SECOND EDITION

Intellectual Property Law AND Interactive Media

FREE FOR A FEE

Edward Lee Lamoureux
Steven L. Baron
Claire Stewart

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Preface to the 2nd Edition

These prefatory remarks meet two general goals: (1) Emphasize important changes in the new media environments where IP laws operate, and (2) Describe new approaches to the 2nd edition.

First, this preliminary section presents a brief yet important review of changes in the socio-cultural environments for intellectual property law in the contemporary United States of America.[1] The situation has changed, considerably, from "the way(s) we were" prior to our 1st edition.

What was new media (digital, computational, networked communication technologies) when we published the 1st edition is now considerably more the mundane, everyday condition. Much of the giddy euphoria associated with the onset of the personal computer and the Internet was in recognition that these could lead to a reorganization of the means for production and distribution of the content protected by intellectual property law. The shift appeared to be toward users and away from "big content," those professionalized corporations and outlets that, prior to the information revolution, controlled the production and distribution of most news, information, entertainment, and artifacts of popular culture.

Advocates of the position that new media would shift content production and distribution from professionalized commercialism to everyday users were particularly enthralled by changes in the Internet often referred to as Web 2.0. The programming and applications that changed the static Web 1.0 into an interactive version seemed to redefine the WWW by promoting "co-creativity and the idea of an equivalence or mutuality in the power relationship in the generative process that allegedly erases the old divisions between 'producers' and 'consumers'" (Lister et al. 208). Among many others, MIT Professor of Humanities and Media Studies Henry Jenkins proposed that "participatory culture, contrasts with older notions of passive media spectatorship. Rather than talking about media producers and consumers as occupying separate roles, we might now see them as participants who interact with each other according to a new set of rules that none of us fully understands" (Jenkins 3).

Written at a time deeply influenced by these perspectives, the 1st edition presented intellectual property law not only as the rules that are supposed to be followed, but also highlighted the weaknesses

in those structures as they failed to keep up with technological innovation and as they failed to clarify and empower the position of the everyday user in the media equation.

However, many of the initial assumptions concerning the democratizing effects of the new media were naïve and misguided. As one might have expected, but not everyone recognized, "old media" were not about to give up the cash cow without a fight. As noted by a number of researchers, authors, and pundits whose ideas will be discussed within this volume, numerous professionalized and commercialized forces have reasserted authority over the production and distribution of media content. In some instances, digital technologies are leveraged as control features. At times, control has been leveraged via data collection and analytics. In other cases, legal structures, including IP law, are the principle control factors.

Many intellectuals interested in cyberspace have long warned of the control factors that are built into, and available for use as a result of, the digital nature of new media technologies. In his 1999 book, *Code*, Lawrence Lessig noted that new media would probably overprotect intellectual property and underprotect privacy. George Washington University Law School professor Daniel J. Solove wrote extensively in his 2004 book, *The Digital Person*, about the lack of efficacy of extant laws to constrain the ways that digital technologies can be used to collect information about people without providing adequate privacy protections.

The Edward Snowden affair drew mass attention to the roles of surveillance and data collection sponsored by the US government and intelligence community, particularly activities of the NSA (Gidda). However, Solove (in *The Digital Person*) and many others had discussed the clandestine role of the NSA and the degree to which surveillance and intelligence activities are aided and abetted by digital technologies long before the 2013 revelations by Snowden hit the headlines. Here, digital technologies are leveraged as control features.

Joseph Turow (*The Daily You*), Andrew Keen (*Digital Vertigo*), and Matthew Crain (*The Revolution Will Be Commercialized*) present detailed descriptions of how the marketing, advertising, and Internet industries collaborate to leverage information collected about users for the purpose of improving, especially the profitability of, targeted marketing. Here, control has been leveraged via data collection and analytics.

Additionally, the everyday user has proven to be somewhat less interested in the production and distribution of content than was originally anticipated by those who expected a lot of cultural change from computational technologies, networks, and the Internet. Although it is the case that enormous amounts of user-generated content (UGC) are created and distributed using computational technologies, networks, and the Internet (for example, via social media), the role of everyday users as potential producers and distributors of professional grade materials has been clarified, somewhat, in a direction that reestablishes their role as consumers rather than producers and distributors. Significantly, the single largest repository of UGC, Google's YouTube, is spending tens of millions of dollars developing professional quality content. John Kennedy notes that their $50 million acquisition of Next New Networks

> could be instrumental in enabling YouTube partners to monetize online and also help the video site face off competition from popular video service rivals like Hulu, iTunes and NetFlix. The move also signals a potential move away from the short videos that characterise most of YouTube's content in the direction of content people will watch for hours on end, such as movies and documentaries.

