Fri kultur

Hvordan store medieaktører bruker teknologi og loven til å låse ned kulturen og kontrollere kreativiteten

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av Lawrence Lessig

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Om forfatteren

Lawrense Lessig (http://www.lessig.org), professor i juss og en John A. Wilson Distinguished Faculty Scholar ved Stanford Law School, er stifteren av Stanford Center for Internet and Society og styreleder i Creative Commons (http://creativecommons.org). Forfatteren har gitt ut The Future of Ideas (Random House, 2001) og Code: And other Laws of Cyberspace (Basic Books, 1999), og er medlem av styrene i Public Library of Science, the Electronic Frontier Foundation, og Public Knowledge. Han har vunnet Free Software Foundation's Award for the Advancement of Free Software, to ganger vært oppført i BusinessWeek's "e.biz 25," og omtalt som en av Scientific American's "50 visjonærer". Etter utdanning ved University of Pennsylvania, Cambridge University, og Yale Law School, assisterte Lessig dommer Richard Posner ved U.S. Seventh Circuit Court of Appeals.

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Code: And Other Laws of Cyberspace

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Lawrence Lessig

Til Eric Eldred — hvis arbeid først trakk meg til denne saken, og for hvem saken fortsetter.

Kolofon

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Forord

På slutten av hans gjennomgang av min første bok *Code: And Other Laws of Cyberspace*, skrev David Pogue, en glimrende skribent og forfatter av utallige tekniske datarelaterte tekster, dette:

> I motsetning til faktiske lover, så har ikke internett-programvare kapasiteten til å straffe. Den påvirker ikke folk som ikke er online (og kun en veldig liten minoritet av verdens befolkning er online). Og hvis du ikke liker systemet på internett, så kan du alltid slå av modemet.[1]

Pogue var skeptisk til argumentet som er kjernen av boken — at programvaren, eller "koden", fungerte som en slags lov — og foreslo i sin anmeldelse den lykkelig tanken at hvis livet i cyberspace gikk dårlig, så kan vi alltid som med en trylleformel slå over en bryter og komme hjem igjen. Slå av modemet, koble fra datamaskinen, og eventuelle problemer som finnes *den* virkeligheten ville ikke "påvirke" oss mer.

Pogue kan ha hatt rett i 1999 — jeg er skeptisk, men det kan hende. Men selv om han hadde rett da, så er ikke argumentet gyldig nå. *Fri Kultur* er om problemene internett forårsaker selv etter at modemet er slått av. Den er et argument om hvordan slagene som nå brer om seg i livet on-line har fundamentalt påvirket "folk som er ikke pålogget." Det finnes ingen bryter som kan isolere oss fra internettets effekt.

[1] David Pogue, "Don't Just Chat, Do Something," *New York Times*, 30. januar 2000

Men i motsetning til i boken *Code*, er argumentet her ikke så mye om internett i seg selv. Istedet er det om konsekvensen av internett for en del av vår tradisjon som er mye mer grunnleggende, og uansett hvor hardt dette er for en geek-wanna-be å innrømme, mye viktigere.

Den tradisjonen er måten vår kultur blir laget på. Som jeg vil forklare i sidene som følger, kommer vi fra en tradisjon av "fri kultur"—ikke "fri" som i "fri bar" (for å låne et uttrykk fra stifteren av fri programvarebevegelsen[2]), men "fri" som i "talefrihet", "fritt marked", "frihandel", "fri konkurranse", "fri vilje" og "frie valg". En fri kultur støtter og beskytter skapere og oppfinnere. Dette gjør den direkte ved å tildele immaterielle rettigheter. Men det gjør den indirekte ved å begrense rekkevidden for disse rettighetene, for å garantere at neste generasjon skapere og oppfinnere forblir *så fri som mulig* fra kontroll fra fortiden. En fri kultur er ikke en kultur uten eierskap, like lite som et fritt marked er et marked der alt er gratis. Det motsatte av fri kultur er "tillatelseskultur"—en kultur der skapere kun kan skape med tillatelse fra de mektige, eller fra skaperne fra fortiden.

Hvis vi forsto denne endringen, så tror jeg vi ville stå imot den. Ikke "vi" på venstresiden eller "dere" på høyresiden, men vi som ikke har investert i den spesifikke kulturindustrien som har definert det tjuende århundre. Enten du er på venstre eller høyresiden, hvis du i denne forstand ikke har interesser, vil historien jeg forteller her gi deg problemer. For endringene jeg beskriver påvirker verdier som begge sider av vår politiske kultur anser som grunnleggende.

[2] Richard M. Stallman, *Fri programvare, Frie samfunn* 57 (Joshua Gay, red. 2002).

Vi så et glimt av dette tverrpolitiske raseri på forsommeren i 2003. Da FCC vurderte endringer i reglene for medieeierskap som ville slakke på begrensningene rundt mediekonsentrasjon, sendte en ekstraordinær koalisjon mer enn 700 000 brev til FCC for å motsette seg endringen. Mens William Safire beskrev å marsjere "ubehagelig sammen med CodePink Women for Peace and the National Rifle Association, mellom liberale Olympia Snowe og konservative Ted Stevens", formulerte han kanskje det enkleste uttrykket for hva som var på spill: konsentrasjonen av makt. Så spurte han:

> Høres dette ikke-konservativt ut? Ikke for meg. Denne konsentrasjonen av makt—politisk, selskapsmessig, pressemessig, kulturelt—bør være bannlyst av konservative. Spredningen av makt gjennom lokal kontroll, og derigjennom oppmuntre til individuell deltagelse, er essensen i føderalismen og det største uttrykk for demokrati.[3]

Denne idéen er et element i argumentet til *Fri Kultur*, selv om min fokus ikke bare er på konsentrasjonen av makt som følger av konsentrasjonen i eierskap, men mer viktig, og fordi det er mindre synlig, på konsentrasjonen av makt som er resultat av en radikal endring i det effektive virkeområdet til loven. Loven er i endring, og endringen forandrer på hvordan vår kultur blir skapt. Den endringen bør bekymre deg—Uansett om du bryr deg om internett eller ikke, og uansett om du er til venstre for Safires eller til høyre. Inspirasjonen til tittelen og mye av argumentet i denne boken kommer fra arbeidet til Richard Stallman og Free Software Foundation. Faktisk, da jeg leste Stallmans egne tekster på nytt,

[3] William Safire, "The Great Media Gulp," *New York Times*, 22. mai 2003.

spesielt essyene i *Free Software, Free Society*, innser jeg at alle de teoretiske innsiktene jeg utvikler her er innsikter som Stallman beskrev for tiår siden. Man kan dermed godt argumentere for at dette verket "kun" er et avledet verk.

Jeg godtar kritikken, hvis det faktisk er kritikk. Arbeidet til en advokat er alltid avledede verker, og jeg mener ikke å gjøre noe mer i denne boken enn å minne en kultur om en tradisjon som alltid har vært deres egen. Som Stallman forsvarer jeg denne tradisjonen på grunnlag av verdier. Som Stallman tror jeg dette er verdiene til frihet. Og som Stallman, tror jeg dette er verdier fra vår fortid som må forsvares i vår fremtid. En fri kultur har vært vår fortid, men vil bare være vår fremtid hvis vi endrer retningen vi følger akkurat nå. På samme måte som Stallmans argumenter for fri programvare, treffer argumenter for en fri kultur på forvirring som er vanskelig å unngå, og enda vanskeligere å forstå. En fri kultur er ikke en kultur uten eierskap. Det er ikke en kultur der kunstnere ikke får betalt. En kultur uten eierskap eller en der skaperne ikke kan få betalt, er anarki, ikke frihet. Anarki er ikke hva jeg fremmer her.

I stedet er den frie kulturen som jeg forsvarer i denne boken en balanse mellom anarki og kontroll. En fri kultur, i likhet med et fritt marked, er fylt med eierskap. Den er fylt med regler for eierskap og kontrakter som blir håndhevet av staten. Men på samme måte som det frie markedet blir pervertert hvis dets eierskap blir føydalt, så kan en fri kultur bli ødelagt av ekstremisme i eierskapsrettighetene som definerer den. Det er dette jeg frykter om vår kultur i dag. Det er som motpol til denne ekstremismen at denne boken er skrevet.

Kapittel 0. Introduksjon

17. desember 1903, på en vindfylt strand i Nord-Carolina i såvidt under hundre sekunder, demonstrerte Wright-brødrene at et selvdrevet fartøy tyngre enn luft kunne fly. Øyeblikket var elektrisk, og dens betydning ble alment forstått. Nesten umiddelbart, eksploderte interessen for denne nye teknologien som muliggjorde bemannet luftfart og en hærskare av oppfinnere begynte å bygge videre på den.

Da Wright-brødrene fant opp flymaskinen, hevdet loven i USA at en grunneier ble antatt å eie ikke bare overflaten på området sitt, men også alt landet under bakken, helt ned til senterpunktet i jorda, og alt volumet over bakken, "i ubestemt grad, oppover".[1] I mange år undret lærde over hvordan en best skulle tolke idéen om at eiendomsretten gikk helt til himmelen. Betød dette at du eide stjernene? Kunne en dømme gjess for at de regelmessig og med vilje tok seg inn på annen manns eiendom?

Så kom flymaskiner, og for første gang hadde dette prinsippet i lovverket i USA—dypt nede i grunnlaget for vår tradisjon og akseptert av de viktigste juridiske tenkerne i vår fortid—en betydning. Hvis min eiendom rekker til himmelen, hva skjer når United flyr over mitt område? Har jeg rett til å nekte dem å bruke min eiendom? Har jeg mulighet til å inngå en eksklusiv avtale med Delta Airlines? Kan vi gjennomføre en auksjon for å finne ut hvor mye disse rettighetene er verdt?

I 1945 ble disse spørsmålene en føderal sak. Da bøndene Thomas Lee og Tinie Causby i Nord Carolina begynte å miste kyllinger

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

på grunn av lavtflygende militære fly (vettskremte kyllinger fløy tilsynelatende i låveveggene og døde), saksøkte Causbyene regjeringen for å trenge seg inn på deres eiendom. Flyene rørte selvfølgelig aldri overflaten på Causbys' eiendom. Men hvis det stemte som Blackstone, Kent, og Cola hadde sagt, at deres eiendom strakk seg "i ubestemt grad, oppover," så hadde regjeringen trengt seg inn på deres eiendom, og Causbys ønsket å sette en stopper for dette.

Høyesterett gikk med på å ta opp Causbys sak. Kongressen hadde vedtatt at luftfartsveiene var tilgjengelig for alle, men hvis ens eiendom virkelig rakk til himmelen, da kunne muligens kongressens vedtak ha vært i strid med grunnlovens forbud mot å "ta" eiendom uten kompensasjon. Retten erkjente at "det er gammel doktrine etter sedvane at en eiendom rakk til utkanten av universet.", men dommer Douglas hadde ikke tålmodighet for forhistoriske doktriner. I et enkelt avsnitt, ble hundrevis av år med eiendomslovgivningen strøket. Som han skrev på vegne av retten,

> [Denne] doktrinen har ingen plass i den moderne verden. Luften er en offentlig motorvei, slik kongressen har erklært. Hvis det ikke var tilfelle, ville hver eneste transkontinentale flyrute utsette operatørene for utallige søksmål om inntrenging på annen manns eiendom. Idéen er i strid med sunn fornuft. Å anerkjenne slike private krav til luftrommet ville blokkere disse motorveiene, seriøst forstyrre muligheten til kontroll og utvikling av dem i fellesskapets interesse

> og overføre til privat eierskap det som kun fellesskapet har et rimelig krav til.[2]

"Idéen er i strid med sunn fornuft."

Det er hvordan loven vanligvis fungerer. Ikke ofte like brått eller utålmodig, men til slutt er dette hvordan loven fungerer. Det var ikke stilen til Douglas å utbrodere. Andre dommere ville ha skrevet mange flere sider før de nådde sin konklusjon, men for Douglas holdt det med en enkel linje: "Idéen er i strid med sunn fornuft.". Men uansett om det tar flere sider eller kun noen få ord, så er det en genial egenskap med et rettspraksis-system, slik som vårt er, at loven tilpasser seg til aktuelle teknologiene. Og mens den tilpasser seg, så endres den. Idéer som var solide som fjell i en tidsalder knuses i en annen.

Eller, det er hvordan ting skjer når det ikke er noen mektige på andre siden av endringen. Causbyene var bare bønder. Og selv om det uten tvil var mange som dem som var lei av den økende trafikken i luften (og en håper ikke for mange kyllinger flakset seg inn i vegger), ville Causbyene i verden finne det svært hardt å samles for å stoppe idéen, og teknologien, som Wright-brødrene hadde ført til verden. Wright-brødrene spyttet flymaskiner inn i den teknologiske meme-dammen. Idéen spredte seg deretter som et virus i en kyllingfarm. Causbyene i verden fant seg selv omringet av "det synes rimelig" gitt teknologien som Wright-brødrene hadde produsert. De kunne stå på sine gårder,

[2] USA mot Causby, U.S. 328 (1946): 256, 261. Domstolen fant at det kunne være å "ta" hvis regjeringens bruk av sitt land reelt sett hadde ødelagt verdien av eiendomen til Causby. Dette eksemplet ble foreslått for meg i Keith Aokis flotte stykke, "(intellectual) Property and Sovereignty: Notes Toward a cultural Geography of Authorship", *Stanford Law Review* 48 (1996): 1293, 1333. Se også Paul Goldstein, *Real Property* (Mineola, N.Y.: Foundation Press (1984)), 1112–13.

med døde kyllinger i hendene, og heve knyttneven mot disse nye teknologiene så mye de ville. De kunne ringe sine representanter eller til og med saksøke. Men når alt kom til alt, ville kraften i det som virket "åpenbart" for alle andre—makten til "sunn fornuft"—ville vinne frem. Deres "personlige interesser" ville ikke få lov til å nedkjempe en åpenbar fordel for fellesskapet.

Edwin Howard Armstrong er en av USAs glemte oppfinnergenier. Han dukket opp på oppfinnerscenen etter titaner som Thomas Edison og Alexander Graham Bell. Alle hans bidrag på området radioteknologi gjør han til kanskje den viktigste av alle enkeltoppfinnere i de første femti årene av radio. Han var bedre utdannet enn Michael Faraday, som var bokbinderlærling da han oppdaget elektrisk induksjon i 1831. Men han hadde like god intuisjon om hvordan radioverden virket, og ved minst tre anledninger, fant Armstrong opp svært viktig teknologier som brakte vår forståelse av radio et hopp videre.

Dagen etter julaften i 1933, ble fire patenter utstedt til Armstrong for hans mest signifikante oppfinnelse—FM-radio. Inntil da hadde forbrukerradioer vært amplitude-modulert (AM) radio. Tidens teoretikere hadde sagt at frekvens-modulert (FM) radio. De hadde rett når det gjelder et smalt bånd av spektrumet. Men Armstrong oppdaget at frekvens-modulert radio i et vidt bånd i spektrumet leverte en forbløffende gjengivelse av lyd, med mye mindre senderstyrke og støy.

Den 5. november 1935 demonstrerte han teknologien på et møte hos institutt for radioingeniører ved Empire State-bygningen i New York City. Han vred radiosøkeren over en rekke AM-stasjoner, inntil radioen låste seg mot en kringkasting som han hadde satt opp 27 kilometer unna. Radioen ble helt stille, som om den var død, og så, med en klarhet ingen andre i rommet noen gang hadde hørt fra et elektrisk apparat, produserte det lyden av en

opplesers stemme: “Dette er amatørstasjon W2AG ved Yonkers, New York, som opererer på frekvensmodulering ved to og en halv meter.”

Publikum hørte noe ingen hadde trodd var mulig:

> Et glass vann ble fylt opp foran mikrofonen i Yonkers, og det hørtes ut som et glass som ble fylt opp. … Et papir ble krøllet og revet opp, og det hørtes ut som papir og ikke som en sprakende skogbrann. … Sousa-marsjer ble spilt av fra plater og en pianosolo og et gitarnummer ble utført. … Musikken ble presentert med en livaktighet som sjeldent om noen gang før hadde vært hørt fra en radio-“musikk-boks”.[3]

Som vår egen sunn fornuft forteller oss, hadde Armstrong oppdaget en mye bedre radioteknologi. Men på tidspunktet for hans oppfinnelse, jobbet Armstrong for RCA. RCA var den dominerende aktøren i det da dominerende AM-radiomarkedet. I 1935 var det tusen radiostasjoner over hele USA, men stasjonene i de store byene var alle eid av en liten håndfull selskaper.

Presidenten i RCA, David Sarnoff, en venn av Armstrong, var ivrig etter å få Armstrong til å oppdage en måte å fjerne støyen fra AM-radio. Så Sarnoff var ganske spent da Armstrong fortalte ham at han hadde en enhet som fjernet støy fra “radio.”. Men da Armstrong demonstrerte sin oppfinnelse, var ikke Sarnoff fornøyd.

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

> Jeg trodde Armstrong ville finne opp et slags filter for å fjerne skurring fra AM-radioen vår. Jeg trodde ikke han skulle starte en revolusjon — starte en hel forbannet ny industri i konkurranse med RCA.[4]

Armstrongs oppfinnelse truet RCAs AM-herredømme, så selskapet lanserte en kampanje for å knuse FM-radio. Mens FM kan ha vært en overlegen teknologi, var Sarnoff en overlegen taktiker. En forfatter beskrev det slik,

> Kreftene til fordel for FM, i hovedsak ingeniørfaglige, kunne ikke overvinne tyngden til strategien utviklet av avdelingene for salg, patenter og juss for å undertrykke denne trusselen til selskapets posisjon. For FM utgjorde, hvis det fikk utvikle seg uten begrensninger … en komplett endring i maktforholdene rundt radio … og muligens fjerningen av det nøye begrensede AM-systemet som var grunnlaget for RCA stigning til makt.[5]

RCA holdt først teknologien innomhus, og insistere på at det var nødvendig med ytterligere tester. Da Armstrong, etter to år med testing, ble utålmodig, begynte RCA å bruke sin makt hos myndighetene til holde tilbake den generelle spredningen av FM-radio. I 1936, ansatte RCA den tidligere lederen av FCC og ga ham oppgaven med å sikre at FCC tilordnet radiospekteret på

[4] Se "Saints: The Heroes and Geniuses of the Electronic Era," første elektroniske kirke i USA, hos www.webstationone.com/fecha, tilgjengelig fra link #1 [http://free-culture.cc/notes/].
[5] Lessing, 226.

en måte som ville kastrere FM—hovedsakelig ved å flytte FM-radio til et annet band i spekteret. I første omgang lyktes ikke disse forsøkene. Men mens Armstrong og nasjonen var distrahert av andre verdenskrig, begynte RCAs arbeid å bære frukter. Like etter at krigen var over, annonserte FCC et sett med avgjørelser som ville ha en klar effekt: FM-radio ville bli forkrøplet.Lawrence lessing beskrevet det slik,

> Serien med slag mot kroppen som FM-radio mottok rett etter krigen, i en serie med avgjørelser manipulert gjennom FCC av de store radiointeressene, var nesten utrolige i deres kraft og underfundighet.[6]

For å gjøre plass i spektrumet for RCAs nyeste satsingsområde, televisjon, skulle FM-radioens brukere flyttes til et helt nytt band i spektrumet. Sendestyrken til FM-radioene ble også redusert, og gjorde at FM ikke lenger kunne brukes for å sende programmer fra en del av landet til en annen. (Denne endringen ble sterkt støttet av AT&T, på grunn av at fjerningen av FM-videresendingsstasjoner ville bety at radiostasjonene ville bli nødt til å kjøpe kablede linker fra AT&T.) Spredningen av FM-radio var dermed kvalt, i hvert fall midlertidig.

Armstrong sto imot RCAs innsats. Som svar motsto RCA Armstrongs patenter. Etter å ha bakt FM-teknologi inn i den nye standarden for TV, erklærte RCS patentene ugyldige—uten grunn og nesten femten år etter at de ble utstedet. De nektet dermed å betale ham for bruken av patentene. I seks år kjempet Armstrong en dyr søksmålskrig for å forsvare patentene sine. Til slutt, samtidig som patentene utløp, tilbød RCA et forlik så lavt

[6] Lessing, 256.

at det ikke engang dekket Armstrongs advokatregning. Beseiret, knust og nå blakk, skrev Armstrong i 1954 en kort beskjed til sin kone, før han gikk ut av et vindu i trettende etasje og falt i døden.

Dette er slik loven virker noen ganger. Ikke ofte like tragisk, og sjelden med heltemodig drama, men noen ganger er det slik det virker. Fra starten har myndigheter og myndighetsorganer blitt tatt til fange. Det er mer sannsynlig at de blir fanget når en mektig interesse er truet av enten en juridisk eller teknologisk endring. Denne mektige interessen utøver for ofte sin innflytelse hos myndighetene til å få myndighetene til å beskytte den. Retorikken for denne beskyttelsen er naturligvis alltid med fokus på fellesskapets beste. Realiteten er noe annet. Idéer som kan være solide som fjell i en tidsalder, men som overlatt til seg selv, vil falle sammen i en annen, er videreført gjennom denne subtile korrupsjonen i vår politiske prosess. RCA hadde hva Causby-ene ikke hadde: Makten til å undertrykke effekten av en teknologisk endring.

Det er ingen enkeltoppfinner av Internet. Ei heller er det en god dato som kan brukes til å markere når det ble født. Likevel har internettet i løpet av svært kort tid blitt en del av vanlige amerikaneres liv. I følge the Pew Internet and American Life-prosjektet, har 58 prosent av amerikanerne hatt tilgang til internettet i 2002, opp fra 49 prosent to år tidligere.[7] Det tallet kan uten problemer passere to tredjedeler av nasjonen ved utgangen av 2004.

Etter hvert som internett er blitt integrert inn i det vanlige liv har ting blitt endret. Noen av disse endringene er teknisk—internettet

[7] Amanda Lenhart, "The Ever-Shifting Internet Population: A New Look at Internet Access and the Digital Divide," Pew Internet and American Life Project, 15. april 2003: 6, tilgjengelig fra link #2 [http://free-culture.cc/notes/].

har gjort kommunikasjon raskere, det har redusert kostnaden med å samle inn data, og så videre. Disse tekniske endringene er ikke fokus for denne boken. De er viktige. De er ikke godt forstått. Men de er den type ting som ganske enkelt ville blir borte hvis vi alle bare slo av internettet. De påvirker ikke folk som ikke bruker internettet, eller i det miste påvirker det ikke dem direkte. De er et godt tema for en bok om internettet. Men dette er ikke en bok om internettet.

I stedet er denne boken om effekten av internettet ut over internettet i seg selv. En effekt på hvordan kultur blir skapt. Min påstand er at internettet har ført til en viktig og ukjent endring i denne prosessen. Denne endringen vil forandre en tradisjon som er like gammel som republikken selv. De fleste, hvis de la merke til denne endringen, ville avvise den. Men de fleste legger ikke engang merke til denne endringen som internettet har introdusert.

Vi kan få en følelse av denne endringen ved å skille mellom kommersiell og ikke-kommersiell kultur, ved å knytte lovens reguleringer til hver av dem. Med "kommersiell kultur" mener jeg den delen av vår kultur som er produsert og solgt eller produsert for å bli solgt. Med "ikke-kommersiell kultur" mener jeg alt det andre. Da gamle menn satt rundt i parker eller på gatehjørner og fortalte historier som unger og andre lyttet til, så var det ikke-kommersiell kultur. Da Noah Webster publiserte sin "Reader", eller Joel Barlow sin poesi, så var det kommersiell kultur.

Fra historisk tid, og for omtrent hele vår tradisjon, har ikke-kommersiell kultur i hovedsak ikke vært regulert. Selvfølgelig, hvis din historie var utuktig, eller hvis dine sanger forstyrret freden, kunne loven gripe inn. Men loven var aldri direkte interessert i skapingen eller spredningen av denne form for kultur, og lot denne kulturen være "fri". Den vanlige måten som vanlige individer delte og formet deres kultur—historiefortelling,

formidling av scener fra teater eller TV, delta i fan-klubber, deling av musikk, laging av kassetter—ble ikke styrt av lovverket.

Fokuset på loven var kommersiell kreativitet. I starten forsiktig, etter hvert betraktelig, beskytter loven insentivet til skaperne ved å tildele dem en eksklusiv rett til deres kreative verker, slik at de kan selge disse eksklusive rettighetene på en kommersiell markedsplass.[8] Dette er også, naturligvis, en viktig del av kreativitet og kultur, og det har blitt en viktigere og viktigere del i USA. Men det var på ingen måte dominerende i vår tradisjon. Det var i stedet bare en del, en kontrollert del, balansert mot det frie.

Denne grove inndelingen mellom den frie og den kontrollerte har nå blitt fjernet.[9] Internettet har satt scenen for denne fjerningen, og pressen frem av store medieaktører har loven nå påvirket det. For første gang i vår tradisjon, har de vanlige måtene som individer skaper og deler kultur havnet innen rekekvidde for reguleringene til loven, som har blitt utvidet til å dra inn i sitt kontrollområde den enorme mengden kultur og kreativitet som den aldri tidligere har nådd over. Teknologien som tok vare på den historiske balansen—mellom bruken av den delen av kulturen vår som var fri og bruken av vår kultur som krevde tillatelse—har blitt borte. Konsekvensen er at vi er mindre og mindre en fri kultur, og mer og mer en tillatelseskultur.

[8] Dette er ikke det eneste formålet med opphavsrett, men det er helt klart hovedformålet med opphavsretten slik den er etablert i føderal grunnlov. Opphavsrettslovene i delstatene beskyttet historisk ikke bare kommersielle interesse når det gjaldt publikasjoner, men også personverninteresser. Ved å gi forfattere eneretten til å publisere først, ga delstatenes opphavsrettslovene forfatterne makt til å kontrollere spredningen av fakta om seg selv. Se Samuel D. Warren og Louis Brandeis, "The Right to Privacy", Harvard Law Review 4 (1890): 193, 198–200.

[9] Se Jessica Litman, *Digital Copyright* (New York: Prometheus bøker, 2001), kap. 13.

Denne endringen blir rettferdiggjort som nødvendig for å beskytte kommersiell kreativitet. Og ganske riktig, proteksjonisme er nøyaktig det som motiverer endringen. Men proteksjonismen som rettferdiggjør endringene som jeg skal beskrive lenger ned er ikke den begrensede og balanserte typen som har definert loven tidligere. Dette er ikke en proteksjonisme for å beskytte artister. Det er i stedet en proteksjonisme for å beskytte bestemte forretningsformer. Selskaper som er truet av potensialet til internettet for å endre måten både kommersiell og ikke-kommersiell kultur blir skapt og delt, har samlet seg for å få lovgiverne til å bruke loven for å beskytte selskapene. Dette er historien om RCA og Armstrong, og det er drømmen til Causbyene.

For internettet har sluppet løs en ekstraordinær mulighet for mange til å delta i prosessen med å bygge og kultivere en kultur som rekker lagt utenfor lokale grenselinjer. Den makten har endret markedsplassen for å lage og kultivere kultur generelt, og den endringen truer i neste omgang etablerte innholdsindustrier. Internettet er dermed for industriene som bygget og distribuerte innhold i det tjuende århundret hva FM-radio var for AM-radio, eller hva traileren var for jernbaneindustrien i det nittende århundret: begynnelsen på slutten, eller i hvert fall en markant endring. Digitale teknologier, knyttet til internettet, kunne produsere et mye mer konkurransedyktig og levende marked for å bygge og kultivere kultur. Dette markedet kunne inneholde en mye videre og mer variert utvalg av skapere. Disse skaperne kunne produsere og distribuere et mye mer levende utvalg av kreativitet. Og avhengig av noen få viktige faktorer, så kunne disse skaperne tjenere mer i snitt fra dette systemet enn skaperne gjør i dag—så lenge RCA-ene av i dag ikke bruker loven til å beskytte dem selv mot denne konkurransen.

Likevel, som jeg argumenterer for i sidene som følger, er dette nøyaktig det som skjer i vår kultur i dag. Dette som er dagens ekvivalenter til tidlig tjuende århundres radio og nittende århundres jernbaner bruker deres makt til å få loven til å beskytte dem mot dette nye, mer effektive, mer levende teknologi for å bygge kultur. De lykkes i deres plan om å gjøre om internettet før internettet gjør om på dem.

Det ser ikke slik ut for mange. Kamphandlingene over opphavsrett og internettet er fjernt for de fleste. For de få som følger dem, virker de i hovedsak å handle om et enklere sett med spørsmål—hvorvidt "piratvirksomhet" vil bli akseptert, og hvorvidt "eiendomsretten" vil bli beskyttet. "Krigen" som har blitt erklært mot teknologiene til internettet—det presidenten for Motion Picture Association of America (MPAA) Jack Valenti kaller sin "egen terroristkrig"[10]—har blitt rammet inn som en kamp om å følge loven og respektere eiendomsretten. For å vite hvilken side vi bør ta i denne krigen, de fleste tenker at vi kun trenger å bestemme om hvorvidt vi er for eiendomsrett eller mot den.

Hvis dette virkelig var alternativene, så ville jeg være enig med Jack Valenti og innholdsindustrien. Jeg tror også på eiendomsretten, og spesielt på viktigheten av hva Mr. Valenti så pent kaller "kreativ eiendomsrett". Jeg tror at "piratvirksomhet" er galt, og at loven, riktig innstilt, bør straffe "piratvirksomhet", både på og utenfor internettet.

Men disse enkle trosoppfatninger maskerer et mye mer grunnleggende spørsmål og en mye mer dramatisk endring. Min frykt er at med mindre vi begynner å legge merke til denne

[10] Amy Harmon, "Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net into an Illicit Video Club," *New York Times*, 17. januar 2002.

endringen, så vil krigen for å befri verden fra internettets "pirater" også fjerne verdier fra vår kultur som har vært integrert til vår tradisjon helt fra starten.

Disse verdiene bygget en tradisjon som, for i hvert fall de første 180 årene av vår republikk, garanterte skaperne rettigheten til å bygge fritt på deres fortid, og beskyttet skaperne og innovatørene fra både statlig og privat kontroll. Det første grunnlovstillegget beskyttet skaperne fra statlig kontroll. Og som professor Neil Netanel kraftfylt argumenterer,[11] opphavsrettslov, skikkelig balansert, beskyttet skaperne mot privat kontroll. Vår tradisjon var dermed hverken Sovjet eller tradisjonen til velgjørere. I stedet skar det ut en bred manøvreringsrom hvor skapere kunne kultivere og utvide vår kultur.

Likevel har lovens respons til internettet, når det knyttes sammen til endringer i teknologien i internettet selv, ført til massiv økting av den effektive reguleringen av kreativitet i USA. For å bygge på eller kritisere kulturen rundt oss må en spørre, som Oliver Twist, om tillatelse først. Tillatelse er, naturligvis, ofte innvilget—men det er ikke ofte innvilget til den kritiske eller den uavhengige. Vi har bygget en slags kulturell adel. De innen dette adelskapet har et enkelt liv, mens de på utsiden har det ikke. Men det er adelskap i alle former som er fremmed for vår tradisjon.

Historien som følger er om denne krigen. Er det ikke om "betydningen av teknologi" i vanlig liv. Jeg tror ikke på guder, hverken digitale eller andre typer. Det er heller ikke et forsøk på å demonisere noen individer eller gruppe, jeg tro heller ikke i en djevel, selskapsmessig eller på annen måte. Det er ikke en moralsk historie. Ei heller er det et rop om hellig krig mot en industri.

[11] Neil W. Netanel, "Copyright and a Democratic Civil Society," *Yale Law Journal* 106 (1996): 283.

Det er i stedet et forsøk på å forstå en håpløst ødeleggende krig som er inspirert av teknologiene til internettet, men som rekker lang utenfor dens kode. Og ved å forstå denne kampen er den en innsats for å finne veien til fred. Det er ingen god grunn for å fortsette dagens batalje rundt internett-teknologiene. Det vil være til stor skade for vår tradisjon og kultur hvis den får lov til å fortsette ukontrollert. Vi må forstå kilden til denne krigen. Vi må finne en løsning snart.

Lik Causbyenes kamp er denne krigen, delvis, om "eiendomsrett". Eiendommen i denne krigen er ikke like håndfast som den til Causbyene, og ingen uskyldige kyllinger har så langt mistet livet. Likevel er idéene rundt denne "eiendomsretten" like åpenbare for de fleste som Causbyenes krav om ukrenkeligheten til deres bondegård var for dem. De fleste av oss tar for gitt de uvanlig mektige krav som eierne av "immaterielle rettigheter" nå hevder. De fleste av oss, som Causbyene, behandler disse kravene som åpenbare. Og dermed protesterer vi, som Causbyene,, når ny teknologi griper inn i denne eiendomsretten. Det er så klart for oss som det var fro dem at de nye teknologiene til internettet "tar seg til rette" mot legitime krav til "eiendomsrett". Det er like klart for oss som det var for dem at loven skulle ta affære for å stoppe denne inntrengingen i annen manns eiendom.

Og dermed, når nerder og teknologer forsvarer sin tids Armstrong og Wright-brødenes teknologi, får de lite sympati fra de fleste av oss. Sunn fornuft gjør ikke opprør. I motsetning til saken til de uheldige Causbyene, er sunn fornuft på samme side som eiendomseierne i denne krigen. I motsetning til hos de heldige Wright-brødrene, har internettet ikke inspirert en revolusjon til fordel for seg.

Mitt håp er å skyve denne sunne fornuften videre. Jeg har blitt stadig mer overrasket over kraften til denne idéen om

immaterielle rettigheter og, mer viktig, dets evne til å slå av kritisk tanke hos lovmakere og innbyggere. Det har aldri før i vår historie vært så mye av vår "kultur" som har vært "eid" enn det er nå. Og likevel har aldri før konsentrasjonen av makt til å kontrollere *bruken* av kulturen vært mer akseptert uten spørsmål enn det er nå.

Gåten er, hvorfor det? Er det fordi vi fått en innsikt i sannheten om verdien og betydningen av absolutt eierskap over idéer og kultur? Er det fordi vi har oppdaget at vår tradisjon med å avvise slike absolutte krav var feil?

Eller er det på grunn av at idéer om absolutt eierskap over idéer og kultur gir fordeler til RCA-ene i vår tid, og passer med vår urefleksterte intuisjon?

Er denne radikale endringen vekk fra vår tradisjon om fri kultur en forekomst av USA som korrigerer en feil fra sin fortid, slik vi gjorde det etter en blodig krig mot slaveri, og slik vi sakte gjør det mot forskjellsbehandling? Eller er denne radikale endringen vekk fra vår tradisjon med fri kultur nok et eksempel på at vårt politiske system er fanget av noen få mektige særinteresser?

Fører sunn fornuft til det ekstreme i dette spørsmålet på grunn av at sunn fornuft faktisk tror på dette ekstreme? Eller står sunn fornuft i stillhet i møtet med dette ekstreme fordi, som med Armstrong versus RCA, at den mer mektige siden har sikret seg at det har et mye mer mektig synspunkt?

Jeg forsøker ikke å være mystisk. Mine egne synspunkter er klare. Jeg mener det var riktig for sunn fornuft å gjøre opprør mot ekstremismen til Causbyene. Jeg mener det ville være riktig for sunn fornuft å gjøre opprør mot de ekstreme krav som gjøres i dag på vegne av "immaterielle rettigheter". Det som loven krever i dag er mer å mer like dumt som om lensmannen skulle

arrestere en flymaskin for å trenge inn på annen manns eiendom. Men konsekvensene av den nye dumskapen vil bli mye mer dyptgripende.

Basketaket som pågår akkurat nå senterer seg rundt to idéer: "piratvirksomhet" og "eiendom". Mitt mål med denne bokens neste to deler er å utforske disse to idéene.

Metoden min er ikke den vanlige metoden for en akademiker. Jeg ønsker ikke å pløye deg inn i et komplisert argument, steinsatt med referanser til obskure franske teoretikere—uansett hvor naturlig det har blitt for den rare sorten vi akademikere har blitt. Jeg vil i stedet begynne hver del med en samling historier som etablerer en sammenheng der disse tilsynelatende enkle idéene kan bli fullt ut forstått.

De to delene setter opp kjernen i påstanden til denne boken: at mens internettet faktisk har produsert noe fantastisk og nytt, bidrar våre myndigheter, presset av store medieaktører for å møte dette "noe nytt" til å ødelegge noe som er svært gammelt. I stedet for å forstå endringene som internettet kan gjøre mulig, og i stedet for å ta den tiden som trengs for å la "sunn fornuft" finne ut hvordan best svare på utfordringen, så lar vi de som er mest truet av endringene bruke sin makt til å endre loven—og viktigere, å bruke sin makt til å endre noe fundamentalt om hvordan vi alltid har fungert.

Jeg tror vi tillater dette, ikke fordi det er riktig, og heller ikke fordi de fleste av oss tror på disse endringene. Vi tillater det på grunn av at de interessene som er mest truet er blant de mest mektige aktørene i vår deprimerende kompromitterte prosess for å utforme lover. Denne boken er historien om nok en konsekvens for denne type korrupsjon—en konsekvens for de fleste av oss forblir ukjent med.

Del I. "Piratvirksomhet"

Helt siden loven begynte å regulere kreative eierrettigheter, har det vært en krig mot "piratvirksomhet". De presise konturene av dette konseptet, "piratvirksomhet", har vært vanskelig å tegne opp, men bildet av urettferdighet er enkelt å beskrive. Som Lord Mansfield skrev i en sak som utvidet rekkevidden for engelsk opphavsrettslov til å inkludere noteark,

> En person kan bruke kopien til å spille den, men han har ingen rett til å robbe forfatteren for profitten, ved å lage flere kopier og distribuere etter eget forgodtbefinnende.[12]

I dag er vi midt inne i en annen "krig" mot "piratvirksomhet". Internettet har fremprovosert denne krigen. Internettet gjør det mulig å effektivt spre innhold. Peer-to-peer (p2p) fildeling er blant det mest effektive av de effektive teknologier internettet muliggjør. Ved å bruke distribuert intelligens, kan p2p-systemer muliggjøre enkel spredning av innhold på en måte som ingen forestilte seg for en generasjon siden.

Denne effektiviteten respekterer ikke de tradisjonelle skillene i opphavsretten. Nettverket skiller ikke mellom deling av opphavsrettsbeskyttet og ikke opphavsrettsbeskyttet innhold. Dermed har det vært deling av en enorm mengde opphavsrettsbeskyttet innhold. Denne delingen har i sin tur ansporet til krigen, på grunn av at eiere av opphavsretter frykter delingen vil "frata forfatteren overskuddet."

[12] *Bach* v. *Longman*, 98 Eng. Rep. 1274 (1777) (Mansfield).

Krigerne har snudd seg til domstolene, til lovgiverne, og i stadig større grad til teknologi for å forsvare sin "eiendom" mot denne "piratvirksomheten". En generasjon amerikanere, advarer krigerne, blir oppdratt til å tro at "eiendom" skal være "gratis". Glem tatoveringer, ikke tenk på kroppspiercing—våre barn blir *tyver*!

Det er ingen tvil om at "piratvirksomhet" er galt, og at pirater bør straffes. Men før vi roper på bødlene, bør vi sette dette "piratvirksomhets"-begrepet i en sammenheng. For mens begrepet blir mer og mer brukt, har det i sin kjerne en ekstraordinær idé som nesten helt sikkert er feil.

Idéen høres omtrent slik ut:

> Kreativt arbeid har verdi. Når jeg bruker, eller tar, eller bygger på det kreative arbeidet til andre, så tar jeg noe fra dem som har verdi. Når jeg tar noe av verdi fra noen andre, bør jeg få tillatelse fra dem. Å ta noe som har verdi fra andre uten tillatelse er galt. Det er en form for piratvirksomhet.

Dette synet går dypt i de pågående debattene. Det er hva jussprofessor Rochelle Dreyfuss ved NYU kritiserer som "hvis verdi, så rettighet"-teorien for kreative eierrettigheter [13]—hvis det finnes verdi, så må noen ha rettigheten til denne verdien. Det er perspektivet som fikk komponistenes rettighetsorganisasjon, ASCAP, til å saksøke jentespeiderne for å ikke betale for sangene

[13] Se Rochelle Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation," *Notre Dame Law Review* 65 (1990): 397.

som jentene sagt rundt jentespeidernes leirbål.[14] Det fantes "verdi" (sangene), så det måtte ha vært en "rettighet"—til og med mot jentespeiderne.

Denne idéen er helt klart en mulig forståelse om hvordan kreative eierrettigheter bør virke. Det er helt klart et mulig design for et lovsystem som beskytter kreative eierrettigheter. Men teorien om "hvis verdi, så rettighet" for kreative eierrettigheter har aldri vært USAs teori for kreative eierrettigheter. It har aldri stått rot i vårt lovverk.

I vår tradisjon har immaterielle rettigheter i stedet vært et instrument. Det bygger fundamentet for et rikt kreativt samfunn, men er fortsatt servilt til verdien av kreativitet. Dagens debatt har snudd dette helt rundt. Vi har blitt så opptatt av å beskytte instrumentet at vi mister verdien av syne.

Kilden til denne forvirringen er et skille som loven ikke lenger bryr seg om å markere—skillet mellom å gjenpublisere noens verk på den ene siden, og bygge på og gjøre om verket på den andre. Da opphavsretten kom var det kun publisering som ble berørt. Opphavsretten i dag regulerer begge.

Før teknologiene til internettet dukket opp, betød ikke denne begrepsmessige sammenblandingen mye. Teknologiene for å publisere var kostbare, som betød at det meste av publisering var kommersiell. Kommersielle aktører kunne håndtere byrden pålagt av loven—til og med byrden som den bysantiske kompleksiteten som opphavsrettsloven har blitt. Det var bare nok en kostnad ved å drive forretning.

[14] Lisa Bannon, "The Birds May Sing, but Campers Can't Unless They Pay Up," *Wall Street Journal*, 21. august 1996, tilgjengelig fra link #3 [http://free-culture.cc/notes/]; Jonathan Zittrain, "Calling Off the Copyright War: In Battle of Property vs. Free Speech, No One Wins," *Boston Globe*, 24. november 2002.

Men da internettet dukket opp, forsvant denne naturlige begrensningen til lovens virkeområde. Loven kontrollerer ikke bare kreativiteten til kommersielle skapere, men effektivt sett kreativiteten til alle. Selv om utvidelsen ikke ville bety stort hvis opphavsrettsloven kun regulerte "kopiering", så betyr utvidelsen mye når loven regulerer så bredt og obskurt som den gjør. Byrden denne loven gir oppveier nå langt fordelene den ga da den ble vedtatt—helt klart slik den påvirker ikke-kommersiell kreativitet, og i stadig større grad slik den påvirker kommersiell kreativitet. Dermed, slik vi ser klarere i kapitlene som følger, er lovens rolle mindre og mindre å støtte kreativitet, og mer og mer å beskytte enkelte industrier mot konkurranse. Akkurat på tidspunktet da digital teknologi kunne sluppet løs en ekstraordinær mengde med kommersiell og ikke-kommersiell kreativitet, tynger loven denne kreativiteten med sinnsykt kompliserte og vage regler og med trusselen om uanstendig harde straffer. Vi ser kanskje, som Richard Florida skriver, "Fremveksten av den kreative klasse"[15] Dessverre ser vi også en ekstraordinær fremvekst av reguleringer av denne kreative klassen.

Disse byrdene gir ingen mening i vår tradisjon. Vi bør begynne med å forstå den tradisjonen litt mer, og ved å plassere dagens slag om oppførsel med merkelappen "piratvirksomhet" i sin rette sammenheng.

[15] I *The Rise of the Creative Class* (New York: Basic Books, 2002), dokumenterer Richard Florida en endring i arbeidsstokken mot kreativitetsarbeide. Hans tekst omhandler derimot ikke direkte de juridiske vilkår som kreativiteten blir muliggjort eller hindret under. Jeg er helt klart enig med ham i viktigheten og betydningen av denne endringen, men jeg tror også at vilkårene som disse endringene blir aktivert under er mye vanskeligere.

Kapittel 1. Kapittel en: Skaperne

I 1928 ble en tegnefilmfigur født. En tidlig Mikke Mus debuterte i mai dette året, i en stille flopp ved navn *Plane Crazy*. I november, i Colony teateret i New York City, ble den første vidt distribuerte tegnefilmen med synkronisert lyd, *Steamboat Willy*, vist frem med figuren som skulle bli til Mikke Mus.

Film med synkronisert lyd hadde blitt introdusert et år tidligere i filmen *The Jazz Singer*. Suksessen fikk Walt Disney til å kopiere teknikken og mikse lyd med tegnefilm. Ingen visste hvorvidt det ville virke eller ikke, og om det fungere, hvorvidt publikum villa ha sans for det. Men da Disney gjorde en test sommeren 1928, var resultatet entydig. Som Disney beskriver dette første eksperimentet,

> Et par av guttene mine kunne lese noteark, og en av dem kunne spille munnspill. Vi stappet dem inn i et rom hvor de ikke kunne se skjermen, og gjorde det slik at lyden de spilte ble sendt videre til et rom hvor våre koner og venner var plassert for å se på bildet.
>
> Guttene brukte et note- og lydeffekt-ark. Etter noen dårlige oppstarter, kom endelig lyd og handling i gang med et smell. Munnspilleren spilte melodien, og resten av oss i lydavdelingen slamret på tinnkasseroller og blåste på slide-fløyte til

> rytmen. Synkroniseringen var nesten helt riktig.
>
> Effekten på vårt lille publikum var intet mindre enn elektrisk. De reagerte nesten instinktivt til denne union av lyd og bevegelse. Jeg trodde de tullet med meg. Så de puttet meg i publikum og satte igang på nytt. Det var grufullt, men det var fantastisk. Og det var noe nytt![1]

Disneys daværende partner, og en av animasjonsverdenens mest ekstraordinære talenter, Ub Iwerks, uttalte det sterkere: "Jeg har aldri vært så begeistret i hele mitt liv. Ingenting annet har noen sinne vært like bra."

Disney hadde laget noe helt nyt, basert på noe relativt nytt. Synkronisert lyd ga liv til en form for kreativitet som sjeldent hadde—unntatt fra Disneys hender—vært noe annet en fyllstoff for andre filmer. Gjennom animasjonens tidligere historie var det Disneys oppfinnelse som satte standarden som andre måtte sloss for å oppfylle. Og ganske ofte var Disneys store geni, hans gnist av kreativitet, bygget på arbeidet til andre.

Dette er kjent stoff. Det du kanskje ikke vet er at 1928 også markerer en annen viktig overgang. I samme år laget et komedie-geni (i motsetning til tegnefilm-geni) sin siste uavhengig produserte stumfilm. Dette geniet var Buster Keaton. Filmen var *Steamboat Bill, Jr.*

Keaton ble født inn i en vauderville-familie i 1895. I stumfilm-æraen hadde han mestret bruken av bredpenslet fysisk komedie

[1] Leonard Maltin, *Of Mice and Magic: A History of American Animated Cartoons* (New York: Penguin Books, 1987), 34–35.

på en måte som tente ukontrollerbar latter fra hans publikum. *Steamboat Bill, Jr*. var en klassiker av denne typen, berømt blant film-elskere for sine utrolige stunts. Filmen var en klassisk Keaton—fantastisk populær og blant de beste i sin sjanger.

Steamboat Bill, Jr. kom før Disneys tegnefilm Steamboat Willie. Det er ingen tilfeldighet at titlene er så like. Steamboat Willie er en direkte tegneserieparodi av Steamboat Bill,[2] og begge bygger på en felles sang som kilde. Det er ikke kun fra nyskapningen med synkronisert lyd i *The Jazz Singer* at vi får *Steamboat Willie*. Det er også fra Buster Keatons nyskapning Steamboat Bill, Jr., som igjen var inspirert av sangen "Steamboat Bill", at vi får Steamboat Willie. Og fra Steamboat Willie får vi så Mikke Mus.

Denne "låningen" var ikke unik, hverken for Disney eller for industrien. Disney apet alltid etter full-lengde massemarkedsfilmene rundt ham.[3] Det samme gjorde mange andre. Tidlige tegnefilmer er stappfulle av etterapninger—små variasjoner over suksessfulle temaer, gamle historier fortalt på nytt. Nøkkelen til suksess var brilliansen i forskjellene. Med Disney var det lyden som ga gnisten til hans animasjoner. Senere var det kvaliteten på hans arbeide relativt til de masseproduserte tegnefilmene som han konkurrerte med. Likevel var disse bidragene bygget på toppen av fundamentet som var lånt. Disney

[2] Jeg er takknemlig overfor David Gerstein og hans nøyaktige historie, beskrevet på link #4 [http://free-culture.cc/notes/]. I følge Dave Smith ved the Disney Archives, betalte Disney for å bruke musikken til fem sanger i *Steamboat Willie*: "Steamboat Bill," "The Simpleton" (Delille), "Mischief Makers" (Carbonara), "Joyful Hurry No. 1" (Baron), og "Gawky Rube" (Lakay). En sjette sang, "The Turkey in the Straw," var allerede allemannseie. Brev fra David Smith til Harry Surden, 10. juli 2003, tilgjenglig i arkivet til forfatteren.

[3] Han var også tilhenger av allmannseiet. Se Chris Sprigman, "The Mouse that Ate the Public Domain," Findlaw, 5. mars 2002, fra link #5 [http://free-culture.cc/notes/].

bygget på arbeidet til andre som kom før han, og skapte noe nytt ut av noe som bare var litt gammelt.

Noen ganger var låningen begrenset, og noen ganger var den betydelig. Tenkt på eventyrene til brødrene Grimm. Hvis du er like ubevisst som jeg var, så tror du sannsynlighvis at disse fortellingene er glade, søte historier som passer for ethvert barn ved leggetid. Realiteten er at Grimm-eventyrene er, for oss, ganske dystre. Det er noen sjeldne og kanskje spesielt ambisiøse foreldre som ville våge å lese disse blodige moralistiske historiene til sine barn, ved leggetid eller hvilken som helst annet tidspunkt.

Disney tok disse historiene og fortalte dem på nytt på en måte som førte dem inn i en ny tidsalder. Han ga historiene liv, med både karakterer og lys. Uten å fjerne bitene av frykt og fare helt, gjorde han morsomt det som var mørkt og satte inn en ekte følelse av medfølelse der det før var frykt. Og ikke bare med verkene av brødrene Grimm. Faktisk er katalogen over Disney-arbeid som baserer seg på arbeidet til andre ganske forbløffende når den blir samlet: *Snøhvit* (1937), *Fantasia* (1940), *Pinocchio* (1940), *Dumbo* (1941), *Bambi* (1942), *Song of the South* (1946), *Askepott* (1950), *Alice in Wonderland* (1951), *Robin Hood* (1952), *Peter Pan* (1953), *Lady og landstrykeren* (1955), *Mulan* (1998), *Tornerose* (1959), *101 dalmatinere* (1961), *Sverdet i steinen* (1963), og *Jungelboken* (1967)—for ikke å nevne et nylig eksempel som vi bør kanskje glemme raskt, *Treasure Planet* (2003). I alle disse tilfellene, har Disney (eller Disney, Inc.) hentet kreativitet fra kultur rundt ham, blandet med kreativiteten fra sitt eget ekstraordinære talent, og deretter brent denne blandingen inn i sjelen til sin kultur. Hente, blande og brenne.

Dette er en type kreativitet. Det er en kreativitet som vi bør huske på og feire. Det er noen som vil si at det finnes ingen

kreativitet bortsett fra denne typen. Vi trenger ikke gå så langt for å anerkjenne dens betydning. Vi kan kalle dette "Disney-kreativitet", selv om det vil være litt misvisende. Det er mer presist "Walt Disney-kreativitet"—en uttrykksform og genialitet som bygger på kulturen rundt oss og omformer den til noe annet.

I 1928 var kulturen som Disney fritt kunne trekke veksler på relativt fersk. Allemannseie i 1928 var ikke veldig gammelt og var dermed ganske levende. Gjennomsnittlig vernetid i opphavsretten var bare rundt tredve år—for den lille delen av kreative verk som faktisk var opphavsrettsbeskyttet.[4] Det betyr at i tredve år, i gjennomsnitt, hadde forfattere eller kreative verks opphavsrettighetsinnehaver en "eksklusiv rett" til a kontrollere bestemte typer bruk av verket. For å bruke disse opphavsrettsbeskyttede verkene på de begrensede måtene krevde tillatelse fra opphavsrettsinnehaveren.

Når opphavsrettens vernetid er over, faller et verk i det fri og blir allemannseie. Ingen tillatelse trengs da for å bygge på eller bruke dette verket. Ingen tillatelse og dermed, ingen advokater. Allemannseie er en "advokat-fri sone". Det meste av innhold fra det nittende århundre var dermed fritt tilgjengelig for Disney å bruke eller bygge på i 1928. Det var tilgjengelig for enhver—uansett om de hadde forbindelser eller ikke, om de var rik eller ikke, om de var akseptert eller ikke—til å bruke og bygge videre på.

[4] Inntil 1976 ga opphavsrettsloven en forfatter to mulige verneperioder: en initiell periode, og en fornyingsperiode. Jeg har beregnet "gjennomsnittlig" vernetid ved å finne vektet gjennomsnitt av de totale registreringer for et gitt år, og andelen fornyinger. Hvis 100 opphavsretter ble registrert i år 1, bare 15 av dem ble fornyet, og fornyingsvernetiden er 28 år, så er gjennomsnittlig vernetid 32,2 år. Fornyingsdata og andre relevante data ligger på nettsidene tilknyttet denne boka, tilgjengelig fra link #6 [http://free-culture.cc/notes/].

Dette er slik det alltid har vært—inntil ganske nylig. For mesteparten av vår historie, har allemannseiet vært like over horisonten. Fram til 1978 var den gjennomsnittlige opphavsrettslige vernetiden aldri mer enn trettito år, som gjorde at det meste av kultur fra en og en halv generasjon tidligere var tilgjengelig for enhver å bygge på uten tillatelse fra noen. Tilsvarende for i dag ville være at kreative verker fra 1960- og 1970-tallet nå ville være fritt tilgjengelig for de neste Walt Disney å bygge på uten tillatelse. Men i dag er allemannseie presumtivt kun for innhold fra før mellomkrigstiden.

Walt Disney hadde selvfølgelig ikke monopol på "Walt Disney-kreativitet". Det har heller ikke USA. Normen med fri kultur har, inntil nylig, og unntatt i totalitære nasjoner, vært bredt utnyttet og svært universell.

Vurder for eksempel en form for kreativitet som synes underlig for mange amerikanere, men som er overalt i japansk kultur: *manga*, eller tegneserier. Japanerne er fanatiske når det gjelder tegneserier. Over 40 prosent av publikasjoner er tegneserier, og 30 prosent av publikasjonsomsetningen stammer fra tegneserier. De er over alt i det japanske samfunnet, tilgjengelig fra ethvert tidsskriftsutsalg, og i hendene på en stor andel av pendlere på Japans ekstraordinære system for offentlig transport.

Amerikanere har en tendens til å se ned på denne formen for kultur. Det er et lite attraktivt kjennetegn hos oss. Vi misforstår sannsynligvis mye rundt manga, på grunn av at få av oss noen gang har lest noe som ligner på historiene i disse "grafiske historiene" forteller. For en japaner dekker manga ethvert aspekt ved det sosiale liv. For oss er tegneserier "menn i strømpebukser". Og uansett er det ikke slik at T-banen i New York er full av folk som leser Joyse eller Hemingway for den saks skyld. Folk i ulike

kulturer skiller seg ut på forskjellig måter, og japanerne på dette interessante viset.

Men mitt formål her er ikke å forstå manga. Det er å beskrive en variant av manga som fra en advokats perspektiv er ganske merkelig, men som fra en Disneys perspektiv er ganske godt kjent.

Dette er fenomenet *doujinshi*. Doujinshi er også tegneserier, men de er slags etterapings-tegneserier. En rik etikk styrer de som skaper doujinshi. Det er ikke doujinshi hvis det *bare* er en kopi. Kunstneren må gjøre et bidrag til kunsten han kopierer ved å omforme det enten subtilt eller betydelig. En doujinshi-tegneserie kan dermed ta en massemarkeds-tegneserie og utvikle den i en annen retning—med en annen historie-linje. Eller tegneserien kan beholde figuren som seg selv men endre litt på utseendet. Det er ingen bestemt formel for hva som gjør en doujinshi tilstrekkelig "forskjellig". Men de må være forskjellige hvis de skal anses som ekte doujinshi. Det er faktisk komiteer som går igjennom doujinshi for å bli med på messer, og avviser etterapninger som bare er en kopi.

Disse etterapings-tegneseriene er ikke en liten del av manga-markedet. Det er enorme. Mer en 33 000 "sirkler" av skapere over hele Japan som produserer disse bitene av Walt Disney-kreativitet. Mer en 450 000 japanere samles to ganger i året, i den største offentlige samlingen i langet, for å bytte og selge dem. Dette markedet er parallelt med det kommersielle massemarkeds-manga-markedet. På noen måter konkurrerer det åpenbart med det markedet, men det er ingen vedvarende innsats fra de som kontrollerer det kommersielle manga-markedet for å stenge doujinshi-markedet. Det blomstrer, på tross av konkurransen og til tross for loven.

Den mest gåtefulle egenskapen med doujinshi-markedet, for de som har juridisk trening i hvert fall, er at det overhodet tillates å eksistere. Under japansk opphavsrettslov, som i hvert fall på dette området (på papiret) speiler USAs opphavsrettslov, er doujinshi-markedet ulovlig. Doujinshi er helt klart "avledede verk". Det er ingen generell praksis hos doujinshi-kunstnere for å sikre seg tillatelse hos manga-skaperne. I stedet er praksisen ganske enkelt å ta og endre det andre har laget, slik Walt Disney gjorde med *Steamboat Bill, Jr*. For både japansk og USAs lov, er å "ta" uten tillatelse fra den opprinnelige opphavsrettsinnehaver ulovlig. Det er et brudd på opphavsretten til det opprinnelige verket å lage en kopi eller et avledet verk uten tillatelse fra den opprinnelige rettighetsinnehaveren.

Likevel eksisterer dette illegale markedet og faktisk blomstrer i Japan, og etter manges syn er det nettopp fordi det eksisterer at japansk manga blomstrer. Som USAs tegneserieskaper Judd Winick fortalte meg, "I amerikansk tegneseriers første dager var det ganske likt det som foregår i Japan i dag. … Amerikanske tegneserier kom til verden ved å kopiere hverandre. … Det er slik [kunstnerne] lærer å tegne—ved å se i tegneseriebøker og ikke følge streken, men ved å se på dem og kopiere dem" og bygge basert på dem.[5]

Amerikanske tegneserier nå er ganske annerledes, forklarer Winick, delvis på grunn av de juridiske problemene med å tilpasse tegneserier slik doujinshi får lov til. Med for eksempel Supermann, fortalte Winick meg, "er det en rekke regler, og du må følge dem". Det er ting som Supermann "ikke kan" gjøre. "For en som lager tegneserier er det frustrerende å måtte begrense seg til noen parameter som er femti år gamle."

[5] For en utmerket historie, se Scott McCloud, *Reinventing Comics* (New York: Perennial, 2000).

Normen i Japan reduserer denne juridiske utfordringen. Noen sier at det nettopp er den oppsamlede fordelen i det japanske mangamarkedet som forklarer denne reduksjonen. Jussprofessor Salil Mehra ved Temple University hypnotiserer for eksempel med at manga-markedet aksepterer disse teoretiske bruddene fordi de får mangamarkedet til å bli rikere og mer produktivt. Alle ville få det verre hvis doujinshi ble bannlyst, så loven bannlyser ikke doujinshi.[6]

Problemet med denne historien, derimot, og som Mehra helt klart erkjenner, er at mekanismen som produserer denne "hold hendene borte"-responsen ikke er forstått. Det kan godt være at markedet som helhet gjør det bedre hvis doujinshi tillates i stedet for å bannlyse den, men det forklarer likevel ikke hvorfor individuelle opphavsrettsinnehavere ikke saksøker. Hvis loven ikke har et generelt unntak for doujinshi, og det finnes faktisk noen tilfeller der individuelle manga-kunstnere har saksøkt doujinshi-kunstnere, hvorfor er det ikke et mer generelt mønster for å blokkere denne "frie takingen" hos doujinshi-kulturen?

Jeg var fire nydelige måneder i Japan, og jeg stilte dette spørsmål så ofte som jeg kunne. Kanskje det beste svaret til slutt kom fra en venn i et større japansk advokatfirma. "Vi har ikke nok advokater", fortalte han meg en ettermiddag. Det er "bare ikke nok ressurser til å tiltale tilfeller som dette".

[6] Se 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. "det kan være en kollektiv økonomisk rasjonalitet som får manga- og anime-kunstnere til ikke å saksøke for opphavsrettsbrudd. Én hypotese er at alle manga-kunstnere kan være bedre stilt hvis de setter sin individuelle egeninteresse til side og bestemmer seg for ikke å forfølge sine juridiske rettigheter. Dette er essensielt en løsning på fangens dilemma."

Dette er et tema vi kommer tilbake til: at lovens regulering både er en funksjon av ordene i bøkene, og kostnadene med å få disse ordene til å ha effekt. Akkurat nå er det endel åpenbare spørsmål som presser seg frem: Ville Japan gjøre det bedre med flere advokater? Ville manga være rikere hvis doujinshi-kunstnere ble regelmessig rettsforfulgt? Ville Japan vinne noe viktig hvis de kunne stoppe praksisen med deling uten kompensasjon? Skader piratvirksomhet ofrene for piratvirksomheten, eller hjelper den dem? Ville advokaters kamp mot denne piratvirksomheten hjelpe deres klienter, eller skade dem? La oss ta et øyeblikks pause.

Hvis du er som meg et tiår tilbake, eller som folk flest når de først begynner å tenke på disse temaene, da bør du omtrent nå være rådvill om noe du ikke hadde tenkt igjennom før.

Vi lever i en verden som feirer "eiendom". Jeg er en av de som feierer. Jeg tror på verdien av eiendom generelt, og jeg tror også på verdien av den sære formen for eiendom som advokater kaller "immateriell eiendom".[7] Et stort og variert samfunn kan ikke overleve uten eiendom, og et moderne samfunn kan ikke blomstre uten immaterielle eierrettigheter.

Men det tar bare noen sekunders refleksjon for å innse at det er masse av verdi der ute som "eiendom" ikke dekker. Jeg mener ikke "kjærlighet kan ikke kjøpes med penger" men heller, at en verdi som ganske enkelt er del av produksjonsprosessen, både for kommersiell og ikke-kommersiell produksjon. Hvis Disneys

[7] Begrepet *immateriell eiendom* er av relativ ny opprinnelse. Se See Siva Vaidhyanathan, *Copyrights and Copywrongs*, 11 (New York: New York University Press, 2001). Se også Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001), 293 n. 26. Begrepet presist beskriver et sett med "eiendoms"-rettigheter—opphavsretter, patenter, varemerker og forretningshemmeligheter—men egenskapene til disse rettighetene er svært forskjellige.

animatører hadde stjålet et sett med blyanter for å tegne Steamboat Willie, vi ville ikke nølt med å dømme det som galt—selv om det er trivielt og selv om det ikke blir oppdaget. Men det var intet galt, i hvert fall slik loven var da, med at Disney tok fra Buster Keaton eller fra Grimm-brødrene. Det var intet galt med å ta fra Keaton, fordi Disneys bruk ville blitt ansett som "rimelig". Det var intet galt med å ta fra brødrene Grimm fordi deres verker var allemannseie.

Dermed, selv om de tingene som Disney tok—eller mer generelt, tingene som blir tatt av enhver som utøver Walt Disney-kreativitet—er verdifulle, så anser ikke vår tradisjon det som galt å ta disse tingene. Noen ting forblir frie til å bli tatt i en fri kultur og denne friheten er bra.

Det er det samme med doujinshi-kulturen. Hvis en doujinshi-kunstner brøt seg inn på kontoret til en forlegger, og stakk av med tusen kopier av hans siste verk—eller bare en kopi—uten å betale, så ville vi uten å nøle si at kunstneren har gjort noe galt. I tillegg til å ha trengt seg inn på andres eiendom, ville han ha stjålet noe av verdi. Loven forbyr stjeling i enhver form, uansett hvor stort eller lite som blir tatt.

