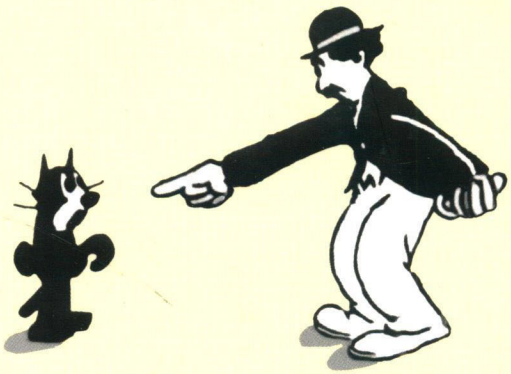
Hollywood's Copyright *WARS*



From Edison *to the* Internet

PETER DECHERNEY

Peter Decherney

HOLLYWOOD's COPYRIGHT WARS

FROM EDISON TO THE INTERNET

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HOLLYWOOD'S COPYRIGHT WARS

FILM AND CULTURE John Belton, Editor

for Emily 

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HOLLYWOOD'S COPYRIGHT WARS

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THE THEATER OF COPYRIGHT

MANY FACTORS have shaped the development of the American film and television industries: the personalities of moguls, advances in technology, and changing social mores to name a few. One of the most important drivers of the media, however, is too often underemphasized or entirely overlooked by media historians.[1] Regulation—government policies, court decisions, and internal company policies—might at first seem to be an impossibly dry or specialized subject. But when put in context, regulatory struggles often reveal some of the most human tales of personal conflicts over power, politics, and art. Regulation has also been vitally important to both the structure of media companies and the art of making movies and television shows. Consider antitrust rulings, First Amendment cases, labor laws, media ownership rules, tax codes, wartime sedition acts, and international trade policy. These forms of regulation touch every aspect of media creation and circulation; they influence who makes films and television shows, what they look like, and ultimately who can see them.

At times, legal regulation has caused the entire film and television industry to turn in one direction or another. After the Supreme Court's 1948 antitrust ruling,[2] for example, the Hollywood studios sold off their theater chains. The entire system for distributing and marketing films changed. Studios stopped churning out weekly B films and short subjects

to fill their theaters. They began to make fewer and more expensive films, and this one decision played a pivotal role in leading Hollywood on the path to the blockbuster-driven industry of today. Other forms of regulation affect Hollywood more subtly. Tax credits, for example, have become one of the most important factors that producers consider when they choose locations for a film or television shoot. Shooting in Louisiana instead of California can shave millions of dollars off of a production budget, because that state returns up to one third of the money that production teams spend there.[3] Regulation arises at almost every stage of production, distribution, and reception from manufacturing cameras to operating a theater to using a clip from a film in a YouTube parody video.

Copyright law is perhaps the most important form of media regulation. It guides filmmakers' artistic decisions; it underlies Hollywood's corporate structure; and it determines how audiences consume media. Since the widespread adoption of the internet in the 1990s, copyright law has begun to affect an ever-expanding range of media producers and consumers, including amateur video makers, file sharers, and internet entrepreneurs. As a result, interest in digital copyright law has moved beyond the realm of scholars and lawyers. Even high school students now hold strong opinions about copy protection, the public domain, and other areas of cultural policy that had previously been the obscure domain of legal experts.

Times have changed, but the issues themselves are not new. *Hollywood's Copyright Wars* historicizes the heated debates over copyright and digital media. Starting with Thomas Edison and continuing through the present, I address the long history of antipiracy campaigns, filmmakers' rights, and the legal environment for new technologies. I demonstrate that the film and television industries have struggled to influence and adapt to copyright law throughout their history. And many of our most valued Hollywood treasures, from *Modern Times* (1936) to *Jaws* (1975), we will see, cannot be fully appreciated without an understanding of their legal context.

