



Artists and Culture: Empowering the Former to Foster the Latter

by Patrick Ross*

Introduction

An irony of the ongoing debate over intellectual property rights in the digital age is that the most critical party to the debate -- the artist -- is often an afterthought in the dialogue. All parties in the debate are quick to insist that the artist is paramount, for without that creative genius there would be no content over which to debate. All parties are also quick to insist that the best interest of artists is at the heart of their arguments and resides at the forefront of their fight. Yet we must accept the truism that in any debate, participants are motivated by self-interest. The best interests of artists can only be promoted by their distributors or their end-users, when such interests coincide. Those interests do *not* always coincide, and artists often find their voices drowned out by the back-and-forth between their distributors and those that claim to be defending "culture."

As the intellectual property debate moves forward, it is critical that the artist be given greater respect. It is easy to fit into a negotiating room representatives of major content companies and their ideological opponents from academia and advocacy groups, but it is not possible to include at that table a representative sampling of artists. They are too numerous, and hold far too many points of view.

However, such an endeavor isn't necessary when conducting this debate. Instead, we should always ask ourselves when engaging in this dialogue these two questions: Does my position presume to know or believe that it is knowable what is in the best interests of artists? Or does my position empower artists to decide that for themselves? Only when the answer is "no" to the former and "yes" to the latter should we feel confident that artists are truly "at the table."

Artists and Culture

Culture is a difficult thing to define, because it is always changing. To preserve something that is in constant flux would seem to be a great challenge indeed, yet many academics and their loyal followers have taken it upon themselves to pursue just this

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challenge. Culture remains in flux because of constant new inputs, primarily from artists. A revolutionary novel such as "Catcher in the Rye" can captivate an entire generation. An English rock group makes its American debut on the *Ed Sullivan Show*, and decades later individuals who watched that show can tell you exactly where they were and what they felt when they heard the music and saw the performance. A society can become more comfortable talking about the plague of AIDS when one of its most popular and beloved actors portrays a sympathetic victim of the disease in a film called *Philadelphia*.

In the case of the novel, one artist was involved. With the rock band, there were four artists (in the spirit of generosity, Ringo Starr is included in that category). With the movie, it goes far beyond Tom Hanks to his co-stars, screenwriter, director, film editors, producers and so on. This, of course, will be obvious to all of the readers of this paper. So why raise it?

Because sometimes the obvious can be overlooked. Holden Caulfield becomes a part of anyone who has read that novel, and quite likely he has influenced more than one reader's life. Anyone who has heard a Beatles tune can retrieve it in his or her head without asking permission of the artists ("I Want to Hold Your Hand" is quite difficult to remove from one's head, in fact, as this author can attest from experience). And any empathy resulting from viewing *Philadelphia* cannot (hopefully) be easily undone.

Art becomes culture, art is culture, and consumers of culture become one with art. This is a conclusion that is difficult to dispute. Where differences arise is what role the artist plays after that art becomes one with culture. If your mission is to preserve and defend culture against perceived threats, then you must seek to preserve and protect access to that culture. That means you must preserve and protect access to the content within that culture. Artists generally want to be part of the culture -- they would have kept their works locked in a desk or computer hard drive otherwise.¹ Along those lines, it's easy to argue that more exposure to art in the culture benefits the artist. In that way, the defender of culture can argue that he or she is also defending the artist.

One artist might agree with that argument, but another artist might strongly disagree. For the danger of that culture protection system is that the artist has lost her say in the matter; she must trust the good intentions of the protectors of not just her work, but culture in general. This rubs against our culture's longstanding tradition of the value of intellectual property, and the belief that in order to encourage future creation of culturally enriching art, artists should have a limited monopoly on the use of their art.

When an artist consents to have his work distributed, he has offered to that distributor some of the "sticks" from his bundle of property rights sticks. He still retains others, and in fact the sticks he has leased out may be due to return to him if that were

¹ Sometimes an artist might hide works out of a fear of rejection. One bestselling author familiar to this writer spent years writing beautiful works, only to hide them under sheet music in her piano bench. Fortunately she found the courage to begin submitting her works to publishers. Under the beauty of our system, however, those works were copyrighted the moment she created them, even though only someone digging through her piano bench could read them.

stipulated in his contract with the distributor. Just because his fictional character catches the imagination of a nation does not mean that his sticks now must be abandoned. To truly protect not only existing culture but ensure that culture continues to grow and be enriched, we must ensure that artists continue to have a voice in the use of their works, with solid default rules from which parties can negotiate alternatives.