Likevel er det en åpenbar motvilje, selv blant japanske advokater, for å si at etterapende tegneseriekunstnere "stjeler". Denne formen for Walt Disney-kreativitet anses som rimelig og riktig, selv om spesielt advokater synes det er vanskelig å forklare hvorfor.

Det er det same med tusen eksempler som dukker opp over alt med en gang en begynner å se etter dem. Forskerne bygger på arbeidet til andre forskere uten å spørre eller betale for privilegiet. ("Unnskyld meg, professor Einstein, men kan jeg få tillatelse til å bruke din relativitetsteori til å vise at du tok

feil om kvantefysikk?") Teatertropper viser frem bearbeidelser av verkene til Shakespeare uten å sikre seg noen tillatelser. (Er det *noen* som tror at Shakespeare ville vært mer spredt i vår kultur om det var et sentralt rettighetsklareringskontor for Shakespeare som alle som laget Shakespeare-produksjoner måtte appellere til først?) Og Hollywood går igjennom sykluser med en bestemt type filmer: fem astroidefilmer i slutten av 1990-tallet, to vulkankatastrofefilmer i 1997.

Skapere her og overalt har alltid og til alle tider bygd på kreativiteten som eksisterte før og som omringer dem nå. Denne byggingen er alltid og overalt i det minste delvis gjort uten tillatelse og uten å kompensere den opprinnelige skaperen. Intet samfunn, fritt eller kontrollert, har noen gang krevd at enhver bruk skulle bli betalt for eller at tillatelse for Walt Disney-kreativitet alltid måtte skaffes. Istedet har ethvert samfunn latt en bestemt bit av sin kultur være fritt tilgjengelig for alle å ta—frie samfunn muligens i større grad enn ufrie, men en viss grad i alle samfunn.

Det vanskelige spørsmålet er derfor ikke *om* en kultur er fri. Alle kulturer er frie til en viss grad. Det vanskelige spørsmålet er i stedet "*hvor* fri er denne kulturen er?" Hvor mye og hvor bredt, er kulturen fritt tilgjengelig for andre å ta, og bygge på? Er den friheten begrenset til partimedlemmer? Til medlemmer av kongefamilien? Til de ti største selskapene på New York-børsen? Eller er at frihet bredt tilgjengelig? Til kunstnere generelt, uansett om de er tilknyttet til nasjonalmuseet eller ikke? Til musikere generelt, uansett om de er hvite eller ikke? Til filmskapere generelt, uansett om de er tilknyttet et studio eller ikke?

Frie kulturer er kulturer som etterlater mye åpent for andre å bygge på. Ufrie, eller tillatelse-kulturer etterlater mye mindre. Vår var en fri kultur. Den er på tur til å bli mindre fri.

Kapittel 2. Kapittel to: “Kun etter-apere”

I 1839 fant Louis Daguerre opp den første praktiske teknologien for å produsere det vi ville kalle “fotografier”. Rimelig nok ble de kalt “daguerreotyper”. Prosessen var komplisert og kostbar, og feltet var dermed begrenset til profesjonelle og noen få ivrige og velstående amatører. (Det var til og med en amerikansk Daguerre-forening som hjalp til med å regulere industrien, slik alle slike foreninger gjør, ved å holde konkurransen ned slik at prisene var høye.)

Men til tross for høye priser var etterspørselen etter daguerreotyper sterk. Dette inspirerte oppfinnere til å finne enklere og billigere måter å lage “automatiske bilder”. William Talbot oppdaget snart en prosess for å lage “negativer”. Men da negativene var av glass, og måtte holdes fuktige, forble prosessen kostbar og tung. På 1870-tallet ble tørrplater utviklet, noe som gjorde det enklere å skille det å ta et bilde fra å fremkalle det. Det var fortsatt plater av glass, og dermed var det fortsatt ikke en prosess som var innenfor rekkevidden til de fleste amatører.

Den teknologiske endringen som gjorde masse-fotografering mulig skjedde ikke før i 1888, og det var takket være en eneste mann. George Eastman, selv en amatørfotograf, var frustrert over den plate-baserte fotografi-teknologien. I et lysglimt av innsikt (for å si det slik), forsto Eastman at hvis filmen kunne gjøres bøyelig, så kunne den holdes på en enkel rull. Denne rullen kunne så sendes til en fremkaller, og senke kostnadene til fotografering vesentlig. Ved å redusere kostnadene, forventet Eastman at han dramatisk kunne utvide andelen fotografer.

Eastman utviklet bøyelig, emulsjons-belagt papirfilm og plasserte ruller med dette i små, enkle kameraer: Kodaken. Enheten ble markedsfør med grunnlag dens enkelhet. "Du trykker på knappen og vi fikser resten."[1] Som han beskrev det i *The Kodak Primer*:

> Prinsippet til Kodak-systemet er skillet mellom arbeidet som enhver kan utføre når en tar fotografier, fra arbeidet som kun en ekspert kan gjøre. … Vi utstyrte alle, menn, kvinner og barn, som hadde tilstrekkelig intelligens til å peke en boks i riktig retning og trykke på en knapp, med et instrument som helt fjernet fra praksisen med å fotografere nødvendigheten av uvanlig utstyr eller for den del, noe som helst spesiell kunnskap om kunstarten. Det kan tas i bruk uten forutgående studier, uten et mørkerom og uten kjemikalier.[2]

For $25 kunne alle ta bilder. Det var allerede film i kameraet, og når det var brukt ble kameraet returnert til en Eastman-fabrikk hvor filmen ble fremkalt. Etter hvert, naturligvis, ble både kostnaden til kameraet og hvor enkelt et var å bruke forbedret. Film på rull ble dermed grunnlaget for en eksplosiv vekst i fotografering blant folket. Eastmans kamera ble lagt ut for salg i 1888, og et år senere trykket Kodak mer enn seks tusen negativer om dagen. Fra 1888 til 1909, mens produksjonen i industrien vokste med 4,7 prosent, økte salget av fotografisk utstyr og

[1] Reese V. Jenkins, *Images and Enterprise* (Baltimore: Johns Hopkins University Press, 1975), 112.
[2] Brian Coe, *The Birth of Photography* (New York: Taplinger Publishing, 1977), 53.

materiale med 11 prosent.[3] Salget til Eastman Kodak i samme periode opplevde en årlig vekst på over 17 prosent.[4]

Den virkelige betydningen av oppfinnelsen til Eastman, var derimot ikke økonomisk. Den var sosial. Profesjonell fotografering ga individer et glimt av steder de ellers aldri ville se. Amatørfotografering ga dem muligheten til å arkivere deres liv på en måte som de aldri hadde vært i stand til tidligere. Som forfatter Brian Coe skriver, "For første gang tilbød fotoalbumet mannen i gata et permanent arkiv over hans familie og dens aktiviteter. … For første gang i historien fantes det en autentisk visuell oppføring av utseende og aktivitet til vanlige mennesker laget uten [skriveför] tolkning eller forutinntatthet."[5]

På denne måten var Kodak-kameraet og film uttrykksteknologier. Blyanten og malepenselen var selvfølgelig også en uttrykksteknologi. Men det tok årevis med trening før de kunne bli brukt nyttig og effektiv av amatører. Med Kodaken var uttrykk mulig mye raskere og enklere. Barrièren for å uttrykke seg var senket. Snobber ville fnyse over "kvaliteten", profesjonelle ville avvise den som irrelevant. Men se et barn studere hvordan best velge bildemotiv og du får følelsen av hva slags kreativitetserfaring som Kodaken muliggjorde. Demokratiske verktøy ga vanlige folk en måte å uttrykke dem selv på enklere enn noe annet verktøy kunne ha gjort før.

Hva krevdes for at denne teknologien skulle blomstre. Eastmans genialitet var åpenbart en viktig del. Men den juridiske miljøet som Eastmans oppfinnelse vokste i var også viktig. For tidlig i historien til fotografering, var det en rekke av rettsavgjørelser

[3] Jenkins, 177.
[4] Basert på et diagram i Jenkins, s. 178.
[5] Coe, 58.

som godt kunne ha endret kursen til fotograferingen betydelig. Domstoler ble spurt om fotografen, amatør eller profesjonell, måtte ha ha tillatelse før han kunne fange og trykke hvilket som helst bilde han ønsket. Svaret var nei.[6]

Argumentene til fordel for å kreve tillatelser vil høres overraskende kjent ut. Fotografen "tok" noe fra personen eller bygningen som ble fotografert—røvet til seg noe av verdi. Noen trodde til og med at han tok målets sjel. På samme måte som Disney ikke var fri til å ta blyantene som hans animatører brukte til å tegne Mikke, så skulle heller ikke disse fotografene være fri til å ta bilder som de fant verdi i.

På den andre siden var et argument som også bør bør være kjent. Joda, det var kanskje noe av verdi som ble brukt. Men borgerne burde ha rett til å fange i hvert fall de bildene som var tatt av offentlig område. (Louis Brandeis, som senere ble høyesterettsjustitiarus, mente regelen skulle være annerledes for bilder tatt av private områder.[7]) Det kan være at dette betyr at fotografen får noe for ingenting. På samme måte som Disney kunne hente inspirasjon fra *Steamboat Bill, Jr.* eller Grimm-brødrene, så burde fotografene stå fritt til å fange et bilde uten å kompensere kilden.

Heldigvis for Mr. Eastman, og for fotografering generelt, gikk disse tidligere avgjørelsene i favør av piratene. Generelt ble det ikke nødvendig å sikre seg tillatelse før et bilde kunne tas og deles med andre. I stedet var det antatt at tillatelse var gitt. Frihet var utgangspunktet. (Loven ga etter en stund et unntak for berømte

[6] For illustrerende saker, se for eksempel, *Pavesich* mot *N.E. Life Ins. Co*., 50 S.E. 68 (Ga. 1905); *Foster-Milburn Co*. mot *Chinn*, 123090 S.W. 364, 366 (Ky. 1909); *Corliss* mot *Walker*, 64 F. 280 (Mass. Dist. Ct. 1894).

[7] Samuel D. Warren og Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review* 4 (1890): 193.

personer: kommersielle fotografer som tok bilder av berømte personer for kommersielle formål har flere begrensninger enn resten av oss. Men i det vanlige tilfellet, kan bildet fanges uten å klarere rettighetene for a fange det.[8])

Vi kan kun spekulere om hvordan fotografering ville ha utviklet seg om loven hadde slått ut den andre veien. Hvis den hadde vært mot fotografen, da ville fotografen måttet dokumentere at tillatelse var på plass. Kanskje Eastman Kodak også måtte ha dokumentert at tillatelse var gitt, før de utviklet filmen som bildene ble fanget på. Tross alt, hvis tillatelse ikke var gitt, da ville Eastman Kodak ha nytt fordeler fra "tyveriet" begått av fotografer. På samme måte som Napster nøt fordeler fra opphavsrettsbrudd utført av Napster-brukere, så ville Kodak nytt fordeler fra "bilde-rettighets"-brudd til deres fotografer. Vi kan forestille oss at loven da krevede at en form for tillatelse ble vist frem før et selskap fremkalte bildene. Vi kan forestille oss et system bli utviklet for å legge frem slike tillatelser.

Men selv om vi kan tenke oss dette godkjenningssystemet, så vil det være svært vanskelig å se hvordan fotografering skulle ha blomstret slik det gjorde hvis det var bygd inn krav om godkjenning i reglene som styrte det. Fotografering ville eksistert. Det ville ha økt sin betydning over tid. Profesjonelle ville ha fortsatt å bruke teknologien slik de gjorde—siden profesjonelle enklere kunne håndtert byrdene pålagt dem av godkjenningssystemet. Men spredningen av fotografering til vanlige folk villa aldri ha skjedd. Veksten det skapte kunne aldri ha skjedd. Og det ville uten tvil aldri vært realisert en slik vekst i

[8] Se Melville B. Nimmer, "The Right of Publicity", *Law and Contemporary Problems* 19 (1954): 203; William L. Prosser, "Privacy", *California Law Review* 48 (1960) 398–407; *White* mot *Samsung Electronics America, Inc*., 971 F. 2d 1395 (9th Cir. 1992), sert. nektet, 508 U.S. 951 (1993).

demokratisk uttrykksteknologi. Hvis du kjører gjennom området Presidio i San Francisco, kan det hende du ser to gusjegule skolebusser overmalt med fargefulle og iøynefallende bilder, og logoen "Just Think!" i stedet for navnet på en skole. Men det er lite som er "bare" mentalt i prosjektene som disse bussene muliggjør. Disse bussene er fylt med teknologi som lærer unger å fikle med film. Ikke filmen til Eastman. Ikke en gang filmen i din videospiller. I stedet er det snakk om "filmen" til digitale kamera. Just Think! er et prosjekt som gjør det mulig for unger å lage filmer, som en måte å forstå og kritisere den filmede kulturen som de finner over alt rundt seg. Hvert år besøker disse bussene mer enn tredve skoler og gir mellom tre hundre og fire hundre barn muligheten til å lære noe om media ved å gjøre noe med media. Ved å gjøre, så tenker de. Ved å fikle, så lærer de.

Disse bussene er ikke billige, men teknologien de har med seg blir billigere og billigere. Kostnaden til et høykvalitets digitalt videosystem har falt dramatisk. Som en analytiker omtalte det, "for fem år siden kostet et godt sanntids redigerinssystem for digital video $25 000. I dag kan du få profesjonell kvalitet for $595."[9] Disse bussene er fylt med teknologi som ville kostet hundre-tusenvis av dollar for bare ti år siden. Og det er nå mulig å forestille seg ikke bare slike busser, men klasserom rundt om i landet hvor unger kan lære mer og mer av det lærerne kaller "medie-skriveføre" eller "mediekompetanse".

"Media-skriveføre," eller "mediekompetanse" som administrerende direktør Dave Yanofsky i Just Think!, sier det, "er evnen til … å forstå, analysere og dekonstruere mediebilder. Dets mål er å gjøre [unger] i stand til å forstå hvordan mediene

[9] H. Edward Goldberg, "Essential Presentation Tools: Hardware and Software You Need to Create Digital Multimedia Presentations," cadalyst, februar 2002, tilgjengelig fra link #7 [http://free-culture.cc/notes/].

fungerer, hvordan de er konstruert, hvordan de blir levert, og hvordan folk bruker dem".

Dette kan virke som en litt rar måte å tenke på "skriveføre". For de fleste handler skriveføre å kunne lese og skrive. "Skriveføre" folk kjenner ting som Faulkner, Hemingway og å kjenne igjen delte infinitiver.

Mulig det. Men i en verden hvor barn ser i gjennomsnitt 390 timer med TV-reklaager i året, eller generelt mellom 20 000 og 45 000 reklameinnslag,[10] så er det mer og mer viktig å forstå "gramatikken" til media. For på samme måte som det er en gramatikk for det skrevne ord, så er det også en for media. Og akkurat slik som unger lærer å skrive ved å skrive masse grusom prosa, så lærer unger å skrive media ved å konstruere masse (i hvert fall i begynnelsen) grusom media.

Et voksende felt av akademikere og aktivister ser denne formen for skriveføre som avgjørende for den neste generasjonen av kultur. For selv om de som har skrevet forstår hvor vanskelig det er å skrive—hvor vanskelig det er å bestemme rekkefølge i historien, å holde på oppmerksomheten hos leseren, å forme språket slik at det er forståelig—så har få av oss en reell følelse av hvor vanskelig medier er. Eller mer fundamentalt, de færreste av av oss har en følelse for hvordan media fungerer, hvordan det holder et publikum eller leder leseren gjennom historien, hvordan det utløser følelser eller bygger opp spenningen.

Det tok filmkusten en generasjon før den kunne gjøre disse tingene bra. Men selv da, så var kunnskapen i filmingen, ikke i

[10] Judith Van Evra, *Television and Child Development* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1990); "Findings on Family and TV Study", *Denver Post*, 25. mai 1997, B6.

å skrive om filmen. Ferdigheten kom fra erfaring med å lage en film, ikke fra å lese en bok om den. En lærer å skrive ved å skrive, og deretter reflektere over det en har skrevet. En lærer å skrive med bilder ved å lage dem, og deretter reflektere over det en har laget.

Denne gramatikken har endret seg etter hvert som media har endret seg. Da det kun var film, som Elizabeth Daley, administrerende direktør ved Universitetet i Sør-Californias Anneberg-senter for kommunkasjon og rektor ved USC skole for Kino-Televisjon, forklarte for meg, var gramatikken om "plasseringen av objekter, farger, … rytme, skritt og tekstur".[11] Men etter hvert som datamaskiner åpner opp et interaktivt rom hvor en historie blir "spillt" i tillegg til opplevd, endrer gramatikken seg. Den enkle kontrollen til forstellerstemmen er forsvunnet, og dermed er andre teknikker nødvendig. Forfatter Michael Crichton hadde mestret fortellerstemmen til science fiction. Men da han forsøkte å lage et dataspill basert på et av sine verk, så var det et nytt håndverk han måtte lære. Det var ikke åpenbart hvordan en leder folk gjennom et spill uten at de far følelsen av å ha blitt ledet, selv for en enormt vellykket forfatter.[12]

Akkurat denne ferdigheten er håndverket en lærer til de som lager filmer. Som Daley skriver, "folk er svært overrasket over hvordan de blir ledet gjennom en film. Den er perfekt konstruert for å hindre deg fra å se det, så du aner det ikke. Hvis en som lager filmer lykkes så vet du ikke at du har vært ledet." Hvis du vet at du ble ledet igjennom en film, så har filmen feilet.

[11] Intervju med Elizabeth Daley og Stephanie Barish, 13. desember 2002.
[12] Se Scott Steinberg, "Crichton Gets Medieval on PCs", E!online, 4. november 2000, tilgjengelig fra link #8 [http://free-culture.cc/notes/]; "Timeline", 22. november 2000, tilgjengelig fra link #9 [http://free-culture.cc/notes/].

Likevel er innsatsen for å utvide skriveføren—til en som går ut over tekst til å ta med lyd og visuelle elementer—handler ikke om å lage bedre filmregisører. Målet er ikke å forbedre filmyrket i det hele tatt. I stedet, som Daley forklarer,

> Fra mitt perspektiv er antagelig det viktigste digitale skillet ikke om en har tilgang til en boks eller ikke. Det er evnen til å ha kontroll over språket som boksen bruker. I motsatt fall er det bare noen få som kan skrive i dette språket, og alle oss andre er redusert til å ikke kunne skrive.

“ikke kunne skrive.” Passive mottakerne av kultur produsert andre steder. Sofapoteter. Forbrukere. Dette er medieverden fra det tjuende århundre.

Det tjueførste århundret kan bli annerledes. Dette er et kritisk punkt: Det kan bli både lesing og skriving. Eller i det minste lesing og bedre forståelse for håndverket å skrive. Eller det beste, lesing og forstå verktøyene som gir skriving mulighet til å veilede eller villede. Målet med enhver skriveførhet, og denne skriveførheten spesielt, er å “gi folket myndighet til å velge det språket som passer for det de trenger å lage eller uttrykke”.[13] Det gir studenter mulighet “til å kommunisere i språket til det tjueførste århundret”.[14]

Som det alle andre språk, læres dette språket lettere for noen enn for andre. Det kommer ikke nødvendigvis lettere for de som gjør det godt skriftlig. Daley og Stephanie Barish, direktør for Institutt for Multimedia-skriveføre ved Annenberg-senteret, beskriver et spesielt sterkt eksempel fra et prosjekt de gjennomførte i en

[13] Intervju med Daley og Barish.
[14] ibid.

videregående skole. Den videregående skolen var en veldig fattig skole i den indre byen i Los Angeles. Etter alle tradisjonelle måleenheter for suksess var denne skolen en fiasko. Men Daley og Barish gjennomførte et program som ga ungene en mulighet til å bruke film til å uttrykke sine meninger om noe som studentene visste noe om—våpen-relatert vold.

Klassen møttes fredag ettermiddag, og skapte et relativt nytt problem for skolen. Mens utfordringen i de fleste klasser var å få ungene til å dukke opp, var utfordringen for denne klassen å holde dem unna. “Ungene dukket opp 06:00, og dro igjen 05:00 på natta”, sa Barish. De jobbet hardere enn i noen annen klasse for å gjøre det utdanning burde handle om—å lære hvordan de skulle uttrykke seg.

Ved å bruke hva som helst av “fritt tilgjengelig web-stoff de kunne finne”, og relativt enkle verktøy som gjorde det mulig for ungene å blande “bilde, lyd og tekst”, sa Barish at denne klassen produserte en serie av prosjekter som viste noe om våpen-basert vold som få ellers ville forstå. Dette var et tema veldig nært livene til disse studentene. Prosjektet “ga dem et verktøy og bemyndiget dem slik at de både ble i stand til å forstå det og snakke om det”, forklarer Barish. Dette verktøyet lyktes med å skape uttrykk—mye mer vellykket og kraffylt enn noe som hadde blitt laget ved å kun bruke tekst. “Hvis du hadde sagt til disse studentene at 'du må gjøre dette i tekstform', så hadde de bare kastet hendene i været og gått og gjort noe annet”, forklarer Barish. Delvis, uten tvil, fordi å uttrykke seg selv i tekstform ikke er noe disse studentene gjør godt. Heller ikke er tekstform en form som kan uttrykke *disse* idéene godt. Kraften i denne meldingen avhenger av dens forbindelse med denne for for uttrykk.

“Men handler ikke utdanning om å lære unger å skrive?” spurte jeg. Jo delvis, naturligvis. Men hvorfor lærer vi unger å skrive?

Utdanning, forklarer Daley, handler om å gi studentene en måte å “konstruere mening”. Å si at det kun betyr skriving er som å si at å lære bort skriving kun handler om å lære ungene å stave. Tekstforming er bare en del—og i større grad ikke den kraftigste delen—for å konstruere mening. Som Daley forklarte i den mest rørende delen av vårt intervju,

> Det du ønsker er å gi disse studentene en måte å konstruere mening. Hvis alt du gir dem er tekst, så kommer de ikke til å gjøre det. Fordi de kan ikke. Du vet, du har Johnny som kan se på en video, han kan spille på et TV-spill, han kan spre grafitti over alle dine vegger, han kan ta fra hverandre bilen din, og han kan gjøre alle mulige andre ting. Men han kan ikke lese teksten din. Så Jonny kommer på skolen og du sier “Johnny, du er analfabet. Ingenting du gjør betyr noe”. Vel, da har Johnny to valg: Han kan avvise deg eller han kan avvise seg selv. Hvis han har et sunt ego så vil han avvise deg. Men hvis du i stedet sier, “Vel, med alle disse tingene som du kan gjøre, la oss snakke om dette temaet. Spill musikk til meg som du mener reflekterer over temaet, eller vis meg bilder som du mener reflekterer over temaet, eller tegn noe til meg som reflektere temaet”. Ikke ved å gi en unge et videokamera og … si “La oss dra å ha det morsomt med videokameraet og lage en liten film”. Men istedet, virkelig hjelpe deg å ta disse elementene som du forstår, som er ditt språk, og konstruer mening om temaet.…

> Dette bemyndiger enormt. Og det som skjer til slutt, selvfølgelig, som det har skjedd i alle disse klassene, er at de stopper opp når de treffer faktumet “jeg trenger å forklare dette, og da trenger jeg virkelig å skrive noe”. Og som en av lærerne fortalte Stephanie, de vil skrive om avsnittet 5, 6, 7, 8 ganger, helt til det blir riktig.
>
> Fordi de trengte det. Det var en grunn til å gjøre det. De trengte å si noe, i motsetning til å kun danse etter din pipe. De trengte faktisk å bruke det språket de ikke håndterte veldig bra. Men de hadde begynt å forstå at de hadde mye gjennomslagskraft med dette språket.

Da to fly krasjet inn i World Trade Center, og et annet inn i Pentagon, og et fjerde inn i et jorde i Pennsylvania, snudde alle medier verden rundt seg til denne nyheten. Ethvert moment for omtreng hver eneste dag den uka, og ukene som fulgte gjenfortalte TV spesielt, men media generelt, historien om disse hendelsene som vi nettopp hadde vært vitne til. Genialiteten i denne forferdelige terrorhandlingen var at det forsinkede andre-angrepet var perfekt tidsatt for å sikre at hele verden ville være der for å se på.

Disse gjenfortellingene ga en økende familiær følelse. Det var musikk spesiallaget for mellom-innslagene, og avansert grafikk som blinket tvers over skjermen. Det var en formel for intervjuer. Det var “balanse” og seriøsitet. Dette var nyheter koreaografert slik vi i stadig større grad forventer det, “nyheter som underholdning”, selv om underholdningen er en tragedie.

Men i tillegg til disse produserte nyhetene om “tragedien 11. september”, kunne de av oss som er knyttet til internettet i

tillegg se en svært annerledes produksjon. Internettet er fullt av fortellinger om de samme hendelsene. Men disse internet-fortellingene hadde en veldig annerledes smak. Noen folk konstruerte foto-sider som fanget bilder fra hele verden og presenterte dem som lysbildepresentasjoner med tekst. Noen tilbød åpne brev. Det var lydopptak. Det var sinne og frustrasjon. Det var forsøk på å tilby en sammenheng. Det var, kort og godt, en ekstraordinær verdensomspennende låvebygging, slik Mike Godwin bruker begrepet i hans bok *Cyber Rights*, rundt en nyhetshendelse som hadde fanget oppmerksomheten til hele verden. Det var ABC og CBS, men det var også internettet.

Det er ikke så enkelt som at jeg ønsker å lovprise internettet—selv om jeg mener at folkene som støtter denne formen for tale bør lovprises. Jeg ønsker i stedet å peke på viktigheten av denne formen for tale. For på samme måte som en Kodak, gjør internettet folk i stand til å fange bilder. Og på samme måte som med en film laget av en av studentene på “Just Think!”-bussen, kan visuelle bilder bli blandet med lyd og tekst.

Men i motsetning til en hvilken som helst teknologi for å enkelt fange bilder, tillater internettet at en nesten umiddelbart deler disse kreasjonene med et ekstraordinært antall menesker. Dette er noe nytt i vår tradisjon—ikke bare kan kultur fanges inn mekanisk, og åpenbart heller ikke at hendelser blir kommentert kritisk, men at denne blandingen av bilder, lyd og kommentar kan spres vidt omkring nesten umiddelbart.

11. september var ikke et avvik. Det var en start. Omtrent på samme tid, begynte en form for kommunkasjon som hadde vokst dramatisk å komme inn i offentlig bevissthet: web-loggen, eller blog. Bloggen er en slags offentlig dagbok, og i noen kulturer, slik som i Japan, fungerer den veldig lik en dagbok. I disse kulturene

registrerer den private fakta på en offentlig måte—det er en slags elektronisk *Jerry Springer*, tilgjengelig overalt i verden.

Men i USA har blogger inntatt en svært annerledes karakter. Det er noen som bruker denne plassen til å snakke om sitt private liv. Men det er mange som bruker denne plassen til å delta i offentlig debatt. Diskuterer saker med offentlig interesse, kritiserer andre som har feil synspunkt, kritisere politigere for avgjørelser de tar, tilbyr løsninger på problemer vi alle ser. Blogger skaper en følelse av et virtuelt offentlig møte, men et hvor vi ikke alle håper å være tilstede på samme tid og hvor konversasjonene ikke nødvendigvis er koblet sammen. De beste av bloggoppføringene er relativt korte. De peker direkte til ord bruk av andre, kritiserer dem eller bidrar til dem. Det kan argumenteres for at de er den viktigste form for ukoreografert offentlig debatt som vi har.

Dette er en sterk uttalelse. Likevel sier den like mye om vårt demokrati som den sier om blogger. Dette er delen av USA som det er mest vanskelig for oss som elsker USA å akseptere: vårt demokrati har svunnet hen. Vi har naturligvis valg, og mesteparten av tiden tillater domstolene at disse valgene teller. Et relativt lite antall mennesker stemmer i disse valgene. Syklusen med disse valgene har blitt totalt profesjonalisert og rutinepreget. De fleste av oss tenker på dette som demokrati.

Men demokrati har aldri kun handlet om valg. Demokrati betyr at folket styrer, og å styre betyr noe mer enn kun valg. I vår tradisjon betyr det også kontroll gjennom gjennomtenkt meningsbrytning. Dette var idéen som fanget fantasien til Alexis de Tocqueville, den franske nittenhundretalls-advokaten som skrev den viktigste historien om det tidlige “demokratiet i Amerika”. Det var ikke allmenn stemmerett som fascinerte han—det var juryen, en institusjon som ga vanlige folk retten til å velge liv eller død før andre borgere. Og det som fascinerte han mest var at juryen ikke

bare stemte over hvilket resultat de ville legge frem. De diskuterte. Medlemmene argumenterte om hva som var "riktig" resultat, de forsøkte å overbevise hverandre om "riktig"resultat, og i hvert fall i kriminalsaker måtte de bli enige om et enstemming resultat for at prosessen skulle avsluttes.[15]

Og likevel fremheves denne institusjonen i USA i dag. Og i dets sted er det ingen systematisk innsats for å muliggjøre borger-diskusjon. Noen gjør en innsats for å lage en slik institusjon.[16] Og i noen landsbyer i New England er det noe i nærheten av diskusjon igjen. Men for de fleste av oss mesteparten av tiden, er det ingen tid og sted for å gjennomføre "demokratisk diskusjon".

Mer merkelig er at en generelt sett ikke engang har aksept for at det skal skje. Vi, det mektigste demokratiet i verden, har utviklet en sterk norm mot å diskutere politikk. Det er greit å diskutere politikk med folk du er enig med, men det er uhøflig å diskutere politikk med folk du er uenig med. Politisk debatt blir isolert, og isolert diskusjon blir mer ekstrem.[17] Vi sier det våre venner vil høre, og hører veldig lite utenom hva våre venner sier.

Så kommer bloggen. Selve bloggens arkitektur løser en del av dette problemet. Folk publiserer det de ønsker å publisere, og folk leser det de ønsker å lese. Det vanskeligste tiden er synkron tid. Teknologier som muliggjør asynkron kommunasjons, slik som epost, øker muligheten for kommunikasjon. Blogger gjør det mulig med offentlig debatt uten at folket noen gang trenger å samle seg på et enkelt offentlig sted.

[15] Se for eksempel Alexis de Tocqueville, *Democracy in America*, bk. 1, overs. Henry Reeve (New York: Bantam Books, 2000), kap. 16.
[16] Bruce Ackerman og James Fishkin, "Deliberation Day", *Journal of Political Philosophy* 10 (2) (2002): 129.
[17] Cass Sunstein, *Republic.com* (Princeton: Princeton University Press, 2001), 65–80, 175, 182, 183, 192.

Men i tillegg til arkitektur, har blogger også løst problemet med normer. Det er (ennå) ingen norm i blogg-sfæren om å ikke snakke om politikk. Sfæren er faktisk fylt med politiske innlegg, både på høyre- og venstresiden. Noen av de mest populære stedene er konservative eller libertarianske, men det er mange av alle politiske farger. Til og med blogger som ikke er politiske dekker politiske temaer når anledningen krever det.

Betydningene av disse bloggene er liten nå, men ikke ubetydelig. Navnet Howard Dean har i stor grad forsvunnet fra 2004-presidentvalgkampen bortsett fra hos noen få blogger. Men selv om antallet lesere er lavt, så har det å lese dem en effekt.

En direkte effekt er på historier som hadde en annerledes livssyklus i de store mediene. Trend Lott-affæren er et eksempel. Da Logg "sa feil" på en fest for senator Storm Thurmond, og essensielt lovpriste segregeringspolitikken til Thurmond, regnet han ganske riktig med at historien ville forsvinne fra de store mediene i løpet av førtiåtte timer. Det skjedde. Men han regnet ikke med dens livssyklus i bloggsfæren. Bloggerne fortsatte å undersøke historien. Etter hvert dukket flere og flere tilfeller av tilsvarende "feiluttalelser" opp. Så dukket historien opp igjen hos de store mediene. Lott ble til slutt tvinget til å trekke seg som leder for senatets flertall.[18]

Denne annerledes syklusen er mulig på grunn av at et tilsvarende kommersielt press ikke eksisterer hos blogger slik det gjør hos andre kanaler. Televisjon og aviser er kommersielle aktører. De må arbeide for å holde på oppmerksomheten. Hvis de mister lesere, så mister de inntekter. Som haier, må de bevege seg videre.

[18] Noah Shachtman, "With Incessant Postings, a Pundit Stirs the Pot", New York Times, 16. januar 2003, G5.

Men bloggere har ikke tilsvarende begresninger. De kan bli opphengt, de kan fokusere, de kan bli seriøse. Hvis en bestemt blogger skriver en spesielt interessant historie, så vil flere og flere folk lenke til den historien. Og etter hvert som antalet lenker til en bestemt historie øker, så stiger den i rangeringen for historier. Folk leser det som er populært, og hva som er populært har blitt valgt gjennom en svært demokratisk prosess av likemanns-generert rangering.

Det er også en annen måte, hvor blogger har en annen syklus enn de store mediene. Som Dave Winer, en av fedrene til denne bevegelsen og en programvareutvikler i mange tiår fortalte meg, er en annen forskjell fraværet av finansiell "interessekonflikt". "Jeg tror du må ta interessekonflikten" ut av journalismen, fortalte Winer meg. "En amatørjournalist har ganske enkelt ikke interessekonflikt, eller interessekonflikten er så enkelt å avsløre at du liksom vet du kan rydde den av veien."

Disse konfliktene blir mer viktig etter hvert som mediene blir mer konsentert (mer om dette under). Konsenterte medier kan skjule mer fra offentligheten enn ikke-konsenterte medier kan—slik CNN innrømte at de gjorde etter Iraq-krigen fordi de var rett for konsekvensene for sine egne ansatte.[19] De trenger også å opprettholde en mer konsistent rapportering. (Midt under Irak-krigen, leste jeg en melding på Internet fra noen som på det tidspunktet lyttet på satellitt-forbindelsen til en reporter i Iraq. New York-hovedkvarteret ba reporteren gang på gang at hennes rapport om krigen var for trist: Hun måtte tilby en mer optimistisk historie. Når hun fortalte New York at det ikke var grunnlag for det, fortalte de henne at det var *dem* som skrev "historien".)

[19] Telefonintervju med David Winer, 16. april 2003.

Blogg-sfæren gir amatører en måte å bli med i debatten —"amatør" ikke i betydningen uerfaren, men i betydningen til en Olympisk atlet, det vil si ikke betalt av noen for å komme med deres rapport. Det tillater en mye bredere rekke av innspill til en historie, slik rapporteringen Columbia-katastrofen avdekket, når hundrevis fra hele sørvest-USA vendte seg til internettet for å gjenfortelle hva de hadde sett.[20] Og det får lesere til å lese på tvers av en rekke fortellinger og "triangulere", som Winer formulerer det, sannheten. Blogger, sier Winer, "kommunserer direkte med vår velgermasse, og mellommannen er fjernet"— med alle de fordeler og ulemper det kan føre med seg.

Winer er optimistisk når det gjelder en journalistfremtid infisert av blogger. "Det kommer til å bli en nødvendig ferdighet", spår Winer, for offentlige aktører og også i større grad for private aktører. Det er ikke klart at "journalismen" er glad for dette— noen journalister har blitt bedt om å kutte ut sin blogging.[21] Men det er klart at vi fortsatt er i en overgangsfase. "Mye av det vi gjør nå er oppvarmingsøvelser", fortalte Winer meg. Det er mye som må modne før dette området har sin modne effekt. Og etter som inkludering av innhold i dette området er det området med minst opphavsrettsbrudd på internettet, sa Wiener at "vi vil være den siste tingen som blir skutt ned".

[20] John Schwartz, "Loss of the Shuttle: The Internet; A Wealth of Information Online", *New York Times*, 2 februar 2003, A28; Staci D. Kramer, "Shuttle Disaster Coverage Mixed, but Strong Overall", Online Journalism Review, 2. februar 2003, tilgjengelig fra link #10 [http://free-culture.cc/notes/].

[21] Se Michael Falcone, "Does an Editor's Pencil Ruin a Web Log?" *New York Times*, 29. september 2003, C4. ("Ikke alle nyhetsorganisasjoner har hatt like stor aksept for ansatte som blogger. Kevin Sites, en CNN-korrespondent i Irak som startet en blogg om sin rapportering av krigen 9. mars, stoppet å publisere 12 dager senere på forespørsel fra sine sjefer. I fjor fikk Steve Olafson, en *Houston Chronicle*-reporter, sparken for å ha hatt en personlig web-logg, publisert under pseudonym, som handlet om noen av temaene og folkene som han dekket")

Slik tale påvirker demokratiet. Winer mener dette skjer fordi “du trenger ikke jobber for noen som kontrollerer, [for] en portvokter”. Det er sant. Men det påvirker demokratiet også på en annen måte. Etter hvert som flere og flere borgere uttrykker hva de mener, og forsvarer det skriftlig, så vil det endre hvordan folk forstår offentlige temaer. Det er enkelt å ha feil og være på villspor i hodet ditt. Det er vanskeligere når resultatet fra dine tanker kan bli kritisert av andre. Det er selvfølgelig et sjeldent menneske som innrømmer at han ble overtalt til å innse at han tok feil. Men det er mer sjeldent for et menneske å ignorere at noen har bevist at han tok feil. Å skrive ned idéer, argumenter og kritikk forbedrer demokratiet. I dag er det antagelig et par millioner blogger der det skrives på denne måten. Når det er ti milloner, så vil det være noe ekstraordært å rapportere.

John Seely Brown er sjefsforsker ved Xerox Corporation. Hans arbeid, i følge hans eget nettsted, er “menneskelig læring og … å skape kunnskapsøkologier for å skape … innovasjon”.

Brown ser dermed på disse teknologiene for digital kreativitet litt annerledes enn fra perspektivene jeg har skissert opp så langt. Jeg er sikker på at han blir begeistret for enhver teknologi som kan forbedre demokratiet. Men det han virkelig blir begeistret over er hvordan disse teknologiene påvirker læring.

Brown tror vi lærer med å fikle. Da “mange av oss vokste opp”, forklarer han, ble fiklingen gjort “pa motorsykkelmotorer, gressklippermotorer, biler, radioer og så videre”. Men digitale teknologier muliggjør en annen type fikling—med abstrakte idéer i sin konkrete form. Ungene i Just Think! tenker ikke bare på hvordan et reklameinnslag fremstiller en politiker. Ved å bruke digital teknologi kan de ta reklameinnslaget fra hverandre og manipulerer det, fikle med det, og se hvordan det blir gjort. Digitale teknologier setter igang en slags *bricolage* eller “fritt

tilgjengelig sammenstilling”, som Brown kaller det. Mange får mulighet til å legge til på eller endre på fiklingen til mange andre.

Det beste eksemplet i større skala så langt på denne typen fikling er fri programvare og åpen kildekode (FS/OSS). FS/OSS er programvare der kildekoden deles ut. Alle kan laste ned teknologien som får et FS/OSS-program til å fungere. Og enhver som har lyst til å lære hvordan en bestemt bit av FS/OSS-teknologi fungerer kan fikle med koden.

Denne muligheten gir en “helt ny type læringsplattform”, i følge Brown. “Så snart du begynner å gjøre dette, så … slipper du løs en fritt tilgjengelig sammenstilling til fellesskapet, slik at andre folk kan begynne å se på koden din, fikle med den, teste den, seom de kan forbedre den”. Og hver innsats er et slags læretid. “Åpen kildekode blir en stor lærlingeplatform.”.

I denne prossesen, “er de konkrete tingene du fikler med abstrakte. De er kildekode”. Unger “endres til å få evnen til å fikle med det abstrakte, og denne fiklingen er ikke lenger en isolert aktivitet som du gjør i garasjen din. Du fikler med en fellesskapsplatform. … Du fikler med andre folks greier. Og jo mer du fikler, jo mer forbedrer du.” Jo mer du forbedrer, jo mer lærer du.

Denne sammen tingen skjer også med innhold. Og det skjer på samme samarbeidende måte når dette innholdet er del av nettet. Som Brown formulerer det, “nettet er det første medium som virkelig tar hensyn til flere former for intelligens”. Tidligere teknologier, slik som skrivemaskin eller tekstbehandling, hjelper med å fremme tekst. Men nettet fremmer mye mer enn tekst. “Nettet … si hvis du er musikalsk, hvis du er kunstnerisk, hvis du er visuell, hvis du er interessert i film …da er det en masse du kan gå igang med på dette mediet. Det kan fremme og ta hensyn til alle disse formene for intelligens.”

Brown snakker om hva Elizabeth Daley, Stephanie Barish Og Just Think! lærer bort: at denne fiklingen med kultur lærer såvel som den skaper. Den utvikler talenter litt anderledes, og den bygger en annen type gjenkjenning.

Likevel er friheten til å fikle med disse objektene ikke garantert. Faktisk, som vi vil se i løpet av denne boken, er den friheten i stadig større grad omstridt. Mens det ikke er noe tvil om at din far hadde rett til å fikle med bilmotoren, så er det stor tvil om dine barn vil ha retten til å fikle med bilder som hun finner over alt. Loven, og teknologi i stadig større grad, forstyrrer friheten som teknolog, nysgjerrigheten, ellers ville sikre.

Disse begresningene har blitt fokusen for forskere og akademikere. Professor Ed Felten ved Princeton (som vi vil se mer fra i kapittel 10 [142]) har utviklet et kraftfylt argument til fordel for "retten til å fikle" slik det gjøres i informatikk og til kunnskap generelt.[22] Men bekymringen til Brown er tidligere, og mer fundamentalt. Det handler om hva slags læring unger kan få, eller ikke kan få, på grunn av loven.

"Dette er dit utviklingen av utdanning i det tjueførste århundret er på vei", forklarer Brown. Vi må "forstå hvordan unger som vokser opp digitalt tenker og ønsker å lære".

"Likevel", fortsatte Brown, og som balansen i denne boken vil føre bevis for, "bygger vi et juridisk system som fullstendig undertrykker den naturlige tendensen i dagens digitale unger. … We bygger en arkitektur som frigjør 60 prosent av hjernen [og] et juridisk system som stenger ned den delen av hjernen".

[22] Se for eksempel, Edward Felten og Andrew Appel, "Technological Access Control Interferes with Noninfringing Scholarship," *Communications of the Association for Computer Machinery* 43 (2000): 9.

Vi bygger en teknologi som tar magien til Kodak, mikser inn bevegelige bilder og lyd, og legger inn plass for kommentarer og en mulighet til å spre denne kreativiteten over alt. Men vi bygger loven for å stenge ned denne teknologien.

“Ikke måten å drive en kultur på”, sa Brewster Kahle, som vi møtte i kapittel 9 [133], kommenterte til meg i et sjeldent øyeblikk av nedstemthet.

Kapittel 3. Kapittel tre: Kataloger

Høsten 2001, ble Jesse Jordan fra Oceanside, New York, innrullert som førsteårsstudent ved Rensselaer Polytechnic Institute, i Troy, New York. Hans studieprogram ved RPI var informasjonsteknologi. Selv om han ikke var en programmerer, bestemte Jesse seg i oktober å begynne å fikle med en søkemotorteknologi som var tilgjengelig på RPI-nettverket.

RPI er en av Amerikas fremste teknologiske forskningsinstitusjoner. De tilbyr grader innen områder som går fra arkitektur og ingeniørfag til informasjonsvitenskap. Mer enn 65 prosent av de fem tusen laveregradsstudentene fullførte blant de 10 prosent beste i deres klasse på videregående. Skolen er dermed en perfekt blanding av talent og erfaring for å se for seg og deretter bygge, en generasjon tilpasset nettverksalderen.

RPIs data-nettverk kobler studenter, forelesere og administrasjon sammen. Det kobler også RPI til internettet. Ikke alt som er tilgjengelig på RPI-nettet er tilgjengelig på internettet. Men nettverket er utformet for å gi alle studentene mulighet til å bruke internettet, i tillegg til mer direkte tilgang til andre medlemmer i RPI-fellesskapet.

Søkemotorer er et mål pa hvor nært et nettverk oppleves å være. Google brakte internettet mye nærmere oss alle ved en utrolig forbedring av kvaliteten på søk i nettverket. Spesialiserte søkemotorer kan gjøre dette enda bedre. Ideen med “intranett”-søkemotorer, søkemotorer som kun søker internt i nettverket til en bestemt institusjon, er å tilby brukerne i denne institusjonen

bedre tilgang til materiale fra denne institusjonen. Bedrifter gjør dette hele tiden, ved å gi ansatte mulighet til å få tak i materiale som folk på utsiden av bedriften ikke kan få tak i. Universitetet gjør også dette.

Disse motorene blir muliggjort av netverksteknologien selv. For eksempel har Microsoft et nettverksfilsystem som gjør det veldig enkelt for søkemotorer tilpasset det nettverket å spørre systemet etter informasjon om det offentlig (innen nettverket) tilgjengelige innholdet. Søkemotoren til Jesse var bygget for å dra nytte av denne teknologien. Den brukte Microsofts nettverksfilsystem for å bygge en indeks over alle filene tilgjengelig inne i RPI-nettverket.

Jesse sin var ikke den første søkemotoren bygget for RPI-nettverket. Hans motor var faktisk en enkel endring av motorer som andre hadde bygget. Hans viktigste enkeltforbedring i forhold til disse motorene var å fikse en feil i Microsofts fildelings-system som fikk en brukers datamaskin til å krasje. Med motorene som hadde eksistert tidligere, hvis du forsøkte å koble deg ved hjelp av Windows-utforskeren til en fil som var på en datamaskin som ikke var på nett, så ville din datamaskin krasje. Jesse endret systemet litt for å fikse det problemet, ved å legge til en knapp som en bruker kunne klikke på for å se om maskinen som hadde filen fortsatt var på nett.

Motoren til Jesse kom pa nett i slutten av oktober. I løpet av de følgende seks månedene fortsatte han å justere den for å forbedre dens funksjonalitet. I mars fungerte systemet ganske bra. Jesse hadde mer enn en million filer i sin katalog, inkludert alle mulige typer innhold som fantes på brukernes datamaskiner.

Dermed inneholdt indeksen som hans søkemotor produserte bilder, som studentene kunne bruke til å legge inn på sine

egne nettsider, kopier av notater og forskning, kopier av informasjonshefter, filmklipp som studentene kanskje hadde laget, universitetsbrosjyrer—ganske enkelt alt som brukerne av RPI-nettverket hadde gjort tilgjengelig i en fellesmappe på sine datamaskiner.

Men indeksen inneholdt også musikkfiler. Faktisk var en fjerdedel av filene som Jesses søkemotor inneholdt musikkfiler. Men det betyr, naturligvis, at tre fjerdedeler ikke var det, og—slik at dette poenget er helt klart—Jesse gjorde ingenting for å få folk til å plassere musikkfiler i deres fellesmapper. Han gjorde ingenting for å sikte søkemotoren mot disse filene. Han var en ungdom som fiklet med Google-lignende teknologi ved et universitet der han studerte informasjonsvitenskap, og dermed var fiklingen målet. I motsetning til Google, eller Microsoft for den saks skyld, tjente han ingen penger på denne fiklingen. Han var ikke knyttet til noen bedrift som skulle tjene penger fra dette eksperimentet. Han var en ungdom som fiklet med teknologi i en omgivelse hvor fikling med teknologi var nøyaktig hva han var ment å gjøre.

Den 3. april 2003 ble Jesse kontaktet av lederen for studentkontoret ved RPI. Lederen fortalte Jesse at Foreningen for musikkindustri i USA, RIAA, wille levere inn et søksmål mot han og tre andre studenter som han ikke en gang kjente, to av dem på andre undersiteter. Noen få timer senere ble Jesse forkynt søksmålet og fikk overlevert dokumentene. Mens han leste disse dokumentene og så på nyhetsrapportene om den, ble han stadig mer forbauset.

“Det var absurd”, fortalte han meg. “Jeg mener at jeg ikke gjorde noe galt. … Jeg mener det ikke er noe galt med søkemotoren som jeg kjørte eller … hva jeg hadde gjort med den. Jeg mener, jeg hadde ikke endret den på noen måte som fremmet eller forbedret arbeidet til pirater. Jeg endret kun søkemotoren slik at den ble

enklere å bruke"—igjen, en *søkemotor*, som Jesse ikke hadde bygd selv, som brukte fildelingssystemet til Windows, som Jesse ikke hadde bygd selv, for å gjøre det mulig for medlemmer av RPI-fellesskapet å få tilgang til innhold, som Jesse ikke hadde laget eller gjort tilgjengelig, og der det store flertall av dette ikke hadde noe å gjøre med musikk.

Men RIAA kalte Jesse en pirat. De hevdet at han opererte et nettverk og dermed "med vilje" hadde brutt opphavsrettslovene. De krevde at han betalte dem skadeerstatning for det han hadde gjort galt. I saker med "krenkelser med vilje", spesifiserer opphavsrettsloven noe som advokater kaller "lovbestemte skader". Disse skadene tillater en opphavsrettighetseier å kreve $150 000 per krenkelse. Etter som RIAA påsto det var mer enn et hundre spesifikke opphavsrettskrenkelser, krevde de dermed at Jesse betalte dem minst $15 000 000.

Lignende søksmål ble gjort mot tre andre studenter: en annen student ved RPI, en ved Michegan Technical University og en ved Princeton. Deres situasjoner var lik den til Jesse. Selv om hver sak hadde forskjellige detaljer, var hovedpoenget nøyaktig det samme: store krav om "erstatning" som RIAA påsto de hadde rett på. Hvis du summerte opp disse kravene, ba disse fire søksmålene domstolene i USA å tildele saksøkerne nesten $100 *milliarder*—seks ganger det *totale* overskuddet til filmindustrien i 2001.[1]

Jesse kontaktet sine foreldre. De støttet ham, men var litt skremt. En onkel var advokat. Han startet forhandlinger med RIAA. De krevde å få vite hvor mye penger Jesse hadde. Jesse hadde spart

[1] Tim Goral, "Recording Industry Goes After Campus P-2-P Networks: Suit Alleges $97.8 Billion in Damages," *Professional Media Group LCC* 6 (2003): 5, tilgjengelig fra 2003 WL 55179443.

opp $12 000 fra sommerjobber og annet arbeid. De krevde 12 000 for å trekke saken.

RIAA ville at Jesse skulle innrømme at han hadde gjort noe galt. Han nektet. De ville ha han til å godta en kjennelse som i praksis ville gjøre det umulig for han å arbeide i mange områder innen teknologi for resten av hans liv. Han nektet. De fikk han til å forstå at denne prosessen med å bli saksøkt ikke kom til å bli hyggelig. (Som faren til Jesse refererte til meg, fortalte sjefsadvokaten på saken, Matt Oppenheimer, "Du ønsker ikke et tannlegebesøk hos meg flere ganger") Og gjennom det hele insisterte RIAA at de ikke ville inngå forlik før de hadde tatt hver eneste øre som Jesse hadde spart opp.

Familien til Jessie ble opprørt over disse påstandene. De ønsket å kjempe. Men onkelen til Jessie gjorde en innsats for å lære familien om hvordan det amerikanske juridiske systemet fungerte. Jesse kunne sloss mot RIAA. Han kunne til og med vinne. Men kostnaden med å loss mot et søksmål som dette, ble Jesse fortalt, ville være minst $250 000. Hvis han vant ville han ikke få tilbake noen av de pengene. Hvis han vant, så ville han ha en bit papir som sa at han vant, og en bit papir som sa at han og hans familie var konkurs.

Så Jesse hadde et mafia-lignende valg: $250 000 og en sjanse til å vinne, eller $12 000 og et forlik.

Musikkindustrien insisterer at dette er et spørsmål om lov og moral. La oss legge loven til side for et øyeblikk og tenke på moralen. Hvor er moralen i et søksmål som dette? Hva er dyden i å skape offerlam. RIAA er en spesielt mektig lobby. Presidenten i RIAA tjener i følge rapporter mer enn $1 million i året. Artister, på den andre siden, får ikke godt betalt. Den gjennomsnittelige

innspillingsartist tjener $45 900.[2] Det er utallige måter som RIAA kan bruke for å påvirke og styre politikken. Så hva er det moralske i å ta penger fra en student for å drive en søkemotor?[3]

23. juni overførte Jesse alle sine oppsparte midler til advokaten som jobbet for RIAA. Saken mot ham ble trukket. Og med dette, ble unggutten som hadde fiklet med en datamaskin og blitt saksøkt for 15 millioner dollar en aktivist:

> Jeg var definitivt ikke en aktivist [tidligere]. Jeg mente egentlig aldri å være en aktivist. … [men] jeg har blitt skjøvet inn i dette. Jeg forutså over hodet ikke noe slik som dette, men jeg tror det er bare helt absurd det RIAA har gjort.

Foreldrene til Jesse avslører en viss stolthet over deres motvillige aktivist. Som hans far fortalte meg, Jesse "anser seg selv for å være konservativ, og det samme gjør jeg. … Han er ingen treklemmer. … Jeg synes det er sært at de ville lage bråk med ham. Men han ønsker å la folk vite at de sender feil budskap. Og han ønsker å korrigere rullebladet."

[2] Occupational Employment Survey, U.S. Dept. of Labor (2001) (27–2042—Musikere og Sangere). Se også National Endowment for the Arts, *More Than One in a Blue Moon* (2000).

[3] Douglas Lichtman kommer med et relatert poeng i "KaZaA and Punishment," *Wall Street Journal*, 10. september 2003, A24.

Kapittel 4. Kapittel fire: “Pirater”

Hvis “piratvirksomhet” betyr å bruke den kreative eiendommen til andre uten deres tillatelse—hvis “hvis verdi, så rettighet” er sant—da er historien om innholdsindustrien en historie om piratvirksomhet. Hver eneste viktige sektor av “store medier” i dag—film, plater, radio og kabel-TV—kom fra en slags piratvirksomhet etter den definisjonen. Den konsekvente fortellingen er at forrige generasjon pirater blir del av denne generasjonens borgerskap—inntil nå.

Film

Filmindustrien i Hollywood var bygget av flyktende pirater.[1] Skapere og regisører migrerte fra østkysten til California tidlig i det tjuende århundret delvis for å slippe unna kontrollene som patenter ga oppfinneren av det å lage filmer, Thomas Edison. Disse kontrollene be utøvet gjennom et monopol-“kartell”, The Motion Pictures Patents company, og var basert på Tomhas Edisons kreative eierrettigheter—patenter. Edison stiftet MPPC for å utøve rettighetene som disse kreative eierrettighetene ga ham, og MPPC var seriøst med kontrollen de krevde.

Som en kommentaror forteller en del av historien,

[1] Jeg er takknemlig til Peter DiMauro for å ha pekt meg i retning av denne ekstraordinære historien. Se også Siva Vaidhyanathan, *Copyrights and Copywrongs*, 87–93, som forteller detaljer om Edisons “eventyr” med opphavsrett og patent.

En tidsfrist ble satt til januar 1909 for alle selskaper å komme i samsvar med lisensen. Når februar kom, protesterte de ulisensierte fredløse, som refererte til seg selv som uavhengige, mot kartellet og fortsatte sin forretningsvirksomhet uten å bøye seg for Edisons monopol. Sommeren 1909 var bevegelsen med uavhenginge i full sving, med produsenter og kinoeiere som brukte ulovlig utstyr og importerte filmlager for å opprette sitt eget undergrunnsmarked.

With the country experiencing a tremendous expansion in the number of nickelodeons, the Patents Company reacted to the independent movement by forming a strong-arm subsidiary known as the General Film Company to block the entry of non-licensed independents. With coercive tactics that have become legendary, General Film confiscated unlicensed equipment, discontinued product supply to theaters which showed unlicensed films, and effectively monopolized distribution with the acquisition of all U.S. film exchanges, except for the one owned by the independent William Fox who defied the Trust even after his license was revoked.[2]

[2] J. A. Aberdeen, *Hollywood Renegades: The Society of Independent Motion Picture Producers* (Cobblestone Entertainment, 2000) and expanded texts posted at "The Edison Movie Monopoly: The Motion Picture Patents Company vs. the Independent Outlaws," available at link #11 [http://free-culture.cc/notes/]. For a discussion of the economic motive behind both these limits and the limits imposed

The Napsters of those days, the "independents," were companies like Fox. And no less than today, these independents were vigorously resisted. "Shooting was disrupted by machinery stolen, and `accidents' resulting in loss of negatives, equipment, buildings and sometimes life and limb frequently occurred."[3] That led the independents to flee the East Coast. California was remote enough from Edison's reach that filmmakers there could pirate his inventions without fear of the law. And the leaders of Hollywood filmmaking, Fox most prominently, did just that.

California vokste naturligvis raskt, og effektiv håndhevelse av føderale lover spredte seg til slutt vestover. Men fordi patenter tildeler patentinnehaveren et i sannhet "begrenset" monopol (kun sytten år på den tiden), så patentene var utgått før nok føderale lovmenn dukket opp. En ny industri var født, delvis fra piratvirksomhet mot Edison's kreative rettigheter.

Innspilt musikk

Musikkindustrien ble født av en annen type piratvirksomhet, dog for å forstå hvordan krever at en setter seg inn i detaljer om hvordan loven regulerer musikk.

På den tiden da Edison og Henri Fourneaux fant opp maskiner for å reprodusere musikk (Edison fonografen, Fourneaux det automatiske pianoet), gav loven komponister eksklusive

by Victor on phonographs, see Randal C. Picker, "From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright" (September 2002), University of Chicago Law School, James M. Olin Program in Law and Economics, Working Paper No. 159.

[3] Marc Wanamaker, "The First Studios," *The Silents Majority*, arkivert på link #12 [http://free-culture.cc/notes/].

rettigheter til å kontrollere kopier av deres musikk og eksklusive rettigheter til å kontrollere fremføringer av deres musikk. Med andre ord, i 1900, hvis jeg ønsket et kopi av Phil Russels populære låt "Happy Mose", sa loven at jeg måtte betale for rettigheten til å få en kopi av notearkene, og jeg måtte også betale for å ha rett til å fremføre det offentlig.

Men hva hvis jeg ønsket å spille inn "Happy Mose" ved hjelp av Edisons fonograf eller Fourneaux automatiske piano? Her snublet loven. Det var klart nok at jeg måtte kjøpe en kopi av notene som jeg fremførte når jeg gjorde innspillingen. Og det var klart nok at jeg måtte betale for enhver offentlig fremførelse av verket jeg spilte inn. Men det var ikke helt klart at jeg måtte betale for en "offentlig fremføring" hvis jeg spilte inn sangen i mitt eget hus (selv i dag skylder du ingenting til Beatles hvis du synger en av deres sanger i dusjen), eller hvis jeg spilte inn sangen fra hukommelsen (kopier i din hjerne er ikke—ennå—regulert av opphavsrettsloven). Så hvis jeg ganske enkelt sang sangen inn i et innspillingsaparat i mitt eget hjem, så var det ikke klart at jeg skyldte komponisten noe. Og enda viktigere, det var ikke klart om jeg skyldte komponisten noe hvis jeg så laget kopier av disse innspillingene. På grunn av dette hullet i loven, sa kunne jeg i effekt røve noen andres sang uten å betale dets komponist noe.

Komponistene (og utgiverne) var ikke veldig glade for denne kapasiteten til å røve. Som Senator Alfred Kittredge fra Sør-Dakota formulerte det,

> Forestill dere denne urettferdigheten. En komponist skriver en sang eller en opera. En utgiver kjøper til et høy sum rettighetene til denne, og registrerer opphavsretten til den. Så kommer de fonografiske selskapene og selskapene som skjærer musikk-ruller og med

> vitende og vilje stjeler arbeidet som kommer fra hjernet til komponisten og utgiveren uten å bry seg om [deres] rettigheter.[4]

The innovators who developed the technology to record other people's works were "sponging upon the toil, the work, the talent, and genius of American composers,"[5] and the "music publishing industry" was thereby "at the complete mercy of this one pirate."[6] As John Philip Sousa put it, in as direct a way as possible, "When they make money out of my pieces, I want a share of it."[7]

These arguments have familiar echoes in the wars of our day. So, too, do the arguments on the other side. The innovators who developed the player piano argued that "it is perfectly demonstrable that the introduction of automatic music players has not deprived any composer of anything he had before their introduction." Rather, the machines increased the sales of sheet music.[8] In any case, the innovators argued, the job of Congress was "to consider first the interest of [the public], whom they represent, and whose servants they are." "All talk about `theft,'"

[4] To Amend and Consolidate the Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the (Joint) Committees on Patents, 59th Cong. 59, 1st sess. (1906) (statement of Senator Alfred B. Kittredge, of South Dakota, chairman), reprinted in *Legislative History of the Copyright Act*, E. Fulton Brylawski and Abe Goldman, eds. (South Hackensack, N.J.: Rothman Reprints, 1976).

[5] To Amend and Consolidate the Acts Respecting Copyright, 223 (uttalelse fra Nathan Burkan, advokat for the Music Publishers Association).

[6] To Amend and Consolidate the Acts Respecting Copyright, 226 (uttalelse fra Nathan Burkan, advokat for the Music Publishers Association).

[7] To Amend and Consolidate the Acts Respecting Copyright, 23 (uttalelse fra John Philip Sousa, komponist).

[8] To Amend and Consolidate the Acts Respecting Copyright, 283–84 (uttalelse fra Albert Walker, representant for the Auto-Music Perforating Company of New York).

the general counsel of the American Graphophone Company wrote, "is the merest claptrap, for there exists no property in ideas musical, literary or artistic, except as defined by statute."[9]

Loven løste snart denne kampen i favør av *både* komponisten og innspillingsartisten. Kongressen endret loven slik at komponisten fikk betalt for den "mekaniske reproduksjonen" av deres musikk. Men i stedet for å ganske enkelt gi komponisten full kontroll over rettigheten til å lage mekaniske reproduksjoner, ga kongressen innspillingsartister rett en til å spille inn musikk, til en pris satt av kongressen, så snart komponisten har tillatt at den ble spilt inn en gang. Det er denne delen av opphavsrettsloven som gjør coverlåter mulig. Så snart en komponist tillater en innspilling av hans sang, har andre mulighet til å spille inn samme sang, så lenge de betaler den originale komponisten et gebyr fastsatt av loven.

Amerikansk lov kaller dette vanligvis en "tvangslisens", men jeg vil referere til dette som en "lovbestemt lisens". En lovbestemt lisens er en lisens hvis nøkkelvilkår er bestemt i lovverket. Etter kongressens endring av opphavsrettsloven i 1909, sto plateselskapene fritt til å distribuere kopier av innspillinger så lenge som de betalte komponisten (eller opphavsrettsinnehaveren) gebyret spesifisert i lovverket.

Dette er et unntak i opphavsrettsloven. Når John Grisham skriver en roman så kan en utgiver kun utgi denne romanen hvis Grisham gir utgiveren tillatelse til det. Girsham står fritt til å kreve hvilken som helst betaling for den tillatelsen. Prisen for å publisere Grisham er dermed bestemt av Grisham og opphavsrettsloven sier

[9] To Amend and Consolidate the Acts Respecting Copyright, 376 (prepared memorandum of Philip Mauro, general patent counsel of the American Graphophone Company Association).

at du ikke har tillatelse til å bruke Grishams verker med mindre du har tillatelse fra Grisham.

But the law governing recordings gives recording artists less. And thus, in effect, the law *subsidizes* the recording industry through a kind of piracy—by giving recording artists a weaker right than it otherwise gives creative authors. The Beatles have less control over their creative work than Grisham does. And the beneficiaries of this less control are the recording industry and the public. The recording industry gets something of value for less than it otherwise would pay; the public gets access to a much wider range of musical creativity. Indeed, Congress was quite explicit about its reasons for granting this right. Its fear was the monopoly power of rights holders, and that that power would stifle follow-on creativity.[10]

Mens musikkindustrien har vært ganske stille om dette i det siste, har de historisk vært høylytte tilhengere av den lovbestemte lisensen for innspillinger. Som det sto i en rapport fra 1967 utgitt av House Committee on the Judiciary:

> the record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers

[10] Copyright Law Revision: Hearings on S. 2499, S. 2900, H.R. 243, and H.R. 11794 Before the (Joint) Committee on Patents, 60th Cong., 1st sess., 217 (1908) (statement of Senator Reed Smoot, chairman), reprinted in *Legislative History of the 1909 Copyright Act*, E. Fulton Brylawski and Abe Goldman, eds. (South Hackensack, N.J.: Rothman Reprints, 1976).

