

2005

Copyright, Ownership, and Digital Media: A Trilogy

Laura J. Gurak

Gretchen Haas

Laurie A. Johnson

Krista A. Kennedy

Jessica L. Reyman

Follow this and additional works at: <https://scholarship.law.umn.edu/mjlst>

Recommended Citation

Laura J. Gurak, Gretchen Haas, Laurie A. Johnson, Krista A. Kennedy & Jessica L. Reyman, *Copyright, Ownership, and Digital Media: A Trilogy*, 6 MINN. J.L. SCI. & TECH. 687 (2005).

Available at: <https://scholarship.law.umn.edu/mjlst/vol6/iss2/7>

Book Reviews

Copyright, Ownership, and Digital Media: A Trilogy

*Reviews by Laura J. Gurak, Gretchen Haas, Laurie A. Johnson, Krista A. Kennedy, & Jessica L. Reyman**

There is certainly no shortage of books on copyright and the Internet. What was recently an esoteric debate limited to law professors, graduate students, and librarians has become a full blown national discussion. The impact of digital recording technologies and distributed file sharing systems has forever changed everyday users' expectations concerning electronic information. Although new compact disc (CD) encryption technologies have begun to hamper copying, products like mp3 players encourage users to rip, mix, and burn their personal CD collection to their heart's desire.¹ But when those same

* All authors are affiliated with the Department of Rhetoric, Programs in Scientific and Technical Communication, at the University of Minnesota.

•Laura J. Gurak is Professor and Head of the Department of Rhetoric. She is also a Faculty Fellow in the Law School. Gurak received her Ph.D. from Rensselaer Polytechnic Institute. Her scholarship is in digital communication, Internet studies, and intellectual property. An early researcher on the social and legal features of the Internet, Gurak is author of two books from Yale University Press (*Persuasion and Privacy in Cyberspace*; *Cyberliteracy*), three textbooks, editor of three edited volumes, and author of numerous journal articles.

•Jessica L. Reyman, a Ph.D. candidate, is currently writing a dissertation on the rhetorical implications of *MGM Studios v. Grokster*. Her research interests include Internet communication and the rhetoric of intellectual property, with particular focus on digital works and the tension between copyright law and innovation.

•Gretchen Haas is a Ph.D. candidate. Her research targets on-line practices of citizens and political campaigns; in her current project, she examines Howard Dean's "Internet candidacy" in his campaign for the U.S. presidential election of 2004.

•Krista Kennedy is a Ph.D. student and 2004-2005 Industrial Affiliates Program Fellow. Her research focuses on intersections of networked texts with intellectual property theory and law.

•Laurie Johnson is a Ph.D. student. Her research centers on the intersection

people download a ninety-nine cent song from iTunes,² they find that they can only make seven copies.³ What gives?

There has been ongoing tension between the open architecture of the Internet, including all of the implications therein—hacking, spam, peer-to-peer file sharing—and the closed architecture that large copyright holders have increasingly been advocating.⁴ In 1996, when hopes were high for an Internet that challenged traditional norms of ownership, Ann Okerson asked whether cyberspace was a “Wild West, where anyone can lay claim to anyone else’s creations”⁵ and if the time had come to “dispense with copyright as we have known it.”⁶ Many replied in the manner of Catherine Kirkman, who suggested that “if the past is any guide, we should expect technological advances to result in more copyright protection, not less.”⁷ A string of important court decisions, such as *Eldred v. Aschcroft*⁸ and *A&M Records, Inc. v. Napster, Inc.*,⁹ as well as federal and state laws, including the Digital Millennium Copyright Act¹⁰ (DMCA) and the Sonny Bono Copyright Term Extension Act¹¹ (CTEA) affirm this prediction.

Yet the situation is more subtle than popular discourse

between rhetoric, intellectual property and authorship, and emerging technologies.

1. See iPod Website, at <http://www.apple.com/ipod/> (last visited Apr. 11, 2005).

2. iTunes Website, at <http://www.apple.com/itunes/> (last visited Apr. 8, 2005).

3. See iTunes Website, *You're unable to burn a CD in iTunes for Windows*, at <http://docs.info.apple.com/article.html?artnum=93360> (last visited Apr. 8, 2005).

4. See HARRY M. SHOOSHAN III, PETER TEMIN & JOSEPH H. WEBER, STRATEGIC POLICY RESEARCH, *MACABLE.COM: CLOSED V. OPEN MODELS FOR THE BROADBAND INTERNET* 5 (1999), available at <http://www.spri.com/pdf/reports/opennet/macable.pdf> (last visited Apr. 21, 2005).

5. Ann Okerson, *Who Owns Digital Works?*, *SCI. AM.*, July 1996, at 80, 81.

6. *Id.*

7. Catherine Kirkman, *Copyright: Alive and Well in the Digital Age*, *WEB TECHNIQUES*, May 1997, at 14, 17.

8. 537 U.S. 186 (2003).

9. 284 F.3d 1091 (Cal. 2002).

10. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C. and 28 U.S.C.).

11. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections 17 U.S.C.).

suggests. New ideas, such as the Public Library of Science¹² and Creative Commons licenses,¹³ continue to push traditional ownership paradigms. Ongoing developments in both software and hardware, for the Internet, for television, and for cell phones, provide increasingly complicated scenarios within which this discussion continues.¹⁴ Intellectual property scholarship has worked diligently to keep up with the ever-changing landscape of new technologies and address the legal and cultural issues these raise in relation to intellectual property, and particularly copyright.¹⁵

In this review, we undertake a look at three important new books: *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* by Lawrence Lessig; *Promises to Keep: Technology, Law, and the Future of Entertainment* by William Fisher; and *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System* by Siva Vaidhyanathan. Each is an attempt to describe and critique the current situation and, in some cases, to suggest possible alternative directions and approaches.

In this review, we examine each book in turn, but at the same time attempt to provide a cohesive layer across all three by noting that all acknowledge the current time of transition and change, and that this time is made difficult by disabling historical and contextual forces. Each of the three authors argues for change to our current system of copyright law, and two propose possible paths for such reform. Regardless of their respective positions, each also recognizes the tensions created by the current context of creating, using, and thinking about intellectual property. Although the authors offer a range of solutions for operating within this tension, they agree on the

12. See PLOS Website, at <http://www.plos.org/index.html> (last visited Mar. 11, 2005).

13. See Creative Commons Website, at <http://creativecommons.org/> (last visited Mar. 11, 2005).

14. See, e.g., Gail Dykstra, *The Great Copyright Debate*, INFO. TODAY, Nov.-Dec. 2003, available at <http://www.infoday.com/it/oct03/dykstra.shtml> (last visited Apr. 8, 2005).

15. See, e.g., James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9 (2004); JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY (Aspen Law & Business 2002 & Supp. 2003); JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001); Pamela Samuelson, *Preserving the Positive Functions of the Public Domain for Science*, 2 DATA SCI. J. 192 (2003).

goal of balance between strict control of intellectual property and the destruction of the legal concept altogether. For example, in *The Anarchist in the Library*, Siva Vaidhyanathan addresses the difficulty of finding middle ground between the binary structures of “information oligarchy” and “techno-anarchism” (pp. xi-xvii). In *Free Culture*, Lawrence Lessig talks about “balance” between preserving the benefits of new technologies while minimizing the wrongful effects on artists (pp. xiii-xvi). And in *Promises to Keep*, William Fisher makes a proposal that he feels may be difficult to implement, but is nevertheless necessary to fix the broken system now in place (pp. 1-10). All three authors are moving beyond critique of the current state of copyright and toward consideration of the difficulties we face in the struggle to make actual progress toward a responsible balance within the current structure of copyright law.

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 691

FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY. By Lawrence Lessig. 2004. New York, N.Y.: Penguin Press. Pp. xiii, 386.

Reviewed by Jessica L. Reyman

Lawrence Lessig, Stanford law professor and founder of the Stanford Center for Internet and Society, is one of the most visible scholars of intellectual property law in the digital age. As an academic critic and a respected public intellectual, Lessig reaches audiences through his active online presence,¹⁶ through various public lectures and appearances, and through his many publications. His work makes the high-level academic and abstruse legal discussions about intellectual property law and Internet technologies accessible to those who are most affected by such laws and technologies: the creators and users of intellectual property and associated products. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, his most recent work, is his most accessible, cogent, and compelling monograph to date.

Lessig is known for his precise predictions about the integration of Internet technology into our culture and keen awareness of its potential as a regulating force.¹⁷ His previous two books established the relationship of the architecture of the Internet to control over information¹⁸ and argued for a protection of the sanctity of intellectual freedom on the Internet.¹⁹ In *Free Culture*, Lessig presents a more complex

16. LAWRENCE LESSIG, LESSIG BLOG, at www.lessig.org/blog/ (last visited Feb. 27, 2005).

17. See Sonia K. Katyal, PRIVATE PROPERTY, THE PUBLIC USE OF CREATIVITY AND THE INTERNET: A REVIEW OF LAWRENCE LESSIG'S THE FUTURE OF IDEAS (Nov. 21, 2001), at http://writ.corporate.findlaw.com/books/reviews/20011121_katyal.html (last visited Apr. 21, 2005); RICHARD KOMAN, LESSIG: THE FUTURE OF IDEAS, O'REILLY P2P (Dec. 21, 2001), at <http://www.openp2p.com/pub/a/p2p/2001/12/21/lessig.html> (last visited Apr. 21, 2005).

18. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (N.Y. Basic Books 1999).

19. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House 2002).

view of the current state of intellectual property, recognizing its situation within the dynamic and interactive contexts of social norms, economic markets, the law, and technological developments, which have effectively transformed our “creative culture” into a “permissions culture” (p. 24). With this book, Lessig takes a necessary step forward in the discussion of intellectual property, moving beyond discussion of the future of the Internet toward understanding the implications for culture production as a whole.

