Free Culture, by Lawrence Lessig
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PREFACE

* David Pogue's skepticism of "Code" premise that software functions as a kind of law. Possibly for 1999 but not today (dependence on Internet).

* Argument here is about consequences of Internet to tradition of free (unfettered, not unpaid) culture -- not left/right partisan. (Example: Opposition to FCC media ownership deregulation.)

* Inspiration for title: Richard Stallman (Free Software, free Society). Balance between anarchy and control, against extremism.

INTRODUCTION

* 1903, Wright brothers invent airplane, creation of air rights for private (land) property. Causby lawsuit: government trespassing land's air rights. "Common sense revolts at the idea" (Douglas).

* 1935, Edwin Howard Armstrong invents FM radio. RCA/David Sarnoff sees FM as competition to AM, lobbies FCC to assign FM spectrum so as to "castrate" it -- different band, power cut (loss of FM relay, buy wired links from AT&T). RCA incorporates FM into TV, resists paying fees for Armstrong's patents, Armstrong commits suicide after losing legal battles. Example of how powerful forces corrupt government against weaker forces.

* Internet increasing market penetration (58% in 2002). Not about Internet itself, but about now it affects how culture is made. Commercial vs. noncommercial culture, law used to address commercial culture, division is now erased, moving from free culture to permission culture. Protectionism for corporations, in face of populist change of Internet. "Remake the Internet before the Internet remakes them." False choice between "piracy" and "property". Tradition of free culture, "hopelessly destructive" war for permission culture, "effort to map peace'.

* Different kind of "property" than Causby's land. "Push common sense along." Profound consequences to "silliness". The ideas of "piracy" and "property" -- Internet fantastic and new, big media pushing government in ways "destroying something very old".

"PIRACY"
========

Creative property leads to issue of piracy, Internet/P2P provokes new "war". Place "piracy" in context -- "if value, then right" is not our tradition: IP is an instrument, subservient to the value. Conflation of republishing with transformation, birth of Internet extends reach of copyright law beyond big publishing to all individuals, vast additional burden.

CHAPTER ONE: Creators

* 1928. Mickey Mouse "Plane Crazy" and "Steamboat Willie" -- synchronized sound for cartoons. Parody of Buster Keaton's "Steamboat Bill, Jr." Disney pattern of derivative works. Vibrant public domain (30 years on average).

* Norm of free culture. Example: Japanese manga, doujinshi -- doujinshi on paper illegal, but leads to flourishing of manga. America: limits to "Superman" behavior, etc. Japan: "we don't have enough lawyers".

* Plenty of value that "property" doesn't capture -- building on works of others. Reluctance of Japanese lawyers to call doujinshi "stealing". Other examples in science, theater, Hollywood films. No society makes every use paid for -- some culture "free for the taking". Not "whether" free, but "how much" free.

CHAPTER TWO: "Mere Copyists"

* 1839, Louis Daguerre invents first practical photography -- still complicated, relegated to professionals. 1888, George Eastman invents paper film, opens up photography to masses, amateurs. "Authentic visual record .. of the common man" (Brian Coe). Legal decisions regarding permission: courts said not necessary. Imagine difference if decisions had gone other way -- photography likely not to flourish among nonprofessional people.

* "Just Think" -- San Francisco educational project for video media literacy. Crucial to next generation of culture. Grammar changes with media: computer games. "Read-only' -- 20th century media. 21st century: read and write. Barish class at Annenberg, gun violence -- powerfully engages students not engaged by other media.

* 9/11 news coverage, contrast between mass media stories and Internet: mass/digested, Internet "barnraising" (ala Mike Godwin). Not an aberration, a beginning: blogs. Some used for (unchoreographed) public discourse. "Our democracy has atrophied." Alexis de Tocqueville: deliberation of juries. "Democratic deliberation" -- requires permission (social norms). Blogs have no social norms yet -- Trent Lott resignation after blogspace keeps story alive. Lack of financial conflict of interest (Dave Winer). Concentrated media hides more from public than unconcentrated media -- blogs allow amateurs to enter debate. Affects democracy: (1) not controlled by gatekeeper, (2) requires defending ideas in public forum.

