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Re-crafting a Public Domain

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INTRODUCTION

There is a public domain, but it is small, relative to its history, and it is shrinking. Digital technology will only speed its decline. And because most are oblivious to the particular threat that digital technology poses for the public domain, the prospects for reversing this trend are not promising. On the present path, the idea of the public domain will be as familiar to our children as the intergovernmental tax immunity doctrine is to our students.

This loss of the public domain, properly understood, will be a profound loss for freedom and culture, or more precisely, free culture. It will also be persistent. For the mechanisms that will effect the elimination of this domain are not merely legal doctrines. The mechanisms are machines protected by the most powerful (if delicate) technologies of control that man has devised.

My aim in this essay is to frame a way of talking about this public domain, and to map a strategy for its defense. The defense will come both from rebuilding the public domain, properly understood, and from crafting an "effective" public domain—meaning a free space that functions as a public domain, even though the resources that constitute it are not properly within the public domain.

The frame connects directly with work done long before the digital age that aimed to understand, or more precisely, to correct a misunderstanding about "the commons." Yet that work, too, shares a pre-digital blindness to the problems that digital technologies create for a commons, as well as a blindness about the usable tools to correct them. Put most concisely, the reformers too are too wedded to pre-digital truths. Until they become comfortable recommending strategies that in the pre-digital age they (rightly) condemned, we will make little progress in stopping the current

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I. A PUBLIC DOMAIN

As Jessica Litman defined the term, the "public domain" includes not only those works never copyrighted, or those works no longer protected by copyright. The public domain also includes the access secured to copyrighted works by the express limits on the scope of copyright. Thus facts or ideas are not copyrightable. They are within the public domain. Likewise the use protected by "fair use" is within the public domain as, again, it is an express limit on scope of copyright.[1]

This "public domain" is free. No one is paid for its use. It is also, and distinctly, "permission free." I do not need the permission of Disney to copy the ideas in *Steamboat Willie*. Nor do I need its permission to make a "fair use" of its foundational cartoon.[2] In this sense, a resource is "permission free" if the right to use the resource does not depend upon anyone's subjective will. In the frame of Calabresi and Malamud, liability entitlements are "permission free" resources; property entitlements are not. It follows that a "permission free" resource could cost something, so long as the user had a right to buy access to the resource. The key freedom that "permission free" marks is the freedom from a subjective will.

This freedom has a value. That value is speech-related. Yet despite the important work of First Amendment scholars such as Jed Rubenfeld and Jack Balkin, there is still an unwillingness within the legal culture to recognize the salience of this freedom to free speech values more generally.[3] For example, the Supreme Court is perpetually eager to discipline Congress as Congress struggles to regulate pornography on the Internet.[4] Yet the Court has yet to find First Amendment values implicated by the regulation of speech that we call "copyright" despite its increasing burden upon free speech generally.

The burden to free speech that I mean is emphatically not that speech resources are costly. That burden is an important one, no doubt, as

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1. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). Pam Samuelson has recently offered a rich catalog of the range of views (she counts 11) defining the public domain. Pamela Samuelson, *Challenges in Mapping the Public Domain, in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (L. Guibault & P. B. Hugenholtz eds.) (forthcoming, 2006). Samuelson tries to narrow these to a core set. My description does little to respect the subtlety she has mapped.

2. There is, however, some evidence Disney, and other major studios, do not think so. *See* J.D. LASICA, DARKNET (2005).

3. *See, e.g.*, Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); J. Rubenfeld, *The Freedom of Imagination: Copyright's Constitution*, 112 YALE L. J. 1 (2002).

4. *See, e.g.*, Ashcroft v. ACLU, 124 S. Ct. 2783, 2788 (2004) (upholding preliminary injunction against enforcement of the Child Online Protection Act); Reno v. ACLU, 521 U.S. 844 (1997) (striking down the Communications Decency Act).

Rebecca Tushnet has argued extensively.[5] But there is a value in a "permission free" zone distinct from equity (though as we will see, equity enters the story very quickly).[6] That value is related to the core ideals protected by limits on content-based or viewpoint-based speech regulation. Just as free speech requires a general immunity from content- or viewpoint-based regulation, free culture requires a substantial immunity from content- or viewpoint-based constraints on the cultivation and spread of our culture.[7]

In principle, the "permission free" zone of the public domain is to provide that immunity. But whether it does depends upon one more consideration: whether the contours of that public domain are easily navigated. In this sense, free culture requires not just a "permission free" zone, but also a "lawyer free" zone: the freedoms secured by the permission free zone of the public domain must be relatively self-authenticating. They must, that is, be freedoms that are useable by those who depend upon them, without the burdens of significant legal cost and uncertainty. That there are works that are no longer protected by copyright is important; that one be able to identify those works easily is essential. Or again, that there be a domain of "fair use" is important; that one be able to identify that domain without risking extraordinarily punitive damages, or spending significant resources on legal advice, is essential. The law must craft the public domain to make it useable, meaning that it must be (relatively) simple for those who depend upon it to determine its freedoms.

The reason for this extra condition should be obvious. Unless the freedoms of the public domain are self-authenticating, they will be unequally distributed. Unequal distribution, of course, is nothing new in our society. But unequal distribution here is something special. To the extent that there is inequality here, it is an inequality produced directly by state action. If between two rules for limning this permission-free zone, the government selects one that is costly over another that is not, all other factors being equal, then the inequality such rules produce is the product of government action. And as this inequality directly affects speech, the

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5. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535 (2004).

6. And hence my concern is distinct from Goldstein's early concern about "enterprise monopolies" affecting First Amendment values in the context of aggregations of copyrights. *See* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

7. Obviously, in this comparison between the norms of free speech and free culture, the source of the "constraints" on each is different. The focus of free speech norms is typically constraints imposed directly by the state through rules regulating speech, while the focus of free culture norms is constraints imposed indirectly by the state, and directly by individuals, exercising monopoly rights granted by the state (i.e., copyrights). I will take it for granted here—though it is by no means taken for granted in the law—that this difference, though important, does not negate any First Amendment concern. Others have done a great deal to establish this point, though that so much work would have to be done is, at least, surprising. *See* Rubenfeld, *supra* note 3; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

question the law should ask is whether any legitimate government interest supports such inequality.

I will leave it to others to argue that there is such a legitimate state interest. I assume there is not. But the legal system functions with an almost studied blindness to this inequality. Lawyers and judges in particular are quick to celebrate the importance of the theoretical limits on the regulations of speech through copyright—limitations such as "fair use" or the idea/expression distinction. Yet almost without exception, they are blind to the ineffectiveness of these limitations, given the nature of the law as it is right now.[8]

Free culture jurisprudence must account for these second-order legal limitations. It does so by adding to the description of a cultural environment an account of the costs of exercising the freedoms within this permission-free zone. And thus can we qualify Jessica Litman's definition: the public domain, technically, is the permission-free zone defined by the limits of copyright. But the *effective public domain* is the lawyer-free zone of freedoms constituted by the nature and efficiency of the limits on copyright.