Free Culture powerfully argues that cultural monopolists have responded to emerging Internet technologies in ways that shrink the public domain to a dangerously restricted level (pp. 25-30). Lessig insightfully analyzes the implications of the concentration of ownership of intellectual products, and thus of power, to limit creativity. Communicating a sense of urgency in the situation, he states, “There has never been a time in our history when more of our ‘culture’ was as ‘owned’ as it is now. And yet there has never been a time when the concentration of power to control the *uses* of culture has been as unquestioningly accepted as it is now” (p.12). *Free Culture* addresses the question of “why?” Why has it been so difficult to resist increased control over intellectual property? Why have previous manifestos yet to inspire social change? Why have the courts failed to resist extended copyright protections? Lessig’s answers are not simple; he recognizes that technologies are not neutral, that legal processes are socially, economically, and culturally situated, and that an imbalance in contemporary intellectual property rights is largely influenced by an imbalance in the distribution of power (pp. 18-20).

It is important to note that Lessig’s main argument is for *balance* among these competing forces, not for “anarchy” or a destruction of intellectual property rights altogether (p. xvi). He does not seek to demonize Disney, Adobe, or even the RIAA. Rather, he shows how the content industry and big media conglomerates, historically appropriative enterprises, successfully use the law to halt cultural production. To make this point, Lessig does not dwell on the specifics of legal cases, but rather uses many concrete examples and personalized stories to make his argument, showing both the absurdity and the dangers in the current structure for control over intellectual property. From the Marx Brothers’ retaliatory claim of ownership on the word “Brothers” in response to the

Warner Brothers' denial of their right to create a parody of *Casablanca*, to the case of Jesse Jordan, the college student who created a search engine that cost him his life savings, Lessig tells story after story of the ways in which private interests in ownership and royalties have defeated the public interest in the development of creative and intellectual works (pp. 199-202).

The first two-thirds of the book make a careful and patient argument for Lessig's thesis. He begins by showing how our country's cultural production has largely been based on various forms of "piracy" (ch. 5). Examining recent activities on peer-to-peer file sharing networks, he draws parallels with the integration of new technology in Hollywood, radio, the recording industry, and cable TV, each of which at one time has been affected by "piracy" (pp. 66-77). In each of these instances, it has been possible to establish a balance between preserving the benefits of new technologies while minimizing the wrongful effects on artists (pp. 66-77). Lessig also addresses the misleading nature of the concept of "property" in intellectual property rights. Here he offers evidence that demonstrates how the notion of copyrighted material as *physical* property can be challenged based on the history of the legal treatment of *creative* property (ch. 10).²⁰ He reminds us that the intellectual property clause of the U.S. Constitution limits exclusive rights, unlike rights to physical property, in order to encourage a public domain. (pp. 119-20). With this look at intellectual property law in context, Lessig argues that over-regulation by concentrated "Big Media" now controls intellectual property in unprecedented way (pp. 161-68).

The last third of *Free Culture* takes a surprising turn toward a rather detailed discussion of Lessig's experience as the legal defender of website operator Eric Eldred in the *Eldred v. Ashcroft*²¹ case (chs. 13-14). The *Eldred* case challenged the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, which added twenty years to existing and future copyrights, thus following a trend of eleven extensions to the terms of copyright in the past forty years.²² Lessig laments his loss of this case, which he views as a crusade to save the public domain from perpetual, unlimited copyright protections (pp.

20. See *id.* at 116-24.

21. *Eldred v. Ashcroft*, 537 U.S. 186 (2002).

22. *Id.* at 192-93.

243-46). Reflecting on his missteps and the weaknesses of his litigation and mapping out an alternative winning strategy, he confesses, “no matter how hard I try to retell this story to myself, I can never escape believing that my own mistake lost it” (p. 229). While this loss is understandably disappointing to all those working toward copyright reform, this section seems inconsistent in tone and intent with the first two thirds of the book. Although his thesis hinges on the role of context and the interplay of regulating forces in the copyright battle, Lessig’s comments on *Eldred* dwell on the failure of one argumentative voice to single-handedly change the course of copyright law. He does entertain the idea that perhaps the Court was not ready to hear the argument and could not have been persuaded by any rhetorical strategy; however, he concludes that “the decision to bring this case . . . was wrong” (p. 245). What Lessig fails to recognize is the level to which the law operates as both agent and subject within the context of regulating forces that he has established so well. It is only through major cultural shifts that change can happen. His efforts in this case, along with other solid and compelling attempts at reform, are needed to lay the groundwork.²³

In the Afterword, Lessig offers a look toward the future. He proposes a solution for change, based on a proposal by William Fisher in *Promises to Keep*, reviewed below. More importantly, Lessig offers several small steps toward change, beginning with change “in the streets” and then proceeding to changes in Congress (pp. 290-96). Among these small steps, though not expressly mentioned in the book, is Lessig’s own unique approach to publishing. Accompanying the print edition of *Free Culture* is an online edition.²⁴ Licensed under a Creative Commons agreement,²⁵ this version is available for redistribution, copying, or “remixing.”²⁶ The possibilities are

23. See generally Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF., Mar.-Apr. 2004.

24. The online edition can be found at <http://free-culture.org/> (last visited Apr. 8, 2005).

25. Creative Commons, Legal Code, at <http://creativecommons.org/licenses/by-nc/1.0/legalcode> (last visited Apr. 8, 2005).

