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Tipping the Scales:
How Free Culture Helps Restore Balance in the Age of Copyright Maximalism

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In late July, news outlets were abuzz that the Library of Congress had issued important new exemptions to the Digital Millennium Copyright Act (Wortham, 2010). United States Copyright Office rule-making historically has been unlikely fodder for breathless mainstream news reporting. That this story was headline news reflects important changes in our relationship to intellectual property and the laws that govern it. To understand how we arrived at a cultural moment where copyright regulations are big news, we can look to the last thirty years of legal and technological change and the activists and organizations that have grown up in response to this change. These activists have come to be called the "free culture" movement.

Berne, Bono, and the DMCA

Copyright law gets complicated fast if you explore it in depth, but at its most basic it is simple. It exists to encourage the production of new creative work by balancing the public's interest and the interest of copyright holders. Copyright holders get monopolies on their works, enabling them to profit and control how those works enter the marketplace. The public's interest is protected because that monopoly is temporary and limited. Copyrighted works eventually enter the public domain and become available to future artists, writers, and other creators as inspiration and raw material.

> "The Congress shall have the Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
>
> (U.S. Constitution, Art. I, § 8, Cl. 8)

United States copyright law recognizes that culture is built on what has come before (Letham's "The ecstasy of influence" (2007) is an elegant discussion of the importance of such borrowing). The public's interest is also protected by exemptions. For instance, the first sale doctrine allows libraries to loan books, while fair use allows us to criticize, satirize, and teach with copyrighted materials. This balance among competing interests is tricky and, many would argue, imbalanced.

Three 20th century changes to copyright law, which had remained relatively unchanged since 1790, are responsible for this imbalance. In 1976, copyright law was overhauled dramatically after a decades-long effort to harmonize US laws with the Berne Convention, an international copyright agreement (Patry, 2000). The 1976 law, among other things, removed "formalities": copyright owners were no longer required to register their copyrights nor print notice of copyright on their works. In the post-Berne world, every napkin doodle had the full protection of copyright at the moment of doodling. The duration of copyright was also extended from 28 years plus one optional renewal to the life of the author plus 50 years.

Not satisfied with this dramatic lengthening of copyright, in 1997 Sonny Bono introduced the Copyright Term Extension Act, which extended duration to life of the author

plus 70 years. The Act passed in 1998 and was named in honor of Bono, who died shortly after its introduction.

Not a great year for aficionados of reasonable copyright, 1998 also saw the passage of the Digital Millennium Copyright Act (DMCA). The DMCA criminalized circumventing technological measures that limit access to copyrighted materials. Where digital rights management (DRM) was in place to prevent copying, trying to get around those measures was now a crime, even if the copying you intended was legal.

These three changes to the copyright law have gutted the public interest protection that has always been part of the copyright bargain. The flow of works into the public domain has slowed to a trickle due to the greatly lengthened copyright term. The massive number of works receiving automatic copyright are not required to be registered anywhere, which makes asking for permission confusing and difficult. And digital works protected by DRM exist outside of the normal exemptions in the law that normally protect free speech.

The rise of the permissions culture

These late 20th century changes to the copyright law threaten to give way to a "permissions culture" (Boynton, 2004). Instead of a limited and brief copyright term enjoyed only by those who opt in, we now have automatic and lengthy copyright. With the DMCA, the public loses the right to exercise those basic exemptions such as first sale and fair use if the digital work they purchase is protected by DRM. In this environment, nearly all uses of creative works must be done with (and only with) permission of the copyright holder. Leaving aside for a moment philosophical questions about how such policies could stifle creativity and criticism, this copyright regime is problematic from a purely practical perspective; it is this combination of long and automatic copyright that has given rise to what we in the library world know as the "orphan works" problem.

From "publish and purchase" to "post and download"

As this legal shift began to change our relationship to cultural products, the environment in which information was being produced, disseminated, and used was being radically transformed by the Web, widespread adoption of broadband, and plummeting cost of storage space. In 1976, we operated in a world where copyrighted materials became available from a publisher: a book publisher, record label, or movie studio. In this environment, the average citizen going about their daily work rarely engaged in activities where copyright came into play.

As the Web has evolved and tools for easy distribution of content have made us all potential publishers, the public faces copyright policy out of sync with their practices. Automatic "all rights reserved" stands in the way of a creator's ability to collaborate, remix, mash up, share, adapt, and otherwise play with the products of culture. In this environment, a woman sharing a video of her child dancing to some music in the background finds herself afoul of the law (Anderson, 2007).

Creative Commons: A partial solution

By 2001, a release valve was needed for the combined pressure of aggressive changes to copyright law, the explosion of copyrighted material facilitated by the Internet, and increasing interest from scholars, artists, and laypeople alike to collaborate and share. Creative

Commons (http://www.creativecommons.org), a nonprofit organization founded by intellectual property scholar Lawrence Lessig, computer science professor Hal Abelson, and public domain advocate Eric Eldred, provided just such a valve. Within a year, Creative Commons released their first set of licenses, allowing creators of content to indicate that they wanted to retain something less than all of the rights to their works.

