
COMMENTARY

Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy

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In *Creativity and Culture in Copyright Theory*,¹ Professor Julie Cohen reminds us that copyright law and theory revolve around creativity. I mean not only that creativity is at the center of copyright, but also that thinking about copyright too often revolves around the periphery of creativity without inquiring into the creative process itself. This failure to grapple with the details of the creative process is a serious shortcoming for copyright theorists, because while we do little investigating of creativity, we regularly make claims about what it is and what it needs to flourish. Some claim creativity needs strong exclusive rights, some claim it needs a rich public domain, and so forth.²

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¹ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151 (2007).

² Professor Tim Wu helpfully summarizes this debate and the questions about the nature of creativity at the heart of it:

Critics of copyright say that aggressive over-enforcement deters those who would borrow from others to create, such as music samplers, satirists, and filmmakers. Copyright's backers warn, conversely, that piracy threatens the very livelihood of the artist and creative industries. The story of twin tragedies, however, creates an indeterminate debate. Both positions have difficulty demonstrating empirically, as opposed to anecdotally, that either

We weasel around our ignorance about creativity in various ways. When pressed, we often avoid the question of how creativity really works by arguing about the burden of proof. We claim that perfect and infinite property rights are the default, limited only by proof that creativity requires a public domain, or that public domain is the default, displaced only where one can prove that creativity requires exclusive rights. It would be more satisfying if we could offer an affirmative theory of creativity to inform copyright policy.

Cohen suggests that one reason that copyright scholars have failed, for the most part, to develop a theory of creativity is that our standard modes of thinking make it difficult.³ For those who focus on economic analysis, creativity may seem too hard to pin down and quantify.⁴ For those who focus on the rights of creators and users, inquiring too closely into the creative process seems to invite discrimination — between the creative and noncreative — that feels inconsistent with our commitment to freedom of expression.⁵ We worship creativity by being sort of agnostic about it, and ignorant about it, too.

As Cohen points out, scholars from other disciplines have thought more rigorously about creativity.⁶ She introduces us to a diverse body of social science and humanities literature and draws on it to develop a

overprotection or piracy has stilled the engines of creativity. Any putative change in copyright protection can both be defended as a necessary creative incentive and attacked as an unnecessary control.

Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004).

³ See generally Cohen, *supra* note 1, at 1154 (elaborating on “first-order methodological commitments” that “define the boundaries of copyright’s epistemological universe in a way that excludes many other approaches to investigating and theorizing about creative processes”).

⁴ E.g., *id.* at 1196 (“Economic analysis can help us to understand some of the considerations relevant to the balance between economic fixity and cultural mobility, but both valuation and incommensurability problems prevent a comprehensive summing of the relevant costs and benefits.”).

⁵ E.g., *id.* at 1165; see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (warning of dangers posed by judicial attempts to assess worth of creative works and insisting on what has come to be known as non-discrimination principle in copyright); J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 493 (1995) (“Wary of unreliable value judgments about art and unable to predict which of even the most successful author’s future works will capture or recapture the public’s fancy, the copyright laws embrace all literary and artistic works simply by virtue of their being creations and leave the assessment of both merit and pecuniary worth entirely to the market.”).

⁶ Cohen, *supra* note 1, at 1176.

multifaceted account of the creative process.⁷ One of the hallmarks of creativity according to her account is “*not knowing* in advance” what one is going to create, or what the inputs will be, or from where the inspiration will come.⁸ The process of moving from not knowing to creating involves bumping around in one’s culture — running across things, absorbing them, and manipulating them. Cohen calls this “working through culture”⁹ and explains that it “involves physical interactions among embodied users, and between embodied users and material artifacts.”¹⁰

Cohen suggests, therefore, that creativity requires physical access to cultural artifacts and some freedom to manipulate and play around with them in a context that allows for serendipity.¹¹ A creator may not know in advance what her raw materials are going to be — as an inflexible permission-based copyright system might require. Cohen’s theory of creativity thus lends support to the argument that “overly rigid control of access to and manipulation of cultural goods stifles artistic and cultural innovation.”¹²

Although she explores this and other implications of her theory of creativity, Cohen does not focus on fine-grained policy prescription. Her theory does, however, generate powerful rejoinders to some common claims about copyright policy. First, Cohen’s theory of creativity challenges the notion that we do not need to worry about the constraints that copyright places on iterative creativity because, so long as copyright provides the right incentives, works will be created and their abstract ideas will be released into the environment where they will fertilize the next generation of creativity.¹³ This trickle-down effect may not be sufficient to foster iterative creativity if, as Cohen

⁷ *Id.* at 1177-92.

⁸ *Id.* at 1178.

⁹ *Id.* at 1179.

