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The Creative Commons

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COMMENTARY

THE CREATIVE COMMONS*

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In 1928, a hero of mine, Walt Disney, created Steamboat Willie. It is from Steamboat Willie that we got Mickey Mouse, and from Mickey Mouse that we got the Disney Corporation. So much you are likely to have known. But what you might not have known is that in 1928, another man, Buster Keaton, also produced a work of similar comic genius. That work was called Steamboat Bill, Jr. And it was from Steamboat Bill, Jr. that Walt Disney was inspired to create Steamboat Willie. Indeed, so explicitly was Steamboat Bill, Jr. part of the creation of Steamboat Willie that in the storyboard for the cartoon Steamboat Willie, the direction explicitly states that the music to be used in the creation of the character was the music from Steamboat Bill.

So from Steamboat Bill, we got Steamboat Willie, and from Steamboat Willie, we got Mickey Mouse, and from Mickey Mouse, the Disney Corporation. This is a kind of creativity. You could call it Disney creativity, but we should be more precise. This is "Walt Disney creativity," and it was shot through Walt Disney's creative work. He was always parroting the feature

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length mainstream films. His career was filled with examples of taking works that were in the public domain, and parroting, changing, improving them to produce something new.

There are other, more famous examples. The Brothers Grimm produced fairytales. They were, in a word, grim: bloody, moralistic stories that were brushed-up for us by the creativity of Walt Disney. We now think of them as nice stories, stories you should let your children read. But only a very ambitious parent would expose their children to the original Grimm fairytales. We think of them as nice today because they have been retold to us through this instance of Disney creativity. He changed that work that was before. He changed it by embracing it and embracing a freedom that the law gave him to take, to change and to release other people's work.

This ideal of Disney creativity is of course not limited to Disney. Nor is it limited to the United States. Indeed, it's a famous part of Japanese culture right now. The Japanese are obsessed with a kind of comic that they call "Manga". Manga in Japan constitutes forty percent of all publications in the Japanese market, thirty percent of revenues to publishers.

In addition to Manga, there's another strain of comics called "Dojinshi". These are what we would call copycat comics. A whole industry of creators takes existing comics and modifies them in slight or dramatic way, and releases that modified version as a Dojinshi comic. There are 33,000 circles of these creators in Japan right now, and twice a year the largest public gathering of people in Japan is a conference to trade and sell these Dojinshi comics. This engine of creative work has been described as the source of the extraordinary creativity that exists in the context of comics in Japan today. That creativity feeds the mainstream creation of Manga comics.

The ideal of this form of creativity—both Walt Disney creativity and the creativity that exists in Japan—still lives, even in America. It has been exploded recently by the introduction of a technology that enables a wide range of people to participate in exactly this form of creativity. This is digital technology, which is creating digital tools that people can use to express and recreate the culture around them.

This technology has created the digital consumer. Digital consumers are different from analog consumers. The analog consumer was the couch potato—passive, programmed, broadcast to. The digital consumer is active, rather than passive. She programs, rather than is programmed. And in peer-to-peer

manner, she spreads her creativity to the many, rather than receiving it broadcast from the few.

Here's an example that Apple is proud of: Brad Schaeffer, a 14-year-old, took Apple's iMovie technology, and produced a film that HBO purchased and put on HBO. Or here's another example that captures a bit more clearly the potential for political speech using this type of technology: a digitally remixed video of President Bush and Prime Minister Blair singing "Endless Love" in perfect lip-synchronization.

The majority of the best of these products are by amateurs, not professionals: amateurs taking digital technology and finding a way to change the content to express their message. This technology enables active programming, feeding creators and building culture in a way that's different from the culture-building that we all grew up with. It's a technology that enables sampling, changing, releasing culture in exactly the way Walt Disney did. But this is Walt Disney creativity squared, for this is an imagination and a set of tools that reaches beyond large corporations into the hands of ordinary people.