> need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argue that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.[11]

Ved å begrense rettighetene musikere hadde, ved å delvis røve deres kreative verk, fikk innspillingsprodusentene, og folket, fordeler.

Radio

Radio kom også fra piratvirksomhet.

When a radio station plays a record on the air, that constitutes a "public performance" of the composer's work.[12] As I described above, the law gives the composer (or copyright holder) an

[11] Copyright Law Revision: Report to Accompany H.R. 2512, House Committee on the Judiciary, 90th Cong., 1st sess., House Document no. 83, (8 March 1967). I am grateful to Glenn Brown for drawing my attention to this report.

[12] See 17 *United States Code*, sections 106 and 110. At the beginning, record companies printed "Not Licensed for Radio Broadcast" and other messages purporting to restrict the ability to play a record on a radio station. Judge Learned Hand rejected the argument that a warning attached to a record might restrict the rights of the radio station. See *RCA Manufacturing Co*. v. *Whiteman*, 114 F. 2d 86 (2nd Cir. 1940). See also Randal C. Picker, "From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright," *University of Chicago Law Review* 70 (2003): 281.

exclusive right to public performances of his work. The radio station thus owes the composer money for that performance.

But when the radio station plays a record, it is not only performing a copy of the *composer's* work. The radio station is also performing a copy of the *recording artist's* work. It's one thing to have “Happy Birthday” sung on the radio by the local children's choir; it's quite another to have it sung by the Rolling Stones or Lyle Lovett. The recording artist is adding to the value of the composition performed on the radio station. And if the law were perfectly consistent, the radio station would have to pay the recording artist for his work, just as it pays the composer of the music for his work.

But it doesn't. Under the law governing radio performances, the radio station does not have to pay the recording artist. The radio station need only pay the composer. The radio station thus gets a bit of something for nothing. It gets to perform the recording artist's work for free, even if it must pay the composer something for the privilege of playing the song.

Denne forskjellen kan bli stor. Forestill deg at du komponerer et stykke musikk. Se for deg at det er ditt første stykke. Du eier de eksklusive rettighetene til å godkjenne offentlig fremføring av den musikken. Så hvis Madonna ønsker å synge din sang offentlig, må hun få din tillatelse.

Tenkt deg videre at hun synger din sang, og at hun liker den veldig godt. Hun bestemmer seg deretter for å spille inn sangen din, og den blir en populær hitlåt. Med vår lov vil du få litt penger hver gang en radiostasjon spiller din sang. Men Madonna får ingenting, fortsett fra de indirekte effektene fra salg av hennes CD-er. Den offentlige fremføringen av hennes innspilling er ikke

en "beskyttet" rettighet. Radiostasjonen får dermed *røve* verdien av Madonnas arbeid uten å betale henne noen ting.

Uten tvil kan en argumentere at, totalt sett, tjener innspillingsartistene på dette. I snitt er reklamen de får verdt mer enn enn fremføringsrettighetene de frasier seg. Kanskje. Men selv om det er slik, så gir loven vanligvis skaperen retten til å gjøre dette valget. Ved å gjøre valgen for ham eller henne, gir loven radiostasjonen rett til å ta noe uten å betale.

Kabel-TV

Kabel-TV kom også fra en form for piratvirksomhet.

When cable entrepreneurs first started wiring communities with cable television in 1948, most refused to pay broadcasters for the content that they echoed to their customers. Even when the cable companies started selling access to television broadcasts, they refused to pay for what they sold. Cable companies were thus Napsterizing broadcasters' content, but more egregiously than anything Napster ever did— Napster never charged for the content it enabled others to give away.

Broadcasters and copyright owners were quick to attack this theft. Rosel Hyde, chairman of the FCC, viewed the practice as a kind of "unfair and potentially destructive competition."[13] There may have been a "public interest" in spreading the reach of cable TV, but as Douglas Anello, general counsel to the National Association of Broadcasters, asked Senator Quentin

[13] Copyright Law Revision—CATV: Hearing on S. 1006 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2nd sess., 78 (1966) (statement of Rosel H. Hyde, chairman of the Federal Communications Commission).

Burdick during testimony, "Does public interest dictate that you use somebody else's property?"[14] As another broadcaster put it,

> The extraordinary thing about the CATV business is that it is the only business I know of where the product that is being sold is not paid for.[15]

Igjen, kravene til opphavsrettsinnehaverne virket rimelige nok:

> Alt vi ber om er en veldig enkel ting, at folk som tar vår eiendom gratis betaler for den. Vi forsøker å stoppe piratvirksomhet og jeg kan ikke tenke på et svakere ord for å beskrive det. Jeg tror det er sterkere ord som ville passe.[16]

Disse var "gratispassasjerer", sa presidenten Charlton Heston i Screen Actor's Guild, som "tok lønna fra skuespillerne"[17]

Men igjen, det er en annen side i debatten. Som assisterende justisminister Edwin Zimmerman sa det,

> Our point here is that unlike the problem of whether you have any copyright protection at all, the problem here is whether copyright

[14] Copyright Law Revision—CATV, 116 (statement of Douglas A. Anello, general counsel of the National Association of Broadcasters).
[15] Copyright Law Revision—CATV, 126 (statement of Ernest W. Jennes, general counsel of the Association of Maximum Service Telecasters, Inc.).
[16] Copyright Law Revision—CATV, 169 (joint statement of Arthur B. Krim, president of United Artists Corp., and John Sinn, president of United Artists Television, Inc.).
[17] Copyright Law Revision—CATV, 209 (vitnemål fra Charlton Heston, president i Screen Actors Guild).

> holders who are already compensated, who already have a monopoly, should be permitted to extend that monopoly. … The question here is how much compensation they should have and how far back they should carry their right to compensation.[18]

Opphavsrettinnehaverne tok kabelselskapene til retten. Høyesterett fant to ganger at kabelselskaper ikke skyldte opphavsrettinnehaverne noen ting.

It took Congress almost thirty years before it resolved the question of whether cable companies had to pay for the content they "pirated." In the end, Congress resolved this question in the same way that it resolved the question about record players and player pianos. Yes, cable companies would have to pay for the content that they broadcast; but the price they would have to pay was not set by the copyright owner. The price was set by law, so that the broadcasters couldn't exercise veto power over the emerging technologies of cable. Cable companies thus built their empire in part upon a "piracy" of the value created by broadcasters' content.

These separate stories sing a common theme. If "piracy" means using value from someone else's creative property without permission from that creator—as it is increasingly described today[19] — then *every* industry affected by copyright today is the product and beneficiary of a certain kind of piracy. Film,

[18] Copyright Law Revision—CATV, 216 (uttalelse fra Edwin M. Zimmerman, fungerende assisterende justisministeren).

[19] See, for example, National Music Publisher's Association, *The Engine of Free Expression: Copyright on the Internet—The Myth of Free Information*, available at link #13 [http://free-culture.cc/notes/]. "The threat of piracy—the use of someone else's creative work without permission or compensation—has grown with the Internet."

records, radio, cable TV. … The list is long and could well be expanded. Every generation welcomes the pirates from the last. Every generation—until now.

Kapittel 5. Kapittel fem: “Piratvirksomhet”

There is piracy of copyrighted material. Lots of it. This piracy comes in many forms. The most significant is commercial piracy, the unauthorized taking of other people's content within a commercial context. Despite the many justifications that are offered in its defense, this taking is wrong. No one should condone it, and the law should stop it.

But as well as copy-shop piracy, there is another kind of “taking” that is more directly related to the Internet. That taking, too, seems wrong to many, and it is wrong much of the time. Before we paint this taking “piracy,” however, we should understand its nature a bit more. For the harm of this taking is significantly more ambiguous than outright copying, and the law should account for that ambiguity, as it has so often done in the past.

Piratvirksomhet I

All across the world, but especially in Asia and Eastern Europe, there are businesses that do nothing but take others people's copyrighted content, copy it, and sell it—all without the permission of a copyright owner. The recording industry estimates that it loses about $4.6 billion every year to physical piracy[1] (that works out to one in three CDs sold worldwide). The

[1] See IFPI (International Federation of the Phonographic Industry), *The Recording Industry Commercial Piracy Report 2003*, July 2003, available at link #14 [http://

MPAA estimates that it loses $3 billion annually worldwide to piracy.

This is piracy plain and simple. Nothing in the argument of this book, nor in the argument that most people make when talking about the subject of this book, should draw into doubt this simple point: This piracy is wrong.

Which is not to say that excuses and justifications couldn't be made for it. We could, for example, remind ourselves that for the first one hundred years of the American Republic, America did not honor foreign copyrights. We were born, in this sense, a pirate nation. It might therefore seem hypocritical for us to insist so strongly that other developing nations treat as wrong what we, for the first hundred years of our existence, treated as right.

That excuse isn't terribly strong. Technically, our law did not ban the taking of foreign works. It explicitly limited itself to American works. Thus the American publishers who published foreign works without the permission of foreign authors were not violating any rule. The copy shops in Asia, by contrast, are violating Asian law. Asian law does protect foreign copyrights, and the actions of the copy shops violate that law. So the wrong of piracy that they engage in is not just a moral wrong, but a legal wrong, and not just an internationally legal wrong, but a locally legal wrong as well.

True, these local rules have, in effect, been imposed upon these countries. No country can be part of the world economy and choose not to protect copyright internationally. We may have been

free-culture.cc/notes/]. See also Ben Hunt, “Companies Warned on Music Piracy Risk,” *Financial Times*, 14 February 2003, 11.

born a pirate nation, but we will not allow any other nation to have a similar childhood.

If a country is to be treated as a sovereign, however, then its laws are its laws regardless of their source. The international law under which these nations live gives them some opportunities to escape the burden of intellectual property law.[2] In my view, more developing nations should take advantage of that opportunity, but when they don't, then their laws should be respected. And under the laws of these nations, this piracy is wrong.

Alternatively, we could try to excuse this piracy by noting that in any case, it does no harm to the industry. The Chinese who get access to American CDs at 50 cents a copy are not people who would have bought those American CDs at $15 a copy. So no one really has any less money than they otherwise would have had.[3]

[2] See Peter Drahos with John Braithwaite, Information Feudalism: *Who Owns the Knowledge Economy?* (New York: The New Press, 2003), 10–13, 209. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement obligates member nations to create administrative and enforcement mechanisms for intellectual property rights, a costly proposition for developing countries. Additionally, patent rights may lead to higher prices for staple industries such as agriculture. Critics of TRIPS question the disparity between burdens imposed upon developing countries and benefits conferred to industrialized nations. TRIPS does permit governments to use patents for public, noncommercial uses without first obtaining the patent holder's permission. Developing nations may be able to use this to gain the benefits of foreign patents at lower prices. This is a promising strategy for developing nations within the TRIPS framework.

[3] For an analysis of the economic impact of copying technology, see Stan Liebowitz, *Rethinking the Network Economy* (New York: Amacom, 2002), 144–90. "In some instances … the impact of piracy on the copyright holder's ability to appropriate the value of the work will be negligible. One obvious instance is the case where the individual engaging in pirating would not have purchased an original even if pirating were not an option." Ibid., 149.

This is often true (though I have friends who have purchased many thousands of pirated DVDs who certainly have enough money to pay for the content they have taken), and it does mitigate to some degree the harm caused by such taking. Extremists in this debate love to say, “You wouldn't go into Barnes & Noble and take a book off of the shelf without paying; why should it be any different with on-line music?” The difference is, of course, that when you take a book from Barnes & Noble, it has one less book to sell. By contrast, when you take an MP3 from a computer network, there is not one less CD that can be sold. The physics of piracy of the intangible are different from the physics of piracy of the tangible.

This argument is still very weak. However, although copyright is a property right of a very special sort, it *is* a property right. Like all property rights, the copyright gives the owner the right to decide the terms under which content is shared. If the copyright owner doesn't want to sell, she doesn't have to. There are exceptions: important statutory licenses that apply to copyrighted content regardless of the wish of the copyright owner. Those licenses give people the right to “take” copyrighted content whether or not the copyright owner wants to sell. But where the law does not give people the right to take content, it is wrong to take that content even if the wrong does no harm. If we have a property system, and that system is properly balanced to the technology of a time, then it is wrong to take property without the permission of a property owner. That is exactly what “property” means.

Finally, we could try to excuse this piracy with the argument that the piracy actually helps the copyright owner. When the Chinese “steal” Windows, that makes the Chinese dependent on Microsoft. Microsoft loses the value of the software that was taken. But it gains users who are used to life in the Microsoft

world. Over time, as the nation grows more wealthy, more and more people will buy software rather than steal it. And hence over time, because that buying will benefit Microsoft, Microsoft benefits from the piracy. If instead of pirating Microsoft Windows, the Chinese used the free GNU/Linux operating system, then these Chinese users would not eventually be buying Microsoft. Without piracy, then, Microsoft would lose.

This argument, too, is somewhat true. The addiction strategy is a good one. Many businesses practice it. Some thrive because of it. Law students, for example, are given free access to the two largest legal databases. The companies marketing both hope the students will become so used to their service that they will want to use it and not the other when they become lawyers (and must pay high subscription fees).

Still, the argument is not terribly persuasive. We don't give the alcoholic a defense when he steals his first beer, merely because that will make it more likely that he will buy the next three. Instead, we ordinarily allow businesses to decide for themselves when it is best to give their product away. If Microsoft fears the competition of GNU/Linux, then Microsoft can give its product away, as it did, for example, with Internet Explorer to fight Netscape. A property right means giving the property owner the right to say who gets access to what—at least ordinarily. And if the law properly balances the rights of the copyright owner with the rights of access, then violating the law is still wrong.

Thus, while I understand the pull of these justifications for piracy, and I certainly see the motivation, in my view, in the end, these efforts at justifying commercial piracy simply don't cut it. This kind of piracy is rampant and just plain wrong. It doesn't transform the content it steals; it doesn't transform the market it competes in. It merely gives someone access to something that the law says

he should not have. Nothing has changed to draw that law into doubt. This form of piracy is flat out wrong.

But as the examples from the four chapters that introduced this part suggest, even if some piracy is plainly wrong, not all "piracy" is. Or at least, not all "piracy" is wrong if that term is understood in the way it is increasingly used today. Many kinds of "piracy" are useful and productive, to produce either new content or new ways of doing business. Neither our tradition nor any tradition has ever banned all "piracy" in that sense of the term.

This doesn't mean that there are no questions raised by the latest piracy concern, peer-to-peer file sharing. But it does mean that we need to understand the harm in peer-to-peer sharing a bit more before we condemn it to the gallows with the charge of piracy.

For (1) like the original Hollywood, p2p sharing escapes an overly controlling industry; and (2) like the original recording industry, it simply exploits a new way to distribute content; but (3) unlike cable TV, no one is selling the content that is shared on p2p services.

These differences distinguish p2p sharing from true piracy. They should push us to find a way to protect artists while enabling this sharing to survive.

Piratvirksomhet II

The key to the "piracy" that the law aims to quash is a use that "rob[s] the author of [his] profit."[4] This means we must determine whether and how much p2p sharing harms before we

[4] *Bach* v. *Longman*, 98 Eng. Rep. 1274 (1777).

know how strongly the law should seek to either prevent it or find an alternative to assure the author of his profit.

Peer-to-peer sharing was made famous by Napster. But the inventors of the Napster technology had not made any major technological innovations. Like every great advance in innovation on the Internet (and, arguably, off the Internet as well[5]), Shawn Fanning and crew had simply put together components that had been developed independently.

The result was spontaneous combustion. Launched in July 1999, Napster amassed over 10 million users within nine months. After eighteen months, there were close to 80 million registered users of the system.[6] Courts quickly shut Napster down, but other services emerged to take its place. (Kazaa is currently the most popular p2p service. It boasts over 100 million members.) These services' systems are different architecturally, though not very different in function: Each enables users to make content available to any number of other users. With a p2p system, you can share your favorite songs with your best friend— or your 20,000 best friends.

[5] See Clayton M. Christensen, *The Innovator's Dilemma: The Revolutionary National Bestseller That Changed the Way We Do Business* (New York: HarperBusiness, 2000). Professor Christensen examines why companies that give rise to and dominate a product area are frequently unable to come up with the most creative, paradigm-shifting uses for their own products. This job usually falls to outside innovators, who reassemble existing technology in inventive ways. For a discussion of Christensen's ideas, see Lawrence Lessig, *Future*, 89–92, 139.

[6] See Carolyn Lochhead, "Silicon Valley Dream, Hollywood Nightmare," *San Francisco Chronicle*, 24 September 2002, A1; "Rock 'n' Roll Suicide," *New Scientist*, 6 July 2002, 42; Benny Evangelista, "Napster Names CEO, Secures New Financing," *San Francisco Chronicle*, 23 May 2003, C1; "Napster's Wake-Up Call," *Economist*, 24 June 2000, 23; John Naughton, "Hollywood at War with the Internet" (London) *Times*, 26 July 2002, 18.

According to a number of estimates, a huge proportion of Americans have tasted file-sharing technology. A study by Ipsos-Insight in September 2002 estimated that 60 million Americans had downloaded music—28 percent of Americans older than 12.[7] A survey by the NPD group quoted in *The New York Times* estimated that 43 million citizens used file-sharing networks to exchange content in May 2003.[8] The vast majority of these are not kids. Whatever the actual figure, a massive quantity of content is being "taken" on these networks. The ease and inexpensiveness of file-sharing networks have inspired millions to enjoy music in a way that they hadn't before.

Some of this enjoying involves copyright infringement. Some of it does not. And even among the part that is technically copyright infringement, calculating the actual harm to copyright owners is more complicated than one might think. So consider—a bit more carefully than the polarized voices around this debate usually do—the kinds of sharing that file sharing enables, and the kinds of harm it entails.

Fildelerne deler ulike typer innhold. Vi kan dele disse ulike typene inn i fire typer.

A. There are some who use sharing networks as substitutes for purchasing content. Thus, when a new Madonna CD is released, rather than buying the CD, these users simply take it. We might quibble about whether everyone who takes it would actually have bought it if sharing didn't make it available for

[7] See Ipsos-Insight, *TEMPO: Keeping Pace with Online Music Distribution* (September 2002), reporting that 28 percent of Americans aged twelve and older have downloaded music off of the Internet and 30 percent have listened to digital music files stored on their computers.

[8] Amy Harmon, "Industry Offers a Carrot in Online Music Fight," *New York Times*, 6 June 2003, A1.

free. Most probably wouldn't have, but clearly there are some who would. The latter are the target of category A: users who download instead of purchasing.

B. There are some who use sharing networks to sample music before purchasing it. Thus, a friend sends another friend an MP3 of an artist he's not heard of. The other friend then buys CDs by that artist. This is a kind of targeted advertising, quite likely to succeed. If the friend recommending the album gains nothing from a bad recommendation, then one could expect that the recommendations will actually be quite good. The net effect of this sharing could increase the quantity of music purchased.

C. There are many who use sharing networks to get access to copyrighted content that is no longer sold or that they would not have purchased because the transaction costs off the Net are too high. This use of sharing networks is among the most rewarding for many. Songs that were part of your childhood but have long vanished from the marketplace magically appear again on the network. (One friend told me that when she discovered Napster, she spent a solid weekend “recalling” old songs. She was astonished at the range and mix of content that was available.) For content not sold, this is still technically a violation of copyright, though because the copyright owner is not selling the content anymore, the economic harm is zero—the same harm that occurs when I sell my collection of 1960s 45-rpm records to a local collector.

D. Finally, there are many who use sharing networks to get access to content that is not copyrighted or that the copyright owner wants to give away.

Hvordan balanserer disse ulike delingstypene?

Let's start with some simple but important points. From the perspective of the law, only type D sharing is clearly legal. From the perspective of economics, only type A sharing is clearly harmful.[9] Type B sharing is illegal but plainly beneficial. Type C sharing is illegal, yet good for society (since more exposure to music is good) and harmless to the artist (since the work is not otherwise available). So how sharing matters on balance is a hard question to answer—and certainly much more difficult than the current rhetoric around the issue suggests.

Whether on balance sharing is harmful depends importantly on how harmful type A sharing is. Just as Edison complained about Hollywood, composers complained about piano rolls, recording artists complained about radio, and broadcasters complained about cable TV, the music industry complains that type A sharing is a kind of "theft" that is "devastating" the industry.

While the numbers do suggest that sharing is harmful, how harmful is harder to reckon. It has long been the recording industry's practice to blame technology for any drop in sales. The history of cassette recording is a good example. As a study by Cap Gemini Ernst & Young put it, "Rather than exploiting this new, popular technology, the labels fought it."[10] The labels claimed

[9] Se Liebowitz, *Rethinking the Network Economy*, 148–49.

[10] See Cap Gemini Ernst & Young, *Technology Evolution and the Music Industry's Business Model Crisis* (2003), 3. This report describes the music industry's effort to stigmatize the budding practice of cassette taping in the 1970s, including an advertising campaign featuring a cassette-shape skull and the caption "Home taping is killing music." At the time digital audio tape became a threat, the Office of Technical Assessment conducted a survey of consumer behavior. In 1988, 40 percent of consumers older than ten had taped music to a cassette format. U.S. Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law*, OTA-CIT-422 (Washington, D.C.: U.S. Government Printing Office, October 1989), 145–56.

that every album taped was an album unsold, and when record sales fell by 11.4 percent in 1981, the industry claimed that its point was proved. Technology was the problem, and banning or regulating technology was the answer.

Yet soon thereafter, and before Congress was given an opportunity to enact regulation, MTV was launched, and the industry had a record turnaround. "In the end," Cap Gemini concludes, "the `crisis' … was not the fault of the tapers—who did not [stop after MTV came into being]—but had to a large extent resulted from stagnation in musical innovation at the major labels."[11]

But just because the industry was wrong before does not mean it is wrong today. To evaluate the real threat that p2p sharing presents to the industry in particular, and society in general—or at least the society that inherits the tradition that gave us the film industry, the record industry, the radio industry, cable TV, and the VCR—the question is not simply whether type A sharing is harmful. The question is also *how* harmful type A sharing is, and how beneficial the other types of sharing are.

We start to answer this question by focusing on the net harm, from the standpoint of the industry as a whole, that sharing networks cause. The "net harm" to the industry as a whole is the amount by which type A sharing exceeds type B. If the record companies sold more records through sampling than they lost through substitution, then sharing networks would actually benefit music companies on balance. They would therefore have little *static* reason to resist them.

[11] U.S. Congress, *Copyright and Home Copying*, 4.

Could that be true? Could the industry as a whole be gaining because of file sharing? Odd as that might sound, the data about CD sales actually suggest it might be close.

In 2002, the RIAA reported that CD sales had fallen by 8.9 percent, from 882 million to 803 million units; revenues fell 6.7 percent.[12] This confirms a trend over the past few years. The RIAA blames Internet piracy for the trend, though there are many other causes that could account for this drop. SoundScan, for example, reports a more than 20 percent drop in the number of CDs released since 1999. That no doubt accounts for some of the decrease in sales. Rising prices could account for at least some of the loss. "From 1999 to 2001, the average price of a CD rose 7.2 percent, from $13.04 to $14.19."[13] Competition from other forms of media could also account for some of the decline. As Jane Black of *BusinessWeek* notes, "The soundtrack to the film *High Fidelity* has a list price of $18.98. You could get the whole movie [on DVD] for $19.99."[14]

But let's assume the RIAA is right, and all of the decline in CD sales is because of Internet sharing. Here's the rub: In the same period that the RIAA estimates that 803 million CDs were sold,

[12] See Recording Industry Association of America, *2002 Yearend Statistics*, available at link #15 [http://free-culture.cc/notes/]. A later report indicates even greater losses. See Recording Industry Association of America, *Some Facts About Music Piracy*, 25 June 2003, available at link #16 [http://free-culture.cc/notes/]: "In the past four years, unit shipments of recorded music have fallen by 26 percent from 1.16 billion units in to 860 million units in 2002 in the United States (based on units shipped). In terms of sales, revenues are down 14 percent, from $14.6 billion in to $12.6 billion last year (based on U.S. dollar value of shipments). The music industry worldwide has gone from a $39 billion industry in 2000 down to a $32 billion industry in 2002 (based on U.S. dollar value of shipments)."

[13] Jane Black, "Big Music's Broken Record", BusinessWeek online, 13. februar 2003, tilgjengelig fra link #17 [http://free-culture.cc/notes/].

[14] ibid.

the RIAA estimates that 2.1 billion CDs were downloaded for free. Thus, although 2.6 times the total number of CDs sold were downloaded for free, sales revenue fell by just 6.7 percent.

There are too many different things happening at the same time to explain these numbers definitively, but one conclusion is unavoidable: The recording industry constantly asks, "What's the difference between downloading a song and stealing a CD?"—but their own numbers reveal the difference. If I steal a CD, then there is one less CD to sell. Every taking is a lost sale. But on the basis of the numbers the RIAA provides, it is absolutely clear that the same is not true of downloads. If every download were a lost sale—if every use of Kazaa "rob[bed] the author of [his] profit"—then the industry would have suffered a 100 percent drop in sales last year, not a 7 percent drop. If 2.6 times the number of CDs sold were downloaded for free, and yet sales revenue dropped by just 6.7 percent, then there is a huge difference between "downloading a song and stealing a CD."

These are the harms—alleged and perhaps exaggerated but, let's assume, real. What of the benefits? File sharing may impose costs on the recording industry. What value does it produce in addition to these costs?

One benefit is type C sharing—making available content that is technically still under copyright but is no longer commercially available. This is not a small category of content. There are millions of tracks that are no longer commercially available.[15] And while it's conceivable that some of this content is not

[15] By one estimate, 75 percent of the music released by the major labels is no longer in print. See Online Entertainment and Copyright Law—Coming Soon to a Digital Device Near You: Hearing Before the Senate Committee on the Judiciary, 107th Cong., 1st sess. (3 April 2001) (prepared statement of the Future of Music Coalition), available at link #18 [http://free-culture.cc/notes/].

available because the artist producing the content doesn't want it to be made available, the vast majority of it is unavailable solely because the publisher or the distributor has decided it no longer makes economic sense *to the company* to make it available.

In real space—long before the Internet—the market had a simple response to this problem: used book and record stores. There are thousands of used book and used record stores in America today.[16] These stores buy content from owners, then sell the content they buy. And under American copyright law, when they buy and sell this content, *even if the content is still under copyright*, the copyright owner doesn't get a dime. Used book and record stores are commercial entities; their owners make money from the content they sell; but as with cable companies before statutory licensing, they don't have to pay the copyright owner for the content they sell.

Type C sharing, then, is very much like used book stores or used record stores. It is different, of course, because the person making the content available isn't making money from making the content available. It is also different, of course, because in real space, when I sell a record, I don't have it anymore, while in cyberspace, when someone shares my 1949 recording of Bernstein's “Two Love Songs,” I still have it. That difference would matter economically if the owner of the copyright were selling the record in competition to my sharing. But we're talking about the class of content that is not currently commercially

[16] While there are not good estimates of the number of used record stores in existence, in 2002, there were 7,198 used book dealers in the United States, an increase of 20 percent since 1993. See Book Hunter Press, *The Quiet Revolution: The Expansion of the Used Book Market* (2002), available at link #19 [http://free-culture.cc/notes/]. Used records accounted for $260 million in sales in 2002. See National Association of Recording Merchandisers, “2002 Annual Survey Results,” available at link #20 [http://free-culture.cc/notes/].

available. The Internet is making it available, through cooperative sharing, without competing with the market.

It may well be, all things considered, that it would be better if the copyright owner got something from this trade. But just because it may well be better, it doesn't follow that it would be good to ban used book stores. Or put differently, if you think that type C sharing should be stopped, do you think that libraries and used book stores should be shut as well?

Finally, and perhaps most importantly, file-sharing networks enable type D sharing to occur—the sharing of content that copyright owners want to have shared or for which there is no continuing copyright. This sharing clearly benefits authors and society. Science fiction author Cory Doctorow, for example, released his first novel, *Down and Out in the Magic Kingdom*, both free on-line and in bookstores on the same day. His (and his publisher's) thinking was that the on-line distribution would be a great advertisement for the “real” book. People would read part on-line, and then decide whether they liked the book or not. If they liked it, they would be more likely to buy it. Doctorow's content is type D content. If sharing networks enable his work to be spread, then both he and society are better off. (Actually, much better off: It is a great book!)

Likewise for work in the public domain: This sharing benefits society with no legal harm to authors at all. If efforts to solve the problem of type A sharing destroy the opportunity for type D sharing, then we lose something important in order to protect type A content.

The point throughout is this: While the recording industry understandably says, “This is how much we've lost,” we must also ask, “How much has society gained from p2p sharing? What

are the efficiencies? What is the content that otherwise would be unavailable?"

For unlike the piracy I described in the first section of this chapter, much of the "piracy" that file sharing enables is plainly legal and good. And like the piracy I described in chapter 4 [67], much of this piracy is motivated by a new way of spreading content caused by changes in the technology of distribution. Thus, consistent with the tradition that gave us Hollywood, radio, the recording industry, and cable TV, the question we should be asking about file sharing is how best to preserve its benefits while minimizing (to the extent possible) the wrongful harm it causes artists. The question is one of balance. The law should seek that balance, and that balance will be found only with time.

"Men er ikke krigen bare en krig mot ulovlig deling? Er ikke angrepsmålet bare det du kaller type-A-deling?"

You would think. And we should hope. But so far, it is not. The effect of the war purportedly on type A sharing alone has been felt far beyond that one class of sharing. That much is obvious from the Napster case itself. When Napster told the district court that it had developed a technology to block the transfer of 99.4 percent of identified infringing material, the district court told counsel for Napster 99.4 percent was not good enough. Napster had to push the infringements "down to zero."[17]

If 99.4 percent is not good enough, then this is a war on file-sharing technologies, not a war on copyright infringement. There

[17] See Transcript of Proceedings, In Re: Napster Copyright Litigation at 34- 35 (N.D. Cal., 11 July 2001), nos. MDL-00-1369 MHP, C 99-5183 MHP, available at link #21 [http://free-culture.cc/notes/]. For an account of the litigation and its toll on Napster, see Joseph Menn, *All the Rave: The Rise and Fall of Shawn Fanning's Napster* (New York: Crown Business, 2003), 269–82.

is no way to assure that a p2p system is used 100 percent of the time in compliance with the law, any more than there is a way to assure that 100 percent of VCRs or 100 percent of Xerox machines or 100 percent of handguns are used in compliance with the law. Zero tolerance means zero p2p. The court's ruling means that we as a society must lose the benefits of p2p, even for the totally legal and beneficial uses they serve, simply to assure that there are zero copyright infringements caused by p2p.

Zero tolerance has not been our history. It has not produced the content industry that we know today. The history of American law has been a process of balance. As new technologies changed the way content was distributed, the law adjusted, after some time, to the new technology. In this adjustment, the law sought to ensure the legitimate rights of creators while protecting innovation. Sometimes this has meant more rights for creators. Sometimes less.

So, as we've seen, when “mechanical reproduction” threatened the interests of composers, Congress balanced the rights of composers against the interests of the recording industry. It granted rights to composers, but also to the recording artists: Composers were to be paid, but at a price set by Congress. But when radio started broadcasting the recordings made by these recording artists, and they complained to Congress that their “creative property” was not being respected (since the radio station did not have to pay them for the creativity it broadcast), Congress rejected their claim. An indirect benefit was enough.

Cable TV followed the pattern of record albums. When the courts rejected the claim that cable broadcasters had to pay for the content they rebroadcast, Congress responded by giving broadcasters a right to compensation, but at a level set by the law.

It likewise gave cable companies the right to the content, so long as they paid the statutory price.

This compromise, like the compromise affecting records and player pianos, served two important goals—indeed, the two central goals of any copyright legislation. First, the law assured that new innovators would have the freedom to develop new ways to deliver content. Second, the law assured that copyright holders would be paid for the content that was distributed. One fear was that if Congress simply required cable TV to pay copyright holders whatever they demanded for their content, then copyright holders associated with broadcasters would use their power to stifle this new technology, cable. But if Congress had permitted cable to use broadcasters' content for free, then it would have unfairly subsidized cable. Thus Congress chose a path that would assure *compensation* without giving the past (broadcasters) control over the future (cable).

In the same year that Congress struck this balance, two major producers and distributors of film content filed a lawsuit against another technology, the video tape recorder (VTR, or as we refer to them today, VCRs) that Sony had produced, the Betamax. Disney's and Universal's claim against Sony was relatively simple: Sony produced a device, Disney and Universal claimed, that enabled consumers to engage in copyright infringement. Because the device that Sony built had a “record” button, the device could be used to record copyrighted movies and shows. Sony was therefore benefiting from the copyright infringement of its customers. It should therefore, Disney and Universal claimed, be partially liable for that infringement.

There was something to Disney's and Universal's claim. Sony did decide to design its machine to make it very simple to record television shows. It could have built the machine to block

or inhibit any direct copying from a television broadcast. Or possibly, it could have built the machine to copy only if there were a special “copy me” signal on the line. It was clear that there were many television shows that did not grant anyone permission to copy. Indeed, if anyone had asked, no doubt the majority of shows would not have authorized copying. And in the face of this obvious preference, Sony could have designed its system to minimize the opportunity for copyright infringement. It did not, and for that, Disney and Universal wanted to hold it responsible for the architecture it chose.

MPAA president Jack Valenti became the studios' most vocal champion. Valenti called VCRs “tapeworms.” He warned, “When there are 20, 30, 40 million of these VCRs in the land, we will be invaded by millions of `tapeworms,' eating away at the very heart and essence of the most precious asset the copyright owner has, his copyright.”[18] “One does not have to be trained in sophisticated marketing and creative judgment,” he told Congress, “to understand the devastation on the after-theater marketplace caused by the hundreds of millions of tapings that will adversely impact on the future of the creative community in this country. It is simply a question of basic economics and plain common sense.”[19] Indeed, as surveys would later show, percent of VCR owners had movie libraries of ten videos or more[20] — a use the Court would later hold was not “fair.” By “allowing VCR owners to copy freely by the means of an exemption

[18] Copyright Infringements (Audio and Video Recorders): Hearing on S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 1st and 2nd sess., 459 (1982) (testimony of Jack Valenti, president, Motion Picture Association of America, Inc.).
[19] Copyright Infringements (Audio and Video Recorders), 475.
[20] *Universal City Studios, Inc*. v. *Sony Corp. of America*, 480 F. Supp. 429, (C.D. Cal., 1979).

from copyright infringementwithout creating a mechanism to compensate copyrightowners," Valenti testified, Congress would "take from the owners the very essence of their property: the exclusive right to control who may use their work, that is, who may copy it and thereby profit from its reproduction."[21]

It took eight years for this case to be resolved by the Supreme Court. In the interim, the Ninth Circuit Court of Appeals, which includes Hollywood in its jurisdiction—leading Judge Alex Kozinski, who sits on that court, refers to it as the "Hollywood Circuit"—held that Sony would be liable for the copyright infringement made possible by its machines. Under the Ninth Circuit's rule, this totally familiar technology—which Jack Valenti had called "the Boston Strangler of the American film industry" (worse yet, it was a *Japanese* Boston Strangler of the American film industry)—was an illegal technology.[22]

But the Supreme Court reversed the decision of the Ninth Circuit. And in its reversal, the Court clearly articulated its understanding of when and whether courts should intervene in such disputes. As the Court wrote,

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests

[21] Copyright Infringements (Audio and Video Recorders), 485 (testimony of Jack Valenti).
[22] *Universal City Studios, Inc*. mot *Sony Corp. of America*, 659 F. 2d 963 (9th Cir. 1981).

> that are inevitably implicated by such new technology.[23]

Congress was asked to respond to the Supreme Court's decision. But as with the plea of recording artists about radio broadcasts, Congress ignored the request. Congress was convinced that American film got enough, this "taking" notwithstanding. If we put these cases together, a pattern is clear:

Tilfelle	**Hvems verdi ble "røvet"**	**Responsen til domstolene**	**Responsen til Kongressen**
Innspillinger	Komponister	Ingen beskyttelse	Statutory license
Radio	Innspillingsartister	N/A	Ingenting
Kabel-TV	Kringkastere	Ingen beskyttelse	Statutory license
VCR	Filmskapere	Ingen beskyttelse	Ingenting

In each case throughout our history, a new technology changed the way content was distributed.[24] In each case, throughout our

[23] *Sony Corp. of America* mot *Universal City Studios, Inc*., 464 U.S. 417, 431 (1984).

[24] These are the most important instances in our history, but there are other cases as well. The technology of digital audio tape (DAT), for example, was regulated by Congress to minimize the risk of piracy. The remedy Congress imposed did burden DAT producers, by taxing tape sales and controlling the technology of DAT. See Audio Home Recording Act of 1992 (Title 17 of the *United States Code*), Pub. L. No. 102-563, 106 Stat. 4237, codified at 17 U.S.C. §1001. Again, however, this regulation did not eliminate the opportunity for free riding in the sense I've described. See Lessig, *Future*, 71. See also Picker, "From Edison to the Broadcast Flag," *University of Chicago Law Review* 70 (2003): 293–96.

history, that change meant that someone got a "free ride" on someone else's work.

In *none* of these cases did either the courts or Congress eliminate all free riding. In *none* of these cases did the courts or Congress insist that the law should assure that the copyright holder get all the value that his copyright created. In every case, the copyright owners complained of "piracy." In every case, Congress acted to recognize some of the legitimacy in the behavior of the "pirates." In each case, Congress allowed some new technology to benefit from content made before. It balanced the interests at stake.

When you think across these examples, and the other examples that make up the first four chapters of this section, this balance makes sense. Was Walt Disney a pirate? Would doujinshi be better if creators had to ask permission? Should tools that enable others to capture and spread images as a way to cultivate or criticize our culture be better regulated? Is it really right that building a search engine should expose you to $15 million in damages? Would it have been better if Edison had controlled film? Should every cover band have to hire a lawyer to get permission to record a song?

We could answer yes to each of these questions, but our tradition has answered no. In our tradition, as the Supreme Court has stated, copyright "has never accorded the copyright owner complete control over all possible uses of his work."[25] Instead, the particular uses that the law regulates have been defined by balancing the good that comes from granting an exclusive right against the burdens such an exclusive right creates. And this balancing has historically been done *after* a technology has

[25] *Sony Corp. of America* v. *Universal City Studios, Inc*., 464 U.S. 417, (1984).

matured, or settled into the mix of technologies that facilitate the distribution of content.

We should be doing the same thing today. The technology of the Internet is changing quickly. The way people connect to the Internet (wires vs. wireless) is changing very quickly. No doubt the network should not become a tool for "stealing" from artists. But neither should the law become a tool to entrench one particular way in which artists (or more accurately, distributors) get paid. As I describe in some detail in the last chapter of this book, we should be securing income to artists while we allow the market to secure the most efficient way to promote and distribute content. This will require changes in the law, at least in the interim. These changes should be designed to balance the protection of the law against the strong public interest that innovation continue.

This is especially true when a new technology enables a vastly superior mode of distribution. And this p2p has done. P2p technologies can be ideally efficient in moving content across a widely diverse network. Left to develop, they could make the network vastly more efficient. Yet these "potential public benefits," as John Schwartz writes in *The New York Times*, "could be delayed in the P2P fight."[26] Yet when anyone begins to talk about "balance," the copyright warriors raise a different argument. "All this hand waving about balance and incentives," they say, "misses a fundamental point. Our content," the warriors insist, "is our *property*. Why should we wait for Congress to `rebalance' our property rights? Do you have to wait before calling the police when your car has been stolen? And why should Congress deliberate at all about the merits of this theft? Do we

[26] John Schwartz, "New Economy: The Attack on Peer-to-Peer Software Echoes Past Efforts," *New York Times*, 22 September 2003, C3.

ask whether the car thief had a good use for the car before we arrest him?”

“Det er *vår eiendom*,” insisterer krigerne. “og den bør være beskyttet på samme måte som all annen eiendom er beskyttet.”

Del II. “Eiendom”

Opphavsretts-krigerne har rett: Opphavsretten er en type eiendom. Den kan eies og selges, og loven beskytter mot at den blir stjålet. Vanligvis, kan opphavsrettseieren be om hvilken som helst pris som han ønsker. Markeder bestemmer tilbud og etterspørsel som i hvert tilfelle bestemmer prisen hun kan få.

Men i vanlig språk er det å kalle opphavsrett for en “eiendoms”-rett litt misvisende, for eindommen i opphavsretten er en merkelig type eiendom. Selve ideen om eienrettigheter til en ide eller et uttrykk er nemlig veldig merkelig. Jeg forstår hva jeg tar når jeg tar en picnic-bord som du plasserte i din bakhage. Jeg tar en ting, picnic-bokrdet, og etter at jeg tar det har ikke du det. Men hva tar jeg når jeg tar den gode *ideen* som du hadde om å plassere picnic-bordet i bakhagen—ved å for eksempel dra til butikken Sears, kjøpe et bord, og plassere det i min egen bakhage? Hva er tingen jeg tar da?

The point is not just about the thingness of picnic tables versus ideas, though that's an important difference. The point instead is that in the ordinary case—indeed, in practically every case except for a narrow range of exceptions—ideas released to the world are free. I don't take anything from you when I copy the way you dress—though I might seem weird if I did it every day, and especially weird if you are a woman. Instead, as Thomas Jefferson said (and as is especially true when I copy the way someone else dresses), “He who receives an idea from me, receives instruction

himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."[27]

Unntakene til fri bruk er ideer og uttrykk innenfor dekningsområdet til loven om patent og opphavsrett, og noen få andre områder som jeg ikke vil diskutere her. Her sier loven at du ikke kan ta min ide eller uttrykk uten min tilatelse: Loven gjør det flyktige til eiendom.

But how, and to what extent, and in what form—the details, in other words—matter. To get a good sense of how this practice of turning the intangible into property emerged, we need to place this "property" in its proper context.[28]

My strategy in doing this will be the same as my strategy in the preceding part. I offer four stories to help put the idea of "copyright material is property" in context. Where did the idea come from? What are its limits? How does it function in practice? After these stories, the significance of this true statement —"copyright material is property"— will be a bit more clear, and its implications will be revealed as quite different from the implications that the copyright warriors would have us draw.

[27] Brev fra Thomas Jefferson til Isaac McPherson (13. august 1813) i *The Writings of Thomas Jefferson*, vol. 6 (Andrew A. Lipscomb and Albert Ellery Bergh, eds., 1903), 330, 333–34.

[28] As the legal realists taught American law, all property rights are intangible. A property right is simply a right that an individual has against the world to do or not do certain things that may or may not attach to a physical object. The right itself is intangible, even if the object to which it is (metaphorically) attached is tangible. See Adam Mossoff, "What Is Property? Putting the Pieces Back Together," *Arizona Law Review* 45 (2003): 373, 429 n. 241.

Kapittel 6. Kapittel seks: Grunnleggerne

William Shakespeare skrev *Romeo og Julie* i 1595. Skuespillet ble først utgitt i 1597. Det var det ellevte store skuespillet Shakespeare hadde skrevet. Han fortsatte å skrive skuespill helt til 1613, og stykkene han skrevhar fortsatt å definere angloamerikansk kultur siden. Så dypt har verkene av en 1500-talls forfatter sunket inn i vår kultur at vi ofte ikke engang kjenner kilden. Jeg overhørte en gang noen som kommentere Kenneth Branaghs utgave av Henry V: "Jeg likte det, men Shakespeare er så full av klisjeer."

I 1774, nesten 180 år etter at *Romeo og Julie* ble skrevet, mente mange at "opphavsretten" kun tilhørte én eneste utgiver i London, John Tonson. [1] Tonson var den mest fremstående av en liten gruppe utgivere kalt "the Conger"[2], som kontrollerte boksalget i England gjennom hele 1700-tallet. The Conger hevdet at de hadde en evigvarende rett over "kopier" av bøker de hadde fått av forfatterne. Denne evigvarende retten innebar at ingen andre kunne publisere kopier av disse bøkene. Slik ble prisen på klassiske bøker holdt oppe; alle konkurrenter som lagde bedre eller billigere utgaver, ble fjernet.

[1] Jacob Tonson er vanligvis husket for sin omgang med 1700-tallets litterære storheter, spesielt John Dryden, og for hans kjekke"ferdige versjoner" av klassiske verk. I tillegg til *Romeo og Julie*, utga han en utrolig rekke liste av verk som ennå er hjertet av den engelske kanon, inkludert de samlede verk av Shakespeare, Ben Jonson, John Milton, og John Dryden. Se Keith Walker: "Jacob Tonson, Bookseller", *American Scholar* 61:3 (1992): 424-31.

[2] Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 151–52.

Men altså, det er noe spennende med året 1774 for alle som vet litt om opphavsretts-lovgivning. Det mest kjente året for opphavsrett er 1710, da det britiske parlamentet vedtok den første loven. Denne loven er kjent som "Statute of Anne" og sa at alle publiserte verk skulle være beskyttet i fjorten år, en periode som kunne fornyes én gang dersom forfatteren ennå levde, og at alle verk publisert i eller før 1710 skulle ha en ekstraperiode på 22 tillegsår.[3] På grunn av denne loven, så skulle *Rome og Julie* ha falt i det fri i 1731. Hvordan kunne da Tonson fortsatt ha kontroll over verket i 1774?

Årsaken var ganske enkelt at engelskmennene ennå ikke hadde bestemt hva opphavsrett innebar -- faktisk hadde ingen i verden det. På den tiden da engelskmennene vedtok "Statute of Anne", var det ingen annen lovgivning om opphavsrett. Den siste loven som regulerte utgivere var lisensieringsloven av 1662, utløpt i 1695. At loven ga utgiverne monopol over publiseringen, noe som gjorde det enklere for kronen å kontrollere hva ble publisert. Men etter at det har utløpt, var det ingen positiv lov som sa at utgiverne hadde en eksklusiv rett til å trykke bøker.

At det ikke fantes noen *positiv* lov, betydde ikke at det ikke fantes noen lov. Den anglo-amerikanske juridiske tradisjon ser både til lover skapt av politikere (det lovgivende statsorgen)og til lover (prejudikater) skapt av domstolene for å bestemme hvordan folket skal leve. Vi kaller politikernes lover for positiv lov og vi kaller lovene fra dommerne sedvanerett."Common law" angir bakgrunnen for de lovgivendes lovgivning; retten til lovgiving, vanligvis kan trumfe at bakgrunnen bare hvis det går gjennom en lov til å forskyve den. Og så var det virkelige spørsmålet

[3] Som Siva Vaidhyanathan så pent argumenterer, er det feilaktige å kalle dette en "opphavsrettslov". Se Vaidhyanathan, *Copyrights and Copywrongs*, 40.

etter lisensiering lover hadde utløpt om felles lov beskyttet opphavsretten, uavhengig av lovverket positiv.

Dette spørsmålet var viktig for utgiverne eller "bokselgere", som de ble kalt, fordi det var økende konkurranse fra utenlandske utgivere, Særlig fra Skottland hvor publiseringen og eksporten av bøker til England hadde økt veldig. Denne konkurransen reduserte fortjenesten til "The Conger", som derfor krevde at parlamentet igjen skulle vedta en lov for å gi dem eksklusiv kontroll over publisering. Dette kravet resulterte i "Statute of Anne".

"Statute of Anne" ga forfatteren eller "eieren" av en bok en eksklusiv rett til å publisere denne boken. Men det var, til bokhandernes forferdelse en viktig begrensning, nemlig hvor lenge denne retten skulle vare. Etter dette gikk trykkeretten bort og verket falt i det fri og kunne trykkes av hvem som helst. Det var ihvertfall det lovgiverne hadde tenkt.

Men nå det mest interessante med dette: Hvorfor ville parlamentet begrense trykkeretten? Sprøsmålet er ikke hvorfor de bestemte seg for denne perioden, men hvorfor ville de begrense retten *i det hele tatt?*

Bokhandlerne, og forfatterne som de representerte, hadde et veldig sterkt krav. Ta *romeo og Julie* som et eksempel: Skuespillet ble skrevet av Shakespeare. Det var hans kreativitet som brakte det til verden. Han krenket ikke noens rett da han skrev dette verket (det er en kontroversiell påstanden, men det er urelevant), og med sin egen rett skapte han verket, han gjorde det ikke noe vanskeligere for andre til å lage skuespill. Så hvorfor skulle loven tillate at noen annen kunne komme og ta Shakespeares verkuten hans, eller hans arvingers, tillatelse? Hvilke grunner finnes for å tillate at noen "stjeler" Shakespeares verk?

Svaret er todel. Først må vi se på noe spesielt med oppfatningen av opphavsrett som fantes på tidspunktet da "Statute of Anne" ble vedtatt. Deretter må vi se på noe spesielt med bokhandlerne.

Først om opphavsretten. I de siste tre hundre år har vi kommet til å bruke begrepet "copyright" i stadig videre forstand. Men i 1710 var det ikke så mye et konsept som det var en bestemt rett. Opphavsretten ble født som et svært spesifikt sett med begrensninger: den forbød andre å reprodusere en bok. I 1710 var "kopi-rett" en rett til å bruke en bestemt maskin til å replikere en bestemt arbeid. Den gikk ikke utover dette svært smale formålet. Den kontrollerte ikke mer generelt hvordan et verk kunne *brukes*. Idag inkluderer retten en stor samling av restriksjoner på andres frihet: den gir forfatteren eksklusiv rett til å kopiere, eksklusiv rett til å distribuere, eksklusiv rett til å fremføre, og så videre.

Så selv om f. eks. opphavsretten til Shakespeares verker var evigvarende, betydde det under den opprinnelige betydningen av begrepet at ingen kunne trykke Shakespeares arbeid uten tillatelse fra Shakespeares arvinger. Den ville ikke ha kontrollert noe mer, for eksempel om hvordan verket kunne fremføres, om verket kunne oversettes eller om Kenneth Branagh ville hatt lov til å lage filmer. "Kopi-retten" var bare en eksklusiv rett til å trykke--ikke noe mindre, selvfølgelig, men heller ikke mer.

Selv dnne begrensede retten ble møtt med skepsis av britene. De hadde hatt en lang og stygg erfaring med "eksklusive rettigheter", spesielt "enerett" gitt av kronen. Engelskmennene hadde utkjempet en borgerkrig delvis mot kronens praksis med å dele ut monopoler--spesielt monopoler for verk som allerede eksisterte. Kong Henrik VIII hadde gitt patent til å trykke Bibelen og monopol til Darcy for å lage spillkort. Det engelske parlamentet begynte å kjempe tilbake mot denne makten hos kronen. I 1656 ble "Statute of Monopolis" vedtatt for å begrense

monopolene på patenter for nye oppfinnelser. Og i 1710 var parlamentet ivrig etter å håndtere det voksende monopolet på publisering.

Dermed ble "kopi-retten", når den sees på som en monopolrett, en rettighet som bør være begrenset. (Uansett hvor overbevisende påstanden om at "det er min eiendom, og jeg skal ha for alltid," prøv hvor overbevisende det er når men sier "det er mitt monopol, og jeg skal ha det for alltid.") Staten ville beskytte eneretten, men bare så lenge det gavnet samfunnet. Britene så skadene særinteresserte kunne skape; de vedtok en lov for å stoppe dem.

Dernest, om bokhandlerne. Det var ikke bare at kopiretten var et monopol. Det var også et monopol holdt av bokhandlerne. En bokhandler høres greie og ufarlige ut for oss, men slik var det ikke i syttenhundretallets England. Medlemmene i "the Conger" ble av en voksende mengde sett på som monopolister av verste sort - et verktøy for kronens undertrykkelse, de solgte Englands frihet mot å være garantert en monopolskinntekt. Men monopolistene ble kvast kritisert: Milton beskrev dem som "gamle patentholdere og monopolister i bokhandlerkunsten"; de var "menn som derfor ikke hadde et ærlig arbeide hvor utdanning er nødvendig."[4]

Mange trodde at den makten bokhandlerne utøvde over spredning av kunnskap, var til skade for selve spredningen, men på dette tidspunktet viste Opplysningen viktigheten av utdannelse og kunnskap for alle. idéen om at kunnskap burde være gratis er et kjennetegn for tiden, og disse kraftige kommersielle interesser forstyrret denne idéen.

[4] Philip Wittenberg, *The Protection and Marketing of Literary Property* (New York: J. Messner, Inc., 1937), 31.

For å balansere denne makten, besluttet Parlamentet å øke konkurransen blant bokhandlerne, og den enkleste måten å gjøre det på, var å spre mengden av verdifulle bøker. Parlamentet begrenset derfor begrepet om opphavsrett, og garantert slik at verdifulle bøker ville bli frie for alle utgiver å publisere etter en begrenset periode. Slik ble det å gi eksisterende verk en periode på tjueen år et kompromiss for å bekjempe bokhandlernes makt. Begrensninger med dato var en indirekte måte å skape konkurranse mellom utgivere, og slik en skapelse og spredning av kultur.

Når 1731 (1710+21) kom, ble bokhandlerne engstelige. De så konsekvensene av mer konkurranse, og som alle konkurrenter, likte de det ikke. Først ignorerte bokhandlere ganske enkelt "Statute of Anne", og fortsatte å kreve en evigvarende rett til å kontrollere publiseringen. Men i 1735 og 1737 de prøvde å tvinge Parlamentet til å utvide periodene. Tjueen år var ikke nok, sa de; de trengte mer tid.

Parlamentet avslo kravene, Som en pamflett sa, i en vending som levere ennå idag,

> Jeg ser ingen grunn til å gi en utvidet perioden nå som ikke ville kunne gi utvidelser om igjen og om igjen, så fort de gamle utgår; så dersom dette lovforslaget blir vedtatt, vil effekten være: at et evig monopol blir skapt, et stort nederlag for handelen, et angrep mot kunnskapen, ingen fordel for forfatterne, men en stor avgift for

> folket; og alt dette kun for å øke bokhandlernes personlige rikdom.[5]

Etter å ha mislyktes i Parlamentet gikk utgiverne til rettssalen i en rekke saker. Deres argument var enkelt og direkte: "Statute of Anne" ga forfatterne en viss beskyttelse gjennom positiv loven, men denne beskyttelsenvar ikke ment som en erstatning for felles lov. Istedet var de ment å supplere felles lov. Ifølge sedvanerett var det galt å ta en annen persons kreative eiendom og bruke den uten hans tillatelse. "Statute of Anne", hevdet bokhandlere, endret ikke dette faktum. Derfor betydde ikke det at beskyttelsen gitt av "Statute of Anne" utløp, at beskyttelsen fra sedvaneretten utløp: Ifølge sedvaneretten hadde de rett til å fordømme publiseringen av en bok, selv følgelig om "Statute of Anne" sa at de var falt i det fri. Dette, mente de, var den eneste måten å beskytte forfatterne.

Dette var et godt argument, og hadde støtte fra flere av den tidens ledende jurister. Det viste også en ekstraordinær chutzpah. Inntail da, som jusprofessor Raymond Pattetson har sagt, "var utgiverne … like bekymret for forfatterne som en gjeter for sine lam."[6] Bokselgerne brydde seg ikke det spor om forfatternes rettigheter. Deres bekymring var den monopolske inntekten forfatterens verk ga.

[5] A Letter to a Member of Parliament concerning the Bill now depending in the House of Commons, for making more effectual an Act in the Eighth Year of the Reign of Queen Anne, entitled, An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned (London, 1735), in Brief Amici Curiae of Tyler T. Ochoa et al., 8, *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

[6] Lyman Ray Patterson, "Free Speech, Copyright, and Fair Use", *Vanderbilt Law Review* 40 (1987): 28. For en fantastisk overbevisende fortelling, se Vaidhyanathan, 37–48.

Men bokhandlernes argument ble ikke godtatt uten kamp. Helten fra denne kampen var den skotske bokselgeren Alexander Donaldson.[7]

Donaldson var en fremmed for Londons "the Conger". Han startet in karriere i Edinburgh i 1750. Hans forretningsidé var billige kopier av standardverk falt i det fri, ihvertfall fri ifølge "Statute of Anne".[8] Donaldsons forlag vokste og ble "et sentrum for litterære skotter." "Blant dem," skriver professor Mark Rose, var "den unge James Boswell som, sammen med sin venn Andrew Erskine, publiserte en hel antologi av skotsk samtidspoesi sammen med Donaldson."[9]

Da Londons bokselgere prøvde å få stengt Donaldsons butikk i Skottland, så flyttet han butikken til London. Her solgte han billige utgaver av "de mest populære, engelske bøker, i kamp mot sedvanerettens rett til litterær eiendom." [10] Bøkene hans var mellom 30% og 50% billigere enn "the Conger"s, og han baserte sin rett til denne konkurransen på at bøkene, takket være "Statute of Anne", var falt i det fri.

Londons bokselgere begynte straks å slå ned mot "pirater" som Donaldson. Flere tiltak var vellykkede, den viktigste var den tidlig seieren i kampen mellom *Millar* og *Taylor*.

Millar var en bokhandler som i 1729 hadde kjøpt opp rettighetene til James Thomsons dikt "The Seasons". Millar hadde da full

[7] For a compelling account, see David Saunders, *Authorship and Copyright* (London: Routledge, 1992), 62–69.
[8] Mark Rose, *Authors and Owners* (Cambridge: Harvard University Press, 1993), 92.
[9] Ibid., 93.
[10] Lyman Ray Patterson, *Copyright in Historical Perspective*, 167 (quoting Borwell).

beskyttelse gjennom "Statute of Anne", men etter at denne beskyttelsen var uløpt, begynte Robert Taylor å trykke et konkurrerende bind. Millar gikk til sak, og hevdet han hadde en evig rett gjennom sedvaneretten, uansett hva "Statute of Anne" sa.[11]

Til moderne juristers forbløffelse, var en av, ikke bare datidens, men en av de største dommere i engelsk historie, Lord Mansfield, enig med bokhandlerne. Uansett hvilken beskyttelse "Statute of Anne" gav bokhandlerne, så sa han at den ikke fortrengte noe fra sedvaneretten. Spørsmålet var hvorvidt sedvaneretten beskyttet forfatterne mot "pirater". Mansfield svar var ja: Sedvaneretten nektet Taylor å reprodusere Thomsons dikt uten Millars tillatelse. Slik gav sedvaneretten bokselgerne en evig publiseringsrett til bøker solgt til dem.

Ser man på det som et spørsmål innen abstrakt jus - dersom man resonnere som om rettferdighet bare var logisk deduksjon fra de første bud - kunne Mansfields konklusjon gitt mening. Men den overså det Parlamentet hadde kjempet for i 1710: Hvordan man på best mulig vis kunne innskrenke utgivernes monopolmakt. Parlamentets strategi hadde vært å kjøpe fred gjennom å tilby en beskyttelsesperiode også for eksisterende verk, men perioden måtte være så kort at kulturen ble utsatt for konkurranse innen rimelig tid. Storbritannia skulle vokse fra den kontrollerte kulturen under kronen, inn i en fri og åpen kultur.

Kampen for å forsvare "Statute of Anne"s begrensninger sluttet uansett ikke der, for nå kommer Donaldson.

[11] Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright", *Wayne Law Review* 29 (1983): 1152.

Millar døde kort tid etter sin seier. Boet hans solgte rettighetene over Thomsons dikt til et syndikat av utgivere, deriblant Thomas Beckett.[12] Da ga Donaldson ut en uautorisert utgave av Thomsons verk. Etter avgjørelsen i *Millar*-saken, gikk Beckett til sak mot Donaldson. Donaldson tok saken inn for Overhuset, som da fungerte som en slags høyesterett. I februar 1774 hadde dette organet muligheten til å tolke Parlamentets mening med utøpsdatoen fra seksti år før.

Rettssaken *Donaldson* mot *Beckett* fikk en enorm oppmerksomhet i hele Storbritannia. Donaldsons advokater mente at selv om det før fantes en del rettigheter i sedvaneretten, så var disse fortrengt av "Statute of Anne". Etter at "Statute of Anne" var blitt vedtatt, skulle den eneste lovlige beskyttelse for trykkerett kom derfra. Og derfor, mente de, i tråd med vilkårene i "Statute of Anne", falle i det fri så fort beskyttelsesperioden var over.

Overhuset var en merkelig institusjon. Juridiske spørsmål ble presentert for huset, og ble først stemt over av "juslorder", medlemmer av enspesiell rettslig gruppe som fungerte nesten slik som justiariusene i vår Høyesterett. Deretter, etter at "juslordene" hadde stemt, stemte resten av Overhuset.

Rapportene om juslordene stemmer er uenige. På enkelte punkter ser det ut som om evigvarende beskyttelse fikk flertall. Men det er ingen tvil om hvordan resten av Overhuset stemte. Med en majoritet på to mot en (22 mot 11) stemte de ned forslaget om en evig beskyttelse. Uansett hvordan man hadde tolket sedvaneretten, var nå kopiretten begrenset til en periode, og etter denne ville verket falle i det fri.

[12] Ibid., 1156.

"Å falle i det fri". Før rettssaken *Donaldson* mot *Beckett* var det ingen klar oppfatning om hva å falle i det fri innebar. Før 1774 var det jo en allmenn oppfatning om at kopiretten var evigvarende. Men etter 1774 ble Public Domain født.For første gang i angloamerikansk historie var den lovlige beskyttelsen av et verk utgått, og de største verk i engelsk historie - inkludert Shakespeare, Bacon, Milton, Johnson og Bunyan - var frie.

Vi kan knapt forestille oss det, men denne avgjørelsen fra Overhuset fyrte opp under en svært populær og politisk reaksjon. I Skottland, hvor de fleste piratugiverne hadde holdt til, ble avgjørelsen feiret i gatene. Som *Edinburgh Advertiser* skrev "Ingen privatsak har noen gang fått slik oppmerksomhet fra folket, og ingen sak som har blitt prøvet i Overhuset har interessert så mange enkeltmennesker." "Stor glede i Edinburgh etter seieren over litterær eiendom: bål og *illuminations*."[13]

I London, ihvertfall blant utgiverne, var reaksjonen like sterk, men i motsatt retning. *Morning Chronicle* skrev:

> Gjennom denne avgjørelsen … er verdier til nesten 200 000 pund, som er blitt ærlig kjøpt gjennom allment salg, og som i går var eiendom, er nå redusert til ingenting. Bokselgerne i London og Westminster, mange av dem har solgt hus og eiendom for å kjøpe kopirettigheter, er med ett ruinerte, og mange som gjennom mange år har opparbeidet kompetanse for å brødfø familien, sitter nå uten en shilling til sine.[14]

[13] Rose, 97.
[14] ibid.

"Ruinert" er en overdrivelse. Men det er ingen overdrivelse å si at endringen var stor. Vedtaket fra Overhuset betydde at bokhandlerne ikke lenger kunnen kontrollere hvordan kulturen i England ville vokse og utvikle seg. Kulturen i England var etter dette *fri*. Ikke i den betydning at kopiretten ble ignorert, for utgiverne hadde i en begrenset periode rett over trykkingen. Og heller ikke i den betydningen at bøker kunne stjeles, for selv etter at boken var falt i det fri, så måtte den kjøpes. Men *fri* i betydningen at kulturen og dens vekst ikke lenger var kontrollert av en liten gruppe utgivere. Som alle frie markeder, ville dette markedet vokse og utvikle seg etter tilbud og etterspørsel. Den engelske kulturen ble nå formet slik flertallet Englands lesere ville at det skulle formes - gjennom valget av hva de kjøpte og skrev, gjennom valget av *memes* de gjentok og beundret. Valg i en *konkurrerende sammenheng*, ikke der hvor valgene var om hvilken kultur som skulle være tilgjengelig for folket og hvor deres tilgang til den ble styrt av noen få, på tros av flertallets ønsker.

Til sist, dette var en verden hvor Parlamentet var antimonopolistisk, og holdt stand mot utgivernes krav. I en verden hvor parlamentet er lett å påvirke, vil den frie kultur være mindre beskyttet.

