Copyright law at its birth had just publishing as its concern; copyright law as it has matured now regulates both.

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

But with the birth of the Internet, and for reasons we'll see more clearly below, this natural limit to reach of the law has now disappeared. The law controls not just the creativity of commercial creators, but effectively the creativity of anyone. And while that expansion would not matter much if the only regulation of copyright law were "copying," when the law regulates as broadly and obscurely as it does, this extension matters lots. The burden of this law now

vastly outweighs any original benefit — certainly as it affects noncommercial creativity, and increasingly as it affects commercial creativity as well. And thus, as we'll see more clearly in the chapters below, the law's role is less and less to support creativity, and more and more to protect certain industries against competition. Just at the time digital technology could unleash an extraordinary range of commercial and noncommercial creativity, the law burdens this creativity with insanely complex and vague rules, and with the threat of obscenely severe penalties. We may be seeing, as Richard Florida writes, the "Rise of the Creative Class."^{xv} But we are also seeing, as this book demonstrates, an extraordinary rise of regulation of this creative class.

These burdens make no sense now. They make no sense of our tradition. But we should begin by understanding that tradition a bit more, and by placing in its proper context the current battles about something called "piracy."

CHAPTER ONE: CREATORS

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

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

A couple of my boys could read music, and one of them could play a mouth organ. We put them in a room where they could not see the screen and arranged to pipe their sound into the room where our wives and friends were going to see the picture.

The boys worked from a music and sound-effects score. After several false starts, sound and action got off with the gun. The mouth organist played the tune, the rest of us in the sound department bammed tin pans and blew slide whistles on the beat. The synchronization was pretty close.

The effect on our little audience was nothing less than electric. They responded almost instinctively to this union of sound and motion. I thought they were kidding me. So they put me in the audience and ran the action again. It was terrible, but it was wonderful! And it was something new!^{xvi}

Disney's then partner, and one of animation's most extraordinary talents, Ub Iwerks, put it more strongly.

I have never been so thrilled in my life. Nothing since has ever equaled it.

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

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

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

"Steamboat Bill, Jr." predated Disney's cartoon, "Steamboat Willie." The coincidence of titles is not coincidental. Like Keaton, Disney's Steamboat Willie is a direct take-off from "Steamboat Bill."^{xvii} It is a cartoon parody of the comedy film, both built upon a common song as a source. It is not just from the invention of synchronized sound in "The Jazz Singer" that we get Steamboat Willie. It is also from Buster Keaton's invention of Steamboat Bill, Jr., itself inspired by the song Steamboat Bill, that we get Steamboat Willie, and then from Steamboat Willie, Mickey Mouse.

This "borrowing" was nothing unique – either for Disney or for the industry. Disney was always parroting the feature length mainstream films of his day.^{xviii} So did many others. Early cartoons are filled with knock-offs – slight variations on winning themes; retellings of ancient stories. The key to any success was the brilliance of the differences. With Disney, it was sound that gave his animation its spark. Later, it was the quality of his work relative to the production-line cartoons with which he competed. Yet these additions were built upon a base that was borrowed. Disney added to the work of others before him, creating something new out of something just barely old.

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

bloody, moralistic stories to his or her child, at bedtime or anytime.

Disney took these stories and retold them in a way that carried them into a new era. He animated the stories, with both characters and light. He made funny what was dark, and injected a genuine emotion of compassion where before there was fear. And not just with the work of the Brothers Grimm. Indeed the catalog of Disney work drawing upon the work of others is astonishing when set together: Snow White (1937), Fantasia (1940), Pinocchio (1940), Dumbo (1941), Bambi (1942), Song of the South (1946), Cinderella (1950), Alice in Wonderland (1951), Robin Hood (1952), Peter Pan (1953), Lady and the Tramp (1955), Sleeping Beauty (1959), 101 Dalmatians (1961), The Sword in the Stone (1963), and The Jungle Book (1967) – not to mention a recent example that we should perhaps quickly forget, Treasure Planet (2003). In all of these cases, Disney (or Disney, Inc.) ripped creativity from the culture around him, he mixed that creativity with his own extraordinary talent, and then burned that mix into the soul of his culture. Rip, Mix, and Burn.