This technology has inspired a market that builds on this freedom to create. Apple sells the idea of the "Rip. Mix. Burn." Culture—the idea that you should be free to take or rip; you should be free to change or mix; you should be free to release or burn, all producing a culture that expresses ideas differently. It is exactly the freedom that Disney knew. But now technology explodes the possibility for creativity—unless the law gets in the way.

So here's the puzzle. Let's go back to comics. Manga in Japan is a flourishing market. United States Manga is essentially dead. We've got men in tights. We even have women in tights. But it's the same sort of thing that it's always been. It's not growing. It's essentially dead. Why is this?

From a Disney perspective, the reason is obvious. The reason is that the law now regulates Disney creativity. For example, in 1995, Alvin Cat and Chris Wren released a rip, mix and burn of the Cat in the Hat—titled "The Cat Not in the Hat." It was a takeoff on the O.J. Simpson trial. They released that cartoon and quickly found themselves in federal court sued by the owners of Dr. Seuss's copyrights for a claim that the effort to rip, mix, and burn culture was no longer permitted.

Or much more famously, in 1971 Bobby London and Danny O'Neill produced a cartoon called *Air Pirates*. It was a critical view of Mickey Mouse. But they found quite quickly that the

courts would intervene to tell them that they were not free to rip, mix, and burn Mickey Mouse.

So one might wonder: How is it that if Mickey Mouse is permitted, *Air Pirates* is not? It is because the law governing creativity has changed, transformed dramatically in the past forty years in a way that removes the opportunity for the kind of creativity that was our tradition just at the time when the technology would turn it into something extraordinary.

We are in the middle of a war. A copyright war. A war that Jack Valenti calls a "terrorist war," where the terrorists are our own children. A war that lobbyists have won by convincing the world that this constant value of copyright is now under threat. This war is to defend this constant value—as Jack Valenti preaches, this traditional value—of copyright.

But here's what we miss. Copyright is not the Rock of Gibraltar. It has not remained fixed over the ages. Instead, copyright is constantly changing. It was a tiny little bit of regulation of the creative process; it has since expanded dramatically. And so before we allow the law to intervene to render this digital consumer illegal, we should ask—does the mix of protection that copyright law gives make sense? Does it make sense still?

Let's begin by understanding the changes that copyright law has undergone. There are five dimensions. First, duration: Disney builds its empire on top of the public domain because the culture in the public domain was free to take. It was free to take because copyrights expire, and when they expire, the work passes into a public domain. What is the public domain? The public domain is a lawyer-free zone. It is a place where culture lives permission-free. One needs no authority from anybody to take and build upon culture that lives in the public domain. It is guaranteed by the freedom of the public domain forever. Copyrights expire because the Constitution says they are to be limited.

In the Anglo-American tradition, before at least 1774, they were not limited. Copyrights before 1774 were perpetual. But after a decision in 1774 interpreting the Statute of Anne (of 1710) established that the term of copyright was set by statute, limited terms became the norm.

The United States copied English law. In 1789, we adopted in our Constitution a clause that says that "Congress has the power to promote the progress of science . . . by securing for limited times exclusive rights to authors . . . for their writings . . . ."

In 1790, the framers of that Constitution created a copy-

right term that was fourteen years and could be renewed once if the author lived to the end of the first term. Five percent of work that could have been copyrighted was actually copyrighted during the first ten years of that regime, and the vast majority of that copyrighted work was never renewed. Thus, ninety-five percent of creative work passed into the public domain immediately.

This term of protection has changed. In 1831 it was extended to forty-two years. In 1909, to fifty-six years. And then, beginning in 1962, the copyright term has been increased for works that already exist quite regularly. Eleven times in the last forty years Congress has extended the copyright term for existing works. The latest of these extensions was the Sonny Bono Copyright Term Extension Act, which extended the terms of existing copyrights by twenty years. In practice (regardless of theory), we have established a system of perpetual copyright, even if only granted, as Peter Jaszi has described it, on the installment plan.