Kapittel 7. Kapittel sju: Innspillerne

Jon Else er en filmskaper. Han er mest kjent for sine dokumentarer og har på ypperlig vis klart å spre sin kunst. Han er også en lærer, som meg selv, og jeg misunner den lojaliteten og beundringen hans studenter har for ham. (Ved et uhell møtte jeg to av hans studenter i et middagsselskap og han var deres Gud.)

Else arbeidet med en dokumentarfilm hvor også jeg var involvert. I en pause så fortalte han meg om hvordan det kunne være å skape film i dagens Amerika.

I 1990 arbeidet Else med en dokumentar om Wagners Ring Cycle. Fokuset var på *stagehands* på San Francisco Opera. Stagehands er spesielt morsomt og fargerikt innslag i en opera. I løpet av forestillingen oppholder de seg blant publikum og på lysloftet. De er en perfekt kontrast til kunsten på scenen.

Under en forestilling, filmet Else noen stagehands som spilte *checkers*. I et hjørne av rommet stod det et fjernsynsapparat. På fjernsynet, mens forestillingen pågikk og operakompaniet spilte Wagner, gikk *The Simpsons*. Slik Else så det, så hjalp dette tegnefilm-innslaget med å fange det spesielle med scenen.

Så noen år senere, da han endelig hadde fått ordnet den siste finansieringen, ville Else skaffe rettigheter til å bruke disse få sekundene med *The Simpson*. For disse få sekundene var selvsagt beskyttet av opphavsretten, og for å bruke beskyttet materiale må man ha tillatelse fra eieren, dersom det ikke er “rimelig bruk” eller det foreligger spesielle avtaler.

Else kontaktet *Simpson*-skaper Matt Groenings kontor for å få tillatelse. Og Groening gav ham det. Det var tross alt kun snakk om fire og et halvt sekund på et lite fjernsyn, bakerst i et hjørne av rommet. Hvordan kunne det skade? Groening var glad for å få ha det med i filmen, men han ba Else om å kontakte Gracie Films, firmaet som produserer programmet.

Gracie Films sa også at det var greit, men de, slik som Groening, ønsket å være forsiktige, og ba Else om å kontakte Fox, konsernet som eide Gracie. Og Else kontaktet Fox og forklarte situasjonen; at det var snakk om et klipp i hjørnet i bakgrunnen i ett rom i filmen. Matt Groening hadde allerede gitt sin tillatelse, sa Else. Han ville bare få det avklart med Fox.

Deretter, fortalte Else: "skjedde to ting. Først oppdaget vi … at Matt Groening ikke eide sitt eget verk — ihvertfall at noen [hos Fox] trodde at han ikke eide sitt eget verk." Som det andre krevde Fox "ti tusen dollar i lisensavgift for disse fire og et halvt sekundene med … fullstendig tilfeldig *Simpson* som var i et hjørne i ett opptak."

Ellers var sikker på at det var en feil. Han fikk tak i noen som han trodde var nestleder for lisensiering, Rebecca Herrera. Han forklarte for henne at "det må være en feil her … Vi ber deg om en utdanningssats på dette." Og de hadde fått utdanningssats, fortalte Herrera. Kort tid etter ringte Else igjen for å få dette bekreftet.

"Jeg måtte være sikker på at jeg hadde riktige opplysninger foran meg", sa han. "Ja, du har riktige opplysninger", sa hun. Det ville koste $10 000 å bruke dette lille klippet av *The Simpson*, plassert bakerst i et hjørne i en scene i en dokumentar om Wagners Ring Cycle. Som om det ikke var nok, forbløffet Herrera Else med å si "Og om du siterer meg, vil du høre fra våre advokater." En av

Herreras assistenter fortalte Else at "De bryr seg ikke i det heletatt. Alt de vil ha er pengene."

Men Else hadde ikke penger til å kjøpe lisens for klippet. Så å gjenskape denne delen av virkeligheten, lå langt utenfor hans budsjett. Like før dokumentaren skulle slippes, redigerte Else inn et annet klipp på fjernsynet, et klipp fra en av hans andre filmer *The Day After Trinity* fra ti år tidligere.

Det er ingen tvil om at noen, enten det er er Matt Groening eller Fox, eier rettighetene til *The Simpsons*. Rettighetene er deres eiendom. For å bruke beskyttet mteriale, kreves det ofte at men får tillatelse fra eieren eller eierne. Dersom Else ønsket å bruke *The Simpsons* til noe hvor loven gir verket beskyttelse, så må han innhente tillatelse fra eieren før han kan bruke det. Og i et fritt markes er det eieren som bestemmer hvor mye han/hun vil ta for hvilken som helst bruk (hvor loven krever tillatelse fra eier).

For eksempel "offentlig fremvisning"* av *The Simpson* er en form for bruk hvor loven gir eieren kontroll. Dersom du velger ut dine favorittepisoder, leier en kinosal og selger billetter til "Mine *Simpson*-favoritter", så må du ha tillatelse fra rettighetsinnhaveren (eieren). Og eieren kan (med rette, slik jeg ser det) kreve hvor mye han vil; $10ellr $1 000 000. Det er hans rett ifølge loven.

Men når jurister hører denne historien om Jon Else og Fox, så er deres første tanke "rimelig bruk".[1] Elses bruk av 4,5 sekunder med et indirekte klipp av en *Simpsons*-episode er et klart eksempel

[1] Ønsker du å lese en flott redegjørelse om hvordan dette er "fair use", og hvordan advokatene ikke anerkjenner det, så les Richard A. Posner og William F. Patry, "Fair Use and Statutory Reform in the Wake of *Eldred* " (utkast arkivert hos forfatteren), University of Chicago Law School, 5. august 2003.

på "rimelig bruk" av *The Simpsons*— og "rimelig bruk" krever ingen tillatelse fra noen.

Så jeg spurte Else om hvorfor han ikke bare stolte på "fair use". Og her er hans svar:

> *Simpsons*-fiaskoen lærte meg om hvor stor avstand det var mellom det jurister finner urelevant på en abstrakt måte, og hva som er knusende relevant på en konkret måte for oss som prøver å lage og kringkaste dokumentarer. Jeg tvilte aldri på at dette helt klart var "rimelig bruk", men jeg kunne ikke stole på konseptet på noen konkret måte. Og dette er grunnen:
>
> 1. Før våre filmer kan kringkastes, krever nettverket at vi kjøper en "Errors and Omissions"-forsikring. Den krever en detailjert "visual cue sheet" med alle kilder og lisens-status på alle scener i filmen. De har et smalt syn på "fair use", og å påstå at noe er nettopp det kan forsinke, og i verste fall stoppe, prosessen.
>
> 2. Jeg skulle nok aldri ha bedt om Matt Groenings tillatelse. Men jeg visste (ihvertfall fra rykter) at Fox tidligere hadde brukt å jakte på og stoppe ulisensiert bruk av *The Simpsons*, på samme måte som George Lucas var veldig ivrig på å forfølge bruken av *Star Wars*. Så jeg bestemte meg for å følge boka, og trodde at vi kulle få til en gratis, i alle fall rimelig, avtale for fire sekunders bruk av *The Simpsons*. Som

en dokumentarskaper, arbeidende på randen av utryddelse, var det siste jeg ønsket en juridisk strid, selv for å forsvare et prinsipp.

3. Jeg snakket faktisk med en av dine kolleger på Stanford Law School … som bekreftet at dette var rimelig bruk. Han bekreftet også at Fox ville "depose and litigate you to within an inch of your life", uavhengig av sannheten i mine krav. Han gjorde det klart at alt ville koke ned til hvem som hadde flest jurister og dypest lommer, jeg eller dem.

4. Spørsmålet om "fair use" dukker om regel opp helt mot slutten av prosjektet, når vi nærmer oss siste frist og er tomme for penger.

I teorien betyr "fair use" at du ikke trenger tillatelse. Teorien støtter derfor den frie kultur og arbeider mot tillatelseskulturen. Men i praksis fungerer "fair use" helt annerledes. Men de uklare linjene i lovverket, samt de fryktelige konsekvensene dersom man tar feil, gjør at mange kunstnere ikke stoler på "fair use". Loven har en svært god hensikt, men praksisen har ikke fulgt opp.

Dette eksempelet viser hvor langt denne loven har kommet fra sine syttenhundretalls røtter. Loven som skulle beskytte utgiverne mot urettferdig piratkonkurranse, hadde utviklet seg til et sverd som slo ned på _all_ bruk, transformativ* eller ikke.

Kapittel 8. Kapittel åtte: Omformere

In 1993, Alex Alben was a lawyer working at Starwave, Inc. Starwave was an innovative company founded by Microsoft cofounder Paul Allen to develop digital entertainment. Long before the Internet became popular, Starwave began investing in new technology for delivering entertainment in anticipation of the power of networks.

Alben had a special interest in new technology. He was intrigued by the emerging market for CD-ROM technology—not to distribute film, but to do things with film that otherwise would be very difficult. In 1993, he launched an initiative to develop a product to build retrospectives on the work of particular actors. The first actor chosen was Clint Eastwood. The idea was to showcase all of the work of Eastwood, with clips from his films and interviews with figures important to his career.

At that time, Eastwood had made more than fifty films, as an actor and as a director. Alben began with a series of interviews with Eastwood, asking him about his career. Because Starwave produced those interviews, it was free to include them on the CD.

That alone would not have made a very interesting product, so Starwave wanted to add content from the movies in Eastwood's career: posters, scripts, and other material relating to the films Eastwood made. Most of his career was spent at Warner Brothers, and so it was relatively easy to get permission for that content.

Then Alben and his team decided to include actual film clips. “Our goal was that we were going to have a clip from every one of Eastwood's films,” Alben told me. It was here that the problem arose. “No one had ever really done this before,” Alben explained. “No one had ever tried to do this in the context of an artistic look at an actor's career.”

Alben brought the idea to Michael Slade, the CEO of Starwave. Slade asked, “Well, what will it take?”

Alben replied, “Well, we're going to have to clear rights from everyone who appears in these films, and the music and everything else that we want to use in these film clips.” Slade said, “Great! Go for it.”[1]

The problem was that neither Alben nor Slade had any idea what clearing those rights would mean. Every actor in each of the films could have a claim to royalties for the reuse of that film. But CD-ROMs had not been specified in the contracts for the actors, so there was no clear way to know just what Starwave was to do.

I asked Alben how he dealt with the problem. With an obvious pride in his resourcefulness that obscured the obvious bizarreness of his tale, Alben recounted just what they did:

> So we very mechanically went about looking up the film clips. We made some artistic decisions about what film clips to include—of course we were going to use the “Make my day” clip from *Dirty Harry*. But you then need to get the guy

[1] Technically, the rights that Alben had to clear were mainly those of publicity—rights an artist has to control the commercial exploitation of his image. But these rights, too, burden “Rip, Mix, Burn” creativity, as this chapter evinces.

> on the ground who's wiggling under the gun and you need to get his permission. And then you have to decide what you are going to pay him.
>
> We decided that it would be fair if we offered them the dayplayer rate for the right to reuse that performance. We're talking about a clip of less than a minute, but to reuse that performance in the CD-ROM the rate at the time was about $600. So we had to identify the people—some of them were hard to identify because in Eastwood movies you can't tell who's the guy crashing through the glass—is it the actor or is it the stuntman? And then we just, we put together a team, my assistant and some others, and we just started calling people.

Some actors were glad to help—Donald Sutherland, for example, followed up himself to be sure that the rights had been cleared. Others were dumbfounded at their good fortune. Alben would ask, “Hey, can I pay you $600 or maybe if you were in two films, you know, $1,200?” And they would say, “Are you for real? Hey, I'd love to get $1,200.” And some of course were a bit difficult (estranged ex-wives, in particular). But eventually, Alben and his team had cleared the rights to this retrospective CD-ROM on Clint Eastwood's career.

It was one *year* later—“and even then we weren't sure whether we were totally in the clear.”

Alben is proud of his work. The project was the first of its kind and the only time he knew of that a team had undertaken such a massive project for the purpose of releasing a retrospective.

> Everyone thought it would be too hard. Everyone just threw up their hands and said, "Oh, my gosh, a film, it's so many copyrights, there's the music, there's the screenplay, there's the director, there's the actors." But we just broke it down. We just put it into its constituent parts and said, "Okay, there's this many actors, this many directors, … this many musicians," and we just went at it very systematically and cleared the rights.

And no doubt, the product itself was exceptionally good. Eastwood loved it, and it sold very well.

But I pressed Alben about how weird it seems that it would have to take a year's work simply to clear rights. No doubt Alben had done this efficiently, but as Peter Drucker has famously quipped, "There is nothing so useless as doing efficiently that which should not be done at all."[2] Did it make sense, I asked Alben, that this is the way a new work has to be made?

For, as he acknowledged, "very few … have the time and resources, and the will to do this," and thus, very few such works would ever be made. Does it make sense, I asked him, from the standpoint of what anybody really thought they were ever giving rights for originally, that you would have to go clear rights for these kinds of clips?

> I don't think so. When an actor renders a performance in a movie, he or she gets paid

[2] U.S. Department of Commerce Office of Acquisition Management, *Seven Steps to Performance-Based Services Acquisition*, available at link #22 [http://free-culture.cc/notes/].

> very well. … And then when 30 seconds of that performance is used in a new product that is a retrospective of somebody's career, I don't think that that person … should be compensated for that.

Or at least, is this *how* the artist should be compensated? Would it make sense, I asked, for there to be some kind of statutory license that someone could pay and be free to make derivative use of clips like this? Did it really make sense that a follow-on creator would have to track down every artist, actor, director, musician, and get explicit permission from each? Wouldn't a lot more be created if the legal part of the creative process could be made to be more clean?

> Absolutely. I think that if there were some fair-licensing mechanism—where you weren't subject to hold-ups and you weren't subject to estranged former spouses—you'd see a lot more of this work, because it wouldn't be so daunting to try to put together a retrospective of someone's career and meaningfully illustrate it with lots of media from that person's career. You'd build in a cost as the producer of one of these things. You'd build in a cost of paying X dollars to the talent that performed. But it would be a known cost. That's the thing that trips everybody up and makes this kind of product hard to get off the ground. If you knew I have a hundred minutes of film in this product and it's going to cost me X, then you build your budget around it, and you can get investments and everything else that you need to produce it.

> But if you say, “Oh, I want a hundred minutes of something and I have no idea what it's going to cost me, and a certain number of people are going to hold me up for money,” then it becomes difficult to put one of these things together.

Alben worked for a big company. His company was backed by some of the richest investors in the world. He therefore had authority and access that the average Web designer would not have. So if it took him a year, how long would it take someone else? And how much creativity is never made just because the costs of clearing the rights are so high?

These costs are the burdens of a kind of regulation. Put on a Republican hat for a moment, and get angry for a bit. The government defines the scope of these rights, and the scope defined determines how much it's going to cost to negotiate them. (Remember the idea that land runs to the heavens, and imagine the pilot purchasing flythrough rights as he negotiates to fly from Los Angeles to San Francisco.) These rights might well have once made sense; but as circumstances change, they make no sense at all. Or at least, a well-trained, regulationminimizing Republican should look at the rights and ask, “Does this still make sense?”

I've seen the flash of recognition when people get this point, but only a few times. The first was at a conference of federal judges in California. The judges were gathered to discuss the emerging topic of cyber-law. I was asked to be on the panel. Harvey Saferstein, a well-respected lawyer from an L.A. firm, introduced the panel with a video that he and a friend, Robert Fairbank, had produced.

Videoen var en glimrende sammenstilling av filmer fra hver periode i det tjuende århundret, rammet inn rundt idéen om en episode i TV-serien *60 Minutes*. Utførelsen var perfekt, ned til seksti minutter stoppeklokken. Dommerne elsket enhver minutt av den.

Da lysene kom på, kikket jeg over til min medpaneldeltager, David Nimmer, kanskje den ledende opphavsrettakademiker og utøver i nasjonen. Han hadde en forbauset uttrykk i ansiktet sitt, mens han tittet ut over rommet med over 250 godt underholdte dommere. Med en en illevarslende tone, begynte han sin tale med et spørsmål: "Vet dere hvor mange føderale lover som nettopp brutt i dette rommet?"

For of course, the two brilliantly talented creators who made this film hadn't done what Alben did. They hadn't spent a year clearing the rights to these clips; technically, what they had done violated the law. Of course, it wasn't as if they or anyone were going to be prosecuted for this violation (the presence of 250 judges and a gaggle of federal marshals notwithstanding). But Nimmer was making an important point: A year before anyone would have heard of the word Napster, and two years before another member of our panel, David Boies, would defend Napster before the Ninth Circuit Court of Appeals, Nimmer was trying to get the judges to see that the law would not be friendly to the capacities that this technology would enable. Technology means you can now do amazing things easily; but you couldn't easily do them legally.

We live in a "cut and paste" culture enabled by technology. Anyone building a presentation knows the extraordinary freedom that the cut and paste architecture of the Internet created—in a second you can find just about any image you want; in another second, you can have it planted in your presentation.

But presentations are just a tiny beginning. Using the Internet and its archives, musicians are able to string together mixes of sound never before imagined; filmmakers are able to build movies out of clips on computers around the world. An extraordinary site in Sweden takes images of politicians and blends them with music to create biting political commentary. A site called Camp Chaos has produced some of the most biting criticism of the record industry that there is through the mixing of Flash! and music.

All of these creations are technically illegal. Even if the creators wanted to be "legal," the cost of complying with the law is impossibly high. Therefore, for the law-abiding sorts, a wealth of creativity is never made. And for that part that is made, if it doesn't follow the clearance rules, it doesn't get released.

To some, these stories suggest a solution: Let's alter the mix of rights so that people are free to build upon our culture. Free to add or mix as they see fit. We could even make this change without necessarily requiring that the "free" use be free as in "free beer." Instead, the system could simply make it easy for follow-on creators to compensate artists without requiring an army of lawyers to come along: a rule, for example, that says "the royalty owed the copyright owner of an unregistered work for the derivative reuse of his work will be a flat 1 percent of net revenues, to be held in escrow for the copyright owner." Under this rule, the copyright owner could benefit from some royalty, but he would not have the benefit of a full property right (meaning the right to name his own price) unless he registers the work.

Who could possibly object to this? And what reason would there be for objecting? We're talking about work that is not now being made; which if made, under this plan, would produce new income for artists. What reason would anyone have to oppose it?

In February 2003, DreamWorks studios announced an agreement with Mike Myers, the comic genius of *Saturday Night Live* and Austin Powers. According to the announcement, Myers and Dream-Works would work together to form a "unique filmmaking pact." Under the agreement, DreamWorks "will acquire the rights to existing motion picture hits and classics, write new storylines and—with the use of stateof-the-art digital technology—insert Myers and other actors into the film, thereby creating an entirely new piece of entertainment."

The announcement called this "film sampling." As Myers explained, "Film Sampling is an exciting way to put an original spin on existing films and allow audiences to see old movies in a new light. Rap artists have been doing this for years with music and now we are able to take that same concept and apply it to film." Steven Spielberg is quoted as saying, "If anyone can create a way to bring old films to new audiences, it is Mike."

Spielberg is right. Film sampling by Myers will be brilliant. But if you don't think about it, you might miss the truly astonishing point about this announcement. As the vast majority of our film heritage remains under copyright, the real meaning of the DreamWorks announcement is just this: It is Mike Myers and only Mike Myers who is free to sample. Any general freedom to build upon the film archive of our culture, a freedom in other contexts presumed for us all, is now a privilege reserved for the funny and famous—and presumably rich.

This privilege becomes reserved for two sorts of reasons. The first continues the story of the last chapter: the vagueness of "fair use." Much of "sampling" should be considered "fair use." But few would rely upon so weak a doctrine to create. That leads to the second reason that the privilege is reserved for the few: The costs of negotiating the legal rights for the creative reuse of content are

astronomically high. These costs mirror the costs with fair use: You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don't have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few.

Kapittel 9. Kapittel ni: Samlere

In April 1996, millions of “bots”—computer codes designed to “spider,” or automatically search the Internet and copy content—began running across the Net. Page by page, these bots copied Internet-based information onto a small set of computers located in a basement in San Francisco's Presidio. Once the bots finished the whole of the Internet, they started again. Over and over again, once every two months, these bits of code took copies of the Internet and stored them.

By October 2001, the bots had collected more than five years of copies. And at a small announcement in Berkeley, California, the archive that these copies created, the Internet Archive, was opened to the world. Using a technology called “the Way Back Machine,” you could enter a Web page, and see all of its copies going back to 1996, as well as when those pages changed.

This is the thing about the Internet that Orwell would have appreciated. In the dystopia described in *1984*, old newspapers were constantly updated to assure that the current view of the world, approved of by the government, was not contradicted by previous news reports.

Thousands of workers constantly reedited the past, meaning there was no way ever to know whether the story you were reading today was the story that was printed on the date published on the paper.

It's the same with the Internet. If you go to a Web page today, there's no way for you to know whether the content you are reading is the same as the content you read before. The page may seem the same, but the content could easily be different. The Internet is Orwell's library—constantly updated, without any reliable memory.

Until the Way Back Machine, at least. With the Way Back Machine, and the Internet Archive underlying it, you can see what the Internet was. You have the power to see what you remember. More importantly, perhaps, you also have the power to find what you don't remember and what others might prefer you forget.[1]

We take it for granted that we can go back to see what we remember reading. Think about newspapers. If you wanted to study the reaction of your hometown newspaper to the race riots in Watts in 1965, or to Bull Connor's water cannon in 1963, you could go to your public library and look at the newspapers. Those papers probably exist on microfiche. If you're lucky, they exist in paper, too. Either way, you are free, using a library, to go back and remember—not just what it is convenient to remember, but remember something close to the truth.

It is said that those who fail to remember history are doomed to repeat it. That's not quite correct. We *all* forget history. The key is whether we have a way to go back to rediscover what we forget. More directly, the key is whether an objective past can keep us honest. Libraries help do that, by collecting content and keeping

[1] The temptations remain, however. Brewster Kahle reports that the White House changes its own press releases without notice. A May 13, 2003, press release stated, “Combat Operations in Iraq Have Ended.” That was later changed, without notice, to “Major Combat Operations in Iraq Have Ended.” E-mail from Brewster Kahle, 1 December 2003.

it, for schoolchildren, for researchers, for grandma. A free society presumes this knowedge.

The Internet was an exception to this presumption. Until the Internet Archive, there was no way to go back. The Internet was the quintessentially transitory medium. And yet, as it becomes more important in forming and reforming society, it becomes more and more important to maintain in some historical form. It's just bizarre to think that we have scads of archives of newspapers from tiny towns around the world, yet there is but one copy of the Internet—the one kept by the Internet Archive.

Brewster Kahle is the founder of the Internet Archive. He was a very successful Internet entrepreneur after he was a successful computer researcher. In the 1990s, Kahle decided he had had enough business success. It was time to become a different kind of success. So he launched a series of projects designed to archive human knowledge. The Internet Archive was just the first of the projects of this Andrew Carnegie of the Internet. By December of 2002, the archive had over 10 billion pages, and it was growing at about a billion pages a month.

The Way Back Machine is the largest archive of human knowledge in human history. At the end of 2002, it held “two hundred and thirty terabytes of material”—and was “ten times larger than the Library of Congress.” And this was just the first of the archives that Kahle set out to build. In addition to the Internet Archive, Kahle has been constructing the Television Archive. Television, it turns out, is even more ephemeral than the Internet. While much of twentieth-century culture was constructed through television, only a tiny proportion of that culture is available for anyone to see today. Three hours of news are recorded each evening by Vanderbilt University—thanks to a specific exemption in the copyright law. That content is indexed, and is

available to scholars for a very low fee. “But other than that, [television] is almost unavailable,” Kahle told me. “If you were Barbara Walters you could get access to [the archives], but if you are just a graduate student?” As Kahle put it,

> Do you remember when Dan Quayle was interacting with Murphy Brown? Remember that back and forth surreal experience of a politician interacting with a fictional television character? If you were a graduate student wanting to study that, and you wanted to get those original back and forth exchanges between the two, the *60 Minutes* episode that came out after it … it would be almost impossible. … Those materials are almost unfindable. …

Why is that? Why is it that the part of our culture that is recorded in newspapers remains perpetually accessible, while the part that is recorded on videotape is not? How is it that we've created a world where researchers trying to understand the effect of media on nineteenthcentury America will have an easier time than researchers trying to understand the effect of media on twentieth-century America?

In part, this is because of the law. Early in American copyright law, copyright owners were required to deposit copies of their work in libraries. These copies were intended both to facilitate the spread of knowledge and to assure that a copy of the work would be around once the copyright expired, so that others might access and copy the work.

These rules applied to film as well. But in 1915, the Library of Congress made an exception for film. Film could be copyrighted

so long as such deposits were made. But the filmmaker was then allowed to borrow back the deposits—for an unlimited time at no cost. In 1915 alone, there were more than 5,475 films deposited and "borrowed back." Thus, when the copyrights to films expire, there is no copy held by any library. The copy exists—if it exists at all—in the library archive of the film company.[2]

The same is generally true about television. Television broadcasts were originally not copyrighted—there was no way to capture the broadcasts, so there was no fear of "theft." But as technology enabled capturing, broadcasters relied increasingly upon the law. The law required they make a copy of each broadcast for the work to be "copyrighted." But those copies were simply kept by the broadcasters. No library had any right to them; the government didn't demand them. The content of this part of American culture is practically invisible to anyone who would look.

Kahle was eager to correct this. Before September 11, 2001, he and his allies had started capturing television. They selected twenty stations from around the world and hit the Record button. After September 11, Kahle, working with dozens of others, selected twenty stations from around the world and, beginning October 11, 2001, made their coverage during the week of September 11 available free on-line. Anyone could see how news reports from around the world covered the events of that day.

Kahle had the same idea with film. Working with Rick Prelinger, whose archive of film includes close to 45,000 "ephemeral films" (meaning films other than Hollywood movies, films that

[2] Doug Herrick, "Toward a National Film Collection: Motion Pictures at the Library of Congress," *Film Library Quarterly* 13 nos. 2–3 (1980): 5; Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* (Jefferson, N.C.: McFarland & Co., 1992), 36.

were never copyrighted), Kahle established the Movie Archive. Prelinger let Kahle digitize 1,300 films in this archive and post those films on the Internet to be downloaded for free. Prelinger's is a for-profit company. It sells copies of these films as stock footage. What he has discovered is that after he made a significant chunk available for free, his stock footage sales went up dramatically. People could easily find the material they wanted to use. Some downloaded that material and made films on their own. Others purchased copies to enable other films to be made. Either way, the archive enabled access to this important part of our culture. Want to see a copy of the “Duck and Cover” film that instructed children how to save themselves in the middle of nuclear attack? Go to archive.org, and you can download the film in a few minutes—for free.

Here again, Kahle is providing access to a part of our culture that we otherwise could not get easily, if at all. It is yet another part of what defines the twentieth century that we have lost to history. The law doesn't require these copies to be kept by anyone, or to be deposited in an archive by anyone. Therefore, there is no simple way to find them.

The key here is access, not price. Kahle wants to enable free access to this content, but he also wants to enable others to sell access to it. His aim is to ensure competition in access to this important part of our culture. Not during the commercial life of a bit of creative property, but during a second life that all creative property has—a noncommercial life.

For here is an idea that we should more clearly recognize. Every bit of creative property goes through different “lives.” In its first life, if the creator is lucky, the content is sold. In such cases the commercial market is successful for the creator. The vast majority of creative property doesn't enjoy such success, but some clearly

does. For that content, commercial life is extremely important. Without this commercial market, there would be, many argue, much less creativity.

After the commercial life of creative property has ended, our tradition has always supported a second life as well. A newspaper delivers the news every day to the doorsteps of America. The very next day, it is used to wrap fish or to fill boxes with fragile gifts or to build an archive of knowledge about our history. In this second life, the content can continue to inform even if that information is no longer sold.

The same has always been true about books. A book goes out of print very quickly (the average today is after about a year[3]). After it is out of print, it can be sold in used book stores without the copyright owner getting anything and stored in libraries, where many get to read the book, also for free. Used book stores and libraries are thus the second life of a book. That second life is extremely important to the spread and stability of culture.

Yet increasingly, any assumption about a stable second life for creative property does not hold true with the most important components of popular culture in the twentieth and twenty-first centuries. For these—television, movies, music, radio, the Internet—there is no guarantee of a second life. For these sorts of culture, it is as if we've replaced libraries with Barnes & Noble superstores. With this culture, what's accessible is nothing but what a certain limited market demands. Beyond that, culture disappears.

[3] Dave Barns, "Fledgling Career in Antique Books: Woodstock Landlord, Bar Owner Starts a New Chapter by Adopting Business," *Chicago Tribune*, 5 September 1997, at Metro Lake 1L. Of books published between 1927 and 1946, only 2.2 percent were in print in 2002. R. Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks," *Boston College Law Review* 44 (2003): 593 n. 51.

For most of the twentieth century, it was economics that made this so. It would have been insanely expensive to collect and make accessible all television and film and music: The cost of analog copies is extraordinarily high. So even though the law in principle would have restricted the ability of a Brewster Kahle to copy culture generally, the real restriction was economics. The market made it impossibly difficult to do anything about this ephemeral culture; the law had little practical effect.

Perhaps the single most important feature of the digital revolution is that for the first time since the Library of Alexandria, it is feasible to imagine constructing archives that hold all culture produced or distributed publicly. Technology makes it possible to imagine an archive of all books published, and increasingly makes it possible to imagine an archive of all moving images and sound.

The scale of this potential archive is something we've never imagined before. The Brewster Kahles of our history have dreamed about it; but we are for the first time at a point where that dream is possible. As Kahle describes,

> It looks like there's about two to three million recordings of music. Ever. There are about a hundred thousand theatrical releases of movies, … and about one to two million movies [distributed] during the twentieth century. There are about twenty-six million different titles of books. All of these would fit on computers that would fit in this room and be able to be afforded by a small company. So we're at a turning point in our history. Universal access is the goal. And the opportunity of leading a different life, based on this, is … thrilling. It could be one of the things

> humankind would be most proud of. Up there with the Library of Alexandria, putting a man on the moon, and the invention of the printing press.

Kahle is not the only librarian. The Internet Archive is not the only archive. But Kahle and the Internet Archive suggest what the future of libraries or archives could be. *When* the commercial life of creative property ends, I don't know. But it does. And whenever it does, Kahle and his archive hint at a world where this knowledge, and culture, remains perpetually available. Some will draw upon it to understand it; some to criticize it. Some will use it, as Walt Disney did, to re-create the past for the future. These technologies promise something that had become unimaginable for much of our past—a future *for* our past. The technology of digital arts could make the dream of the Library of Alexandria real again.

Technologists have thus removed the economic costs of building such an archive. But lawyers' costs remain. For as much as we might like to call these “archives,” as warm as the idea of a “library” might seem, the “content” that is collected in these digital spaces is also someone's “property.” And the law of property restricts the freedoms that Kahle and others would exercise.

Kapittel 10. Kapittel ti: “Eiendom”

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

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

Valenti is only the third president of the MPAA. No president before him has had as much influence over that organization, or over Washington. As a Texan, Valenti has mastered the single most important political skill of a Southerner—the ability to appear simple and slow while hiding a lightning-fast intellect. To this day, Valenti plays the simple, humble man. But this Harvard MBA, and author of four books, who finished high school at the

age of fifteen and flew more than fifty combat missions in World War II, is no Mr. Smith. When Valenti went to Washington, he mastered the city in a quintessentially Washingtonian way.

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

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

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

[1] Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, 97th Cong., 2nd sess. (1982): 65 (testimony of Jack Valenti).

The strategy of this rhetoric, like the strategy of most of Valenti's rhetoric, is brilliant and simple and brilliant because simple. The “central theme” to which “reasonable men and women” will return is this: “Creative property owners must be accorded the same rights and protections resident in all other property owners in the nation.” There are no second-class citizens, Valenti might have continued. There should be no second-class property owners.

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

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

[2] Lawyers speak of “property” not as an absolute thing, but as a bundle of rights that are sometimes associated with a particular object. Thus, my “property right” to my car gives me the right to exclusive use, but not the right to drive at 150 miles an hour. For the best effort to connect the ordinary meaning of “property” to “lawyer talk,” see Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), 26–27.

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

I have two purposes in this chapter. The first is to convince you that, historically, Valenti's claim is absolutely wrong. The second is to convince you that it would be terribly wrong for us to reject our history. We have always treated rights in creative property differently from the rights resident in all other property owners. They have never been the same. And they should never be the same, because, however counterintuitive this may seem, to make them the same would be to fundamentally weaken the opportunity for new creators to create. Creativity depends upon the owners of creativity having less than perfect control.

Organizations such as the MPAA, whose board includes the most powerful of the old guard, have little interest, their rhetoric notwithstanding, in assuring that the new can displace them. No organization does. No person does. (Ask me about tenure, for example.) But what's good for the MPAA is not necessarily good for America. A society that defends the ideals of free culture must preserve precisely the opportunity for new creativity to threaten the old. To get just a hint that there is something fundamentally wrong in Valenti's argument, we need look no further than the United States Constitution itself.

The framers of our Constitution loved “property.” Indeed, so strongly did they love property that they built into the Constitution an important requirement. If the government takes your property —if it condemns your house, or acquires a slice of land from your farm—it is required, under the Fifth Amendment's “Takings

Clause,” to pay you “just compensation” for that taking. The Constitution thus guarantees that property is, in a certain sense, sacred. It cannot *ever* be taken from the property owner unless the government pays for the privilege.

Yet the very same Constitution speaks very differently about what Valenti calls “creative property.” In the clause granting Congress the power to create “creative property,” the Constitution *requires* that after a “limited time,” Congress take back the rights that it has granted and set the “creative property” free to the public domain. Yet when Congress does this, when the expiration of a copyright term “takes” your copyright and turns it over to the public domain, Congress does not have any obligation to pay “just compensation” for this “taking.” Instead, the same Constitution that requires compensation for your land requires that you lose your “creative property” right without any compensation at all.

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

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

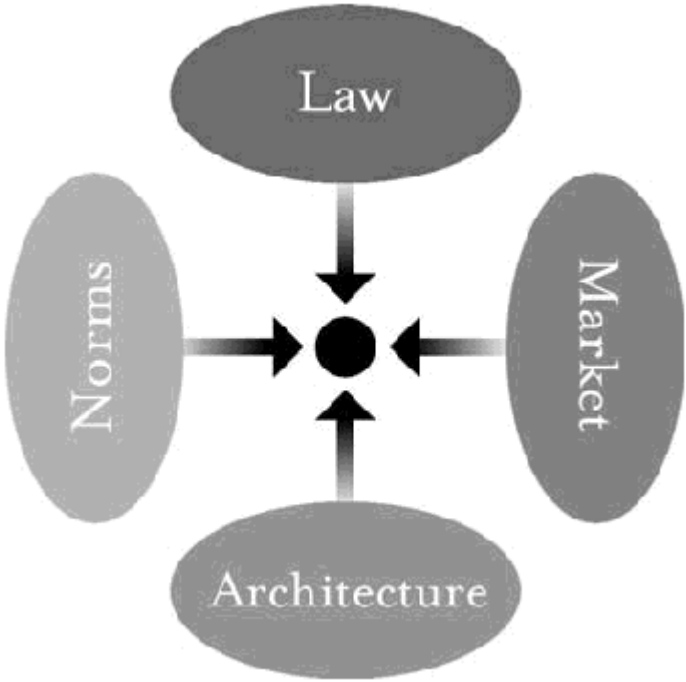
argument is not simply that because Jefferson did it, we should, too.

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

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

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

Figur 10.1. How four different modalities of regulation interact to support or weaken the right or regulation.



At the center of this picture is a regulated dot: the individual or group that is the target of regulation, or the holder of a right. (In each case throughout, we can describe this either as regulation or as a right. For simplicity's sake, I will speak only of regulations.) The ovals represent four ways in which the individual or group might be regulated— either constrained or, alternatively, enabled.

Law is the most obvious constraint (to lawyers, at least). It constrains by threatening punishments after the fact if the rules set in advance are violated. So if, for example, you willfully infringe Madonna's copyright by copying a song from her latest CD and posting it on the Web, you can be punished with a $150,000 fine. The fine is an ex post punishment for violating an ex ante rule. It is imposed by the state.

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

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

Finally, and for the moment, perhaps, most mysteriously, “architecture”—the physical world as one finds it—is a constraint on behavior. A fallen bridge might constrain your ability to get across a river. Railroad tracks might constrain the ability of a community to integrate its social life. As with the market, architecture does not effect its constraint through ex post punishments. Instead, also as with the market, architecture effects

its constraint through simultaneous conditions. These conditions are imposed not by courts enforcing contracts, or by police punishing theft, but by nature, by “architecture.” If a 500-pound boulder blocks your way, it is the law of gravity that enforces this constraint. If a $500 airplane ticket stands between you and a flight to New York, it is the market that enforces this constraint.

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

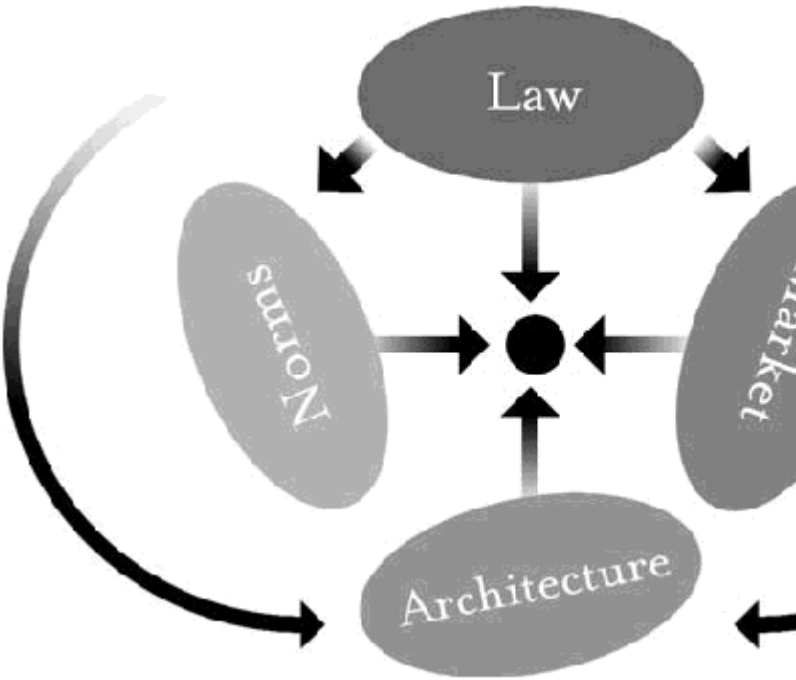
The second point follows directly: If we want to understand the effective freedom that anyone has at a given moment to do any particular thing, we have to consider how these four modalities interact. Whether or not there are other constraints (there may well be; my claim is not about comprehensiveness),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

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

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

[3] By describing the way law affects the other three modalities, I don't mean to suggest that the other three don't affect law. Obviously, they do. Law's only distinction is that it alone speaks as if it has a right self-consciously to change the other three. The right of the other three is more timidly expressed. See Lawrence Lessig, *Code: And Other Laws of Cyberspace* (New York: Basic Books, 1999): 90–95; Lawrence Lessig, "The New Chicago School," *Journal of Legal Studies*, June 1998.

Figur 10.2. Law has a special role in affecting the three.



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

erased by another. A freedom enabled by one modality might be displaced by another.[4]

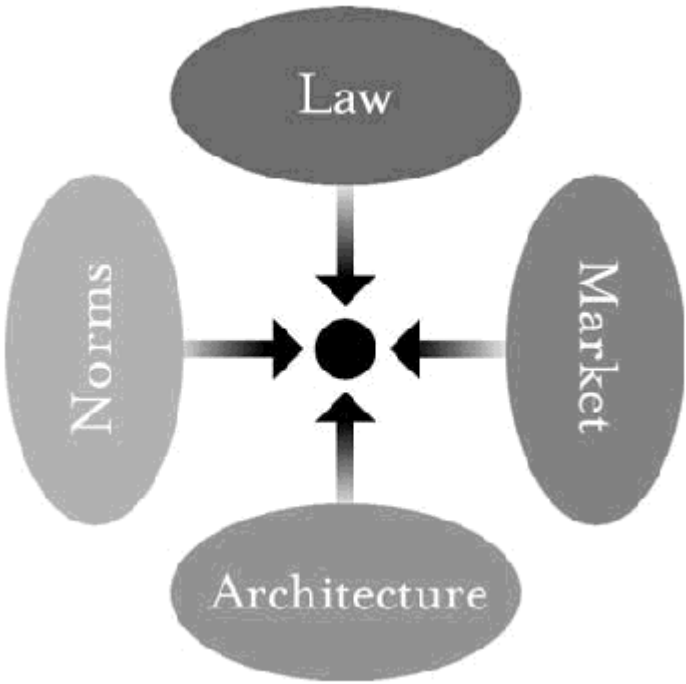
Hvorfor Hollywood har rett

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

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

[4] Some people object to this way of talking about “liberty.” They object because their focus when considering the constraints that exist at any particular moment are constraints imposed exclusively by the government. For instance, if a storm destroys a bridge, these people think it is meaningless to say that one's liberty has been restrained. A bridge has washed out, and it's harder to get from one place to another. To talk about this as a loss of freedom, they say, is to confuse the stuff of politics with the vagaries of ordinary life. I don't mean to deny the value in this narrower view, which depends upon the context of the inquiry. I do, however, mean to argue against any insistence that this narrower view is the only proper view of liberty. As I argued in *Code*, we come from a long tradition of political thought with a broader focus than the narrow question of what the government did when. John Stuart Mill defended freedom of speech, for example, from the tyranny of narrow minds, not from the fear of government prosecution; John Stuart Mill, *On Liberty* (Indiana: Hackett Publishing Co., 1978), 19. John R. Commons famously defended the economic freedom of labor from constraints imposed by the market; John R. Commons, “The Right to Work,” in Malcom Rutherford and Warren J. Samuels, eds., *John R. Commons: Selected Essays* (London: Routledge: 1997), 62. The Americans with Disabilities Act increases the liberty of people with physical disabilities by changing the architecture of certain public places, thereby making access to those places easier; 42 *United States Code*, section 12101 (2000). Each of these interventions to change existing conditions changes the liberty of a particular group. The effect of those interventions should be accounted for in order to understand the effective liberty that each of these groups might face.

Figur 10.3. Copyright's regulation before the Internet.



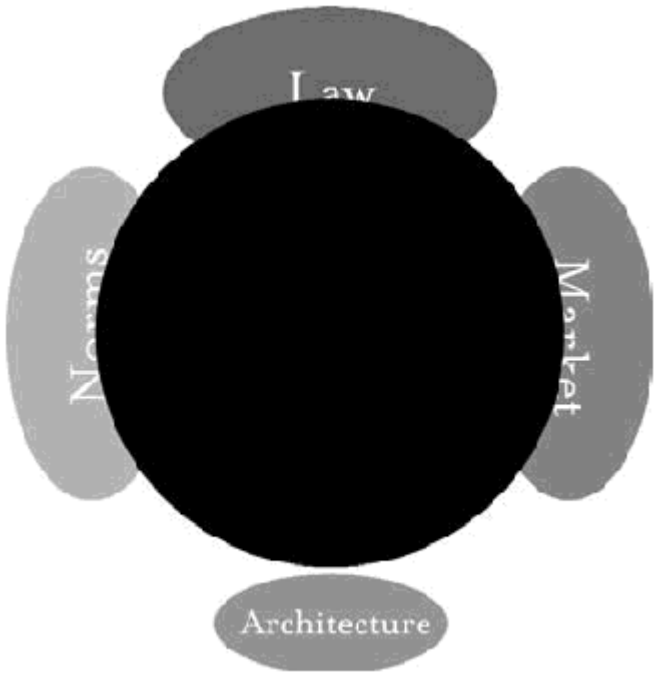
There is balance between law, norms, market, and architecture. The law limits the ability to copy and share content, by imposing penalties on those who copy and share content. Those penalties are reinforced by technologies that make it hard to copy and share content (architecture) and expensive to copy and share content (market). Finally, those penalties are mitigated by norms we all

recognize—kids, for example, taping other kids' records. These uses of copyrighted material may well be infringement, but the norms of our society (before the Internet, at least) had no problem with this form of infringement.

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

Thus the sense of, and justification for, the warriors' response. Technology has changed, the warriors say, and the effect of this change, when ramified through the market and norms, is that a balance of protection for the copyright owners' rights has been lost. This is Iraq after the fall of Saddam, but this time no government is justifying the looting that results.

Figur 10.4. effective state of anarchy after the Internet.



Neither this analysis nor the conclusions that follow are new to the warriors. Indeed, in a “White Paper” prepared by the Commerce Department (one heavily influenced by the copyright warriors) in 1995, this mix of regulatory modalities had already been identified and the strategy to respond already mapped. In response to the changes the Internet had effected, the White Paper argued (1) Congress should strengthen intellectual property law,

(2) businesses should adopt innovative marketing techniques, (3) technologists should push to develop code to protect copyrighted material, and (4) educators should educate kids to better protect copyright.

This mixed strategy is just what copyright needed—if it was to preserve the particular balance that existed before the change induced by the Internet. And it's just what we should expect the content industry to push for. It is as American as apple pie to consider the happy life you have as an entitlement, and to look to the law to protect it if something comes along to change that happy life. Homeowners living in a flood plain have no hesitation appealing to the government to rebuild (and rebuild again) when a flood (architecture) wipes away their property (law). Farmers have no hesitation appealing to the government to bail them out when a virus (architecture) devastates their crop. Unions have no hesitation appealing to the government to bail them out when imports (market) wipe out the U.S. steel industry.

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

But just because a particular interest asks for government support, it doesn't follow that support should be granted. And just because technology has weakened a particular way of doing business, it doesn't follow that the government should intervene to support that old way of doing business. Kodak, for example, has lost perhaps as much as 20 percent of their traditional film market

5. See, e.g., Thomas Hoffman, “Film vs. Digital: Can Kodak Build a Bridge?” BusinessWeek online, 2 August 1999, available at link #23 [http://free-culture.cc/notes/]. For a more recent analysis of Kodak's place in the market, see Chana R. Schoenberger, “Can Kodak Make Up for Lost Moments?” Forbes.com, 6 October 2003, available at link #24 [http://free-culture.cc/notes/].

to the emerging technologies of digital cameras.[5] Does anyone believe the government should ban digital cameras just to support Kodak? Highways have weakened the freight business for railroads. Does anyone think we should ban trucks from roads *for the purpose of* protecting the railroads? Closer to the subject of this book, remote channel changers have weakened the "stickiness" of television advertising (if a boring commercial comes on the TV, the remote makes it easy to surf), and it may well be that this change has weakened the television advertising market. But does anyone believe we should regulate remotes to reinforce commercial television? (Maybe by limiting them to function only once a second, or to switch to only ten channels within an hour?)

The obvious answer to these obviously rhetorical questions is no. In a free society, with a free market, supported by free enterprise and free trade, the government's role is not to support one way of doing business against others. Its role is not to pick winners and protect them against loss. If the government did this generally, then we would never have any progress. As Microsoft chairman Bill Gates wrote in 1991, in a memo criticizing software patents, "established companies have an interest in excluding future competitors."[6] And relative to a startup, established companies also have the means. (Think RCA and FM radio.) A world in which competitors with new ideas must fight not only the market but also the government is a world in which competitors with new ideas will not succeed. It is a world of stasis and increasingly concentrated stagnation. It is the Soviet Union under Brezhnev.

Thus, while it is understandable for industries threatened with new technologies that change the way they do business to look

[6] Fred Warshofsky, *The Patent Wars* (New York: Wiley, 1994), 170–71.

to the government for protection, it is the special duty of policy makers to guarantee that that protection not become a deterrent to progress. It is the duty of policy makers, in other words, to assure that the changes they create, in response to the request of those hurt by changing technology, are changes that preserve the incentives and opportunities for innovation and change.

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

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

Her kommer metaforen som vil forklare argumentet.

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

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

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

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

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

[7] Se for eksempel James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?" *Duke Law Journal* 47 (1997): 87.

copyright not an endorsement of anarchy or an attack on authors. It is an environment of creativity that we seek, and we should be aware of our actions' effects on the environment.

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

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

Opphav

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

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

Congress has the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

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

The Progress Clause expressly limits the term of copyrights. As we saw in chapter 6 [106], the English limited the term of copyright so as to assure that a few would not exercise disproportionate control over culture by exercising disproportionate control over publishing. We can assume the framers followed the English for a similar purpose. Indeed, unlike the English, the framers reinforced that objective, by requiring that copyrights extend "to Authors" only.

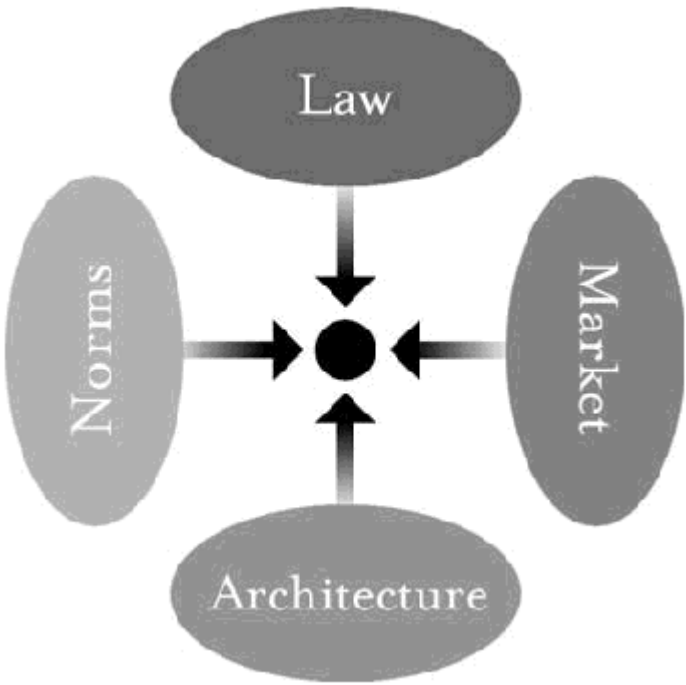
The design of the Progress Clause reflects something about the Constitution's design in general. To avoid a problem, the framers built structure. To prevent the concentrated power of publishers, they built a structure that kept copyrights away from publishers and kept them short. To prevent the concentrated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

I doubt the framers would recognize the regulation we call "copyright" today. The scope of that regulation is far beyond anything they ever considered. To begin to understand what they

did, we need to put our “copyright” in context: We need to see how it has changed in the 210 years since they first struck its design.

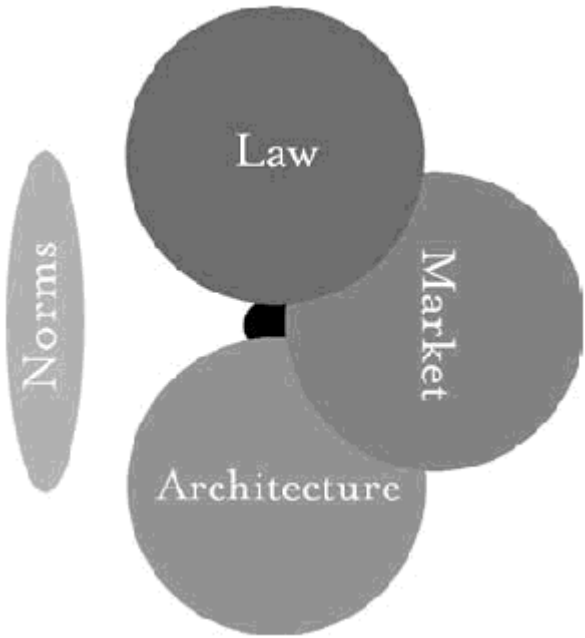
Some of these changes come from the law: some in light of changes in technology, and some in light of changes in technology given a particular concentration of market power. In terms of our model, we started here:

Figur 10.5. Copyright's regulation before the Internet.



Vi kommer til å ende opp her:

Figur 10.6. “Opphavsrett” i dag.



La meg forklare hvordan.

Loven: Varighet

When the first Congress enacted laws to protect creative property, it faced the same uncertainty about the status of creative property

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

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

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

Selv om det ble skapt mange verker i USA i de første 10 årene til republikken, så ble kun 5 prosent av verkene registrert under det føderale opphavsrettsregimet. Av alle verker skapt i USA både før 1790 og fra 1790 fram til 1800, så ble 95 prosent øyeblikkelig

[8] William W. Crosskey, *Politics and the Constitution in the History of the United States* (London: Cambridge University Press, 1953), vol. 1, 485–86: "extinguish[ing], by plain implication of `the supreme Law of the Land,' *the perpetual rights which authors had, or were supposed by some to have, under the Common Law*" (emphasis added).

allemannseie (public domain). Resten ble allemannseie etter maksimalt 20 år, og som oftest etter 14 år.[9]

Dette fornyelsessystemet var en avgjørende del av det amerikanske systemet for opphavsrett. Det sikret at maksimal vernetid i opphavsretten bare ble gitt til verker der det var ønsket. Etter den første perioden på fjorten år, hvis forfatteren ikke så verdien av å fornye sin opphavsrett, var det heller ikke verdt det for samfunnet å håndheve opphavsretten.

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

Even today, this structure would make sense. Most creative work has an actual commercial life of just a couple of years. Most books

[9] Although 13,000 titles were published in the United States from 1790 to 1799, only 556 copyright registrations were filed; John Tebbel, *A History of Book Publishing in the United States*, vol. 1, *The Creation of an Industry, 1630–1865* (New York: Bowker, 1972), 141. Of the 21,000 imprints recorded before 1790, only twelve were copyrighted under the 1790 act; William J. Maher, *Copyright Term, Retrospective Extension and the Copyright Law of 1790 in Historical Context*, 7–10 (2002), available at link #25 [http://free-culture.cc/notes/]. Thus, the overwhelming majority of works fell immediately into the public domain. Even those works that were copyrighted fell into the public domain quickly, because the term of copyright was short. The initial term of copyright was fourteen years, with the option of renewal for an additional fourteen years. Copyright Act of May 31, 1790, §1, 1 stat. 124.

[10] Few copyright holders ever chose to renew their copyrights. For instance, of the 25,006 copyrights registered in 1883, only 894 were renewed in 1910. For a year-by-year analysis of copyright renewal rates, see Barbara A. Ringer, "Study No. 31: Renewal of Copyright," *Studies on Copyright*, vol. 1 (New York: Practicing Law Institute, 1963), 618. For a more recent and comprehensive analysis, see William M. Landes and Richard A. Posner, "Indefinitely Renewable Copyright," *University of Chicago Law Review* 70 (2003): 471, 498–501, and accompanying figures.

fall out of print after one year.[11] When that happens, the used books are traded free of copyright regulation. Thus the books are no longer *effectively* controlled by copyright. The only practical commercial use of the books at that time is to sell the books as used books; that use—because it does not involve publication—is effectively free.

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

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

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

[11] Se Ringer, kap. 9, n. 2.

into the public domain by virtue of the expiration of a copyright term.

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

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

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

The effect of these changes on the average duration of copyright is dramatic. In 1973, more than 85 percent of copyright owners failed to renew their copyright. That meant that the average term of copyright in 1973 was just 32.2 years. Because of the elimination of the renewal requirement, the average term of

copyright is now the maximum term. In thirty years, then, the average term has tripled, from 32.2 years to 95 years.[12]

Loven: Virkeområde

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

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

This, too, has changed dramatically. While the contours of copyright today are extremely hard to describe simply, in general terms, the right covers practically any creative work that is reduced to a tangible form. It covers music as well as architecture, drama as well as computer programs. It gives the copyright owner

[12] These statistics are understated. Between the years 1910 and 1962 (the first year the renewal term was extended), the average term was never more than thirty-two years, and averaged thirty years. See Landes and Posner, “Indefinitely Renewable Copyright,” loc. cit.

of that creative work not only the exclusive right to “publish” the work, but also the exclusive right of control over any “copies” of that work. And most significant for our purposes here, the right gives the copyright owner control over not only his or her particular work, but also any “derivative work” that might grow out of the original work. In this way, the right covers more creative work, protects the creative work more broadly, and protects works that are based in a significant way on the initial creative work.

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

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

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

Vurder et praktisk eksempel for å forstå omfanget av disse forskjellene.

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

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

Today the story is very different: If you write a book, your book is automatically protected. Indeed, not just your book. Every e-

[13] See Thomas Bender and David Sampliner, "Poets, Pirates, and the Creation of American Literature," 29 *New York University Journal of International Law and Politics* 255 (1997), and James Gilraeth, ed., Federal Copyright Records, 1790–1800 (U.S. G.P.O., 1987).

mail, every note to your spouse, every doodle, *every* creative act that's reduced to a tangible form—all of this is automatically copyrighted. There is no need to register or mark your work. The protection follows the creation, not the steps you take to protect it.

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

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

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

In preventing that joke, the law created an astonishing power within a free culture—at least, it's astonishing when you understand that the law applies not just to the commercial publisher but to anyone with a computer. I understand the wrong

in duplicating and selling someone else's work. But whatever *that* wrong is, transforming someone else's work is a different wrong. Some view transformation as no wrong at all—they believe that our law, as the framers penned it, should not protect derivative rights at all.[14] Whether or not you go that far, it seems plain that whatever wrong is involved is fundamentally different from the wrong of direct piracy.

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

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

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

[14] Jonathan Zittrain, "The Copyright Cage", *Legal Affairs*, julu/august 2003,tilgjengelig fra link #26 [http://free-culture.cc/notes/].

[15] Professor Rubenfeld has presented a powerful constitutional argument about the difference that copyright law should draw (from the perspective of the First Amendment) between mere "copies" and derivative works. See Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," *Yale Law Journal* 112 (2002): 1–60 (see especially pp. 53–59).

Lov og arkitektur: Rekkevidde

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

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

This is perhaps the central claim of this book, so let me take this very slowly so that the point is not easily missed. My claim is that the Internet should at least force us to rethink the conditions under

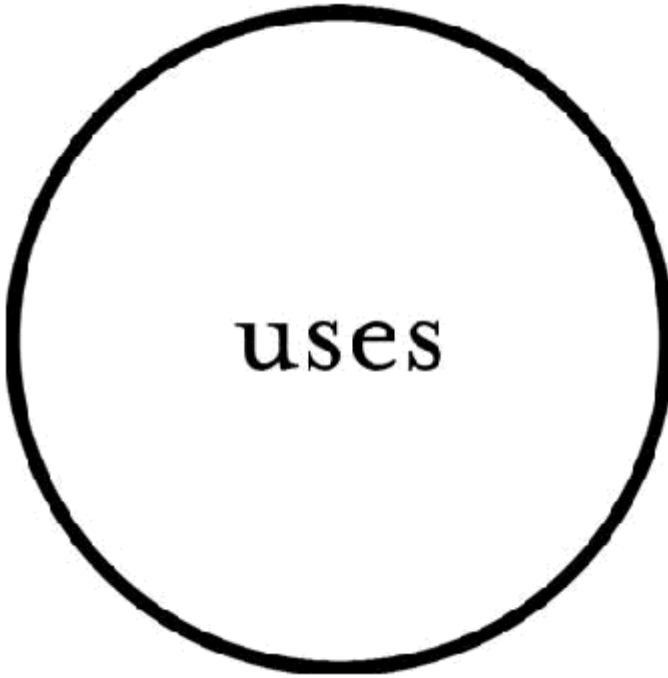
[16] This is a simplification of the law, but not much of one. The law certainly regulates more than “copies”—a public performance of a copyrighted song, for example, is regulated even though performance per se doesn't make a copy; 17 *United States Code*, section 106(4). And it certainly sometimes doesn't regulate a “copy”; 17 *United States Code*, section 112(a). But the presumption under the existing law (which regulates “copies;” 17 *United States Code*, section 102) is that if there is a copy, there is a right.

which the law of copyright automatically applies,[17] because it is clear that the current reach of copyright was never contemplated, much less chosen, by the legislators who enacted copyright law.

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

[17] Thus, my argument is not that in each place that copyright law extends, we should repeal it. It is instead that we should have a good argument for its extending where it does, and should not determine its reach on the basis of arbitrary and automatic changes caused by technology.

Figur 10.7. Alle potensielle bruk av en bok.



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

you sleep on the book or use it to hold up a lamp or let your puppy chew it up, those acts are not regulated by copyright law, because those acts do not make a copy.

Figur 10.8. Eksempler på uregulert bruk av en bok.

Obviously, however, some uses of a copyrighted book are regulated by copyright law. Republishing the book, for example, makes a copy. It is therefore regulated by copyright law. Indeed, this particular use stands at the core of this circle of possible

uses of a copyrighted work. It is the paradigmatic use properly regulated by copyright regulation (see first diagram on next page).

Til slutt er det en tynn skive av ellers regulert kopierings-bruk som forblir uregluert på grunn av at loven anser dette som “rimelig bruk”.

Figur 10.9. Republishing stands at the core of this circle of possible uses of a copyrighted work.

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

Figur 10.10. Uregulert kopiering anses som “rimelig bruk”.

Figur 10.11. Uses that before were presumptively unregulated are now presumptively regulated.

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

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

So let's be very specific to make this general point clear. Before the Internet, if you purchased a book and read it ten times, there would be no plausible *copyright*-related argument that the copyright owner could make to control that use of her book. Copyright law would have nothing to say about whether you read the book once, ten times, or every night before you went to bed. None of those instances of use—reading— could be regulated by copyright law because none of those uses produced a copy.

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

[18] I don't mean "nature" in the sense that it couldn't be different, but rather that its present instantiation entails a copy. Optical networks need not make copies of content they transmit, and a digital network could be designed to delete anything it copies so that the same number of copies remain.

time, you are making a copy of the book contrary to the copyright owner's wish.

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

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

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

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

fair use defense. The right to read was effectively protected before because reading was not regulated.

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

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

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

In 1998, Video Pipeline informed Disney and other film distributors that it intended to distribute the trailers through the Internet (rather than sending the tapes) to distributors of their videos. Two years later, Disney told Video Pipeline to stop. The owner of Video Pipeline asked Disney to talk about the matter—he had built a business on distributing this content as a way to help sell Disney films; he had customers who depended upon his delivering this content. Disney would agree to talk only if Video

Pipeline stopped the distribution immediately. Video Pipeline thought it was within their “fair use” rights to distribute the clips as they had. So they filed a lawsuit to ask the court to declare that these rights were in fact their rights.

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

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

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

control. The technology expands the scope of effective control, because the technology builds a copy into every transaction.

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

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

Arkitektur og lov: Makt

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

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

Det er en berømt historie om en kamp mellom Marx-brødrene (the Marx Brothers) og Warner Brothers. Marx-brødrene planla å lage en parodi av *Casablanca*. Warner Brothers protesterte. De skrev et ufint brev til Marx-brødrene og advarte dem om at det ville få seriøse juridiske konsekvenser hvis de gikk videre med sin plan.[19]

Dette fikk Marx-brødrene til å svare tilbake med samme mynt. De advarte Warner Brothers om at Marx-brødrene "var brødre lenge før dere var det".[20] Marx-brødrene eide derfor ordet *Brothers*, og hvis Warner Brothers insisterte på å forsøke å kontrollere *Casablanca*, så ville Marx-brødrene insistere på kontroll over *Brothers*.

Det var en absurd og hul trussel, selvfølgelig, fordi Warner Brothers, på samme måte som Marx-brødrene, visste at ingen domstol noensinne ville håndheve et slikt dumt krav. Denne ekstremismen var irrelevant for de ekte friheter som alle (inkludert Warner Brothers) nøt godt av.

On the Internet, however, there is no check on silly rules, because on the Internet, increasingly, rules are enforced not by a human but by a machine: Increasingly, the rules of copyright law, as interpreted by the copyright owner, get built into the technology

[19] Se David Lange, "Recognizing the Public Domain", *Law and Contemporary Problems* 44 (1981): 172–73.
[20] Ibid. Se også Vaidhyanathan, *Copyrights and Copywrongs*, 1–3.

that delivers copyrighted content. It is code, rather than law, that rules. And the problem with code regulations is that, unlike law, code has no shame. Code would not get the humor of the Marx Brothers. The consequence of that is not at all funny.

