

# The IP Law Book Review

IP Law Center, Golden Gate University School of Law

**Vol. 4 No. 1 (April 2014) pp. 32-46**

**CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE**, by Julie Cohen. Yale University Press, 2012. 352 pp. Paperback \$52.00.

Reviewed by Frank Pasquale, Professor of Law, University of Maryland Carey School of Law.  
fpasquale@law.umaryland.edu.

Julie Cohen has made extraordinarily illuminating contributions to the field of law and technology. In **CONFIGURING THE NETWORKED SELF**, she articulates a compelling normative framework for her earlier interventions. Her method is eclectic, situated, and particularist. She adopts no sweeping philosophical desiderata to unify her treatment of intellectual property online. Nor do economic measures of efficiency and utility motivate the project.

Cohen's **CONFIGURING** is instead a book that takes online subjectivity and community seriously, in both its established and emergent forms. It cautions against either public or private entities trying too hard to monitor and control information flows online. It does so not in the name of fairness, welfare, utility, or deontology, but in the name of play—or, more expansively, recognizing the value of intrinsically worthwhile, “pursued-for-their-own sake” activities on the net. Grounded in cultural theory and thick descriptions of life online, Cohen's work should lead thinkers within law—and well outside it—to reconsider how they think about critical problems in the design and regulation of technology.

To demonstrate this, I'm going to focus less on how **CONFIGURING** should affect others' thought, and more on how it changed how I think about digital copyright infringement. In past work, I've endorsed legal reform that is broadly in the mainstream of technocratic meliorism,<sup>1</sup> including a proposal to tax broadband to compensate artists based on their popularity.

Those who take CONFIGURING seriously can't endorse such a proposal without more adequately acknowledging its "costs." Moreover, Cohen shows us why the term "costs" deserves scare quotes. Influenced by her, I use it here only in the broadest sense of "negative effects," and not to claim the patina of quantified rationality enjoyed by cost-benefit analysis.

My review focuses first on the practical implications of CONFIGURING, then addresses Cohen's methodology. A cautionary note: CONFIGURING is an extraordinarily rich, dense book. Rather than merely applying extant cultural theory to law, Cohen tends to distill it into her own distinctive social theory of the information age. Thus, even relatively short sections of chapters of her book often merit article-length close readings, optimally done by a reader far better schooled in social theory than me. What I can offer here is a brief for the practical importance of Cohen's theory, and ways it should influence Internet policy and scholarship.

As Cohen shows in her discussion of "the emergence of architectures of control," both government and corporate efforts to manage computers and the Internet have a long history. The 1986 Computer Fraud and Abuse Act criminalized "unauthorized access" to "protected" computer systems. In the 1990s, a series of changes in copyright law parried the impact of new technologies of reproduction and distribution of works. Worries over cybersecurity, industrial espionage, and pornography also shaped legislative battles and law enforcement decisions.

By the late 1990s, the Internet appeared to be at a crossroads, drifting either toward either "info-anarchy" or "perfect control." Just as the major record labels seemed to have secured an impregnable oligopoly, services like Napster disrupted their (and many other content owners') control over works. "File sharing" provoked new technology and law designed to control users' activity. Cohen wrote a series of articles at the time critiquing misguided initiatives and proposing technology and law that would give users some assurance that rights they traditionally enjoyed in the analog world would endure as more works went digital.<sup>2</sup>

Then, as now, there has been a divide between an academic community deeply committed to promoting user rights, and the content managers who aspire to monetize works. Some academics proposed a middle ground, designed to separate the issue of control from compensation. In the past, when Congress realized that new technology would lead to widespread copying, it often imposed a small fee per copy—a practice known as compulsory licensing. This regime, still in place for many works, could

perhaps be applied to digital copying, assuring some payment to artists and distributors without trampling free speech and a thriving remix culture.<sup>3</sup> The recording industry itself has repeatedly (and successfully) lobbied to force composers and lyricists to accept a governmentally set compulsory license; turnabout is fair play.