This is the system that has replaced the idea that copyrights would expire and that works would pass into the public domain. And the effect of this change has been especially dramatic in the last thirty years. In 1973 the average term of copyrights was just 32.2 years. Because copyrights had to be renewed after twenty-eight years, and eighty-five percent of copyrighted works were never renewed, the average term was quite short. But after changes in the 1976 Act, and especially after the most recent extensions, the average term is now the maximum. For corporate works, that means a term of ninety-five years. The average term for corporate works has thus tripled in the last thirty years.

Second, copyright's scope: In 1790, copyright reached maps, charts and books. Its protection extended to someone's effort to republish maps, charts and books. It restricted the publication of the same work, not a derivative work, and it gave that protection only if you registered the work, only if you deposited copies of the work in a library, and only if you marked the work with a symbol to put the world on notice. The law was essentially a regulation of publishers. In 1790, there were 174 publishers in the United States. It was a tiny regulation of a tiny part of the American economy.

This, too, has changed dramatically. The law no longer regulates just maps, charts and books; it governs anything basically reduced to a tangible form. It regulates not just against

someone who wants to republish the same work; it regulates anyone who would "copy" the work. It regulates not just the same work, but derivative works too. It regulates whether or not the work is registered, whether or not the work is deposited, whether or not it is marked with the famous copyright mark—©. Automatically, copyright law regulates essentially any creative work reduced to a tangible form.

Third is a change in reach: Copyright law regulates copies. So let's think about all the possible uses of a copyrighted work. Take a book. Many of these uses of a book in real space are totally unregulated. You can read a book without the copyright law regulating you because there's no copy made when you read a book. You can give it to someone without the copyright law regulating you because there's no copy made when you give a book to someone. You can sell it without the law regulating you, you can sleep on it without the law regulating you. You can do all of these things without the regulation of the law.

At the core of all these possible uses is a set of uses that the law traditionally granted copyright owners control over. So, for example, if you want to publish a copyrighted work, that's a regulated use of the work. And then, in addition to the unregulated and regulated uses of the work, there's a tiny sliver of presumptively regulated uses which the law privileges whether or not the copyright owner agrees. These uses are fair uses. So you're allowed to quote my book in a review of my book, even if it's critical, regardless of what I say. You have that right protected by the law.

Enter the Internet, with a fundamental architectural feature: Every act on the Internet is a copy. Every act in a digital network produces a copy. And that simple architectural fact means that the scope of copyright regulation has changed dramatically.

Here's an instance of what I'm thinking of here. I have an E-book reader provided to me by Adobe Corporation. That reader gives publishers the power to control how people use the texts contained within the reader. So for example, I have some books inside the Adobe E-book reader. Here's one, *Middlemarch*, a book that is in the public domain. If you click on the "permissions" for *Middlemarch*, you are told that you're given the permission to copy ten text selections to the clipboard every ten days. You can print ten pages of this book every ten days, and you're allowed to use the "read aloud" button to listen to this book. Here's another book, Aristotle's *Politics*. The permissions

here state: You may not copy any text selections to the clipboard of this book. You may not print any pages of this book, but, fear not, you're allowed to use the "read aloud" button to listen to this book on your computer. And, to my great embarrassment, here's my most recent book, *The Future of Ideas*: Don't copy any text from my book, don't print any pages in the book, and don't you dare try to listen to my book on your computer!

These controls get built into the technology for gaining access to copyrighted works and uncopyrighted works. And because every act in a digital network is a copy, this means that a presumptive unregulated space of ordinary uses becomes presumptively regulated. Uses that before were not within the scope of copyright law now come within copyright's scope—an expansion of the reach of copyright never intended by anyone.

Fourth is a change in the force of its regulation: Before the net, the law regulated through the courts. *Courts*, which meant that eventually a judge would have to say whether the regulation of the law was reasonable, which meant that eventually a human would have to say whether the regulation of the law was reasonable.

