

COPYRIGHT AND CREATIVITY

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Thank you all. It is a pleasure to be here. What you are going to hear is not a single paper but rather a condensed version of a couple of book chapters.

What I want to argue today is that copyright law, or at least American copyright law, which is my area of expertise, is premised on a defective model of creativity, and that that deficiency in copyright's model of creativity is a direct consequence of the tools that lawyers and theorists have brought to the task of understanding the creative process.

Legal scholarship is closely aligned with the tradition of liberal political economy, and therefore with the foundational principles on which that tradition rests. So, in particular, liberal theory regards the self as a disembodied abstract being; it treats knowledge as transcendent and existing on a plane separate from and superior to culture; and it treats the self and culture as fundamentally distinct entities. Those commitments exact a very high price when we start talking about copyright, because creativity operates at the interface between self and culture, and plays out in the concrete and materially determined contexts in which people live and interact.

I would like to do three things in my time today. First, I want to critically examine copyright's model of cultural development as it builds from those fundamental assumptions. Then we will take a look at some examples drawn from a variety of art forms and genres, and will use those examples to illustrate an alternative model of cultural development that more closely aligns with how creative people actually work

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on a day-to-day basis. Finally, I will say a couple of things about how we might actually proceed to revise copyright law in accordance with that alternative model.

COPYRIGHT'S MODEL OF CREATIVITY

First let's take a look at copyright's implicit model of cultural development. You know, certainly, that copyright scholars don't agree on whether current copyright laws strike the right balance between authors and the public. Some people argue that expanded rights are necessary to counteract the effects of technologies for mass reproduction and redistribution. Others disagree, and argue that to exploit the democratising potential of new digital media technologies, copyright protection should be balanced by a more robust set of exceptions. Earlier today, Professor Lessig characterised those debates as the copyright wars.

Even so, copyright law is premised on a set of assumptions about the relationship between copyright and creativity that most people, on both sides of the debate, generally accept. Legal scholars on both sides of the copyright wars largely assume that copyright supplies incentives for authors to produce creative work, but that the creative process is essentially internal and unknowable. They assume that copyright can strike a satisfactory balance between the needs of authors and the needs of audiences as long as it includes well tailored exceptions for uses of great social importance. They assume that because copyright attaches only to creative expression, and not to underlying ideas, copyright can avoid frustrating future authors. A lot hinges on whether those assumptions are right.

Let's start with authors and the question of where creativity comes from. Legal scholars who advance rights based arguments for copyright have generally described creativity in terms of an individual liberty whose form remains largely unspecified. Sometimes this argument relies on self reporting by artists; when asked about why they create, artists tend to describe a process that is intrinsically unknowable. When legal scholars consider those self reports, however, they also add something. They characterise creative motivation as both intrinsically unknowable and essentially internal: a gift of self, or a 'black box' inside the mind of the author. The belief in creativity's essentially internal aspect does not match the experience that artists describe at all. Artists may not be able to tell us why they create but they can tell us a great deal about the where, what and how of particular creative processes: what they were looking at, what they were reading, what they were listening to, who they were talking to, and so on. Social scientists who study the creative process have found that these things matter a lot.

Economically minded scholars have focused on the marketable by-products of creativity. For scholars of the 'copyright maximalist' persuasion, creative motivation

matters only to the extent that we presume it is enhanced by the possibility of an economic reward. The details of why somebody would create this rather than that are irrelevant; market signals will take care of the details. Critics of the maximalist model challenge the argument that copyright always supplies an incentive to produce more creative material. They argue that sometimes creative motivation has no market origins. Even so, they generally agree with the maximalist view that the specifics of creative motivation are irrelevant. As James Boyle puts it, “It is irrelevant that people create, only that they do it”. If creativity is not purely internal, if it’s a function of what authors were looking at, and reading, and listening to, then the details matter.