Some say that the compulsory licensing regime can't work in the Wild West of untrammelled Internet distribution. But Terry Fisher has offered a detailed proposal in *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT*.<sup>4</sup> The Fisher plan would subsidize culture by lightly taxing the communication networks that enable its uncompensated duplication, and distributing the proceeds to artists based on how often their works are accessed and viewed.

I have endorsed proposals like Fisher's in the past. And yet, looking at them from the perspective of Cohen's "networked self," I grow more skeptical. To work well, the new compulsory licensing must rely on pervasive surveillance of what is being listened to and watched. If purely based on "number of downloads" or "number of views", it would provoke extensive gaming. We've already seen scandals concerning artists who allegedly manipulated their YouTube view count (either to gain more ad revenue, or to appear more popular than they actually were). Such gaming will in turn provoke countermeasures—monitoring who is viewing and liking what. Do we really want some central authority to collect all this information, merely in order to ensure that Lady Gaga gets, say, 100 times more revenue than Lana del Ray?<sup>5</sup>

After reading Cohen's work, it's hard not to see technocratic plans for allocating entertainment industry revenue as an instance of "modulation," an effort to monitor and exercise soft control over certain communities (here, artists). We should reconsider the plasticity of institutions like compulsory license fees. Maybe there should be minimum compensation, to assure some degree of security to all artists (WPA 2.0?), and maximum gains, to discourage gaming at the high end? Perhaps the aspiration to precisely calibrate reward to "value," as measured by the number of times something is viewed or watched, fails on its own economic terms: a particularly effective film may do its "work" in one sitting.<sup>6</sup> Or someone might reasonably value one experience of a particularly transcendent song over 100 plays of background music.

The larger point here is that there is not just a tension between the play of creativity and the copyright maximalism of dominant industry players.

Even the most progressive reform proposals can unintentionally warp creative endeavors in one way or another. The legal establishment has more often than not tried to wall out these considerations: “we’ll worry about the law and the money, and let the artists themselves figure out the creative angle.” But, as Cohen shows, the experience of play and creativity are at the core of the enterprise—they shouldn’t be treated as “add-ons” or independent of legal deliberations. We can’t get cultural policy right if we fail to consider what better and worse modes of artistic creation are on the terms of creators themselves.

What if it turns out that properly calibrating risk and reward is a near-impossible task for law? I’m reminded of the insights of John Kay’s *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY*,<sup>7</sup> and in that spirit, let me make a side observation on the way to my point. At least in my experience, the best way of predicting whether someone would pursue a career in the arts was a wealthy spouse or family. The word is out: it’s simply too risky to try and make a living as a painter, musician, actor, or poet—particularly given constant pressure for cuts to welfare benefits, food stamps, and Medicaid in the United States.

But in other countries, where the social safety net is more generous, the possibility of failure is not so bone-chilling. Consider the fate of J.K. Rowling, who hit “rock bottom” (in her words) while writing, and had to rely on Britain’s benefits system.<sup>8</sup> A few years of support allowed her to get a foothold in the literary profession—and without it, Harry Potter might never have been written. The implementation of the Affordable Care Act in 2014 is one bright spot for the marginally employed in the United States. Perhaps we’ll find, decades hence, that the biggest impetus to artistic careers (and independent employment of all kind) was guaranteed issue of health insurance policies via state exchanges, and subsidies to purchase them. Perhaps the health policy experts will do more to advance creativity than all the copyright policymakers combined, simply by assuring some breathing room for the (hopefully, temporary) failures of those in creative industries.

These reflections may not gather much of a following in an academy that prizes methodological rigor and citation counts over whimsy and the acknowledgement of contingency. But the academy’s own disciplines and forms of problem definition can obscure as much as they clarify.<sup>9</sup> Their appeal can be more rhetorical than substantive. As Cohen has stated:

[T]he purported advantage of rights theories and economic theories is neither precisely that they are normative nor precisely that they are scientific, but that they do normative work in a scientific way. Their normative heft derives from a small number of formal principles and purports to concern questions that are a step or two removed from the particular question of policy to be decided . . . . These theories manifest a quasi-scientific neutrality as to copyright law that consists precisely in the high degree of abstraction with which they facilitate thinking about processes of cultural transmission.<sup>10</sup>