But the legal battles are only half of the story. In contrast to (most) legal scholars who touch on some of the same issues, I focus on the industrial and cultural impact of copyright law. Legal historians often limit themselves to landmark decisions and key policy changes. But sometimes landmark legal decisions have surprisingly little effect. Other times, new copyright policies have revolutionary unintended effects. The most surprising thing that we learn from the history of Hollywood and copyright is that most of the time Hollywood's leaders have responded to intellectual property skirmishes through self-regulation. Rather than submit to Congress or judges and juries, studio heads and filmmakers have consistently brought copyright

regulation "in house," as it were. Hollywood has a history of responding to other forms of legal regulation in the same way. Most famously, in the 1920s and 1930s Hollywood found itself subject to the whims of state censor boards and facing the potential threat of federal content legislation. The studios reacted by adopting the Production Code and allowing their trade association, the Motion Picture Producers and Distributors Association, to regulate violent, sexual, and political content in movies. Hollywood has, similarly, devised internal methods for controlling intellectual property. In the 1940s, for example, Hollywood's writers and moguls found themselves frustrated by decades of shifting court decisions about screenwriting credit and compensation. Rather than continue to pursue a legal resolution, they turned to Hollywood's talent guilds to arbitrate disputes over authorship. Similar stories of self-regulation, we will see, can be told about piracy battles in the 1900s, film studios' attempts to contain the disruption wrought by the VCR (video cassette recorder), big copyright holders' strategies for managing amateur and noncommercial uses of their content, and many other pivotal moments in the development of Hollywood. Indeed, much of what constitutes the history of Hollywood's engagement with copyright law has happened outside courthouses and congressional halls—in the larger theater of copyright—as well as inside them. *Hollywood's Copyright Wars* examines in great detail the court cases and policy battles that have shaped American media, but I also consider the often extralegal resolution to these conflicts.

COPYRIGHT WARS AND PIRACY

A common misconception about copyright is that its primary function is to protect authors and creators. It does protect creators but only as a by-product. At least in the United States, copyright's goal, as it is stated in the Constitution, is to "promote the progress of science." (Science, in this instance, retains its eighteenth-century meaning of knowledge or learning.) To serve this goal, copyright gives creators a limited monopoly on their creations before their work enters the public domain and becomes freely available to all. Since 1998, works enter the public domain 70 years after their creator's death. If the work was created for a corporation, as most films and television shows are, its copyright term expires 95 years after it is published (or 120 years after creation, whichever comes first). This assumes that the copyright term will not be extended, as it has been every time that works from the 1920s—including early Hollywood masterpieces—approach the end of

their monopoly. Even before a work enters the public domain, however, there are many limits on a copyright holder's monopoly. Whole categories of creative work are excluded from copyright protection, including fashion design and culinary creations. Other limitations on copyrighted works exist to protect users, i.e., consumers or creators who need to use work still protected by copyright. A user may be a television writer who wants to remake a basic science fiction plot or an engineer with a brilliant new concept for a video player or a parent who simply wants to show a Warner Bros. cartoon to a group of children. As these examples suggest, copyright is not a watertight monopoly that protects against all forms of copying and reuse. It is designed to leak at the sides, and it has strategically placed holes throughout. As it is often said, copyright strikes a balance between copyright holders and users. It allows copyright holders to profit from and control their work, but only up to the point where society's needs outweigh those of the copyright holder.[4] At that threshold, the public domain, fair use, and other exemptions begin to take over. The ultimate goal of copyright is always to enrich society by encouraging the creation of art and ideas, so they can be consumed and built upon.

Hollywood is caught on both sides of this divide. Studios are in the business of creating and controlling intellectual property, but the creative professionals working in the film and television industries make new works by building on the storehouse of cultural ideas. The Walt Disney Company's tried-and-true business model is retelling public domain fairy tales, and George Lucas drew on a wide range of myths and allusions in order to create the *Star Wars* franchise. Yet Disney and Lucasfilm remain some of the most aggressive policers of their intellectual property. Throughout its history, Hollywood has been placed in the often-contradictory position of trying to protect filmmakers' rights to use copyrighted material as freely as possible while, at the same time, limiting others' use of the works created by Hollywood. To some extent, studios' positions on copyright have changed predictably over time. As the industry's archive of intellectual property has increased, studios have sought greater copyright protection. At least this is their public face. Behind the scenes, we will see, the industry has remained very pragmatic about intellectual property. Both Disney and Lucasfilm, for example, often remain quiet when fans reuse their work. And despite overinflated public rhetoric, studios have regularly been willing to accept compromises and creative solutions when new media—from the VCR to the internet—have challenged their business models.