From this perspective, it should be obvious that whatever the technical reach of the "public domain" in current American law, the effective public domain is tiny. Copyright terms are "limited." But even though limited, there is no simple way to know which works are no longer protected by copyright, and which works are. In America, works published before 1923 are in the public domain, though sound recordings are not, nor are a host of other creative works creatively exempted from the ordinary meaning of the word "published."[9] The practice of publishers is to mark all work as copyrighted, whether published initially before 1923 or not.

From 1923 on, the story becomes murkier. For work published after 1922 and before 1964, the copyright status depends upon whether the work was registered when published, and whether the copyright was renewed twenty-eight years later. As the majority of works published were likely never registered, and as the vast majority of registered works were never renewed, the public domain potential of this period is quite great.[10] But as there is no simple or accessible database of such registrations or renewals, there is no simple (or lawyer-free) way to identify the public domain.

For those works created between 1963 and 1978, the task of identifying

8. The single prominent exception to this blindness is a self-critical piece by William Patry and Judge Richard Posner. William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. (2004).

9. *See* Capitol Records, Inc. v. Naxos of America, Inc., 4 N.Y.3d 540, 560 (2005) (describing common law copyright for recordings); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 89 (1966) (describing gerrymander of "publication" rules).

10. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

the public domain is easier, but its scope is much smaller. Works published after December 31, 1963, and before January 1, 1978, are protected by copyright if initially registered. The renewal requirement was removed in 1988.[11] But again, there is no easily accessible database of such registrations.

After December 31, 1977, the problem of identifying the public domain is simpler still, but the scope of the public domain is smaller still. Before 1978, work entered the public domain if published and not registered. After 1978, all work is protected by a federal copyright upon creation, and until seventy years after the author has died. For published works, this may prove to be an easier line to negotiate (at least once it becomes relevant).[12] We might expect simpler databases to develop for identifying authors, at least for published work. But for work that is not published—and hence, work that has no necessary link to a particular author—it will be practically impossible to identify when such work enters the public domain.

That is the status of the public domain fed through copyright expiration (assuming at least that Congress permits copyrights to expire). The status of the public domain fed through the limits on copyright's reach is even more tenuous.

There is in principle a line of "originality" that puts facts and ideas into the public domain. For text, how that line divides might be relatively clear. But for film and music, the line is simply illusory. The same is true of the "idea/expression" distinction. Ideas are in the public domain: what the idea is behind Einstein's 1905 paper about special relativity is clear (if difficult); what the idea is of Claude Debussy's "La Mer" is not.[13]

Finally, the same is true for that part of the public domain fed by "fair use." The rules of "fair use" are self-consciously not self-authenticating. The Supreme Court has repeatedly insisted that lower courts not develop simple, automatic rules.[14] The effect is that fair use in practice becomes the right to hire a lawyer, in contexts in which the defense of fair use rights is effectively impossible.[15]

Again, because this point is so systematically missed, especially by

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11. *See* Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853-2861 (1988).

12. The soonest any work copyrighted in 1978 could enter the public domain is 2049.

13. Judge Kaplan expressed similar skepticism in his classic AN UNHURRIED VIEW OF COPYRIGHT 56 (1968).

14. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules . . . .").

15. Technically, "fair use" functions as a defense to a claim of copyright infringement. That balance made sense when the force of copyright regulation got applied through a legal action. As the rules of copyright become embedded in technology, however, it may well make more sense to conceive of "fair use" as a right. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 139 (1999) (discussing the "Cohen Theorem," which supports an affirmative right to hack to protect fair use).

judges, it bears repeating and emphasis. If a documentary filmmaker wants to include a clip from a news program in her film, the standard procedure is to ask permission, regardless of the length, and regardless of the clip's transformative nature. If the clip is from ABC's *Good Morning, America*, she will not receive permission. ABC, at least currently, does not license any of its *Good Morning, America* material for reuse.

The filmmaker must therefore decide whether, despite that denial, the use of the clip is nonetheless "fair." That inquiry is fundamentally uncertain. But even if the filmmaker and her lawyer are quite convinced of the "fair use" status of the clip the filmmaker wants to include, their confidence is ordinarily not sufficient to free the film that would include that clip. Films are viewed only if distributed; they are distributed only with "Errors and Omissions" insurance. And E&O insurance is typically issued only if the filmmaker can represent that each clip used within the film was "cleared." The effective right of fair use for filmmakers is thus not only costly, but constrained, as the expense of error is so extraordinarily high.[16]

The reality for most filmmakers is thus not a public domain. It is a permission domain. The "use" of culture is not a right; it is a permission slip. And while we might not be so concerned about these constraints when we think of the latest "Batman" remake, or the burden placed on George Lucas, it takes a willed obliviousness not to see the First Amendment values implicated when we consider documentary films, or any film commenting upon matters of public import. The reality is that while the law effectively secures to writers a broad and unquestioned freedom to quote without permission, it grants no such freedom to filmmakers.

A. The Problem Machines Add to This Mix

So far my description of the effective public domain has focused exclusively upon the constraints imposed by law, both technical and practical. These are the constraints we know today. They are widely ignored of course, especially on the Internet. But whether ignored or not, they are the legal restrictions that define the scope of free culture.

Yet, in the future, these legal constraints will not be as significant, or effective, as technological constraints. These technological constraints remain invisible to most today, and because the genesis of these constraints seems so absurd to most, most refuse even to name them.[17]

16. *See* Documentary Filmmakers' Statement of Best Practices in Fair Use (2005), *available at* http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf (last visited February 20, 2006).

17. Most, not all. Jessica Litman made this same point a decade ago. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34-35 (1994).

To see this point, we need to make some obvious points about the difference between analog and digital culture.

In the analog world, the regulation of copyright is the exception. In the digital world, the regulation of copyright is the rule. Or again, in the analog world, there are many "uses" of creative work that never trigger the law of copyright. In the digital world, there is no use of creative work that does not, technically at least, trigger the law of copyright. If the law of copyright protects the exclusive right to "copy," then as digital technologies make copies with every use, there is no use of a creative work in a digital network that does not trigger the law of copyright.

No doubt, today that trigger too often fires a blank. It may be technically true that the law requires permission, but it is effectively true that no permission is needed. Relative to the baselines of the law, the Internet is home to massive copyright infringement. No consequence follows from most of that infringement. Regulation may be everywhere, but that regulation is largely irrelevant.

At least for now. But the irrelevance of law comes from an obvious contingency about the architecture of the current digital network. The Internet as originally constituted enabled this permission-less use, because the Internet as originally constituted, like the pre-Internet world it increasingly replaces, technically had no way to implement anything different.

That contingency, however, is changing. Through a relatively swift transformation in the basic elements of the network, the network is increasingly recognizing a permissions layer, layered onto the original Internet. This permissions layer will enforce the permission the law establishes by default. It will require, in a physical sense, the permission that the law now requires by rule.