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

In 1928, the culture that Disney was free to draw upon was relatively fresh. The public domain in 1928 was not very old and was therefore quite vibrant. The average term of copyright was just around 30 years – for that minority of creative work that was in fact copyrighted.^{xix} That means that for 30 years, on average, the authors, or copyright holders, of a creative work had an "exclusive right" to control certain uses of a creative work. To use this copyrighted work in limited ways required the permission of a copyright owner.

At the end of a copyright term, a work passes into the public domain. No permission is then needed to draw upon or use that work. No permission, and hence, no lawyers. The

public domain is a "lawyer-free zone." Thus, most of the content from the 19th century was free for Disney to use and build upon in 1928. It was free for anyone – whether connected or not, whether rich or not, whether approved or not – to use and build upon.

This is the ways things had always been – until quite recently. For most of our history, the public domain was just over the horizon. From 1790 until 1978, the average copyright term was never more than 32 years – meaning that most culture just a generation and a half old was free for anyone to build upon without the permission of anyone else. In the context of today, the equivalent would be for creative work from the 1960s and 1970s to be free for the next Walt Disney to build upon without permission. Yet today, the public domain is presumptive only for content from before the Great Depression.

Of course, Walt Disney had no monopoly on "Walt Disney creativity." Nor does America. The norm of free culture has been, until recently, and except with totalitarian nations, broadly exploited and quite universal.

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

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

But my purpose here is not to understand "manga." It is to describe a variant on "manga" that, from a lawyer's

perspective, is quite odd, but from a Disney perspective, is quite familiar.

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

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

The most puzzling feature of the dojinshi market, for those trained in the law at least, is that it is allowed to exist at all. Under Japanese copyright law, which in this respect on paper at least, mirrors American copyright law – the dojinshi market is an illegal market. Dojinshi are plainly "derivate works" – derived from original manga art. There is no general practice by dojinshi artists of securing the permission of the manga creators. Instead, as Walt Disney did to Steamboat Bill, Jr., the practice is simply to take and modify the creations of others. Under Japanese law (and American law too), that "taking" without the permission of the original copyright owner is illegal. It is an infringement of the original copyright to make a copy or a derivative work without the original copyright owner's permission.

Yet this illegal market exists and indeed flourishes within Japan. And in the view of many, it is precisely because it exists that Japanese manga flourishes. As American graphic novelist Judd Winick said to me, "The early days of comics in America are very much like what's going on in Japan now. ... American comics were born out of copying each other. ... That's how [they] learn to draw - by going into comic books and not tracing them, but looking at them and copying them" and building from them.^{xx}

American comics now are quite different, Winick explains, in part because of the difficulty - the legal difficulty - of adapting comics the way *dojinshi* allow. Speaking of Superman, Winick told me, "there are these rules and you have to stick to them." There are things Superman "cannot" do. "As a creator, it's frustrating having to stick to some parameters which are 50 years old."

The norm in Japan mitigates this legal difficulty. And some say it is precisely this benefit accruing to the Japanese manga market that explains the mitigation. Temple law professor Salil Mehra, for example, hypothesizes that the manga market is accepting of these technical violations of the law because it spurs the manga market to be more wealthy and productive. Everyone would be worse off if *dojinshi* were banned, so the law does not ban *dojinshi*.^{xxi}

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

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

This is a theme to which we will recur: That the regulation by law is a function of both the words on the

books, and the costs of making those words have effect. But for now, focus on the obvious question that is begged: would Japan be better off with more lawyers? Would manga be richer if dojinshi artists were regularly prosecuted? Would the Japanese gain something important if it could end this practice of uncompensated sharing? Does piracy here hurt the victims of the piracy, or help? Would lawyers fighting this piracy help their clients, or hurt them?

Let's pause for a moment.