What’s missing from both rights based and economic accounts of copyright is careful consideration of the complicated interrelationship between authors and their surrounding cultural environments, within which works of artistic expression are created and used. Copyright law is an important factor in that environment, but it is only one factor, and we should want to know more about the other factors in play.

Next, let’s consider the ways in which copyright defines and enforces rights in expression. In general, the drafters of copyright law have attempted to define rights that will extend to most commercialization of works of authorship. To shield certain uses, they have defined exceptions and limitations, and in most cases they have tried to define them narrowly. Of particular interest to many copyright scholars, there are almost no exceptions or limitations that cover what Jessica Litman has called “lawful personal use” of copyrighted works. Exceptions and limitations instead tend to be directed at public uses of high social value.

Copyright scholars have different positions on where lines between rights and limitations should be drawn. Generally speaking, though, they tend to agree that markets for copyrighted use are more or less value neutral with respect to copyright’s ultimate goal of progress. Put differently, they tend to think relying principally on the market to order uses of copyrighted works allows the forward march of progress to proceed without interference, and without attempting to decide which kinds of progress are best. We can argue about whether or not the market needs to be corrected in particular cases, or whether we need a new exception or limitation, but otherwise we should leave well enough alone.

One may object, first, that that account of progress makes some rather large assumptions about the transcendent nature of knowledge, and the linear forward marching character of progress. Those assumptions don’t square with a large and growing body of work in the social sciences that suggest that knowledge and cultural context are much more interrelated. That objection is extremely important, but I don’t want to talk about it today.

More concretely, one might object that before we decide just how far rights in creative works ought to extend, we ought to have some idea about how the other side of the

progress equation works. Once a creative work is prepared and released, how do audiences interact with it, how do they receive it, what do they do with it? We say that copyright is supposed to promote the dissemination of knowledge and learning, but before we assume that the process is working well, we ought to have some understanding of what users of copyrighted works do with those works, and how and why they do it.

Copyright lawyers have answers to those questions, but the answers turn out to depend on some extraordinarily one-dimensional models of user activities and interests. Sometimes people talk about a particular kind of user, who I will call the economic user, who enters the market for copyrighted content with predetermined tastes in search of the best deal or sometimes in search of a free deal. Copyright rules targeting commercial exploitation and rules about secondary liability for technology providers are designed for that user. They presume that, in general, copyrighted works must be paid for to be enjoyed in any of the ways that the user might want to enjoy them. In the context of those rules, the reasons for wanting to copy or reuse created material are typically deemed unimportant.

At other times, some scholars talk about a different user who I call the romantic user. This person is quite an amazing being whose life is an endless cycle of sophisticated debate about current events, high quality blog posts, discerning quests for the most freedom-enhancing new media technologies, and home production of high quality movies, music, remix culture and open source software. This user's reasons for copying or reusing content are so important that they are typically the reason for creating the exceptions and limitations that I mentioned. In general, though, copyright scholars don't spend a lot of time thinking about the processes by which one would become a romantic user, or by which romantic users come into being.

Now the interesting thing about these models is that copyright scholars have very little idea how these users relate to one another, so little that it sometimes sounds like they are talking about members of different species. But of course they aren't different species or even different people. The economic user and the romantic user are often the same person. We should want to know a lot more about how that person comes to encounter and use cultural products, and to understand his or her own experiences. Finally, let's consider copyright's end-product, the works within which copyright protection subsists. We all learn on the first or second day of the copyright course that rights subsist only in the words "creative expression", which is fundamentally separable from its underlying ideas. When disentangling the two gets complicated, we tell our students they can approach that problem by using levels of abstraction to separate the ideas from the expressions. The ideas, along with similar entities like processing and functional principles, exist in the public domain, where they are building blocks that anyone may use to construct new creative edifices.