This will be the consequence of the set of technologies ordinarily referred to as "DRM"—digital rights management technologies. DRM technologies enable fine-grained control over how content is used in a digital environment. They control whether the content can be copied, or how often; they control how long the content survives; they control whom the content can be shared with, or whether it can be altered or transformed. DRM thus uses technology to enforce control of content, independent of whether the law authorizes that control.

It is my view that DRM will increasingly get layered onto the Internet, and thus expand the physical capacity to enforce the rules the law enforces through (largely empty) threats. These physical restrictions of course will never be perfect. But neither need they be. Uses outside of the range permitted will be rendered effectively impossible for most users by raising the cost of noncompliance beyond the reach of most. Compare: it is not impossible to occupy CBS and take over the evening news; it's just sufficiently difficult that no one does.

We could argue endlessly about when this change will occur. There might even be a reason to argue about whether it will occur. But the important point for my purposes here is that if the almost taken-for-granted set of changes that technologists now discuss actually happens, then the environment of free culture will have been radically changed. Today, the practice of free culture happens, albeit against the law. Tomorrow, the practice will simply not happen. The difference is not a difference in the legal authority given. The difference is a product of the technical environment within which those permissions are granted. In a line, the code will then make the law effective by making it effectively impossible for anyone to ignore the law.

This change will not break the Internet. It will not destroy much of the value of the Internet. In fact, to the extent the Internet is viewed as a "read-only" medium, facilitating the efficient delivery of culture created elsewhere, these changes will actually improve the Internet. They will lower the "piracy" costs of an imperfect market, and thus raise the returns to those who benefit from the distribution of professional created culture.

But these changes will destroy a different ecology of cultural creation: tautologically, that ecology of creativity that cannot secure permission from the rights holder. One part of that excluded ecology is excluded because of resource constraints (the stuff costs too much). One part is excluded because the substance of their use is beyond the preferences of the rights holder (the use is not the sort of use the copyright owner will allow). To be included in a movie, or within a political ad; to be remixed with hip hop; to be rendered in a way that criticizes: these are "uses" enabled by the technology today that will only happen tomorrow if the technology permits.

Finally, DRM will quite directly affect one important part of the public domain—fair use. As the doctrine is currently crafted, "fair use" requires a determination of the purposes for which a use is directed. As it is currently implemented, DRM cannot grok that purpose. Thus, as many have noted, the effect of widespread deployment of DRM upon the content of our culture will restrict significantly the "fair use" component to the public domain.

In these obvious ways, then, the public domain is fading. While the law of copyright in principle reserves a permission free zone, the law as currently constituted renders that permission free zone unusable. However strong in principle those limits are, in practice they give little support to a wide range of citizens and creators. More significantly, as the reach of the regulation of copyright expands, from regulating just a portion of the possible uses of culture in the analog world to effectively all uses of culture in the digital world, that melting accelerates. And thus while the practical consequence of this change today may be small, the practical consequence tomorrow, once the technologies of control get added into

the mix, will be profound.

II. THE COMMONS

Culture is the classic comedic commons. In the sense that Carol Rose first taught us,[18] culture is precisely the sort of commons that gets enriched (rather than depleted) the more people consume it. Culture is reference; reference is meaning; meaning is life. Of course, there is no guarantee that the meaning is a happy one. The enrichment of a cultural reference might well make some unhappy. But nonetheless, use makes the reference more salient. And as technologies and experience increase the depth and frequency of the connections that bind cultures together, the value to all within that culture increases as more get to use, and reuse, that culture.

This is the core assumption I bring to this argument about the fading public domain. For the richness of culture comes not just from its consumption (a use that the technologies of perfect control will well supply). The richness comes as well from a broad range of participants actively making, and remaking, the culture. This is the use of culture that the future of DRM will not (yet) support. Such use in a digital context triggers copyright law; DRM will connect that trigger to meaningful enforcement. If the law remains as it is defined today, that enforcement will smother much of the potential of digital networks to reinvigorate a democratic free culture.

I recognize that as it stands, the value I claim for this free culture is nothing more than an assertion. My aim in this essay is not to defend that assertion. It is instead to ask how one who accepts it should meaningfully respond. Or more directly: in light of this change in the public domain, what possible responses are there to revive or restore a permission-free, or lawyer-free, zone for culture?

In the balance of this essay, I identify first the legal reform that might revive a public domain. Such reform is unlikely. I therefore conclude by reviewing an effort at private reform that, while not affecting the technical scope of "the public domain," builds a commons that produces effectively the same result as the public domain—a permission-free, and lawyer-free, zone of culture. This again is the "effective public domain."

A. Legal Reform to Support Permission-Free Culture

While the law of copyright has evolved slowly over the past hundred years, the effect and significance of the law of copyright has changed dramatically in the past ten. From the narrow perspective of copyright treatises, the changes in copyright law have been small, and obvious: slow

18. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 712 (1986).

extensions to new technologies, such as devices to reproduce music, and then radio, and film; steady extensions in the term of copyright, responding not to the logic of incentives, but to the dynamics of political power; simplifications in the manner by which copyright attaches, and runs with creative property.

Had the world remained analog, none of these changes would have harmed the development and spread of culture. The extension of protection to new technologies still left the force of copyright regulation bearing most significantly upon commercial actors. The extension of term kept the cost of certain creative work higher than it otherwise would have been—but as the effective prices of access to culture were falling generally, this addition was hardly noticed. And the simplifications in the manner by which copyright attaches—effected through changes in America beginning in 1976, and transforming American copyright law from an opt-in to (in theory) an opt-out system of protection—did not matter much to ordinary culture, as again the real trigger for the law was only ever pulled by commercial entities. There were exceptions to this of course—the Xerox machine and the VCR being the most prominent.[19] But in the main, what IP scholars studied until the birth of the Internet was not strategies for regulating citizens, but strategies for regulating commercial entities. As Lyman Ray Patterson described the law of copyright (even while rightly regretting its massively expanded scope), copyright was born as industrial policy—regulating competitors.[20] And through most of the twentieth century, that is all it really was.

But the world did not remain analog. Beginning technically in the early 1970s, and effectively in the late 1990s, more and more of human life moved from analog to digital. And as I have already described, that move means that more and more of life moved to a platform where "copying" was the default. That default, in turn, means that negotiating the law of copyright too becomes a default. For the first time in the history of copyright, its target is no longer narrowly tailored to a copyright industry; for the first time, it is universal. As Jessica Litman put the point more than a decade ago:

> At the turn of the century, U.S. copyright law was technical, inconsistent, and difficult to understand, but it didn't apply to very many people or very many things. If one were an author or publisher of books, maps, charts, paintings, sculpture, photographs or sheet music, a playwright or producer of plays, or a printer, the copyright law bore on one's business. Booksellers, piano-roll and phonograph record publishers, motion picture producers, musicians, scholars,

19. For a description of the emergence of democratic copy machines (the Xerox), see PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 81 (1994).

20. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

members of Congress, and ordinary consumers could go about their business without ever encountering a copyright problem.

> Ninety years later, the U.S. copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything. In the intervening years, copyright has reached out to embrace much of the paraphernalia of modern society. . . . Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission—potentially actionable events under the copyright statute—into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law.[21]

Two features of the architecture of copyright law combine with one feature of the architecture of a digital network to produce this change.

First, in America, copyright law since 1909 has regulated "copies."[22] When that change was effected, the difference didn't matter much. The technologies to effect "copies" in 1909 were relatively few, and the distribution of those technologies was concentrated. But the nominal reach of the law meant that the scope of the law changed as the technologies for effecting copies changed.

The second feature of American law was a shift beginning in 1976 from narrowly tailored copyright regulation (regulation tied to those authors who opt-in to the copyright system) to indiscriminate copyright protection (regulating any creative work reduced to a tangible form).[23]

These two changes again would hardly have mattered had the world remained analog. But they become tectonic when the world moves to digital. They establish a presumptive default that permission is required for any "use" of culture, a default that has no precedent in the Anglo-American tradition.

Some might be mistakenly seduced by the nature of the world I am describing—one where permission is always required. I do not mean totalitarians. I mean economists. One advantage of the permission culture is that the "right to use" becomes a kind of property right. One advantage of property rights is that they enable resources to move to the highest valued user. One disadvantage of the commons is that it is not possible—at least if exclusive rights are necessary—to move property to its highest valued user. Thus, the economist might be encouraged by a change from commons to property.

But before making this leap, the economist should reckon a fact about our copyright system that is generally obscure. The argument for property

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21. Litman, *supra* note 17, at 34-35.

22. *See* Lyman Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 12 (1989) (describing change in law).

23. *See* Sprigman, *supra* note 10.

depends fundamentally upon the efficiency of the property system. It assumes, that is, a property system where at a minimum it is possible to know who owns what. Even then, a property system may suffer an anticommons problem.[24] But long before we get to the anticommons, we must consider whether the property system performs its most basic function—again, identifying who owns what.[25]

Yet this is precisely what our current system of copyright law does not do. Because we have abandoned the law of our Founders, and embraced the law of the French, we have given up any requirement within copyright that works be registered, or owners identified. Again, there are no complete lists of copyright holders. There is no simple way to identify who owns what rights. Thus the emergence of the permission culture is not the explosion of perfect markets for culture. Instead, the particular architecture of the permission culture that we now have affirmatively disables markets from allocating or reallocating resources efficiently. These rights are thus not building blocks; they are instead just blocks.

These features of the current interaction between the architectures of copyright and digital networks suggest at least three changes in the law that might mitigate the effects of this permission culture. I outline these changes in the balance of this section.

1. Taking the "Copy" Out of Copyright

The simplest way to respond to this change in the default produced by copyright's regulation of "copies" in a world where copying is as common as breathing would be to embrace a suggestion by Yale scholars Ernie Miller and Joan Feigenbaum—that we remove "reproduction" from the exclusive rights that copyright law grants.[26] The law would then have to be reformed to better target those uses at the core of the monopoly right. But by removing "copying" from the collection of exclusive rights copyright law grants,[27] we could avoid many of the unintended consequences of the

24. Michael A. Heller, *The Tragedy of the Anticommons*, 111 HARV. L. REV. 621 (1998).

25. Mark Lemley makes this point powerfully and concisely in his *What's Different About Intellectual Property*, 83 TEX L. REV. 1097, 1101-02 (2005).

26. Ernie Miller & Joan Feigenbaum, *Taking the "Copy" out of Copyright*, *available at* http://www.cis.upenn.edu/~dsl/SPYCE/papers/MF.pdf (last visited February 20, 2006).

27. The core rights protected by American copyright law are:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a

interaction between old law and new technology.

The best example of this unintended, and unproductive, interaction is the battle currently brewing over Google Book Search. In December, 2004, Google announced a project to "google-ize" 18,000,000 books from five major research libraries. As a study by the OCLC estimates, that 18,000,000 is a significant proportion of the total number of books now contained within the world catalog of publications (WorldCat): 32,000,000. Of those 32,000,000, approximately 5,400,000 are in the public domain. Approximately 3,000,000 are in print and in copyright. And the balance—23,600,000, or seventy-five percent of these works—are in copyright, yet out of print.

Google's project will give at least some access to all 18,000,000 books. The kind of access depends upon the status of the book. If the book is in the public domain, then Google will give full access to the book. If the book is in print and the publishers agree, then Google would give limited access (a few pages around any search) to the book. And if the book is still within copyright, but no express permission has been granted, then Google would make just "snippets" of the text available. Here is an example of this "snippet" access.

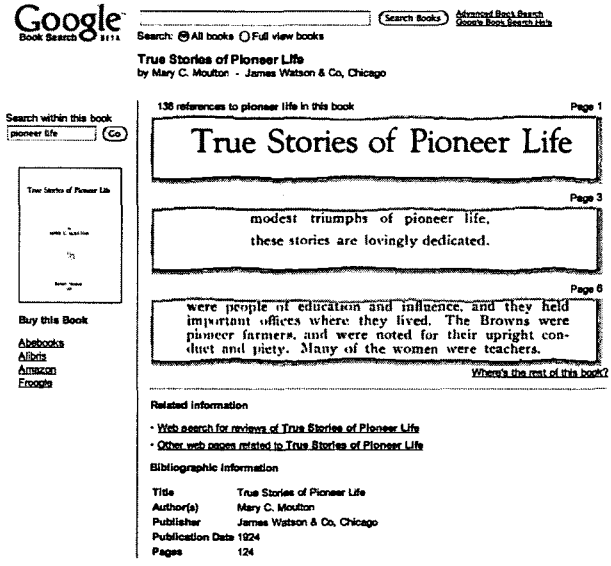

Image No. 1: Google Book Search Snippet View[28]

digital audio transmission.

17 U.S.C. §106 (2000).

28. Google, *Google Book Search Snippet View*, *available at* http://books.google.com/google books/about.htm (last visited April 4, 2006).

Thus, for all the books in the Google Book Search database, Google would grant at least "snippet" access. Any access beyond snippets would depend upon the work either being in the public domain or upon copyright holder permission. For any work in the Google database, however, the copyright holder could request that Google remove the work, and Google has promised to comply. The project promises to expand the access to our past more dramatically than anything since the invention of a library. It is an extraordinary gift to culture, even if it was also a way for Google to make (even more) money.

Google's "use" of the public domain works is uncontroversial. It argues that its "use" of the copyrighted works is "fair." The Authors Guild and many publishers have disagreed. In late 2005, the Authors Guild and five publishers (supported by the American Association of Publishers) filed two separate suits against Google, claiming Google's project constituted "massive copyright infringement."