* John Seely Brown, Xerox: tinkering, open-source software. Also happens with content. Freedom/right to tinker with content is not guaranteed, systematically suppressed in digital world.

CHAPTER THREE: Catalogs

* 2002, Jesse Jordan/RPI, intranet search engine, RIAA lawsuit. Similar: MTU, Princeton. "Mafia-like choice" -- cost to win prohibitive (250K), settlement total savings (12K). Created an activist out of a conservative.

CHAPTER FOUR: "Pirates"

* Every big media sector "born of a kind of piracy" -- defined as "using the creative property of others without their permission".

Film

* Edison: MPPC, control film patents. California to escape MPPC reach. By time enough federal marshals appeared to enforce, patents expired.

Recorded Music

* 1900: new inventions (phonograph, player piano) not covered by copyright. Mechanical reproductions, statutory license.

Radio

* Not even recordings given royalties. Only composers.

Cable TV

* Re-broadcasting -- another statutory license.

CHAPTER FIVE: "Piracy"

* Distinguish "copy shop" piracy from Internet-related "taking".

Piracy I

* Physical piracy is wrong. Even so, possible excuses: (1) born a pirate nation -- but now international law, (2) does no harm -- still a sort of property right, even with exceptions (statutory licensing), violates owner's right, (3) helps copyright owner -- addiction strategy, but owner should still decide.

* Even if some is wrong, not all is wrong (cf. examples from chapters 1-4). Understand P2P harm before condemning it. Like Hollywood, escapes overly controlling industry, like recording industry, exploits new distribution method, unlike cable TV, nobody is selling content.

Piracy II

* How much does P2P harm. Napster -- 18 months, 80 million users. Some infringing, some not. Four types: A. download instead of purchase, B. download to sample prior to purchase, C. download out-of-print content, D. download non-copyrighted or authorized content. Balance: A clearly harmful, B illegal but beneficial, C illegal but harmless to artist and beneficial to society, D legal. Compare with cassette recording -- MTV contradicted evidence of taping loss, industry was wrong. Question, how harmful is A compared to benefits of B-C-D. Market data complex, inconclusive. Type C: compare with used record stores and libraries.

* Isn't fight only against type A? No. Napster offered 99.4% block, not good enough. Zero tolerance is not our history -- balance. Mechanicals/statutory. Radio, indirect benefit (exposure). Cable TV: compensation without control. Betamax case.

Table:

Case	Whose value was pirated	Response of the courts	Response of Congress
Recordings	Composers	No protection	Statutory license
Radio	Recording artists	N/A	Nothing
Cable TV	Broadcasters	No protection	Statutory license
VCR	Film creators	No protection	Nothing

No elimination of "free riding", Congress balanced interests, recognized some legitimacy of "pirates". SCOTUS: "never complete control over all possible uses". Balance versus "our property".

"PROPERTY"

Copyright is a kind of property. "In ordinary language" misleading: Jefferson -- receiving without lessening/darkening. Context for this sort of "property".

CHAPTER SIX: Founders

* Shakespeare, 1774: copy-right for Romeo and Juliet still held by Jacob Tonson. 1710, Statute of Anne. Licensing Act 1662 expired 1695 -- had given publishers monopoly over publishing. Common law: protect in lieu of "positive" law? Statute of Anne had limited term -- question: common law takeover after term or not?

** Copyright: specific, re-printing a book. No other rights delineated. 1656: Statute of Monopolies (patents for new inventions only). Copyright originally conceived as naturally limited.

** Booksellers: power over spread of knowledge. Balance power, increase competition: limited term in Statute of Anne.

* 1774: Donaldson v. Beckett: House of Lords, 22/11 rejection of perpetual copyright. Clearly established "public domain" after term expiration, no common law extension.