The problem with this theory is that it is just plain wrong. It is created out of whole cloth, based on nothing more than legal theory's assumptions about the relationship between culture and true knowledge. Remember again that legal political theory presumes that knowledge and ideas are abstract and transcendent, separate and distinct from the particulars of the expression that embodies them and the culture that surrounds them. We regard culture as an imperfect bridge to knowledge. We are confident that the repeated iteration of ideas through different modes of expression will lead us to progress, and that granting copyrights in the expression won't frustrate that process.

This model of cultural transmission is unique to intellectual property law. Nobody else thinks about cultural transmission this way. Scholars who study the arts and literature have catalogued an extensive list of imitative activities, including illusion, pastiche and so on, that are central to the ongoing process of culture production. All of those activities require the reuse of expression and proceed on the presumption that idea and expression are fundamentally indistinguishable. For artists positioning themselves relative to the previous generations, and relative to the surrounding culture, ideas and expression cannot be separated.

The part of the story about end-products that deals with the public domain is also very odd, and is so regardless of one's position in the copyright wars. The term "public domain" has pronounced geographic connotations, but we tend to worry about what is in the public domain, rather than where it is. The public domain comes to be seen as a mythical Heisenbergian place that is always accessible everywhere, whether or not that is actually true. There is a vital and enormously important advocacy movement for the public domain that has grown up over the last decade, and sometimes the rhetoric of that movement actually makes this particular problem worse. Its advocates use terms like "enclosure" to describe what is wrong with copyright today, and "commons" to describe what copyright ought to create, and those are geographic terms as well. The discourse of the public domain, which proceeds without acknowledging the geographic assumptions, can operate to minimise the questions of where public domain resources are actually located in real space, relative to the people who need to access them.

To understand the cultural work that copyright does, and the role that it plays in our emerging information society, we need to do better than this. We need to confront and study the interdependencies between self and culture, including the ways that people become authors, the ways that users receive copyrighted works and the way that people use copyrighted works in the real world. And we shouldn't begin that process presuming that copyright's artificial model of the way that culture proceeds is the right model.

A DIFFERENT MODEL OF CULTURAL CREATION

Now for the fun part.² Before articulating a different model of cultural production it is useful to look at some real world examples. We are all familiar with the seemingly endless parade of contemporary examples of cultural borrowing. So here are two contemporary examples.

The first is a progression of four slides, beginning with some things that served as inputs but were themselves copyrighted: an obscure Japanese art film, *The Hidden Fortress*, and a very popular American comic book series, *The Adventures of Buck Rogers in the 25th Century*, pieces which were combined in an inspired pastiche by the folks who brought us *Star Wars – Episode IV: A New Hope*. The film *Star Wars – Episode IV: A New Hope* ultimately became an empire of its own, and in turn inspired acts of borrowing and reworking. For example, you can visit www.blamesociety.net to view the adventures of Chad Vader, Lord Vader's little brother, who came into being when somebody asked what if someone with Lord Vader's distinctive physical and personality attributes ran a grocery store in New Jersey. Or, if your tastes run more to being the characters that you have imagined for so long, you can have a Star Wars themed wedding or party instead.

Here's a different example – the lawsuit between the Associated Press and an artist named Shepard Fairey. Fairey created the poster *Hope*, using as a template a photograph taken of Barack Obama by a freelancer for the Associated Press. Why did he do it? Well that was an image of Barack Obama that he could get. It could have been anybody else's copyright photograph, but it happened to be that one. Since Fairey is not personally acquainted with Barack Obama, and wasn't able to get close enough to him to get his own photograph, he had to use somebody's. This image, as transfigured in the portrait, helped to fuel a grass-roots popular movement that gained momentum on the internet, but it has been dignified after the fact as high art. Shepard Fairey's painted portrait of Barack Obama, reproducing the image from the poster, has now been hung in the National Portrait Gallery in Washington, DC. It has also been recycled back into popular culture. If you go to the website www.obamiconme.pastemagazine.com, you can create your own Fairey-style portrait. People have done some amazing things, including some that reference the other cultural example I talked about a moment ago, such as this portrait of Obi Wan Kenobi.