26. Lawrence Lessig’s Free Culture Website, at <http://free-culture.org/freecontent/> (“Free Culture is available for free under a Creative Commons license. You may redistribute, copy, or otherwise reuse/remix this book provided that you do so for non-commercial purposes and credit Professor Lessig.”) (last visited Apr. 8, 2005).

endless, and we can see “Remixes” (linked from the companion website to the book) that show a sampling—audio versions, translations in eight languages to date, and HTML linked versions that extend the reading experience to other related content on the web. This release of *Free Culture* is an example of the many ways Lessig proposes that we can encourage the creation and sharing of intellectual property.

Free Culture presents a clear, accessible, yet sophisticated argument about intellectual property in the era of the Internet. Law scholars will no doubt benefit from this important contribution to the fruitful study of intellectual property. For those who are new to the study of intellectual property, Lessig makes the complex issues understandable. For those who have long been exposed to the work of intellectual property law scholars, such as James Boyle, Julie Cohen, Peter Jaszi, and others, Lessig emerges as an academic with the unique capabilities of a readable narrative style and a keen perception of the paradoxes that plague contemporary intellectual property debates. This book provides useful insight into the complexities of intellectual property in contemporary contexts in a way that can reach both seasoned and novice legal scholars.

Additionally, *Free Culture* is a good example of how the study of intellectual property crosses disciplinary boundaries, providing rich context and critical perspective on the current judicial state of copyright. Insofar as intellectual property has implications for so many facets of our culture, from the production of artistic and literary works, to the work of libraries in creating archives, to the impact on economic markets for new media, its study is by nature interdisciplinary.²⁷ Indeed, there is much to gain for scholars across disciplines by following Lessig’s lead and asking “why?” when looking critically at current trends in copyright law.

27. For a sampling of work by scholars outside of law, see DEBORA HALBERT, *INTELLECTUAL PROPERTY IN THE DIGITAL AGE* (Quorum Books 1999); TYANNA HERRINGTON, *CONTROLLING VOICES: INTELLECTUAL PROPERTY, HUMANISTIC STUDIES, AND THE INTERNET* (S. Ill. Univ. Press 2001); and SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (N.Y. Univ. Press 2001).

PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT. By William W. Fisher III. Stanford, Cal.: Stanford University Press. Pp. ix, 340.

Reviewed by Gretchen Haas

William Fisher opens his book on the to date irreconcilable differences between copyright law and digital downloading practices by reminding us of the vast numbers of people who knowingly download music illegally (pp. 1-6). In doing so, he sets the stage to explain his proposal for a system that would fulfill two overarching goals to which a reformed music distribution system should aspire: first, that such a system would do a better job of protecting copyright owners, and second, that the intellectual property of recorded music and movies should be made more broadly—and legally—available to the public. To set the stage for his ideal solution, which he explains in his final chapter, Fisher first reviews the changes in technology that, since approximately 1990, have brought us to a place where Internet Service Providers have been subpoenaed to identify their clients and individual music downloaders have paid thousands of dollars in settlements for their copyright violations (ch. 1).

Fisher's account of technological changes in informal music distribution encompasses most of Chapter One, where he also comments on the social and economic implications of the new way of obtaining music in digital form through the network. Chapter Two includes a detailed explanation of how the music and movie industries made money prior to the advent of digital distribution, which provides a foundation for understanding why Fisher advocates the solution he does and is invaluable in understanding the industries' opposition to a new paradigm that would involve digital delivery of music and movies. His explanation of copyright law in Chapter Three and how it has been applied in some of the earliest cases involving piracy are as clear an explanation as one can find in this subject area. This is an explanation suited for non-law students dealing with copyright law and digital distribution issues as well as for members of the public interested in gaining a more technical perspective on the subject. These first three chapters lay the groundwork necessary to understand the solutions Fisher

describes in the book's final three chapters.

In the remainder of the book, Fisher proposes a number of remedies to the problem presented in Chapter Three. His solutions involve viewing copyright as analogous to property rights (ch. 4), industry regulation (ch. 5), and his solution of choice, which involves a fee-based system (or tax) that would distribute profits according to any given song's popularity (ch. 6). Although the Chapter Six, which sets out his proposal, is intended to be the showpiece of this book, his first three chapters are particularly exemplary, especially when it comes to describing technology, the law, and their confluence in the events of the past few years as related to digital music distribution. This is not to say that Fisher's proposals are lacking (other than the myriad of problems he identifies with them himself), but simply that the strengths of this book lie in Fisher's explanations of the events that have already taken place. As it has happened, digital music distribution has made more inroads into the legal mainstream in the time it took to publish this book, which decreases the potency of Fisher's solutions and especially of his more radical solution proposed in Chapter Six. The speed of innovation in technology and new, network-based business models present one of the more significant obstacles to giving the proposal in Chapter Six its full due, but a number of other assumptions Fisher makes also color his proposals in such a way as to impact their potential efficacy.