Cohen notes many “scholars’ aversion to the complexities of cultural theory, which persistently violates those principles.”<sup>11</sup> But she feels they should embrace it, given that it offers “account[s] of the nature and development of knowledge that [are] both far more robust and far more nuanced than anything that liberal political philosophy has to offer . . . . [particularly in understanding] how existing knowledge systems have evolved, and how they are encoded and enforced.”<sup>12</sup>

A term like “knowledge system” may itself seem very abstract, and far from the urgency of contemporary debates about privacy or intellectual property. But its very open-endedness and capaciousness is precisely what is needed as technology advances and leaves us in an increasingly “weightless” economy and society. As more economic value is located in software systems, “big data”, pattern recognition, and the “lords of the cloud” with privileged access to all these processes, we ought to feel more free to reimagine the terms of social cooperation—not less. These systems are in principle more plastic than the industrial economy they are supplanting—but may well end up being less easy to influence to reflect public values.<sup>13</sup>

Notably, Cohen evokes imagination in two of her chapter titles—“Imagining the Networked Information Society” and “Reimagining Privacy.”<sup>14</sup> The value of her emphasis on particularism—and the cultural theory such close reading of actual practice supports—lies precisely in its ability to catalyze creative thought about social arrangements, fueled by attention to actually existing cultures and creativity and discretion. Like the “constructed commons” project of Madison, Strandburg, & Frischmann, Cohen’s work points to experiments in information sharing (and protecting) that need to be preserved against standardization according to monolithic economic or philosophical models.

Inspired by Cohen's work, we may well be able to get beyond the usual antinomy of information as "end product" (which justifies a high purchase price) vs. "input" (which is used as a justification for policies that set a zero or low price on content, like fair use or compulsory licensing). Cohen's work insists on a capacious view of network-enabled forms of knowing. Rather than naturalizing and accepting as given the limits of copyright law on the dissemination of knowledge, she can subsume them into a much broader framework of understanding where "knowing" is going. That framework includes cultural practices, norms, economics, and bureaucratic processes, as well as law.

We've seen that kind of ambition before, in Lawrence Lessig's *CODE: AND OTHER LAWS OF CYBERSPACE*.<sup>15</sup> But Cohen is not willing to accept its pathbreaking "modalities" approach to the shaping and control of human action.<sup>16</sup> As stated in Chapter 7 of *CONFIGURING*:

The four-part framework [of Lessig's *CODE*] cannot take us where we need to go. An account of regulation emerging from the Newtonian interaction of code, law, market, and norms [i.e., culture] is far too simple regarding both instrumentalities and effects. The architectures of control now coalescing around issues of copyright and security signal systemic realignments in the ordering of vast sectors of activity both inside and outside markets, in response to asserted needs that are both economic and societal.<sup>17</sup>

What is happening beyond the *CODE* framework? Aside from the theoretical rationales Cohen gives, historical developments motivate a move beyond Lessig's pre-millennial framework.

The Internet is in many ways centralizing power.<sup>18</sup> But life online runs the gamut from frivolity to high public purpose.<sup>19</sup> As Ethan Zuckerman observes, these high and low aims can be mutually reinforcing.<sup>20</sup> A video like "Collateral Murder" can be spliced into MIA's "Vicki Leekz" mixtape.<sup>21</sup> A Twitter community formed around cricket may turn to political activism, and vice versa.<sup>22</sup> As images, music, and words get recopied, repurposed, and remixed, symbolic orders emerge undisciplined by the usual triple authority of church, state, and home.

As legal scholars, we're conditioned to jump to the normative questions immediately, asking "is this a good thing?" It's tempting to flee to free speech-fundamentalism ("promiscuous publication and zero privacy, *uber*

*alles!*”) or control fetishism (“lock down and propertize!”) in order to respond decisively to fast-paced events.<sup>23</sup> Cohen insists that before we take any normative stance toward the blooming, buzzing confusion of Internet life, we had better understand it. Cultural theory is above all specific—to time, place, and people grappling with situated struggles.