We could go on in this vein for some time, and we could see, ad nauseam, examples of cultural works circulating, recirculating, being remixed and recycled in ways that involve the internet, but I don't want to do that because the point I want to make is that the model of creative practice that these two sets of slides illustrate is much older

² Professor Cohen's lecture linked to a series of videos and audiovisual slides. Images from her presentation are not included in this book.

than the internet. It turns out that this basic pattern of the movement of culture, of the recycling of images back and forth between mass culture, establishment culture, and popular grass roots culture has existed for a very long time.

Let's look at some other examples. In 1920, photographer Louis Hine, working in the modernist medium of documentary photography, created an image of a nameless worker in a big factory, who became an iconic figure of modernist art. That figure was then recycled into a big budget work of mass culture, Charlie Chaplin's movie *Modern Times*, which involves a nameless worker in a big factory, but in a distinctly non-heroic way. The movie is a comedy of errors. Charlie Chaplin's buffoonish character in the factory where everything goes amiss was then recycled into high art by American painter Larry Rivers, who took mass culture as his subject matter and created portraits of icons of mass culture within the settings in which they gained their prominence. And it's not just the visual arts that work this way. Consider now a musical example. In 1899 Gustav Mahler took a nursery rhyme (*Frere Jacques*, or *Bruder Martin* in the German version) and turned it into the Third Movement of his Symphony No 1.

What can copyright lawyers do with the examples on these slides? Well, we can start by acknowledging that the questions what do users do, and what do authors do, are really the same question. Everyone is a user of cultural works first and an author second, so we can start by replacing the artificial cardboard figures of the user and the author with a single figure, who I will call the situated user because that user is situated within his or her own culture.

We can then lay out a model of creativity organised around the situated user that has five essential parts:

- First – situated users engage with artistic and cultural works for multiple intertwined purposes, including consumption, communication, self-development, creative play. These activities shade into one another, and are impossible to disentangle, or understand, out of context. The ways in which situated users interact with creative works are so diverse as to defy easy characterisation. They use creative works to inform themselves and to fuel their own creative input and output, but also to imitate others, to perform cultural identities, and to build and sustain relationships. Some of these activities map to the economic user. They are just straightforwardly consumptive. Some activities map to the romantic user. They are bold exemplars of dissent. Many activities are mundane, and lie somewhere in between in that grey area that we haven't looked at hard enough.
- Second – the state of being a situated user entails cultural constraint. The everyday practice of users is constrained by the various social and cultural networks within which users find themselves. When those users become authors, their own creative output is subject to the cultural path dependencies that those networks create. Consider the following simple question: What should a painting of the

female face look like? [Images shown from a YouTube video titled “Women in Western Art”.] We are not going to watch the whole thing, but you get the point. This woman looks a particular way. Quite surprisingly, in every one of these paintings this woman does not look like the women in this room, or in this city, or in this country, or in this world. The images are much more uniform than they would be if creativity were simply an internal proposition rather than constrained by cultural demands. At the same time, though, the boundaries of the networks are fluid, so boundary crossings are frequent. Forms of expression can migrate from one network to another with astonishing speed. Consider first what happens when you cross traditional Malian music with the American blues. A result is the music of Ali Farka Toure. [Music played.] Then when you cross the music of Ali Farka Toure with that of Led Zeppelin, Jimi Hendrix, and other assorted American rock and roll influences, you get this: the rock music of Tinariwen. [Music played.] Boundary crossings between cultures happen because, of course, people within cultural networks are opportunistic. They see things that float in front of them and they grab them and mix them with what they already know. A different kind of cultural boundary crossing is illustrated by the obamicon.³ The boundaries between mass culture, high art, and popular grass roots culture are very fluid. Things circulate, and recirculate, across those boundaries.