In short, the days of UGC driving Internet profitability have receded in favor of the re-emergence of professional grade, corporate generated, big content. That re-emergence calls for re-energizing and refocusing intellectual property law protection of creative content.

Further, consider the role played by the switch from desktop and laptops to tablets and mobile devices. Hamblen notes that "The combined value of paid apps, app-enabled purchases of goods and services, and in-app advertising is expected to double to $151 billion in the US by 2017" (Hamblen).

One of the principle features of apps is that they are dedicated to one activity (as compared to computer applications that are multi-functional). Although there are apps that enable users to create a wide variety of content, apps are primarily used to consume content rather than to create and distribute intellectual property. Dana Blankenhorn notes: "An app has limited functionality. It's designed to do one thing, not as a means to an end but an end in itself" (Blankenhorn).

Combine that with the fact that tablet sales are projected to overtake laptop and desktop sales by 2015 (Cheng). Forrester's Frank Gillett writes, "Tablets aren't the most powerful computing gadgets. But they are the most convenient … And tablets are very good for information consumption, an activity that many of us do a lot of" (Gillett). Not only are apps and tablets more useful for consumption than production, they can be prodigious collectors of information about users (Faughnder; Singer).

Finally, note the dramatic upward trend in media consumption (Bohn and Short; Coldewey; Wolford). By almost every measure, Americans consume more media than ever. Edison Research estimated the increase in total media consumption merely between 2010–11 to be in the 20% range (Webster). Some research estimates that the average American consumes, roughly, 8 ½ hours of media content daily, a number that towers over the 4–6 hours of TV watching attributed to American viewers in even the most robust years of mass television viewing. Contrary to predictions by commentators such as Clay Shirky, who argued that watching less television and sharing more UGC would produce enormous cognitive surpluses that could be "spent" solving significant (humanitarian) global problems (Shirky), Americans are once again rushing to become the most media saturated consumers on the planet.

In short, new media users are moving toward mobile devices, tablets, and apps and away from personal computers and applications as they consume an increasing amount of media. These trends work against the new media environment serving as a place where users primarily leverage opportunities to create and distribute content in competition with professionally produced material. While everyday users exchange tremendous amounts of personal information via social networks, the material is not of the type that users are apt to protect with intellectual property registrations and law.

The importance of these changes in context should not be understated. While it is still the case that the authors strongly support the efforts of everyday citizens to use computational technologies, networks, and the Internet in creative and innovative ways, there is a burgeoning realization that regulatory structures are reasserting control over the general communication environment. While new media continue to hold much promise and potential for the democratization of content production and distribution, many of the legal structures that were challenged by the development of computational technologies, networks, and the Internet have been strengthened and reasserted in favor of big content. Many of the activities that challenged the conventional orders associated with professionalized, corporate media practices have been addressed via structures of constraint and punishment found within intellectual property law.

When we published the 1st edition, music piracy seemed rampant and virtually unstoppable, websites like the Pirate Bay appeared to be out of the reach of legal/judicial interventions, and long-standing industry actors had provided few alternatives to illegal file sharing. The Recording Industry Association of America (RIAA) appeared to be determined to find and litigate against any and all illegal downloaders. The movie industry was not yet deeply touched by online/digital piracy although illegal bootlegging and mass duplication (mostly overseas) of videotapes and early DVDs were serious problems for the movie industry. Patent litigation was just beginning to recognize and deal with the massive profusion of new media patents issued by the US Copyright and Patent Office early in the development of digital media. Later we would come to understand that many patented items and processes had not really been new and useful and that far too many inappropriate patents had been issued. The year 2014 saw major changes in these important aspects.

Although action against one website does not in any way constitute the end of illegal downloading, the fact that Pirate Bay cofounders Jonas Nilsson and Peter Althin were found guilty, by a Swedish

district court, of copyright infringement, were fined millions of dollars, and were forced into exile by an impending prison term is but one example of the successful use of intellectual property law and enforcement regimes against illegal downloading (Nate Anderson, "Pirate Bay"; Farivar, "European Court").