The legal question raised by these cases is difficult: is Google's use of the copyrighted works "fair use"? That question inaugurates a complex and uncertain inquiry, ostensibly guided by four statutory questions.[29]

There is strong precedent supporting Google.[30] There is some precedent going the other way.[31] But in my view, the strongest argument supporting a finding of "fair use" turns upon the insanely inefficient property system that copyright is. If the OCLC's estimates are correct, then the transaction costs of securing permission for close to seventy-five percent of this collection are essentially infinite. And one core justification for "fair use" has always been to avoid unproductive transaction costs.[32]

Put aside, however, the merits of the argument for "fair use." The significance of this case is the very idea that copyright owners have a say at all about how Google builds its index. That idea is the product of the interaction between the architecture of copyright law and the architecture of digital technologies. The equivalent to the Google Book Search in analog space is the card catalog. It, too, indexed published works; its purpose, too, was to facilitate easy access to those works. But no one would have imagined that publishers or copyright owners had the right to control how a card catalog gets built. And that is because one building a card catalog in analog space does not trigger copyright law.

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29. The four questions are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See* 17 U.S.C. §107.

30. The strongest authority for Google is *Kelly v. Arriba Soft Co.*, 280 F.3d 984 (9th Cir. 2002).

31. *See, e.g.*, UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, (S.D.N.Y. 2000).

32. *See, e.g.*, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610-11 (1982); *see also* Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 25-27 (S.D.N.Y. 1992).

A digital card catalog is different, again because to make the catalog requires copying the original work. And thus, because of the interaction between copyright law and digital technology, the reach of copyright law in digital space is radically greater.

That difference, in turn, provides the affirmative argument for removing the reproduction right from the bundle of rights copyright law grants. In a world where copying is as common as breathing, the exclusive right to copy no longer tracks the necessary or productive control that copyright owner needs. Instead, its indiscriminate reach simply introduces strategic costs into the creative process. Those costs have little to do with any efficient incentive to create. Thus the reason to carve back the exclusive right to exclude any control over the act of copying.

It may seem odd that we would have a system called "copyright" that did not protect the right to copy. But there's nothing historically odd about excluding the reproduction right from the rights granted by copyright. From 1790 to 1909 in the United States, the law of copyright did not grant authors an exclusive right to copy. For most of our history, the law was more narrowly tailored, targeting uses properly needing the protection of the exclusive right. That again could be our strategy, Miller, Feigenbaum, and I would suggest. And if it were, it would at least alter the most dramatic, if least considered, effect of the interaction between copyright and technology.

2. Restoring Formalities

A second obvious reform would be to restore the opt-in character to copyright, thereby eliminating its reach over creative work that does not opt in to the copyright system. Scholars have just begun the process of reckoning the cost of giving up formalities. Chris Sprigman's work is the most extensive,[33] though no doubt it is just the beginning of a wide range of similar scholarship.

The basic insight motivating Sprigman is that the decision to shift from an opt-in to an opt-out copyright regime has had unintended and harmful consequences in the digital world. Again, it did not matter much that work was copyrighted in the analog world since most uses of copyrighted work was free. There were very few ways that ordinary citizens would interact with copyright law in the world circa 1976. And thus the indiscriminate extension of copyright to all creative work reduced to a tangible form would not have mattered much in 1976.

It does matter now, now that permission is required generally. For if permission is required, then we need a way to know from whom that permission must be secured. Yet the abolishment of formalities has

33. *See* Sprigman, *supra* note 10.

Yale Journal of Law & the Humanities, Vol. 18, Iss. 3 [2013], Art. 4

removed any easy possibility of knowing. A work is protected whether or not you can identify who the owner is; it is a felony to use that work in certain ways, even if there is no one to ask for the permission to use it.

The push to restore formalities has been resisted by the IP bar. In part, their resistance is driven by, in my view, an inaccurate view of what international law requires.[34] In part, it is driven by a misestimation of the burden of restoring a system of formalities: formalities were abolished when the costs of complying with formalities internationally would have been astronomical. But in the world of a free global Internet, the costs of formalities could be trivial. And finally, in part the resistance is driven by a view that it really does not matter if most people are "technically" in violation of the law most of the time. If those enforcing the rights are properly selective in their enforcement, the over breadth of this system of regulation would not be costly.

I do not believe international law would block a properly crafted system of formalities. I do believe we could architect such a system at a very low cost. And I am fundamentally opposed to any system of speech regulation that makes most speech illegal—even if you can trust the enforcers to target only really bad illegal speech. There is a corrosive effect from illegality that spreads beyond its generating domain. That corrosion is precisely what I fear about the "anarchy" of the digital world: we tell our kids their behavior is illegal; we wage what former MPAA president Jack Valenti calls a "terrorist war" against that illegal behavior; and soon, the targets of that war begin to internalize the names we call them.

A restored system of formalities would operate to narrow the reach of copyright law to those works where protection is necessary, at least as judged by the copyright owners. Only if an affirmative step were taken would a work be protected by copyright. That affirmative step would permit owners to signal that they intend to protect their rights; as a byproduct, it would construct a registry of rights holders. The vast majority of currently copyrighted material would quickly pass out of the regulation of copyright. Remaining would be that material benefiting from such monopoly protection.

This in turn would free a great deal of culture to the public domain. More would therefore exist within the permission-free zone. And if properly architected, the remaining copyrighted material would be relatively self-authenticating. It would be easy to understand who owns what, even possible without a lawyer. On both dimensions of the public domain, then, such a move would be progress.

34. *Id.* at 551-68 (explaining why international law would not restrict formalities reform).

3. A New York Times v. Sullivan *for Fair Use*

The final change that I describe is an obvious extension of First Amendment jurisprudence into the realm of copyright law. The model for the principle I believe we should extend is *New York Times v. Sullivan*.[35] The context is the doctrine of "fair use."

Sullivan involved a certain kind of property right. The underlying tort at issue protected the reputation of an individual. That resource is not truly alienable. But it is an important aspect of individual capital which is valuable for society to protect.

The issue in *Sullivan*, however, was how the importance of protecting reputation should be reckoned with the equally important public function of facilitating debate about matters of public import. The *New York Times* had published an advertisement that allegedly harmed the reputation of the plaintiff "Bo" Sullivan. The question was whether the First Amendment would shield the *New York Times* from the traditional operation of defamation law.

The Court held that it would. While the *New York Times* should not have license to knowingly spread defamatory information about anyone, the Court crafted an immunity from liability for defamation. That immunity has evolved to be (1) if the matter was of public import, or (2) the target was a public figure, and (3) the newspaper had no "actual malice," meaning it did not know that the assertions it was making were false, then the speaker is free of liability even if the statements made are false and defamatory. This rule no doubt weakens the protection of defamation law. But that weakening was justified, the Court reasoned, by important free speech interests.

A similar principle could protect free speech in the context of "fair use." As the law is currently crafted, "fair use" is a statutory defense to copyright infringement. The defense is determined by weighing four independent factors. These factors serve different copyright-related functions. Some are trying to determine whether a market could supply the use at issue better; some are trying to determine whether a subsidy to this particular actor is justified.

