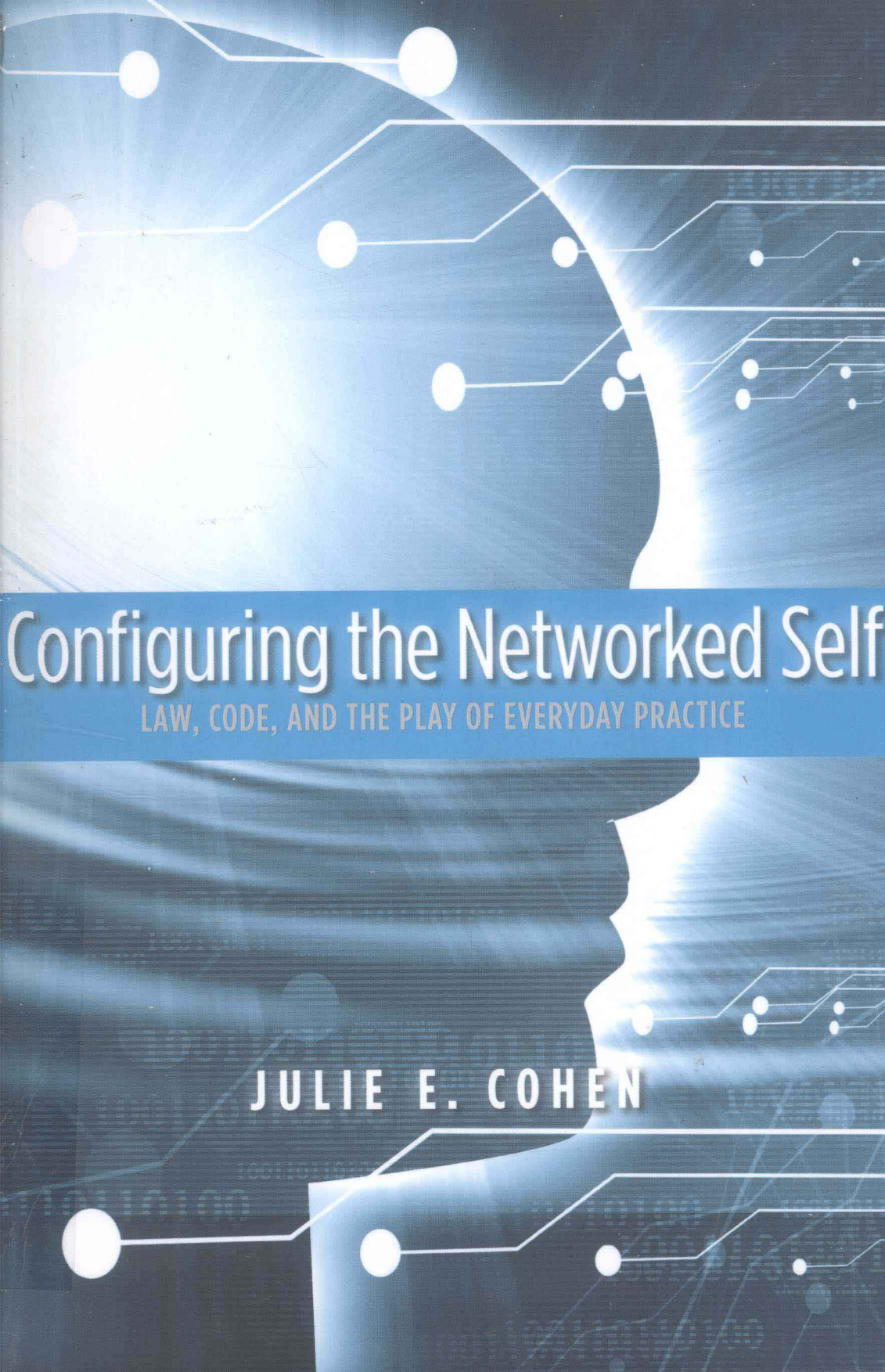
Configuring the Networked Self
LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE
JULIE E. COHEN

# Configuring the Networked Self

*Law, Code, and the Play of Everyday Practice*

Julie E. Cohen



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# Contents

# PART I

## Locating the Networked Self

CHAPTER 1

# Introduction: Imagining the Networked Information Society

Over the last two decades, the rapid evolution of networked information and communication technologies has catalyzed equally rapid change in the organization of economic and social activity. Spurred by the perceived economic opportunities and threats that new digital technologies create, powerful actors have endeavored to define and channel flows of information in ways that serve their goals. Those efforts have led to prolonged and often bitter struggles over the content of law, the design of technology, the structure of information markets, and the ethics of information use. In addition, they have stimulated heated scholarly and policy debates about what a good information society should look like.

