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## SECTION 5.

# THE FUTURE OF INTELLECTUAL PROPERTY: THREE VIEWS

Rapid cultural changes resulting from widespread access to the Internet and other information technologies are opening up space for a vigorous discussion about the role of copyright and fair use in contemporary society. Much creative work -- with video, software, images, language and multimedia -- is now being developed by people who are making and sharing materials on the Internet for free. At the same time, both large media companies and independent artists who are trying to make a living from their creative work are asserting their rights to control information and profit from it. What are the implications for the future of copyright? Consider the perspectives of scholars who have articulated three different approaches to the future of intellectual property.

## A NEW MODEL OF LICENSING: SOME RIGHTS RESERVED

Larry Lessig is a Professor of Law at Stanford Law School who spearheaded the development of a new model of licensing creative works called Creative Commons. Creative Commons promotes itself as a “best-of-both-worlds way for creators to protect their works while encouraging certain uses of them.” The Creative Commons model allows creators to specify exactly how they want their work to be used by others -- in other words, they can declare “some rights reserved.”

Creative Commons was developed in order to counteract the problems with the current copyright system -- namely, the fact that large copyright holders were exercising a disproportionate amount of power that made it hard for new content creators to distribute their work. Lessig has publicly condemned the “permission culture” that is evident in the current copyright system. In his book *Free Culture* (published under a Creative Commons license and [available free online](#)), he writes:

The law’s response to the Internet, when tied to changes in the technology of the Internet itself, has massively increased the effective regulation of creativity in America. To build upon or critique the culture around us one must ask, *Oliver Twist*–like, for permission first. Permission is, of course, often granted— but it is not often granted to the critical or the independent. We have built a kind of cultural nobility; those within the noble class live easily; those outside it don’t.

Creative Commons offers alternatives to this permission culture with new types of licenses for creators who wish to share their work. There are searchable indexes for users who are looking to find work that is freely available.

While Lessig and other scholars argue that Creative Commons provides a useful copyright alternative, the model has received some criticism. For example, some critics have argued that the Creative Commons model fuels the same corporate system as copyright. Others claim that Creative Commons is providing unnecessary licenses, and that some of the Creative Commons licensing options are incompatible with one another. Finally, others argue that [Creative Commons licenses](#) actually *diminish* users’ rights, by promoting a system of licensing options instead of the doctrine of fair use.

## RECLAIMING FAIR USE WITH ADVOCACY FROM COMMUNITIES OF PRACTICE

Pat Aufderheide, Director of the Center for Social Media at American University in Washington, D.C. is part of a rising scholarly movement to reclaim freedom of expression under copyright law. She writes about intellectual property with the public interest in mind. She believes that the United States is in need of less media conglomeration and fewer rigid, protectionist intellectual property policies such as the Digital Copyright Millennium Act (DMCA), which makes it illegal to break the encryption codes on DVDs for movies and software.

Aufderheide recognizes that copyright law has been reframed in the last several decades in order to benefit large media conglomerates and, as a result, has diminished the quality and quantity of work available in the public domain. According to Aufderheide, corporations have “zealously pursued their ownership rights and worked to intimidate and misinform potential users and the general public about the viability of the doctrine of fair use.” Aufderheide focuses on intellectual property users and owners asserting their rights under the existing doctrine of fair use. The doctrine of fair use can only be applied by considering the social practices within creative communities. Artists, teachers, architects, TV producers and poets all have social norms, established by the traditions within each professional group, for what’s appropriate in using copyrighted materials. These social norms exist side-by-side with the marketplace model for disseminating information and entertainment. Because copyright law includes a provision for fair use that is flexible and contextual, it can be responsive to the social norms of many different creative communities.

Working with the legal scholar Peter Jaszi at American University Washington College of Law, Aufderheide explored the role of copyright and fair use in an important creative community—the world of documentary filmmakers. As a result of the high costs and complicated process of clearing rights to use copyrighted images, texts, or sounds in their work, documentary filmmakers were avoiding making films that addressed certain topics. They also changed sound, images and locations in order to avoid copyright problems. Each facet of documentary production comes with its own hurdles: images, text, art, graphics, and music are copyrighted by the original creators; soundtracks are copyrighted separately from the film; and promotional materials can be copyrighted and trademarked at both the federal and state levels.

Aufderheide and Jaszi helped filmmakers develop their own clearly articulated consensus about what is fair and reasonable under the law. Media literacy educators, online video producers, film professors and others are using the “best practices” approach, because it enables creative communities to better advocate for their rights as copyright users under the doctrine of fair use.

In this view, copyright law is an effective way to ensure the development of innovative ideas and the spread of knowledge. The rights of the copyright holder must be respected, but the rights of users must be equally respected so that people can use copyrighted material in new and innovative ways. The “best practices” approach can help creative communities advocate for a robust interpretation of fair use, which enables the law to be relevant to the new forms of usage, sharing and distribution that are now part of daily life in a networked information society.

## IS COPYRIGHT NECESSARY IN A 21<sup>ST</sup> CENTURY INFORMATION ECONOMY?

Yochai Benkler, a Yale University legal scholar, writes about the future of copyright in a networked society. He believes that non-proprietary information production (that is, the creation of information that is unencumbered by ownership rights) may be superior to the traditional industrial model that emphasizes exclusive rights. The economic model of information as a commodity might not be the best fit. After all, economists consider

information to be a special kind of property. It's not like other kinds of property. Why? If one person consumes it, there is no effect on whether or not another person can consume it as well.

Benkler believes that the current economic model of classifying intellectual property as a marketable product is inefficient. Right now, the current market system attempts to put a price on these resources and thereby restricts access to them. People who wish to freely share information, culture, and knowledge are being systemically shut down by corporations who have an economic interest in controlling the production and dissemination of information and entertainment. This system attempts to make access to creative works more difficult and expensive for the general public to obtain. This may not be efficient from an economic standpoint or a cultural one.

A non-proprietary production system that encourages the free flow of information, knowledge and culture would intensify the spread of knowledge and innovation. Benkler believes this system would encourage the free flow of information, which would intensify the spread of knowledge and innovation. After all, the cost of creating new material is typically much lower in a production model that relies on sharing information. We have seen a tremendous growth in the number of successful collaborative, peer production projects where creative products are developed outside of the traditional economic system. It does not require a huge financial investment to create on the Web. Open source software, social sharing and other forms of peer production are widespread today.

However, industries with an economic interest in maintaining the proprietary model of information dissemination (for example, Hollywood and the music industry) are working towards more restrictive copyright legislation that could shut down many peer production and information sharing projects. In Benkler's view, overly strict international and American copyright laws are obstacles to the free flow of information. Copyright has become more hostile to users' rights. Fair use has been narrowed, criminal penalties are in effect for many peer-to-peer sharing projects, and many large corporations are attempting to halt information sharing with high licensing fees or legal intimidation.

Benkler wonders whether intellectual property laws, copyrights and patents are still useful ways to regulate information in a world in which information consumers are now users and creators themselves. He notes, "If we pass a law that regulates information production too strictly, allowing its beneficiaries to impose prices that are too high on today's innovators, then we will have not only too little consumption of information today, but also too little production of new information tomorrow."

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