But what the law does poorly is to recognize, or institutionalize, the radically different inquiry that ought to obtain in the different speech contexts within which "fair use" might be invoked.

For example, consider again a film that would like to use a clip from a major news network. As the law currently stands, it is exceptionally difficult to include such a clip in a film. This is both because the actual case law supporting such use is thin, and because the norms within the industry strongly oppose use without permission. Indeed, as I have

35. *See* N. Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

Yale Journal of Law & the Humanities, Vol. 18, Iss. 3 [2013], Art. 4

described, it is usually impossible to secure Errors and Omission insurance without demonstrating every clip has been cleared. So whatever the formal rule of law, the practical effect is that clips without permission can rarely be included within a film.

If the film is a Hollywood blockbuster, that might not trouble you much. But if the film is a documentary about matters of public import, then to a lawyer steeped in *New York Times v. Sullivan* norms, the actual practice of these restrictions on filmmaking will astonish. While the law has carved a wide berth around reporters, insulating them from all but the most egregious defamation-related liability, the law has been blind to the arguably much more significant restrictive effect produced by copyright. Put differently, I understand the chill that *Sullivan* addressed, even though it is hard to accept the real harm to innocent reputations (not Sullivan's of course, but others) that the rule has sanctioned. But I cannot understand the refusal to recognize the equivalent chill that the current practice of fair use with films has produced, especially because the actual property-related harm from such a use of copyrighted material is effectively nil.

This concern would be important as a matter of principle in any case. It is increasingly important as a matter of practice. There is a growing resistance by major media outlets to license content to independent and documentary filmmakers. In one case, for example, NBC refused to license one minute of the President explaining his reasons for going to war (the filmmaker's agent was originally told, "[I]t doesn't make the president look very good"). These refusals sound like threats to producers, funders, and insurance companies. The effect of these refusals is often to force the material at issue out of the film—even though, again, in none of these cases could one imagine that there is any economic harm to the entities whose work is "fairly" used.

The remedy here would model itself on *Sullivan*. Just as *Sullivan* aims at intentional torts only, so too could a *Sullivan*-like rule in copyright aim at intentionally malicious breach only. The aim would be a rule that grants to any actor using work as commentary or criticism in a matter of public import a *Sullivan*-like buffer. That buffer would make it harder for a copyright holder to threaten a filmmaker, by making it less likely that any law suit could survive summary judgment.

The aim of such a rule would be to track the second dimension of the public domain that I identified initially: to effect a lawyer-free zone of culture. Artists and filmmakers should be able to negotiate the field of copyright without the fear of oppressive liability and the cost of expensive lawyers. A *Sullivan*-like rule could effectively secure that freedom for creators, just as it has secured that freedom for reporters. Put differently, there is no principled way to distinguish the need for protection in the context of journalism from the need for protection in the context of documentaries and the like, at least in the context in which digital

technologies have enabled an extraordinarily wide range of creators in both fields.

III. RE-FORMING A COMMONS

In the previous section, I described a motivation for legal reform and then sketched three relatively small changes in the law that would restore a public domain. I am not optimistic that any of these changes will be adopted anytime soon (though the third is certainly more likely than either the first or second). "Copyright reform" in America today has nothing to do with re-forming copyright to make it make sense in the digital age. The aim of copyright reform today is to further extend the outdated features of the current system, to protect powerful, if dying, copyright industries.

It is for this reason that a number of us have tried to develop private responses to this public problem. This is not because we believe that only private reform is necessary. Some may believe that. I certainly do not. Instead, the stronger motivation is that waiting for public reform would risk too much. As I describe more completely in the balance of this essay, it is urgent now to awake recognition of the need for reform. For if the strategy of DRM that I described initially gets deployed broadly, it will be impossibly difficult at a later point to inspire even recognition of the problems at stake.

The project that I will describe here is the one I am most familiar with—Creative Commons. Creative Commons took its inspiration from the most successful example of a private commons that we have seen so far: the Free Software Movement. My aim here is not so much education about Creative Commons as it is education about the strategy of using private ordering to build a public commons. That question is quite general, even if it is addressed in the context of a particular organization. And as the strategy in general has been the target of a careful and informed criticism,[36] it is helpful to use the particular to reflect upon the more general question.

In the terminology I will adopt, neither the Creative Commons, nor the Free Software Movement, technically expands "the public domain." They instead expand the "effective public domain" by creating a "commons," a resource that anyone within the relevant community can use under content-neutral terms.[37] If the public domain is technically a domain without property rights, the commons is not. The freedoms granted in this commons are granted by the permission of property holders. But this commons is experienced as a permission-free zone because the

36. *See* Niva Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005).

37. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 19-22 (2001).

permissions are granted up front. They are not negotiated as a condition of use and are thus experienced in the same way the public domain is experienced. And if the project does its work properly, the permission that is granted can be understood without a lawyer—a lawyer-free zone, with any necessary permission granted in advance. That, as I will use the term, is a commons for intangible resources.

The qualification ("for intangible resources") is crucial. While there has been an extraordinary amount of productive scholarship disabusing a confused world about the nature of the "commons," the vast majority of that scholarship has focused upon tangible resources held in common.[38] And while the insights from that research are helpful in understanding intangible commons as well, there are some habits of mind developed in the tangible world that are misleading when applied to the intangible commons. It is premature to do more than flag this problem just now. I will return to it as I explicate the idea, and the problems, of the intangible commons.

A. The Creative Commons

The Creative Commons launched in December 2002, offering authors and artists a set of free copyright licenses with which they could mark their work and signal the freedoms they intended their work to carry. Because of the nature of copyright law, and digital networks, the default for all creative work is "all rights reserved," and any use of a creative work in digital environment triggers those rights. But the view motivating those who launched the Creative Commons was that most authors and creators would do best by reserving some rights, rather than all the rights copyright secures. Hence the slogan of the organization: "Some Rights Reserved."

The rights reserved and granted generally get expressed in six core licenses. These six are the product of four restrictions.[39] One restriction requires "attribution." That requirement applies to every Creative Commons license. Another restricts "commercial use." A third restricts derivative uses. And a fourth requires that any derivative be licensed under a similarly free license.

These licenses are in turn implemented through three distinct layers. The first layer is a human-readable "Commons Deed" that expresses the freedoms associated with the content. An example is reproduced below.

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38. *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS (1990). Ostrom's work goes far towards demonstrating the exaggerations made by those who believed that any commons was a recipe for disaster. But her analysis is primarily tied to physical resources that are rivalrous. My analysis is exclusively of nonrivalrous intangible resources.

39. A description of the licenses is at http://creativecommons.org/about/licenses/meet-the-licenses.

Image No. 2: Creative Commons, Commons Deed[40]

The second layer is a copyright license, which enforces the freedoms associated with the content. This license is not a contract, or at least, it does not rely upon contracting principles for it to be enforceable. It is rather a set of permissions that authorize what would otherwise be a type of "trespass." The right to impose the restrictions, and release the permissions, is triggered of course by the very feature of copyright law that I criticized above: but for the fact that every "use" of a creative work in a digital environment was a copy, Creative Commons could not restrict use without a contract.