- Third – boundary crossings can create conflict because the artistic influences come into contact with the values of particular social groups. On your left is Tjangala’s *Emu Dreaming*, which became the subject of litigation when it was put onto a carpet without the original Aboriginal people’s permission, and in direct conflict with their religious practices. On your right is a nativity family that you could have bought from Target last year at Christmas time, showing you that Christianity does not take the same view of the commercialisation of its religious symbols. We have culture then as a kind of contest, in which different groups struggle about the forms of artistic expression, about what is permissible, and about what these expressions mean.

Sometimes the struggle is resolved one way, and sometimes another. I don’t mean to be making an argument about how the carpet case should have been resolved. What I mean to be making is a more general point about what keeps the system of culture in motion. Situated users appropriate and use works of creative expression in many ways which are intertwined with and channelled by the forms of expression within those networks.

³ A reference to the obamicon.me website. The site allows users to create stylised images generated by uploading personal photographs that are electronically integrated on a template of Shepard Fairey’s “Hope” portrait of Barack Obama.

- Fourth, the creative practice of situated users is embodied and materially situated. Situated users use their bodies to communicate works to one another – for example, singing and dancing to popular songs, or repeating lines from favourite TV shows. Sometimes it is really obnoxious but this is what we do – dancing the Macarena, for instance. [Video played.] I looked for the video of Peter Costello being taught to do the Macarena on a talk show that you have here, but sadly it seems to have been taken down. [Video of teacher showing the Macarena moves.] This is very mundane stuff, not sexy remix culture, but this is a common denominator. This is what people do, and it is important, because this is how we process our culture. Sometimes the mundane way we process our culture is remixed into something more elevated. [Clip from the film *Muriel's Wedding* with characters lip-synching to Abba music.] Here this music is more than just a shallow pop song. It's embedded in a movie about ultimate female empowerment, although you would have to watch the whole movie to get there. Sometimes embodied cultural practice is strange. This is a prison in the Philippines where they do dance therapy. [YouTube video of prison inmates dancing to Michael Jackson's "Thriller".] That's fun to watch on video and it's probably on the list of 100 things you have seen on the internet unless you are a loser, or old or dead or whatever. The loftier point is that culture is an embodied conversation. The body is how people process their culture. This has implications not just for whether we can copy, but for the scope of the rights of public performance and communication to the public, whichever name they are called in the country you are in. That is why I prefer the term "cultural landscape" to "public domain". Creative practice by situated users involves working through what is ready to hand in the cultural landscape that is there around them. This means that often works of mass culture will be the raw material for a new creative effort. To experience, assimilate, appreciate, and have a conversation about works of mass culture requires behaviours like this. When we create our own works, we begin with real bodies and spaces.
- Finally – The creative practice of situated users relies on interplay between what is ready to hand and familiar in the cultural environment, on one hand, and serendipity or play on the other. People are opportunistic. They latch onto whatever they encounter. Always the familiar, but also the unpredicted and the unpredictable. For authors, creative practice is most fruitful when it includes these encounters with the unpredicted – and when it includes the freedom to exploit the serendipitous encounter without asking permission to do so first. This interaction between the familiar and the unexpected in the cultural landscape is exactly what we refer to when we talk about why art and intellectual culture are important on a personal level. We talk about art opening time and space for reflection. We talk about how the serendipitous encounter and its unexpected creative fruit

contribute to a dynamic culture, a culture that moves and avoids becoming calcified and rigid. These things are what we mean when we talk about why art is important. They ought to be what copyright seeks to promote.

A LOGICALLY DISCONTINUOUS COPYRIGHT LAW

I want to close with some brief thoughts about how copyright ought to respond to the reality of creative practice. To begin, we need to acknowledge that copyright plays a relatively small role in stimulating many of the processes that I have just described and shown to you. That doesn't mean that copyright is unimportant. Copyright is extraordinarily important. It simply serves a different set of goals than the ones that we have become used to thinking that it serves.