For close to 300 years, two metaphors have been used dependably to explain the conflict over how to balance copyright law, and I think

they are worth retaining. Since the eighteenth-century's "Battle of the Booksellers," critics have cast copyright debates as a "war," and they have referred to the side challenging the status quo as "pirates." There have been many attempts to abandon these metaphors over the centuries,[5] but they persist. And from a historical perspective, it is difficult to escape the conclusion that copyright has been shaped largely by militaristic and piratical thinking.[6]

The parties invested in copyright wars have changed over time, but copyright has consistently pitted incumbents who have grown too comfortable with the status quo against pirates who are pushing the boundaries of art and technology. To be sure, many pirates push too far and act maliciously. But just about every leading media company from the Edison Manufacturing Company to Fox Studios to YouTube have been labeled pirates at one time or another. Surely many pirates must be doing something that society values. Legal scholar Lawrence Lessig makes the important historical argument that most media technologies began as piratical instruments. Recorded music, radio, and cable television all exist today because copyright law was changed or reinterpreted in order to legalize practices that had previously been labeled piracy. Piracy, history tells us, is often just a name for media practices we have yet to figure out how to regulate.[7]

Debates about piracy are not only normal, they are actually a healthy aspect of a developing media industry and society. In chapter 1, "Piracy and the Birth of Film," I show that many forms of copying which we would now consider piracy were central to the emergence of both the art of film and the structure of the film industry. Filmmakers made exact copies of each other's films and sold them as their own; they remade competitors' films shot for shot; and Thomas Edison and his Trust built an industry on the unauthorized adaptation of books, plays, and newspaper cartoons. Early filmmakers, in other words, copied from each other and from other media without permission. Courts ultimately put an end to most of these types of copying, but not before the circulation of films and a culture of copying fostered the rapid growth of film as an art form. Moreover, the courts took decades to devise effective methods for regulating the new technology of films. I argue in this chapter that what we now see as piracy in the pre-1911 debates about regulating film were simply a function of society's attempts to explore, understand, and assimilate the new technology.

Claims of piracy did not end in 1911. They have continued throughout the history of the entertainment industries, and there are no doubt new copyright wars on the horizon. These wars take place in the press as well

as in courts and congressional hearings, and consumers make themselves heard through purchases. Piracy debates are a form of indirect public negotiation, another part of the theater of copyright. The debates often drag on for decades, as they did with Edison and his rivals, and the ongoing debates about piracy are a necessary part of the regulatory process; they build in a valuable element of deliberation. The length of a particular copyright battle alone can sometimes be the key to determining its outcome. In a telling interview, intellectual property lawyer Fred von Lohmann described his many years' work for the digital rights advocacy organization the Electronic Frontier Foundation. Von Lohmann suggests that the longer a new consumer media technology remains on the market, the more consumers become accustomed to it and the harder it is for Hollywood studios or other companies to have legal limits placed on its use. As a consumer advocate, von Lohmann saw his job, in part, as prolonging debates until watching your TV remotely via the web, for example, became so routine that it could not be taken away. Conversely, a swift end to a piracy battle can often help incumbents.[8] It is easier to deny the importance of new technologies or new artistic practices while they still seem strange and potentially transgressive. From the Battle of the Booksellers to the copyright disputes of Edison and his rivals to the lawsuits against YouTube, piracy battles denote the most innovative periods in media history. And where we see claims of piracy, we are seeing a vital part of the regulatory process.

NEW TECHNOLOGY AND AUTHORSHIP

Each chapter of *Hollywood's Copyright Wars* addresses a different technological or institutional transformation that has affected the American film industry: the invention of movies, the development of the studio system, the challenge of airing films on television, the rise of home video, and the impact of the internet. At the same time, each chapter also addresses new challenges to the definition of authorship. The Constitution does not actually provide for the grant of a monopoly to "creators," as I have been suggesting. The framers of the Constitution used the much narrower term "author." But conceptions of authorship are constantly changing, and copyright has expanded to protect a much wider group of creators than we think of when we use the term *author*. "Author" conjures up images of a lone writer sitting at a café, but film editors, producers, and camera operators are all potential authors or coauthors of a film or television show.