CHAPTER SEVEN: Recorders

* 1990, Jon Else, "Simpsons" in background TV for documentary film, Groening: OK, Fox: nada. Digital replacement.

* Fair use? Else: 1. errors and omissions insurance: underwriters have dim view of fair use, 2. wanted to play by the book ("should never have asked in the first place"), 3. expert advice: Fox would "depose and litigate" until broke, regardless of the merits, 4. fair use addressed usually at end of project/budget. In principle, fair use means don't need permission. In practice, fuzzy lines and "extraordinary liability if lines are crossed" makes for only slight effective fair use.

CHAPTER EIGHT: Transformers

* 1993, Alex Alben, Starwave (Paul Allen), CD-ROM: Clint Eastwood retrospective, film clip clearance -- a full year. Statutory license? David Nimmer at conference of federal judges after collage video intro: "Do you know how many federal laws were just violated in this room?"

* Internet: cut and paste culture. Possible solution: "royalty for derivative reuse of unregistered work = flat 1% of net revenues, held in escrow" -- name own price only when registered.

* 2003, Dreamworks "film sampling" project with Mike Myers. Privilege of the rich. "Creative process is a process of paying lawyers."

CHAPTER NINE: Collectors

* 1996, Brewster Kahle, Internet Archive "Way Back Machine". (1915 exception for film TV registration -- copies "borrowed back" from LOC.) Kahle: Movie Archive. Ephemeral culture. Great historical potential for archive but hampered by law, legal costss.

CHAPTER TEN: "Property"

* Jack Valenti, MPAA, 1982: equating "intellectual property" with other property. (1) claim is wrong, (2) would be terribly wrong to change in that direction.

* Constitution: 5th Amendment: takings clause, just compensation. Creative property: limited term, no compensation after expiration. Not "whether" creative property should be protected, but "how".

* General paradigm (from Code): modalities of regulation: Law, Market, Architecture, Norms. (1) they interact, (2) "effective freedom" - consider the interactions, (3) law has a special role. Constraints can change, can be changed.

Why Hollywood Is Right

* Before Internet: balance between Law, Norms, Market and Architecture. Enter Internet (MP3, P2P): Architecture and Market change dramatically, "Norms pile on", "balance of protection lost".

* 1995 Commerce Department White Paper: (1) strengthen IP law, (2) new marketing techniques, (3) tech DRM, (4) educate norms to protect. Designed to protect old balance. But should we protect the old way? No, not government's role to protect specific businesses (= authoritarianism). Before talking about justification, talk about effect.

* 1873, DDT insecticide. 1962, Rachel Carson, Silent Spring - unintended consequences. James Boyle (Duke): "environmentalism" for culture. LL: "To kill a gnat, we are spraying DDT with consequences for free culture that will be far more devastating than that this gnat will be lost."

Beginnings

* Progress Clause: "promote progress", "to Authors", short. Modern scope of copyright regulation far beyond the original. Law, Market, Architecture far more influential than Norms.

Law: Duration

* No guaranteed public domain in US up to 1790. Congress enacts first copyright law: 14 year initial term, 14 year optional renewal. 1831: initial term increased to 28 years. 1909: renewal term increased to 28 years (max: 56).

* 1962, new pattern begins: periodic increases. Recently: 1976 - 19 years, 1998 - 20 years (Bono Act). 1976/1992: removed renewal requirements. Dramatic reduction of content falling into public domain.

Law: Scope

* 1790: maps, charts and books. Now broad: music, architecture, drama, computer software, etc. Registration requirement, abolished when US "decided to follow European copyright law". Other procedural limitations relaxed, protection now automatic: copyright exists without circle-C mark, without duplication for distribution. Derivative rights - distinct from duplication/distribution rights.