Reading Cohen’s book, I was reminded of classic debates about the role of social science, philosophy, and values in law. As David Kennedy and William W. Fisher III have observed,

Law students struggle to understand the relationship between “the rules” and the vague arguments that lawyers call “policy.” Should “policy” begin only in the exception—when legal deduction runs out—or should it be a routine part of legal analysis? If the latter, how should lawyers reason about policy? What should go into reasoning about “policy”—how much ethics, how much empiricism, how much economics? Which of the arguments laypeople use count as professionally acceptable arguments of “policy” and which do not? Which mark one as naïve, an outsider to the professional consensus? What is it about policy argument that makes it seem more professional, more analytical, more persuasive, than talking about “mere politics”?<sup>24</sup>

Cohen cleared the ground for CONFIGURING in earlier works like *Lochner in Cyberspace* and *Copyright and the Perfect Curve*.<sup>25</sup> In those articles, she explored how ostensibly neutral and objective philosophic and economic approaches failed to rise above “mere politics” in many contexts. Combining her analytic critique with the narrative of legislative history in Jessica Litman’s *DIGITAL COPYRIGHT*,<sup>26</sup> one is hard-pressed to interpret modern copyright policy as much more than a messy compromise between the commercial interests of massive communications, content, and Internet firms. That law has created a set of baseline expectations that is hard to rationalize on either economic or philosophic grounds. Moreover, efforts to justify small departures from it on such grounds miss a greater and more necessary subject of critique and reconsideration: namely, the larger information system that intellectual property and surveillance laws are underwriting.

As more traditional scholars battle over whether Comcast’s property and free speech rights should trump those of their customers,<sup>27</sup> Cohen suggests a more open-ended approach. How invasive is the deep packet inspection

that an Internet Service Provider like Comcast proposes? Who gets to monitor its monitoring? Why is it performing this surveillance? Are financial criminals as likely to be targeted as, say, copyright infringers?<sup>28</sup> Who gets the data? What type of activity will be chilled by this intervention? Can users opt out, or is the fused public and private power here for all intents and purposes monopolistic? As she notes, “[s]ome information policy problems cannot be solved simply by prescribing greater ‘openness’ or more ‘neutrality.’”

[R]ights of access to information and information networks do not necessarily correlate with rights to privacy; indeed, they more typically function in the opposite way. As network users become habituated to trading information for information and other services, access to goods and services takes place in an environment characterized by increasing amounts of both transparency and exposure . . . . [H]uman flourishing in the networked information society requires additional structural safeguards.

.....

. . . . The lives of situated subjects are increasingly shaped by decisions made and implemented using networked information technologies. Those decisions present some possibilities and foreclose others. Most people have very little understanding of the ways that such decisions are made or of the options that are not presented. In many cases, this facial inaccessibility is reinforced by regimes of secrecy that limit even technically trained outsiders to “black box” testing. We would not tolerate comparable restrictions on access to the basic laws of physics, chemistry, or biology, which govern the operation of the physical environment. The algorithms and protocols that sort and categorize situated subjects, shape information flows, and authorize or deny access to network resources are the basic operational laws of the emerging networked information society; to exercise meaningful control over their surroundings, people need access to a baseline level of information about what those algorithms and protocols do.<sup>29</sup>

Trying to theorize rights and utility claims in the absence of such information may be an exercise in futility. We can’t grasp the landscape without a map.



A short review can only scratch the surface of Cohen's contributions in this book. So far, I've barely mentioned the type of selfhood her work aims to support. CONFIGURING's construction of the "networked self" is deeply insightful, and deserves at least some comment.

There is a lucky class of people who live to work, but most tend to work in order to live.<sup>30</sup> The point of life is in non-work—time to spend with family and friends, enjoy culture (low, high, and in between), to reconnect with the ultimate sources of value and meaning, and to communicate about all of this. This balance of work and leisure, or instrumentally rational action and value-driven action, is a theme of political economy. In a field preoccupied with the fair allocation of rewards from work(s) of various kinds, Cohen emphasizes the "play" of culture, subjectivity, and material practice in respective parts of her book.<sup>31</sup> She helps us understand that "play" isn't just something that happens on the edges of a life well lived—it's often the point.