Locke, Blackstone and Madison

The debate on the similarities and differences between real property and intellectual property is a long and complicated one, and cannot possibly be settled here. What hopefully can be agreed upon, however, is that the U.S. approach to intellectual property in both our laws and our culture stem in large part from philosophers of real property, most notably John Locke of the seventeenth century. Locke believed that one's right to life, liberty and property were natural rights, not ones granted by a king or other earthly power. Thomas Jefferson borrowed heavily from Locke in proclaiming in the opening of the Declaration of Independence that colonists were worthy of self-governing without needing the permission of King George III. Those colonists, settling what they viewed as untamed land (disregarding the presence of Native Americans, of course), embraced Locke with vigor when claiming real property ownership by mixing their own labor with the land.

Another principle of Locke regarding property is that property itself does not have "rights," but that people have rights, including the right of property ownership. That leads us to William Blackstone, an English contemporary of the Founding Fathers also clearly influenced by Locke. In his *Commentaries*, Blackstone writes that property is an "absolute right, inherent in every Englishman." With language that suggests he would put an artist ahead of culture, he writes:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.²

Blackstone also gave us the legal concept known as the "Blackstonian bundle," namely the notion that as used in the metaphor earlier, individual property rights are like a bundle of sticks. Each stick gives the property owner the authority to perform a certain

² William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, 1:134-135, Chicago, University of Chicago Press, 1979.

action on or exclude a certain party from a property, and those sticks can be leased, sold, traded or given away. That concept is critical in the market for intellectual property.

The Blackstonian bundle clearly was in the minds of the Founding Fathers when they incorporated the concept of intellectual property into the U.S. Constitution in Article I, Clause 8, Section 8. That clause states that Congress shall have the power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries." In No. 43 of the Federalist Papers, James Madison defends that clause as follows: "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."³

Like Locke and Blackstone, Madison celebrates the claims of the individual, and sees the public good stemming from that claim. Thus, during the limited time granted by Congress the author has an "exclusive right" to her creative work, and she alone can decide how her sticks will be allocated. We have a rich and vibrant culture, which suggests that in the more than two centuries since the Federalist Papers helped ensure adoption of the U.S. Constitution, culture has thrived even as artists alternately extended and withheld sticks from their Blackstonian bundle.

Creativity is what separates an artist from the rest of society, and creativity has existed throughout recorded history, whether inspired by unseen muses in ancient Greece or financed by patrons in 16th Century Venice. There is no reason to believe creativity is now somehow different when the end result is delivered to us in ones and zeros rather than on paper or canvas. But there are those who argue strongly that in fact the digital age has turned the world on its head, and that culture, once thriving, now faces a mortal threat.

The Preservation of "Free Culture"

While arguments about promoting the "greater good" of culture over the longtime valued good of the creator have been around as long as there have been those unwilling to respect a creator's rights⁴, the debate has accelerated with the expansion of the Internet and the peculiar notion that somehow technology has changed the rights that should be accorded to artists. This culture-focused movement has become known

³ James Madison, *The Federalist Papers: No. 43*. Numerous archives of the Federalist Papers are available online; one collection is hosted by Yale University, and No. 43 can be found here -- <http://www.yale.edu/lawweb/avalon/federal/fed43.htm> . For a fascinating take on the speedy authorship of the Federalist Papers by Alexander Hamilton, John Jay and Madison, and the critical role they played in encouraging New York, a key swing state, to adopt the Constitution, read *Alexander Hamilton* by Ron Chernow, Penguin Press, 2004.

⁴ Many Free Culture advocates like to note that for the first hundred or so years of our existence as a nation, the United States didn't respect foreign copyrights. While true, that is hardly something to be praised or defended, and in fact we began to respect copyrights once our leaders recognized that American artists needed to have their work protected abroad.

loosely as the Free Culture Movement, inspired by the title of Stanford University Law Professor Lawrence Lessig's book *Free Culture*.⁵ There are many other academics in this movement, as well as nonprofit law firms and advocacy groups. For purposes of this paper, however, the focus will remain on *Free Culture* and how this writer believes the book promotes culture over the interests of artists.⁶

Lessig makes clear quite early in his work his perspective on creators, in a chapter appropriately titled "Creators." This chapter, Chapter One in fact, is ten pages in length and dedicated to celebrating a handful of creators of the author's choosing. What is notable about the choice is that the creators cited are ones who drew their inspiration from previous works. In one instance, it is an artist attempting to capture the appeal of a competing creation, with Walt Disney's Mickey Mouse in *Steamboat Willie* influenced by Buster Keaton's *Steamboat Bill, Jr.* Keaton's movie was a live-action vaudeville production, and *Steamboat Willie* was a cartoon featuring a rodent, but Lessig feels it is essential to focus on the creation of *Steamboat Willie* and its reliance on previous work.