Finally, every license also expresses its freedoms in machine readable form. This permits search engines, and other net technologies, to understand the freedoms associated with content in a standardized manner.

In the three years since its launch, the project has seen explosive growth in the adoption of its licenses. Within a year, the project counted over 1,000,000 link-backs to the licenses. At a year and a half, that number was over 1,800,000. At two, the number was just about 5,000,000. At two and

40. Creative Commons Deed, available at http://creativecommons.org/licenses/by-nc-nd/2.5/ (last visited April 12, 2006).

a half years (last June), the number was just over 12,000,000. At the end of 2005, Google reported close to 45,000,000 link-backs to Creative Commons licenses.

The aim of the project should be plain. By creating a standard by which people can signal the freedoms that they intend their creative work to carry—different from the default of copyright law—the project aims to move a significant amount of content into an effectively permission-free zone. The hope is that supply will in turn create its own demand—that a practice built upon free culture will support a greater demand more generally.

B. Challenges: Federation

The project of privately ordering a commons, however, faces a number of significant challenges. Perhaps the most important is to assure that freely-licensed creative work can, in a sense, "interoperate." If work licensed under one free public license cannot be integrated with work licensed under a second free public license, then a significant part of the potential for free licensing will be lost.

This problem is plain in the Free Software Movement. There are many different free software licenses (though the dominant is the Free Software Foundation's GPL). Many of these licenses, however, are "incompatible."

Incompatibility in this context can be created in two ways. One is that the preferences of those selecting a free license can be incompatible—for example, one may want a free license that only requires attribution; another may want a free license that requires attribution and that modifications be released; content from the second license cannot be released under the first. The other is that licenses of the same type can be crafted to be incompatible—for example, two licenses, each of which require modified content be released freely, could each require modified content be released only under that particular license.

The first type of incompatibility can be limited through persuasion. But so long as people are different, it will not be eliminated. The second incompatibility, however, is simply a product of bad design. Because of this bad design, content gets ghettoized into particular licenses, fracturing the resources for innovation.

The solution to the second incompatibility is standardization. But that standardization should permit reasonable variation among licenses of the same type. And such variation can be tolerated so long as there are express terms within each similar license permitting cross licensing of content from each.

So for example, a popular type of free content license is a "copyleft" content license. Such a license gives users the freedom to copy and distribute the original content, but any modifications of the content must

be licensed under a similarly free license. One example of this license is the Free Software Foundation's Free Documentation License (FDL). A second is the Creative Commons' Attribution-ShareAlike license. A third is the "Free Art" hosted by a collective in France.

The core freedoms protected by each of these three licenses are the same. Yet content licensed under one cannot be relicensed under another. Thus, a photo on Flickr licensed under an Attribution-ShareAlike license cannot be included in Wikipedia, since Wikipedia is governed by the FDL.

This incompatibility serves no useful purpose. It instead simply fractures free culture and slows its spread. More importantly, there is no need for such incompatibility. These licenses can be architected to at least permit derivatives from one license to be licensed under an "equivalent" license. And thus to enable this ability to re-license content, Creative Commons has launched a license interoperability project.

This project will establish a procedure to certify compatibility among similar license types. That procedure will first verify that the differences among the licenses are relatively small. If so, then if each license adds a "compatibility clause"—expressly permitting cross-licensing under licenses deemed compatible—the license can bear a compatibility certification mark, so long as it also exposes Creative Commons metadata appropriate for the license and a Creative Commons "Commons Deed," explaining the terms of the license. Once certified, content licensed under one "Attribution-ShareAlike" license can, when modified, be licensed under either the original "Attribution-ShareAlike" license, or any "compatible" "Attribution-ShareAlike" license.

This technique, if successful, will achieve two important ends. First, it will assure that content is not trapped within any particular license. This is important particularly to ensure that major content projects not become isolated from one another. Second, through any migration from one particular license to another, the system signals the strengths of particular licenses (those into which content is flowing) and the weaknesses of others (those from which content is flowing). These signals will help assure that content gets licensed under systemically strong licenses. It will thereby also assure the stability of a free license infrastructure.

C. Criticisms of Private Ordering

As with any major movement, Creative Commons has had its critics. Some of these criticisms flow from obviously conflicting interests. But others are the product of genuine questions about the wisdom of the project, or at least the strategy. In this final section, I address one such critic, Professor Niva Elkin-Koren, whose recent, largely sympathetic, review of Creative Commons nonetheless raised important questions of

strategy.[41] These questions reveal, I suggest, not a difference in ends but instead a difference in perception about the current challenges that free culture faces.

Elkin-Koren has a number of concerns about the project. My focus here is on just one. Put simply, the concern is that the use of licenses to craft freedom may in turn affect the meaning of that freedom. In particular, it may change a creative ecology within which one creates and shares creativity without concern for underlying property rights into one in which property is central. The focus on licenses may thus make that community less likely to engage in property-less creativity.

The intuition behind this concern is a picture of the Internet circa 1996, just before "the copyright wars" had broken out. In that world, there was a norm of sharing for content that was placed on the web. That norm reflected not express copyright licenses, but instead an understanding about the benefit of nonexclusive creativity. This norm had limits of course—it would be inconsistent with the norm, for example, for an individual to take another's work and begin to market it commercially. But within a wide range of acceptable behavior, individuals could take and build upon the work of others in the Net.

Elkin-Koren's understanding of the early Internet accords with my own. And indeed, I share the nostalgia for a time when the creativity and innovation surrounding the Internet occurred oblivious to the underlying issues of copyright. Some copyright scholars explained this behavior by invoking the device of an implied license. But I share Elkin-Koren's view that any such implication was purely constructed. The issue of ownership over expression was not at issue. Attribution was important. But beyond attribution, sharing was the norm.

This early understanding of copyright on the Net has now changed. Fueled by litigation against "piracy," it is no longer possible to describe content placed on the Net as free for sharing simply because it is placed on the Net. None could believe (any more at least) that the Net is a copyright-free zone. Everybody now recognizes that at least with respect to commercial work, copyright remains the rule.

This new understanding is supported, of course, by the description I gave at the start about the interaction between the architectures of copyright law and digital networks. From the perspective of copyright law, it is in fact correct to say that at least with respect to commercial work, copyright remains the rule. It is also correct to say that there is no copyright-based reason to believe the rule of copyright stops at the commercial-noncommercial line. What makes content subject to copyright's jurisdiction is that it is used in ways that are within the range

41. *See* Elkin-Koren, *supra* note 36.

of exclusive rights granted to the copyright holder. So long as those rights include the right to copy, the presumptive reach of copyright covers absolutely everything done on the Net.