So consider the famous story of the Warner Brothers and Marx Brothers getting into a battle over *Casablanca* because the Marx Brothers intended to produce a parody of *Casablanca*. The Warner Brothers got wind of this and sent a very nasty letter to the Marx Brothers saying they had no permission to make a parody of the work *Casablanca*. This led the Marx Brothers to send a letter to the Warner Brothers saying, well, you should recognize that the Marx Brothers have been around longer than Warner Brothers and, therefore, Marx Brothers owns the word "brothers" and that Warner Brothers had better watch out.

The point is that these extremisms would never have harmed the law, because in the end, a judge would need to listen to these arguments and find them persuasive. In that process, absurdity fades. But increasingly, it is no longer courts that are enforcing copyright law. Increasingly, it is technology. Increasingly, it is the software, or technology, or generically, "code" that controls how you get access to the copyrighted works that determine what your freedom is. Increasingly, that means your freedom is restricted by code.

And not just code. As if code was not powerful enough, Congress is now passing laws that purport to protect the code that protects copyrighted (and noncopyrighted) material. These protections often extend beyond the protections of copyright law

itself.

Here's my favorite example. There's a little creature called a Sony Aibo dog. The Aibo dog is like a regular dog, though a robot—expensive, but not quite as messy. It moves around, and you can teach it to do things. Many people purchased the Sony Aibo and loved it. One fan loved it so much that he set up a Web site called aibopet.com. On aibopet.com, he described all sorts of things you can do with a Sony Aibo dog, including how to "hack" the dog. Not with a machete, but in the computer sense of hacking, meaning a way to teach the dog to do new tricks. In particular, he wanted to teach the dog to dance jazz.

People outside of the United States are sometimes confused about this, so I want to make sure we all understand: it's not a crime to dance jazz in the United States. Outside of Georgia, and indeed, in most jurisdictions, it's a completely legal activity to dance jazz, even to teach your dog to dance jazz. So the activity that this Web site was instructing people on how to do was a totally permissible activity.

And yet, when he posted this instruction for how to hack the Sony Aibo pet, he got this letter from Sony: "Your site contains information providing the means to circumvent Aibo's copy protection protocol, constituting a violation of the anticircumvention provisions of the Digital Millennium Copyright Act." The Digital Millennium Copyright Act is a law that says you can't muck about with any code designed to protect copyrighted material, even if the use you would make of that copyrighted material is totally legal under the law. The code thus protects copyrighted material more strongly than the law, and the law makes it a crime to circumvent the code to reestablish the balance that the law originally was intended to protect.

And fifth, and finally, is a change in the concentration of media: Copyright law, as we tend to forget, was originally structured the way it was in order to limit the scope of media monopoly. In 1710, the motivation in passing the statute in England was to break publishing monopolies. Publishers were hated in England. As Milton described them, they were "Old patentees and monopolizers in the trade of bookselling, men who do not labor in an honest profession to which learning is indebted." The view was that these publishers—monopolists—had too much power over English culture. They owned copyrights forever. They picked which works would get republished, and when those works were published was totally within their control. And thus the English adopted limited times as a way to allow works to

pass into the public domain and allow other publishers to emerge who could compete with those monopolists.

In America, we added one additional innovation here. We granted copyrights to authors, not to booksellers, which meant the author ultimately controlled who got the right to publish his or her book, which meant the author could help weaken concentrations in power. That meant we produced lots of little monopolies, but because there are lots of little monopolies out there, which is what a copyright is, it doesn't create any great distortion on the process for creating culture.

This, too, has dramatically changed, and in just the last twenty years. Concentration of media in the United States is dramatically different from what it was even twenty years ago. Today, eighty percent of the music distributed in the world is distributed by five companies. Seventy percent of the radio market is controlled by just four firms. Eighty percent of television and cable in the United States is controlled by six firms. In 1947, eighty percent of newspapers were independent. Today that number is below twenty percent. In 1970, ten percent of major first-run films in America were foreign films. That number is now .5 percent. This concentration in these monopolies has produced a world where no longer are there many people competing to produce and distribute culture. Instead, there is increasingly just a handful. Well, a kind of alien handful—it is six, not five, companies exercising all this control. This is a concentrated form of control producing a kind of homogeneous culture, a culture which is increasingly tailored to this vision of a certain mainstream market and, therefore, protects that market against different kinds of creativity.