Cohen's work on play fills in a concept simultaneously hypostatized by natural law theory (Finnis calls play one of the seven basic human goods), and too often left under-explained within it. As Cohen shows, play is indeed capacious, ranging from remixes of music videos and punning on Twitter to the "freedom to tinker" with devices and undisturbed exploration of alternate points of view (or even alternate selves). Considering some of the edgier forms of play, we may well understand why the natural law theorists have left it relatively underdeveloped (in comparison with other basic goods like sociability, religion, life, and aesthetic experience). Moreover, one person's play can be another's boring chore (I remember how enthusiastic I was as a kid to play Monopoly, and how my poor overworked father recoiled, in mock horror, from another round of "Monotony"). Play can be paradoxical, creating (within its general aura of rest and Csikmenthalyan flow) spaces of reward and frustration, achievement and stigma. But those alternate spaces are (supposed to be a) refuge from the daily grind of getting and spending, control and submission, that are characteristic of our more hierarchically ordered economy and politics.

Space for play and leisure has been politically contested. Patterns of rest and work considered perfectly acceptable under feudalism had to be altered dramatically by capitalist enterprise. Workers fought back over decades, demanding limits on the workweek and certain basic rights. And that revolution has in turn inspired a counterrevolution in our time, promoted by both neoliberal and neoconservative ideologies.<sup>32</sup> Under neoliberalism, the

sphere of play must either contract or bear profit. Under post-9/11 neoconservatism, there is an increasing emphasis on surveillance of all aspects of life, leaving little room for the unsupervised, unmonitored encounters vital to certain forms of intersubjectivity and self-expression.<sup>33</sup>

Leading neoliberals and neoconservatives employ the rhetoric of emergency to announce “there is no alternative” to the social arrangements that their theories, in truth, merely recommend.<sup>34</sup> Our social networks do not need to be fonts of advertising revenue; our artists should not need to shake down every would-be fan. At least in the developed world, there is ample social surplus to support these far more creative endeavors.<sup>35</sup> Nor does the “terrorist threat” merit the level of surveillance or policing now targeted at political activists, copyright infringers, and travelers. The economic pressure of austerity and the political movement for absolute “security” are in this sense “play emergencies” in the pejorative sense of play: performed, pretended, miniature.<sup>36</sup> The men behind the curtains of banks and law enforcement agencies ominously warn of horrible consequences should they not get their way. In response, we must question: when is the cure of control worse than the diseases of disorder it promises to eliminate? When is “disorder” really an unrecognized, spontaneous order, worth preserving rather than taming and transforming?

Cohen’s book will not give us definitive answers to these questions. But in forcing us to consider them, it substantially broadens the horizon of inquiry in what are classically considered “intellectual property and privacy” disputes. While narrow specialists in each field tend to develop tunnel vision, the lived experience of Internet users inevitably discloses their intertwining (with every EULA clicked, or ad served, or warning given about the consequences of infringement and industry and government’s ability to watch it).<sup>37</sup> Powerful trends would ever more tightly restrict individual access to content, and ever expand the ability of various authorities to monitor that access. Cohen’s work forces us to reconsider those social forces in light a true “play emergency”—the declining number of free, unmonitored, unmonetized opportunities ordinary people have to pursue creative expression, cooperation, and consumption. Preserving and expanding those spaces is as worthy a vocation as promoting economic efficiency or defending rights.

## ENDNOTES

<sup>1</sup> Matthew Fagin, Frank Pasquale, and Kimberlee Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 *Boston University J. of Science & Technology L.* 451 (2002); Frank Pasquale, *Restoring Transparency to Automated Authority*, 9 *J. on Telecommunications and High Technology L.* 235 (2001); Danielle Keats Citron and Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *Hastings L. J.* 1441 (2011) (documenting fusion center abuses in greater detail and offering reform proposals).

<sup>2</sup> Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 *Mich. L. Rev.* 462 (1998); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 *Harvard J. L. & Technology* 41 (2001).

<sup>3</sup> Frank Pasquale, *Remix Culture Reconsidered*, *Madisonian.net* (Jan. 14, 2012), <http://www.madisonian.net/2012/01/14/remix-culture-reconsidered>.