Elkin-Koren does not disagree with this technical description, either of the law or digital networks. The disagreement is about the best strategy for resisting the emerging social meaning about creativity on the Net. To the extent copyright commodifies the creative process, Elkin-Koren worries Creative Commons will further that commodification. If we talk about "rights" not only in the context of commercializing content, but also in the wide range of contexts within which creativity happens without commercialization, then that will only further fuel a trend to an understanding about creativity that will be harmful to these earlier norms.

This is an argument about the best strategy in a context where there are no clear analytical tools for selecting among the strategies. The evolution of social meaning is an inherently difficult path to track; it is an inherently difficult dynamic to control. And hence, arguments in this space must begin by recognizing the humility that the field demands: all we can do is muster reasons for one view over the other; there is no metric for reckoning one set of reasons over the other.

And thus, while I certainly concede the concern, my sense of how meanings evolve in this context is different. Had there not been the "copyright wars," saying and doing nothing about copyright may well have been the better strategy. In that context, Creative Commons would be the solution to no problem, and perhaps would be a problem of its own.

But we do not live in the world of no "copyright wars." The dominant message of those waging that war has been the core logic of copyright: the "use" of creative work requires the permission of the copyright owner. And however optimistic it is to count over 45,000,000 objects on the web that say "Some Rights Reserved," Google reports over a billion pages on the web that state "All Rights Reserved." The message of complete control is loud on the Net, and repeated.

This imbalance has led otherwise balanced institutions to make an inference about the content they find on the Net. For example, the presumption within many university "copy shops" is that material found on the Net cannot be distributed for class without express permission granted by a copyright owner. This reaction is the product of the prominence of struggles about copyright in the press, and an aversion to risk suggested by these struggles. While the average web content does not express the extreme, the normal does. And institutions faced with this perception respond as the extreme defines it.

This extremism increasingly confirms another important gap that exists between ordinary and professional perspectives about copyright. At least in the United States, there is no ambiguity about whether copyright is property. And especially in the United States, the understanding that

copyright is property tends to support a simplistic view about the nature of that property. The ordinary view about property is binary at its core. Limits or subtle restrictions on the scope or strength of "copyright" are not internalized within this view.

The professional view is of course different. Anyone who knows anything about copyright recognizes the important limitations built into any copyright system. Lawyers in particular recognize property not as a thing, but as a bundle of rights. As those rights are very different, it is hard to see the set as mapping one side of a binary pair.

In this context, my sense is that education helps. Demonstrating the wide range of "permissions" built into a copyright regime is a part of that education. If the frame of analysis is binary—either you "respect copyright" or you do not—then the normalcy of the "All Rights Reserved" is conceded. But if the frame of analysis is more diverse—recognizing the many steps between "No rights respected" and "All Rights Reserved"—then the extremism of "All Rights Reserved" can be recognized. The diversity of positions between zero and one encourages a dialog about which level is appropriate. And given the diversity of creative forms, my expectation at least is that the equilibrium view is far from the extreme.

The data from Creative Commons confirm some of this, as the pattern of licensing has been consistent and diverse. Two thirds of Creative Commons licensors restrict commercial use of their creative work. Two thirds permit derivatives. And of those who permit derivatives, half require that any derivative be released under a similarly free license. All of these licensors, through this process of marking content with the freedom they intend it to have, now see something of the diversity that copyright supports. And many of those who have come across these licenses now understand something of that diversity that they likely did not see before. Against the background of the "copyright wars," this feels like progress.

A second feature of Elkin-Koren's concern, however, I feel more strongly about. This concern we could call the fear of contracting. Ignoring for the moment the view that licenses such as the GPL or the Creative Commons licenses are not contracts, or at least, not necessarily understood as contracts, this fear of contracting is the concern that private ordering structures may weaken fundamental freedoms. This concern is distinct from concern about social meaning. It is born in struggles against "click-wrap" or "shrink-wrap" licensing. In those contexts, contracts are often used to get the consumer to waive important consumer rights. These rights, established by the law as defaults, are effectively modified by devices that condition access to important resources on waiving these default rights.

The concern over the effect of shrink-wrap licenses is important. And work done by many, especially Pam Samuelson, to resist legislation supporting such licensing was critical to avoiding the radical restructuring

of underlying contracting freedoms.[42] But in my view, the tool (shrink-wrap licensing) was properly criticized because of the baseline benefits it modified. The problem was not that individuals were participating in crafting a new baseline; the problem was the obvious problems in the new baseline that their individual actions would create.

But if the problem is the baseline itself, then in my view, an efficient tool for modifying that baseline is a solution, and not properly a target of criticism. Opting out of an oppressive regime is a good thing, even if the device facilitating that opt-out is properly criticized when it used to opt out of a free(er) regime.

This is an obvious point. But it is missed, I suggest, when one fails to recognize the inversion that the Internet has effected with respect to creative freedom. Were there no such inversion, then there would be no urgent need to escape the new baseline. But in light of that inversion, it is my view that the tools to facilitate escape are not subject to criticism simply because similar tools are used to undesirable ends.

The qualification "similar" is critical here. For again, a copyright license is not, at its core, a contract. It operates within what the Germans call "the corridor of freedom" that copyright law creates. But it is a license crafted against the background of property law. Property law has thus set the default; the license is a way to escape that default. And where, again, the default is so extreme, devices that facilitate an escape are not, in my view, subject to condemnation.

Finally, we should consider more explicitly the role of DRM in this debate about strategy and meaning. Were we assured that the next 10 years would simply continue as a struggle of ideas between competing visions of how creativity should be shared, then, in my view, Elkin-Koren's concerns would be quite strong. We might expect a more balanced position to emerge from the simple tide of competing ideas. But if, as I believe, we are facing a fundamental shift in the architecture through which digital culture is accessed, then it becomes more urgent to at least mark, and rally, an alternative view. From this perspective, the function of Creative Commons licenses is not so much to produce a particular mix of freedom. It is instead to mark clearly an alternative view of the mix between freedom and control. When the technology makes it seem to most as if there is no choice about whether copyright gets respected perfectly, the role of these alternative movements is to sow dissent.

42. This was the battle to stop "UCITA," which would have "updated" contract law for transactions in information. *See* http://www.jamesshuggins.com/h/tek1/ucita_psam_19990709_letter.htm.

CONCLUSION

As a descriptive matter, there has been a radical change in the scope and vitality of the public domain. About that I assert there can be no disagreement. As a normative matter, one can be troubled about this change, or not. Some support it; some celebrate it; but that support and celebration reflect important values.

For those who are troubled by this change, this essay has mapped two (sometimes) complementary strategies in response. These strategies are designed to restore a commons—either legally, by restoring a public domain, or effectively, through voluntary acts that produce a simulated public domain.

Both strategies are motivated by an urgency surrounding this debate. As the infrastructure of digital networks is being changed to implement through code the extreme control now recognized in law, it is especially important that a different perspective on the mix between control and freedom be visible. Whether this alternative can prevail is a hard question. But even if one believes it will not, marking clearly what we lose is nonetheless an important effort.