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Figur 10.12. Bilde av en gammel versjon av Adobe eBook Reader.

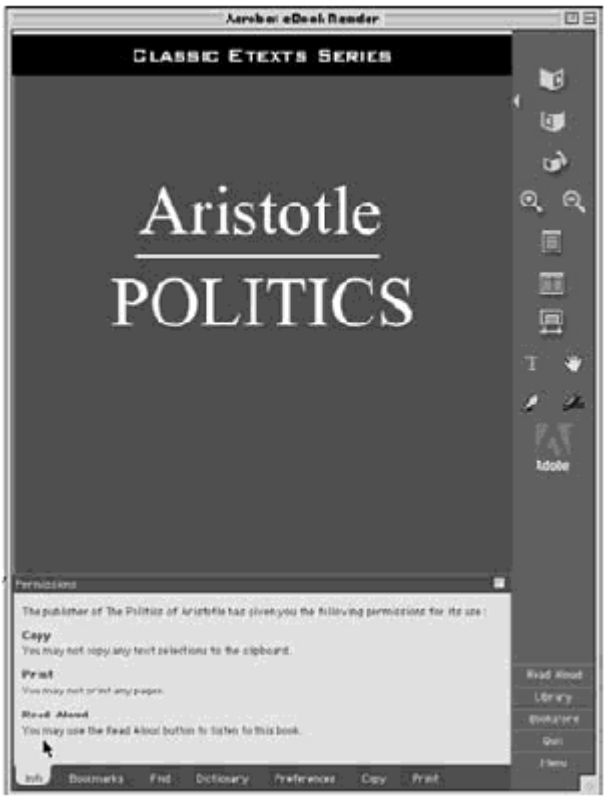
If you click on the Permissions button, you'll see a list of the permissions that the publisher purports to grant with this book.

Figur 10.13. List of the permissions that the publisher purports to grant.

According to my eBook Reader, I have the permission to copy to the clipboard of the computer ten text selections every ten days. (So far, I've copied no text to the clipboard.) I also have the permission to print ten pages from the book every ten days. Lastly, I have the permission to use the Read Aloud button to hear *Middlemarch* read aloud through the computer.

Her er e-boken for et annet allemannseid verk (inkludert oversettelsen): Aristoteles *Politikk*

Figur 10.14. E-bok av Aristoteles “Politikk”

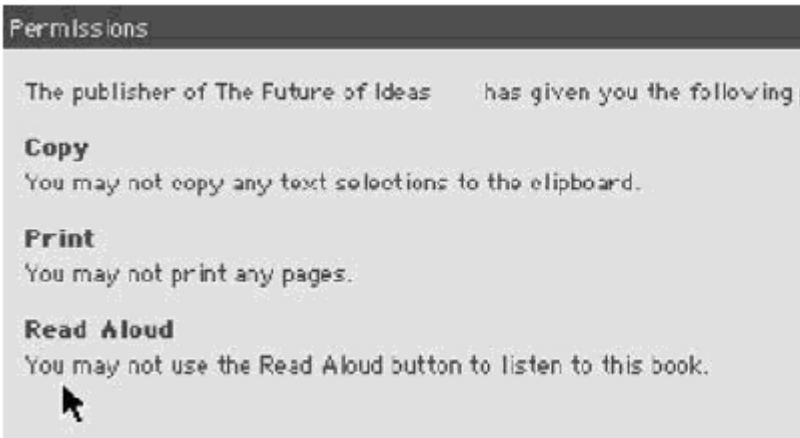


According to its permissions, no printing or copying is permitted at all. But fortunately, you can use the Read Aloud button to hear the book.

Figur 10.15. Liste med tillatelser for Aristotles "Politikk".

Finally (and most embarrassingly), here are the permissions for the original e-book version of my last book, *The Future of Ideas*:

Figur 10.16. Liste med tillatelser for “The Future of Ideas”.



Ingen kopiering, ingen utskrift, og våg ikke å prøve å lytte til denne boken!

Now, the Adobe eBook Reader calls these controls “permissions”— as if the publisher has the power to control how you use these works. For works under copyright, the copyright owner certainly does have the power—up to the limits of the copyright law. But for work not under copyright, there is no such copyright power.[21] When my e-book of *Middlemarch* says I have

[21] In principle, a contract might impose a requirement on me. I might, for example, buy a book from you that includes a contract that says I will read it only three times, or that I promise to read it three times. But that obligation (and the limits for creating that obligation) would come from the contract, not from copyright law, and the obligations of contract would not necessarily pass to anyone who subsequently acquired the book.

the permission to copy only ten text selections into the memory every ten days, what that really means is that the eBook Reader has enabled the publisher to control how I use the book on my computer, far beyond the control that the law would enable.

The control comes instead from the code—from the technology within which the e-book “lives.” Though the e-book says that these are permissions, they are not the sort of “permissions” that most of us deal with. When a teenager gets “permission” to stay out till midnight, she knows (unless she's Cinderella) that she can stay out till 2 A.M., but will suffer a punishment if she's caught. But when the Adobe eBook Reader says I have the permission to make ten copies of the text into the computer's memory, that means that after I've made ten copies, the computer will not make any more. The same with the printing restrictions: After ten pages, the eBook Reader will not print any more pages. It's the same with the silly restriction that says that you can't use the Read Aloud button to read my book aloud—it's not that the company will sue you if you do; instead, if you push the Read Aloud button with my book, the machine simply won't read aloud.

These are *controls*, not permissions. Imagine a world where the Marx Brothers sold word processing software that, when you tried to type “Warner Brothers,” erased “Brothers” from the sentence.

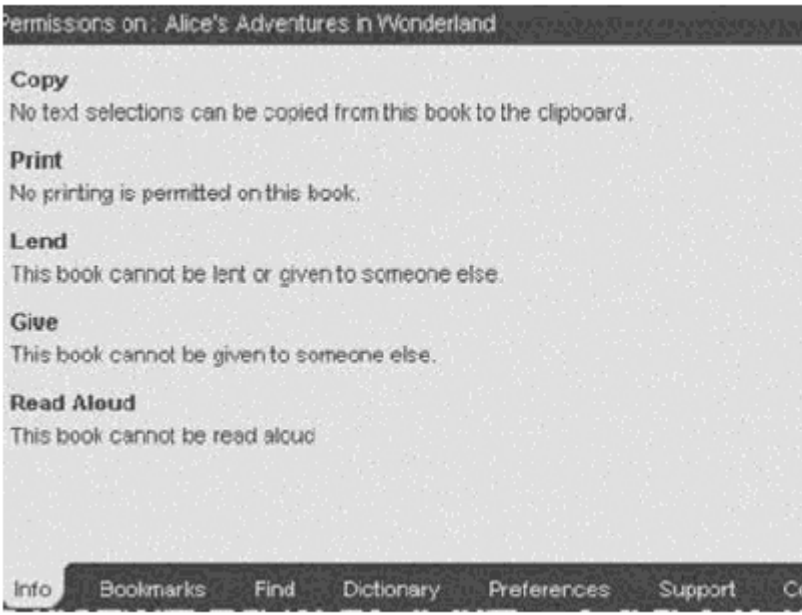
This is the future of copyright law: not so much copyright *law* as copyright *code*. The controls over access to content will not be controls that are ratified by courts; the controls over access to content will be controls that are coded by programmers. And whereas the controls that are built into the law are always to be checked by a judge, the controls that are built into the technology have no similar built-in check.

How significant is this? Isn't it always possible to get around the controls built into the technology? Software used to be sold with technologies that limited the ability of users to copy the software, but those were trivial protections to defeat. Why won't it be trivial to defeat these protections as well?

We've only scratched the surface of this story. Return to the Adobe eBook Reader.

Early in the life of the Adobe eBook Reader, Adobe suffered a public relations nightmare. Among the books that you could download for free on the Adobe site was a copy of *Alice's Adventures in Wonderland*. This wonderful book is in the public domain. Yet when you clicked on Permissions for that book, you got the following report:

Figur 10.17. Liste med tillatelser for “Alice i Eventyrland”.



Here was a public domain children's book that you were not allowed to copy, not allowed to lend, not allowed to give, and, as the “permissions” indicated, not allowed to “read aloud”!

The public relations nightmare attached to that final permission. For the text did not say that you were not permitted to use the Read Aloud button; it said you did not have the permission to read the book aloud. That led some people to think that Adobe was restricting the right of parents, for example, to read the book to their children, which seemed, to say the least, absurd.

Adobe responded quickly that it was absurd to think that it was trying to restrict the right to read a book aloud. Obviously it was only restricting the ability to use the Read Aloud button to have the book read aloud. But the question Adobe never did answer is this: Would Adobe thus agree that a consumer was free to use software to hack around the restrictions built into the eBook Reader? If some company (call it Elcomsoft) developed a program to disable the technological protection built into an Adobe eBook so that a blind person, say, could use a computer to read the book aloud, would Adobe agree that such a use of an eBook Reader was fair? Adobe didn't answer because the answer, however absurd it might seem, is no.

The point is not to blame Adobe. Indeed, Adobe is among the most innovative companies developing strategies to balance open access to content with incentives for companies to innovate. But Adobe's technology enables control, and Adobe has an incentive to defend this control. That incentive is understandable, yet what it creates is often crazy.

To see the point in a particularly absurd context, consider a favorite story of mine that makes the same point.

Consider the robotic dog made by Sony named “Aibo.” The Aibo learns tricks, cuddles, and follows you around. It eats only electricity and that doesn't leave that much of a mess (at least in your house).

The Aibo is expensive and popular. Fans from around the world have set up clubs to trade stories. One fan in particular set up a Web site to enable information about the Aibo dog to be shared. This fan set up aibopet.com (and aibohack.com, but that resolves to the same site), and on that site he provided information about

how to teach an Aibo to do tricks in addition to the ones Sony had taught it.

“Teach” here has a special meaning. Aibos are just cute computers. You teach a computer how to do something by programming it differently. So to say that aibopet.com was giving information about how to teach the dog to do new tricks is just to say that aibopet.com was giving information to users of the Aibo pet about how to hack their computer “dog” to make it do new tricks (thus, aibohack.com).

If you're not a programmer or don't know many programmers, the word *hack* has a particularly unfriendly connotation. Nonprogrammers hack bushes or weeds. Nonprogrammers in horror movies do even worse. But to programmers, or coders, as I call them, *hack* is a much more positive term. *Hack* just means code that enables the program to do something it wasn't originally intended or enabled to do. If you buy a new printer for an old computer, you might find the old computer doesn't run, or “drive,” the printer. If you discovered that, you'd later be happy to discover a hack on the Net by someone who has written a driver to enable the computer to drive the printer you just bought.

Some hacks are easy. Some are unbelievably hard. Hackers as a community like to challenge themselves and others with increasingly difficult tasks. There's a certain respect that goes with the talent to hack well. There's a well-deserved respect that goes with the talent to hack ethically.

The Aibo fan was displaying a bit of both when he hacked the program and offered to the world a bit of code that would enable the Aibo to dance jazz. The dog wasn't programmed to dance jazz. It was a clever bit of tinkering that turned the dog into a more talented creature than Sony had built.

I've told this story in many contexts, both inside and outside the United States. Once I was asked by a puzzled member of the audience, is it permissible for a dog to dance jazz in the United States? We forget that stories about the backcountry still flow across much of the world. So let's just be clear before we continue: It's not a crime anywhere (anymore) to dance jazz. Nor is it a crime to teach your dog to dance jazz. Nor should it be a crime (though we don't have a lot to go on here) to teach your robot dog to dance jazz. Dancing jazz is a completely legal activity. One imagines that the owner of aibopet.com thought, *What possible problem could there be with teaching a robot dog to dance?*

Let's put the dog to sleep for a minute, and turn to a pony show— not literally a pony show, but rather a paper that a Princeton academic named Ed Felten prepared for a conference. This Princeton academic is well known and respected. He was hired by the government in the Microsoft case to test Microsoft's claims about what could and could not be done with its own code. In that trial, he demonstrated both his brilliance and his coolness. Under heavy badgering by Microsoft lawyers, Ed Felten stood his ground. He was not about to be bullied into being silent about something he knew very well.

But Felten's bravery was really tested in April 2001.[22] He and a group of colleagues were working on a paper to be submitted

[22] See Pamela Samuelson, "Anticircumvention Rules: Threat to Science," *Science* 293 (2001): 2028; Brendan I. Koerner, "Play Dead: Sony Muzzles the Techies Who Teach a Robot Dog New Tricks," *American Prospect*, January 2002; "Court Dismisses Computer Scientists' Challenge to DMCA," *Intellectual Property Litigation Reporter*, 11 December 2001; Bill Holland, "Copyright Act Raising Free-Speech Concerns," *Billboard*, May 2001; Janelle Brown, "Is the RIAA Running Scared?" Salon.com, April 2001; Electronic Frontier Foundation, "Frequently Asked Questions about *Felten and USENIX* v. *RIAA* Legal Case," available at link #27 [http://free-culture.cc/notes/].

at conference. The paper was intended to describe the weakness in an encryption system being developed by the Secure Digital Music Initiative as a technique to control the distribution of music.

The SDMI coalition had as its goal a technology to enable content owners to exercise much better control over their content than the Internet, as it originally stood, granted them. Using encryption, SDMI hoped to develop a standard that would allow the content owner to say “this music cannot be copied,” and have a computer respect that command. The technology was to be part of a “trusted system” of control that would get content owners to trust the system of the Internet much more.

When SDMI thought it was close to a standard, it set up a competition. In exchange for providing contestants with the code to an SDMI-encrypted bit of content, contestants were to try to crack it and, if they did, report the problems to the consortium.

Felten and his team figured out the encryption system quickly. He and the team saw the weakness of this system as a type: Many encryption systems would suffer the same weakness, and Felten and his team thought it worthwhile to point this out to those who study encryption.

Let's review just what Felten was doing. Again, this is the United States. We have a principle of free speech. We have this principle not just because it is the law, but also because it is a really great idea. A strongly protected tradition of free speech is likely to encourage a wide range of criticism. That criticism is likely, in turn, to improve the systems or people or ideas criticized.

What Felten and his colleagues were doing was publishing a paper describing the weakness in a technology. They were not spreading free music, or building and deploying this technology.

The paper was an academic essay, unintelligible to most people. But it clearly showed the weakness in the SDMI system, and why SDMI would not, as presently constituted, succeed.

What links these two, aibopet.com and Felten, is the letters they then received. Aibopet.com received a letter from Sony about the aibopet.com hack. Though a jazz-dancing dog is perfectly legal, Sony wrote:

> Your site contains information providing the means to circumvent AIBO-ware's copy protection protocol constituting a violation of the anti-circumvention provisions of the Digital Millennium Copyright Act.

And though an academic paper describing the weakness in a system of encryption should also be perfectly legal, Felten received a letter from an RIAA lawyer that read:

> Any disclosure of information gained from participating in the Public Challenge would be outside the scope of activities permitted by the Agreement and could subject you and your research team to actions under the Digital Millennium Copyright Act (“DMCA”).

In both cases, this weirdly Orwellian law was invoked to control the spread of information. The Digital Millennium Copyright Act made spreading such information an offense.

The DMCA was enacted as a response to copyright owners' first fear about cyberspace. The fear was that copyright control

was effectively dead; the response was to find technologies that might compensate. These new technologies would be copyright protection technologies— technologies to control the replication and distribution of copyrighted material. They were designed as *code* to modify the original *code* of the Internet, to reestablish some protection for copyright owners.

The DMCA was a bit of law intended to back up the protection of this code designed to protect copyrighted material. It was, we could say, *legal code* intended to buttress *software code* which itself was intended to support the *legal code of copyright*.

But the DMCA was not designed merely to protect copyrighted works to the extent copyright law protected them. Its protection, that is, did not end at the line that copyright law drew. The DMCA regulated devices that were designed to circumvent copyright protection measures. It was designed to ban those devices, whether or not the use of the copyrighted material made possible by that circumvention would have been a copyright violation.

Aibopet.com and Felten make the point. The Aibo hack circumvented a copyright protection system for the purpose of enabling the dog to dance jazz. That enablement no doubt involved the use of copyrighted material. But as aibopet.com's site was noncommercial, and the use did not enable subsequent copyright infringements, there's no doubt that aibopet.com's hack was fair use of Sony's copyrighted material. Yet fair use is not a defense to the DMCA. The question is not whether the use of the copyrighted material was a copyright violation. The question is whether a copyright protection system was circumvented.

The threat against Felten was more attenuated, but it followed the same line of reasoning. By publishing a paper describing how a copyright protection system could be circumvented,

the RIAA lawyer suggested, Felten himself was distributing a circumvention technology. Thus, even though he was not himself infringing anyone's copyright, his academic paper was enabling others to infringe others' copyright.

The bizarreness of these arguments is captured in a cartoon drawn in 1981 by Paul Conrad. At that time, a court in California had held that the VCR could be banned because it was a copyright-infringing technology: It enabled consumers to copy films without the permission of the copyright owner. No doubt there were uses of the technology that were legal: Fred Rogers, aka “*Mr. Rogers*,” for example, had testified in that case that he wanted people to feel free to tape Mr. Rogers' Neighborhood.

> Some public stations, as well as commercial stations, program the “Neighborhood” at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the “Neighborhood” off-the-air, and I'm speaking for the “Neighborhood” because that's what I produce, that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been “You are an important person just the way you are. You can make healthy decisions.” Maybe I'm going on too long, but I just feel that anything that allows a person to be

> more active in the control of his or her life, in a healthy way, is important.[23]

Even though there were uses that were legal, because there were some uses that were illegal, the court held the companies producing the VCR responsible.

This led Conrad to draw the cartoon below, which we can adopt to the DMCA.

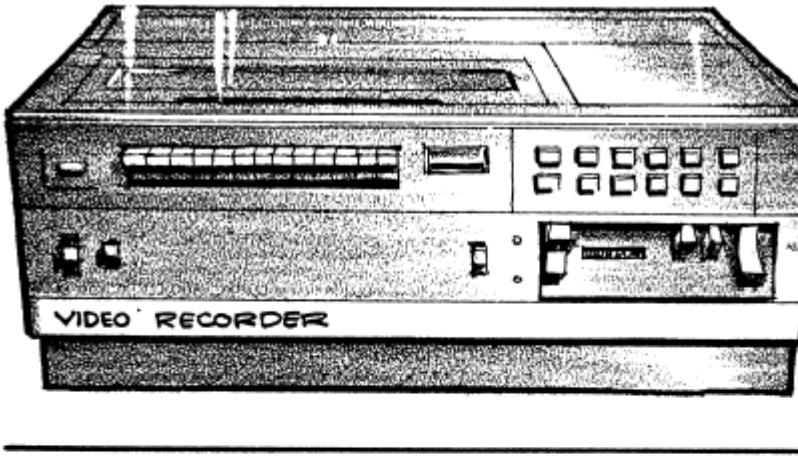
No argument I have can top this picture, but let me try to get close.

The anticircumvention provisions of the DMCA target copyright circumvention technologies. Circumvention technologies can be used for different ends. They can be used, for example, to enable massive pirating of copyrighted material—a bad end. Or they can be used to enable the use of particular copyrighted materials in ways that would be considered fair use—a good end.

A handgun can be used to shoot a police officer or a child. Most would agree such a use is bad. Or a handgun can be used for target practice or to protect against an intruder. At least some would say that such a use would be good. It, too, is a technology that has both good and bad uses.

[23] *Sony Corporation of America* v. *Universal City Studios, Inc*., 464 U.S. 417, 455 fn. 27 (1984). Rogers never changed his view about the VCR. See James Lardner, *Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR* (New York: W. W. Norton, 1987), 270–71.

Figur 10.18. VCR/handgun cartoon.



The obvious point of Conrad's cartoon is the weirdness of a world where guns are legal, despite the harm they can do, while VCRs (and circumvention technologies) are illegal. Flash: *No one ever died from copyright circumvention*. Yet the law bans circumvention technologies absolutely, despite the potential that they might do some good, but permits guns, despite the obvious and tragic harm they do.

The Aibo and RIAA examples demonstrate how copyright owners are changing the balance that copyright law grants. Using code, copyright owners restrict fair use; using the DMCA, they punish those who would attempt to evade the restrictions on fair use that they impose through code. Technology becomes a means by which fair use can be erased; the law of the DMCA backs up that erasing.

This is how *code* becomes *law*. The controls built into the technology of copy and access protection become rules the violation of which is also a violation of the law. In this way, the code extends the law—increasing its regulation, even if the subject it regulates (activities that would otherwise plainly constitute fair use) is beyond the reach of the law. Code becomes law; code extends the law; code thus extends the control that copyright owners effect—at least for those copyright holders with the lawyers who can write the nasty letters that Felten and aibopet.com received.

There is one final aspect of the interaction between architecture and law that contributes to the force of copyright's regulation. This is the ease with which infringements of the law can be detected. For contrary to the rhetoric common at the birth of cyberspace that on the Internet, no one knows you're a dog, increasingly, given changing technologies deployed on the Internet, it is easy to find the dog who committed a legal wrong. The technologies of the

Internet are open to snoops as well as sharers, and the snoops are increasingly good at tracking down the identity of those who violate the rules.

For example, imagine you were part of a *Star Trek* fan club. You gathered every month to share trivia, and maybe to enact a kind of fan fiction about the show. One person would play Spock, another, Captain Kirk. The characters would begin with a plot from a real story, then simply continue it.[24]

Before the Internet, this was, in effect, a totally unregulated activity. No matter what happened inside your club room, you would never be interfered with by the copyright police. You were free in that space to do as you wished with this part of our culture. You were allowed to build on it as you wished without fear of legal control.

But if you moved your club onto the Internet, and made it generally available for others to join, the story would be very different. Bots scouring the Net for trademark and copyright infringement would quickly find your site. Your posting of fan fiction, depending upon the ownership of the series that you're depicting, could well inspire a lawyer's threat. And ignoring the lawyer's threat would be extremely costly indeed. The law of copyright is extremely efficient. The penalties are severe, and the process is quick.

This change in the effective force of the law is caused by a change in the ease with which the law can be enforced. That change too shifts the law's balance radically. It is as if your car transmitted

[24] For an early and prescient analysis, see Rebecca Tushnet, "Legal Fictions, Copyright, Fan Fiction, and a New Common Law," *Loyola of Los Angeles Entertainment Law Journal* 17 (1997): 651.

the speed at which you traveled at every moment that you drove; that would be just one step before the state started issuing tickets based upon the data you transmitted. That is, in effect, what is happening here.

Marked: Konsentrasjon

So copyright's duration has increased dramatically—tripled in the past thirty years. And copyright's scope has increased as well—from regulating only publishers to now regulating just about everyone. And copyright's reach has changed, as every action becomes a copy and hence presumptively regulated. And as technologists find better ways to control the use of content, and as copyright is increasingly enforced through technology, copyright's force changes, too. Misuse is easier to find and easier to control. This regulation of the creative process, which began as a tiny regulation governing a tiny part of the market for creative work, has become the single most important regulator of creativity there is. It is a massive expansion in the scope of the government's control over innovation and creativity; it would be totally unrecognizable to those who gave birth to copyright's control.

Still, in my view, all of these changes would not matter much if it weren't for one more change that we must also consider. This is a change that is in some sense the most familiar, though its significance and scope are not well understood. It is the one that creates precisely the reason to be concerned about all the other changes I have described.

This is the change in the concentration and integration of the media. In the past twenty years, the nature of media ownership has undergone a radical alteration, caused by changes in legal rules

governing the media. Before this change happened, the different forms of media were owned by separate media companies. Now, the media is increasingly owned by only a few companies. Indeed, after the changes that the FCC announced in June 2003, most expect that within a few years, we will live in a world where just three companies control more than percent of the media.

Det er her to sorter endringer: omfanget av konsentrasjon, og dens natur.

Changes in scope are the easier ones to describe. As Senator John McCain summarized the data produced in the FCC's review of media ownership, "five companies control 85 percent of our media sources."[25] The five recording labels of Universal Music Group, BMG, Sony Music Entertainment, Warner Music Group, and EMI control 84.8 percent of the U.S. music market.[26] The "five largest cable companies pipe programming to 74 percent of the cable subscribers nationwide."[27]

The story with radio is even more dramatic. Before deregulation, the nation's largest radio broadcasting conglomerate owned fewer than seventy-five stations. Today *one* company owns more than 1,200 stations. During that period of consolidation, the total number of radio owners dropped by 34 percent. Today, in most markets, the two largest broadcasters control 74 percent of that market's revenues. Overall, just four companies control 90 percent of the nation's radio advertising revenues.

[25] FCC Oversight: Hearing Before the Senate Commerce, Science and Transportation Committee, 108th Cong., 1st sess. (22 May 2003) (statement of Senator John McCain).
[26] Lynette Holloway, "Despite a Marketing Blitz, CD Sales Continue to Slide," *New York Times*, 23 December 2002.
[27] Molly Ivins, "Media Consolidation Must Be Stopped," *Charleston Gazette*, 31 May 2003.

Newspaper ownership is becoming more concentrated as well. Today, there are six hundred fewer daily newspapers in the United States than there were eighty years ago, and ten companies control half of the nation's circulation. There are twenty major newspaper publishers in the United States. The top ten film studios receive 99 percent of all film revenue. The ten largest cable companies account for 85 percent of all cable revenue. This is a market far from the free press the framers sought to protect. Indeed, it is a market that is quite well protected— by the market.

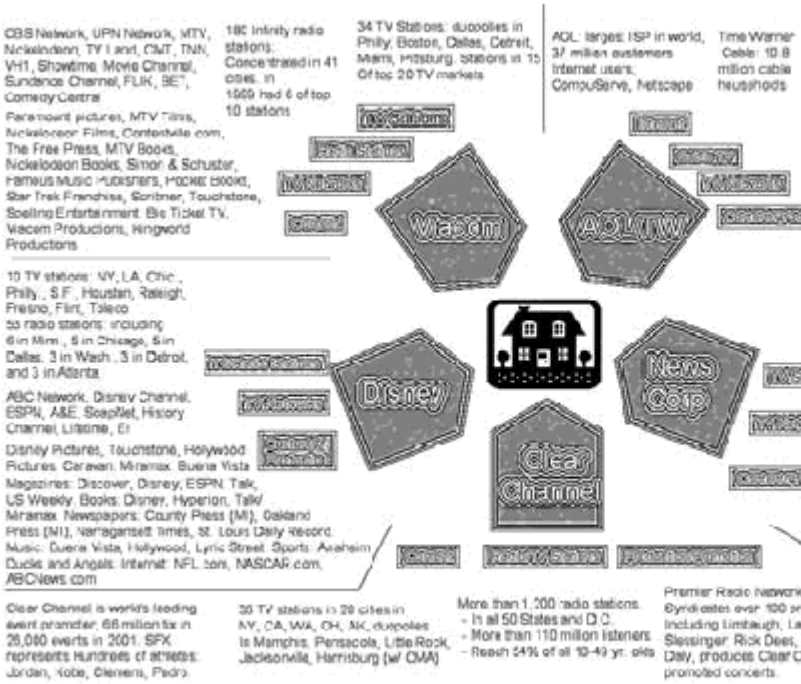
Concentration in size alone is one thing. The more invidious change is in the nature of that concentration. As author James Fallows put it in a recent article about Rupert Murdoch,

> Murdoch's companies now constitute a production system unmatched in its integration. They supply content—Fox movies … Fox TV shows … Fox-controlled sports broadcasts, plus newspapers and books. They sell the content to the public and to advertisers—in newspapers, on the broadcast network, on the cable channels. And they operate the physical distribution system through which the content reaches the customers. Murdoch's satellite systems now distribute News Corp. content in Europe and Asia; if Murdoch becomes DirecTV's largest single owner, that system will serve the same function in the United States.[28]

[28] James Fallows, "The Age of Murdoch", *Atlantic Monthly* (September 2003): 89.

The pattern with Murdoch is the pattern of modern media. Not just large companies owning many radio stations, but a few companies owning as many outlets of media as possible. A picture describes this pattern better than a thousand words could do:

Figur 10.19. Mønster for moderne mediaeierskap.



Betyr denne konsentrasjonen noe? Påvirker det hva som blir laget, eller hva som blir distribuert? Eller er det bare en mer effektiv måte å produsere og distribuere innhold?

Mitt syn var at konsentrasjonen ikke betød noe. Jeg tenkte det ikke var noe mer enn en mer effektiv finansiell struktur. Men nå, etter å ha lest og hørt på en haug av skapere prøve å overbevise meg om det motsatte, har jeg begynt å endre mening.

Her er en representativ historie som kan foreslå hvorfor denne integreringen er viktig.

I 1969 laget Norman Lear en polit for *All in the Family*. Han tok piloten til ABC, og nettverket likte det ikke. Da sa til Lear at det var for på kanten. Gjør det om igjen. Lear lagde piloten på nytt, mer på kanten enn den første. ABC ble fra seg. Du får ikke med deg poenget, fortalte de Lear. Vi vil ha det mindre på kanten, ikke mer.

I stedet for å føye seg, to Lear ganske enkelt serien sin til noen andre. CBS var glad for å ha seriene, og ABC kunne ikke stoppe Lear fra å gå til andre. Opphavsretten som Lear hadde sikret uavhengighet fra nettverk-kontroll.[29]

The network did not control those copyrights because the law forbade the networks from controlling the content they syndicated. The law required a separation between the networks and the content producers; that separation would guarantee Lear freedom. And as late as 1992, because of these rules, the vast majority of prime time television—75 percent of it—was "independent" of the networks.

[29] Leonard Hill, "The Axis of Access," remarks before Weidenbaum Center Forum, "Entertainment Economics: The Movie Industry," St. Louis, Missouri, 3 April 2003 (transcript of prepared remarks available at link #28 [http://free-culture.cc/notes/]; for the Lear story, not included in the prepared remarks, see link #29 [http://free-culture.cc/notes/]).

In 1994, the FCC abandoned the rules that required this independence. After that change, the networks quickly changed the balance. In 1985, there were twenty-five independent television production studios; in 2002, only five independent television studios remained. "In 1992, only 15 percent of new series were produced for a network by a company it controlled. Last year, the percentage of shows produced by controlled companies more than quintupled to 77 percent." "In 1992, 16 new series were produced independently of conglomerate control, last year there was one."[30] In 2002, 75 percent of prime time television was owned by the networks that ran it. "In the ten-year period between 1992 and 2002, the number of prime time television hours per week produced by network studios increased over 200%, whereas the number of prime time television hours per week produced by independent studios decreased 63%."[31]

Today, another Norman Lear with another *All in the Family* would find that he had the choice either to make the show less edgy or to be fired: The content of any show developed for a network is increasingly owned by the network.

Mens antall kanaler har økt dramatisk, har eierskapet til disse kanalene snevret inn fra få til stadig færre. Som Barry Diller sa til Bill Moyers,

[30] NewsCorp./DirecTV Merger and Media Consolidation: Hearings on Media Ownership Before the Senate Commerce Committee, 108th Cong., 1st sess. (2003) (testimony of Gene Kimmelman on behalf of Consumers Union and the Consumer Federation of America), available at link #30 [http://free-culture.cc/notes/]. Kimmelman quotes Victoria Riskin, president of Writers Guild of America, West, in her Remarks at FCC En Banc Hearing, Richmond, Virginia, 27 February 2003.
[31] ibid.

> Well, if you have companies that produce, that finance, that air on their channel and then distribute worldwide everything that goes through their controlled distribution system, then what you get is fewer and fewer actual voices participating in the process. [We u]sed to have dozens and dozens of thriving independent production companies producing television programs. Now you have less than a handful.[32]

This narrowing has an effect on what is produced. The product of such large and concentrated networks is increasingly homogenous. Increasingly safe. Increasingly sterile. The product of news shows from networks like this is increasingly tailored to the message the network wants to convey. This is not the communist party, though from the inside, it must feel a bit like the communist party. No one can question without risk of consequence—not necessarily banishment to Siberia, but punishment nonetheless. Independent, critical, different views are quashed. This is not the environment for a democracy.

Economics itself offers a parallel that explains why this integration affects creativity. Clay Christensen has written about the "Innovator's Dilemma": the fact that large traditional firms find it rational to ignore new, breakthrough technologies that compete with their core business. The same analysis could help explain why large, traditional media companies would find it

[32] "Barry Diller Takes on Media Deregulation", *Now with Bill Moyers*, Bill Moyers, 25 April 2003, redigert avskrift tilgjengelig fra link #31 [http://free-culture.cc/notes/].

rational to ignore new cultural trends.[33] Lumbering giants not only don't, but should not, sprint. Yet if the field is only open to the giants, there will be far too little sprinting.

I don't think we know enough about the economics of the media market to say with certainty what concentration and integration will do. The efficiencies are important, and the effect on culture is hard to measure.

But there is a quintessentially obvious example that does strongly suggest the concern.

In addition to the copyright wars, we're in the middle of the drug wars. Government policy is strongly directed against the drug cartels; criminal and civil courts are filled with the consequences of this battle.

Let me hereby disqualify myself from any possible appointment to any position in government by saying I believe this war is a profound mistake. I am not pro drugs. Indeed, I come from a family once wrecked by drugs—though the drugs that wrecked my family were all quite legal. I believe this war is a profound mistake because the collateral damage from it is so great as to make waging the war insane. When you add together the burdens on the criminal justice system, the desperation of generations of kids whose only real economic opportunities are as drug warriors,

[33] Clayton M. Christensen, *The Innovator's Dilemma: The Revolutionary National Bestseller that Changed the Way We Do Business* (Cambridge: Harvard Business School Press, 1997). Christensen acknowledges that the idea was first suggested by Dean Kim Clark. See Kim B. Clark, "The Interaction of Design Hierarchies and Market Concepts in Technological Evolution," *Research Policy* 14 (1985): 235–51. For a more recent study, see Richard Foster and Sarah Kaplan, *Creative Destruction: Why Companies That Are Built to Last Underperform the Market —and How to Successfully Transform Them* (New York: Currency/Doubleday, 2001).

the queering of constitutional protections because of the constant surveillance this war requires, and, most profoundly, the total destruction of the legal systems of many South American nations because of the power of the local drug cartels, I find it impossible to believe that the marginal benefit in reduced drug consumption by Americans could possibly outweigh these costs.

You may not be convinced. That's fine. We live in a democracy, and it is through votes that we are to choose policy. But to do that, we depend fundamentally upon the press to help inform Americans about these issues.

Beginning in 1998, the Office of National Drug Control Policy launched a media campaign as part of the “war on drugs.” The campaign produced scores of short film clips about issues related to illegal drugs. In one series (the Nick and Norm series) two men are in a bar, discussing the idea of legalizing drugs as a way to avoid some of the collateral damage from the war. One advances an argument in favor of drug legalization. The other responds in a powerful and effective way against the argument of the first. In the end, the first guy changes his mind (hey, it's television). The plug at the end is a damning attack on the pro-legalization campaign.

Fair enough. It's a good ad. Not terribly misleading. It delivers its message well. It's a fair and reasonable message.

But let's say you think it is a wrong message, and you'd like to run a countercommercial. Say you want to run a series of ads that try to demonstrate the extraordinary collateral harm that comes from the drug war. Can you do it?

Well, obviously, these ads cost lots of money. Assume you raise the money. Assume a group of concerned citizens donates all the

money in the world to help you get your message out. Can you be sure your message will be heard then?

No. You cannot. Television stations have a general policy of avoiding "controversial" ads. Ads sponsored by the government are deemed uncontroversial; ads disagreeing with the government are controversial. This selectivity might be thought inconsistent with the First Amendment, but the Supreme Court has held that stations have the right to choose what they run. Thus, the major channels of commercial media will refuse one side of a crucial debate the opportunity to present its case. And the courts will defend the rights of the stations to be this biased.[34]

I'd be happy to defend the networks' rights, as well—if we lived in a media market that was truly diverse. But concentration in the media throws that condition into doubt. If a handful of companies

[34] The Marijuana Policy Project, in February 2003, sought to place ads that directly responded to the Nick and Norm series on stations within the Washington, D.C., area. Comcast rejected the ads as "against [their] policy." The local NBC affiliate, WRC, rejected the ads without reviewing them. The local ABC affiliate, WJOA, originally agreed to run the ads and accepted payment to do so, but later decided not to run the ads and returned the collected fees. Interview with Neal Levine, 15 October 2003. These restrictions are, of course, not limited to drug policy. See, for example, Nat Ives, "On the Issue of an Iraq War, Advocacy Ads Meet with Rejection from TV Networks," *New York Times*, 13 March 2003, C4. Outside of election-related air time there is very little that the FCC or the courts are willing to do to even the playing field. For a general overview, see Rhonda Brown, "Ad Hoc Access: The Regulation of Editorial Advertising on Television and Radio," *Yale Law and Policy Review* 6 (1988): 449–79, and for a more recent summary of the stance of the FCC and the courts, see *Radio-Television News Directors Association* v. *FCC*, 184 F. 3d 872 (D.C. Cir. 1999). Municipal authorities exercise the same authority as the networks. In a recent example from San Francisco, the San Francisco transit authority rejected an ad that criticized its Muni diesel buses. Phillip Matier and Andrew Ross, "Antidiesel Group Fuming After Muni Rejects Ad," SFGate.com, 16 June 2003, available at link #32 [http://free-culture.cc/notes/]. The ground was that the criticism was "too controversial."

control access to the media, and that handful of companies gets to decide which political positions it will allow to be promoted on its channels, then in an obvious and important way, concentration matters. You might like the positions the handful of companies selects. But you should not like a world in which a mere few get to decide which issues the rest of us get to know about.

Sammen

There is something innocent and obvious about the claim of the copyright warriors that the government should “protect my property.” In the abstract, it is obviously true and, ordinarily, totally harmless. No sane sort who is not an anarchist could disagree.

But when we see how dramatically this “property” has changed — when we recognize how it might now interact with both technology and markets to mean that the effective constraint on the liberty to cultivate our culture is dramatically different—the claim begins to seem less innocent and obvious. Given (1) the power of technology to supplement the law's control, and (2) the power of concentrated markets to weaken the opportunity for dissent, if strictly enforcing the massively expanded “property” rights granted by copyright fundamentally changes the freedom within this culture to cultivate and build upon our past, then we have to ask whether this property should be redefined.

Not starkly. Or absolutely. My point is not that we should abolish copyright or go back to the eighteenth century. That would be a total mistake, disastrous for the most important creative enterprises within our culture today.

But there is a space between zero and one, Internet culture notwithstanding. And these massive shifts in the effective power of copyright regulation, tied to increased concentration of the content industry and resting in the hands of technology that will increasingly enable control over the use of culture, should drive us to consider whether another adjustment is called for. Not an adjustment that increases copyright's power. Not an adjustment that increases its term. Rather, an adjustment to restore the balance that has traditionally defined copyright's regulation—a weakening of that regulation, to strengthen creativity.

Copyright law has not been a rock of Gibraltar. It's not a set of constant commitments that, for some mysterious reason, teenagers and geeks now flout. Instead, copyright power has grown dramatically in a short period of time, as the technologies of distribution and creation have changed and as lobbyists have pushed for more control by copyright holders. Changes in the past in response to changes in technology suggest that we may well need similar changes in the future. And these changes have to be *reductions* in the scope of copyright, in response to the extraordinary increase in control that technology and the market enable.

For the single point that is lost in this war on pirates is a point that we see only after surveying the range of these changes. When you add together the effect of changing law, concentrated markets, and changing technology, together they produce an astonishing conclusion: *Never in our history have fewer had a legal right to control more of the development of our culture than now*.

Not when copyrights were perpetual, for when copyrights were perpetual, they affected only that precise creative work. Not when only publishers had the tools to publish, for the market then was much more diverse. Not when there were only three television

networks, for even then, newspapers, film studios, radio stations, and publishers were independent of the networks. *Never* has copyright protected such a wide range of rights, against as broad a range of actors, for a term that was remotely as long. This form of regulation—a tiny regulation of a tiny part of the creative energy of a nation at the founding—is now a massive regulation of the overall creative process. Law plus technology plus the market now interact to turn this historically benign regulation into the most significant regulation of culture that our free society has known.[35]

This has been a long chapter. Its point can now be briefly stated.

At the start of this book, I distinguished between commercial and noncommercial culture. In the course of this chapter, I have distinguished between copying a work and transforming it. We can now combine these two distinctions and draw a clear map of the changes that copyright law has undergone. In 1790, the law looked like this:

	Publisere	**Omforme**
Kommersiell	©	Fri
Ikke-kommersiell	Fri	Fri

The act of publishing a map, chart, and book was regulated by copyright law. Nothing else was. Transformations were free. And as copyright attached only with registration, and only those who intended to benefit commercially would register, copying through publishing of noncommercial work was also free.

[35] Siva Vaidhyanathan fanger et lignende poeng i hans "fire kapitulasjoner" for opphavsrettsloven i den digitale tidsalder. Se Vaidhyanathan, 159–60.

På slutten av det nittende århundre hadde loven blitt endret til dette:

	Publisere	**Omforme**
Kommersiell	©	©
Ikke-kommersiell	Fri	Fri

Derivative works were now regulated by copyright law—if published, which again, given the economics of publishing at the time, means if offered commercially. But noncommercial publishing and transformation were still essentially free.

In 1909 the law changed to regulate copies, not publishing, and after this change, the scope of the law was tied to technology. As the technology of copying became more prevalent, the reach of the law expanded. Thus by 1975, as photocopying machines became more common, we could say the law began to look like this:

	Kopiere	**Omforme**
Kommersiell	©	©
Ikke-kommersiell	©/Fri	Fri

The law was interpreted to reach noncommercial copying through, say, copy machines, but still much of copying outside of the commercial market remained free. But the consequence of the emergence of digital technologies, especially in the context of a digital network, means that the law now looks like this:

	Kopiere	**Omforme**
Kommersiell	©	©
Ikke-kommersiell	©	©

Every realm is governed by copyright law, whereas before most creativity was not. The law now regulates the full range of creativity— commercial or not, transformative or not—with the same rules designed to regulate commercial publishers.

Obviously, copyright law is not the enemy. The enemy is regulation that does no good. So the question that we should be asking just now is whether extending the regulations of copyright law into each of these domains actually does any good.

I have no doubt that it does good in regulating commercial copying. But I also have no doubt that it does more harm than good when regulating (as it regulates just now) noncommercial copying and, especially, noncommercial transformation. And increasingly, for the reasons sketched especially in chapters 7 [118] and 8 [123], one might well wonder whether it does more harm than good for commercial transformation. More commercial transformative work would be created if derivative rights were more sharply restricted.

The issue is therefore not simply whether copyright is property. Of course copyright is a kind of "property," and of course, as with any property, the state ought to protect it. But first impressions notwithstanding, historically, this property right (as with all property rights[36]) has been crafted to balance the important need to give authors and artists incentives with the equally important need to assure access to creative work. This balance has always been struck in light of new technologies. And for almost half of our tradition, the "copyright" did not control *at all* the freedom

[36] It was the single most important contribution of the legal realist movement to demonstrate that all property rights are always crafted to balance public and private interests. See Thomas C. Grey, "The Disintegration of Property," in *Nomos XXII: Property*, J. Roland Pennock and John W. Chapman, eds. (New York: New York University Press, 1980).

of others to build upon or transform a creative work. American culture was born free, and for almost 180 years our country consistently protected a vibrant and rich free culture.

We achieved that free culture because our law respected important limits on the scope of the interests protected by "property." The very birth of "copyright" as a statutory right recognized those limits, by granting copyright owners protection for a limited time only (the story of chapter 6). The tradition of "fair use" is animated by a similar concern that is increasingly under strain as the costs of exercising any fair use right become unavoidably high (the story of chapter 7). Adding statutory rights where markets might stifle innovation is another familiar limit on the property right that copyright is (chapter 8). And granting archives and libraries a broad freedom to collect, claims of property notwithstanding, is a crucial part of guaranteeing the soul of a culture (chapter 9). Free cultures, like free markets, are built with property. But the nature of the property that builds a free culture is very different from the extremist vision that dominates the debate today.

Free culture is increasingly the casualty in this war on piracy. In response to a real, if not yet quantified, threat that the technologies of the Internet present to twentieth-century business models for producing and distributing culture, the law and technology are being transformed in a way that will undermine our tradition of free culture. The property right that is copyright is no longer the balanced right that it was, or was intended to be. The property right that is copyright has become unbalanced, tilted toward an extreme. The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer.

Del III. Nøtter

Kapittel 11. Kapittel elleve: Chimera

In a well-known short story by H. G. Wells, a mountain climber named Nunez trips (literally, down an ice slope) into an unknown and isolated valley in the Peruvian Andes.[1] The valley is extraordinarily beautiful, with "sweet water, pasture, an even climate, slopes of rich brown soil with tangles of a shrub that bore an excellent fruit." But the villagers are all blind. Nunez takes this as an opportunity. "In the Country of the Blind," he tells himself, "the One-Eyed Man is King." So he resolves to live with the villagers to explore life as a king.

Things don't go quite as he planned. He tries to explain the idea of sight to the villagers. They don't understand. He tells them they are "blind." They don't have the word *blind*. They think he's just thick. Indeed, as they increasingly notice the things he can't do (hear the sound of grass being stepped on, for example), they increasingly try to control him. He, in turn, becomes increasingly frustrated. "`You don't understand,' he cried, in a voice that was meant to be great and resolute, and which broke. `You are blind and I can see. Leave me alone!'"

The villagers don't leave him alone. Nor do they see (so to speak) the virtue of his special power. Not even the ultimate target of his affection, a young woman who to him seems "the most beautiful thing in the whole of creation," understands the beauty of sight.

[1] H. G. Wells, "The Country of the Blind" (1904, 1911). Se H. G. Wells, *The Country of the Blind and Other Stories*, Michael Sherborne, ed. (New York: Oxford University Press, 1996).

Nunez's description of what he sees “seemed to her the most poetical of fancies, and she listened to his description of the stars and the mountains and her own sweet white-lit beauty as though it was a guilty indulgence.” “She did not believe,” Wells tells us, and “she could only half understand, but she was mysteriously delighted.”

When Nunez announces his desire to marry his “mysteriously delighted” love, the father and the village object. “You see, my dear,” her father instructs, “he's an idiot. He has delusions. He can't do anything right.” They take Nunez to the village doctor.

After a careful examination, the doctor gives his opinion. “His brain is affected,” he reports.

“What affects it?” the father asks. “Those queer things that are called the eyes … are diseased … in such a way as to affect his brain.”

The doctor continues: “I think I may say with reasonable certainty that in order to cure him completely, all that we need to do is a simple and easy surgical operation—namely, to remove these irritant bodies [the eyes].”

“Thank Heaven for science!” says the father to the doctor. They inform Nunez of this condition necessary for him to be allowed his bride. (You'll have to read the original to learn what happens in the end. I believe in free culture, but never in giving away the end of a story.) It sometimes happens that the eggs of twins fuse in the mother's womb. That fusion produces a “chimera.” A chimera is a single creature with two sets of DNA. The DNA in the blood, for example, might be different from the DNA of the skin. This possibility is an underused plot for murder mysteries. “But the

DNA shows with 100 percent certainty that she was not the person whose blood was at the scene. …"

Before I had read about chimeras, I would have said they were impossible. A single person can't have two sets of DNA. The very idea of DNA is that it is the code of an individual. Yet in fact, not only can two individuals have the same set of DNA (identical twins), but one person can have two different sets of DNA (a chimera). Our understanding of a "person" should reflect this reality.

The more I work to understand the current struggle over copyright and culture, which I've sometimes called unfairly, and sometimes not unfairly enough, "the copyright wars," the more I think we're dealing with a chimera. For example, in the battle over the question "What is p2p file sharing?" both sides have it right, and both sides have it wrong. One side says, "File sharing is just like two kids taping each others' records—the sort of thing we've been doing for the last thirty years without any question at all." That's true, at least in part. When I tell my best friend to try out a new CD that I've bought, but rather than just send the CD, I point him to my p2p server, that is, in all relevant respects, just like what every executive in every recording company no doubt did as a kid: sharing music.

But the description is also false in part. For when my p2p server is on a p2p network through which anyone can get access to my music, then sure, my friends can get access, but it stretches the meaning of "friends" beyond recognition to say "my ten thousand best friends" can get access. Whether or not sharing my music with my best friend is what "we have always been allowed to do," we have not always been allowed to share music with "our ten thousand best friends."

Likewise, when the other side says, “File sharing is just like walking into a Tower Records and taking a CD off the shelf and walking out with it,” that's true, at least in part. If, after Lyle Lovett (finally) releases a new album, rather than buying it, I go to Kazaa and find a free copy to take, that is very much like stealing a copy from Tower.

But it is not quite stealing from Tower. After all, when I take a CD from Tower Records, Tower has one less CD to sell. And when I take a CD from Tower Records, I get a bit of plastic and a cover, and something to show on my shelves. (And, while we're at it, we could also note that when I take a CD from Tower Records, the maximum fine that might be imposed on me, under California law, at least, is $1,000. According to the RIAA, by contrast, if I download a ten-song CD, I'm liable for $1,500,000 in damages.)

The point is not that it is as neither side describes. The point is that it is both—both as the RIAA describes it and as Kazaa describes it. It is a chimera. And rather than simply denying what the other side asserts, we need to begin to think about how we should respond to this chimera. What rules should govern it?

We could respond by simply pretending that it is not a chimera. We could, with the RIAA, decide that every act of file sharing should be a felony. We could prosecute families for millions of dollars in damages just because file sharing occurred on a family computer. And we can get universities to monitor all computer traffic to make sure that no computer is used to commit this crime. These responses might be extreme, but each of them has either been proposed or actually implemented.[2]

[2] For an excellent summary, see the report prepared by GartnerG2 and the Berkman Center for Internet and Society at Harvard Law School, “Copyright and Digital Media in a Post-Napster World,” 27 June 2003, available at link

Alternatively, we could respond to file sharing the way many kids act as though we've responded. We could totally legalize it. Let there be no copyright liability, either civil or criminal, for making copyrighted content available on the Net. Make file sharing like gossip: regulated, if at all, by social norms but not by law.

Either response is possible. I think either would be a mistake. Rather than embrace one of these two extremes, we should embrace something that recognizes the truth in both. And while I end this book with a sketch of a system that does just that, my aim in the next chapter is to show just how awful it would be for us to adopt the zero-tolerance extreme. I believe *either* extreme would be worse than a reasonable alternative. But I believe the zero-tolerance solution would be the worse of the two extremes.

#33 [http://free-culture.cc/notes/]. Reps. John Conyers Jr. (D-Mich.) and Howard L. Berman (D-Calif.) have introduced a bill that would treat unauthorized online copying as a felony offense with punishments ranging as high as five years imprisonment; see Jon Healey, "House Bill Aims to Up Stakes on Piracy," *Los Angeles Times*, 17 July 2003, available at link #34 [http://free-culture.cc/notes/]. Civil penalties are currently set at $150,000 per copied song. For a recent (and unsuccessful) legal challenge to the RIAA's demand that an ISP reveal the identity of a user accused of sharing more than 600 songs through a family computer, see *RIAA* v. *Verizon Internet Services (In re. Verizon Internet Services)*, 240 F. Supp. 2d 24 (D.D.C. 2003). Such a user could face liability ranging as high as $90 million. Such astronomical figures furnish the RIAA with a powerful arsenal in its prosecution of file sharers. Settlements ranging from $12,000 to $17,500 for four students accused of heavy file sharing on university networks must have seemed a mere pittance next to the $98 billion the RIAA could seek should the matter proceed to court. See Elizabeth Young, "Downloading Could Lead to Fines," redandblack.com, August 2003, available at link #35 [http://free-culture.cc/notes/]. For an example of the RIAA's targeting of student file sharing, and of the subpoenas issued to universities to reveal student file-sharer identities, see James Collins, "RIAA Steps Up Bid to Force BC, MIT to Name Students," *Boston Globe*, 8 August 2003, D3, available at link #36 [http://free-culture.cc/notes/].

Yet zero tolerance is increasingly our government's policy. In the middle of the chaos that the Internet has created, an extraordinary land grab is occurring. The law and technology are being shifted to give content holders a kind of control over our culture that they have never had before. And in this extremism, many an opportunity for new innovation and new creativity will be lost.

I'm not talking about the opportunities for kids to “steal” music. My focus instead is the commercial and cultural innovation that this war will also kill. We have never seen the power to innovate spread so broadly among our citizens, and we have just begun to see the innovation that this power will unleash. Yet the Internet has already seen the passing of one cycle of innovation around technologies to distribute content. The law is responsible for this passing. As the vice president for global public policy at one of these new innovators, eMusic.com, put it when criticizing the DMCA's added protection for copyrighted material,

> eMusic opposes music piracy. We are a distributor of copyrighted material, and we want to protect those rights.
>
> But building a technology fortress that locks in the clout of the major labels is by no means the only way to protect copyright interests, nor is it necessarily the best. It is simply too early to answer that question. Market forces operating naturally may very well produce a totally different industry model.
>
> This is a critical point. The choices that industry sectors make with respect to these systems will in many ways directly shape the market for digital media and the manner in which

> digital media are distributed. This in turn will directly influence the options that are available to consumers, both in terms of the ease with which they will be able to access digital media and the equipment that they will require to do so. Poor choices made this early in the game will retard the growth of this market, hurting everyone's interests.[3]

In April 2001, eMusic.com was purchased by Vivendi Universal, one of “the major labels.” Its position on these matters has now changed.

Reversing our tradition of tolerance now will not merely quash piracy. It will sacrifice values that are important to this culture, and will kill opportunities that could be extraordinarily valuable.

[3] WIPO and the DMCA One Year Later: Assessing Consumer Access to Digital Entertainment on the Internet and Other Media: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection, House Committee on Commerce, 106th Cong. 29 (1999) (statement of Peter Harter, vice president, Global Public Policy and Standards, EMusic.com), available in LEXIS, Federal Document Clearing House Congressional Testimony File.

Kapittel 12. Kapittel tolv: Skader

To fight “piracy,” to protect “property,” the content industry has launched a war. Lobbying and lots of campaign contributions have now brought the government into this war. As with any war, this one will have both direct and collateral damage. As with any war of prohibition, these damages will be suffered most by our own people.

My aim so far has been to describe the consequences of this war, in particular, the consequences for “free culture.” But my aim now is to extend this description of consequences into an argument. Is this war justified?

In my view, it is not. There is no good reason why this time, for the first time, the law should defend the old against the new, just when the power of the property called “intellectual property” is at its greatest in our history.

Yet “common sense” does not see it this way. Common sense is still on the side of the Causbys and the content industry. The extreme claims of control in the name of property still resonate; the uncritical rejection of “piracy” still has play.

There will be many consequences of continuing this war. I want to describe just three. All three might be said to be unintended. I am quite confident the third is unintended. I'm less sure about the first two. The first two protect modern RCAs, but there is no Howard Armstrong in the wings to fight today's monopolists of culture.

Constraining Creators

In the next ten years we will see an explosion of digital technologies. These technologies will enable almost anyone to capture and share content. Capturing and sharing content, of course, is what humans have done since the dawn of man. It is how we learn and communicate. But capturing and sharing through digital technology is different. The fidelity and power are different. You could send an e-mail telling someone about a joke you saw on Comedy Central, or you could send the clip. You could write an essay about the inconsistencies in the arguments of the politician you most love to hate, or you could make a short film that puts statement against statement. You could write a poem to express your love, or you could weave together a string—a mash-up— of songs from your favorite artists in a collage and make it available on the Net.

This digital "capturing and sharing" is in part an extension of the capturing and sharing that has always been integral to our culture, and in part it is something new. It is continuous with the Kodak, but it explodes the boundaries of Kodak-like technologies. The technology of digital "capturing and sharing" promises a world of extraordinarily diverse creativity that can be easily and broadly shared. And as that creativity is applied to democracy, it will enable a broad range of citizens to use technology to express and criticize and contribute to the culture all around.

Teknologien har dermed gitt oss en mulighet til å gjøre noe med kultur som bare har vært mulig for enkeltpersoner i små grupper, isolert fra andre grupper. Forestill deg en gammel mann som forteller en historie til en samling med naboer i en liten landsby.

Forestill deg så den samme historiefortellingen utvidet til å nå over hele verden.

Yet all this is possible only if the activity is presumptively legal. In the current regime of legal regulation, it is not. Forget file sharing for a moment. Think about your favorite amazing sites on the Net. Web sites that offer plot summaries from forgotten television shows; sites that catalog cartoons from the 1960s; sites that mix images and sound to criticize politicians or businesses; sites that gather newspaper articles on remote topics of science or culture. There is a vast amount of creative work spread across the Internet. But as the law is currently crafted, this work is presumptively illegal.

That presumption will increasingly chill creativity, as the examples of extreme penalties for vague infringements continue to proliferate. It is impossible to get a clear sense of what's allowed and what's not, and at the same time, the penalties for crossing the line are astonishingly harsh. The four students who were threatened by the RIAA (Jesse Jordan of chapter 3 was just one) were threatened with a $98 billion lawsuit for building search engines that permitted songs to be copied. Yet WorldCom—which defrauded investors of $11 billion, resulting in a loss to investors in market capitalization of over $200 billion—received a fine of a mere $750 million.[1] And under legislation being pushed in Congress right now, a doctor who negligently removes the wrong leg in an operation would be liable for no more

[1] Se Lynne W. Jeter, *Disconnected: Deceit and Betrayal at WorldCom* (Hoboken, N.J.: John Wiley & Sons, 2003), 176, 204; for detaljer om dette forliket, se pressemelding fra MCI, "MCI Wins U.S. District Court Approval for SEC Settlement" (7. juli 2003), tilgjengelig fra link #37 [http://free-culture.cc/notes/].

than $250,000 in damages for pain and suffering.[2] Can common sense recognize the absurdity in a world where the maximum fine for downloading two songs off the Internet is more than the fine for a doctor's negligently butchering a patient?

The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open. We drive this creative process underground by branding the modern-day Walt Disneys "pirates." We make it impossible for businesses to rely upon a public domain, because the boundaries of the public domain are designed to be unclear. It never pays to do anything except pay for the right to create, and hence only those who can pay are allowed to create. As was the case in the Soviet Union, though for very different reasons, we will begin to see a world of underground art—not because the message is necessarily political, or because the subject is controversial, but because the very act of creating the art is legally fraught. Already, exhibits of "illegal art" tour the United States.[3] In what does their "illegality" consist? In the act of mixing the culture around us with an expression that is critical or reflective.

Part of the reason for this fear of illegality has to do with the changing law. I described that change in detail in chapter 10 [142].

[2] The bill, modeled after California's tort reform model, was passed in the House of Representatives but defeated in a Senate vote in July 2003. For an overview, see Tanya Albert, "Measure Stalls in Senate: `We'll Be Back,' Say Tort Reformers," amednews.com, 28 July 2003, available at link #38 [http://free-culture.cc/notes/], and "Senate Turns Back Malpractice Caps," CBSNews.com, 9 July 2003, available at link #39 [http://free-culture.cc/notes/]. President Bush has continued to urge tort reform in recent months.

[3] Se Danit Lidor, "Artists Just Wanna Be Free", *Wired*, 7. juli 2003, tilgjengelig fra link #40 [http://free-culture.cc/notes/]. For en oversikt over utstillingen, se link #41 [http://free-culture.cc/notes/].

But an even bigger part has to do with the increasing ease with which infractions can be tracked. As users of file-sharing systems discovered in 2002, it is a trivial matter for copyright owners to get courts to order Internet service providers to reveal who has what content. It is as if your cassette tape player transmitted a list of the songs that you played in the privacy of your own home that anyone could tune into for whatever reason they chose.

Never in our history has a painter had to worry about whether his painting infringed on someone else's work; but the modern-day painter, using the tools of Photoshop, sharing content on the Web, must worry all the time. Images are all around, but the only safe images to use in the act of creation are those purchased from Corbis or another image farm. And in purchasing, censoring happens. There is a free market in pencils; we needn't worry about its effect on creativity. But there is a highly regulated, monopolized market in cultural icons; the right to cultivate and transform them is not similarly free.

Lawyers rarely see this because lawyers are rarely empirical. As I described in chapter 7 [118], in response to the story about documentary filmmaker Jon Else, I have been lectured again and again by lawyers who insist Else's use was fair use, and hence I am wrong to say that the law regulates such a use.

But fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad —in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.

Judges and lawyers can tell themselves that fair use provides adequate "breathing room" between regulation by the law and the access the law should allow. But it is a measure of how out of touch our legal system has become that anyone actually believes this. The rules that publishers impose upon writers, the rules that film distributors impose upon filmmakers, the rules that newspapers impose upon journalists— these are the real laws governing creativity. And these rules have little relationship to the "law" with which judges comfort themselves.

For in a world that threatens $150,000 for a single willful infringement of a copyright, and which demands tens of thousands of dollars to even defend against a copyright infringement claim, and which would never return to the wrongfully accused defendant anything of the costs she suffered to defend her right to speak—in that world, the astonishingly broad regulations that pass under the name "copyright" silence speech and creativity. And in that world, it takes a studied blindness for people to continue to believe they live in a culture that is free.

As Jed Horovitz, the businessman behind Video Pipeline, said to me,

> We're losing [creative] opportunities right and left. Creative people are being forced not to express themselves. Thoughts are not being expressed. And while a lot of stuff may [still] be created, it still won't get distributed. Even if the stuff gets made … you're not going to get it distributed in the mainstream media unless you've got a little note from a lawyer saying, "This has been cleared." You're not even going to get it on PBS without that kind of permission. That's the point at which they control it.

Constraining Innovators

The story of the last section was a crunchy-lefty story—creativity quashed, artists who can't speak, yada yada yada. Maybe that doesn't get you going. Maybe you think there's enough weird art out there, and enough expression that is critical of what seems to be just about everything. And if you think that, you might think there's little in this story to worry you.

But there's an aspect of this story that is not lefty in any sense. Indeed, it is an aspect that could be written by the most extreme promarket ideologue. And if you're one of these sorts (and a special one at that, 188 pages into a book like this), then you can see this other aspect by substituting “free market” every place I've spoken of “free culture.” The point is the same, even if the interests affecting culture are more fundamental.

The charge I've been making about the regulation of culture is the same charge free marketers make about regulating markets. Everyone, of course, concedes that some regulation of markets is necessary—at a minimum, we need rules of property and contract, and courts to enforce both. Likewise, in this culture debate, everyone concedes that at least some framework of copyright is also required. But both perspectives vehemently insist that just because some regulation is good, it doesn't follow that more regulation is better. And both perspectives are constantly attuned to the ways in which regulation simply enables the powerful industries of today to protect themselves against the competitors of tomorrow.

This is the single most dramatic effect of the shift in regulatory strategy that I described in chapter 10 [142]. The consequence

of this massive threat of liability tied to the murky boundaries of copyright law is that innovators who want to innovate in this space can safely innovate only if they have the sign-off from last generation's dominant industries. That lesson has been taught through a series of cases that were designed and executed to teach venture capitalists a lesson. That lesson—what former Napster CEO Hank Barry calls a “nuclear pall” that has fallen over the Valley—has been learned.

Consider one example to make the point, a story whose beginning I told in *The Future of Ideas* and which has progressed in a way that even I (pessimist extraordinaire) would never have predicted.

In 1997, Michael Roberts launched a company called MP3.com. MP3.com was keen to remake the music business. Their goal was not just to facilitate new ways to get access to content. Their goal was also to facilitate new ways to create content. Unlike the major labels, MP3.com offered creators a venue to distribute their creativity, without demanding an exclusive engagement from the creators.

To make this system work, however, MP3.com needed a reliable way to recommend music to its users. The idea behind this alternative was to leverage the revealed preferences of music listeners to recommend new artists. If you like Lyle Lovett, you're likely to enjoy Bonnie Raitt. And so on.

This idea required a simple way to gather data about user preferences. MP3.com came up with an extraordinarily clever way to gather this preference data. In January 2000, the company launched a service called my.mp3.com. Using software provided by MP3.com, a user would sign into an account and then insert into her computer a CD. The software would identify the CD, and then give the user access to that content. So, for example, if you

inserted a CD by Jill Sobule, then wherever you were—at work or at home—you could get access to that music once you signed into your account. The system was therefore a kind of music-lockbox.