2001 - Creative Commons founded.
2002 - Version 1.0 licenses released.
2003 - Approximately 1 million licenses in use.
2006 - Estimated 50 million licensed works.
2008 - Estimated 130 million CC-licensed works.

(Creative Commons, 2010)

Inspired by the work of the Free Software Foundation (which developed the GNU General Public License in the mid-1980s, giving rise to what we now know as open source software) (Bretthauer, 2002), these licenses essentially allow content creators to grant permission in advance for certain categories of use. As Boyle (2008) explains:

> "Creative Commons was conceived as a private 'hack' to produce a more fine-tuned copyright structure, to replace 'all rights reserved' with 'some rights reserved' for those who wished to do so. It tried to do for culture what the General Public License had done for software. It made use of the same technologies that had created the issue: the technologies that made fixation of expressive content and its distribution to the world something that people, as well as large concentrations of capital, could do." (182–183)

CC licenses have, in less than a decade, resulted in a proliferation of shareable materials. Though Creative Commons initially was founded and supported by the relatively small group of people actively concerned about free culture, the licenses have rapidly become mainstream. CC licenses are used on everything from blog posts and podcasts to magazine and journal articles to music albums and feature films. Google and Yahoo now allow users to limit searches based on usage rights, returning only CC-licensed works. Similarly, the photo sharing site Flickr allows users to license their images with CC licenses and limit searches to CC-licensed photos. This steady creep of CC licenses into the mainstream speaks to a real need for a more flexible and utilitarian approach to intellectual property.

Useful but complex

Unfortunately, CC licenses do come with some complexity. Gordon-Murnane (2010) identifies three potential problems with CC licenses. First, Creative Commons licenses are non-revocable, which means that if you change your mind about sharing your work you cannot do anything about the copies of your work that already CC-licensed. Second, there

is not a high degree of consensus regarding how people understand "noncommercial," one of the license attributes (Creative Commons, 2009). Finally, downstream derivative works of a user's content could present problems. We cannot anticipate all future uses of a work—to some extent, that is a point of sharing in the first place—and we may object to some uses.

Not just copyright

Whether or not we regard Creative Commons and the myriad other organizations involved with this kind of information policy work as a "movement," it is safe to say that "free culture" does not begin and end with copyright reform. A glance at the Web sites of such organizations as the Electronic Frontier Foundation and Public Knowledge—or even the American Library Association—gives a sense of the range of issues embraced by proponents of "free culture." Privacy, network neutrality, patent and trademark reform, broadband access, open design, and e-voting transparency are among the many issues that tend to fall under the broad "free culture" umbrella. In many ways, this range of issues reflects the diversity of constituents that come together under this moniker. Librarians, musicians, scholars, small publishers, huge companies like Google, lawyers, programmers, engineers, sculptors, filmmakers, and teachers are just some of the groups that participate in the free culture movement.

What's a librarian to do?

Libraries are, of course, at the center of many "free culture" issues. Our professional organizations work for information policies that protect the public's access to information—pushing for orphan works legislation, getting the NIH open access mandate passed, participating in the Google Books settlement debate, working to preserve network neutrality, and many other activities. But at a local, personal level what can we as individual librarians do?

- **Learn copyright basics**
  Individual librarians and library workers should learn the basics of copyright, including the exemptions and how to confidently conduct a fair use analysis. Librarians can inadvertently be enemies of free culture when they are unnecessarily conservative about copyright either out of fear or simply not feeling like they understand the law.

- **Offer alternatives**
  Learn about Creative Commons and how to find CC-licensed materials. Instead of being "copyright cops," affirmatively direct users to licensed materials as alternatives to "all rights reserved" ones. In addition to being great service, these conversations are excellent opportunities to educate patrons about copyright.

- **Socialize**
  Connect with others in your community who share a passion for free culture issues. Open source programmers often have user group meetings and social events where nontechies are welcome. Talk to that professor on campus who makes it a point to publish in an open access journal.

- **Tell stories**
  One of the biggest challenges in advocating for the public's interest in copyright and information policy issues is humanizing fairly esoteric issues when we talk to legislators.

Elected officials hear regularly from the big owners of content—publishers, movie studios, the recording industry—about the challenges posed by the Internet to their businesses. If we do not give legislators a clear picture of how aggressive copyright affects the average person's ability to learn, create, share, and speak her mind, we can hardly blame them for agreeing to copyright policies that do not suit our needs.

- **Be fearless**
  Finally, do not be afraid to be a free culture booster! The rhetoric around free culture issues gets heated. At times, it seems asserting fair use is tantamount to endorsing piracy. It is not! Remember that copyright is designed at its heart to balance the interests of content owners and the public. Using the copyright exemptions like fair use is not radical or liberal; it is a fundamental right. Librarians are fearless in defending such liberties as the freedom to read. We should be as confident in our defense of and advocacy for reasonable copyright.

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