Law and Architecture: Reach

* Originally regulated only publishers, now also users and authors (now capable of making copies). Intenet: "copies" should not always be the trigger for copyright law.

* Distinguish (pre-Internet): (1) unregulated uses, (2) regulated uses, (3) regulated fair uses. Internet: use entails making copies, copyright law eats up unregulated and fair uses. (1) no policy maker ever intended to get rid of unregulated uses, (2) also regulates even trivial transformative use, (3) extraordinary burden on fair use. Fair use often ignored, even by free culture advocates.

* Example: Video Pipeline, movie trailers for video stores. 1998, Internet distribution: Disney sued. Without Internet, there is no suit (first-sale doctrine allows performance of clips to promote sales, copyright does not apply).

Architecture and Law: Force

* Enforcement: before digital-tech, law (Marx Brothers vs. Warner Brothers: "we were brothers long before you were"); Internet: no check on "silly rules" (rules built into technology, not embodied in law - cf. Adobe eBook Reader).

* "controls" versus "permissions" -- not copyright "law", copyright "code". Sony "Aibo": aibopet.com, reprogramming Aibo - hack. Ed Felten, SDMI competition, encryption reverse-engineer. DMCA - DRM anti-circumvention, Law to back up Architecture. (Paul Conrad cartoon about VCR vs. guns) Changing balance: using code to restrict fair use, DMCA to punish evasion of restrictions for fair use. Code becomes Law.

* New technologies to detect infringement. Metaphor: speed detectors on cars, tickets issued from speed data.

Market: Concentration

* Duration, scope, reach, force all increased - wouldn't matter much except for concentration/integration of media. Scope/nature of concentration.

* Scope: FCC deregulation. Nature: vertical integration, cross-ownership. Example: Norman Lear, AITF, competition from ABC to CBS, networks could not own content. 1994, FCC abandoned independence, networks dramatically increased ownership of content, independent productions dramatically decreased. More channels but fewer owners. Cf. drug war: TV policy against "controversial" ads,

Together

* Simple claim: "protect my property" -- but "property" has dramatically changed, (1) power of technology to supplant law, (2) power of concentrated markets to weaken opportunity for dissent -- redefine "property"? New balance "between zero and one." Reductions in scope of copyright to balance "extraordinary increase in control". "never in our history have fewer had a legal right to control more of the development of our culture than now."

* Tables of changes (domains covered by copyright law indicated with "(c)", others with "Free"):

1790:	Publish	Transform
Commercial	(c)	Free
Noncommercial	Free	Free

1900:	Publish	Transform
Commercial	(c)	(c)
Noncommercial	Free	Free

1975:	Publish	Transform
Commercial	(c)	(c)
Noncommercial	(c)/Free	Free

Now:	Publish	Transform
Commercial	(c)	(c)
Noncommercial	(c)	(c)

* Copyright law not the enemy: "regulation that does no good". issue not simply whether copyright is property, crafted to balance creative incentives with public access, "free culture". "Free culture is increasingly the casualty in this war on piracy." Copyright property right no longer balanced, tilted toward an extreme. "The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer."

PUZZLES

CHAPTER ELEVEN: Chimera

* H.G. Wells story: "In the Country of the Blind, the One-Eyed Man is King." Not so fast (attempt to remove eyes)...

* "Chimeras" -- people with two sets of DNA. Metaphor for copyright battles: "What is P2P file sharing?" Like cassette taping -- yes. Like stealing from record store -- yes. Embrace truth in both views, one-sided extremes are bad. Either extreme worse than a reasonable alternative, but zero-tolerance ("stealing") is the worse of the two extremes. But recent law is going in that direction.

CHAPTER TWELVE: Harms

* Collateral damage of content industry war to fight "piracy" and protect "property". War not justified. Here are three consequences.