For example, assumptions emerge in Fisher's discussion of Web radio, which can be represented by two key points: first, Fisher believes Web radio is vast in that it offers something for everyone, and second, that Web radio will become the prevalent way of listening to "broadcasts," or what he refers to as non-interactive downloading (pp. 17-18). This treatment of Web radio indicates two areas that Fisher has left underexplored, both in relation to the Web radio discussion, but also in relation to the entirety of the solutions he discusses. His first assumption is that the network is ubiquitous enough for Web radio to truly provide an alternative to traditionally broadcast radio (pp. 23-24). The second assumption is that if Web radio proves to be a successful business model, it will not be appropriated and fundamentally changed by the radio stations and radio station owners that dominate broadcast radio today (pp. 211-12). The extrapolation of this first assumption to his

overall solution is that Fisher relies on a notion of the Internet that is much more ingrained in everyday activity than what perhaps might be the norm for Internet users.

Fisher relies on a high level of comfort with the presence of and use of the network when answering how people would register their copyrighted sound recordings in his new system as "Over the Internet, of course" (p. 204). However, Fisher ignores the reality that the Internet is, of course, not yet ubiquitous. Even for those American citizens who do have home Internet access, using the network has yet to become mundane or second nature to the point that when people go on-line, they no longer realize they are moving from one realm to another. Fisher's answer to his self-posed question as well as his treatment of Web radio seem to point to a familiarity and comfort level that Fisher has with the Internet that others may not have. In the context of the Web radio discussion, this means that as Fisher contemplates the wide capacity of Web radio to serve the needs of any music aficionado, he neglects to consider that most people still do not listen to music primarily through the Internet.²⁸ In addition, he does not seem aware that a number of people who still use a modem lack a fast enough connection to listen to streaming music, and even that a large portion of radio is listened to in a place that is still almost entirely off-limits to the Internet (e.g., our cars).²⁹ Until the home network is firmly in place and Web radio is accessible in cars, there is little danger that Web radio broadcasts will supplant our current radio-listening habits.

In a broader sense, Fisher's comfort with the network leads him to consider as an afterthought those people for whom accessing the Internet is not yet second nature. What this largely implies is that for a considerable period of time, music and movies will need to continue to be delivered via physical media such as CDs, tapes, and DVDs at the same time that a mechanism is available for legal music and movie downloads.

28. From Arbitron ratings, 8% of Americans had listened to Internet radio in the past week, whereas 94% of Americans had listened to terrestrial radio in the past week. See ARBITRON & EDISON MEDIA RESEARCH, INTERNET AND MULTIMEDIA 2005 (2005), available at <http://www.edisonresearch.com/home/archives/Internet%202005%20Summary%20Final.pdf> (last visited Apr. 21, 2005); ARBITRON, RADIO TODAY (2005), available at <http://www.arbitron.com/downloads/radiotoday05.pdf> (last visited Apr. 21, 2005).

29. See ARBITRON, RADIO TODAY, *supra* note 28.

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 699

Although Fisher remembers to discount the “old school” music listeners in his analysis of the money due to record companies and recording artists (ch. 6), one area he does not fully consider is the cost associated with facilitating “hard copy” music delivery concurrently with digital music delivery. Digital music delivery will take more time to make inroads, and so any investment in digital delivery mechanisms will have a higher expense to profit ratio. Further, since a significant portion of music listeners will continue to purchase and listen to their music on CDs and tapes, the need to establish efficient and fair digital delivery is at a point where a gradual approach to digital delivery is still an option, i.e., demand for digital downloads is not such that the recording companies cannot continue to make a profit without providing that mechanism. To some degree, then, consumers are at the mercy of the record companies and will shift their music purchasing habits as new mechanisms for doing so come about.

A final implication of this point is that a phased approach may ultimately make more sense than the radical approach Fisher advocates—and advances in digital music delivery in the past six months reinforce this fact. Fisher touches on the popularity of iTunes and mentions Napster’s revised business model, and some new digital music distribution services have launched their services since this book went to press. Two of these services (although there may be others) are the Real Networks service and Wal-Mart, both of which offer songs and albums for downloading, have competitive prices (in relation to other digital music download services, which tend to be less expensive than CDs), and also have relatively large catalogs.³⁰ The fate of these services remains to be seen, as well as if they have made an impact on illegal downloading activity or legal CD purchasing activity. In any case, the launch of these sites among probable others indicates that the recording industry is moving forward to take incremental, less radical steps toward digital music delivery.