No doubt some could use this system to illegally copy content. But that opportunity existed with or without MP3.com. The aim of the my.mp3.com service was to give users access to their own content, and as a by-product, by seeing the content they already owned, to discover the kind of content the users liked.

To make this system function, however, MP3.com needed to copy 50,000 CDs to a server. (In principle, it could have been the user who uploaded the music, but that would have taken a great deal of time, and would have produced a product of questionable quality.) It therefore purchased 50,000 CDs from a store, and started the process of making copies of those CDs. Again, it would not serve the content from those copies to anyone except those who authenticated that they had a copy of the CD they wanted to access. So while this was 50,000 copies, it was 50,000 copies directed at giving customers something they had already bought.

Nine days after MP3.com launched its service, the five major labels, headed by the RIAA, brought a lawsuit against MP3.com. MP3.com settled with four of the five. Nine months later, a federal judge found MP3.com to have been guilty of willful infringement with respect to the fifth. Applying the law as it is, the judge imposed a fine against MP3.com of $118 million. MP3.com then settled with the remaining plaintiff, Vivendi Universal, paying over $54 million. Vivendi purchased MP3.com just about a year later.

Den delen av historien har jeg fortalt før. Nå kommer konklusjonen.

After Vivendi purchased MP3.com, Vivendi turned around and filed a malpractice lawsuit against the lawyers who had advised it that they had a good faith claim that the service they wanted to offer would be considered legal under copyright law. This lawsuit alleged that it should have been obvious that the courts would find this behavior illegal; therefore, this lawsuit sought to punish any lawyer who had dared to suggest that the law was less restrictive than the labels demanded.

Den åpenbare hensikten med dette søksmålet (som ble avsluttet med et forlik for et uspesifisert beløp like etter at saken ikke lenger fikk pressedekning), var å sende en melding som ikke kan misforstås til advokater som gir råd til klienter på dette området: Det er ikke bare dine klienter som får lide hvis innholdsindustrien retter sine våpen mot dem. Det får også du. Så de av dere som tror loven burde være mindre restriktiv bør innse at et slikt syn på loven vil koste deg og ditt firma dyrt.

This strategy is not just limited to the lawyers. In April 2003, Universal and EMI brought a lawsuit against Hummer Winblad, the venture capital firm (VC) that had funded Napster at a certain stage of its development, its cofounder (John Hummer), and general partner (Hank Barry).[4] The claim here, as well, was that the VC should have recognized the right of the content industry to control how the industry should develop. They should be held personally liable for funding a company whose business turned out to be beyond the law. Here again, the aim of the lawsuit is

[4] See Joseph Menn, "Universal, EMI Sue Napster Investor," *Los Angeles Times*, 23 April 2003. For a parallel argument about the effects on innovation in the distribution of music, see Janelle Brown, "The Music Revolution Will Not Be Digitized," Salon.com, 1 June 2001, available at link #42 [http://free-culture.cc/notes/]. See also Jon Healey, "Online Music Services Besieged," *Los Angeles Times*, 28 May 2001.

transparent: Any VC now recognizes that if you fund a company whose business is not approved of by the dinosaurs, you are at risk not just in the marketplace, but in the courtroom as well. Your investment buys you not only a company, it also buys you a lawsuit. So extreme has the environment become that even car manufacturers are afraid of technologies that touch content. In an article in *Business 2.0*, Rafe Needleman describes a discussion with BMW:

> I asked why, with all the storage capacity and computer power in the car, there was no way to play MP3 files. I was told that BMW engineers in Germany had rigged a new vehicle to play MP3s via the car's built-in sound system, but that the company's marketing and legal departments weren't comfortable with pushing this forward for release stateside. Even today, no new cars are sold in the United States with bona fide MP3 players. … [5]

Dette er verden til mafiaen—fylt med "penger eller livet"-trusler, som ikke er regulert av domstolene men av trusler som loven gir rettighetsinnehaver mulighet til å komme med. Det er et system som åpenbart og nødvendigvis vil kvele ny innovasjon. Det er vanskelig nok å starte et selskap. Det blir helt umulig hvis selskapet er stadig truet av søksmål.

The point is not that businesses should have a right to start illegal enterprises. The point is the definition of "illegal." The law is a mess of uncertainty. We have no good way to know how it

[5] Rafe Needleman, "Driving in Cars with MP3s", *Business 2.0*, 16. juni 2003, tilgjengelig via link #43 [http://free-culture.cc/notes/]. Jeg er Dr. Mohammad Al-Ubaydli takknemlig mot for dette eksemplet.

should apply to new technologies. Yet by reversing our tradition of judicial deference, and by embracing the astonishingly high penalties that copyright law imposes, that uncertainty now yields a reality which is far more conservative than is right. If the law imposed the death penalty for parking tickets, we'd not only have fewer parking tickets, we'd also have much less driving. The same principle applies to innovation. If innovation is constantly checked by this uncertain and unlimited liability, we will have much less vibrant innovation and much less creativity.

The point is directly parallel to the crunchy-lefty point about fair use. Whatever the “real” law is, realism about the effect of law in both contexts is the same. This wildly punitive system of regulation will systematically stifle creativity and innovation. It will protect some industries and some creators, but it will harm industry and creativity generally. Free market and free culture depend upon vibrant competition. Yet the effect of the law today is to stifle just this kind of competition. The effect is to produce an overregulated culture, just as the effect of too much control in the market is to produce an overregulatedregulated market.

The building of a permission culture, rather than a free culture, is the first important way in which the changes I have described will burden innovation. A permission culture means a lawyer's culture —a culture in which the ability to create requires a call to your lawyer. Again, I am not antilawyer, at least when they're kept in their proper place. I am certainly not antilaw. But our profession has lost the sense of its limits. And leaders in our profession have lost an appreciation of the high costs that our profession imposes upon others. The inefficiency of the law is an embarrassment to our tradition. And while I believe our profession should therefore do everything it can to make the law more efficient, it should at least do everything it can to limit the reach of the law where the

law is not doing any good. The transaction costs buried within a permission culture are enough to bury a wide range of creativity. Someone needs to do a lot of justifying to justify that result. The uncertainty of the law is one burden on innovation. There is a second burden that operates more directly. This is the effort by many in the content industry to use the law to directly regulate the technology of the Internet so that it better protects their content.

The motivation for this response is obvious. The Internet enables the efficient spread of content. That efficiency is a feature of the Internet's design. But from the perspective of the content industry, this feature is a "bug." The efficient spread of content means that content distributors have a harder time controlling the distribution of content. One obvious response to this efficiency is thus to make the Internet less efficient. If the Internet enables "piracy," then, this response says, we should break the kneecaps of the Internet.

The examples of this form of legislation are many. At the urging of the content industry, some in Congress have threatened legislation that would require computers to determine whether the content they access is protected or not, and to disable the spread of protected content.[6] Congress has already launched proceedings to explore a mandatory "broadcast flag" that would be required on any device capable of transmitting digital video (i.e., a computer), and that would disable the copying of any content that is marked with a broadcast flag. Other members of Congress have proposed immunizing content providers from liability for technology they might deploy that would hunt down copyright violators and disable their machines.[7]

[6] "Copyright and Digital Media in a Post-Napster World," GartnerG2 and the Berkman Center for Internet and Society at Harvard Law School (2003), 33–35, available at link #44 [http://free-culture.cc/notes/].
[7] GartnerG2, 26–27.

In one sense, these solutions seem sensible. If the problem is the code, why not regulate the code to remove the problem. But any regulation of technical infrastructure will always be tuned to the particular technology of the day. It will impose significant burdens and costs on the technology, but will likely be eclipsed by advances around exactly those requirements.

In March 2002, a broad coalition of technology companies, led by Intel, tried to get Congress to see the harm that such legislation would impose.[8] Their argument was obviously not that copyright should not be protected. Instead, they argued, any protection should not do more harm than good.

There is one more obvious way in which this war has harmed innovation—again, a story that will be quite familiar to the free market crowd.

Copyright may be property, but like all property, it is also a form of regulation. It is a regulation that benefits some and harms others. When done right, it benefits creators and harms leeches. When done wrong, it is regulation the powerful use to defeat competitors.

As I described in chapter 10 [142], despite this feature of copyright as regulation, and subject to important qualifications outlined by Jessica Litman in her book *Digital Copyright*,[9] overall this history of copyright is not bad. As chapter 10 details, when new technologies have come along, Congress has struck a balance to assure that the new is protected from the old. Compulsory, or

[8] See David McGuire, "Tech Execs Square Off Over Piracy," Newsbytes, February 2002 (Entertainment).
[9] Jessica Litman, *Digital Copyright* (Amherst, N.Y.: Prometheus Books, 2001).

statutory, licenses have been one part of that strategy. Free use (as in the case of the VCR) has been another.

But that pattern of deference to new technologies has now changed with the rise of the Internet. Rather than striking a balance between the claims of a new technology and the legitimate rights of content creators, both the courts and Congress have imposed legal restrictions that will have the effect of smothering the new to benefit the old.

The response by the courts has been fairly universal.[10] It has been mirrored in the responses threatened and actually implemented by Congress. I won't catalog all of those responses here.[11] But there is one example that captures the flavor of them all. This is the story of the demise of Internet radio.

[10] The only circuit court exception is found in *Recording Industry Association of America (RIAA)* v. *Diamond Multimedia Systems*, 180 F. 3d 1072 (9th Cir. 1999). There the court of appeals for the Ninth Circuit reasoned that makers of a portable MP3 player were not liable for contributory copyright infringement for a device that is unable to record or redistribute music (a device whose only copying function is to render portable a music file already stored on a user's hard drive). At the district court level, the only exception is found in *Metro-Goldwyn-Mayer Studios, Inc*. v. *Grokster, Ltd*., 259 F. Supp. 2d 1029 (C.D. Cal., 2003), where the court found the link between the distributor and any given user's conduct too attenuated to make the distributor liable for contributory or vicarious infringement liability.

[11] For example, in July 2002, Representative Howard Berman introduced the Peer-to-Peer Piracy Prevention Act (H.R. 5211), which would immunize copyright holders from liability for damage done to computers when the copyright holders use technology to stop copyright infringement. In August 2002, Representative Billy Tauzin introduced a bill to mandate that technologies capable of rebroadcasting digital copies of films broadcast on TV (i.e., computers) respect a "broadcast flag" that would disable copying of that content. And in March of the same year, Senator Fritz Hollings introduced the Consumer Broadband and Digital Television Promotion Act, which mandated copyright protection technology in all digital media devices. See GartnerG2, "Copyright and Digital Media in a Post-Napster World," 27 June 2003, 33–34, available at link #44 [http://free-culture.cc/notes/].

As I described in chapter 4 [67], when a radio station plays a song, the recording artist doesn't get paid for that “radio performance” unless he or she is also the composer. So, for example if Marilyn Monroe had recorded a version of “Happy Birthday”—to memorialize her famous performance before President Kennedy at Madison Square Garden— then whenever that recording was played on the radio, the current copyright owners of “Happy Birthday” would get some money, whereas Marilyn Monroe would not.

The reasoning behind this balance struck by Congress makes some sense. The justification was that radio was a kind of advertising. The recording artist thus benefited because by playing her music, the radio station was making it more likely that her records would be purchased. Thus, the recording artist got something, even if only indirectly. Probably this reasoning had less to do with the result than with the power of radio stations: Their lobbyists were quite good at stopping any efforts to get Congress to require compensation to the recording artists.

Enter Internet radio. Like regular radio, Internet radio is a technology to stream content from a broadcaster to a listener. The broadcast travels across the Internet, not across the ether of radio spectrum. Thus, I can “tune in” to an Internet radio station in Berlin while sitting in San Francisco, even though there's no way for me to tune in to a regular radio station much beyond the San Francisco metropolitan area.

This feature of the architecture of Internet radio means that there are potentially an unlimited number of radio stations that a user could tune in to using her computer, whereas under the existing architecture for broadcast radio, there is an obvious limit to the number of broadcasters and clear broadcast frequencies.

Internet radio could therefore be more competitive than regular radio; it could provide a wider range of selections. And because the potential audience for Internet radio is the whole world, niche stations could easily develop and market their content to a relatively large number of users worldwide. According to some estimates, more than eighty million users worldwide have tuned in to this new form of radio.

Internet radio is thus to radio what FM was to AM. It is an improvement potentially vastly more significant than the FM improvement over AM, since not only is the technology better, so, too, is the competition. Indeed, there is a direct parallel between the fight to establish FM radio and the fight to protect Internet radio. As one author describes Howard Armstrong's struggle to enable FM radio,

> An almost unlimited number of FM stations was possible in the shortwaves, thus ending the unnatural restrictions imposed on radio in the crowded longwaves. If FM were freely developed, the number of stations would be limited only by economics and competition rather than by technical restrictions. … Armstrong likened the situation that had grown up in radio to that following the invention of the printing press, when governments and ruling interests attempted to control this new instrument of mass communications by imposing restrictive licenses on it. This tyranny was broken only when it became possible for men freely to acquire printing presses and freely to run them. FM in this sense was as great

> an invention as the printing presses, for it gave radio the opportunity to strike off its shackles.[12]

This potential for FM radio was never realized—not because Armstrong was wrong about the technology, but because he underestimated the power of "vested interests, habits, customs and legislation"[13] to retard the growth of this competing technology.

Now the very same claim could be made about Internet radio. For again, there is no technical limitation that could restrict the number of Internet radio stations. The only restrictions on Internet radio are those imposed by the law. Copyright law is one such law. So the first question we should ask is, what copyright rules would govern Internet radio?

But here the power of the lobbyists is reversed. Internet radio is a new industry. The recording artists, on the other hand, have a very powerful lobby, the RIAA. Thus when Congress considered the phenomenon of Internet radio in 1995, the lobbyists had primed Congress to adopt a different rule for Internet radio than the rule that applies to terrestrial radio. While terrestrial radio does not have to pay our hypothetical Marilyn Monroe when it plays her hypothetical recording of "Happy Birthday" on the air, *Internet radio does*. Not only is the law not neutral toward Internet radio—the law actually burdens Internet radio more than it burdens terrestrial radio.

This financial burden is not slight. As Harvard law professor William Fisher estimates, if an Internet radio station distributed adfree popular music to (on average) ten thousand listeners,

[12] Lessing, 239.
[13] Ibid., 229.

twenty-four hours a day, the total artist fees that radio station would owe would be over $1 million a year.[14] A regular radio station broadcasting the same content would pay no equivalent fee.

The burden is not financial only. Under the original rules that were proposed, an Internet radio station (but not a terrestrial radio station) would have to collect the following data from *every listening transaction*:

1. navn på tjenesten,

2. kanalen til programmet (AM/FM-stasjoner bruker stasjons-ID);

3. type program (fra arkivet/i løkke/direkte);

4. dato for sending;

5. tidspunkt for sending;

6. tidssone til opprinnelsen for sending;

[14] This example was derived from fees set by the original Copyright Arbitration Royalty Panel (CARP) proceedings, and is drawn from an example offered by Professor William Fisher. Conference Proceedings, iLaw (Stanford), 3 July 2003, on file with author. Professors Fisher and Zittrain submitted testimony in the CARP proceeding that was ultimately rejected. See Jonathan Zittrain, Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 and 2, available at link #45 [http://free-culture.cc/notes/]. For an excellent analysis making a similar point, see Randal C. Picker, "Copyright as Entry Policy: The Case of Digital Distribution," *Antitrust Bulletin* (Summer/Fall 2002): 461: "This was not confusion, these are just old-fashioned entry barriers. Analog radio stations are protected from digital entrants, reducing entry in radio and diversity. Yes, this is done in the name of getting royalties to copyright holders, but, absent the play of powerful interests, that could have been done in a media-neutral way."

7. numeric designation of the place of the sound recording within the program;

8. varigheten av sending (til nærmeste sekund):

9. lydinnspilling-tittel;

10. ISRC-kode for opptaket;

11. release year of the album per copyright notice and in the case of compilation albums, the release year of the album and copyright date of the track;

12. spillende plateartist;

13. tittel på album i butikker;

14. plateselskap;

15. UPC-koden for albumet i butikker;

16. katalognummer;

17. informasjon om opphavsrettsinnehaver;

18. musikksjanger for kanal eller programmet (stasjonsformat);

19. navn på tjenesten eller selskap;

20. kanal eller program;

21. date and time that the user logged in (in the user's time zone);

22. date and time that the user logged out (in the user's time zone);

23.time zone where the signal was received (user);

24.unik bruker-identifikator;

25.landet til brukeren som mottok sendingene.

The Librarian of Congress eventually suspended these reporting requirements, pending further study. And he also changed the original rates set by the arbitration panel charged with setting rates. But the basic difference between Internet radio and terrestrial radio remains: Internet radio has to pay a *type of copyright fee* that terrestrial radio does not.

Why? What justifies this difference? Was there any study of the economic consequences from Internet radio that would justify these differences? Was the motive to protect artists against piracy?

In a rare bit of candor, one RIAA expert admitted what seemed obvious to everyone at the time. As Alex Alben, vice president for Public Policy at Real Networks, told me,

> The RIAA, which was representing the record labels, presented some testimony about what they thought a willing buyer would pay to a willing seller, and it was much higher. It was ten times higher than what radio stations pay to perform the same songs for the same period of time. And so the attorneys representing the webcasters asked the RIAA, … "How do you come up with a rate that's so much higher? Why is it worth more than radio? Because here we have hundreds of thousands of webcasters who want to pay, and that should establish the

> market rate, and if you set the rate so high, you're going to drive the small webcasters out of business. …"
>
> And the RIAA experts said, "Well, we don't really model this as an industry with thousands of webcasters, *we think it should be an industry with, you know, five or seven big players who can pay a high rate and it's a stable, predictable market*." (Emphasis added.)

Translation: The aim is to use the law to eliminate competition, so that this platform of potentially immense competition, which would cause the diversity and range of content available to explode, would not cause pain to the dinosaurs of old. There is no one, on either the right or the left, who should endorse this use of the law. And yet there is practically no one, on either the right or the left, who is doing anything effective to prevent it.

Corrupting Citizens

Overregulation stifles creativity. It smothers innovation. It gives dinosaurs a veto over the future. It wastes the extraordinary opportunity for a democratic creativity that digital technology enables.

In addition to these important harms, there is one more that was important to our forebears, but seems forgotten today. Overregulation corrupts citizens and weakens the rule of law.

The war that is being waged today is a war of prohibition. As with every war of prohibition, it is targeted against the behavior

of a very large number of citizens. According to *The New York Times*, 43 million Americans downloaded music in May 2002.[15] According to the RIAA, the behavior of those 43 million Americans is a felony. We thus have a set of rules that transform 20 percent of America into criminals. As the RIAA launches lawsuits against not only the Napsters and Kazaas of the world, but against students building search engines, and increasingly against ordinary users downloading content, the technologies for sharing will advance to further protect and hide illegal use. It is an arms race or a civil war, with the extremes of one side inviting a more extreme response by the other.

The content industry's tactics exploit the failings of the American legal system. When the RIAA brought suit against Jesse Jordan, it knew that in Jordan it had found a scapegoat, not a defendant. The threat of having to pay either all the money in the world in damages ($15,000,000) or almost all the money in the world to defend against paying all the money in the world in damages ($250,000 in legal fees) led Jordan to choose to pay all the money he had in the world ($12,000) to make the suit go away. The same strategy animates the RIAA's suits against individual users. In September 2003, the RIAA sued 261 individuals—including a twelve-year-old girl living in public housing and a seventy-year-old man who had no idea what file sharing was.[16] As these scapegoats discovered, it will always cost more to defend against these suits than it would cost to simply settle. (The twelve year old, for example, like Jesse Jordan, paid her life savings of $2,000

[15] Mike Graziano and Lee Rainie, "The Music Downloading Deluge," Pew Internet and American Life Project (24 April 2001), available at link #46 [http://free-culture.cc/notes/]. The Pew Internet and American Life Project reported that 37 million Americans had downloaded music files from the Internet by early 2001.
[16] Alex Pham, "The Labels Strike Back: N.Y. Girl Settles RIAA Case," *Los Angeles Times*, 10 September 2003, Business.

to settle the case.) Our law is an awful system for defending rights. It is an embarrassment to our tradition. And the consequence of our law as it is, is that those with the power can use the law to quash any rights they oppose.

Wars of prohibition are nothing new in America. This one is just something more extreme than anything we've seen before. We experimented with alcohol prohibition, at a time when the per capita consumption of alcohol was 1.5 gallons per capita per year. The war against drinking initially reduced that consumption to just 30 percent of its preprohibition levels, but by the end of prohibition, consumption was up to 70 percent of the preprohibition level. Americans were drinking just about as much, but now, a vast number were criminals.[17] We have launched a war on drugs aimed at reducing the consumption of regulated narcotics that 7 percent (or 16 million) Americans now use.[18] That is a drop from the high (so to speak) in 1979 of 14 percent of the population. We regulate automobiles to the point where the vast majority of Americans violate the law every day. We run such a complex tax system that a majority of cash businesses regularly cheat.[19] We pride ourselves on our "free society," but an endless array of ordinary behavior is regulated within our society. And as a result, a huge proportion of Americans regularly violate at least some law.

This state of affairs is not without consequence. It is a particularly salient issue for teachers like me, whose job it is to teach law

[17] Jeffrey A. Miron and Jeffrey Zwiebel, "Alcohol Consumption During Prohibition," *American Economic Review* 81, no. 2 (1991): 242.
[18] National Drug Control Policy: Hearing Before the House Government Reform Committee, 108th Cong., 1st sess. (5 March 2003) (statement of John P. Walters, director of National Drug Control Policy).
[19] See James Andreoni, Brian Erard, and Jonathon Feinstein, "Tax Compliance," *Journal of Economic Literature* 36 (1998): 818 (survey of compliance literature).

students about the importance of “ethics.” As my colleague Charlie Nesson told a class at Stanford, each year law schools admit thousands of students who have illegally downloaded music, illegally consumed alcohol and sometimes drugs, illegally worked without paying taxes, illegally driven cars. These are kids for whom behaving illegally is increasingly the norm. And then we, as law professors, are supposed to teach them how to behave ethically—how to say no to bribes, or keep client funds separate, or honor a demand to disclose a document that will mean that your case is over. Generations of Americans—more significantly in some parts of America than in others, but still, everywhere in America today—can't live their lives both normally and legally, since “normally” entails a certain degree of illegality.

The response to this general illegality is either to enforce the law more severely or to change the law. We, as a society, have to learn how to make that choice more rationally. Whether a law makes sense depends, in part, at least, upon whether the costs of the law, both intended and collateral, outweigh the benefits. If the costs, intended and collateral, do outweigh the benefits, then the law ought to be changed. Alternatively, if the costs of the existing system are much greater than the costs of an alternative, then we have a good reason to consider the alternative.

My point is not the idiotic one: Just because people violate a law, we should therefore repeal it. Obviously, we could reduce murder statistics dramatically by legalizing murder on Wednesdays and Fridays. But that wouldn't make any sense, since murder is wrong every day of the week. A society is right to ban murder always and everywhere.

My point is instead one that democracies understood for generations, but that we recently have learned to forget. The rule of law depends upon people obeying the law. The more often, and

more repeatedly, we as citizens experience violating the law, the less we respect the law. Obviously, in most cases, the important issue is the law, not respect for the law. I don't care whether the rapist respects the law or not; I want to catch and incarcerate the rapist. But I do care whether my students respect the law. And I do care if the rules of law sow increasing disrespect because of the extreme of regulation they impose. Twenty million Americans have come of age since the Internet introduced this different idea of "sharing." We need to be able to call these twenty million Americans "citizens," not "felons."

When at least forty-three million citizens download content from the Internet, and when they use tools to combine that content in ways unauthorized by copyright holders, the first question we should be asking is not how best to involve the FBI. The first question should be whether this particular prohibition is really necessary in order to achieve the proper ends that copyright law serves. Is there another way to assure that artists get paid without transforming forty-three million Americans into felons? Does it make sense if there are other ways to assure that artists get paid without transforming America into a nation of felons?

This abstract point can be made more clear with a particular example.

We all own CDs. Many of us still own phonograph records. These pieces of plastic encode music that in a certain sense we have bought. The law protects our right to buy and sell that plastic: It is not a copyright infringement for me to sell all my classical records at a used record store and buy jazz records to replace them. That "use" of the recordings is free.

But as the MP3 craze has demonstrated, there is another use of phonograph records that is effectively free. Because these

recordings were made without copy-protection technologies, I am "free" to copy, or "rip," music from my records onto a computer hard disk. Indeed, Apple Corporation went so far as to suggest that "freedom" was a right: In a series of commercials, Apple endorsed the "Rip, Mix, Burn" capacities of digital technologies.

This "use" of my records is certainly valuable. I have begun a large process at home of ripping all of my and my wife's CDs, and storing them in one archive. Then, using Apple's iTunes, or a wonderful program called Andromeda, we can build different play lists of our music: Bach, Baroque, Love Songs, Love Songs of Significant Others—the potential is endless. And by reducing the costs of mixing play lists, these technologies help build a creativity with play lists that is itself independently valuable. Compilations of songs are creative and meaningful in their own right.

This use is enabled by unprotected media—either CDs or records. But unprotected media also enable file sharing. File sharing threatens (or so the content industry believes) the ability of creators to earn a fair return from their creativity. And thus, many are beginning to experiment with technologies to eliminate unprotected media. These technologies, for example, would enable CDs that could not be ripped. Or they might enable spy programs to identify ripped content on people's machines.

If these technologies took off, then the building of large archives of your own music would become quite difficult. You might hang in hacker circles, and get technology to disable the technologies that protect the content. Trading in those technologies is illegal, but maybe that doesn't bother you much. In any case, for the vast majority of people, these protection technologies would effectively destroy the archiving use of CDs. The technology, in other words, would force us all back to the world where we either

listened to music by manipulating pieces of plastic or were part of a massively complex “digital rights management” system.

If the only way to assure that artists get paid were the elimination of the ability to freely move content, then these technologies to interfere with the freedom to move content would be justifiable. But what if there were another way to assure that artists are paid, without locking down any content? What if, in other words, a different system could assure compensation to artists while also preserving the freedom to move content easily?

My point just now is not to prove that there is such a system. I offer a version of such a system in the last chapter of this book. For now, the only point is the relatively uncontroversial one: If a different system achieved the same legitimate objectives that the existing copyright system achieved, but left consumers and creators much more free, then we'd have a very good reason to pursue this alternative—namely, freedom. The choice, in other words, would not be between property and piracy; the choice would be between different property systems and the freedoms each allowed.

I believe there is a way to assure that artists are paid without turning forty-three million Americans into felons. But the salient feature of this alternative is that it would lead to a very different market for producing and distributing creativity. The dominant few, who today control the vast majority of the distribution of content in the world, would no longer exercise this extreme of control. Rather, they would go the way of the horse-drawn buggy.

Except that this generation's buggy manufacturers have already saddled Congress, and are riding the law to protect themselves against this new form of competition. For them the choice is

between fortythree million Americans as criminals and their own survival.

It is understandable why they choose as they do. It is not understandable why we as a democracy continue to choose as we do. Jack Valenti is charming; but not so charming as to justify giving up a tradition as deep and important as our tradition of free culture. There's one more aspect to this corruption that is particularly important to civil liberties, and follows directly from any war of prohibition. As Electronic Frontier Foundation attorney Fred von Lohmann describes, this is the "collateral damage" that "arises whenever you turn a very large percentage of the population into criminals." This is the collateral damage to civil liberties generally.

"Hvis du kan behandle noen som en antatt lovbryter", forklarer von Lohmann,

> then all of a sudden a lot of basic civil liberty protections evaporate to one degree or another. … If you're a copyright infringer, how can you hope to have any privacy rights? If you're a copyright infringer, how can you hope to be secure against seizures of your computer? How can you hope to continue to receive Internet access? … Our sensibilities change as soon as we think, "Oh, well, but that person's a criminal, a lawbreaker." Well, what this campaign against file sharing has done is turn a remarkable percentage of the American Internet-using population into "lawbreakers."

And the consequence of this transformation of the American public into criminals is that it becomes trivial, as a matter of

due process, to effectively erase much of the privacy most would presume.

Users of the Internet began to see this generally in 2003 as the RIAA launched its campaign to force Internet service providers to turn over the names of customers who the RIAA believed were violating copyright law. Verizon fought that demand and lost. With a simple request to a judge, and without any notice to the customer at all, the identity of an Internet user is revealed.

The RIAA then expanded this campaign, by announcing a general strategy to sue individual users of the Internet who are alleged to have downloaded copyrighted music from file-sharing systems. But as we've seen, the potential damages from these suits are astronomical: If a family's computer is used to download a single CD's worth of music, the family could be liable for $2 million in damages. That didn't stop the RIAA from suing a number of these families, just as they had sued Jesse Jordan.[20]

Even this understates the espionage that is being waged by the RIAA. A report from CNN late last summer described a strategy the RIAA had adopted to track Napster users.[21] Using a sophisticated hashing algorithm, the RIAA took what is in effect

[20] See Frank Ahrens, "RIAA's Lawsuits Meet Surprised Targets; Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants," *Washington Post*, 10 September 2003, E1; Chris Cobbs, "Worried Parents Pull Plug on File `Stealing'; With the Music Industry Cracking Down on File Swapping, Parents are Yanking Software from Home PCs to Avoid Being Sued," *Orlando Sentinel Tribune*, 30 August 2003, C1; Jefferson Graham, "Recording Industry Sues Parents," *USA Today*, 15 September 2003, 4D; John Schwartz, "She Says She's No Music Pirate. No Snoop Fan, Either," *New York Times*, 25 September 2003, C1; Margo Varadi, "Is Brianna a Criminal?" *Toronto Star*, 18 September 2003, P7.

[21] Se Nick Brown, "Fair Use No More?: Copyright in the Information Age", tilgjengelig fra link #49 [http://free-culture.cc/notes/].

a fingerprint of every song in the Napster catalog. Any copy of one of those MP3s will have the same “fingerprint.”

So imagine the following not-implausible scenario: Imagine a friend gives a CD to your daughter—a collection of songs just like the cassettes you used to make as a kid. You don't know, and neither does your daughter, where these songs came from. But she copies these songs onto her computer. She then takes her computer to college and connects it to a college network, and if the college network is “cooperating” with the RIAA's espionage, and she hasn't properly protected her content from the network (do you know how to do that yourself ?), then the RIAA will be able to identify your daughter as a “criminal.” And under the rules that universities are beginning to deploy,[22] your daughter can lose the right to use the university's computer network. She can, in some cases, be expelled.

Now, of course, she'll have the right to defend herself. You can hire a lawyer for her (at $300 per hour, if you're lucky), and she can plead that she didn't know anything about the source of the songs or that they came from Napster. And it may well be that the university believes her. But the university might not

[22] See Jeff Adler, “Cambridge: On Campus, Pirates Are Not Penitent,” *Boston Globe*, 18 May 2003, City Weekly, 1; Frank Ahrens, “Four Students Sued over Music Sites; Industry Group Targets File Sharing at Colleges,” *Washington Post*, 4 April 2003, E1; Elizabeth Armstrong, “Students `Rip, Mix, Burn' at Their Own Risk,” *Christian Science Monitor*, 2 September 2003, 20; Robert Becker and Angela Rozas, “Music Pirate Hunt Turns to Loyola; Two Students Names Are Handed Over; Lawsuit Possible,” *Chicago Tribune*, 16 July 2003, 1C; Beth Cox, “RIAA Trains Antipiracy Guns on Universities,” *Internet News*, 30 January 2003, available at link #48 [http://free-culture.cc/notes/]; Benny Evangelista, “Download Warning 101: Freshman Orientation This Fall to Include Record Industry Warnings Against File Sharing,” *San Francisco Chronicle*, 11 August 2003, E11; “Raid, Letters Are Weapons at Universities,” *USA Today*, 26 September 2000, 3D.

believe her. It might treat this "contraband" as presumptive of guilt. And as any number of college students have already learned, our presumptions about innocence disappear in the middle of wars of prohibition. This war is no different. Says von Lohmann,

> So when we're talking about numbers like forty to sixty million Americans that are essentially copyright infringers, you create a situation where the civil liberties of those people are very much in peril in a general matter. [I don't] think [there is any] analog where you could randomly choose any person off the street and be confident that they were committing an unlawful act that could put them on the hook for potential felony liability or hundreds of millions of dollars of civil liability. Certainly we all speed, but speeding isn't the kind of an act for which we routinely forfeit civil liberties. Some people use drugs, and I think that's the closest analog, [but] many have noted that the war against drugs has eroded all of our civil liberties because it's treated so many Americans as criminals. Well, I think it's fair to say that file sharing is an order of magnitude larger number of Americans than drug use. … If forty to sixty million Americans have become lawbreakers, then we're really on a slippery slope to lose a lot of civil liberties for all forty to sixty million of them.

When forty to sixty million Americans are considered "criminals" under the law, and when the law could achieve the same objective — securing rights to authors—without these millions being

considered “criminals,” who is the villain? Americans or the law? Which is American, a constant war on our own people or a concerted effort through our democracy to change our law?

Del IV. Maktfordeling

Så her er bildet: Du står på siden av veien. Bilen din er på brann. Du er sint og opprørt fordi du delvis bidro til å starte brannen. Nå vet du ikke hvordan du slokker den. Ved siden av deg er en bøtte, fylt med bensin. Bensin vil åpenbart ikke slukke brannen.

Mens du tenker over situasjonen, kommer noen andre forbi. I panikk griper hun bøtta, og før du har hatt sjansen til å be henne stoppe—eller før hun forstår hvorfor hun bør stoppe—er bøtten i svevet. Bensinen er på tur mot den brennende bilen. Og brannen som bensinen kommer til å fyre opp vil straks sette fyr på alt i omgivelsene.

En krig om opphavsrett pågår over alt— og vi fokuserer alle på feil ting. Det er ingen tvil om at dagens teknologier truer eksisterende virksomheter. Uten tvil kan de true artister. Men teknologier endrer seg. Industrien og teknologer har en rekke måter å bruke teknologi til å beskytte dem selv mot dagens trusler på Internet. Dette er en brann som overlatt til seg selv vil brenne ut.

Likevel er ikke besluttningstagere villig til å la denne brannen i fred. Ladet med masse penger fra lobbyister er de lystne på å gå i mellom for å fjerne problemet slik de oppfatter det. Men problemet slik de oppfatter det er ikke den reelle trusselen som denne kulturen står med ansiktet mot. For mens vi ser på denne lille brannen i hjørnet er det en massiv endring i hvordan kultur blir skapt som pågår over alt.

På en eller annen måte må vi klare å snu oppmerksomheten mot dette mer viktige og fundametale problemet. Vi må finne en måte å unngå å helle bensin på denne brannen.

Vi har ikke funne denne måten ennå. Istedet synes vi å være fanget i en enklere og sort-hvit tenkning. Uansett hvor mange folk som presser på for å gjøre rammen for debatten litt bredere, er det dette enkle sort-hvit-synet som består. Vi kjører sakte forbi og stirrer på brannen når vi i stedet burde holde øynene på veien.

Denne utfordringen har vært livet mitt de siste årene. Det har også vært min falitt. I de to neste kapittlene, beskriver jeg en liten innsats, så langt uten suksess, på å finne en måte å endre fokus på denne debatten. Vi må forstå disse mislyktede forsøkene hvis vi skal forstå hva som kreves for å lykkes.

Kapittel 13. Kapittel tretten: Eldred

In 1995, a father was frustrated that his daughters didn't seem to like Hawthorne. No doubt there was more than one such father, but at least one did something about it. Eric Eldred, a retired computer programmer living in New Hampshire, decided to put Hawthorne on the Web. An electronic version, Eldred thought, with links to pictures and explanatory text, would make this nineteenth-century author's work come alive.

It didn't work—at least for his daughters. They didn't find Hawthorne any more interesting than before. But Eldred's experiment gave birth to a hobby, and his hobby begat a cause: Eldred would build a library of public domain works by scanning these works and making them available for free.

Eldred's library was not simply a copy of certain public domain works, though even a copy would have been of great value to people across the world who can't get access to printed versions of these works. Instead, Eldred was producing derivative works from these public domain works. Just as Disney turned Grimm into stories more accessible to the twentieth century, Eldred transformed Hawthorne, and many others, into a form more accessible—technically accessible—today.

Eldred's freedom to do this with Hawthorne's work grew from the same source as Disney's. Hawthorne's *Scarlet Letter* had passed into the public domain in 1907. It was free for anyone to take without the permission of the Hawthorne estate or anyone else. Some, such as Dover Press and Penguin Classics, take

works from the public domain and produce printed editions, which they sell in bookstores across the country. Others, such as Disney, take these stories and turn them into animated cartoons, sometimes successfully (*Cinderella*), sometimes not (*The Hunchback of Notre Dame*, *Treasure Planet*). These are all commercial publications of public domain works.

The Internet created the possibility of noncommercial publications of public domain works. Eldred's is just one example. There are literally thousands of others. Hundreds of thousands from across the world have discovered this platform of expression and now use it to share works that are, by law, free for the taking. This has produced what we might call the "noncommercial publishing industry," which before the Internet was limited to people with large egos or with political or social causes. But with the Internet, it includes a wide range of individuals and groups dedicated to spreading culture generally.[1]

As I said, Eldred lives in New Hampshire. In 1998, Robert Frost's collection of poems *New Hampshire* was slated to pass into the public domain. Eldred wanted to post that collection in his free public library. But Congress got in the way. As I described in

[1] There's a parallel here with pornography that is a bit hard to describe, but it's a strong one. One phenomenon that the Internet created was a world of noncommercial pornographers—people who were distributing porn but were not making money directly or indirectly from that distribution. Such a class didn't exist before the Internet came into being because the costs of distributing porn were so high. Yet this new class of distributors got special attention in the Supreme Court, when the Court struck down the Communications Decency Act of 1996. It was partly because of the burden on noncommercial speakers that the statute was found to exceed Congress's power. The same point could have been made about noncommercial publishers after the advent of the Internet. The Eric Eldreds of the world before the Internet were extremely few. Yet one would think it at least as important to protect the Eldreds of the world as to protect noncommercial pornographers.

chapter 10 [142], in 1998, for the eleventh time in forty years, Congress extended the terms of existing copyrights—this time by twenty years. Eldred would not be free to add any works more recent than 1923 to his collection until 2019. Indeed, no copyrighted work would pass into the public domain until that year (and not even then, if Congress extends the term again). By contrast, in the same period, more than 1 million patents will pass into the public domain.

This was the Sonny Bono Copyright Term Extension Act (CTEA), enacted in memory of the congressman and former musician Sonny Bono, who, his widow, Mary Bono, says, believed that "copyrights should be forever."[2]

Eldred decided to fight this law. He first resolved to fight it through civil disobedience. In a series of interviews, Eldred announced that he would publish as planned, CTEA notwithstanding. But because of a second law passed in 1998, the NET (No Electronic Theft) Act, his act of publishing would make Eldred a felon—whether or not anyone complained. This was a dangerous strategy for a disabled programmer to undertake.

It was here that I became involved in Eldred's battle. I was a constitutional scholar whose first passion was constitutional interpretation. And though constitutional law courses never focus upon the Progress Clause of the Constitution, it had always struck me as importantly different. As you know, the Constitution says,

[2] The full text is: "Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress," 144 Cong. Rec. H9946, 9951-2 (October 7, 1998).

> Congress has the power to promote the Progress of Science … by securing for limited Times to Authors … exclusive Right to their … Writings. …

As I've described, this clause is unique within the power-granting clause of Article I, section 8 of our Constitution. Every other clause granting power to Congress simply says Congress has the power to do something—for example, to regulate "commerce among the several states" or "declare War." But here, the "something" is something quite specific—to "promote … Progress"—through means that are also specific— by "securing" "exclusive Rights" (i.e., copyrights) "for limited Times."

In the past forty years, Congress has gotten into the practice of extending existing terms of copyright protection. What puzzled me about this was, if Congress has the power to extend existing terms, then the Constitution's requirement that terms be "limited" will have no practical effect. If every time a copyright is about to expire, Congress has the power to extend its term, then Congress can achieve what the Constitution plainly forbids—perpetual terms "on the installment plan," as Professor Peter Jaszi so nicely put it.

As an academic, my first response was to hit the books. I remember sitting late at the office, scouring on-line databases for any serious consideration of the question. No one had ever challenged Congress's practice of extending existing terms. That failure may in part be why Congress seemed so untroubled in its habit. That, and the fact that the practice had become so lucrative for Congress. Congress knows that copyright owners will be willing to pay a great deal of money to see their copyright terms extended. And so Congress is quite happy to keep this gravy train going.

For this is the core of the corruption in our present system of government. “Corruption” not in the sense that representatives are bribed. Rather, “corruption” in the sense that the system induces the beneficiaries of Congress's acts to raise and give money to Congress to induce it to act. There's only so much time; there's only so much Congress can do. Why not limit its actions to those things it must do—and those things that pay? Extending copyright terms pays.

If that's not obvious to you, consider the following: Say you're one of the very few lucky copyright owners whose copyright continues to make money one hundred years after it was created. The Estate of Robert Frost is a good example. Frost died in 1963. His poetry continues to be extraordinarily valuable. Thus the Robert Frost estate benefits greatly from any extension of copyright, since no publisher would pay the estate any money if the poems Frost wrote could be published by anyone for free.

So imagine the Robert Frost estate is earning $100,000 a year from three of Frost's poems. And imagine the copyright for those poems is about to expire. You sit on the board of the Robert Frost estate. Your financial adviser comes to your board meeting with a very grim report:

“Next year,” the adviser announces, “our copyrights in works A, B, and C will expire. That means that after next year, we will no longer be receiving the annual royalty check of $100,000 from the publishers of those works.”

“There's a proposal in Congress, however,” she continues, “that could change this. A few congressmen are floating a bill to extend the terms of copyright by twenty years. That bill would be extraordinarily valuable to us. So we should hope this bill passes.”

“Hope?” a fellow board member says. “Can't we be doing something about it?”

“Well, obviously, yes,” the adviser responds. “We could contribute to the campaigns of a number of representatives to try to assure that they support the bill.”

You hate politics. You hate contributing to campaigns. So you want to know whether this disgusting practice is worth it. “How much would we get if this extension were passed?” you ask the adviser. “How much is it worth?”

“Well,” the adviser says, “if you're confident that you will continue to get at least $100,000 a year from these copyrights, and you use the `discount rate' that we use to evaluate estate investments (6 percent), then this law would be worth $1,146,000 to the estate.”

You're a bit shocked by the number, but you quickly come to the correct conclusion:

“So you're saying it would be worth it for us to pay more than $1,000,000 in campaign contributions if we were confident those contributions would assure that the bill was passed?”

“Absolutely,” the adviser responds. “It is worth it to you to contribute up to the `present value' of the income you expect from these copyrights. Which for us means over $1,000,000.”

You quickly get the point—you as the member of the board and, I trust, you the reader. Each time copyrights are about to expire, every beneficiary in the position of the Robert Frost estate faces the same choice: If they can contribute to get a law passed to extend copyrights, they will benefit greatly from that extension.

And so each time copyrights are about to expire, there is a massive amount of lobbying to get the copyright term extended.

Thus a congressional perpetual motion machine: So long as legislation can be bought (albeit indirectly), there will be all the incentive in the world to buy further extensions of copyright.

In the lobbying that led to the passage of the Sonny Bono Copyright Term Extension Act, this "theory" about incentives was proved real. Ten of the thirteen original sponsors of the act in the House received the maximum contribution from Disney's political action committee; in the Senate, eight of the twelve sponsors received contributions.[3] The RIAA and the MPAA are estimated to have spent over $1.5 million lobbying in the 1998 election cycle. They paid out more than $200,000 in campaign contributions.[4] Disney is estimated to have contributed more than $800,000 to reelection campaigns in the cycle.[5]

Constitutional law is not oblivious to the obvious. Or at least, it need not be. So when I was considering Eldred's complaint, this reality about the never-ending incentives to increase the copyright term was central to my thinking. In my view, a pragmatic court committed to interpreting and applying the Constitution of our framers would see that if Congress has the power to extend existing terms, then there would be no effective constitutional

[3] Associated Press, "Disney Lobbying for Copyright Extension No Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years", *Chicago Tribune*, 17. oktober 1998, 22.
[4] Se Nick Brown, "Fair Use No More?: Copyright in the Information Age", tilgjengelig fra link #49 [http://free-culture.cc/notes/].
[5] Alan K. Ota, "Disney in Washington: The Mouse That Roars", *Congressional Quarterly This Week*, 8. august 1990, tilgjengelig fra link #50 [http://free-culture.cc/notes/].

requirement that terms be “limited.” If they could extend it once, they would extend it again and again and again.

It was also my judgment that *this* Supreme Court would not allow Congress to extend existing terms. As anyone close to the Supreme Court's work knows, this Court has increasingly restricted the power of Congress when it has viewed Congress's actions as exceeding the power granted to it by the Constitution. Among constitutional scholars, the most famous example of this trend was the Supreme Court's decision in 1995 to strike down a law that banned the possession of guns near schools.

Since 1937, the Supreme Court had interpreted Congress's granted powers very broadly; so, while the Constitution grants Congress the power to regulate only “commerce among the several states” (aka “interstate commerce”), the Supreme Court had interpreted that power to include the power to regulate any activity that merely affected interstate commerce.

As the economy grew, this standard increasingly meant that there was no limit to Congress's power to regulate, since just about every activity, when considered on a national scale, affects interstate commerce. A Constitution designed to limit Congress's power was instead interpreted to impose no limit.

The Supreme Court, under Chief Justice Rehnquist's command, changed that in *United States* v. *Lopez*. The government had argued that possessing guns near schools affected interstate commerce. Guns near schools increase crime, crime lowers property values, and so on. In the oral argument, the Chief Justice asked the government whether there was any activity that would not affect interstate commerce under the reasoning the government advanced. The government said there was not; if Congress says an activity affects interstate commerce, then

that activity affects interstate commerce. The Supreme Court, the government said, was not in the position to second-guess Congress.

“We pause to consider the implications of the government's arguments,” the Chief Justice wrote.[6] If anything Congress says is interstate commerce must therefore be considered interstate commerce, then there would be no limit to Congress's power. The decision in *Lopez* was reaffirmed five years later in *United States* v. *Morrison*.[7]

If a principle were at work here, then it should apply to the Progress Clause as much as the Commerce Clause.[8] And if it is applied to the Progress Clause, the principle should yield the conclusion that Congress can't extend an existing term. If Congress could extend an existing term, then there would be no “stopping point” to Congress's power over terms, though the Constitution expressly states that there is such a limit. Thus, the same principle applied to the power to grant copyrights should entail that Congress is not allowed to extend the term of existing copyrights.

If, that is, the principle announced in *Lopez* stood for a principle. Many believed the decision in *Lopez* stood for politics—a conservative Supreme Court, which believed in states' rights,

[6] *United States* v. *Lopez*, 514 U.S. 549, 564 (1995).
[7] *United States* v. *Morrison*, 529 U.S. 598 (2000).
[8] If it is a principle about enumerated powers, then the principle carries from one enumerated power to another. The animating point in the context of the Commerce Clause was that the interpretation offered by the government would allow the government unending power to regulate commerce—the limitation to interstate commerce notwithstanding. The same point is true in the context of the Copyright Clause. Here, too, the government's interpretation would allow the government unending power to regulate copyrights—the limitation to “limited times” notwithstanding.

using its power over Congress to advance its own personal political preferences. But I rejected that view of the Supreme Court's decision. Indeed, shortly after the decision, I wrote an article demonstrating the “fidelity” in such an interpretation of the Constitution. The idea that the Supreme Court decides cases based upon its politics struck me as extraordinarily boring. I was not going to devote my life to teaching constitutional law if these nine Justices were going to be petty politicians.

Now let's pause for a moment to make sure we understand what the argument in *Eldred* was not about. By insisting on the Constitution's limits to copyright, obviously Eldred was not endorsing piracy. Indeed, in an obvious sense, he was fighting a kind of piracy—piracy of the public domain. When Robert Frost wrote his work and when Walt Disney created Mickey Mouse, the maximum copyright term was just fifty-six years. Because of interim changes, Frost and Disney had already enjoyed a seventy-five-year monopoly for their work. They had gotten the benefit of the bargain that the Constitution envisions: In exchange for a monopoly protected for fifty-six years, they created new work. But now these entities were using their power—expressed through the power of lobbyists' money—to get another twenty-year dollop of monopoly. That twenty-year dollop would be taken from the public domain. Eric Eldred was fighting a piracy that affects us all.

Some people view the public domain with contempt. In their brief before the Supreme Court, the Nashville Songwriters Association wrote that the public domain is nothing more than “legal piracy.”[9] But it is not piracy when the law allows it; and in our constitutional system, our law requires it. Some may not like the Constitution's

[9] Brief of the Nashville Songwriters Association, *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), n.10, available at link #51 [http://free-culture.cc/notes/].

requirements, but that doesn't make the Constitution a pirate's charter.

As we've seen, our constitutional system requires limits on copyright as a way to assure that copyright holders do not too heavily influence the development and distribution of our culture. Yet, as Eric Eldred discovered, we have set up a system that assures that copyright terms will be repeatedly extended, and extended, and extended. We have created the perfect storm for the public domain. Copyrights have not expired, and will not expire, so long as Congress is free to be bought to extend them again.

It is valuable copyrights that are responsible for terms being extended. Mickey Mouse and "Rhapsody in Blue." These works are too valuable for copyright owners to ignore. But the real harm to our society from copyright extensions is not that Mickey Mouse remains Disney's. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that have continuing commercial value. The real harm of term extension comes not from these famous works. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.

If you look at the work created in the first twenty years (1923 to 1942) affected by the Sonny Bono Copyright Term Extension Act, 2 percent of that work has any continuing commercial value. It was the copyright holders for that 2 percent who pushed the CTEA through. But the law and its effect were not limited to that 2 percent. The law extended the terms of copyright generally.[10]

[10] The figure of 2 percent is an extrapolation from the study by the Congressional Research Service, in light of the estimated renewal ranges. See Brief of Petitioners, *Eldred* v. *Ashcroft*, 7, available at link #52 [http://free-culture.cc/notes/].

Think practically about the consequence of this extension—practically, as a businessperson, and not as a lawyer eager for more legal work. In 1930, 10,047 books were published. In 2000, 174 of those books were still in print. Let's say you were Brewster Kahle, and you wanted to make available to the world in your iArchive project the remaining 9,873. What would you have to do?

Well, first, you'd have to determine which of the 9,873 books were still under copyright. That requires going to a library (these data are not on-line) and paging through tomes of books, cross-checking the titles and authors of the 9,873 books with the copyright registration and renewal records for works published in 1930. That will produce a list of books still under copyright.

Then for the books still under copyright, you would need to locate the current copyright owners. How would you do that?

Most people think that there must be a list of these copyright owners somewhere. Practical people think this way. How could there be thousands and thousands of government monopolies without there being at least a list?

But there is no list. There may be a name from 1930, and then in 1959, of the person who registered the copyright. But just think practically about how impossibly difficult it would be to track down thousands of such records—especially since the person who registered is not necessarily the current owner. And we're just talking about 1930!

“But there isn't a list of who owns property generally,” the apologists for the system respond. “Why should there be a list of copyright owners?”

Well, actually, if you think about it, there *are* plenty of lists of who owns what property. Think about deeds on houses, or titles to cars. And where there isn't a list, the code of real space is pretty good at suggesting who the owner of a bit of property is. (A swing set in your backyard is probably yours.) So formally or informally, we have a pretty good way to know who owns what tangible property.

So: You walk down a street and see a house. You can know who owns the house by looking it up in the courthouse registry. If you see a car, there is ordinarily a license plate that will link the owner to the car. If you see a bunch of children's toys sitting on the front lawn of a house, it's fairly easy to determine who owns the toys. And if you happen to see a baseball lying in a gutter on the side of the road, look around for a second for some kids playing ball. If you don't see any kids, then okay: Here's a bit of property whose owner we can't easily determine. It is the exception that proves the rule: that we ordinarily know quite well who owns what property.

Compare this story to intangible property. You go into a library. The library owns the books. But who owns the copyrights? As I've already described, there's no list of copyright owners. There are authors' names, of course, but their copyrights could have been assigned, or passed down in an estate like Grandma's old jewelry. To know who owns what, you would have to hire a private detective. The bottom line: The owner cannot easily be located. And in a regime like ours, in which it is a felony to use such property without the property owner's permission, the property isn't going to be used.

The consequence with respect to old books is that they won't be digitized, and hence will simply rot away on shelves. But the consequence for other creative works is much more dire.

Consider the story of Michael Agee, chairman of Hal Roach Studios, which owns the copyrights for the Laurel and Hardy films. Agee is a direct beneficiary of the Bono Act. The Laurel and Hardy films were made between 1921 and 1951. Only one of these films, *The Lucky Dog*, is currently out of copyright. But for the CTEA, films made after 1923 would have begun entering the public domain. Because Agee controls the exclusive rights for these popular films, he makes a great deal of money. According to one estimate, "Roach has sold about 60,000 videocassettes and 50,000 DVDs of the duo's silent films."[11]

Yet Agee opposed the CTEA. His reasons demonstrate a rare virtue in this culture: selflessness. He argued in a brief before the Supreme Court that the Sonny Bono Copyright Term Extension Act will, if left standing, destroy a whole generation of American film.

His argument is straightforward. A tiny fraction of this work has any continuing commercial value. The rest—to the extent it survives at all—sits in vaults gathering dust. It may be that some of this work not now commercially valuable will be deemed to be valuable by the owners of the vaults. For this to occur, however, the commercial benefit from the work must exceed the costs of making the work available for distribution.

We can't know the benefits, but we do know a lot about the costs. For most of the history of film, the costs of restoring film were very high; digital technology has lowered these costs substantially. While it cost more than $10,000 to restore a ninety-

[11] See David G. Savage, "High Court Scene of Showdown on Copyright Law," *Los Angeles Times*, 6 October 2002; David Streitfeld, "Classic Movies, Songs, Books at Stake; Supreme Court Hears Arguments Today on Striking Down Copyright Extension," *Orlando Sentinel Tribune*, 9 October 2002.

minute black-and-white film in 1993, it can now cost as little as $100 to digitize one hour of mm film.[12]

Restoration technology is not the only cost, nor the most important. Lawyers, too, are a cost, and increasingly, a very important one. In addition to preserving the film, a distributor needs to secure the rights. And to secure the rights for a film that is under copyright, you need to locate the copyright owner.

Or more accurately, *owners*. As we've seen, there isn't only a single copyright associated with a film; there are many. There isn't a single person whom you can contact about those copyrights; there are as many as can hold the rights, which turns out to be an extremely large number. Thus the costs of clearing the rights to these films is exceptionally high.

"But can't you just restore the film, distribute it, and then pay the copyright owner when she shows up?" Sure, if you want to commit a felony. And even if you're not worried about committing a felony, when she does show up, she'll have the right to sue you for all the profits you have made. So, if you're successful, you can be fairly confident you'll be getting a call from someone's lawyer. And if you're not successful, you won't make enough to cover the costs of your own lawyer. Either way, you have to talk to a lawyer. And as is too often the case, saying you have to talk to a lawyer is the same as saying you won't make any money.

For some films, the benefit of releasing the film may well exceed these costs. But for the vast majority of them, there is no way

[12] Brief of Hal Roach Studios and Michael Agee as Amicus Curiae Supporting the Petitoners, *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003) (No. 01- 618), 12. See also Brief of Amicus Curiae filed on behalf of Petitioners by the Internet Archive, *Eldred* v. *Ashcroft*, available at link #53 [http://free-culture.cc/notes/].

the benefit would outweigh the legal costs. Thus, for the vast majority of old films, Agee argued, the film will not be restored and distributed until the copyright expires.

But by the time the copyright for these films expires, the film will have expired. These films were produced on nitrate-based stock, and nitrate stock dissolves over time. They will be gone, and the metal canisters in which they are now stored will be filled with nothing more than dust.

Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. For that tiny fraction, the copyright is a crucially important legal device. For that tiny fraction, the copyright creates incentives to produce and distribute the creative work. For that tiny fraction, the copyright acts as an "engine of free expression."

But even for that tiny fraction, the actual time during which the creative work has a commercial life is extremely short. As I've indicated, most books go out of print within one year. The same is true of music and film. Commercial culture is sharklike. It must keep moving. And when a creative work falls out of favor with the commercial distributors, the commercial life ends.

Yet that doesn't mean the life of the creative work ends. We don't keep libraries of books in order to compete with Barnes & Noble, and we don't have archives of films because we expect people to choose between spending Friday night watching new movies and spending Friday night watching a 1930 news documentary. The noncommercial life of culture is important and valuable—for entertainment but also, and more importantly, for knowledge. To understand who we are, and where we came from, and how we have made the mistakes that we have, we need to have access to this history.

Copyrights in this context do not drive an engine of free expression. In this context, there is no need for an exclusive right. Copyrights in this context do no good.

Yet, for most of our history, they also did little harm. For most of our history, when a work ended its commercial life, there was no *copyright-related use* that would be inhibited by an exclusive right. When a book went out of print, you could not buy it from a publisher. But you could still buy it from a used book store, and when a used book store sells it, in America, at least, there is no need to pay the copyright owner anything. Thus, the ordinary use of a book after its commercial life ended was a use that was independent of copyright law.

The same was effectively true of film. Because the costs of restoring a film—the real economic costs, not the lawyer costs—were so high, it was never at all feasible to preserve or restore film. Like the remains of a great dinner, when it's over, it's over. Once a film passed out of its commercial life, it may have been archived for a bit, but that was the end of its life so long as the market didn't have more to offer.

In other words, though copyright has been relatively short for most of our history, long copyrights wouldn't have mattered for the works that lost their commercial value. Long copyrights for these works would not have interfered with anything.

But this situation has now changed.

One crucially important consequence of the emergence of digital technologies is to enable the archive that Brewster Kahle dreams of. Digital technologies now make it possible to preserve and give access to all sorts of knowledge. Once a book goes out of print, we can now imagine digitizing it and making it available

to everyone, forever. Once a film goes out of distribution, we could digitize it and make it available to everyone, forever. Digital technologies give new life to copyrighted material after it passes out of its commercial life. It is now possible to preserve and assure universal access to this knowledge and culture, whereas before it was not.

And now copyright law does get in the way. Every step of producing this digital archive of our culture infringes on the exclusive right of copyright. To digitize a book is to copy it. To do that requires permission of the copyright owner. The same with music, film, or any other aspect of our culture protected by copyright. The effort to make these things available to history, or to researchers, or to those who just want to explore, is now inhibited by a set of rules that were written for a radically different context.

Here is the core of the harm that comes from extending terms: Now that technology enables us to rebuild the library of Alexandria, the law gets in the way. And it doesn't get in the way for any useful *copyright* purpose, for the purpose of copyright is to enable the commercial market that spreads culture. No, we are talking about culture after it has lived its commercial life. In this context, copyright is serving no purpose *at all* related to the spread of knowledge. In this context, copyright is not an engine of free expression. Copyright is a brake.

You may well ask, “But if digital technologies lower the costs for Brewster Kahle, then they will lower the costs for Random House, too. So won't Random House do as well as Brewster Kahle in spreading culture widely?”

Maybe. Someday. But there is absolutely no evidence to suggest that publishers would be as complete as libraries. If Barnes &

Noble offered to lend books from its stores for a low price, would that eliminate the need for libraries? Only if you think that the only role of a library is to serve what “the market” would demand. But if you think the role of a library is bigger than this—if you think its role is to archive culture, whether there's a demand for any particular bit of that culture or not—then we can't count on the commercial market to do our library work for us.

I would be the first to agree that it should do as much as it can: We should rely upon the market as much as possible to spread and enable culture. My message is absolutely not antimarket. But where we see the market is not doing the job, then we should allow nonmarket forces the freedom to fill the gaps. As one researcher calculated for American culture, 94 percent of the films, books, and music produced between and 1946 is not commercially available. However much you love the commercial market, if access is a value, then 6 percent is a failure to provide that value.[13]

In January 1999, we filed a lawsuit on Eric Eldred's behalf in federal district court in Washington, D.C., asking the court to declare the Sonny Bono Copyright Term Extension Act unconstitutional. The two central claims that we made were (1) that extending existing terms violated the Constitution's “limited Times” requirement, and (2) that extending terms by another twenty years violated the First Amendment.

The district court dismissed our claims without even hearing an argument. A panel of the Court of Appeals for the D.C. Circuit also dismissed our claims, though after hearing an extensive argument. But that decision at least had a dissent, by one of the

[13] Jason Schultz, “The Myth of the 1976 Copyright `Chaos' Theory”, 20 December 2002, tilgjengelig fra link #54 [http://free-culture.cc/notes/].

most conservative judges on that court. That dissent gave our claims life.

Judge David Sentelle said the CTEA violated the requirement that copyrights be for “limited Times” only. His argument was as elegant as it was simple: If Congress can extend existing terms, then there is no “stopping point” to Congress's power under the Copyright Clause. The power to extend existing terms means Congress is not required to grant terms that are “limited.” Thus, Judge Sentelle argued, the court had to interpret the term “limited Times” to give it meaning. And the best interpretation, Judge Sentelle argued, would be to deny Congress the power to extend existing terms.

We asked the Court of Appeals for the D.C. Circuit as a whole to hear the case. Cases are ordinarily heard in panels of three, except for important cases or cases that raise issues specific to the circuit as a whole, where the court will sit “en banc” to hear the case.

The Court of Appeals rejected our request to hear the case en banc. This time, Judge Sentelle was joined by the most liberal member of the D.C. Circuit, Judge David Tatel. Both the most conservative and the most liberal judges in the D.C. Circuit believed Congress had overstepped its bounds.

It was here that most expected Eldred v. Ashcroft would die, for the Supreme Court rarely reviews any decision by a court of appeals. (It hears about one hundred cases a year, out of more than five thousand appeals.) And it practically never reviews a decision that upholds a statute when no other court has yet reviewed the statute.

But in February 2002, the Supreme Court surprised the world by granting our petition to review the D.C. Circuit opinion.

Argument was set for October of 2002. The summer would be spent writing briefs and preparing for argument.

It is over a year later as I write these words. It is still astonishingly hard. If you know anything at all about this story, you know that we lost the appeal. And if you know something more than just the minimum, you probably think there was no way this case could have been won. After our defeat, I received literally thousands of missives by well-wishers and supporters, thanking me for my work on behalf of this noble but doomed cause. And none from this pile was more significant to me than the e-mail from my client, Eric Eldred.

Men min klient og disse vennene tok feil. Denne saken kunne vært vunnet. Det burde ha vært vunnet. Og uansett hvor hardt jeg prøver å fortelle den historien til meg selv, kan jeg aldri unnslippe troen på at det er min feil at vi ikke vant.

Feil ble gjort tidlig, skjønt den ble først åpenbart på slutten. Vår sak hadde støtte hos en ekstraordinær advokat, Geoffrey Stewart, helt fra starten, og hos advokatfirmaet hadde han flyttet til, Jones, Day, Reavis og Pogue. Jones Day mottok mye press fra sine opphavsrettsbeskyttende klienter på grunn av sin støtte til oss. De ignorert dette presset (noe veldig få advokatfirmaer noen sinne ville gjøre), og ga alt de hadde gjennom hele saken.

Det var tre viktige advokater på saken fra Jones DaY. Geoff Stewart var den først, men siden ble Dan Bromberg og Don Ayer ganske involvert. Bromberg og Ayer spesielt hadde en felles oppfatning om hvordan denne saken ville bli vunnet: vi ville bare vinne, fortalte de gjentatte ganger til meg, hvis vi få problemet til å virke "viktig" for Høyesterett. Det måtte synes som om dramatisk skade ble gjort til ytringsfriheten og fri kultur, ellers ville de aldri stemt mot "de mektigste mediaselskapene i verden".