This continues in the chapter with citations of later Disney movies such as *Snow White* and *Cinderella*, which draw on fairy tales then (and now) in the public domain. Again his focus is on a creator being inspired by past creations. This, of course, continues in the present day, without any revisions to copyright law. A perusal of dollar stores will find cheap knockoff VHS tapes of *Snow White* and *Cinderella* that are legal because they too draw on those public domain tales, and the creators thus can free-ride on the success of the Disney versions. Satire comes into play here as well, and this is how our culture has come to be inflicted with the *Scary Movie* franchise. But the focus of his "Creators" chapter is exclusively on the derivative creators; no acknowledgment is given to original "creators" such as Buster Keaton or the Brothers Grimm (who have also seen their legacy further sullied recently by Matt Damon and Heath Ledger).

Perhaps this focus on the importance of derivative works and "mixing" explains why artists otherwise get only passing attention in *Free Culture*. One example is in Chapter 5, provocatively titled "Piracy" (the quotation marks are in the original, and give a clear hint of what is to come on the author's take on the subject). Lessig defends peer-to-peer file-sharing, echoing back to his Disney examples by saying "(1) like the original Hollywood, p2p sharing escapes an overly controlling industry; and (2) like the original recording industry, it simply exploits a new way to distribute content; but (3) unlike cable TV, no one is selling the content that is shared on p2p services."

It is a critical point that no one is selling the content on p2p services (although distributors of p2p software profit from ad revenue related to the use of their software).

⁵ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Press, 2004.

⁶ This writer would like it to be known that the singling out of Professor Lessig is in no way meant to offend or provoke. Quite the opposite; Lessig's prose is less shrill and on the surface more appealingly seductive than those of other authors making similar arguments, and thus seems most meritorious of response. The reader is asked to be forgiving if this writer's prose lacks the same seductiveness.

Yet Lessig says these three points "distinguish p2p sharing from true piracy. They should push us to find a way to protect artists while enabling this sharing to survive."

That last sentence captures in crystalline fashion where "culture" defenders differ from an artist focused on managing her Blackstonian bundle. Lessig values p2p file-sharing because he believes it enriches the culture at large. He says he wants his fellow culture-defenders "to find a way to protect artists" as long as that sharing, and the culture promoted by it, is preserved. But where in copyright law, or in the norms of culture, is it written that Lessig and his allies can appoint themselves protectors of artists?

Artists, under copyright law, are empowered to protect themselves. They are given rights to their property that they can lease, sell, trade or even give away, as many users of Creative Commons do every day. They can also lease, sell or otherwise lend some rights to distributors such as publishers or record labels in exchange for those entities' access to retailers, marketing and manufacturing facilities. But when defenders of p2p say artists need to be protected, the simple answer is to respect the artists' bundles. If an artist wants to participate in p2p sharing, he can do so by letting go of that stick.

This "*in loco parentis*" mentality of culture defenders regarding artists is patronizing but persistent. In that same "Piracy" chapter, Lessig outlines four types of p2p users:⁷

- A. Those downloading works instead of purchasing them.
- B. Those sampling works before purchasing them.
- C. Those obtaining works no longer commercially available.
- D. Those obtaining non-copyrighted works.

While this taxonomy is necessarily simplistic, for the purposes of this paper the *Free Culture* categorizations are suitable. We are informed that as a matter of law, only D is clearly legal, and from an economic perspective, only A is clearly harmful. If you accept those arguments, you are left with B and C. "Type B sharing is illegal but plainly beneficial," Lessig writes. "Type C sharing is illegal, yet good for society (since more

⁷ For a penetrating critique of this breakdown of file sharers and other aspects of *Free Culture*, read Lawrence W. Solum, "The Future of Copyright," *Texas Law Review*, v. 83, pp. 1137, 2005.

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=698306). A sample from Solum's conclusion: "There is a distinction between effective rhetoric and responsible rhetoric. One can persuade with good arguments and with bad arguments. Does *Free Culture* achieve its rhetorical effects using stories and arguments that illuminate the future of copyright? Or did Lessig go over the top and take the cheap shots? As much as I admire Lessig and his book, the answer to these questions must be, 'A little bit of both.' *Free Culture* tells stories that are deeply illuminating, but it also avails itself of stories that seem calculated to drive home ad hominem attacks. The struggle over the future of copyright can be painted as the good guys versus the bad guys, but that way of framing the issues does little to enlighten and much to obscure the real and very tough questions that need to be answered."

exposure to music is good) and harmless to the artist (since the work is not otherwise available)."

Let's break down the logic of those statements. First, Lessig writes that Type B sharing, while illegal, is "plainly beneficial." But is it? If in fact the only users of p2p file sharing were B users, then yes, that would have to be seen as beneficial to artists. Two caveats, however. One, B users likely are a fairly small number of p2p users, at least compared to A. Two, there are means to allow sampling of music before purchase that don't involve illegality and do involve consent of the artist. One example would be online music services such as Rhapsody that permit a limited amount of selected streaming at no cost. So Lessig has adopted a parental view of what's best for the artist in this situation without recognizing that the artist, working with a free market, can reach the same goal without enabling theft of his work.