Beyond Fisher’s assumptions relating to network omnipresence, he disregards or deemphasizes other aspects of

30. See Real Networks Website, 2004 Press Releases, at http://www.realnetworks.com/company/press/releases/2004/freedom_choice.html (last visited Apr. 8, 2005); Walmart Website, Music Downloads, at <http://musicdownloads.walmart.com/catalog/servlet/MainServlet> (last visited Apr. 8, 2005).

his approach that should be considered when weighing our options for a more just copyright system: for example, he goes to great lengths to accommodate the concerns of recording companies and to ensure their continuing viability as a business (ch. 6). When it comes to other businesses that rely on current licensing and distribution models such as video rental stores or record shops, he makes less of an effort to address their changing business model (or impending demise) with the advent of pure digital distribution (pp. 212-216).

Although Fisher addresses the problematic issue of monitoring to ensure a fair compensation system, (ch. 6) privacy advocates are sure to feel that Fisher does not give this problem its due. Further, when Fisher states that the ideal would be to develop a system to accommodate for length and “intensity of enjoyment,” (p. 231) he makes privacy concerns more problematic and takes his proposal one step further from its potential implementation. The overall effect is to promote the relatively simple system of micropayments, an option to which Fisher is opposed (pp. 166-169), that may not quite promote the compensation and distribution to which Fisher aspires, but would nevertheless be an improvement on the current system.

As compelling as Fisher’s solution to the broken system related to copyright and digital music distribution is, a transitional approach to the problem appears on the horizon in the form of greater availability of digital music at acceptable prices—and it is a solution that requires a much less radical change to the system than what Fisher proposes. Although such an approach does not do justice to Fisher’s ideal of better protection for copyright owners, that lack may be made up for in the relative ease of such a system’s implementation. As Fisher himself writes, people are averse to change and so no matter how just his proposed system is, it would take events of a catastrophic nature or a gradually phased-in approach to spur acceptance of his system (ch. 6). The problems it retains—copyright in the context of international law, song play tracking and other potential privacy invasions, system gaming, and less control over intellectual property—present enough of an obstacle for people to opt for less radical change in the form of services that we are beginning to see today. Fisher himself realizes the shortcomings of his proposal but nevertheless believes those shortcomings are preferable to the broken

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 701

system we have today—and he is right; in the absence of a system that allows legal music downloads, his proposal is preferable, but in the environment that has changed just enough in the time it took to publish this book, his system appears to be unwieldy and almost unnecessary. This is not to say that the systems that are emerging have no problems of their own; they do, and mostly in the form of the problems associated with the potential solution Fisher proposed in Chapter Four, which is a solution that heavily enforces the rights of copyright owners to the possible detriment of consumers.

THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM. By Siva Vaidhyathan. 2004. New York, N.Y.: Basic Books. Pp. ix, 256.

Reviewed by Laurie A. Johnson & Krista A. Kennedy

As a cultural studies scholar who examines intellectual property issues, Siva Vaidhyathan brings a unique perspective to the peer-to-peer discussions. While most texts on this area focus narrowly on contemporary considerations and American entertainment concerns, *The Anarchist in the Library* aspires to critique nothing less than the dynamics of the global information economy and the international discourse surrounding it. The text considers a broad range of subjects that have recently faced increased information control measures, including not only music and film but also libraries, encryption technologies, political dissidents, and the human genome (chs. 8-9). It manages to do so in a lucid, entertaining style, weaving politics and policy together with pop culture and internet phenomena such as *The Phantom Edit*. The book is clearly meant for an audience beyond the usual cadre of intellectual property scholars, and it works hard to present a compelling argument accessible to anyone with a general interest in issues of intellectual property and information control.

Vaidhyathan begins by framing the current discourse within the age-old oppositional systems of oligarchy and anarchy, updating them as information oligarchy and techno-anarchism (pp. xi-xvii). Oligarchy, with its top-down power structure, remains the default system for information control. Anarchism is perhaps less familiar, and he is careful to trace the movement from the eighteenth century Parisian *bruits publics* ("public noises," the political gossip of public parks) through the bloodier periods of American anarcho-syndicalism and the Spanish Civil War, and on to its current incarnation as techno-anarchism. The anarchism referred to in the title is not necessarily violent resistance, but rather an ethics and a methodology, "nonhierarchical and radically democratic . . . a

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 703

series of uncoordinated actions toward a coordinated goal” (p. 3).

The author argues in Chapter 2 that anarchic elements are inherent in distributed systems, which are by their nature decentralized, antiauthoritarian, and available to the masses. BitTorrent,³¹ FreeNet,³² and Gnutella³³ are all examples of distributed systems, as is the Web itself. As such, they are resistant to oligarchic systems of information control, such as traditional copyright law originally developed for print media. Together, the two systems create symbiotic opposition, each feeding from the other and leaving no middle ground for fruitful compromise.