<sup>4</sup> See William Fisher III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (Stanford Law and Politics, 2004).

<sup>5</sup> For a broader perspective on the many ways government can support creative work, see Stephen Benedict, *PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS* (W.W. Norton & Co., 1991).

<sup>6</sup> The same problem exists in health care, where companies have an incentive to develop drugs for chronic conditions which must be taken once per day, for life (as opposed to, say, antibiotics, which are designed to completely cure the condition they target in one course of treatment). Patients (or, more likely, third-party payers) can be a continual source of revenue in the case of the management chronic conditions, but only get charged once for a cure. Frank Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 *Annals of Health L.* 269 (2010).

<sup>7</sup> John Kay, *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY* (Penguin Books, 2012).

<sup>8</sup> Mike Hale, *The Woman Behind the Boy Wizard*, N.Y. Times, July 16, 2009, at C4, available at <http://www.nytimes.com/2009/07/16/arts/television/16rowling.html> (“Ms. Rowling’s oft-told family history is told again—her strained relationship with her father, her mother’s death from complications of multiple sclerosis, her ‘short and really quite catastrophic’ first marriage, her depression while supporting her daughter on welfare payments.”).

<sup>9</sup> Norbert Haring and Niall Douglas, *ECONOMISTS AND THE POWERFUL: CONVENIENT THEORIES, DISTORTED FACTS, AMPLE REWARDS* (Anthem Press, 2012); Michael Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* (Cambridge University Press, 1984).

<sup>10</sup> Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151, 1157 (2007).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1165.

<sup>13</sup> Plasticity is a critical dimension of social power. Roberto Mangabeira Unger, *PLASTICITY INTO POWER* (Verso, 2004).

<sup>14</sup> Julie Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE*, 9-10 (Yale University Press, 2012) (Chapters 1 and 6 are available at <http://juliecohen.com/page3.php> and <http://www.juliecohen.com/page12.php>, respectively).

<sup>15</sup> Lawrence Lessig, *CODE: AND OTHER LAWS OF CYBERSPACE* (Basic Books, 2000).

<sup>16</sup> John D. Luteran, *THE APPLICATION OF LAWRENCE LESSIG’S FOUR MODALITIES OF REGULATION IN A VIRTUAL SOCIETY: AN EXAMINATION OF THE LEGAL STRUCTURE OF THE WORLD OF WARCRAFT* (2007) (unpublished manuscript), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jluteran>.

<sup>17</sup> Lessig, *supra* note 15; Ted Striphas, Better Stories, Better Laws, Better Culture, Concurring Opinions (Mar. 6, 2012, 11:59 PM), <http://www.concurringopinions.com/archives/2012/03/story-law-culture.html>.

<sup>18</sup> David Golumbia, *THE CULTURAL LOGIC OF COMPUTATION* (Harvard University Press, 2009).

<sup>19</sup> See Animated GIFs: The Birth of a Medium (PBS Off Book Mar. 7, 2012), available at <http://www.youtube.com/watch?v=vuxKb5mxM8g&list=PLC3D565688483CCB5&index=1&feature=plcp> (discussing GIFs, free animated photographs that automatically replay that are widely used on the web for aesthetic or humorous purposes); Cute Cats and the Arab Spring: When Social Media Meet Social Change (lecture by Ethan Zuckerman at the University of British Columbia 2011), available at [http://www.youtube.com/watch?v=tkDFVz\\_VL\\_I&feature=youtu.be](http://www.youtube.com/watch?v=tkDFVz_VL_I&feature=youtu.be) (discussing why social networking sites are good places for controversial discourse, because they are easy to use, have a wide reach, and are difficult to censor); but see Tom Slee, Ethan Zuckerman's "Cute Cats and the Arab Spring", Whimsley (Jan. 5, 2012, 10:56 PM), <http://www.whimsley.typepad.com/whimsley/2012/01/ethan-zuckermans-cute-cats-and-the-arab-spring.html>.

<sup>20</sup> Cute Cats, *supra* note 19; Cory Doctorow, The Internet is the Best Place for Dissent to Start, *The Guardian* (Jan. 3, 2012, 1:12 PM), <http://www.theguardian.com/technology/blog/2012/jan/03/the-internet-best-dissent-start>.

