# Copyright and Creativity

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In his new book, *Free Culture* (Penguin Press, 2004), Larry Lessig of Stanford Law School presents an excellent explanation of copyright law's effect on creativity—and of large corporations' effect on copyright law. Lessig is well known as the founder of Creative Commons (www.creativecommons.org), the opponent of copyright term extension in the 2002 *Eldred v. Ashcroft* suit before the US Supreme Court, and a leading advocate of a larger public domain.

*Free Culture* covers the history of copyright and its expansion from books to music, pictures, and videos, as well as its extension from 28 to 95 years. The book is remarkable because—unlike the vast majority of flaming on both sides of the downloading controversy—it presents both a factual argument and proposed solutions.

Lessig documents the concentration of media ownership and the expansion of intellectual property's protected area, which work to put increasingly more creative output in the hands of fewer organizations. Even cliché phrases can now "belong" to somebody. Rupert Murdoch's Fox News has tried to claim control of the words "fair and balanced," for example, and Donald Trump wants to trademark "you're fired." What can you say if you can't allude to anything that's gone before without stepping on the toes of someone who can afford a bigger lawsuit than you can?

## Suppose Holinshed had sued Shakespeare

Perhaps the deepest question in the book is the extent to which new creativity depends on earlier work. A Platonist, of course, would say that we invent nothing; we only remember things and adapt them. Many great creations are indeed derived from earlier works. Beethoven wrote some variations on Thomas Arne's *Rule Britannia*, others on a minor work by Anton Diabelli, and still others on "God Save the King" (often attributed to Henry Carey). Monet painted the Gare St. Lazare, designed by Eugène Flachat. And Disney's 1950 movie *Kim* was based on a 1901 novel by Rudyard Kipling; the copyright term in 1901 was 48 years, which means the movie came out one year after the novel's copyright expired.

Shakespeare, of course, took several of his plots from Raphael Holinshed's 1587 *Chronicles of England, Scotland, and Irelande*. (See John Julius Norwich's *Shakespeare's Kings* [Scribner, 2000] for a fascinating comparison of history as Shakespeare wrote it, as he read it, and as we think it really was.) Shakespeare himself has been reused constantly, including Bernstein and Sondheim's *West Side Story*, Rodgers and Hart's *The Boys from Syracuse*, or Jane Smiley's *A Thousand Acres*, to name but a few.

This begs the question of whether it is more admirable to create anew or to adapt earlier work. Any theatre producer will tell you that it's easier to sell tickets to a new version of *Hamlet* or *Don Giovanni*, whether set in a Mafia family or a cheese factory, than to find patrons for a new play or opera. Salvador Dali wrote in his autobiography, *Dali by Dali*, "Those who do not want to imitate anything, produce nothing." Yet, supporters of the Recording Industry Association of America (RIAA) suggest it is a higher form of creativity to produce something completely new. They might quote Ralph Waldo Emerson's *Self-Reliance*: "Insist on yourself; never imitate." (Of course, if it weren't for fair use and the expiration of copyright terms, they might have to pay to do so.)

Clearly, there is a continuum between imitation and inspiration, but Lessig shows that we used to be able to draw on a much larger fraction of our culture than we can today. He follows the various changes in copyright law, the way people could use existing ideas in the past, and the difficulties in using even trivial quotations from other works today. A picture as simple as the New York City skyline becomes impossible to reproduce if building owners demand payment when images of their buildings appear somewhere (as the Chrysler Building's owners are now doing to movie studios).

## Lessig of La Mancha

Lessig spends a good part of the book with the *Eldred v. Ashcroft* lawsuit, including several pages taking the blame for failing to get the Supreme Court to declare copyright term extension unconstitutional. In truth,

however, there was never much chance of winning. After the argument in that case, I sat at a lunch table with several lawyers, and one of them pointed out that Solicitor General Theodore Olson had taken the case, rather than assigning it to a subordinate. Olson was 7 and 0 in his personal appearances in the Court, and another man recognized that Olson wouldn't have argued the case himself unless he was sure it was a "slam dunk."

Relying on his faith in the Court's nonpolitical nature, however, Lessig seems to think a different argument might have won. "I had spent my life teaching my students that this Court does the right thing—not because of politics but because it was right," he writes. Was this man awake for the 2000 Presidential election? I agree that the Court is a much better place than the US Congress for someone arguing law and morality without money behind him. Unfortunately, I really can't think that a different approach would have succeeded (see my January/February 2003 column, "Copyright Extension: *Eldred v. Ashcroft*," for more).

On the other hand, I'm very glad that Lessig argued this case, although he has been criticized for bringing it with little chance of success. The case's publicity has encouraged Congress to consider new bills in favor of a larger public domain, and it has energized some in the computing community to take an interest in copyright law.