I hate this view of the law. Of course I thought the Sonny Bono Act was a dramatic harm to free speech and free culture. Of course I still think it is. But the idea that the Supreme Court decides the law based on how important they believe the issues are is just wrong. It might be “right” as in “true,” I thought, but it is “wrong” as in “it just shouldn't be that way.” As I believed that any faithful interpretation of what the framers of our Constitution did would yield the conclusion that the CTEA was unconstitutional, and as I believed that any faithful interpretation of what the First Amendment means would yield the conclusion that the power to extend existing copyright terms is unconstitutional, I was not persuaded that we had to sell our case like soap. Just as a law that bans the swastika is unconstitutional not because the Court likes Nazis but because such a law would violate the Constitution, so too, in my view, would the Court decide whether Congress's law was constitutional based on the Constitution, not based on whether they liked the values that the framers put in the Constitution.

In any case, I thought, the Court must already see the danger and the harm caused by this sort of law. Why else would they grant review? There was no reason to hear the case in the Supreme Court if they weren't convinced that this regulation was harmful. So in my view, we didn't need to persuade them that this law was bad, we needed to show why it was unconstitutional.

There was one way, however, in which I felt politics would matter and in which I thought a response was appropriate. I was convinced that the Court would not hear our arguments if it thought these were just the arguments of a group of lefty loons. This Supreme Court was not about to launch into a new field of judicial review if it seemed that this field of review was simply the preference of a small political minority. Although my focus in the

case was not to demonstrate how bad the Sonny Bono Act was but to demonstrate that it was unconstitutional, my hope was to make this argument against a background of briefs that covered the full range of political views. To show that this claim against the CTEA was grounded in *law* and not politics, then, we tried to gather the widest range of credible critics—credible not because they were rich and famous, but because they, in the aggregate, demonstrated that this law was unconstitutional regardless of one's politics.

The first step happened all by itself. Phyllis Schlafly's organization, Eagle Forum, had been an opponent of the CTEA from the very beginning. Mrs. Schlafly viewed the CTEA as a sellout by Congress. In November 1998, she wrote a stinging editorial attacking the Republican Congress for allowing the law to pass. As she wrote, “Do you sometimes wonder why bills that create a financial windfall to narrow special interests slide easily through the intricate legislative process, while bills that benefit the general public seem to get bogged down?” The answer, as the editorial documented, was the power of money. Schlafly enumerated Disney's contributions to the key players on the committees. It was money, not justice, that gave Mickey Mouse twenty more years in Disney's control, Schlafly argued.

In the Court of Appeals, Eagle Forum was eager to file a brief supporting our position. Their brief made the argument that became the core claim in the Supreme Court: If Congress can extend the term of existing copyrights, there is no limit to Congress's power to set terms. That strong conservative argument persuaded a strong conservative judge, Judge Sentelle.

In the Supreme Court, the briefs on our side were about as diverse as it gets. They included an extraordinary historical brief by the Free Software Foundation (home of the GNU project that made GNU/ Linux possible). They included a powerful brief about the

costs of uncertainty by Intel. There were two law professors' briefs, one by copyright scholars and one by First Amendment scholars. There was an exhaustive and uncontroverted brief by the world's experts in the history of the Progress Clause. And of course, there was a new brief by Eagle Forum, repeating and strengthening its arguments.

Those briefs framed a legal argument. Then to support the legal argument, there were a number of powerful briefs by libraries and archives, including the Internet Archive, the American Association of Law Libraries, and the National Writers Union.

But two briefs captured the policy argument best. One made the argument I've already described: A brief by Hal Roach Studios argued that unless the law was struck, a whole generation of American film would disappear. The other made the economic argument absolutely clear.

This economists' brief was signed by seventeen economists, including five Nobel Prize winners, including Ronald Coase, James Buchanan, Milton Friedman, Kenneth Arrow, and George Akerlof. The economists, as the list of Nobel winners demonstrates, spanned the political spectrum. Their conclusions were powerful: There was no plausible claim that extending the terms of existing copyrights would do anything to increase incentives to create. Such extensions were nothing more than “rent-seeking”—the fancy term economists use to describe special-interest legislation gone wild.

The same effort at balance was reflected in the legal team we gathered to write our briefs in the case. The Jones Day lawyers had been with us from the start. But when the case got to the Supreme Court, we added three lawyers to help us frame this argument to this Court: Alan Morrison, a lawyer from Public

Citizen, a Washington group that had made constitutional history with a series of seminal victories in the Supreme Court defending individual rights; my colleague and dean, Kathleen Sullivan, who had argued many cases in the Court, and who had advised us early on about a First Amendment strategy; and finally, former solicitor general Charles Fried.

Fried was a special victory for our side. Every other former solicitor general was hired by the other side to defend Congress's power to give media companies the special favor of extended copyright terms. Fried was the only one who turned down that lucrative assignment to stand up for something he believed in. He had been Ronald Reagan's chief lawyer in the Supreme Court. He had helped craft the line of cases that limited Congress's power in the context of the Commerce Clause. And while he had argued many positions in the Supreme Court that I personally disagreed with, his joining the cause was a vote of confidence in our argument.

The government, in defending the statute, had its collection of friends, as well. Significantly, however, none of these "friends" included historians or economists. The briefs on the other side of the case were written exclusively by major media companies, congressmen, and copyright holders.

The media companies were not surprising. They had the most to gain from the law. The congressmen were not surprising either—they were defending their power and, indirectly, the gravy train of contributions such power induced. And of course it was not surprising that the copyright holders would defend the idea that they should continue to have the right to control who did what with content they wanted to control.

Dr. Seuss's representatives, for example, argued that it was better for the Dr. Seuss estate to control what happened to Dr. Seuss's work— better than allowing it to fall into the public domain— because if this creativity were in the public domain, then people could use it to "glorify drugs or to create pornography."[14] That was also the motive of the Gershwin estate, which defended its "protection" of the work of George Gershwin. They refuse, for example, to license *Porgy and Bess* to anyone who refuses to use African Americans in the cast.[15] That's their view of how this part of American culture should be controlled, and they wanted this law to help them effect that control.

This argument made clear a theme that is rarely noticed in this debate. When Congress decides to extend the term of existing copyrights, Congress is making a choice about which speakers it will favor. Famous and beloved copyright owners, such as the Gershwin estate and Dr. Seuss, come to Congress and say, "Give us twenty years to control the speech about these icons of American culture. We'll do better with them than anyone else." Congress of course likes to reward the popular and famous by giving them what they want. But when Congress gives people an exclusive right to speak in a certain way, that's just what the First Amendment is traditionally meant to block.

We argued as much in a final brief. Not only would upholding the CTEA mean that there was no limit to the power of Congress to extend copyrights—extensions that would further concentrate the market; it would also mean that there was no limit to Congress's power to play favorites, through copyright, with who has the

[14] Brief of Amici Dr. Seuss Enterprise et al., *Eldred* v. *Ashcroft*, 537 U.S. (2003) (No. 01-618), 19.
[15] Dinitia Smith, "Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray," *New York Times*, 28 March 1998, B7.

right to speak. Between February and October, there was little I did beyond preparing for this case. Early on, as I said, I set the strategy.

The Supreme Court was divided into two important camps. One camp we called “the Conservatives.” The other we called “the Rest.” The Conservatives included Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas. These five had been the most consistent in limiting Congress's power. They were the five who had supported the *Lopez/Morrison* line of cases that said that an enumerated power had to be interpreted to assure that Congress's powers had limits.

The Rest were the four Justices who had strongly opposed limits on Congress's power. These four—Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer—had repeatedly argued that the Constitution gives Congress broad discretion to decide how best to implement its powers. In case after case, these justices had argued that the Court's role should be one of deference. Though the votes of these four justices were the votes that I personally had most consistently agreed with, they were also the votes that we were least likely to get.

In particular, the least likely was Justice Ginsburg's. In addition to her general view about deference to Congress (except where issues of gender are involved), she had been particularly deferential in the context of intellectual property protections. She and her daughter (an excellent and well-known intellectual property scholar) were cut from the same intellectual property cloth. We expected she would agree with the writings of her daughter: that Congress had the power in this context to do as it wished, even if what Congress wished made little sense.

Close behind Justice Ginsburg were two justices whom we also viewed as unlikely allies, though possible surprises. Justice Souter strongly favored deference to Congress, as did Justice Breyer. But both were also very sensitive to free speech concerns. And as we strongly believed, there was a very important free speech argument against these retrospective extensions.

The only vote we could be confident about was that of Justice Stevens. History will record Justice Stevens as one of the greatest judges on this Court. His votes are consistently eclectic, which just means that no simple ideology explains where he will stand. But he had consistently argued for limits in the context of intellectual property generally. We were fairly confident he would recognize limits here.

This analysis of "the Rest" showed most clearly where our focus had to be: on the Conservatives. To win this case, we had to crack open these five and get at least a majority to go our way. Thus, the single overriding argument that animated our claim rested on the Conservatives' most important jurisprudential innovation—the argument that Judge Sentelle had relied upon in the Court of Appeals, that Congress's power must be interpreted so that its enumerated powers have limits.

This then was the core of our strategy—a strategy for which I am responsible. We would get the Court to see that just as with the *Lopez* case, under the government's argument here, Congress would always have unlimited power to extend existing terms. If anything was plain about Congress's power under the Progress Clause, it was that this power was supposed to be "limited." Our aim would be to get the Court to reconcile *Eldred* with *Lopez*: If Congress's power to regulate commerce was limited, then so, too, must Congress's power to regulate copyright be limited.

The argument on the government's side came down to this: Congress has done it before. It should be allowed to do it again. The government claimed that from the very beginning, Congress has been extending the term of existing copyrights. So, the government argued, the Court should not now say that practice is unconstitutional.

There was some truth to the government's claim, but not much. We certainly agreed that Congress had extended existing terms in 1831 and in 1909. And of course, in 1962, Congress began extending existing terms regularly—eleven times in forty years.

But this “consistency” should be kept in perspective. Congress extended existing terms once in the first hundred years of the Republic. It then extended existing terms once again in the next fifty. Those rare extensions are in contrast to the now regular practice of extending existing terms. Whatever restraint Congress had had in the past, that restraint was now gone. Congress was now in a cycle of extensions; there was no reason to expect that cycle would end. This Court had not hesitated to intervene where Congress was in a similar cycle of extension. There was no reason it couldn't intervene here. Oral argument was scheduled for the first week in October. I arrived in D.C. two weeks before the argument. During those two weeks, I was repeatedly “mooted” by lawyers who had volunteered to help in the case. Such “moots” are basically practice rounds, where wannabe justices fire questions at wannabe winners.

I was convinced that to win, I had to keep the Court focused on a single point: that if this extension is permitted, then there is no limit to the power to set terms. Going with the government would mean that terms would be effectively unlimited; going with us would give Congress a clear line to follow: Don't extend existing

terms. The moots were an effective practice; I found ways to take every question back to this central idea.

One moot was before the lawyers at Jones Day. Don Ayer was the skeptic. He had served in the Reagan Justice Department with Solicitor General Charles Fried. He had argued many cases before the Supreme Court. And in his review of the moot, he let his concern speak:

“I'm just afraid that unless they really see the harm, they won't be willing to upset this practice that the government says has been a consistent practice for two hundred years. You have to make them see the harm—passionately get them to see the harm. For if they don't see that, then we haven't any chance of winning.”

He may have argued many cases before this Court, I thought, but he didn't understand its soul. As a clerk, I had seen the Justices do the right thing—not because of politics but because it was right. As a law professor, I had spent my life teaching my students that this Court does the right thing—not because of politics but because it is right. As I listened to Ayer's plea for passion in pressing politics, I understood his point, and I rejected it. Our argument was right. That was enough. Let the politicians learn to see that it was also good. The night before the argument, a line of people began to form in front of the Supreme Court. The case had become a focus of the press and of the movement to free culture. Hundreds stood in line for the chance to see the proceedings. Scores spent the night on the Supreme Court steps so that they would be assured a seat.

Not everyone has to wait in line. People who know the Justices can ask for seats they control. (I asked Justice Scalia's chambers for seats for my parents, for example.) Members of the Supreme Court bar can get a seat in a special section reserved for them.

And senators and congressmen have a special place where they get to sit, too. And finally, of course, the press has a gallery, as do clerks working for the Justices on the Court. As we entered that morning, there was no place that was not taken. This was an argument about intellectual property law, yet the halls were filled. As I walked in to take my seat at the front of the Court, I saw my parents sitting on the left. As I sat down at the table, I saw Jack Valenti sitting in the special section ordinarily reserved for family of the Justices.

When the Chief Justice called me to begin my argument, I began where I intended to stay: on the question of the limits on Congress's power. This was a case about enumerated powers, I said, and whether those enumerated powers had any limit.

Justice O'Connor stopped me within one minute of my opening. The history was bothering her.

> justice o'connor: Congress has extended the term so often through the years, and if you are right, don't we run the risk of upsetting previous extensions of time? I mean, this seems to be a practice that began with the very first act.

She was quite willing to concede “that this flies directly in the face of what the framers had in mind.” But my response again and again was to emphasize limits on Congress's power.

> mr. lessig: Well, if it flies in the face of what the framers had in mind, then the question is, is there a way of interpreting their words that gives effect to what they had in mind, and the answer is yes.

There were two points in this argument when I should have seen where the Court was going. The first was a question by Justice Kennedy, who observed,

> justice kennedy: Well, I suppose implicit in the argument that the '76 act, too, should have been declared void, and that we might leave it alone because of the disruption, is that for all these years the act has impeded progress in science and the useful arts. I just don't see any empirical evidence for that.

Here follows my clear mistake. Like a professor correcting a student, I answered,

> mr. lessig: Justice, we are not making an empirical claim at all. Nothing in our Copyright Clause claim hangs upon the empirical assertion about impeding progress. Our only argument is this is a structural limit necessary to assure that what would be an effectively perpetual term not be permitted under the copyright laws.

That was a correct answer, but it wasn't the right answer. The right answer was instead that there was an obvious and profound harm. Any number of briefs had been written about it. He wanted to hear it. And here was the place Don Ayer's advice should have mattered. This was a softball; my answer was a swing and a miss.

The second came from the Chief, for whom the whole case had been crafted. For the Chief Justice had crafted the *Lopez* ruling, and we hoped that he would see this case as its second cousin.

It was clear a second into his question that he wasn't at all sympathetic. To him, we were a bunch of anarchists. As he asked:

> chief justice: Well, but you want more than that. You want the right to copy verbatim other people's books, don't you?
>
> mr. lessig: We want the right to copy verbatim works that should be in the public domain and would be in the public domain but for a statute that cannot be justified under ordinary First Amendment analysis or under a proper reading of the limits built into the Copyright Clause.

Things went better for us when the government gave its argument; for now the Court picked up on the core of our claim. As Justice Scalia asked Solicitor General Olson,

> justice scalia: You say that the functional equivalent of an unlimited time would be a violation [of the Constitution], but that's precisely the argument that's being made by petitioners here, that a limited time which is extendable is the functional equivalent of an unlimited time.

When Olson was finished, it was my turn to give a closing rebuttal. Olson's flailing had revived my anger. But my anger still was directed to the academic, not the practical. The government was arguing as if this were the first case ever to consider limits on Congress's Copyright and Patent Clause power. Ever the professor and not the advocate, I closed by pointing out the long history of the Court imposing limits on Congress's power in the name of the Copyright and Patent Clause— indeed, the

very first case striking a law of Congress as exceeding a specific enumerated power was based upon the Copyright and Patent Clause. All true. But it wasn't going to move the Court to my side.

As I left the court that day, I knew there were a hundred points I wished I could remake. There were a hundred questions I wished I had answered differently. But one way of thinking about this case left me optimistic.

The government had been asked over and over again, what is the limit? Over and over again, it had answered there is no limit. This was precisely the answer I wanted the Court to hear. For I could not imagine how the Court could understand that the government believed Congress's power was unlimited under the terms of the Copyright Clause, and sustain the government's argument. The solicitor general had made my argument for me. No matter how often I tried, I could not understand how the Court could find that Congress's power under the Commerce Clause was limited, but under the Copyright Clause, unlimited. In those rare moments when I let myself believe that we may have prevailed, it was because I felt this Court—in particular, the Conservatives—would feel itself constrained by the rule of law that it had established elsewhere.

The morning of January 15, 2003, I was five minutes late to the office and missed the 7:00 A.M. call from the Supreme Court clerk. Listening to the message, I could tell in an instant that she had bad news to report.The Supreme Court had affirmed the decision of the Court of Appeals. Seven justices had voted in the majority. There were two dissents.

A few seconds later, the opinions arrived by e-mail. I took the phone off the hook, posted an announcement to our blog, and sat down to see where I had been wrong in my reasoning.

My *reasoning*. Here was a case that pitted all the money in the world against *reasoning*. And here was the last naïve law professor, scouring the pages, looking for reasoning.

I first scoured the opinion, looking for how the Court would distinguish the principle in this case from the principle in *Lopez*. The argument was nowhere to be found. The case was not even cited. The argument that was the core argument of our case did not even appear in the Court's opinion.

Justice Ginsburg simply ignored the enumerated powers argument. Consistent with her view that Congress's power was not limited generally, she had found Congress's power not limited here.

Her opinion was perfectly reasonable—for her, and for Justice Souter. Neither believes in *Lopez*. It would be too much to expect them to write an opinion that recognized, much less explained, the doctrine they had worked so hard to defeat.

But as I realized what had happened, I couldn't quite believe what I was reading. I had said there was no way this Court could reconcile limited powers with the Commerce Clause and unlimited powers with the Progress Clause. It had never even occurred to me that they could reconcile the two simply *by not addressing the argument*. There was no inconsistency because they would not talk about the two together. There was therefore no principle that followed from the *Lopez* case: In that context, Congress's power would be limited, but in this context it would not.

Yet by what right did they get to choose which of the framers' values they would respect? By what right did they—the silent five—get to select the part of the Constitution they would enforce

based on the values they thought important? We were right back to the argument that I said I hated at the start: I had failed to convince them that the issue here was important, and I had failed to recognize that however much I might hate a system in which the Court gets to pick the constitutional values that it will respect, that is the system we have.

Justices Breyer and Stevens wrote very strong dissents. Stevens's opinion was crafted internal to the law: He argued that the tradition of intellectual property law should not support this unjustified extension of terms. He based his argument on a parallel analysis that had governed in the context of patents (so had we). But the rest of the Court discounted the parallel—without explaining how the very same words in the Progress Clause could come to mean totally different things depending upon whether the words were about patents or copyrights. The Court let Justice Stevens's charge go unanswered.

Justice Breyer's opinion, perhaps the best opinion he has ever written, was external to the Constitution. He argued that the term of copyrights has become so long as to be effectively unlimited. We had said that under the current term, a copyright gave an author 99.8 percent of the value of a perpetual term. Breyer said we were wrong, that the actual number was 99.9997 percent of a perpetual term. Either way, the point was clear: If the Constitution said a term had to be "limited," and the existing term was so long as to be effectively unlimited, then it was unconstitutional.

These two justices understood all the arguments we had made. But because neither believed in the *Lopez* case, neither was willing to push it as a reason to reject this extension. The case was decided without anyone having addressed the argument that we had carried from Judge Sentelle. It was *Hamlet* without the Prince.

Defeat brings depression. They say it is a sign of health when depression gives way to anger. My anger came quickly, but it didn't cure the depression. This anger was of two sorts.

It was first anger with the five “Conservatives.” It would have been one thing for them to have explained why the principle of *Lopez* didn't apply in this case. That wouldn't have been a very convincing argument, I don't believe, having read it made by others, and having tried to make it myself. But it at least would have been an act of integrity. These justices in particular have repeatedly said that the proper mode of interpreting the Constitution is “originalism”—to first understand the framers' text, interpreted in their context, in light of the structure of the Constitution. That method had produced *Lopez* and many other “originalist” rulings. Where was their “originalism” now?

Here, they had joined an opinion that never once tried to explain what the framers had meant by crafting the Progress Clause as they did; they joined an opinion that never once tried to explain how the structure of that clause would affect the interpretation of Congress's power. And they joined an opinion that didn't even try to explain why this grant of power could be unlimited, whereas the Commerce Clause would be limited. In short, they had joined an opinion that did not apply to, and was inconsistent with, their own method for interpreting the Constitution. This opinion may well have yielded a result that they liked. It did not produce a reason that was consistent with their own principles.

My anger with the Conservatives quickly yielded to anger with myself. For I had let a view of the law that I liked interfere with a view of the law as it is.

Most lawyers, and most law professors, have little patience for idealism about courts in general and this Supreme Court in

particular. Most have a much more pragmatic view. When Don Ayer said that this case would be won based on whether I could convince the Justices that the framers' values were important, I fought the idea, because I didn't want to believe that that is how this Court decides. I insisted on arguing this case as if it were a simple application of a set of principles. I had an argument that followed in logic. I didn't need to waste my time showing it should also follow in popularity.

As I read back over the transcript from that argument in October, I can see a hundred places where the answers could have taken the conversation in different directions, where the truth about the harm that this unchecked power will cause could have been made clear to this Court. Justice Kennedy in good faith wanted to be shown. I, idiotically, corrected his question. Justice Souter in good faith wanted to be shown the First Amendment harms. I, like a math teacher, reframed the question to make the logical point. I had shown them how they could strike this law of Congress if they wanted to. There were a hundred places where I could have helped them want to, yet my stubbornness, my refusal to give in, stopped me. I have stood before hundreds of audiences trying to persuade; I have used passion in that effort to persuade; but I refused to stand before this audience and try to persuade with the passion I had used elsewhere. It was not the basis on which a court should decide the issue.

Would it have been different if I had argued it differently? Would it have been different if Don Ayer had argued it? Or Charles Fried? Or Kathleen Sullivan?

My friends huddled around me to insist it would not. The Court was not ready, my friends insisted. This was a loss that was destined. It would take a great deal more to show our society why

our framers were right. And when we do that, we will be able to show that Court.

Maybe, but I doubt it. These Justices have no financial interest in doing anything except the right thing. They are not lobbied. They have little reason to resist doing right. I can't help but think that if I had stepped down from this pretty picture of dispassionate justice, I could have persuaded.

And even if I couldn't, then that doesn't excuse what happened in January. For at the start of this case, one of America's leading intellectual property professors stated publicly that my bringing this case was a mistake. “The Court is not ready,” Peter Jaszi said; this issue should not be raised until it is.

After the argument and after the decision, Peter said to me, and publicly, that he was wrong. But if indeed that Court could not have been persuaded, then that is all the evidence that's needed to know that here again Peter was right. Either I was not ready to argue this case in a way that would do some good or they were not ready to hear this case in a way that would do some good. Either way, the decision to bring this case—a decision I had made four years before—was wrong. While the reaction to the Sonny Bono Act itself was almost unanimously negative, the reaction to the Court's decision was mixed. No one, at least in the press, tried to say that extending the term of copyright was a good idea. We had won that battle over ideas. Where the decision was praised, it was praised by papers that had been skeptical of the Court's activism in other cases. Deference was a good thing, even if it left standing a silly law. But where the decision was attacked, it was attacked because it left standing a silly and harmful law. *The New York Times* wrote in its editorial,

> In effect, the Supreme Court's decision makes it likely that we are seeing the beginning of the end of public domain and the birth of copyright perpetuity. The public domain has been a grand experiment, one that should not be allowed to die. The ability to draw freely on the entire creative output of humanity is one of the reasons we live in a time of such fruitful creative ferment.

The best responses were in the cartoons. There was a gaggle of hilarious images—of Mickey in jail and the like. The best, from my view of the case, was Ruben Bolling's, reproduced on the next page (Figur 13.1, “Tom the Dancing Bug cartoon[307]). The “powerful and wealthy” line is a bit unfair. But the punch in the face felt exactly like that.

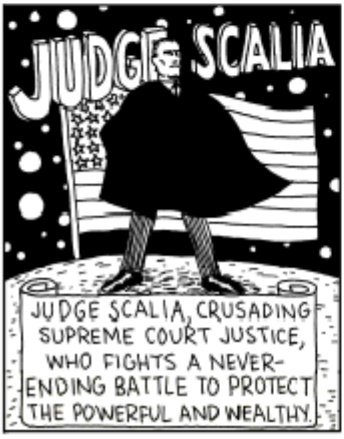

PITCHED PLEA!
HELP! SUPERMAN!


MY P
WHE


THAT'S BECAUSE WHEN CONGRESS'S ENDLESS EXTENSIONS OF COPYRIGHT TERMS ARE DECLARED UNCONSTITUTIONAL, YOU'LL ALL BE MY--OR ANYONE'S--HELPLESS PLAYTHINGS!


COPYRIGHT... FADING! CAN'T...RESIST UNAUTHORIZED...USE!
IF HE CAN CAPTURE SUPERMAN, WHO CAN SAVE US?!


AND NO
ALL TO
WITH T


JUDGE SCALIA
JUDGE SCALIA, CRUSADING SUPREME COURT JUSTICE, WHO FIGHTS A NEVER-ENDING BATTLE TO PROTECT THE POWERFUL AND WEALTHY.


GO! RUN BACK TO YOUR CORPORATIONS!


B-BUT
THAT
PLAIN
GRES
FRAN
DON'T

The image that will always stick in my head is that evoked by the quote from *The New York Times*. That “grand experiment” we call the “public domain” is over? When I can make light of it, I think, “Honey, I shrunk the Constitution.” But I can rarely make light of it. We had in our Constitution a commitment to free culture. In the case that I fathered, the Supreme Court effectively renounced that commitment. A better lawyer would have made them see differently.

Kapittel 14. Kapittel fjorten: Eldred II

The day *Eldred* was decided, fate would have it that I was to travel to Washington, D.C. (The day the rehearing petition in *Eldred* was denied—meaning the case was really finally over—fate would have it that I was giving a speech to technologists at Disney World.) This was a particularly long flight to my least favorite city. The drive into the city from Dulles was delayed because of traffic, so I opened up my computer and wrote an op-ed piece.

It was an act of contrition. During the whole of the flight from San Francisco to Washington, I had heard over and over again in my head the same advice from Don Ayer: You need to make them see why it is important. And alternating with that command was the question of Justice Kennedy: "For all these years the act has impeded progress in science and the useful arts. I just don't see any empirical evidence for that." And so, having failed in the argument of constitutional principle, finally, I turned to an argument of politics.

The New York Times published the piece. In it, I proposed a simple fix: Fifty years after a work has been published, the copyright owner would be required to register the work and pay a small fee. If he paid the fee, he got the benefit of the full term of copyright. If he did not, the work passed into the public domain.

We called this the Eldred Act, but that was just to give it a name. Eric Eldred was kind enough to let his name be used once again,

but as he said early on, it won't get passed unless it has another name.

Or another two names. For depending upon your perspective, this is either the “Public Domain Enhancement Act” or the “Copyright Term Deregulation Act.” Either way, the essence of the idea is clear and obvious: Remove copyright where it is doing nothing except blocking access and the spread of knowledge. Leave it for as long as Congress allows for those works where its worth is at least $1. But for everything else, let the content go.

The reaction to this idea was amazingly strong. Steve Forbes endorsed it in an editorial. I received an avalanche of e-mail and letters expressing support. When you focus the issue on lost creativity, people can see the copyright system makes no sense. As a good Republican might say, here government regulation is simply getting in the way of innovation and creativity. And as a good Democrat might say, here the government is blocking access and the spread of knowledge for no good reason. Indeed, there is no real difference between Democrats and Republicans on this issue. Anyone can recognize the stupid harm of the present system.

Indeed, many recognized the obvious benefit of the registration requirement. For one of the hardest things about the current system for people who want to license content is that there is no obvious place to look for the current copyright owners. Since registration is not required, since marking content is not required, since no formality at all is required, it is often impossibly hard to locate copyright owners to ask permission to use or license their work. This system would lower these costs, by establishing at least one registry where copyright owners could be identified.

As I described in chapter 10 [142], formalities in copyright law were removed in 1976, when Congress followed the Europeans by abandoning any formal requirement before a copyright is granted.[1] The Europeans are said to view copyright as a "natural right." Natural rights don't need forms to exist. Traditions, like the Anglo-American tradition that required copyright owners to follow form if their rights were to be protected, did not, the Europeans thought, properly respect the dignity of the author. My right as a creator turns on my creativity, not upon the special favor of the government.

That's great rhetoric. It sounds wonderfully romantic. But it is absurd copyright policy. It is absurd especially for authors, because a world without formalities harms the creator. The ability to spread "Walt Disney creativity" is destroyed when there is no simple way to know what's protected and what's not.

The fight against formalities achieved its first real victory in Berlin in 1908. International copyright lawyers amended the Berne Convention in 1908, to require copyright terms of life plus

[1] Until the 1908 Berlin Act of the Berne Convention, national copyright legislation sometimes made protection depend upon compliance with formalities such as registration, deposit, and affixation of notice of the author's claim of copyright. However, starting with the 1908 act, every text of the Convention has provided that "the enjoyment and the exercise" of rights guaranteed by the Convention "shall not be subject to any formality." The prohibition against formalities is presently embodied in Article 5(2) of the Paris Text of the Berne Convention. Many countries continue to impose some form of deposit or registration requirement, albeit not as a condition of copyright. French law, for example, requires the deposit of copies of works in national repositories, principally the National Museum. Copies of books published in the United Kingdom must be deposited in the British Library. The German Copyright Act provides for a Registrar of Authors where the author's true name can be filed in the case of anonymous or pseudonymous works. Paul Goldstein, *International Intellectual Property Law, Cases and Materials* (New York: Foundation Press, 2001), 153–54.

fifty years, as well as the abolition of copyright formalities. The formalities were hated because the stories of inadvertent loss were increasingly common. It was as if a Charles Dickens character ran all copyright offices, and the failure to dot an *i* or cross a *t* resulted in the loss of widows' only income.

These complaints were real and sensible. And the strictness of the formalities, especially in the United States, was absurd. The law should always have ways of forgiving innocent mistakes. There is no reason copyright law couldn't, as well. Rather than abandoning formalities totally, the response in Berlin should have been to embrace a more equitable system of registration.

Even that would have been resisted, however, because registration in the nineteenth and twentieth centuries was still expensive. It was also a hassle. The abolishment of formalities promised not only to save the starving widows, but also to lighten an unnecessary regulatory burden imposed upon creators.

In addition to the practical complaint of authors in 1908, there was a moral claim as well. There was no reason that creative property should be a second-class form of property. If a carpenter builds a table, his rights over the table don't depend upon filing a form with the government. He has a property right over the table "naturally," and he can assert that right against anyone who would steal the table, whether or not he has informed the government of his ownership of the table.

This argument is correct, but its implications are misleading. For the argument in favor of formalities does not depend upon creative property being second-class property. The argument in favor of formalities turns upon the special problems that creative property presents. The law of formalities responds to the special physics

of creative property, to assure that it can be efficiently and fairly spread.

No one thinks, for example, that land is second-class property just because you have to register a deed with a court if your sale of land is to be effective. And few would think a car is second-class property just because you must register the car with the state and tag it with a license. In both of those cases, everyone sees that there is an important reason to secure registration—both because it makes the markets more efficient and because it better secures the rights of the owner. Without a registration system for land, landowners would perpetually have to guard their property. With registration, they can simply point the police to a deed. Without a registration system for cars, auto theft would be much easier. With a registration system, the thief has a high burden to sell a stolen car. A slight burden is placed on the property owner, but those burdens produce a much better system of protection for property generally.

It is similarly special physics that makes formalities important in copyright law. Unlike a carpenter's table, there's nothing in nature that makes it relatively obvious who might own a particular bit of creative property. A recording of Lyle Lovett's latest album can exist in a billion places without anything necessarily linking it back to a particular owner. And like a car, there's no way to buy and sell creative property with confidence unless there is some simple way to authenticate who is the author and what rights he has. Simple transactions are destroyed in a world without formalities. Complex, expensive, *lawyer* transactions take their place.

This was the understanding of the problem with the Sonny Bono Act that we tried to demonstrate to the Court. This was the part it didn't "get." Because we live in a system without formalities,

there is no way easily to build upon or use culture from our past. If copyright terms were, as Justice Story said they would be, “short,” then this wouldn't matter much. For fourteen years, under the framers' system, a work would be presumptively controlled. After fourteen years, it would be presumptively uncontrolled.

But now that copyrights can be just about a century long, the inability to know what is protected and what is not protected becomes a huge and obvious burden on the creative process. If the only way a library can offer an Internet exhibit about the New Deal is to hire a lawyer to clear the rights to every image and sound, then the copyright system is burdening creativity in a way that has never been seen before *because there are no formalities*.

The Eldred Act was designed to respond to exactly this problem. If it is worth $1 to you, then register your work and you can get the longer term. Others will know how to contact you and, therefore, how to get your permission if they want to use your work. And you will get the benefit of an extended copyright term.

If it isn't worth it to you to register to get the benefit of an extended term, then it shouldn't be worth it for the government to defend your monopoly over that work either. The work should pass into the public domain where anyone can copy it, or build archives with it, or create a movie based on it. It should become free if it is not worth $1 to you.

Noen bekymrer seg over byrden på forfattere. Gjør ikke byrden med å registrere verket at beløpet $1 egentlig er misvisende? Er ikke ekstraarbeidet verdt mer enn $1? Er ikke dette det virkelige problemet med registrering?

It is. The hassle is terrible. The system that exists now is awful. I completely agree that the Copyright Office has done a terrible

job (no doubt because they are terribly funded) in enabling simple and cheap registrations. Any real solution to the problem of formalities must address the real problem of *governments* standing at the core of any system of formalities. In this book, I offer such a solution. That solution essentially remakes the Copyright Office. For now, assume it was Amazon that ran the registration system. Assume it was one-click registration. The Eldred Act would propose a simple, one-click registration fifty years after a work was published. Based upon historical data, that system would move up to 98 percent of commercial work, commercial work that no longer had a commercial life, into the public domain within fifty years. What do you think?

Da Steve Forbes støttet idéen, begynte enkelte i Washington å følge med. Mange kontaktet meg med tips til representanter som kan være villig til å introdusere en Eldred-lov. og jeg hadde noen få som foreslo direkte at de kan være villige til å ta det første skrittet.

En representant, Zoe Lofgren fra California, gikk så langt som å få lovforslaget utarbeidet. Utkastet løste noen problemer med internasjonal lov. Det påla de enklest mulige forutsetninger på innehaverne av opphavsretter. I mai 2003 så det ut som om loven skulle være introdusert. 16. mai, postet jeg på Eldred Act-bloggen, "vi er nære". Det oppstod en generell reaksjon i blogg-samfunnet om at noe godt kunne skje her.

But at this stage, the lobbyists began to intervene. Jack Valenti and the MPAA general counsel came to the congresswoman's office to give the view of the MPAA. Aided by his lawyer, as Valenti told me, Valenti informed the congresswoman that the MPAA would oppose the Eldred Act. The reasons are embarrassingly thin. More importantly, their thinness shows something clear about what this debate is really about.

The MPAA argued first that Congress had “firmly rejected the central concept in the proposed bill”—that copyrights be renewed. That was true, but irrelevant, as Congress's “firm rejection” had occurred long before the Internet made subsequent uses much more likely. Second, they argued that the proposal would harm poor copyright owners—apparently those who could not afford the $1 fee. Third, they argued that Congress had determined that extending a copyright term would encourage restoration work. Maybe in the case of the small percentage of work covered by copyright law that is still commercially valuable, but again this was irrelevant, as the proposal would not cut off the extended term unless the $1 fee was not paid. Fourth, the MPAA argued that the bill would impose “enormous” costs, since a registration system is not free. True enough, but those costs are certainly less than the costs of clearing the rights for a copyright whose owner is not known. Fifth, they worried about the risks if the copyright to a story underlying a film were to pass into the public domain. But what risk is that? If it is in the public domain, then the film is a valid derivative use.

Finally, the MPAA argued that existing law enabled copyright owners to do this if they wanted. But the whole point is that there are thousands of copyright owners who don't even know they have a copyright to give. Whether they are free to give away their copyright or not—a controversial claim in any case—unless they know about a copyright, they're not likely to.

At the beginning of this book, I told two stories about the law reacting to changes in technology. In the one, common sense prevailed. In the other, common sense was delayed. The difference between the two stories was the power of the opposition—the power of the side that fought to defend the status quo. In both cases, a new technology threatened old interests. But

in only one case did those interest's have the power to protect themselves against this new competitive threat.

Jeg brukte disse to tilfellene som en måte å ramme inn krigen som denne boken har handlet om. For her er det også en ny teknologi som tvinger loven til å reagere. Og her bør vi også spørre, er loven i tråd med eller i strid med sunn fornuft. Hvis sunn fornuft støtter loven, hva forklarer denne sunne fornuften?

When the issue is piracy, it is right for the law to back the copyright owners. The commercial piracy that I described is wrong and harmful, and the law should work to eliminate it. When the issue is p2p sharing, it is easy to understand why the law backs the owners still: Much of this sharing is wrong, even if much is harmless. When the issue is copyright terms for the Mickey Mouses of the world, it is possible still to understand why the law favors Hollywood: Most people don't recognize the reasons for limiting copyright terms; it is thus still possible to see good faith within the resistance.

But when the copyright owners oppose a proposal such as the Eldred Act, then, finally, there is an example that lays bare the naked selfinterest driving this war. This act would free an extraordinary range of content that is otherwise unused. It wouldn't interfere with any copyright owner's desire to exercise continued control over his content. It would simply liberate what Kevin Kelly calls the “Dark Content” that fills archives around the world. So when the warriors oppose a change like this, we should ask one simple question:

Hva ønsker denne industrien egentlig?

With very little effort, the warriors could protect their content. So the effort to block something like the Eldred Act is not really

about protecting *their* content. The effort to block the Eldred Act is an effort to assure that nothing more passes into the public domain. It is another step to assure that the public domain will never compete, that there will be no use of content that is not commercially controlled, and that there will be no commercial use of content that doesn't require *their* permission first.

The opposition to the Eldred Act reveals how extreme the other side is. The most powerful and sexy and well loved of lobbies really has as its aim not the protection of "property" but the rejection of a tradition. Their aim is not simply to protect what is theirs. *Their aim is to assure that all there is is what is theirs*.

It is not hard to understand why the warriors take this view. It is not hard to see why it would benefit them if the competition of the public domain tied to the Internet could somehow be quashed. Just as RCA feared the competition of FM, they fear the competition of a public domain connected to a public that now has the means to create with it and to share its own creation.

Det som er vanskelig å forstå er hvorfor folket innehar dette synet. Det er som om loven gjorde at flymaskiner tok seg inn på annen manns eiendom. MPAA står side om side med Causbyene og krever at deres fjerne og ubrukelige eierrettigheter blir respektert, slik at disse fjerne og glemte opphavsrettsinnehaverne kan blokkere fremgangen til andre.

All this seems to follow easily from this untroubled acceptance of the "property" in intellectual property. Common sense supports it, and so long as it does, the assaults will rain down upon the technologies of the Internet. The consequence will be an increasing "permission society." The past can be cultivated only if you can identify the owner and gain permission to build upon

his work. The future will be controlled by this dead (and often unfindable) hand of the past.

Kapittel 15. Konklusjon

Det er mer enn trettifem millioner mennesker over hele verden med AIDS-viruset. Tjuefem millioner av dem bor i Afrika sør for Sahara. Sytten millioner har allerede dødd. Sytten millioner afrikanere er prosentvis proporsjonalt med syv millioner amerikanere. Viktigere er det at dette er 17 millioner afrikanere.

Det finnes ingen kur for AIDS, men det finnes medisiner som kan hemme sykdommens utvikling. Disse antiretrovirale terapiene er fortsatt eksperimentelle, men de har hatt en dramatisk effekt allerede. I USA øker AIDS-pasienter som regelmessig tar en cocktail av disse medisinene sin levealder med ti til tjue år. For noen gjøre medisinene sykdommen nesten usynlig.

Disse medisinene er dyre. Da de ble først introdusert i USA, kostet de mellom $10 000 og $15 000 pr. person hvert år. I dag koster noen av dem $25 000 pr. år. Med disse prisene har, selvfølgelig, ingen afrikansk stat råd til medisinen for det store flertall av sine innbyggere: $15 000 er tredve ganger brutto nasjonalprodukt pr. innbygger i Zimbabwe. Med slike priser er disse medisinene fullstendig utilgjengelig.[1]

Disse prisene er ikke høye fordi ingrediensene til medisinene er dyre. Disse prisene er høye fordi medisinene er beskyttet av patenter. Farmasiselskapene som produserer disse livreddende blandingene nyter minst tjue års monopol på sine oppfinnelser.

[1] Commission on Intellectual Property Rights, "Final Report: Integrating Intellectual Property Rights and Development Policy" (London, 2002), tilgjengelig fra link #55 [http://free-culture.cc/notes/]. I følge en pressemelding fra verdens helseorganisasjon sendt ut 9. juli 2002, mottar kun 320 000 av de 6 millioner som trenger medisiner i utviklingsland dem de trenger—og halvparten av dem er i Brasil.

De bruker denne monopolmakten til å hente ut så mye de kan fra markedet. Ved hjelp av denne makten holder de prisene høye.

Det er mange som er skeptiske til patenter, spesielt patenter på medisiner. Det er ikke jeg. Faktisk av alle forskningsområder som kan være støttet av patenter, er forskning på medisiner, etter min mening, det klareste tilfelle der patenter er nødvendig. Patenter gir et farmasøytiske firma en viss forsikring om at hvis det lykkes i å finne opp et nytt medikament som kan behandle en sykdom, vil det kunne tjene tilbake investeringen og mer til. Dette ber sosialt et ekstremt verdifullt insentiv. Jeg er den siste personen som vil argumentere for at loven skal avskaffe dette, i det minste uten andre endringer.

Men det er én ting å støtte patenter, selv patenter på medisiner. Det er en annen ting å avgjøre hvordan en best skal håndtere en krise. Og i det afrikanske ledere begynte å erkjenne ødeleggelsen AIDS brakte, begynte de å se etter måter å importere HIV-medisiner til kostnader betydelig under markedspris.

I 1997 forsøkte Sør-Afrika seg på en tilnærming. Landet vedtok en lov som tillot import av patenterte medisiner som hadde blitt produsert og solgt i en annen nasjons marked med godkjenning fra patenteieren. For eksempel, hvis medisinen var solgt i India, så kunne den bli importert inn til Afrika fra India. Dette kalles "parallellimport" og er generelt tillatt i internasjonal handelslovgivning, og spesifikt tillatt i den europeiske union.[2]

Men USA var imot lovendringen. Og de nøyde seg ikke med å være imot. Som International Intellectual Property Association karakteriserte det, "Myndighetene i USA presset Sør-Afrika … til

[2] Se Peter Drahos og John Braithwaite, Information Feudalism: *Who Owns the Knowledge Economy?* (New York: The New Press, 2003), 37.

å ikke tillate tvungen lisensiering eller parallellimport"[3] Gjennom kontoret til USAs handelsrepresentant (USTR), ba myndighetene Sør-Afrika om å endre loven—og for å legge press bak den forespørselen, listet USTR i 1998 opp Sør-Afrika som et land som burde vurderes for handelsrestriksjoner. Samme år gikk mer enn førti farmasiselskaper til retten for å utfordre myndighetenes handlinger. USA fikk selskap av andre myndigheter fra EU. Deres påstand, og påstanden til farmasiselskapene, var at Sør-Afrika brøt sine internasjonale forpliktelser ved å diskriminere mot en bestemt type patenter—farmasøytiske patenter. Kravet fra disse myndighetene, med USA i spissen, var at Sør-Afrika skulle respektere disse patentene på samme måte som alle andre patenter, uavhengig av eventuell effekt på behandlingen av AIDS i Sør-Afrika.[4]

Vi bør sette intervensjonen til USA i sammenheng. Det er ingen tvil om at patenter ikke er den viktigste årsaken til at Afrikanere ikke har tilgang til medisiner. Fattigdom og den totale mangel på effektivt helsevesen betyr mer. Men uansett om patenter er en viktigste grunnen eller ikke, så har prisen på medisiner en effekt på etterspørselen, og patenter påvirker prisen. Så uansett, massiv eller marginal, så var det en effekt av våre myndigheters intervensjon for å stoppe flyten av medisiner inn til Afrika.

[3] International Intellectual Property Institute (IIPI), *Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa, a Report Prepared for the World Intellectual Property Organization* (Washington, D.C., 2000), 14, available at link #56 [http://free-culture.cc/notes/]. For a firsthand account of the struggle over South Africa, see Hearing Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources, House Committee on Government Reform, H. Rep., 1st sess., Ser. No. 106-126 (22 July 1999), 150–57 (statement of James Love).

[4] International Intellectual Property Institute (IIPI), *Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa, en rapport forberedt for the World Intellectual Property Organization* (Washington, D.C., 2000), 15.

Ved å stoppe flyten av HIV-behandling til Afrika, sikret ikke myndighetene i USA medisiner til USA borgere. Dette er ikke som hvete (hvis de spise det så kan ikke vi spise det). Det som USA i effekt intervenerte for å stoppe, var flyten av kunnskap: Informasjon om hvordan en kan ta kjemikalier som finnes i Afrika og gjøre disse kjemikaliene om til medisiner som kan redde 15 til 30 millioner liv.

Intervensjonen fra USA ville heller ikke beskytte fortjenesten til medisinselskapene i USA— i hvert fall ikke betydelig. Det var jo ikke slik at disse landene hadde mulighet til å kjøpe medisinene til de prisene som medisinselskapene forlangte. Igjen var afrikanerne for fattige til å ha råd til disse medisinene til de tilbudte prisene. Å blokkere for parallellimport av disse medisinene ville ikke øke salget til de amerikanske selskapene betydelig.

I stedet var argumentet til fordel for restriksjoner på denne flyten av informasjon, som var nødvendig for å redde millioner av liv, et argument om eiendoms ukrenkelighet.[5] Det var på grunn av at "intellektuell eiendom" ville bli krenket at disse medisinene ikke skulle flomme inn til Afrika. Det var prinsippet om viktigheten av "intellektuell eiendom" som fikk disse myndighetsaktørene til å intervenere mot Sør-Afrikas mottiltak mot AIDS.

[5] See Sabin Russell, "New Crusade to Lower AIDS Drug Costs: Africa's Needs at Odds with Firms' Profit Motive," *San Francisco Chronicle*, 24 May 1999, A1, available at link #57 [http://free-culture.cc/notes/] ("compulsory licenses and gray markets pose a threat to the entire system of intellectual property protection"); Robert Weissman, "AIDS and Developing Countries: Democratizing Access to Essential Medicines," *Foreign Policy in Focus* 4:23 (August 1999), available at link #58 [http://free-culture.cc/notes/] (describing U.S. policy); John A. Harrelson, "TRIPS, Pharmaceutical Patents, and the HIV/AIDS Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion, a Synopsis," *Widener Law Symposium Journal* (Spring 2001): 175.

La oss ta et skritt tilbake for et øyeblikk. En gang om tredve år vil våre barn se tilbake på oss og spørre, hvordan kunne vi la dette skje? Hvordan kunne vi tillate å gjennomføre en politikk hvis direkte kostnad var få 15 til 30 millioner afrikanere til å dø raskere, og hvis eneste virkelige fordel var å opprettholde "ukrenkeligheten" til en idé? Hva slags berettigelse kan noen sinne eksistere for en politikk som resulterer i så mange døde? Hva slags galskap er det egentlig som tillater at så mange dør for slik en abstraksjon?

Noen skylder på farmasiselskapene. Det gjør ikke jeg. De er selskaper, og deres ledere er lovpålagt å tjene penger for selskapene. De presser på for en bestemt patentpolitikk, ikke på grunn av idealer, men fordi det er dette som gjør at de tjener mest penger. Og dette gjør kun at de tjener mest penger på grunn av en slags korrupsjon i vårt politiske system— en korrupsjon som farmasiselskapene helt klart ikke er ansvarlige for.

Denne korrupsjonen er våre egne politikeres manglende integritet. For medisinprodusentene ville elske—sier de selv, og jeg tror dem — å selge sine medisiner så billig som de kan til land i Afrika og andre steder. Det er utfordringer de må løse å sikre at medisinene ikke kommer tilbake til USA, men dette er bare teknologiske utfordring. De kan bli overvunnet.

Et annet problem kan derimot ikke løses. Det er frykten for at en politiker som skal vise seg og kaller inn lederne hos medisinprodusentene til høring i senatet eller representantenes hus og spør, "hvordan har det seg at du kan selge HIV-medisinen i Afrika for bare $1 pr. pille, mens samme pille koster en amerikansker $1 500?" Da det ikke finnes et "kjapt svar" på det spørsmålet, ville effekten bli regulering av priser i Amerika. Medisinprodusentene unngår dermed denne spiralen ved å sikre at det første steget ikke tas. De forsterker idéen om at eierrettigheter

skal være ukrenkelige. De legger seg på en rasjonell strategi i en irrasjonell omgivelse, med den utilsiktede konsekvens at kanskje millioner dør. Og den rasjonelle strategien rammes dermed inn ved hjel av dette ideal—helligheten til en idé som kalles "immaterielle rettigheter".

Så når du konfronteres av ditt barns sunne fornuft, hva vil du si? Når den sunne fornuften hos en generasjon endelig gjør opprør mot hva vi har gjort, hvordan vil vi rettferdiggjøre det? Hva er argumentet?

En fornuftig patentpolitikk kunne gå god for og gi sterk støtte til patentsystemet uten å måtte nå alle overalt på nøyaktig samme måte. På samme måte som en fornuftig opphavsrettspolitikk kunne gå god for og gi sterk støtte til et opphavsretts-system uten å måtte regulere spredningen av kultur perfekt og for alltid. En fornuftig patentpolitikk kunne gå god for og gi sterk støtte til et patentsystem uten å måtte blokkere spredning av medisiner til et land som uansett ikke er rikt nok til å ha råd til markedsprisen. En fornuftig politikk kan en dermed si kunne være en balansert politikk. For det meste av vår historie har både opphavsrett- og patentpolitikken i denne forstand vært balansert.

Men vi som kultur har mistet denne følelsen for balanse. Vi har mistet det kritiske blikket som hjelper oss til å se forskjellen mellom sannhet og ekstremisme. En slags eiendomsfundamentalisme, uten grunnlag i vår tradisjon, hersker nå i vår kultur—sært, og med konsekvenser mer alvorlig for spredningen av idéer og kultur enn nesten enhver annen politisk enkeltavgjørelse vi som demokrati kan fatte.

En enkel idé blender oss, og under dekke av mørket skjer mye som de fleste av oss ville avvist hvis vi hadde fulgt med. Så ukritisk aksepterer vi idéen om eierskap til idéer at vi ikke engang

legger merke til hvor uhyrlig det er å nekte tilgang til idéer for et folk som dør uten dem. Så ukritisk aksepterer vi idéen om eiendom til kulturen at vi ikke engang stiller spørsmål ved når kontrollen over denne eiendommen fjerner vår evne, som folk, til å utvikle vår kultur demokratisk. Blindhet blir vår sunne fornuft, og utfordringen for enhver som vil gjenvinne retten til å dyrke vår kultur er å finne en måte å få denne sunne fornuften til å åpne sine øyne.

Så langt sover sunn fornuft. Det er intet opprør. Sunn fornuft ser ennå ikke hva det er å gjøre opprør mot. Ekstremismen som nå dominerer denne debatten resonerer med idéer som virker naturlige, og resonansen er forsterket av våre moderne RCA-ene. De fører en frenetisk krig for å bekjempe "piratvirksomhet" og knuser kreativitetskultur. De forsvarer idéen om "kreativt eierskap", mens de endrer ekte skapere til moderne leilendinger. De blir fornærmet av idéen om at rettigheter skulle være balanserte, selv om hver av hovedaktørene i denne innholdskrigen selv hadde fordeler av et mer balansert ideal. Hykleriet rår. Men i en by som Washington blir ikke hykleriet en gang lagt merke til. Mektige lobbyister, kompliserte problemer og MTV-oppmerksomhetsspenn gir en "perfekt storm" for fri kultur.

I august 2003 brøt en kamp ut i USA om en avgjørelse fra World Intellectual Property Organiation om å avlyse et møte.[6] På forespørsel fra en lang rekke med interessenter hadde WIPO bestemt å avholde et møte for å diskutere "åpne og samarbeidende

[6] Jonathan Krim, "The Quiet War over Open-Source", *Washington Post*, august 2003, E1, tilgjengelig fra link #59 [http://free-culture.cc/notes/]; William New, "Global Group's Shift on `Open Source' Meeting Spurs Stir", *National Journal's Technology Daily*, 19. august 2003, tilgjengelig fra link #60 [http://free-culture.cc/notes/]; William New, "U.S. Official Opposes `Open Source' Talks at WIPO", *National Journal's Technology Daily*, 19. august 2003, tilgjengelig fra link #61 [http://free-culture.cc/notes/].

prosjekter for å skape goder for felleskapet". Disse prosjektene som hadde lyktes i å produsere goder for fellesskapet uten å basere seg eksklusivt på bruken av proprietære immaterielle rettigheter. Eksempler inkluderer internettet og verdensveven, begge som ble utviklet på grunnlag av protokoller i allemannseie. Det hadde med en begynnende trend for å støtte åpne akademiske tidsskrifter, og inkluderte Public Library of Science-prosjektet som jeg beskriver i etterordet. Det inkluderte et prosjekt for a utvikle enkeltnukleotidforskjeller (SNPs), som er antatt å få stor betydning i biomedisinsk forskning. (Dette ideelle prosjektet besto av et konsortium av Wellcome Trust og farmasøytiske og teknologiske selskaper, inkludert Amersham Biosciences, AstraZeneca, Aventis, Bayer, Bristol-Myers Squibb, Hoffmann-La Roche, Glaxo-SmithKline, IBM, Motorola, Novartis, Pfizer, og Searle.) Det inkluderte Globalt posisjonssystem (GPS) som Ronald Reagen frigjorde tidlig på 1980-tallet. Og det inkluderte "åpen kildekode og fri programvare".

Formålet med møtet var å vurdere denne rekken av prosjekter fra et felles perspektiv: at ingen av disse prosjektene hadde som grunnlag immateriell ekstremisme. I stedet, hos alle disse, ble immaterielle rettigheter balansert med avtaler om å holde tilgang åpen, eller for å legge begrensninger på hvordan proprietære krav kan bli brukt.

Dermed var, fra perspektivet i denne boken, denne konferansen ideell.[7] Prosjektene innenfor temaet var både kommersielle og ikkekommersielle verker. De involverte i hovedsak vitenskapen, men fra mange perspektiver. Og WIPO var et ideelt sted for denne diskusjonen, siden WIPO var den fremstående internasjonale aktør som drev med immaterielle rettighetsspørsmål.

[7] Jeg bør nevne at jeg var en av folkene som ba WIPO om dette møtet.

Faktisk fikk jeg en gang offentlig kjeft for å ikke anerkjenne dette faktum om WIPO. I februar 2003 leverte jeg et hovedinnlegg på en forberedende konferanse for World Summit on the Information Society (WSIS). På en pressekonferanse før innlegget, ble jeg spurt hva jeg skulle snakke om. Jeg svarte at jeg skulle snakke litt om viktigheten av balanse rundt immaterielle verdier for utviklingen av informasjonssamfunnet. Ordstyreren på arrangementet avbrøt meg da brått for å informere meg og journalistene tilstede at ingen spørsmål rundt immaterielle verdier ville bli diskutert av WSIS, da slike spørsmål kun skulle diskuteres i WIPO. I innlegget jeg hadde forberedt var temaet om immaterielle verdier en forholdvis liten del av det hele. Men etter denne forbløffende uttalelsen, gjorde jeg immaterielle verdier til hovedfokus for mitt innlegg. Det var ikke mulig å snakke om et "informasjonssamfunn" uten at en også snakket om andelen av informasjon og kultur som ikke er vernet av opphavsretten. Mitt innlegg gjorde ikke min overivrige moderator veldig glad. Og hun hadde uten tvil rett i at omfanget til vern av immaterielle rettigheter normalt hørte inn under WIPO. Men etter mitt syn, kunne det ikke bli for mye diskusjon om hvor mye immaterielle rettigheter som trengs, siden etter mitt syn, hadde selve idéen om en balanse rundt immaterielle rettigheter hadde gått tapt.

Så uansett om WSIS kan diskutere balanse i intellektuell eiendom eller ikke, så hadde jeg trodd det var tatt for gitt at WIPO kunne og burde. Og dermed møtet om "åpne og samarbeidende prosjekter for å skape fellesgoder" virker å passe perfekt for WIPOs agenda.

Men det er ett prosjekt i listen som er svært kontroversielt, i hvert fall blant lobbyister. Dette prosjektet er "åpen kildekode og fri programvare". Microsoft spesielt er skeptisk til diskusjon om emnet. Fra deres perspektiv, ville en konferanse for å diskutere åpen kildekode og fri programvare være som en konferanse

for å diskutere Apples operativsystem. Både åpen kildekode og fri programvare konkurrerer med Microsofts programvare. Og internasjonalt har mange myndigheter begynt å utforske krav om at de skal bruke åpen kildekode eller fri programvare, i stedet for "proprietær programvare", til sine egne interne behov.

Jeg mener ikke å gå inn i den debatten her. Det er viktig kun for å gjøre det klart at skillet ikke er mellom kommersiell og ikke-kommersiell programvare. Det er mange viktige selskaper som er fundamentalt avhengig av fri programvare, der IBM er den mest fremtredende. IBM har i stadig større grad skiftet sitt fokus til GNU/Linux-operativsystemet, det mest berømte biten av "fri programvare"—og IBM er helt klart en kommersiell aktør. Dermed er det å støtte "fri programvare" ikke å motsette seg kommersielle aktører. Det er i stedet å støtte en måte å drive programvareutvikling som er forskjellig fra Microsofts.[8]

Mer viktig for våre formål, er at å støtte "åpen kildekode og fri programvare" ikke er å motsette seg opphavsrett. "Åpen kildekode og fri programvare" er ikke programvare uten opphavsrettslig vern. Istedet, på samme måte som programvare fra Microsoft, insisterer opphavsrettsinnehaverne

[8] Microsofts posisjon om åpen kildekode og fri programvare er mer sofistikert. De har flere ganger forklart at de har ikke noe problem med programvare som er "åpen kildekode" eller programvare som er allemannseie. Microsofts prinsipielle motstand er mot "fri programvare" lisensiert med en "copyleft"-lisens, som betyr at lisensen krever at de som lisensierer skal adoptere same vilkår for ethvert avledet verk. Se Bradford L. Smith, "The Future of Software: Enabling the Marketplace to Decide", *Government Policy Toward Open Source Software* (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, American Enterprise Institute for Public Policy Research, 2002), 69, tilgjengelig fra link #62 [http://free-culture.cc/notes/]. Se også Craig Mundie, Microsoft senior vice president, *The Commercial Software Model*, diskusjon ved New York University Stern School of Business (3. mai 2001), tilgjengelig fra link #63 [http://free-culture.cc/notes/].

av fri programvare ganske sterkt at vilkårene i deres programvarelisens blir respektert av de som tar i bruk fri programvare. Vilkårene i den lisensen er uten tvil forskjellig fra vilkårene i en proprietær programvarelisens. For eksempel krever fri programvare lisensiert med den generelle offentlige lisensen (GPL), at kildekoden for programvare gjøres tilgjengelig for alle som endrer og videredistribuerer programvaren. Men dette kravet er kun effektivt hvis opphavsrett råder over programvare. Hvis opphavsretten ikke råder over programvare, så kunne ikke fri programvare pålegge slike krav på de som tar i bruk programvaren. Den er dermed like avhengig av opphavsrettsloven som Microsoft.

Det er dermed forståelig at Microsoft, som utviklere av proprietær programvare, gikk imot et slikt WIPO-møte, og like fullt forståelig at de bruker sine lobbyister til å få USAs myndigheter til å gå imot møtet. Og ganske riktig, det er akkurat dette som i følge rapporter hadde skjedd. I følge Jonathan Krim i *Washington Post*, lyktes Microsofts lobbyister i å få USAs myndigheter til å legge ned veto mot et slikt møte.[9] Og uten støtte fra USA ble møtet avlyst.

Jeg klandrer ikke Microsoft for å gjøre det de kan for å fremme sine egne interesser i samsvar med loven. Og lobbyvirksomhet mot myndighetene er åpenbart i samsvar med loven. Det er ikke noe overraskende her med deres lobbyvirksomhet, og ikke veldig overraskende at den mektigste programvareprodusenten i USA har lyktes med sin lobbyvirksomhet.

Det som var overraskende var USAs regjerings begrunnelse for å være imot møtet. Igjen, sitert av Krim, forklarte Lois Boland,

[9] Krim, "The Quiet War over Open-Source", tilgjengelig fra link #64 [http://free-culture.cc/notes/].

direktør for internasjonale forbindelser ved USAs patent og varemerkekontor, at "programvare med åpen kildekode går imot til formålet til WIPO, som er å fremme immaterielle rettigheter.". Hun skal i følge sitatet ha sagt, "Å holde et møte som har som formål å fraskrive seg eller frafalle slike rettigheter synes for oss å være i strid med formålene til WIPO."

Disse utsagnene er forbløffende på flere nivåer.

For det første er de ganske enkelt ikke riktige. Som jeg beskrev, er det meste av åpen kildekode og fri programvare fundamentalt avhengig av den immaterielle retten kalt "opphavsrett". Uten den vil begrensningene definert av disse lisensene ikke fungere. Dermed er det å si at de "går imot" formålet om å fremme immaterielle rettigheter å avsløre en ekstraordinær mangel på forståelse—den type feil som er tilgivelig hos en førsteårs jusstudent, men pinlig fra en høyt plassert statstjenestemann som håndterer utfordringer rundt immaterielle rettigheter.

For det andre, hvem har noen gang hevdet at WIPOs eksklusive mål var å "fremme" immaterielle rettigheter maksimalt? Som jeg fikk kjeft om på den forberedende konferansen til WSIS, skal WIPO vurdere ikke bare hvordan best beskytte immaterielle rettigheter, men også hva som er den beste balansen rundt immaterielle rettigheter. Som enhver økonom og advokat vet, er det vanskelige spørsmålet i immaterielle rettighetsjuss å finne den balansen. Men at det skulle være en grense, trodde jeg, var ubestridt. Man ønsker å spørre Ms. Boland om generelle medisiner (medisiner basert på medisiner med patenter som er utløpt) i strid med WIPOs oppdrag? Svekker allemannseie immaterielle rettigheter? Ville det vært bedre om internettets protokoller hadde vært patentert?

For det tredje, selv om en tror at formålet med WIPO var å maksimere immaterielle rettigheter, så innehas immaterielle rettigheter, i vår tradisjon, av individer og selskaper. De får bestemme hva som skal gjøres med disse rettighetene, igjen fordi det er *de* som eier rettighetene. Hvis de ønsker å "frafalle" eller "frasi" seg sine rettigheter, så er det helt etter boka i vår tradisjon. Når Bill Gates gir bort mer enn $20 milliarder til gode formål, så er ikke det uforenelig med målene til eiendomssystemet. Det er heller tvert i mot, akkurat hva eiendomssysstemet er ment å oppnå, at individer har retten til å bestemme hva de vil gjøre med *sin* eiendom.

Når Ms. Boland sier at det er noe galt med et møte "som har som sitt formål å fraskrive eller frafalle slike rettigheter", så sier hun at WIPO har en interesse i å påvirke valgene til enkeltpersoner som eier immaterielle rettigheter. At på en eller annen WIPOs oppdrag bør være å stoppe individer fra å "fraskrive" eller "frafalle" seg sine immaterielle rettigheter. At interessen til WIPO ikke bare er maksimale immaterielle rettigheter, men også at de skal utøves på den mest ekstreme og restriktive mulig måten.

Det er en historie om akkurat et slikt eierskapssystem som er velkjent i den anglo-amerikansk tradisjon. Det kalles "føydalisme". Under føydalismen var eiendommer ikke bare kontrollert av et relativt lite antall individer og aktører. Men det føydale systemet hadde en sterk interesse i å sikre at landeier i systemet ikke svekke føydalismen ved å frigjøre folkene og eiendomene som de kontrollerte til det frie markedet. Føydalismen var avhengig av maksimal kontroll og konsentrasjon. Det sloss mot enhver frihet som kunne forstyrre denne kontrollen.