<sup>21</sup> Yochai Benkler, A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate, 46 *Harvard Civil Rights-Civil Liberties L. Rev.* 311, 321-323 (2011) (describing the "Collateral Murder" video); Video: M.I.A.—"Vicki Leekz Mixtape 1," Pinboard (Feb. 3, 2011), <http://www.pinboardblog.com/2011/02/video-m-i-a-vicki-leekz-mixtape-1/>.

<sup>22</sup> Frank Pasquale, A Duty to Tweet?, *Balkinization* (June 18, 2009), <http://balkin.blogspot.com/2009/06/duty-to-tweet.html>.

<sup>23</sup> William E. Scheuerman, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (John Hopkins University Press, 2004).

<sup>24</sup> THE CANON OF AMERICAN LEGAL THOUGHT 4 (David Kennedy & William W. Fisher III eds., Princeton University Press, 2006).

<sup>25</sup> Cohen, Lochner in Cyberspace, *supra* note 2; Julie E. Cohen, Copyright and the Perfect Curve, 53 *Vanderbilt L. Rev.* 1799 (2000).

<sup>26</sup> Jessica Litman, DIGITAL COPYRIGHT (Prometheus Books, 2006).

<sup>27</sup> Frank Pasquale, The New Neutralities, *Concurring Opinions* (Aug. 15, 2008, 11:59 AM), [http://www.concurringopinions.com/archives/2008/08/the\\_new\\_neutral.html](http://www.concurringopinions.com/archives/2008/08/the_new_neutral.html).

<sup>28</sup> George Washington, Copyright Infringement Is Being Treated as Terrorism, Naked Capitalism (Aug. 16, 2013, 2:28 PM), <http://www.nakedcapitalism.com/2013/08/copyright-infringement-is-being-treated-as-terrorism.html>.

<sup>29</sup> Julie Cohen, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE, 9-10 (Yale University Press, 2012).

<sup>30</sup> As John Kenneth Galbraith has observed, the luckier class tends to be in charge of companies and governments, with predictably biased influence on business plans and political priorities. John Kenneth Galbraith, THE ECONOMICS OF INNOCENT FRAUD: TRUTH FOR OUR TIME (Houghton Mifflin Harcour, 2004).

<sup>31</sup> Cohen, CONFIGURING, *supra* note 14, at 19 (“The play of culture and the play of subjectivity are inextricably intertwined; each feeds into the other. Creativity and cultural play foster the ongoing development of subjectivity. Educators in particular have long recognized that engagement with the arts promotes both cognitive development and transformative learning. Evolving subjectivity, meanwhile, fuels the ongoing production of artistic and intellectual culture, and the interactions among multiple, competing self-conceptions create cultural dynamism.”).

<sup>32</sup> Jonathan Crary, 24/7: Late Capitalism and the Ends of Sleep (Verso, 2013).

<sup>33</sup> See Mike Konczal, *Is A Democratic Surveillance State Possible?*, Washington Post Wonkblog (June 8, 2013, 12:30 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/08/is-a-democratic-surveillance-state-possible/> (discussing the convergence of the two modes of thought, the authoritarian surveillance state and the democratic surveillance state, in the modern United States).

<sup>34</sup> Naomi Klein, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (Picador, 2007).

<sup>35</sup> But cf. Nancy Fraser, *Marketization, Social Protection, Emancipation: Toward a Neo-Polanyian Conception of Capitalist Crisis*, in *Business as Usual: The Roots of the Global Financial Meltdown* 137 (Craig Calhoun & Georgi Derluguian eds., 2011) (discussing the exploitation of Global South as underwriting the Global North's welfare state).

<sup>36</sup> For historicization of emergency rhetoric, see Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, *University of Pennsylvania J. of Constitutional L.* 6 (2004).

<sup>37</sup> Margaret Jane Radin, *BOILERPLATE* (Princeton Press, 2013); *TERMS AND CONDITIONS MAY APPLY* (Hyrax Films 2013).

**Suggested Citation:** 4 *The IP Law Book Review* 32 (2014).

© 2014 Frank Pasquale