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

We live in a world that celebrates "property." I am one of those celebrants. I believe in the value of property in general, and I also believe in the value of that weird form of property that lawyers call "intellectual property."^{xxii} A large, diverse society cannot survive without property; a large, diverse and modern society cannot flourish without intellectual property.

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

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

The same with the dojinshi culture. If a dojinshi artist broke into a publisher's office and ran off with 1,000 copies of his latest work – or even took one copy of his work without paying – we'd have no hesitation in saying the artist was wrong. In addition to trespass, he would have "stolen" something of value. The law bans that stealing in whatever form, whether large or small.

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

And the same with a thousand examples that appear everywhere once you begin to look. Scientists build upon the work of other scientists without asking or paying for the privilege. ("Excuse me, Professor Einstein, but may I have permission to use your theory of relativity to show that you were wrong about quantum physics?") Shakespeare Companies perform adaptations of the works of Shakespeare without securing permission from anyone. (Does anyone believe Shakespeare would be better spread within our culture if there were a central Shakespeare rights clearing house that all productions of Shakespeare must appeal to first?) Hollywood gets in cycles with a certain kind of movie – five asteroid films in the late 1990s, or two volcano disaster films (Dante's Peak and Volcano) in 1997.

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

The hard question is therefore not *whether* a culture is free. All cultures are to some degree. The hard question instead is "how free is this culture?" How much, and how broadly is the culture free for others to take and build upon? Is that freedom limited to party members? To members of the royal family? To the top 10 corporations on the New York Stock Exchange? Or is that freedom spread broadly – to

artists generally, whether affiliated with the Met or not? To musicians generally – whether white or not? To filmmakers generally – whether affiliated with a studio or not?

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

End Notes

Throughout this text, there are references to links on the world wide web. As anyone who has tried to use the web knows, these links are highly unstable. I have therefore tried to fix the instability by using links through the website associated with this book, to redirect to the original source. For each link below, the reader can link to <<http://free-culture.cc/notes>> and locate the original source by clicking on the number after the #-sign. If the original link remains alive, you will be redirected to that link. If the original link disappears, then you will be redirects to an appropriate reference for the material.

INTRODUCTION

ⁱ St. George Tucker, *Blackstone's Commentaries* 3 (South Hackensack, N.J.: Rothman Reprints, 1969), 18.

ⁱⁱ *United States v. Causby*, *United States Reporter* 328 (1946): 256, 261 (emphasis added). The Court did find that there could be a "taking" if the government's use of its land effectively destroyed the value of the Causby's land. This example was suggested to me by Keith Aoki's wonderful piece, "(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship," *Stanford Law Review* 48 (1996): 1293, 1333. See also Paul Goldstein, *Real Property* (Mineola, N.Y.: The Foundation Press, 1984), 1112-13.

ⁱⁱⁱ Lawrence Lessing, *Man of High Fidelity: Edwin Howard Armstrong* (Philadelphia, Pa.: J.B. Lipincott Company, 1956), 209.

^{iv} See #1 (from the First Electronic Church of America's series on Saints: The Heroes and Geniuses of the Electronic Era).

^v Lessing, 226.

^{vi} Lessing, 256.

^{vii} Amanda Lenhart, "The Ever-Shifting Internet Population: A new look at Internet access and the digital divide," Pew Internet & American Life Project, April 15, 2003: 6, available at #2.

^{viii} This is not the only purpose of "copyright," though it is the overwhelmingly primary purpose of the "copyright" established in the federal constitution. State "copyright" law historically protected not just the commercial interest in publication, but also a privacy interest. By granting authors the exclusive right to first publication, state copyright law gave authors the power to control the spread of

facts about them. See Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193, 198-200.

^{ix} See Jessica Litman, *Digital Copyright* (New York: Prometheus Books 2001), at Chapter 13.

^x Amy Harmon, "Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net into an Illicit Video Club," *The New York Times*, January 17, 2002.

^{xi} Neil W. Netanel, "Copyright and a Democratic Civil Society," *Yale Law Journal* 106 (1996): 283.

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^{xii} *Bach v. Longman*, 98 Eng. Rep. 1274, 1274 (1777) (Mansfield).