If you add all of these changes together—the changes in duration, scope, reach, force, and concentration—then you reach a point that is important for us to see: Never in our history have fewer exercised more control over the development of our culture than now. Not when copyrights were perpetual, because even then the reach of the right was only narrowly about republishing a particular work. Never has the concentration been as significant as it is now. And so, just at the time when the technology enables an extraordinary range of new creativity, the new creators, the new Walt Disneys, must fight this system of legal regulation to find a right to speak. But the law regulates that right in a way it didn't before. Today, no one can do to the Disney Corporation what Walt Disney did to the Brothers Grim. The free society that defines our tradition is increasingly a permis-

sion society. The free culture that defined our birth is increasingly an owned culture—where the ability to cultivate that culture is a function of the permission you can get from the culture owners.

This war, this culture war, is a product of an insane and unintended consequence of the law. Eighteenth century law has now been bloated by two-hundred years of change, shrinking the traditional freedoms which defined the rights of people to create. The freedom to speak using the culture around you, the freedom to cultivate the culture around you, the freedom to criticize using the culture around you, the freedom to Disnify the culture around you: those freedoms are increasingly restricted. And the question becomes, how do we respond?

Here's one response. We live in a world governed by extremes. Two views about copyright dominate. There are those that believe that all rights must be controlled, and those who believe that no rights should be controlled. Call them the alls and the nones.

But the world is divided not into two, but into three. There are those who believe in all rights reserved, those who believe in no rights at all, but there are also many who believe that some rights should be controlled but not all.

In the beginning of the Internet, the architecture of the Internet disabled any ability to control the distribution of copyrighted works. That meant that if we had this triad among all, some, and none, the effective protection of the original Internet was none. The architecture meant that copyright was not respected because anybody could copy and perfectly distribute any copyrighted work without control.

That extreme begot another: the terror of the copyright industry, which in 1995, in response to the Internet launched a campaign to change the technical and legal infrastructure that defined the Internet, to change the Internet from an architecture of no control into an architecture of total control. So again, instead of a triad, we have increasingly an architecture of total control over everything. We have thus moved from one extreme to the other: from the extreme of total freedom to total control, and this is the shift the law is encouraging.

I'm not against extremists. Some of my best friends are extremists. Let them be extremists. The point is that we're solving based on the extremes. We're setting up a regime that thinks as if the world is either one or the other when it is in fact neither. Some want total control, some want no control, but

most want this balance in the middle. Not "all rights reserved," not "no rights reserved," but increasingly the idea of "some rights reserved." My content is out there, I want you to respect it in some ways, but I want you to use it in lots of ways that traditional "all rights reserved" models would not permit.

Enter an organization that I have helped start called the Creative Commons. Think of it as pushing, as another founder, James Boyle, describes it, as a kind of environmentalism for culture. The idea here is that we need to build a layer of reasonable copyright law, by showing the world a layer of reasonable copyright law resting on top of the extremes. Take this world that is increasingly a world by default regulating all and change it into a world where once again we can see the mix between all, none, and some, using the technology of the Creative Commons.

This change is done through the voluntary action of individuals—creators, content owners. They take voluntary action by marking their content with a tag that expresses a kind of freedom. They use these tags then to build a kind of balance into the system to restore this reasonableness into the system by giving people a way to say, "I don't believe in this extremism."