Now to Lessig's take on Type C. Again, he acknowledges this activity (downloading copyrighted but not commercially available works) is illegal, but defends it as "good for society" because "more exposure to music is good," and more importantly as "harmless to the artist." This is a clear enunciation of the supremacy of culture and "society" in the Free Culture movement, and what is somewhat unnerving about promoting that approach is that it we do not have in our democracy a designated entity that is authorized to define what is best for "society" or "culture."⁸ Lessig and his allies have appointed themselves to this task, but their efforts are unnecessary, for if artists are permitted to manage their Blackstonian bundles our vibrant culture will continue growing and changing as it has throughout US history. What is being advocated here are default rules that do not enable protection and hence encourage production, which would replace the current system has default rules that allow "freedom" but protect creation.

That brings us to the second half of Lessig's argument on Type C, that this is "harmless to the artist." If a book is out of print, if a song is no longer available on a commercial label, if a film is not on DVD, that is a loss to the culture. However, it once again is a leap of false logic to believe that the solution is the embrace of actions that a law professor acknowledges is illegal. As Wired Editor Chris Anderson is writing for an upcoming book⁹, the Internet enables a "Long Tail" effect where the small number of individuals with an interest in obscure works can find those obscure works, and the creators of those works can be compensated. Anderson describes the Long Tail effect as follows:

The theory of the Long Tail is that our culture and economy is increasingly shifting away from a focus on a relatively small number of "hits" (mainstream products and markets) at the head of the demand curve and toward a huge number of niches in the tail. As the costs of production and

⁸ This writer for one prays it stays that way.

⁹ Anderson's book is due out from Hyperion in early 2006. Cleverly embracing the power of the Internet, he has been crafting his book with feedback to his ideas on his Long Tail blog (http://longtail.typepad.com/the_long_tail/).

distribution fall, especially online, there is now less need to lump products and consumers into one-size-fits-all containers. In an era without the constraints of physical shelf space and other bottlenecks of distribution, narrowly-target goods and services can be as economically attractive as mainstream fare.¹⁰

Now it may be in the self-interest of the Type C downloader to obtain "niche" content at no cost. But the vast majority of artists on Anderson's curve are on the "long tail," not at the head of the demand curve. Free Culture defenders like to cite how the Internet has changed things. Here is an example of true change resulting from the Internet; the ability of niche artists to profit from their work, even when it isn't mainstream. For respected scholars to argue that depriving a creator of potential revenue for her work is "harmless to the artist" shows a true disrespect to all artists, and a dangerous compulsion to put the desires of the masses ahead of the rights of individuals.

Conclusion

The first chapter of *Free Culture* takes repeated shots at a major movie studio, suggesting a hint of hypocrisy in that studio fighting to protect intellectual property for media it produces and distributes. The subtitle of the book, *How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, advertises up front the theme that large corporations are using copyright law to suppress, well, freedom. This paper didn't address the actions of corporations, for one good reason -- any action a corporation is taking regarding intellectual property is authorized directly or indirectly by an artist, who has sold or leased a property "stick" to that corporation.

The Internet is changing the way media is produced, packaged and distributed. It likely will become increasingly common to see artists as their own distributors as the Internet removes the need for manufacturing, transportation of media, and retailing shelf space. That said, one would assume there will remain a role for intermediaries with expertise in marketing and distribution that artists will seek out to maximize both their own exposure and their own profit.¹¹

Our culture is remarkably vibrant and expressive, and is consumed around the world (even if many of those global consumers enjoy deriding our culture while consuming it). We embrace freedom of expression. We don't burn down buildings when someone publishes a cartoon we find offensive. A bookstore can display the latest David McCullough biography beside a paperback collection of bathroom jokes. In fact, our culture seems pretty indestructible (we've survived the lip-synching scandals of Milli

¹⁰ Ibid, <http://www.thelongtail.com/about.html> .

¹¹ After all, Lessig offered *Free Culture* for downloading via a Creative Commons license, but he also sold hardcover reproduction rights to the book to Penguin Group while retaining his copyright, as the book's copyright page makes clear: "Copyright © Lawrence Lessig, 2004, All rights reserved." This shows again how our default rules enable the creator freedom in how to distribute his work, but default to protection as that is generally thought to be better for the production of cultural works.

Vanilli and Ashlee Simpson, after all). While there will always be those who appoint themselves guardians and protectors of our culture, we can recognize that they aren't truly needed. That is, they aren't needed as long as artists retain their longstanding role in the culture. Artists, through the flexible exercise of their rights bundles, allow the culture to be enriched. No corporation can lock that culture down, and no p2p pirate can significantly erode that culture, as long as society collectively thanks its artists by respecting property rights.

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