The ongoing debate among U.S. legal scholars and policy makers about the structure of the networked information society has two odd features. First, the emerging regime of information rights and privileges is publicly justified in terms of economic and political liberty, but as a practical matter, it allows individuals less and less control over information flows to, from, and about themselves. In particular, the commercial, legal, and technical infrastructures that define the individual experience of the network are converging around relatively strong default protection for intellectual property rights in information—most notably copyright and trade secrecy—and relatively weak protection for individual privacy. To an extent, the explanation for this is political. Advocates of strong copyright and advocates of weak privacy share interests in strengthening the commodification of information and in developing infrastructures that render individual activity transparent to third-party observers. Those

entities wield considerable political and economic clout. But the gap between the rhetoric of liberty and the reality of diminished individual control is nonetheless striking.

Second, despite their practical convergence, legal and policy discussions about control of cultural information and control of personal information have remained largely separate. For the most part, the leading scholarly books on these topics do not acknowledge, much less attempt to explore, the interconnections. Within the wider public policy arena, copyright and privacy issues are rarely linked. To an extent, this disconnect also has a political explanation. Advocates of increased commodification and transparency have nothing to gain from highlighting the overlap. Advocates of "free culture" and "access to knowledge," meanwhile, tend to be uneasy with the limitations on access that privacy claims represent, and so have difficulty making common cause with privacy advocates across a broad range of issues. This uneasiness produces a second rhetorical gap, within which advocacy for human rights and human welfare in the networked information society proceeds as though "openness" were the only thing that mattered.

This book argues that the two phenomena are linked. The curious divergence between the rhetoric of liberty and the reality of diminished individual control and the failure to link copyright and privacy issues more systematically on both political and theoretical levels have a common origin. Together, they signal deep inadequacies in the conventional ways of thinking about information rights and architectures.

For the most part, U.S. legal and policy scholarship about the networked information society shares a set of first-order commitments—to individual autonomy, to an abstract and disembodied vision of the self, and to the possibility of rational value-neutrality—that derive from the tradition of liberal political theory within which legal academics are primarily trained. Those commitments shape both the prevailing understanding of the legal subject and the preferred form of analysis by which a just and intellectually defensible system of information rights is to be derived.

In each of three areas that the book will explore—copyright in cultural creations, privacy interests against surveillance, and the design of the architectures and artifacts that mediate access to networked information resources—a common pattern emerges: legal scholarship posits simplistic models of individual behavior derived from the first-order liberal commitments and then evaluates emerging legal and technical regimes that govern information flow according to the models. Theoretical frameworks organized around the core liberal individualist themes of ex-

pressive and market liberty predominate, regardless of their fit with the phenomena under investigation.

This approach has not served either theory or policy well. The models of individual behavior upon which it relies are too narrow both descriptively and normatively to yield useful insights into the relationships between copyright, creativity and culture; between surveillance, privacy, and subjectivity; and between network architecture and social ordering. Moving beyond the bounds of liberal political theory is essential if we are to understand the cultural work that regimes of information rights do and to appreciate the ways in which formally separate regimes of information rights intersect.

Human beings and human societies are constituted by webs of cultural and material connections. Our beliefs, goals, and capabilities are shaped by the cultural products that we encounter, the tools that we use, and the framing expectations of social institutions. Those processes play out in concrete contexts, involving real spaces and artifacts that we encounter as embodied beings. We cannot claim to judge cultural and social institutions from a vantage point of detached, value-neutral distance, as liberal theory would have us do. But we also cannot avoid the necessity of judging. The legal, technical, and institutional conditions that shape flows of information to, from, and about us are of the utmost importance not because they promote free speech or free choice in markets, but because they shape the sort of subjectivity that we can attain, the kinds of innovation that we can produce, and the opportunities for creation of political and ethical meaning that we can claim to offer.