Copyright serves roles that are primarily economic. It creates predictability in the organisation of cultural production, and this is important, particularly in capital intensive industries like film and television. It generates revenues, exports, jobs – all things that are good – and it enables the production of mass culture, which is so extraordinarily important. It's quite fashionable among free culture advocates to pooh pooh mass culture and talk about how bland and banal it is. I couldn't disagree more. Mass culture is a crucial ingredient in the process of circulation I described. We need the mass culture to enable everything else. At the same time, we need to acknowledge that the single-minded pursuit of economic predictability and fixity, and of the copyright primacy of mass culture, frustrates creative practice by situated users. We would be worse off if people couldn't do things like those we have just seen and heard.

A good copyright system needs to hold both of these goods, economic fixity and cultural mobility, in the balance. That means that the rules that establish rights in creative works need to ensure sufficient breathing room for creative practice as it actually occurs. The rules should ensure degrees of freedom, if you will, within which the serendipitous encounter can take place, and within which serendipitous appropriation and reuse can occur.

This requires narrower rights, with gaps and discontinuities between them. A logically discontinuous copyright law – a regime characterised by incomplete rights, by logical gaps that permit imitation and reworking, is exactly what is required.

This is easy to say but very hard to do for three reasons. We resist setting limits on rights, and this resistance is deeply embedded in the form of legal reasoning our culture prizes most highly. I will illustrate it with an anecdote. The other day I asked students in my upper level seminar to describe their law school exam taking strategy. I asked them to imagine that they were taking an exam in some non-copyright-related subject like torts or constitutional law, and they had been given a long complicated fact-pattern and asked whether the plaintiff would succeed with any number of

theories of relief. I asked, do you think you would get a better grade by arguing that the plaintiff could succeed or fail? They unanimously agreed that they thought they would get better grades by attempting to show how the plaintiff could succeed even if it required an expansion of the grounds recognised by the law as the basis for recovery.

Now, to some extent, this response reflects successful internalisation of the common law method of flexible incrementalism that is so beloved of our Anglo-American legal system. To some extent, it reflects successful internalisation of the principle that you should seek to please your clients, by getting rights extended if necessary. But students also understood arguments for extension as demonstrating more skill at lawyering, and more true understanding of the subject matter. You really understand torts, or you really understand constitutional rights, or whatever, when you can explain why a particular rule really extends to cover situations to which it has never before been applied. That's what lawyers do, and skill at doing it is a key indicator of professional and intellectual excellence. Within that analytical frame, it makes sense that arbitrary barriers to copyright expansion, for example, should fall away before the relentless logic of good lawyering.

The second reason that we resist setting limits on copyright stems from a set of convictions that are essentially technocratic. We believe that if we try hard enough, we can define in an extraordinarily precise fashion the rules of a good copyright system. If we really use our language to the full extent of our ability, we can define rules that separate the economic exploiters from everyday users – the people who make the good technology from the people who make the bad technology, and so on. When those technocratic instincts are coupled with our expansionist inclinations, the result is a seemingly iron-clad case for broad open-ended rights with narrow precisely defined exceptions.

The third reason, the icing on the cake, is what I call a naïve restitutionary impulse, the idea that commercial gain to anyone other than the right holder constitutes an injury that demands compensation, so that the right holder can be made whole. If we need to expand copyrights to do this, then we ought to do it. Yet there is a deep irony here. When we commit ourselves to a legal methodology that treats limited, discontinuous rights as logically disreputable, no matter what the context, we detach means from ends. When you have competing, equally important goods on both sides of the equation, as we do in copyright, it becomes impossible to balance the competing and equally important interests that the copyright system must serve.

In order to have a good copyright law that is logically discontinuous in the way I just described, we need to invert some of those most fundamental assumptions. I think that this quite a tall order.

Thank you very much.