For years, the RIAA took direct legal action against individual downloaders. Across almost a decade of litigation, featuring perhaps thousands of out-of-court settlements, the RIAA was victorious in the two lawsuits that went completely through the legal system. Jamie Thomas-Rassert lost a trial, numerous appeals, and was ordered, in 2012, to pay $222,000 in fines (Farivar, "Minnesota File-Sharing"). Joel Tenenbaum also lost trial and appeal cases and faces a $675,000 damages fine (Balasubramani, "1st Circuit Reinstates"). These two cases cannot be said to serve as indication of the end of illegal downloading. Quite to the contrary, there is evidence that it is virtually impossible to accurately estimate the total amount of illegal downloading in the US (Nate Anderson, "US Government"). However, the three cases (noted above) indicate that although copyright law and the justice system may not have kept up with the rapid changes brought about by digital technologies, the legal constraints and practices that are in place can be used against everyday users and new media operators who would seek to overturn big content's control over the mediascape. After all, digital leaves tracks.

It also appears that despite extravagant claims about losses due to piracy, industries relying on copyright law are alive, well, and prospering (Nate Anderson, "Piracy Problems?"). Companies in both the music and film industries have had substantive conversations with the most successful peer-to-peer technology company, BitTorrent, in efforts to improve streaming technologies for delivering content to users (Brodkin, "In World"). Success in the Pirate Bay case continues the trend set by Napster and Grokster litigation, as well as action against many file sharing sites (Limewire, etc.). Although it is not possible to curtail illegal downloading, intellectual property law can be, and is, used in litigation against identifiable large volume offenders. Additionally, the same technologies that once "empowered" everyman can now be used by big content to further their control over production and distribution.

Big content has also re-emerged as providers of content in ways that both meet legal requirements and move toward satisfying consumers' desires. By collaborating with new media industries, traditional music and film companies, for example, have finally begun to provide viable alternatives to illegal downloading. The iTunes store has been wildly successful in distributing both audio and video; Hulu, Netflix, Spotify, Pandora, Shoutcast, and similar services, have made significant inroads toward meeting consumer needs while satisfying industry demands for profit and copyright protection.

While there is still a very strong sense among many that US intellectual property law is in desperate need of wide-ranging revision, there is also a realization that most of the changes that have occurred in IP law since the publication of the 1st edition have tilted toward further advantaging big content at the cost of everyday users. Just as it is the case that having more information is not always better, likewise, making changes in the legal structures surrounding intellectual property often results in unintended consequences. Advocating for changes in intellectual property law is a somewhat risky business if one is hoping to support innovation and creativity on the part of every-person.

For example, the single largest change to intellectual property law, since the publication of the 1st edition, is the broad update, in 2011, of the US patent law system (Leahy-Smith America Invents Act [AIA]). Among other important changes, the system was revised from a preference for "first to invent," to "first to file." This, and other revisions, may well advantage large, corporate content developers. It is easy to understand that large corporate entities with significant stables of lawyers will have a much easier time navigating the patent application process more quickly than will single, unaffiliated inventors. Large corporations can also more afford the costs for patent filing, especially in an environment that gives preference to quick filing and payment. Although the law lowered filing rates for small entities, the "first to file" provision, the major change in the law, advantages large corporate entities. University of California, Berkeley intellectual property law professor Robert Barr notes that "Now it's really important to be the first to file, and it's really important to file before somebody else puts a product

out, or puts the invention in their product ... [this creates] a new urgency on the part of everyone to file faster—and that's going to be a problem for the small inventor" (Hurst).

One of the standard truisms presented in the 1st edition was the claim that "everything has changed, nothing has changed" (Lamoureux, Baron, and Stewart 1). This maxim was presented as an indication that while so-called new media presented numerous challenges to the legal status quo of intellectual property law, extant legal structures were in place, functioning, and should not be ignored by students and practitioners, even during advocacy for revisions.

The realities suggested by that maxim remain in place and are, perhaps, accentuated by the continued resurgence of big content. Even more, big content now has a partner in "big data." The lifeblood of the Internet is, and has always been, information. However, the information that was thought to be central to the information revolution is not, primarily, the information that now fuels the Internet. Early prognostications about the value of computational technologies, networks, and the Internet suggested that the most important feature would be the vast informational resources available to everyone. In a sense, this dream is reality, as people in all walks of life and across every sort of enterprise and endeavor now have access to far more information than one could have imagined. Further, combining big data with big content aligns some corporations (and industries) that were previously new media companies with traditional big content and previously old mass media interests.