This book seeks to remedy legal scholarship's theoretical deficit and, in the process, to develop a unified framework for conceptualizing the social and cultural effects of legal and technical regimes that govern information access and use. It will ask the sorts of questions with which law traditionally has concerned itself—what regime of information rights is just, and why—but it will foreground a set of considerations that legal thinking about those issues has tended to marginalize. It will consider how people encounter, use, and experience information, and how those practices inform the development of culture and identity. In particular, it will explore the ways in which social practices of information use are mediated by context: by cultures, bodies, places, artifacts, discourses, and social networks. From that vantage point, it will consider the ways in which the processes of cultural development and self-formation adapt to laws, practices, and technologies designed to impose commodification and transparency within the information environment.

In brief, I will argue that the production of the networked information society should proceed in ways that promote the well-being of the situated, embodied beings who inhabit it. That framework owes something to the theory of capabilities for human flourishing developed by Martha Nussbaum and Amartya Sen, and more recently applied to questions of information law and policy by a number of influential scholars. In the abstract, however, the statement that law should promote human flourishing tells us very little about the conditions of human flourishing in the networked information society.

We will see that law- and policy making for the networked information society serve the ultimate goal of human flourishing most effectively when they attend to the ordinary, everyday ways in which situated, embodied subjects experience their culture and their own evolving subjectivity, and when they consider the ways in which networked information technologies reshape everyday experience. To promote human flourishing in the emerging networked information society, information law and policy should foster institutional and technical structures that promote access to knowledge, that create operational transparency, and that preserve room for the play of everyday practice. We will see why the politics of "access to knowledge" should include a commitment to privacy, and why a commitment to human flourishing demands a more critical stance toward the market-driven evolution of network architectures.

## Variations on a Common Theme: Freedom and Control in Information Policy and Theory

Discussions among legal scholars and policy makers about copyright, privacy, and the design of network architecture revolve inexorably around the central themes of freedom and control. One view of the ideal information society, which I will call "information-as-freedom," celebrates networked information technologies because they enable unimpeded, "end-to-end" communication and thereby facilitate the growth of a vibrant, broadly participatory popular culture. The other, which I will call "information-as-control," celebrates networked information technologies because they enable precise, carefully calibrated control of information flows and thereby facilitate the flourishing of vibrant information markets. Few legal scholars advocate either view in its purest form all the time. Policy and legal debate about any given topic, however, are inevitably driven by the clash between the two, and the different policy prescriptions that they appear to generate.

My goal in this book is to focus critical attention on what the freedom/control binary leaves out. Upon closer inspection, each vision of the information society has a hollow core. The self that is to exercise expressive freedom, or to benefit from market abundance, remains a mere abstraction, and the emergent character of the relation between self and surrounding culture remains largely unexplored. Relatedly (and not coincidentally), scholars in both groups have been spectacularly unsuccessful at grappling with a series of difficult questions about normative endpoints: about the sort of culture that a regime of copyright should seek to privilege, about the kind of subjectivity that a regime of privacy protection should seek to promote, and about the values that network architectures ought to serve.

### *Enclosure and the "Cultural Environment"*

In the domain of copyright, the clash between information-as-freedom and information-as-control plays out in the form of a debate about the merits of broader rights and increased commodification of copyrighted content. Adherents of increased commodification point to the economic welfare that stronger property rights create. Critics of increased commodification have sought to rebut those arguments by drawing attention to the interdependence of cultural and informational goods and activities. They argue that commodification not only impedes specific economically and socially valuable activities that result from the free flow of information, but also impairs overall cultural health. Neither set of scholars, however, can explain why its preferred approach to fostering cultural progress is a good one.