¹⁰ *Id.* at 1180.

¹¹ *E.g., id.* at 1192 (“Logically and chronologically antecedent to the creative play performed by individuals and groups, the play of culture supplies the unexpected inputs to creative processes, fuels serendipitous consumption by situated users, and inclines audiences toward the new.”).

¹² *Id.* at 1193.

¹³ *See, e.g.,* R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1033 (2003) (“[E]ach creation of even proprietary information expands the sum total of open information available for further technological, cultural, and social development”). *See generally* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1575-76 (2005) (discussing and refuting this argument).

suggests, creativity requires engagement with and manipulation of specific cultural artifacts, not mere abstract ideas.¹⁴

Second, Cohen's theory refutes the idea that the constraints that copyright places on iterative creativity are acceptable so long as permission to build upon existing works is available in the marketplace.¹⁵ Complete reliance on the market is not satisfying in light of Cohen's description of the creative process. Participating in a market to reuse existing creative works often involves the kind of forethought and cost-benefit analysis that is inconsistent with the serendipity that she describes. And, of course, the market does not foster creativity for those who cannot afford to participate in it.¹⁶ Indeed, Professor Margaret Chon suggests that whole communities, even countries, may not be able to participate in the market for creative works and permission to reuse them¹⁷ — an inability that threatens to impede the cultural cross-fertilization that Cohen also identifies as an important feature of the creative process.¹⁸

Beyond shedding new light on recurring debates within copyright policy, Cohen's theory may usefully guide our analysis of new controversies. It is especially thought provoking as applied to the current dispute about the Google Book Search project that Professor Siva Vaidhyanathan writes about in *The Googlization of Everything and the Future of Copyright*.¹⁹

Consider how the bumping around in culture that Cohen describes happens in the realm of text. A scholar may start with a vague and half-baked idea, not sure what resources he will need for a project or

¹⁴ Cohen, *supra* note 1, at 1183. Whether copyright law in fact threatens the type of access to and manipulation of cultural artifacts that creativity requires is a contested question. Cf. Wagner, *supra* note 13, at 1015-16 ("Even the aggressive legal efforts mounted by the content industries have had relatively little effect on the reality of some level of unauthorized copying.").

¹⁵ See, e.g., Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 583 (1998); see also Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 15 (1997); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 233 (1996); Edmund W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880, 881 (1999). See generally Van Houweling, *supra* note 13, at 1565-66 (discussing and refuting this argument).

¹⁶ See generally Van Houweling, *supra* note 13 (discussing copyright's impact on distribution of expressive opportunities for poorly financed creators).

¹⁷ Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 UC DAVIS L. REV. 803, 828 (2007).

¹⁸ Cohen, *supra* note 1, at 1190.

¹⁹ Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 UC DAVIS L. REV. 1207 (2007).

where it will lead. Then he bumps around — visiting libraries and archives, talking to colleagues, and encountering books and articles. He copies documents, clips things out of the newspaper, borrows books, and follows the footnotes somewhere he may not have intended to go.

This type of creativity could clearly be enhanced by the Google Book Search project. Google's effort to digitize millions of books in order to make them searchable online²⁰ promises serendipitous encounters with many more works from geographically distant libraries and unfamiliar fields — a boon to a creative process that relies on bumping around and cross-fertilization. On the other hand, this access will not have the physicality that Cohen says is also an important part of creativity.²¹ It will be disembodied and potentially divorced from cultural clues that would help to make it meaningful — the kind of clues that we get in a physical library. What is next to this book on the shelf? Is it important enough to justify multiple copies? Who else is standing in this row of books? As Vaidhyanathan has written elsewhere: "Libraries are more than resources. They are both places and functions. They are people and institutions, budgets and books, conversations and collections."²²

Cohen suggests that places, institutions, conversations, and collections contribute to creativity.²³ Libraries may be key loci for the kind of spontaneous and physical bumping around in culture that she describes. The Internet may be as well, although its physicality is different — limitless in its geographic reach but disembodied and divorced from some of the cultural guideposts that have informed creativity in the past. As Vaidhyanathan suggests, we should think about whether we are recreating, enhancing, or threatening key cultural environments as we contemplate the "Googlization of everything" and other public policy challenges that demand a rich understanding of and respect for the creative process that Cohen has so helpfully illuminated.

²⁰ See *id.* at 1215-22 (describing project in detail).

²¹ Cohen, *supra* note 1, at 1180.

²² Siva Vaidhyanathan, *A Risky Gamble with Google*, CHRON. HIGHER EDUC., Dec. 2, 2005, at B7, B10; see also Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1021-27 (2006) (arguing that libraries serve important functions "[e]ven in a world of pervasively digitized information").

²³ Cohen, *supra* note 1, at 1180.