For example, if you go to the Creative Commons Web site (http://creativecommons.org), you are given a very simple choice by which you can select the freedoms you want to grant. You can say, "I want people to give me attribution or not," or you can say, "I want people to use this for commercial use or not," or you can say, "I want to allow people to modify this or not," or you can use what we call a "share alike" license that says, whatever freedoms you got from me, you have to pass on to someone else. Once you make these selections, the technology then produces a license that is comprised of three separate layers. One layer is a human-readable version of that license. Another is the lawyer-readable version of the license—the license. And a third layer is a machine-readable version of the license, which enables computers to understand what freedoms you are granting.

These three layers live together in a "Creative Commons" tag. And in four months, more than 400,000 pages have appeared on the Internet linking back to these licenses. Four-hundred thousand have said, we believe in a kind of freedom associated with our content that is not the extreme.

Now we want this 400,000 to turn into 10,000,000. Because if there are 10,000,000 people out there who say we don't believe in the extremes, then this debate is no longer a debate between copyright owners and anarchists. Instead, it is increasingly a

debate between extremists and those who believe in a tradition that expresses a freedom more fundamental. Beyond the permissions of fair use, these licenses give people ways to say go ahead, sample me, share me, copy me, liberate me, and together they restore something of balance in this debate. And this balance, we believe, will enable a different kind of creativity: creativity built upon a tradition of building upon the works of others, freely. A free culture, not the permission culture that our law has produced.

I have been in the middle of this debate now for about five years. It has only gotten worse. And its character was perfectly captured for me in a moment of terror I experienced on a recent flight to Oakland airport. I can't remember the numbers precisely, but imagine our flight was United flight 235. We were landing in very bad weather, and, while listening to air traffic I heard our pilot say, "This is United flight 235 with you at 10,000 feet." Silence. Then the air traffic controller came back and said, "United flight 253 turn left." More silence. The air traffic controller again said, "United flight 253 turn left immediately." More silence still. And the air traffic controller then said, or almost screamed, "Silence on the channel: United flight 253, acknowledge, and turn left immediately."

At some point in this exchange, another pilot came on and said, "Are you trying to call United flight 235?" And the tower said, "Yes, United 235." And he said, "Well, you didn't call 235, you called 253." Instantly our plane steered to the left. And then the tower said, "I've been calling you forever, where have you been?" And then an argument broke out: "You've been calling United 253." The controller contradicted him. Another pilot confirmed the claim of the first. The controller contradicted both. And in the middle of all this, I thought: "This is extraordinary. It is 2003, and air traffic is controlled by a system where the tower and the airplane do not know that they're talking to each other just because the controller made a simple mistake. Air traffic lives with a technology where this profound collision could almost have happened merely because we hadn't learned how to talk to each other."

This is, in a fundamental sense, the battle going on in the context of culture today. There is an extraordinary potential enabled by a technology that is increasingly threatened and destroyed. The potential for a different, critical, democratic creativity, is increasingly being forced into last century's model for doing business.

It is a world where the dinosaurs have been given the power to control evolution. A system where last century's powerful has the ability to veto next century's innovators. In such a world, creativity and innovation die. The free culture that defined our tradition has been eroded, not by idealists, but by lobbyists. The free culture that we have lived under now is under threat. And we have an obligation, all of us, to engage in this practice to enable this freedom again.

In the last five years, we have spent a long time in courts. And lots of time before legislatures. These efforts have failed. They have failed because the debate has become so polarized and so binary that the choice seems a choice just between property and anarchy. And in that world, there is no choice for us except property.

We are lawyers, most of us. We speak from a certain tradition and that tradition has been a tradition of balance. Yet the Bar has allowed this debate to become so polarized because our lawyers are too little for this tradition, and too much for a particular set of clients.

I believe in clients. I believe in loyalty to clients. But I also believe in a loyalty to our profession. We as a profession have a duty to fight extremism. We have an obligation to carry on a tradition that preserves the free culture that was the culture that our framers gave us. We have the obligation to at least allow our culture to know the truth of our tradition and choose, in the light of that truth, between the extremism that defines the debate right now and a practice that would enable this generation's Disneys to flourish as famously as the last. Using technologies increasingly available to everyone, and a platform for spreading ideas never imagined by anyone.