Constraining Creators

* Digital technology will enable "almost anyone to capture and share content." Only if legal. Vast amount of Net content "is presumptively illegal" and will chill creativity. Fines out of balance ($98 billion lawsuit for students building search engines enabling copying of songs vs. WorldCom fine of $750 million for $11 billion fraud or pending bill in Congress to cap medical malpractice at $250,000).

* Creativity suppressed or driven underground. Public domain boundaries designed to be unclear. Ease of tracking infractions. "Fair use in America simply means the right to hire a lawyer to defend your right to create." Costs too much, delivers too slowly, often with "little connection to the justice underlying the claim." Tolerable only for very rich.

Constraining Innovators

* If preceding section is "too lefty" then try this: entrepreneurial innovators must "have the sign-off from last generation's dominant industries." (cf. Hank Barry: "nuclear pall" over Silicon Valley).

* Example: 1997 MP3.com -- my.mp3.com (intended partially to collect preference data for recommendation engines), music lock-box system. Company made copies instead of users, but only available if users confirm they own purchased copies. RIAA lawsuit, "willful infringement", MP3 settled, Vivendi/Universal purchased. VU then filed malpractice lawsuit against former MP3.com lawyers. Message to lawyers that they are targets as well as their clients. Strategy also expanded to venture capital (Hummer Winblad).

* Law is "a mess of uncertainty" that now threatens all sorts of market innovation. "Wildly punitive system of regulation" that stifles market competition, producing an over-regulated "permission" culture ("a lawyer's culture") with high transaction costs. Not justified, burden on innovation.

* Direct regulation of technology to protect content ("break the kneecaps of the Internet"). Broadcast flag, immunizing liability for technology to hunt and disable computers of violators. More harm than good.

* Copyright is a form of regulation. "When done right, it benefits creators and harms leeches. When done wrong, it is regulation the powerful use to defeat competition." "Pattern of deference to new technologies" giving way to "legal restrictions that will have the effect of smothering the new to benefit the old."

* Example: Internet radio. Artists not paid for airplay (though composers and publishers are) -- form of advertising for records. Internet radio: no channel limit, more competition. Parallel with FM/AM: almost unlimited channels in shortwave spectrum, but not released for FM transmission, thus maintaining scarcity of bandwidth for FM, so AM could still compete. Internet radio requires payment to SR copyright holders, plus data meta-collection/reporting, extra burden on Internet radio. RIAA: "we think it should be an industry with, you know, five or seven big players who can pay a high rate and it's a stable, predictable market,"

Corrupting Citizens

* War of prohibition -- NYT: 43 million downloaded music in May 2002. RIAA: all felons (scapegoats). Alcohol, drugs, automobiles (speeding), taxes (cash businesses), "a huge proportion of Americans regularly violate at least some law." Problem for teaching ethics. Either enforce the law more severely or change the law. Is prohibition "really necessary to achieve the proper ends that that copyright serves"?

* Example: Selling used records/CDs. Ripping copies of records/CDs (unprotected media) for personal use. But: also enables file sharing. DRM aimed at constraining such copying -- people would search out hacker communities to enable it illegally.

* "If the only way to assure that artists get paid were the elimination of the ability to freely move content, then these technologies to interfere with the freedom to move content would be justifiable. But what if ... a different system could assure compensation to artists while also preserving the freedom to move content easily?"

* Criminalization of citizens threatens privacy. RIAA lawsuits: Verizon fought to protect user identities, lost. Then RIAA proceeded to sue individuals identified by ISPs. Fingerprinting technology can identify users on a network. Tens of millions of citizens subject to reduced civil liberties. If law can secure rights of authors without criminalizing millions of citizens, "who is the villain?"

BALANCES
========

* Picture: car of fire, bucket of gasoline, another person panics and assumes bucket has water, throws it on car, "about to ignite everything around." Copyright war is "a fire that if left alone would burn itself out ... policy makers are not willing to leave this fire to itself. ... Somehow we have to find a way to avoid pouring gasoline on the fire." Failed efforts, try to understand them:

CHAPTER THIRTEEN: Eldred

* 1995: Eric Eldred, public domain library available for free. Bono Extension Act (CTEA), civil disobedience. NET Act -- makes Eldred a felon. Lessig takes on Eldred's case -- "perpetual terms on the installment plan" (Jaszi).