Market forces have produced an alternative reality as to what kinds of information have real value on the Internet, and why. The need for funding sources for the Internet and the capitalist drive for profits have combined to bring heretofore new media companies—for example, Google, Apple, and Facebook—more in line with the old media companies than had been the case in the early days of the Internet. Many of those who might have previously sought to move power from corporate structures to everyday people are now fully enmeshed in the American capitalist, corporate system and their principal interests are concerned with how to maximize profit from the information provided by users without giving users credit for the value of that information, all the while doing so in an environment where law does not (much) protect everyday users. The new media information pyramid has been turned on its head; the value of the Internet no longer rests with the vast amount of information everyday people can retrieve. Rather, the Internet pays off for companies that collect information about users in the process of data analytic-driven targeted marketing.[2] The information of value, in new media, is now information about users.

In short, the new media landscape that provides contexts for intellectual property law has changed significantly since publication of the 1st edition. Technology always advances; law always trails. Late twentieth and early twenty-first century digital, computerized, networked technologies continue to challenge efforts to keep legal regimes upto date. And although new media continues presenting rapidly changing and challenging circumstances, forces allied with big content exert pressures to pull intellectual property back from the brink of anarchy once implied by computational technologies and networks. In many ways, these changes re-invigorate the functions and importance of intellectual property law and its significant role in the legitimate circulation of mediated content. Because, although "information still wants to be free," big content and big data prefer that using new media is frictionless for consumers while remaining profitable for producers and distributors and therefore *Free for a Fee*.

Second, this preliminary section specifies the changes that we have made in this 2nd edition. We have worked hard to update the information and we have adjusted our approaches to the material in an effort to deliver the content for efficient and effective improvement of learning outcomes.

Readers will find the following changes:

- Every chapter is updated: Laws, cases, and circumstances have evolved since the 1st edition was published. Changes indicated in the "Chapter Updates" sections of *freeforafee.com* are incorporated and extended.

- Each chapter includes a new section that clearly introduces the fundamentals of the IP law aspect highlighted in the chapter. In the 1st edition, we depended on the overall "Introduction" chapter to explain how given areas of the law, later covered in the individual chapters, operate. The 2nd edition previews these matters in the "Introduction," but also provides needed details at the start of each chapter.

- Each chapter includes a new section dedicated to "Emerging Issues." The 1st edition stopped at "what's the law and how does it work?" The 2nd edition details the emerging trends that one could expect through the next 3–5 years.

- The 2nd edition presents "Open Source and Open Access" (Chapter Four). The 1st edition made brief mention of the open source movement in the patent chapter. That material has been moved, expanded, and joined to content detailing the open content movement. These areas are important to new media developers and to people who consume content that was previously available only via proprietary print sources (for example, researchers, teachers, librarians). The roles for media conservators are changed by open content initiatives.

- The 2nd edition expands the chapter on virtual worlds to include games (Chapter Ten). The 1st edition depended on the unique features of *Second Life* as illustration in a discussion of IP law in virtual worlds. At the time of the 1st edition, *Second Life* had the potential for being one of the "next big things." That did not come to pass. *SL* is still interesting for its unique features among virtual worlds; however, games are the most important virtual environments and the ways that IP laws work within them cannot be ignored in favor of an outlier.

- The last chapter summarizes IP law in new media. The 1st edition used the virtual worlds chapter as capstone ("since we've now covered the outlier material, we can wrap things up"). The 2nd edition includes a chapter that provides a unifying theme, summary, and closure.

- The 2nd edition presents learning objectives for each chapter. Whereas the 1st edition featured questions for discussion, the 2nd edition includes learning objectives at the end of each chapter. These help students target learning on core concepts in addition to integrating knowledge into contexts and conceptual relationships.

- Case coverage is revised in two important ways. First, the bulk of the case analyses have been moved to a second volume, *Case Analyses for Intellectual Property Law and New Media* (Baron, Lamoureux, and Stewart). References to cases, in the primary text, direct readers to pertinent sections in the new book. Second, some of the case coverage in the 1st edition was overly complex with legal technicalities and did not clearly focus on the principle learning/implications for new media. The revised sections, in the new volume, highlight the central findings taken from each case and the implications for digital media technologies. Technical legal analysis is minimized and presented only when crucial to understanding.

- A list of online resources for the 2nd edition is included on *freeforafee.com*.

- Readers should take note of the use of non-standard stylistic practices in this volume. The text and reference section follow *MLA* documentation style. However, cases are listed (both within the analytical sections in the text and in the reference list of cases at the end of the work) following the practices of *The Bluebook: A Uniform System of Citation*, 19th ed. (2010), the preferred style guide (within the legal community) for legal documents.

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