He further situates his argument within the realm of classical cynicism in the next chapter (ch. 3). While the pessimistic, selfish “Costanzan cynicism” modeled by the character George Costanza on *Seinfeld* is the cynicism most familiar to contemporary society, the classical cynicism modeled by Diogenes of Sinope is the cynicism Vaidhyanathan embraces. Diogenes, whose thought is preserved in the writing Seneca and Marcus Aurelius, considered himself a “citizen of the Kosmos” (p. 25). He lived as a playful antagonist to the Athenian government, embracing humanity while fighting against its selfish and destructive aspects. Vaidhyanathan espouses this notion of cynical ethics, and argues that the Internet was built on similar cynical principles of borderlessness and accountability to peers rather than to governments (p. 29). He suggests that any workable guides to digital intellectual property rights must rest on ethical considerations because technical and legal measures have not adapted to the “radical freedom” of digital spaces (p. 28). While this discussion of Diogenic cynicism is intriguing, it is not used to develop a sustained argument, and appears only sporadically throughout the rest of the book.

The next two chapters explore the ethics and economics of peer-to-peer sharing of film and music. Interestingly, he never shies away from the piracy metaphor that so many copyleft

31. Bittorrent Website, at <http://www.bittorrent.com/> (last visited Apr. 8, 2005).

32. FreeNet Website, The Free Network Project, at <http://freenet.sourceforge.net/> (last visited Apr. 8, 2005).

33. Gnutella Website, at <http://www.gnutella.com> (last visited Apr. 8, 2005).

advocates pointedly reject, instead using it as a basic neutral term for those engaging in file sharing. Chapter 6 is devoted to derivative works, which Vaidhyanathan views as products of healthy creative cultures, (pp. 82-84) defined as radically democratic, peer-accountable, vibrant, and malleable—in other works, anarchistic. He begins with the *Suntrust v. Houghton Mifflin*³⁴ decision concerning the fate of Alice Randall's *The Wind Done Gone*,³⁵ providing a brief discussion of duration and fair use (pp. 81-85). He contends that the decision is an inappropriate application of fair use doctrine and that a strict interpretation of the law would have led to a decision more in alignment with the exclusive rights delineated by 17 U.S.C. § 106 (pp. 80-85).³⁶ He also advances the popular stance that copyright is, in instances like this, tantamount to censorship (pp. 93-95). The courts have historically disagreed with this position, as demonstrated by *Eldred v Ashcroft*.³⁷ The rest of Chapter 6 continues along this line, as he briefly covers the more stringent effects of the DMCA, digital rights management systems (DRMs),³⁸ Internet Corporation for Assigned Names and Numbers (ICANN),³⁹ the establishment of WIPO and the TRIPS⁴⁰ accord, and the negative effects of standardization on developing economies. In Vaidhyanathan's view, these elements combine to create a public "crisis of confidence" in intellectual property (p. 90). Extensive control has resulted in backlash, with new hacks being quickly developed in response to new digital protection schemes (pp. 90-93). The chapter ends with a return to and endorsement of Eldred's claim that current copyright violates the Constitution's mandate "to

34. 268 F.3d 1257 (11th Cir. 2001).

35. ALICE RANDALL, *THE WIND DONE GONE* (Mariner Books 2002).

36. 17 U.S.C. § 106 (2004).

37. Eldred, 537 U.S. at 221-22; see also David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004).

38. For an international perspective on DRMs and DRM policy, see, e.g., Canadian Copyright Policy Branch, Technical Protection Measures § 5, at http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/tdm_e.cfm (last modified Dec. 15, 2004).

39. ICANN Website, at <http://www.icann.org/> (last visited Apr. 8, 2005).

40. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (TRIPS Agreement), Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994), available at <http://www.wto.org> (last visited Apr. 8, 2005).

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 705

promote the progress of science and useful arts.”⁴¹

While the first half of the book lays the groundwork for discussions of peer-to-peer communication, information anarchy and information oligarchy mainly within the context of the American entertainment and content industries, the second half of the book shifts to quite different subject matter. This proves both a strength and a weakness of the text. Vaidhyanathan's first offering, *Copyrights and Copywrongs*,⁴² was also far-ranging, covered an expansive amount of material, and managed quite successfully to weave diverse strands of inquiry into a cohesive study of copyright from a cultural perspective. His second book makes similar moves, but is not as successful at interweaving the main themes of the book. While there are some sound connections made between entertainment and politics, cultural theory and scientific work, the argument on the whole proves less cohesive.

Chapter 7, “Culture as Anarchy,” furthers his examination of international issues of copyright and information distribution. As copyright enforcement has been privatized, once-centralized pirate activities have moved to a distributed, cottage industry model in developing countries, where price and availability are an impediment to access (pp. 97-102). Vaidhyanathan argues that copyright “may be the most powerful instrument of global American cultural policy” (p. 113). Large media outlets and the small, distributed networks may thrive independently, but institutions such as the library, the topic of the following chapter, suffer (pp. 112-14).

The USA PATRIOT Act⁴³ has transformed the library from a site of exploration to one of surveillance. Hollywood and the content industries' desires for pay-per-view systems further threaten a library's ability to freely disseminate intellectual and cultural materials. Vaidhyanathan contrasts this with the hypothetical “perfect library”: comprehensive, ubiquitous, free, and “a powerful resource for the expansion and enrichment of democracy,” and “a haven for those who wished to abuse these freedoms” (p. 121). The real library is under real threat. Information and control is increasingly placed into the hands of

41. U.S. CONST. art. 1, § 8, cl. 8.

42. VAIDHYANATHAN, *supra* note 27.

43. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

global organizations such as the World Trade Organization (WTO)⁴⁴ and World Intellectual Property Organization (WIPO),⁴⁵ while resistance is disseminated through global distributed networks (pp. 128-29). Vaidhyanathan argues that we need global information justice and global cultural justice to mediate between the increasingly divergent systems of control and resistance (p. 129).