* Core corruption in our system of government: incentives to influence political process (campaign contributions).

* Judgment that "this Supreme Court would not allow Congress to extend existing terms." US v. Lopez: government: whatever Congress says affects interstate commerce is unarguable, SC strikes down law, claiming that Congress would have unlimited power. Same principle that applies to Commerce Clause ought to apply to Progress Clause (copyright). If Lopez stood for principle and not politics.

* Eldred not endorsing piracy (fighting piracy of the public domain). NSA: public domain = "legal piracy".

* Term extensions are for 2% of works with commercial value, but everything else along for the ride. Intangible property versus tangible property: public registration of ownership for tangible, but not intangible (owner cannot be easily located).

* Michael Agee, Hal Roach Studios (Laurel and Hardy films): opposed CTEA (would allow much historical work to physically decompose without a viable market to preserve content).

* When commercial life ends, historical life still remains, but copyright does no good in this context. Obstructs digital archive, big publishers probably won't do it (no profit). "Where we see the market is not doing its job, then we should allow nonmarket forces the freedom to fill the gaps."

* 1999: filed lawsuit for Eldred to declare CETA unconstitutional. (1) violated "limited Times", (2) violated First Amendment. District court dismissed claims without hearing an argument. To Appeals, D.C. Circuit, also dismissed, but with dissent (Sentelle, Tatel), gave case life. Accepted by Supreme Court February 2002. Hearing October 2002.

* Lost, could/should have been won. LL believes own mistake lost it.

* Early (obvious) -- Geoff Stewart/Dan Bromberg/Don Ayer: "We would only win ... if we could make the issue seem 'important' to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and free culture; otherwise, they would never vote against 'the most powerful media companies in the world.' "

"I hate this view of the law." Not persuaded "that we had to sell our case like soap. ... Court must already see the danger and the harm caused by this sort of law. Why else would they grant the review?"

* Politics: demonstrate support across the political spectrum. Eagle Forum, Free Software Foundation, copyright scholars, First Amendment scholars, Progress Clause experts, Internet Archive, American Association of Law Libraries, National Writers Union, Hal Roach Studios, plus economists including five Nobel winners: Ronald Coase, James Buchanan, Milton Friedman, Kenneth Arrow, George Akerlof.

* Lawyers included Charles Fried (Reagan Solicitor General). Government briefs from only major media, congressmen and copyright holders (large estates: Seuss, Gershwin).

* SC: Conservatives (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) -- limiting Congress' power, The Rest (Stevens, Souter, Ginsburg, Breyer) -- Congress has broad discretion. Strategy: "crack open" the Conservatives, get them to see unlimited power to extend existing terms, reconcile Eldred with Lopez.

* Government strategy: Precedent -- Congress did it before, should be allowed to do it again. But Court had intervened in other cycles of extension, "no reason it couldn't intervene here."

* Oral argument first week in October, moots: Ayer (experienced SC lawyer) "get them to see the harm" -- LL rejected it (experience as SC clerk, teaching principles in law school).

* Arguments:
- Congress' enumerated powers, limits.
- O'Connor: History of extensions. Upsetting previous extensions?
- LL: If flies in the face of framers, then yes.

Two points where "should have seen where the Court was going":
(1)
- Kennedy: '76 Act impeded progress? No evidence.
- LL (mistake): Not an empirical claim, structural limit to perpetual term.

"That was a correct answer but not the right answer. The right answer was instead that there was an obvious and profound harm. Any number of briefs had been written about it. He wanted to hear it And here was the place Don Ayer's advice should have mattered. This was a softball; my answer was a swing and a miss."