Som Peter Drahos og John Braithwaite beskriver, dette er nøyaktig det valget vi nå gjør om immaterielle rettigheter.[10] Vi kommer til å få et informasjonssamfunn. Så mye er sikkert. Vårt eneste valg nå er hvorvidt dette informasjonssamfunnet skal være *fritt* eller *føydalt*. Trenden er mot det føydale.

Da denne bataljen brøt ut, blogget jeg om dette. En heftig debatt brøt ut i kommentarfeltet. Ms. Boland hadde en rekke støttespillere som forsøkte å vise hvorfor hennes kommentarer ga mening. Men det var spesielt en kommentar som gjorde meg trist. En anonym kommentator skrev,

> George, du misforstår Lessig: Han snakker bare om verden slik den burde være ("målet til WIPO, og målet til enhver regjering, bør være å fremme den riktige balansen for immaterielle rettigheter, ikke bare å fremme immaterielle rettigheter"), ikke som den er. Hvis vi snakket om verden slik den er, så har naturligvis Boland ikke sagt noe galt. Men i verden slik Lessig vil at den skal være, er det åpenbart at hun har sagt noe galt. En må alltid være oppmerksom på forskjellen mellom Lessigs og vår verden.

Jeg gikk glipp av ironien først gangen jeg leste den. Jeg lese den raskt og trodde forfatteren støttet idéen om at det våre myndigheter burde gjøre var å søke balanse. (Min kritikk av Ms Boland, selvfølgelig, var ikke om hvorvidt hun søkte balanse eller ikke; min kritikk var at hennes kommentarer avslørte en feil kun en førsteårs jusstudent burde kunne gjøre. Jeg har noen illusjon om ekstremismen hos våre myndigheter, uansett om de er

[10] Se Drahos with Braithwaite, *Information Feudalism*, 210–20.

republikanere eller demokrater. Min eneste tilsynelatende illusjon er hvorvidt våre myndigheter bør snakke sant eller ikke.)

Det var derimot åpenbart at den som postet meldingen ikke støttet idéen. I stedet latterliggjorde forfatteren selve idéen om at i den virkelig verden skulle "målet" til myndighetene være "å fremme den riktige balanse" for immaterielle rettigheter. Det var åpenbart tåpelig for ham. Og det avslørte åpenbart, trodde han, min egen tåpelige utopisme. "Typisk for en akademiker", kunne forfatteren like gjerne ha fortsatt.

Jeg forstår kritikken av akademisk utopisme. Jeg mener også at utopisme er tåpelig, og jeg vil være blant de første til å gjøre narr av de absurde urealistiske idealer til akademikere gjennom historien (og ikke bare i vårt eget lands historie).

Men når det har blitt dumt å anta at rollen til våre myndigheter bør være å "oppnå balanse", da kan du regne meg blant de dumme, for det betyr at dette faktisk har blitt ganske seriøst. Hvis det bør være åpenbart for alle at myndighetene ikke søker å oppnå balanse, at myndighetene ganske enkelt et verktøy for de mektigste lobbyistene, at idéen om å forvente bedre av myndighetene er absurd, at idéen om å kreve at myndighetene snakker sant og ikke lyver bare er naiv, hva har da vi, det mektigste demokratiet i verden, blitt?

Det kan være galskap å forvente at en mektig myndigshetsperson skal si sannheten. Det kan være galskap å tro at myndighetenes politikk skal gjøre mer enn å tjene de mektigste interesser. Det kan være galskap å argumentere for å bevare en tradisjon som har vært en del av vår tradisjon for mesteparten av vår historie—fri kultur.

Hvis dette er galskap, så la det være mer gærninger. Snart. Det finnes øyeblikk av håp i denne kampen. Og øyeblikk som

overrasker. Da FCC vurderte mindre strenge eierskapsregler, som ville ytterligere konsentrere medieeierskap, dannet det seg en en ekstraordinær koalisjon på tvers av partiene for å bekjempe endringen. For kanskje første gang i historien organiserte interesser så forskjellige som NRA, ACLU, moveon.org, William Safire, Ted Turner og Codepink Women for Piece seg for å protestere på denne endringen i FCC-reglene. Så mange som 700 000 brev ble sendt til FCC med krav om flere høringer og et annet resultat.

Disse protestene stoppet ikke FCC, men like etter stemte en bred koalisjon i senatet for å reversere avgjørelsen i FCC. De fiendtlige høringene som ledet til avstemmingen avslørte hvor mektig denne bevegelsen hadde blitt. Det var ingen betydningsfull støtte for FCCs avgjørelse, mens det var bred og vedvarende støtte for å bekjempe ytterligere konsentrasjon i media.

Men selv denne bevegelsen går glipp av en viktig brikke i puslespillet. Å være stor er ikke ille i seg selv. Frihet er ikke truet bare på grunn av at noen blir veldig rik, eller på grunn av at det bare er en håndfull store aktører. Den dårlige kvaliteten til Big Macs eller Quartar Punders betyr ikke at du ikke kan få en god hamburger andre steder.

Faren med mediekonsentrasjon kommer ikke fra selve konsentrasjonen, men kommer fra føydalismen som denne konsentrasjonen fører til når den kobles til endringer i opphavsretten. Det er ikke kun at det er noen mektige selskaper som styrer en stadig voksende andel av mediene. Det er at denne konsentrasjonen kan påkalle en like oppsvulmet rekke rettigheter —eiendomsrettigheter i en historisk ekstrem form—som gjør størrelsen ille.

Det er derfor betydningsfullt at så mange vil kjempe for å kreve konkurranse og økt mangfold. Likevel, hvis kampanjen blir forstått til å kun gjelde størrelse, så er ikke det veldig overraskende. Vi amerikanere har en lang historie med å slåss mot "stort", klokt eller ikke. At vi kan være motivert til å slåss mot "store" igjen ikke noe nytt.

Det ville vært noe nytt, og noe veldig viktig, hvis like mange kan være med på en kampanje for å bekjempe økende ekstremisme bygget inn i idéen om "intellektuell eiendom". Ikke fordi balanse er fremmed for vår tradisjon. Jeg argumenterer for at balanse er vår tradisjon. Men fordi evnen til å tenke kritisk på omfanget av alt som kalles "eiendom" ikke er lenger er godt trent i denne tradisjonen.

Hvis vi var Akilles, så ville dette være vår hæl. Dette ville være stedet for våre tragedie.

Mens jeg skriver disse avsluttende ordene, er nyhetene fylt med historier om at RIAA saksøker nesten tre hundre individer.[11] Eminem har nettopp blitt saksøkt for å ha "samplet" noen andres musikk.[12] Historien om hvordan Bob Dylan har "stjålet" fra en

[11] John Borland, "RIAA Sues 261 File Swappers", CNET News.com, september 2003, tilgjengelig fra link #65 [http://free-culture.cc/notes/]; Paul R. La Monica, "Music Industry Sues Swappers", CNN/Money, 8 september 2003, tilgjengelig fra link #66 [http://free-culture.cc/notes/]; Soni Sangha og Phyllis Furman sammen med Robert Gearty, "Sued for a Song, N.Y.C. 12-Yr-Old Among 261 Cited as Sharers", *New York Daily News*, 9. september 2003, 3; Frank Ahrens, "RIAA's Lawsuits Meet Surprised Targets; Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants", *Washington Post*, 10. september 2003, E1; Katie Dean, "Schoolgirl Settles with RIAA", *Wired News*, 10. september 2003, tilgjengelig fra link #67 [http://free-culture.cc/notes/].

[12] Jon Wiederhorn, "Eminem Gets Sued … by a Little Old Lady", mtv.com, 17. september 2003, tilgjengelig fra link #68 [http://free-culture.cc/notes/].

japansk forfatter har nettopp gått verden over.[13] En på innsiden i Hollywood—som insisterer på at han må forbli anonym—rapporterer "en utrolig samtale med disse studiofolkene. De har fantastisk [gammelt] innhold som de ville elske å bruke, men det kan de ikke på grunn av at de først må klarere rettighetene. De har hauger med ungdommer som kunne gjøre fantastiske ting med innholdet, men det vil først kreve hauger med advokater for å klarere det først". Kongressrepresentanter snakker om å gi datavirus politimyndighet for å ta ned datamaskiner som antas å bryte loven. Universiteter truer med å utvise ungdommer som bruker en datamaskin for å dele innhold.

I mens på andre siden av Atlanteren har BBC nettopp annonsert at de vil bygge opp et "kreativt arkiv" som britiske borgere kan laste ned BBC-innhold fra, og rippe, mikse og brenne det ut.[14] Og i Brasil har kulturministeren, Gilberto Gil, i seg selv en folkehelt i brasiliansk musikk, slått seg sammen med Creative Commons for å gi ut innhold og frie lisenser i dette latinamerikanske landet.[15] Jeg har fortalt en mørk historie. Sannheten er mer blandet. En teknologi har gitt oss mer frihet. Sakte begynner noen å forstå at denne friheten trenger ikke å bety anarki. Vi kan få med oss fri kultur inn i det tjueførste århundre, uten at artister taper og uten at potensialet for digital teknologi blir knust. Det vil kreve omtanke, og viktigere, det vil kreve at noen omforme RCAene av i dag til Causbyere.

[13] Kenji Hall, Associated Press, "Japanese Book May Be Inspiration for Dylan Songs", Kansascity.com, 9. juli 2003, tilgjengelig fra link #69 [http://free-culture.cc/notes/].
[14] "BBC Plans to Open Up Its Archive to the Public", pressemelding fra BBC, 24. august 2003, tilgjengelig fra link #70 [http://free-culture.cc/notes/].
[15] "Creative Commons and Brazil", Creative Commons Weblog, 6. august 2003, tilgjengelig fra link #71 [http://free-culture.cc/notes/].

Sunn fornuft må gjøre opprør. Den må handle for å frigjøre kulturen. Og snart, hvis dette potensialet skal noen gang bli realisert.

Kapittel 16. Etterord

I hvert fall noen av de som har lest helt hit vil være enig med meg om at noe må gjøres for å endre retningen vi holder. Balansen i denne boken kartlegger hva som kan gjøres.

Jeg deler dette kartet i to deler: det som enhver kan gjøre nå, og det som krever hjelp fra lovgiverne. Hvis det er en lærdom vi kan trekke fra historien om å endre på sunn fornuft, så er det at det krever å endre hvordan mange mennesker tenker på den aktuelle saken.

Det betyr at denne bevegelsen må starte i gatene. Det må rekrutteres et signifikant antall foreldre, lærere, bibliotekarer, skapere, forfattere, musikere, filmskapere, forskere—som alle må fortelle denne historien med sine egne ord, og som kan fortelle sine naboer hvorfor denne kampen er så viktig.

Når denne bevegelsen har hatt sin effekt i gatene, så er det et visst håp om at det kan ha effekt i Washington. Vi er fortsatt et demokrati. Hva folk mener betyr noe. Ikke så mye som det burde, i hvert fall når en RCA står imot, men likevel, det betyr noe. Og dermed vil jeg skissere, i den andre delen som følger, endringer som kongressen kunne gjøre for å bedre sikre en fri kultur.

Oss, nå

Common sense is with the copyright warriors because the debate so far has been framed at the extremes—as a grand either/or: either property or anarchy, either total control or artists won't be paid. If that really is the choice, then the warriors should win.

The mistake here is the error of the excluded middle. There are extremes in this debate, but the extremes are not all that there is. There are those who believe in maximal copyright—"All Rights Reserved"— and those who reject copyright—"No Rights Reserved." The "All Rights Reserved" sorts believe that you should ask permission before you "use" a copyrighted work in any way. The "No Rights Reserved" sorts believe you should be able to do with content as you wish, regardless of whether you have permission or not.

When the Internet was first born, its initial architecture effectively tilted in the "no rights reserved" direction. Content could be copied perfectly and cheaply; rights could not easily be controlled. Thus, regardless of anyone's desire, the effective regime of copyright under the original design of the Internet was "no rights reserved." Content was "taken" regardless of the rights. Any rights were effectively unprotected.

This initial character produced a reaction (opposite, but not quite equal) by copyright owners. That reaction has been the topic of this book. Through legislation, litigation, and changes to the network's design, copyright holders have been able to change the essential character of the environment of the original Internet. If the original architecture made the effective default "no rights reserved," the future architecture will make the effective default "all rights reserved." The architecture and law that surround the Internet's design will increasingly produce an environment where all use of content requires permission. The "cut and paste" world that defines the Internet today will become a "get permission to cut and paste" world that is a creator's nightmare.

What's needed is a way to say something in the middle—neither "all rights reserved" nor "no rights reserved" but "some rights reserved"— and thus a way to respect copyrights but enable

creators to free content as they see fit. In other words, we need a way to restore a set of freedoms that we could just take for granted before.

Gjenoppbygging av friheter som tidligere var antatt: Eksempler

If you step back from the battle I've been describing here, you will recognize this problem from other contexts. Think about privacy. Before the Internet, most of us didn't have to worry much about data about our lives that we broadcast to the world. If you walked into a bookstore and browsed through some of the works of Karl Marx, you didn't need to worry about explaining your browsing habits to your neighbors or boss. The “privacy” of your browsing habits was assured.

Hva gjorde at det var sikret?

Well, if we think in terms of the modalities I described in chapter 10 [142], your privacy was assured because of an inefficient architecture for gathering data and hence a market constraint (cost) on anyone who wanted to gather that data. If you were a suspected spy for North Korea, working for the CIA, no doubt your privacy would not be assured. But that's because the CIA would (we hope) find it valuable enough to spend the thousands required to track you. But for most of us (again, we can hope), spying doesn't pay. The highly inefficient architecture of real space means we all enjoy a fairly robust amount of privacy. That privacy is guaranteed to us by friction. Not by law (there is no law protecting “privacy” in public places), and in many places, not by norms (snooping and gossip are just fun), but instead, by the costs that friction imposes on anyone who would want to spy.

Enter the Internet, where the cost of tracking browsing in particular has become quite tiny. If you're a customer at Amazon, then as you browse the pages, Amazon collects the data about what you've looked at. You know this because at the side of the page, there's a list of “recently viewed” pages. Now, because of the architecture of the Net and the function of cookies on the Net, it is easier to collect the data than not. The friction has disappeared, and hence any “privacy” protected by the friction disappears, too.

Amazon, of course, is not the problem. But we might begin to worry about libraries. If you're one of those crazy lefties who thinks that people should have the “right” to browse in a library without the government knowing which books you look at (I'm one of those lefties, too), then this change in the technology of monitoring might concern you. If it becomes simple to gather and sort who does what in electronic spaces, then the friction-induced privacy of yesterday disappears.

It is this reality that explains the push of many to define “privacy” on the Internet. It is the recognition that technology can remove what friction before gave us that leads many to push for laws to do what friction did.[1] And whether you're in favor of those laws or not, it is the pattern that is important here. We must take affirmative steps to secure a kind of freedom that was passively provided before. A change in technology now forces those who

[1] See, for example, Marc Rotenberg, “Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get),” *Stanford Technology Law Review* 1 (2001): par. 6–18, available at link #72 [http://free-culture.cc/notes/] (describing examples in which technology defines privacy policy). See also Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* (New York: Random House, 2004) (mapping tradeoffs between technology and privacy).

believe in privacy to affirmatively act where, before, privacy was given by default.

A similar story could be told about the birth of the free software movement. When computers with software were first made available commercially, the software—both the source code and the binaries— was free. You couldn't run a program written for a Data General machine on an IBM machine, so Data General and IBM didn't care much about controlling their software.

Dette var verden Richard Stallman ble født inn i, og mens han var forsker ved MIT, lærte han til å elske samfunnet som utviklet seg når en var fri til å utforske og fikle med programvaren som kjørte på datamaskiner. Av den smarte sorten selv, og en talentfull programmerer, begynte Stallman å basere seg frihet til å legge til eller endre på andre personers arbeid.

In an academic setting, at least, that's not a terribly radical idea. In a math department, anyone would be free to tinker with a proof that someone offered. If you thought you had a better way to prove a theorem, you could take what someone else did and change it. In a classics department, if you believed a colleague's translation of a recently discovered text was flawed, you were free to improve it. Thus, to Stallman, it seemed obvious that you should be free to tinker with and improve the code that ran a machine. This, too, was knowledge. Why shouldn't it be open for criticism like anything else?

No one answered that question. Instead, the architecture of revenue for computing changed. As it became possible to import programs from one system to another, it became economically attractive (at least in the view of some) to hide the code of your program. So, too, as companies started selling peripherals for mainframe systems. If I could just take your printer driver and

copy it, then that would make it easier for me to sell a printer to the market than it was for you.

Thus, the practice of proprietary code began to spread, and by the early 1980s, Stallman found himself surrounded by proprietary code. The world of free software had been erased by a change in the economics of computing. And as he believed, if he did nothing about it, then the freedom to change and share software would be fundamentally weakened.

Derfor, i 1984, startet Stallmann på et prosjekt for å bygge et fritt operativsystem, slik i hvert fall en flik av fri programvare skulle overleve. Dette var starten på GNU-prosjektet, som “Linux”-kjernen til Linus Torvalds senere ble lagt til i for å produsere GNU/Linux-operativsystemet.

Stallman's technique was to use copyright law to build a world of software that must be kept free. Software licensed under the Free Software Foundation's GPL cannot be modified and distributed unless the source code for that software is made available as well. Thus, anyone building upon GPL'd software would have to make their buildings free as well. This would assure, Stallman believed, that an ecology of code would develop that remained free for others to build upon. His fundamental goal was freedom; innovative creative code was a byproduct.

Stallman was thus doing for software what privacy advocates now do for privacy. He was seeking a way to rebuild a kind of freedom that was taken for granted before. Through the affirmative use of licenses that bind copyrighted code, Stallman was affirmatively reclaiming a space where free software would survive. He was actively protecting what before had been passively guaranteed.

Finally, consider a very recent example that more directly resonates with the story of this book. This is the shift in the way academic and scientific journals are produced.

As digital technologies develop, it is becoming obvious to many that printing thousands of copies of journals every month and sending them to libraries is perhaps not the most efficient way to distribute knowledge. Instead, journals are increasingly becoming electronic, and libraries and their users are given access to these electronic journals through password-protected sites. Something similar to this has been happening in law for almost thirty years: Lexis and Westlaw have had electronic versions of case reports available to subscribers to their service. Although a Supreme Court opinion is not copyrighted, and anyone is free to go to a library and read it, Lexis and Westlaw are also free to charge users for the privilege of gaining access to that Supreme Court opinion through their respective services.

There's nothing wrong in general with this, and indeed, the ability to charge for access to even public domain materials is a good incentive for people to develop new and innovative ways to spread knowledge. The law has agreed, which is why Lexis and Westlaw have been allowed to flourish. And if there's nothing wrong with selling the public domain, then there could be nothing wrong, in principle, with selling access to material that is not in the public domain.

But what if the only way to get access to social and scientific data was through proprietary services? What if no one had the ability to browse this data except by paying for a subscription?

As many are beginning to notice, this is increasingly the reality with scientific journals. When these journals were distributed in paper form, libraries could make the journals available to anyone

who had access to the library. Thus, patients with cancer could become cancer experts because the library gave them access. Or patients trying to understand the risks of a certain treatment could research those risks by reading all available articles about that treatment. This freedom was therefore a function of the institution of libraries (norms) and the technology of paper journals (architecture)—namely, that it was very hard to control access to a paper journal.

As journals become electronic, however, the publishers are demanding that libraries not give the general public access to the journals. This means that the freedoms provided by print journals in public libraries begin to disappear. Thus, as with privacy and with software, a changing technology and market shrink a freedom taken for granted before.

This shrinking freedom has led many to take affirmative steps to restore the freedom that has been lost. The Public Library of Science (PLoS), for example, is a nonprofit corporation dedicated to making scientific research available to anyone with a Web connection. Authors of scientific work submit that work to the Public Library of Science. That work is then subject to peer review. If accepted, the work is then deposited in a public, electronic archive and made permanently available for free. PLoS also sells a print version of its work, but the copyright for the print journal does not inhibit the right of anyone to redistribute the work for free.

This is one of many such efforts to restore a freedom taken for granted before, but now threatened by changing technology and markets. There's no doubt that this alternative competes with the traditional publishers and their efforts to make money from the exclusive distribution of content. But competition in

our tradition is presumptively a good—especially when it helps spread knowledge and science.

Gjenoppbygging av fri kultur: En idé

Den samme strategien kan brukes på kultur, som et svar på den økende kontrollen som gjennomføres gjennom lov og teknologi.

Enter the Creative Commons. The Creative Commons is a nonprofit corporation established in Massachusetts, but with its home at Stanford University. Its aim is to build a layer of *reasonable* copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people's work, by making it simple for creators to express the freedom for others to take and build upon their work. Simple tags, tied to human-readable descriptions, tied to bulletproof licenses, make this possible.

Simple—which means without a middleman, or without a lawyer. By developing a free set of licenses that people can attach to their content, Creative Commons aims to mark a range of content that can easily, and reliably, be built upon. These tags are then linked to machine-readable versions of the license that enable computers automatically to identify content that can easily be shared. These three expressions together—a legal license, a human-readable description, and machine-readable tags—constitute a Creative Commons license. A Creative Commons license constitutes a grant of freedom to anyone who accesses the license, and more importantly, an expression of the ideal that the person associated with the license believes in something different than the “All” or “No” extremes. Content is marked with the CC mark, which does

not mean that copyright is waived, but that certain freedoms are given.

These freedoms are beyond the freedoms promised by fair use. Their precise contours depend upon the choices the creator makes. The creator can choose a license that permits any use, so long as attribution is given. She can choose a license that permits only noncommercial use. She can choose a license that permits any use so long as the same freedoms are given to other uses ("share and share alike"). Or any use so long as no derivative use is made. Or any use at all within developing nations. Or any sampling use, so long as full copies are not made. Or lastly, any educational use.

These choices thus establish a range of freedoms beyond the default of copyright law. They also enable freedoms that go beyond traditional fair use. And most importantly, they express these freedoms in a way that subsequent users can use and rely upon without the need to hire a lawyer. Creative Commons thus aims to build a layer of content, governed by a layer of reasonable copyright law, that others can build upon. Voluntary choice of individuals and creators will make this content available. And that content will in turn enable us to rebuild a public domain.

This is just one project among many within the Creative Commons. And of course, Creative Commons is not the only organization pursuing such freedoms. But the point that distinguishes the Creative Commons from many is that we are not interested only in talking about a public domain or in getting legislators to help build a public domain. Our aim is to build a movement of consumers and producers of content ("content conducers," as attorney Mia Garlick calls them) who help build the public domain and, by their work, demonstrate the importance of the public domain to other creativity.

The aim is not to fight the “All Rights Reserved” sorts. The aim is to complement them. The problems that the law creates for us as a culture are produced by insane and unintended consequences of laws written centuries ago, applied to a technology that only Jefferson could have imagined. The rules may well have made sense against a background of technologies from centuries ago, but they do not make sense against the background of digital technologies. New rules—with different freedoms, expressed in ways so that humans without lawyers can use them—are needed. Creative Commons gives people a way effectively to begin to build those rules.

Why would creators participate in giving up total control? Some participate to better spread their content. Cory Doctorow, for example, is a science fiction author. His first novel, *Down and Out in the Magic Kingdom*, was released on-line and for free, under a Creative Commons license, on the same day that it went on sale in bookstores.

Why would a publisher ever agree to this? I suspect his publisher reasoned like this: There are two groups of people out there: (1) those who will buy Cory's book whether or not it's on the Internet, and (2) those who may never hear of Cory's book, if it isn't made available for free on the Internet. Some part of (1) will download Cory's book instead of buying it. Call them bad-(1)s. Some part of (2) will download Cory's book, like it, and then decide to buy it. Call them (2)-goods. If there are more (2)-goods than bad-(1)s, the strategy of releasing Cory's book free on-line will probably *increase* sales of Cory's book.

Indeed, the experience of his publisher clearly supports that conclusion. The book's first printing was exhausted months before the publisher had expected. This first novel of a science fiction author was a total success.

The idea that free content might increase the value of nonfree content was confirmed by the experience of another author. Peter Wayner, who wrote a book about the free software movement titled *Free for All*, made an electronic version of his book free online under a Creative Commons license after the book went out of print. He then monitored used book store prices for the book. As predicted, as the number of downloads increased, the used book price for his book increased, as well.

These are examples of using the Commons to better spread proprietary content. I believe that is a wonderful and common use of the Commons. There are others who use Creative Commons licenses for other reasons. Many who use the "sampling license" do so because anything else would be hypocritical. The sampling license says that others are free, for commercial or noncommercial purposes, to sample content from the licensed work; they are just not free to make full copies of the licensed work available to others. This is consistent with their own art—they, too, sample from others. Because the *legal* costs of sampling are so high (Walter Leaphart, manager of the rap group Public Enemy, which was born sampling the music of others, has stated that he does not "allow" Public Enemy to sample anymore, because the legal costs are so high[2]), these artists release into the creative environment content that others can build upon, so that their form of creativity might grow.

Finally, there are many who mark their content with a Creative Commons license just because they want to express to others the importance of balance in this debate. If you just go along with the system as it is, you are effectively saying you believe

[2] *Willful Infringement: A Report from the Front Lines of the Real Culture Wars* (2003), produced by Jed Horovitz, directed by Greg Hittelman, a Fiat Lucre production, available at link #72 [http://free-culture.cc/notes/].

in the “All Rights Reserved” model. Good for you, but many do not. Many believe that however appropriate that rule is for Hollywood and freaks, it is not an appropriate description of how most creators view the rights associated with their content. The Creative Commons license expresses this notion of “Some Rights Reserved,” and gives many the chance to say it to others.

In the first six months of the Creative Commons experiment, over 1 million objects were licensed with these free-culture licenses. The next step is partnerships with middleware content providers to help them build into their technologies simple ways for users to mark their content with Creative Commons freedoms. Then the next step is to watch and celebrate creators who build content based upon content set free.

These are first steps to rebuilding a public domain. They are not mere arguments; they are action. Building a public domain is the first step to showing people how important that domain is to creativity and innovation. Creative Commons relies upon voluntary steps to achieve this rebuilding. They will lead to a world in which more than voluntary steps are possible.

Creative Commons is just one example of voluntary efforts by individuals and creators to change the mix of rights that now govern the creative field. The project does not compete with copyright; it complements it. Its aim is not to defeat the rights of authors, but to make it easier for authors and creators to exercise their rights more flexibly and cheaply. That difference, we believe, will enable creativity to spread more easily.

Dem, snart

We will not reclaim a free culture by individual action alone. It will also take important reforms of laws. We have a long way to go before the politicians will listen to these ideas and implement these reforms. But that also means that we have time to build awareness around the changes that we need.

In this chapter, I outline five kinds of changes: four that are general, and one that's specific to the most heated battle of the day, music. Each is a step, not an end. But any of these steps would carry us a long way to our end.

1. Flere formaliteter

If you buy a house, you have to record the sale in a deed. If you buy land upon which to build a house, you have to record the purchase in a deed. If you buy a car, you get a bill of sale and register the car. If you buy an airplane ticket, it has your name on it.

These are all formalities associated with property. They are requirements that we all must bear if we want our property to be protected.

In contrast, under current copyright law, you automatically get a copyright, regardless of whether you comply with any formality. You don't have to register. You don't even have to mark your content. The default is control, and “formalities” are banished.

Why?

As I suggested in chapter 10 [142], the motivation to abolish formalities was a good one. In the world before digital

technologies, formalities imposed a burden on copyright holders without much benefit. Thus, it was progress when the law relaxed the formal requirements that a copyright owner must bear to protect and secure his work. Those formalities were getting in the way.

But the Internet changes all this. Formalities today need not be a burden. Rather, the world without formalities is the world that burdens creativity. Today, there is no simple way to know who owns what, or with whom one must deal in order to use or build upon the creative work of others. There are no records, there is no system to trace— there is no simple way to know how to get permission. Yet given the massive increase in the scope of copyright's rule, getting permission is a necessary step for any work that builds upon our past. And thus, the *lack* of formalities forces many into silence where they otherwise could speak.

The law should therefore change this requirement[3]—but it should not change it by going back to the old, broken system. We should require formalities, but we should establish a system that will create the incentives to minimize the burden of these formalities.

The important formalities are three: marking copyrighted work, registering copyrights, and renewing the claim to copyright. Traditionally, the first of these three was something the copyright owner did; the second two were something the government did. But a revised system of formalities would banish the government from the process, except for the sole purpose of approving standards developed by others.

[3] The proposal I am advancing here would apply to American works only. Obviously, I believe it would be beneficial for the same idea to be adopted by other countries as well.

Registrering og fornying

Under the old system, a copyright owner had to file a registration with the Copyright Office to register or renew a copyright. When filing that registration, the copyright owner paid a fee. As with most government agencies, the Copyright Office had little incentive to minimize the burden of registration; it also had little incentive to minimize the fee. And as the Copyright Office is not a main target of government policymaking, the office has historically been terribly underfunded. Thus, when people who know something about the process hear this idea about formalities, their first reaction is panic—nothing could be worse than forcing people to deal with the mess that is the Copyright Office.

Yet it is always astonishing to me that we, who come from a tradition of extraordinary innovation in governmental design, can no longer think innovatively about how governmental functions can be designed. Just because there is a public purpose to a government role, it doesn't follow that the government must actually administer the role. Instead, we should be creating incentives for private parties to serve the public, subject to standards that the government sets.

In the context of registration, one obvious model is the Internet. There are at least 32 million Web sites registered around the world. Domain name owners for these Web sites have to pay a fee to keep their registration alive. In the main top-level domains (.com, .org, .net), there is a central registry. The actual registrations are, however, performed by many competing registrars. That competition drives the cost of registering down, and more importantly, it drives the ease with which registration occurs up.

We should adopt a similar model for the registration and renewal of copyrights. The Copyright Office may well serve as the central registry, but it should not be in the registrar business. Instead, it should establish a database, and a set of standards for registrars. It should approve registrars that meet its standards. Those registrars would then compete with one another to deliver the cheapest and simplest systems for registering and renewing copyrights. That competition would substantially lower the burden of this formality—while producing a database of registrations that would facilitate the licensing of content.

Merking

It used to be that the failure to include a copyright notice on a creative work meant that the copyright was forfeited. That was a harsh punishment for failing to comply with a regulatory rule—akin to imposing the death penalty for a parking ticket in the world of creative rights. Here again, there is no reason that a marking requirement needs to be enforced in this way. And more importantly, there is no reason a marking requirement needs to be enforced uniformly across all media.

The aim of marking is to signal to the public that this work is copyrighted and that the author wants to enforce his rights. The mark also makes it easy to locate a copyright owner to secure permission to use the work.

One of the problems the copyright system confronted early on was that different copyrighted works had to be differently marked. It wasn't clear how or where a statue was to be marked, or a record, or a film. A new marking requirement could solve these problems by recognizing the differences in media, and by allowing the system of marking to evolve as technologies enable it to. The

system could enable a special signal from the failure to mark—not the loss of the copyright, but the loss of the right to punish someone for failing to get permission first.

Let's start with the last point. If a copyright owner allows his work to be published without a copyright notice, the consequence of that failure need not be that the copyright is lost. The consequence could instead be that anyone has the right to use this work, until the copyright owner complains and demonstrates that it is his work and he doesn't give permission.[4] The meaning of an unmarked work would therefore be "use unless someone complains." If someone does complain, then the obligation would be to stop using the work in any new work from then on though no penalty would attach for existing uses. This would create a strong incentive for copyright owners to mark their work.

That in turn raises the question about how work should best be marked. Here again, the system needs to adjust as the technologies evolve. The best way to ensure that the system evolves is to limit the Copyright Office's role to that of approving standards for marking content that have been crafted elsewhere.

For example, if a recording industry association devises a method for marking CDs, it would propose that to the Copyright Office. The Copyright Office would hold a hearing, at which other proposals could be made. The Copyright Office would then select the proposal that it judged preferable, and it would base that choice *solely* upon the consideration of which method could best be integrated into the registration and renewal system. We would not count on the government to innovate; but we would count on

[4] There would be a complication with derivative works that I have not solved here. In my view, the law of derivatives creates a more complicated system than is justified by the marginal incentive it creates.

the government to keep the product of innovation in line with its other important functions.

Finally, marking content clearly would simplify registration requirements. If photographs were marked by author and year, there would be little reason not to allow a photographer to reregister, for example, all photographs taken in a particular year in one quick step. The aim of the formality is not to burden the creator; the system itself should be kept as simple as possible.

The objective of formalities is to make things clear. The existing system does nothing to make things clear. Indeed, it seems designed to make things unclear.

If formalities such as registration were reinstated, one of the most difficult aspects of relying upon the public domain would be removed. It would be simple to identify what content is presumptively free; it would be simple to identify who controls the rights for a particular kind of content; it would be simple to assert those rights, and to renew that assertion at the appropriate time.

2. Kortere vernetid

Vernetiden i opphavsretten har gått fra fjorten år til nittifem år der selskap har forfatterskapet , og livstiden til forfatteren pluss sytti år for individuelle forfattere.

In *The Future of Ideas*, I proposed a seventy-five-year term, granted in five-year increments with a requirement of renewal every five years. That seemed radical enough at the time. But after we lost *Eldred* v. *Ashcroft*, the proposals became even more radical. *The Economist* endorsed a proposal for a fourteen-year

copyright term.[5] Others have proposed tying the term to the term for patents.

I agree with those who believe that we need a radical change in copyright's term. But whether fourteen years or seventy-five, there are four principles that are important to keep in mind about copyright terms.

1. *Keep it short:* The term should be as long as necessary to give incentives to create, but no longer. If it were tied to very strong protections for authors (so authors were able to reclaim rights from publishers), rights to the same work (not derivative works) might be extended further. The key is not to tie the work up with legal regulations when it no longer benefits an author.

2. *Gjør det enkelt:* Skillelinjen mellom verker uten opphavsrettslig vern og innhold som er beskyttet må forbli klart. Advokater liker uklarheten som "rimelig bruk" og forskjellen mellom "idéer" og "uttrykk" har. Denne type lovverk gir dem en masse arbeid. Men de som skrev grunnloven hadde en enklere idé: vernet versus ikke vernet. Verdien av korte vernetider er at det er lite behov for å bygge inn unntak i opphavsretten når vernetiden holdes kort. En klar og aktiv "advokat-fri sone" gjør komplesiteten av "rimelig bruk" og "idé/uttrykk" mindre nødvendig å håndtere.

3. *Keep it alive:* Copyright should have to be renewed. Especially if the maximum term is long, the copyright owner should be required to signal periodically that he wants the protection continued. This need not be an onerous burden, but there is no reason this monopoly protection has to be granted for free.

[5] "A Radical Rethink", *Economist*, 366:8308 (25. januar 2003): 15, tilgjengelig fra link #74 [http://free-culture.cc/notes/].

On average, it takes ninety minutes for a veteran to apply for a pension.[6] If we make veterans suffer that burden, I don't see why we couldn't require authors to spend ten minutes every fifty years to file a single form.

4. *Keep it prospective:* Whatever the term of copyright should be, the clearest lesson that economists teach is that a term once given should not be extended. It might have been a mistake in 1923 for the law to offer authors only a fifty-six-year term. I don't think so, but it's possible. If it was a mistake, then the consequence was that we got fewer authors to create in 1923 than we otherwise would have. But we can't correct that mistake today by increasing the term. No matter what we do today, we will not increase the number of authors who wrote in 1923. Of course, we can increase the reward that those who write now get (or alternatively, increase the copyright burden that smothers many works that are today invisible). But increasing their reward will not increase their creativity in 1923. What's not done is not done, and there's nothing we can do about that now.

Disse endringene vil sammen gi en *gjennomsnittlig* opphavsrettslig vernetid som er mye kortere enn den gjeldende vernetiden. Frem til 1976 var gjennomsnittlig vernetid kun 32.2 år. Vårt mål bør være det samme.

Uten tvil vil ekstremistene kalle disse idéene “radikale”. (Tross alt, så kaller jeg dem “ekstremister”.) Men igjen, vernetiden jeg anbefalte var lengre enn vernetiden under Richard Nixon. hvor “radikalt” kan det være å be om en mer sjenerøs opphavsrettighet enn da Richard Nixon var president?

3. Fri Bruk vs. rimelig bruk

As I observed at the beginning of this book, property law originally granted property owners the right to control their property from the ground to the heavens. The airplane came along. The scope of property rights quickly changed. There was no fuss, no constitutional challenge. It made no sense anymore to grant that much control, given the emergence of that new technology.

Our Constitution gives Congress the power to give authors "exclusive right" to "their writings." Congress has given authors an exclusive right to "their writings" plus any derivative writings (made by others) that are sufficiently close to the author's original work. Thus, if I write a book, and you base a movie on that book, I have the power to deny you the right to release that movie, even though that movie is not "my writing."

Congress granted the beginnings of this right in 1870, when it expanded the exclusive right of copyright to include a right to control translations and dramatizations of a work.[7] The courts have expanded it slowly through judicial interpretation ever since. This expansion has been commented upon by one of the law's greatest judges, Judge Benjamin Kaplan.

> So inured have we become to the extension of the monopoly to a large range of so-called derivative works, that we no longer sense the oddity of accepting such an enlargement of copyright while yet intoning the abracadabra of idea and expression.[8]

[7] Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 32.
[8] Ibid., 56.

I think it's time to recognize that there are airplanes in this field and the expansiveness of these rights of derivative use no longer make sense. More precisely, they don't make sense for the period of time that a copyright runs. And they don't make sense as an amorphous grant. Consider each limitation in turn.

Term: If Congress wants to grant a derivative right, then that right should be for a much shorter term. It makes sense to protect John Grisham's right to sell the movie rights to his latest novel (or at least I'm willing to assume it does); but it does not make sense for that right to run for the same term as the underlying copyright. The derivative right could be important in inducing creativity; it is not important long after the creative work is done.

Scope: Likewise should the scope of derivative rights be narrowed. Again, there are some cases in which derivative rights are important. Those should be specified. But the law should draw clear lines around regulated and unregulated uses of copyrighted material. When all “reuse” of creative material was within the control of businesses, perhaps it made sense to require lawyers to negotiate the lines. It no longer makes sense for lawyers to negotiate the lines. Think about all the creative possibilities that digital technologies enable; now imagine pouring molasses into the machines. That's what this general requirement of permission does to the creative process. Smothers it.

This was the point that Alben made when describing the making of the Clint Eastwood CD. While it makes sense to require negotiation for foreseeable derivative rights—turning a book into a movie, or a poem into a musical score—it doesn't make sense to require negotiation for the unforeseeable. Here, a statutory right would make much more sense.

In each of these cases, the law should mark the uses that are protected, and the presumption should be that other uses are not protected. This is the reverse of the recommendation of my colleague Paul Goldstein.[9] His view is that the law should be written so that expanded protections follow expanded uses.

Goldstein's analysis would make perfect sense if the cost of the legal system were small. But as we are currently seeing in the context of the Internet, the uncertainty about the scope of protection, and the incentives to protect existing architectures of revenue, combined with a strong copyright, weaken the process of innovation.

The law could remedy this problem either by removing protection beyond the part explicitly drawn or by granting reuse rights upon certain statutory conditions. Either way, the effect would be to free a great deal of culture to others to cultivate. And under a statutory rights regime, that reuse would earn artists more income.

4. Frigjør musikken—igjen

The battle that got this whole war going was about music, so it wouldn't be fair to end this book without addressing the issue that is, to most people, most pressing—music. There is no other policy issue that better teaches the lessons of this book than the battles around the sharing of music.

The appeal of file-sharing music was the crack cocaine of the Internet's growth. It drove demand for access to the Internet more powerfully than any other single application. It was the Internet's killer app—possibly in two senses of that word. It no doubt was

[9] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford: Stanford University Press, 2003), 187–216.

the application that drove demand for bandwidth. It may well be the application that drives demand for regulations that in the end kill innovation on the network.

The aim of copyright, with respect to content in general and music in particular, is to create the incentives for music to be composed, performed, and, most importantly, spread. The law does this by giving an exclusive right to a composer to control public performances of his work, and to a performing artist to control copies of her performance.

File-sharing networks complicate this model by enabling the spread of content for which the performer has not been paid. But of course, that's not all the file-sharing networks do. As I described in chapter 5 [80], they enable four different kinds of sharing:

A. Det er noen som bruker delingsnettverk som erstatninger for å kjøpe CDer.

B. There are also some who are using sharing networks to sample, on the way to purchasing CDs.

C. Det er mange som bruker fildelingsnettverk til å få tilgang til innhold som ikke lenger er i salg, men fortsatt er vernet av opphavsrett eller som ville ha vært altfor vanskelig å få kjøpt via nettet.

D. Det er mange som bruker fildelingsnettverk for å få tilgang til innhold som ikke er opphavsrettsbeskyttet, eller for å få tilgang som opphavsrettsinnehaveren åpenbart går god for.

Any reform of the law needs to keep these different uses in focus. It must avoid burdening type D even if it aims to eliminate type A. The eagerness with which the law aims to eliminate type A, moreover, should depend upon the magnitude of type B. As with

VCRs, if the net effect of sharing is actually not very harmful, the need for regulation is significantly weakened.

As I said in chapter 5 [80], the actual harm caused by sharing is controversial. For the purposes of this chapter, however, I assume the harm is real. I assume, in other words, that type A sharing is significantly greater than type B, and is the dominant use of sharing networks.

Uansett, det er et avgjørende faktum om den gjeldende teknologiske omgivelsen som vi må huske på hvis vi skal forstå hvordan loven bør reagere.

Today, file sharing is addictive. In ten years, it won't be. It is addictive today because it is the easiest way to gain access to a broad range of content. It won't be the easiest way to get access to a broad range of content in ten years. Today, access to the Internet is cumbersome and slow—we in the United States are lucky to have broadband service at 1.5 MBs, and very rarely do we get service at that speed both up and down. Although wireless access is growing, most of us still get access across wires. Most only gain access through a machine with a keyboard. The idea of the always on, always connected Internet is mainly just an idea.

But it will become a reality, and that means the way we get access to the Internet today is a technology in transition. Policy makers should not make policy on the basis of technology in transition. They should make policy on the basis of where the technology is going. The question should not be, how should the law regulate sharing in this world? The question should be, what law will we require when the network becomes the network it is clearly becoming? That network is one in which every machine with electricity is essentially on the Net; where everywhere you are—except maybe the desert or the Rockies—you can instantaneously

be connected to the Internet. Imagine the Internet as ubiquitous as the best cell-phone service, where with the flip of a device, you are connected.

In that world, it will be extremely easy to connect to services that give you access to content on the fly—such as Internet radio, content that is streamed to the user when the user demands. Here, then, is the critical point: When it is *extremely* easy to connect to services that give access to content, it will be *easier* to connect to services that give you access to content than it will be to download and store content *on the many devices you will have for playing content*. It will be easier, in other words, to subscribe than it will be to be a database manager, as everyone in the download-sharing world of Napster-like technologies essentially is. Content services will compete with content sharing, even if the services charge money for the content they give access to. Already cell-phone services in Japan offer music (for a fee) streamed over cell phones (enhanced with plugs for headphones). The Japanese are paying for this content even though "free" content is available in the form of MP3s across the Web.[10]

This point about the future is meant to suggest a perspective on the present: It is emphatically temporary. The "problem" with file sharing—to the extent there is a real problem—is a problem that will increasingly disappear as it becomes easier to connect to the Internet. And thus it is an extraordinary mistake for policy makers today to be "solving" this problem in light of a technology that will be gone tomorrow. The question should not be how to regulate the Internet to eliminate file sharing (the Net will evolve that problem away). The question instead should be how to assure that artists get paid, during this transition between

[10] For eksempel, se, "Music Media Watch", The J@pan Inc. Newsletter, 3 April 2002, tilgjengelig fra link #76 [http://free-culture.cc/notes/].

twentieth-century models for doing business and twenty-first-century technologies.

The answer begins with recognizing that there are different "problems" here to solve. Let's start with type D content—uncopyrighted content or copyrighted content that the artist wants shared. The "problem" with this content is to make sure that the technology that would enable this kind of sharing is not rendered illegal. You can think of it this way: Pay phones are used to deliver ransom demands, no doubt. But there are many who need to use pay phones who have nothing to do with ransoms. It would be wrong to ban pay phones in order to eliminate kidnapping.

Type C content raises a different "problem." This is content that was, at one time, published and is no longer available. It may be unavailable because the artist is no longer valuable enough for the record label he signed with to carry his work. Or it may be unavailable because the work is forgotten. Either way, the aim of the law should be to facilitate the access to this content, ideally in a way that returns something to the artist.

Again, the model here is the used book store. Once a book goes out of print, it may still be available in libraries and used book stores. But libraries and used book stores don't pay the copyright owner when someone reads or buys an out-of-print book. That makes total sense, of course, since any other system would be so burdensome as to eliminate the possibility of used book stores' existing. But from the author's perspective, this "sharing" of his content without his being compensated is less than ideal.

The model of used book stores suggests that the law could simply deem out-of-print music fair game. If the publisher does not make copies of the music available for sale, then commercial and noncommercial providers would be free, under this rule, to

“share” that content, even though the sharing involved making a copy. The copy here would be incidental to the trade; in a context where commercial publishing has ended, trading music should be as free as trading books.

Alternatively, the law could create a statutory license that would ensure that artists get something from the trade of their work. For example, if the law set a low statutory rate for the commercial sharing of content that was not offered for sale by a commercial publisher, and if that rate were automatically transferred to a trust for the benefit of the artist, then businesses could develop around the idea of trading this content, and artists would benefit from this trade.

This system would also create an incentive for publishers to keep works available commercially. Works that are available commercially would not be subject to this license. Thus, publishers could protect the right to charge whatever they want for content if they kept the work commercially available. But if they don't keep it available, and instead, the computer hard disks of fans around the world keep it alive, then any royalty owed for such copying should be much less than the amount owed a commercial publisher.

The hard case is content of types A and B, and again, this case is hard only because the extent of the problem will change over time, as the technologies for gaining access to content change. The law's solution should be as flexible as the problem is, understanding that we are in the middle of a radical transformation in the technology for delivering and accessing content.

Så her er en løsning som i første omgang kan virke veldig undelig for begge sider i denne krigen, men som jeg tror vil gi mer mening når en får tenkt seg om.

Stripped of the rhetoric about the sanctity of property, the basic claim of the content industry is this: A new technology (the Internet) has harmed a set of rights that secure copyright. If those rights are to be protected, then the content industry should be compensated for that harm. Just as the technology of tobacco harmed the health of millions of Americans, or the technology of asbestos caused grave illness to thousands of miners, so, too, has the technology of digital networks harmed the interests of the content industry.

Jeg elsker internett, så jeg liker ikke å sammenligne det med tobakk eller asbest. Men analogien er rimelig når en ser det fra lovens perspektiv. Og det foreslår en rimelig respons: I stedet for å forsøke å ødelegge internett eller p2p-teknologien som i dag skader innholdsleverandører på internett, så bør vi finne en relativt enkel måte å kompensere de som blir skadelidende.

The idea would be a modification of a proposal that has been floated by Harvard law professor William Fisher.[11] Fisher

[11] William Fisher, *Digital Music: Problems and Possibilities* (sist revidert: 10. oktober 2000), tilgjengelig fra link #77 [http://free-culture.cc/notes/]; William Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (kommer) (Stanford: Stanford University Press, 2004), kap. 6, tilgjengelig fra link #78 [http://free-culture.cc/notes/]. Professor Netanel har foreslått en relatert idé som ville gjøre at opphavsretten ikke gjelder ikke-kommersiell deling fra og ville etablere kompenasjon til kunstnere for å balansere eventuelle tap. Se Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free P2P File Sharing", tilgjengelig fra link #79 [http://free-culture.cc/notes/]. For andre forslag, se Lawrence Lessig, "Who's Holding Back Broadband?" *Washington Post*, 8. january 2002, A17; Philip S. Corwin på vegne av Sharman Networks, Et brev til Senator Joseph R. Biden, Jr., leder i the Senate Foreign Relations Committee, 26. februar. 2002, tilgjengelig fra link #80 [http://free-culture.cc/notes/]; Serguei Osokine, *A Quick Case for Intellectual Property Use Fee (IPUF)*, 3. mars 2002, tilgjengelig fra link #81 [http://free-culture.cc/notes/]; Jefferson Graham, "Kazaa, Verizon Propose to Pay Artists Directly", *USA Today*, 13. mai

suggests a very clever way around the current impasse of the Internet. Under his plan, all content capable of digital transmission would (1) be marked with a digital watermark (don't worry about how easy it is to evade these marks; as you'll see, there's no incentive to evade them). Once the content is marked, then entrepreneurs would develop (2) systems to monitor how many items of each content were distributed. On the basis of those numbers, then (3) artists would be compensated. The compensation would be paid for by (4) an appropriate tax.

Fisher's proposal is careful and comprehensive. It raises a million questions, most of which he answers well in his upcoming book, *Promises to Keep*. The modification that I would make is relatively simple: Fisher imagines his proposal replacing the existing copyright system. I imagine it complementing the existing system. The aim of the proposal would be to facilitate compensation to the extent that harm could be shown. This compensation would be temporary, aimed at facilitating a transition between regimes. And it would require renewal after a period of years. If it continues to make sense to facilitate free exchange of content, supported through a taxation system, then it can be continued. If this form of protection is no longer necessary, then the system could lapse into the old system of controlling access.

2002, tilgjengelig fra link #82 [http://free-culture.cc/notes/]; Steven M. Cherry, "Getting Copyright Right", IEEE Spectrum Online, 1. juli 2002, tilgjengelig fra link #83 [http://free-culture.cc/notes/]; Declan McCullagh, "Verizon's Copyright Campaign", CNET News.com, 27. august 2002, tilgjengelig fra link #84 [http://free-culture.cc/notes/]. Forslaget fra Fisher er ganske likt forslaget til Richard Stallman når det gjelder DAT. I motsetning til Fishers forslag, ville Stallmanns forslag ikke betale kunstnere proposjonalt, selv om mer populære artister ville få mer betalt enn mindre populære. Slik det er typisk med Stallman, la han fram sitt forslag omtrent ti år før dagens debatt. Se link #85 [http://free-culture.cc/notes/].

Fisher would balk at the idea of allowing the system to lapse. His aim is not just to ensure that artists are paid, but also to ensure that the system supports the widest range of "semiotic democracy" possible. But the aims of semiotic democracy would be satisfied if the other changes I described were accomplished—in particular, the limits on derivative uses. A system that simply charges for access would not greatly burden semiotic democracy if there were few limitations on what one was allowed to do with the content itself.

No doubt it would be difficult to calculate the proper measure of "harm" to an industry. But the difficulty of making that calculation would be outweighed by the benefit of facilitating innovation. This background system to compensate would also not need to interfere with innovative proposals such as Apple's MusicStore. As experts predicted when Apple launched the MusicStore, it could beat "free" by being easier than free is. This has proven correct: Apple has sold millions of songs at even the very high price of 99 cents a song. (At 99 cents, the cost is the equivalent of a per-song CD price, though the labels have none of the costs of a CD to pay.) Apple's move was countered by Real Networks, offering music at just 79 cents a song. And no doubt there will be a great deal of competition to offer and sell music on-line.

This competition has already occurred against the background of "free" music from p2p systems. As the sellers of cable television have known for thirty years, and the sellers of bottled water for much more than that, there is nothing impossible at all about "competing with free." Indeed, if anything, the competition spurs the competitors to offer new and better products. This is precisely what the competitive market was to be about. Thus in Singapore, though piracy is rampant, movie theaters are often luxurious—

with “first class” seats, and meals served while you watch a movie —as they struggle and succeed in finding ways to compete with “free.”

Dette konkurranseregimet, med en sikringsmekanisme for å sikre at kunstnere ikke taper, ville bidra mye til nyskapning innen levering av innhold. Konkurransen ville fortsette å redusere type-A-deling. Det ville inspirere en ekstraordinær rekke av nye innovatører—som ville ha retten til a bruke innhold, og ikke lenger frykte usikre og barbarisk strenge straffer fra loven.

Oppsummert, så er dette mitt forslag:

Internett er i endring. Vi bør ikke regulere en teknologi i endring. Vi bør i stedet regulere for å minimere skaden påført interesser som er berørt av denne teknologiske endringen, samtidig vi muliggjør, og oppmuntrer, den mest effektive teknologien vi kan lage.

Vi kan minimere skaden og samtidig maksimere fordelen med innovasjon ved å

1. garantere retten til å engasjere seg i type-D-deling;

2. tillate ikke-kommersiell type-C-deling uten erstatningsansvar, og kommersiell type-C-deling med en lav og fast rate fastsatt ved lov.

3. mens denne overgangen pågår, skattlegge og kompensere for type-A-deling, i den grad faktiske skade kan påvises.

Men hva om “piratvirksomheten” ikke forsvinner? Hva om det finnes et konkurranseutsatt marked som tilbyr innhold til en lav kostnad, men et signifikant antall av forbrukere fortsetter å “ta” innhold uten å betale? Burde loven gjøre noe da?

Ja, det bør den. Men, nok en gang, hva den bør gjøre avhenger hvordan realitetene utvikler seg. Disse endringene fjerner kanskje ikke all type-A-deling. Men det virkelige spørmålet er ikke om de eliminerer deling i abstrakt betydning. Det virkelige spørsmålet er hvilken effekt det har på markedet. Er det bedre (a) å ha en teknologi som er 95 prosent sikker og gir et marked av størrelse *x*, eller (b) å ha en teknologi som er 50 prosent sikker, og som gir et marked som er fem ganger større enn *x*? Mindre sikker kan gi mer uautorisert deling, men det vil sannsynligvis også gi et mye større marked for autorisert deling. Det viktigste er å sikre kunstneres kompensasjon uten å ødelegge internettet. Når det er på plass, kan det hende det er riktig å finne måter å spore opp de smålige piratene.

Men vi er langt unna å spikke problemet ned til dette delsettet av type-A-delere. Og vårt fokus inntil er der bør ikke være å finne måter å ødelegge internettet. Var fokus inntil vi er der bør være hvordan sikre at artister får betalt, mens vi beskytter rommet for nyskapning og kreativitet som internettet er.

5. Spark en masse advokater

Jeg er en advokat. Jeg lever av å utdanne advokater. Jeg tror på loven. Jeg tror på opphavsrettsloven. Jeg har faktisk viet livet til å jobbe med loven, ikke fordi det er mye penger å tjene, men fordi det innebærer idealer som jeg elsker å leve opp til.

Likevel har mye av denne boken vært kritikk av advokater, eller rollen advokater har spilt i denne debatten. Loven taler om idealer, mens det er min oppfatning av vår yrkesgruppe er blitt for knyttet til klienten. Og i en verden der rike klienter har sterke synspunkter vil uviljen hos vår yrkesgruppe til å stille spørsmål med eller protestere mot dette sterke synet ødelegge loven.

Indisiene for slik bøyning er overbevisene. Jeg er angrepet som en "radikal" av mange innenfor yrket, og likevel er meningene jeg argumenterer for nøyaktig de meningene til mange av de mest moderate og betydningsfulle personene i historien til denne delen av loven. Mange trodde for eksempel at vår utfordring til lovforslaget om å utvide opphavsrettens vernetid var galskap. Mens bare tredve år siden mente den dominerende foreleser og utøver i opphavsrettsfeltet, Melville Nimmer, at den var åpenbar.[12]

Min kritikk av rollen som advokater har spilt i denne debatten handler imidlertid ikke bare om en profesjonell skjevhet. Det handler enda viktigere om vår manglende evne til å faktisk ta inn over oss hva loven koster.

Økonomer er forventet å være gode til å forstå utgifter og inntekter. Men som oftest antar økonomene uten peiling på hvordan det juridiske systemet egentlig fungerer, at transaksjonskostnaden i det juridiske systemet er lav.[13] De ser et system som har eksistert i hundrevis av år, og de antar at det

[12] Lawrence Lessig, "Copyright's First Amendment" (Melville B. Nimmer Memorial Lecture), *UCLA law Review* 48 (2001): 1057, 1069–70.

[13] Et godt eksempel er arbeidet til professor Stan Liebowitz. Liebowitz bør få ros for sin nøye gjennomgang av data om opphavsrettsbrudd, som fikk ham til å stille spørsmål med sin egen uttalte posisjon—to ganger. I starten predicated han at nedlasting ville påføre industrien vesentlig skade. Han endret så sitt syn etter i lys av dataene, og han har siden endret sitt syn på nytt. Sammenlign Stan J. Liebowitz, *Rethinking the Network Economy: The True Forces That Drive the Digital Marketplace* (New York: Amacom, 2002), (gikk igjennom hans originale syn men uttrykte skepsis) med Stan J. Liebowitz, "Will MP3s Annihilate the Record Industry?" artikkelutkast, juni 2003, tilgjengelig fra link #86 [http://free-culture.cc/notes/]. Den nøye analysen til Liebowitz er ekstremt verdifull i sin estimering av effekten av fildelingsteknologi. Etter mitt syn underestimerer han forøvrig kostnaden til det juridiske system. Se, for eksempel, *Rethinking*, 174–76.

fungerer slik grunnskolens samfunnsfagsundervisning lærte dem at det fungerer.

Men det juridiske systemet fungerer ikke. Eller for å være mer nøyaktig, det fungerer kun for de med mest ressurser. Det er ikke fordi systemet er korrupt. Jeg tror overhodet ikke vårt juridisk system (på føderalt nivå, i hvert fall) er korrupt. Jeg mener ganske enkelt at på grunn av at kostnadene med vårt juridiske systemet er så hårreisende høyt vil en praktisk talt aldri oppnå rettferdighet.

Disse kostnadene forstyrrer fri kultur på mange vis. En advokats tid faktureres hos de største firmaene for mer enn $400 pr. time. Hvor mye tid bør en slik advokat bruke på å lese sakene nøye, eller undersøke obskure rettskilder. Svaret er i økende grad: svært lite. Jussen er avhengig av nøye formulering og utvikling av doktrine, men nøye formulering og utvikling av doktrine er avhengig av nøyaktig arbeid. Men nøyaktig arbeid koster for mye, bortsett fra i de mest høyprofilerte og kostbare sakene.

Kostbarheten, klomsetheten og tilfeldigheten til dette systemet håner vår tradisjon. Og advokater, såvel som akademikere, bør se det som sin plikt å endre hvordan loven praktiseres— eller bedre, endre loven slik at den fungerer. Det er galt at systemet fungerer godt bare for den øverste 1-prosenten av klientene. Det kan gjøres radikalt mer effektivt, og billig, og dermed radikalt mer rettferdig.

Men inntil en slik reform er gjennomført, bør vi som samfunn holde lover unna områder der vi vet den bare vil skade. Og det er nettopp det loven altfor ofte vil gjøre hvis for mye av vår kultur er lovregulert.

Tenk på de fantastiske tingene ditt barn kan gjøre eller lage med digital teknologi—filmen, musikken, web-siden, bloggen. Eller tenk på de fantastiske tingene ditt fellesskap kunne få til med

digital teknologi—en wiki, oppsetting av låve, kampanje til å endre noe. Tenk på alle de kreative tingene, og tenk deretter på kald sirup helt inn i maskinene. Dette er hva et hvert regime som krever tillatelser fører til. Dette er virkeligheten slik den var i Brezhnevs Russland.

Loven bør regulere i visse områder av kulturen—men det bør regulere kultur bare der reguleringen bidrar positivt. Likevel tester advokater sjeldent sin kraft, eller kraften som de fremmer, mot dette enkle pragmatisk spørsmålet: "vil det bidra positivt?". Når de blir utfordret om det utvidede rekkevidden til loven, er advokat-svaret, "Hvorfor ikke?"

Vi burde spørre: "Hvorfor?". Vis meg hvorfor din regulering av kultur er nødvendig og vis meg hvordan reguleringen bidrar positivt. Før du kan vise meg begge, holde advokatene din unna.

Kapittel 17. Notater

I denne teksten er det referanser til lenker på verdensveven. Og som alle som har forsøkt å bruke nettet vet, så vil disse lenkene være svært ustabile. Jeg har forsøkt å motvirke denne ustabiliteten ved å omdirigere lesere til den originale kilden gjennom en nettside som hører til denne boken. For hver lenke under, så kan du gå til http://free-culture.cc/notes og finne den originale kilden ved å klikke på nummeret etter #-tegnet. Hvis den originale lenken fortsatt er i live, så vil du bli omdirigert til den lenken. Hvis den originale lenken har forsvunnet, så vil du bli omdirigert til en passende referanse til materialet.

Kapittel 18. Takk til

Denne boken er produktet av en lang og så langt mislykket kamp som begynte da jeg leste om Eric Eldreds krig for å sørge for at bøker forble frie. Eldreds innsats bidro til å lansere en bevegelse, fri kultur-bevegelsen, og denne boken er tilegnet ham.

Jeg fikk veiledning på ulike steder fra venner og akademikere, inkludert Glenn Brown, Peter DiCola, Jennifer Mnookin, Richard Posner, Mark Rose og Kathleen Sullivan. Og jeg fikk korreksjoner og veiledning fra mange fantastiske studenter ved Stanford Law School og Stanford University. Det inkluderer Andrew B. Coan, John Eden, James P. Fellers, Christopher Guzelian, Erica Goldberg, Robert Hallman, Andrew Harris, Matthew Kahn, Brian-Link, Ohad Mayblum, Alina Ng og Erica Platt. Jeg er særlig takknemlig overfor Catherine Crump og Harry Surden, som hjalp til med å styre deres forskning og til Laura Lynch, som briljant håndterte hæren de samlet, samt bidro med sitt egen kritisk blikk på mye av dette.

Yuko Noguchi hjalp meg å forstå lovene i Japan, så vel som Japans kultur. Jeg er henne takknemlig, og til de mange i Japan som hjalp meg med forundersøkelsene til denne boken: Joi Ito, Takayuki Matsutani, Naoto Misaki, Michihiro Sasaki, Hiromichi Tanaka, Hiroo Yamagata og Yoshihiro Yonezawa. Jeg er også takknemlig til professor Nobuhiro Nakayama og Tokyo University Business Law Center, som ga meg muligheten til å bruke tid i Japan, og Tadashi Shiraishi og Kiyokazu Yamagami for deres generøse hjelp mens jeg var der.

Dette er de tradisjonelle former for hjelp som akademikere regelmessig trekker på. Men i tillegg til dem, har Internett gjort det

mulig å motta råd og korrigering fra mange som jeg har aldri møtt. Blant de som har svart med svært nyttig råd etter forespørsler om boken på bloggen min er Dr. Muhammed Al-Ubaydli, David Gerstein og Peter Dimauro, I tillegg en lang liste med de som hadde spesifikke idéer om måter å utvikle mine argumenter på. De inkluderte Richard Bondi, Steven Cherry, David Coe, Nik Cubrilovic, Bob Devine, Charles Eicher, Thomas Guida, Elihu M. Gerson, Jeremy Hunsinger, Vaughn Iverson, John Karabaic, Jeff Keltner, James Lindenschmidt, K. L. Mann, Mark Manning, Nora McCauley, Jeffrey McHugh, Evan McMullen, Fred Norton, John Pormann, Pedro A. D. Rezende, Shabbir Safdar, Saul Schleimer, Clay Shirky, Adam Shostack, Kragen Sitaker, Chris Smith, Bruce Steinberg, Andrzej Jan Taramina, Sean Walsh, Matt Wasserman, Miljenko Williams, “Wink,” Roger Wood, “Ximmbo da Jazz,” og Richard Yanco. (jeg beklager hvis jeg gikk glipp av noen, med datamaskiner kommer feil og en krasj i e-postsystemet mitt gjorde at jeg mistet en haug med flotte svar.)

Richard Stallman og Michael Carroll har begge lest hele boken i utkast, og hver av dem har bidratt med svært nyttige korreksjoner og råd. Michael hjalp meg å se mer tydelig betydningen av regulering for avledede verker . Og Richard korrigerte en pinlig stor mengde feil. Selv om mitt arbeid er delvis inspirert av Stallmans, er han ikke enig med meg på vesentlige steder i denne boken.

Til slutt, og for evig, er jeg Bettina takknemlig, som alltid har insistert på at det ville være endeløs lykke utenfor disse kampene, og som alltid har hatt rett. Denne trege eleven er som alltid takknemlig for hennes evigvarende tålmodighet og kjærlighet.

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