Critics of increased commodification of cultural goods advance two major themes, one drawn from economic history and one drawn from natural history. The first theme invokes the "enclosure movement" in Britain. At various times from the fourteenth century to the early nineteenth century, common lands were enclosed, with drastic consequences for the commoners accustomed to using them. Legal scholars have called recent expansions of copyright a "second enclosure movement" that threatens to produce equally drastic consequences for information users.[1] Many scholars, including Yochai Benkler, James Boyle, Lawrence Lessig, Brett Frischmann, and Carol Rose, have sought to rehabilitate the "commons" from its association with tragedy and to celebrate the productivity of common cultural resources.

The second theme is that of environmentalism. Although today

the idea of a natural environment seems unremarkable, that idea emerged within scientific and popular discourse only in the mid-twentieth century, during the debate that followed publication of Rachel Carson's *Silent Spring*. Scientists were beginning to understand the complex web of ecological cause and effect; naming that web gave it an independent existence invested with political meaning. Borrowing self-consciously from the history of the environmental movement, James Boyle has argued that policies favoring increased commodification of information harm a different kind of environment, constituted by society's cultural and informational resources.[2] By appropriating the complex web of political meaning centered on the interdependency of environmental resources, he sought to jump-start a political movement focused on an ecological understanding of culture and cultural processes. Other scholars have taken up the call, and count themselves part of a new movement organized around the cause of a diverse and self-sustaining culture.

In the public policy arena, academic critiques of commodification and enclosure intersect with a set of grassroots movements loosely organized around the banner of "free culture." Inspired by the successes of free and open source software, free-culture advocates argue that free and open access to informational goods is essential to both cultural progress and democratic self-government. Legal scholars, in turn, cite the free-culture movements as evidence of the vibrancy of the cultural commons, and regard free-culture advocates as the environmental activists of the information age.

Yet the metaphors of "commons" and "environment" also surface unanswered and deeply divisive questions about substantive cultural policy. Ecological analysis of "culture" does not lead unproblematically to the conclusions its advocates urge. Instead, attempts to do the "science" of cultural environmentalism have generated some very peculiar results. Many scholars appear to lose sight of the metaphoric quality of the references to "environment," pursuing explanations for culture in the realms of complex systems theory and evolutionary theory rather than in the literatures that study culture itself.[3] In the realm of culture, however, conflating metaphor with reality is a risky move. The health of ecological environments is constrained by scientific principles and therefore relatively amenable to objective measurement. Cultural environments have attributes and tendencies, but they are far less predictable, and their health is a matter of opinion. For precisely this reason, attempts to translate cultural "science" into cultural policy are open to contestation. Cul-

tural change may be empirically and anecdotally demonstrated, but cultural harm is in the eye of the beholder.

Scholars who favor broader copyright rights and increased commodification, for their part, have preferred to seek explanations for culture within the "science" of markets, but this is hardly an improvement.[4] The environment within which artistic and intellectual culture emerges and evolves isn't a market, though it contains markets. It is a social entity, generated by patterns of human and institutional interaction. Social formations exhibit patterns and create path-dependencies, some of which can be described using economic laws, but we can't deploy economic laws to generate scientifically determinate prescriptions for their optimal form. Untangling the arguments about which patterns are better requires good descriptive and normative accounts of culture itself.

When it comes to articulating a normative theory of culture, though, both scholars who oppose increased commodification and scholars who favor it become oddly reticent. Adherents of cultural environmentalism know what they think a good culture would look like, but are sensitive to the irony of appearing to dictate how that culture should be achieved. Scholars who favor commodification do not share this difficulty—the vision they promote is that of the unfettered market in cultural works—but the terms of that theory mean they must show enthusiasm, at least in aggregate, for whatever the market turns out. Their task is then reduced to justifying whatever the market has generated, and sometimes they sound as though they have trouble believing themselves.

Establishing good descriptive and normative foundations for cultural policy requires confronting culture on its own terms, stripped of the veneer of scientism that the "environment" and "market" metaphors encourage. It requires, in other words, exactly what scholars on both sides of the debate have been trying to avoid: a theory that focuses on culture as culture and grapples directly with questions about why institutional arrangements for the production of culture matter. To decide whether the future of the "cultural environment" is in jeopardy, we need to understand how cultural processes work, why we should value them, and whether legal and institutional structures adequately take those values into account. Part II of this book develops an account of culture organized around the everyday creative practice of situated individuals and communities and explains why copyright law and theory require such an account to function effectively.