Chapter 9 shifts the discussion to two of the most open areas of inquiry, science and math, traditionally dependent upon peer review and shared research. The openness of science and math, however, much like the openness of public libraries, is threatened by restrictive (oligarchic) corporate and government control of intellectual property. In the medical sciences, patenting of genes and the licensing of genetic information has had chilling effects on both research and practical applications (pp. 138-44). Math is impacted in several ways, particularly forms of encryption and decryption. Decryption is made illegal in some cases by the DMCA (pp. 145-48). Strong encryption is also undesirable in certain cases, as it renders communications and electronic transactions of suspected terrorists and criminals difficult to monitor. "Encryption," Vaidhyanathan argues, "is the hinge of the struggle between information anarchy and information oligarchy" (p. 149).

Chapter 10 returns of the question of globalization, this time with respect to the nation-state. In past years, theorists proclaimed the death of the nation-state, facilitated by networked technology and associated international financial, cultural, and social interactions (p. 151). The nation-state has not died, but has experienced significant pressure from, as Vaidhyanathan identifies, the "Washington consensus," the "California ideology," and the "Zapatista swarm" (ch. 10). In the end, all three of these ideologies fell short of their goals, and the nation-state remains in place, and in power (pp. 152-65). Chapter 11, "The Empire Strikes Back," continues the discussion of the nation-state and the development of the "global community" in recent years. The global community as represented by the collection of nation-states that participate, for example, in the United Nations, is tied to geography and, the author suggests, does a poor job of representing diasporic

44. WTO Website, at www.wto.org (last visited Apr. 8, 2005).

45. WIPO Website, at www.wipo.int (last visited Apr. 8, 2005).

2005] *COPYRIGHT, OWNERSHIP, AND DIGITAL MEDIA* 707

communities and other cultural and economic minorities (pp. 167-71). Distributed networks have also become targets for the nation-state (pp. 171-75). Different strategies have been developed to combat distributed networks, including data-mining, deliberate use of misinformation or disinformation, and increased state surveillance (pp. 176-78). Vaidhyanathan offers hopeful examples, however, in examples drawn from China, where Falun Gong spreads despite great government opposition and repression, and where hackers and users of networks like FreeNet find ways to evade state censorship of Internet resources (pp. 179- 82). In Africa, however, the situation has been quite different: “tight controls, lack of moral legitimacy, breakdown in social norms, and a means to spread corrosive information contributed to an anarchic crisis,” the “half-baked anarchy” Vaidhyanathan discusses earlier in the book (pp. 183-84). Though the contexts are extremely different, this appears to be the case with copyright as well.

Vaidhyanathan concludes his discussion of anarchy and oligarchy, freedom and control, with a cautionary reminder. “The question for us in the twenty-first century should not be choosing anarchy or oligarchy but constructing and maintaining systems that discourage both” (p. 187). What we need, he explains, is cultural democracy and civic republicanism, conditions under which culture and communication flourish, but also conditions under which debate and discussion must be undertaken to answer difficult questions (p. 188-92). Under these conditions, there are no easy answers. “We would be better off,” Vaidhyanathan concludes, “with less disobedience and more deliberation” (p. 192).

The text often reads as a copyleft manifesto, a factor that in the end cuts both ways. The open content movement needs diverse voices to supplement Lessig’s more formal tone, and the book fulfills that need well by providing a transnational, populist, culturally-focused take on the topic. However, Vaidhyanathan leans toward utopianism in his enthusiasm for the creolization of web-based cultural artifacts, envisioning a happy melting pot of creativity that at times largely ignores the aftereffects of cultural dilution. This tendency is particularly prevalent in Chapter 7’s discussion of “gumbophilia” and the radical “creative and democratic power of sharing” (p. 105). He does, however, temper this by recounting a discussion with a

Canadian official about the existence and effects of American cultural policy (pp. 108-14).

Throughout the text, Vaidhyanathan seems to prefer anarchistic principles to oligarchic ones, even to the point of excess. In spite of this overt preference, in the conclusion he abruptly jettisons anarchic principles as a desirable stance. He refrains from offering firm solutions to the current problems, instead calling for renewed discussions of cultural democracy and civic republicanism. The text is largely descriptive, and fails to take the crucial next step of proposing concrete reform measures. Regardless, it remains an important work in the current intellectual property debates. Vaidhyanathan has successfully chronicled and examined an exceptional range of contemporary open content concerns. While not without flaws, *The Anarchist in the Library* will stand as a vibrant historical record of post-millennial thought and, particularly, American post-9/11 thought on information flow and control.