^{xiii} See Rochelle Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation," *Notre Dame Law Review* 65 (1990): 397.

^{xiv} Lisa Bannon, "The birds may sing, but campers can't unless they pay up," *The Wall Street Journal* (August 23, 1996), available at #3; Jonathon Zittrain, "Calling off the copyright war: In battle of property vs. free speech, no one wins," *The Boston Globe* (November 24, 2002).

^{xv} In *The Rise of the Creative Class* (New York: Basic Books 2002), Richard Florida documents a shift in the nature of labor towards a labor of creativity. His work, however, doesn't address directly the legal conditions under which that creativity is enabled, or stifled. I certainly agree with him about the importance and significance of this change. But I also believe the conditions under which it will be enabled are much more tenuous.

CHAPTER ONE

^{xvi} Leonard Maltin, *Of Mice and Magic: A History of American Animated Cartoons* (New York, N.Y.: Penguin Books, 1987), 34-35.

^{xvii} I am grateful to David Gerstein and his careful history, described at #4. According to Dave Smith of the Disney Archives, Disney paid royalties to use the music for five songs in Steamboat Willie: "Steamboat Bill," "The Simpleton" (Delille), "Mischievous Makers" (Carbonara), "Joyful Hurry #1" (Baron), and "Gawky Rube" (Lakay). A sixth song, "The Turkey in the Straw," was already in the public domain. Letter from David Smith to Harry Surden, July 10, 2003, on file with author.

^{xviii} He was also a fan of the public domain. See Chris Sprigman, "The Mouse that Ate the Public Domain," *Findlaw* (Mar. 5 2002), at #5.

^{xix} Until 1976, copyright law granted an author the possibility of two terms – an initial term, and a renewal term. I have calculated the "average" term by determining the weighted average of total registrations for any particular year, and the proportion renewing. Thus, if 100 copyrights registered in year 1, and only 15 renewed, and the renewal term is 28 years, then the average term is 32.2 years. For the renewal data, and other relevant data, see the website associated with this book, available at #6. Only a "minority" of works were actually copyrighted before copyright was automatic, since copyright required registration and marking.

^{xx} For an excellent history, see Scott McCloud, *Reinventing Comics* (New York, N.Y.: Perennial, 2000).

^{xxi} See Salil K. Mehra, "Copyright and Comics in Japan: Does Law Explain Why All the Comics My Kid Watches are Japanese Imports?" *Rutgers Law Review* 55 (2002): 155, 182. "[T]here might be a collective economic rationality that would lead manga and anime artists to forgo bringing legal actions for infringement. One hypothesis is that all manga artists may be better off collectively if they set aside their individual self-interest and decide not to press their legal rights. This is essentially a prisoner's dilemma solved."

^{xxii} The term "intellectual property" is of relatively recent origin. See Siva Vaidhyanathan, *Copyrights and Copywrongs* 11 (New York University Press 2001). See also Lawrence Lessig, *The Future of Ideas* 293 n.26 (New York, N.Y.: Random House, 2001).

CHAPTER TWO

1 Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity By Lawrence Lessig New York: The Penguin Press, 2004, ISBN (hardcover) (Price: \$24.95) pp Reviewed by Tisha Pyatt Mark Journal of High Technology Law Suffolk University Law School As software developers, the entertainment industry, lawyers, and Internet users anxiously await the Supreme Court s. decision in the recently argued case, Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 1 all would be wise to pick up a copy of Lawrence Lessig s Free Culture for a clear, in-depth analysis of a prob FREE CULTURE is available for free under a Creative Commons license. You may redistribute, copy, or otherwise reuse/remix this book provided that you do so for non-commercial purposes and credit Professor Lessig. For the full license, click here. To make your creative work more easily available to others, click here. This video (or .ogg) and this video (or .ogg) explain why this is so important. As does this book: Click to Download FREE CULTURE (PDF). (also available in many other formats). or. FREE CULTURE (bittorrent). Free Culture by Lawrence Lessig How Big Media Uses Technology and the La...