(2)
- Chief: Right to copy verbatim other people's books?
- LL: Those that should be in the public domain ... under proper reading of limits.
- Scalia (to Olsen): Functional equivalent of an unlimited time would violate Constitution, argument being made by petitioners.
- LL (closing rebuttal): History of Court imposing limits.

"All true. But it wasn't going to move the court to my side."

* Government repeatedly was asked, what is the limit? Repeatedly answered, none. LL thought Court (Conservatives) "would feel itself constrained by the rule of law it had established elsewhere."

* Jan 15, 2003 7-2 decision against. Reasoning? Lopez not even cited. Ginsburg ignored enumerated powers. 'Reconcile'-- "simply by not addressing the argument." Breyer/Stevens dissents. Stevens "internal to the law: tradition of IP law does not support (cf. patents). Breyer "external to the Constitution": "effectively unlimited" therefore unconstitutional. But neither believed in Lopez so it was not addressed.

* Anger with Conservatives (inconsistency with own method for interpreting Constitution). Anger with self (view of law interfered with law "as it is"). Decision to bring the case "was wrong." Media reaction: public domain over?

CHAPTER FOURTEEN: Eldred II

* NYT Op-Ed piece -- LL proposes: 50 years after publication, register for small fee ($1), otherwise fall into public domain. "Eldred Act" (Public Domain Enhancement Act) Would establish "registry where copyright owners could be identified." 1976 removal of formalities was because of absurd strictness -- law should forgive innocent mistakes.

* 1908 moral claim: natural right, IP should not be "a second-class form of property." But law of formalities is intended to assure creative property "can be efficiently and fairly spread." Without formalities (registration), "complex, expensive, lawyer transactions take their place."

* Drafted by Zoe Lofgren (CA). MPAA opposes: (1) Congress "firmly rejected" renewal (LL: before Internet made subsequent uses more likely), (2) "harms poor copyright holders" (LL: $1??), (3) extending terms encourages restoration (LL: only for small % of commercially valuable, and with registration it is not cut off), (4) "enormous costs" (LL: less than costs of clearing rights), (5) "risks if underlying rights fall into PD" (LL: what risk? if PD, film is valid derivative use).

* Opposition to P2P sharing can be understood as "common sense" but opposition to Eldred Act "lays bare the naked self-interest driving this war." Not about protecting their content, but about closing the public domain (market competition).

CONCLUSION

* AIDS, expensive drugs to treat -- patents. 1997: South Africa, parallel importation law, US opposed it. Pharmaceutical companies, EU, joined -- violation of international law. But: does not save drugs for US citizens, doesn't protect US profits -- "sanctity of property." Blame drug companies? No. Blame politicians (price differential is hard to explain in principle). "A sensible patent policy could endorse and strongly support the patent system without having to reach everyone everywhere in exactly the same way. ... We as a culture have lost this sense of balance." 'Property fundamentalism' -- bizarre, blind.

* 2003, WIPO meeting canceled -- open source software. Microsoft opposed, got US govt to oppose too: WIPO purpose to promote IP rights, open source runs counter. (1) wrong, OS relies on copyright, (2) WIPO not about maximalism: balance, (3) interfering with rights of individuals and companies to waive rights voluntarily (cf. feudalism).

* Moments of hope: FCC ownership rules, activism to oppose relaxation. Bigness not bad in and of itself, but when tied to maximalist copyright powers.

* More RIAA lawsuits against individuals, etc. But BBC "Creative Archive", Gilberto Gil (Brazil) with Creative Commons. Reality is mixed. "Common sense must revolt. It must act to free culture. Soon, if this potential is ever to be realized."

AFTERWORD

* Mapping what might be done moving forward.

Us, Now

* Error of excluded middle: "some rights reserved" -- what is being done now.

Rebuilding freedoms Previously Presumed: Examples

* Privacy: browsing Marx in a bookstore, architecture inefficient for gathering personal data (spying), friction, not law, not norms. Internet: tracking browsing very cheap/easy (Amazon, cookies). Libraries? "We must take affirmative steps to secure a kind of freedom that was passively provided before."