In the Eldred case, the Supreme Court said term extension simply changed some numbers within the traditional copyright regime. Does this mean that a change that radically alters what we mean by copyright would be unconstitutional? We'll likely find out soon: Lessig is raising that issue in a new case, *Kahle v. Ashcroft*. He is arguing on the Internet Archive's behalf that Congress overstepped its rights in removing requirements for formal notice or registration for copyright, which the US had required for almost two centuries until joining the Berne Convention international copyright treaty.

Will the Supreme Court find that the First Amendment or the Copyright Clause of the US Constitution requires Congress to retain a notice or registration requirement for copyright? I'm skeptical, but again, this court case is helping gain adherents and publicity for the limited-copyright view.

## Solutions

Although many are working to increase the public domain, a protected area will always remain to encourage writers, artists, and musicians. If personal copying makes it difficult to compensate these creators by royalties on industrial-scale distribution, what might take its place?

Following the model used in many European countries, Lessig proposes using tax money, rather than just sales, to compensate creative artists. Germany, for example, paid its composers' society about 20 million euros in 2002 collected from a tax on blank tapes and discs. The Netherlands also compensates composers from a tax on CDRs. It charges different rates for audio and data CDRs, believing about a fifth of the data CDRs are used for music; presumably all the audio CDRs (which are made to work with particular recording hardware that enforces serial copy-management rules) are used for music. The US already has a special tax on digital audio tapes (DATs) to help composers, but not on other media. It wouldn't be difficult to extend this to implement the proposed model.

If we estimate that artist royalties are 10 percent of the roughly US$12 billion in annual audio CD sales, and that (according to Ritek CEO Gordon Yeh) about 11 or 12 billion blank CDRs will be sold in 2004, a tax of 10 cents per disk could completely replace the royalties if all CD sales went away. Alternatively, we could divide the tax among blank CDRs, cassette tapes (for as long as they are sold), and hard disk drives (a much larger market of some US$20 billion per year).

As Lessig points out, however, this model breaks down once the Internet can stream music so quickly that people just download songs each time they listen rather than burning them to CD. In anticipation of this change, perhaps we could consider a tax on bandwidth: given some US$30 billion per year in ISP revenues, raising US$1 billion to compensate artists would require about a 3 percent tax. Congress is unlikely to plan so far ahead, however.

Beyond just finding the money to reward those who create new work, we also must ensure that the money can flow to them with reasonable efficiency. The book emphasizes the importance of getting the law right. If everyone perceives the law as fair and reasonable, we can minimize administrative costs while reducing intellectual-property sellers' need to introduce elaborate, rigid technological controls. Such controls tend to stop not only piracy but also what is now considered "fair use," which the publishing industry has said it feels no obligation to help. As Lessig paints it, "If they can find a distribu-

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tion method that provides no access without payment, not even trivial access or educational use, they might impose it. The closer we can make our law to a reasonable bargain, the more we discourage attempts at both piracy and protection."

In the near term, Lessig supports the Public Domain Enhancement Act. This new bill before the US Congress would require copyright owners to reregister copyrighted works for a nominal fee after 50 years to preserve protection. The intent isn't to discourage people from renewing work they think is valuable, but to ease the passage into the public domain for the vast majority of older material that has no commercial value, and whose owners either don't care about it or don't even remember that they have it. In addition, this law would help those who are interested in licensing works by providing the current owner's name and address. (See www.eldred.cc for more on this bill.)

Unfortunately, the bill is under attack by the usual groups, including Jack Valenti and the Motion Picture Association of America (MPAA). I recently asked a class of students to prepare arguments for and against this bill. They proposed a variety of reasons this would be a bad law, including the administrative hassle on copyright owners and the risk of a new government bureaucracy making a mess of things. But neither they nor I came up with what Lessig believes is the real reason the bill is in trouble. He says the MPAA and its friends aren't really worried about the difficulties they would face in renewing their own productions, but rather about the number of other people's works that would go into the public domain.

By keeping old but commercially worthless works inaccessible for administrative reasons, they minimize competition for their own work. They oppose the bill not because it might cause some of their material to enter to public domain, but because it might cause works that are now ignored to become available. In other words, they oppose the bill not because it wouldn't work, but because it would. If it is hard to present old works, theatre patrons will have to buy tickets for new productions. But will modern drama be as good if it can't be inspired by older works?

Many uses of downloading are actually innocuous or helpful. In an effort to reach a wider audience and spur concert-ticket sales, for example, some musicians are happy to give their music away. Since Lessig's book was written, professors Felix Oberholzer-Gee of Harvard and Koleman Strumpf of the University of North Carolina at Chapel Hill have also presented data showing that downloading doesn't seem to have a net effect on CD sales. This might mean that for every CD not sold because someone downloaded it, someone else bought a CD because they downloaded part of it and liked it.

As further evidence, the National Academy Press has found that allowing people to read their books online has increased the number of paper copies sold; Lessig is trying the same experiment with *Free Culture*, which is available online at www.free-culture.org/freecontent.

There is a great deal more in this book—about the Internet, about history, and about our culture. I recommend it to everyone interested in public policy about copyright, downloading, and the deeper questions of how best to encourage a creative society. □

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