* Free software movement: In past HW/SW linked, IBM and Data General not concerned with controlling SW. Richard Stallman, MIT: tinkering with code. 1980s: more proprietary code, so 1984, GNU project.

* Academic/scientific journals: Lexis/Westlaw, electronic-only publication. Loss of paper publication removes prior freedom to copy. PLoS tries to restore.

Rebuilding Free Culture: One Idea

* Creative Commons: "content conducers" to create a public domain in lieu of legislation. Examples: Cory Doctorow novel, Peter Wayner, 'Free for All', sampling license (Public Enemy), symbolic statement.

Them, Soon

* Legal changes are still needed. Five steps.

1. More Formalities

* Deeds, bills of sales, registrations, tickets -- formalities associated with property, to enforce protection. In past, formalities obstructed protection, but with Internet no longer such a burden. So, change, but not back to old system: new system (marking, registration, renewing).

Registration and Renewal

* Old: file application with CO to register/renew, fee. CO underfunded, mess. Compare with web domain registration, adopt similar model (multiple registries competing for business, CO sets standards).

Marking

* Old: failure to properly mark forfeits copyright. Too harsh. Different works had different marks, marking protocol unclear. New: Adjust as technologies evolve, CO sets protocol to fit with registration/renewal process.

2. Shorter Terms

* Keep it short: long enough for incentive but no longer.
* Keep it simple: clarify line between protected and public domain, "lawyer-free zone".
* Keep it alive: require renewal, with minimal burden.
* Keep it prospective: no retroactive term extensions, because it creates no additional incentive in the past.

3. Free Use Vs. Fair Use

* Derivative use limitations:

- Term: shorter than underlying term ("not important long after the creative work is done")

- Scope: draw clear lines around regulated and unregulated use, clarify protected uses, assume others are not protected (statutory rights)

4. Liberate the Music--Again

* File-sharing comes in four flavors (from chapter five):
  A. download instead of purchase
  B. download to sample prior to purchase
  C. download out-of-print content
  D. download non-copyrighted or authorized content

Keep these differences in focus. Today file-sharing is addictive, but not ten years from now -- technology in transition: always-on wireless broadband, content on the fly, easier to subscribe to services than manage own libraries, etc. File-sharing "problem" will disappear over time. Different "problems" with different categories.

* Type D: make sure that technology for sharing is not rendered illegal.

* Type C: facilitate access while compensating artists -- used book stores? statutory license? (incentive to keep in print, choose own rates instead of statutory rates)

* Hard case is types A and B: modification of Fisher (Harvard) proposal: tax for statutory license for identified/monitored Internet use -- modification: temporary to facilitate transition of regimes only, renewable after finite terms only if deemed necessary

* Summary: Internet in transition, don't regulate for intermediate stages. Regulate only to minimize harm while enabling most efficient technology possible.

(1) Guarantee right to share Type-D.
(2) Permit non-commercial Type-C without liability and permit commercial Type-C at low fixed statutory rate,
(3) During transition, tax/compensate Type A to extent actual harm is demonstrated.

"The most important thing is to assure artists' compensation without breaking the Internet."

5. Fire Lots of Lawyers

* Law profession "has become too attuned to the client." Not just professional bias, but "failure to actually reckon the costs of the law." Economists assume "transaction costs of the legal system are slight." But legal system only works for "those with the most resources." Costs distort free culture.

* "The law should regulate in certain areas of culture -- but it should regulate culture only where that regulation does good. Yet lawyers rarely test their power, or the power they promote, against this simple pragmatic question: 'Will it do good?' When challenged about the expanding reach of the law, the lawyer answers, 'Why not?' We should ask, 'Why?' Show me why your regulation of culture is needed. Show me how it does good. And until you can show me both, keep your lawyers away."