A Debate on
“Creativity, Commerce & Culture”
with
Larry Lessig and Jack Valenti

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The USC Annenberg Norman Lear Center staged a debate between Larry Lessig, an expert on intellectual property, and Jack Valenti, President of the Motion Picture Association of America. These heavyweights matched wits and words on the ownership of creative content, the role of the artist in commerce, and copyright. This publication is a transcript of this event.

THE NORMAN LEAR CENTER

The Norman Lear Center is a multidisciplinary research and public policy center exploring implications of the convergence of entertainment, commerce, and society. Located at the USC Annenberg School for Communication, the Lear Center builds bridges between eleven schools whose faculty study aspects of entertainment, media, and culture. Beyond campus, it bridges the gap between the entertainment industry and academia, and between them and the public. Through scholarship and research; through its programs of visiting fellows, conferences, public events, and publications; and in its attempts to illuminate and repair the world, the Lear Center works to be at the forefront of discussion and practice in the field.

CREATIVITY, COMMERCE & CULTURE

Creativity, Commerce & Culture is a Norman Lear Center project that explores the new digital environment and the impact of intellectual property rights on innovation and creativity. A forthcoming book will gather materials from the project’s conference, “Artists, Technology, and Ownership of Creative Content.” This project is directed by David Bollier, a Lear Center Senior Fellow.

LARRY LESSIG

Lawrence Lessig, is a Professor of Law at Stanford Law School and founder of the School’s Center for Internet and Society. He also serves as Chairman of the Board of Directors of Creative Commons. Prior to joining the Stanford faculty, he was the Berkman Professor of Law at Harvard Law School. Lessig was also a fellow at the Wissenschaftskolleg zu Berlin, and a Professor at the University of Chicago Law School. In 2001, he was once again listed among the “visionaries” on Business Week’s “e.biz25,” the magazine’s roundup of the 25 most influential people in electronic business. Lessig earned a BA in economics and a BS in management from the University of Pennsylvania, an MA in philosophy from Cambridge, and a JD from Yale.

JACK VALENTI

Jack Valenti is President and Chief Executive Officer of the Motion Picture Association of America. He began his career with the Humble Oil Company (now Exxon), and served with distinction as a pilot-commander with the 12th Air Force in Italy during WWII. In 1952, he co-founded an advertising and political consulting agency, and later worked in both the Kennedy and Johnson administrations. In 1966, Valenti resigned his White House post to become the President of the MPAA.

Valenti has written four books, The Bitter Taste of Glory; A Very Human President; Speak Up With Confidence; and Protect and Defend. He has written numerous essays for The New York Times, the Washington Post, the Los Angeles Times, Reader’s Digest, Atlantic Monthly, Newsweek, Cox newspapers and other publications. Valenti was awarded France’s Legion d’Honneur, the French Legion of Honor.
Welcome by Geoffrey Cowan: One of the good things about events at the Annenberg School is that they are a combination intellectual feast and true party. Tonight, you'll have both of those.

I’m Geoff Cowan, Dean of the Annenberg School for Communication. I’m delighted to welcome you here this evening for a very special event. I’m particularly thrilled to have our two debaters here tonight, Larry Lessig and Jack Valenti. They’ll be introduced in a moment, but first I want to say a word of thanks to both of you for being here.

I also want to thank another special group that’s in the audience from the London School of Economics. We have a wonderful partnership with the LSE called Global Communication, run by Roger Silverstone. Every year we host a conference for students who study in both places. It’s great to have Roger and these students here with us today for this very special event.

To start things off, it’s my pleasure to introduce the star of Marketplace—although David Brancacchio thinks he’s the star, and David’s sitting in back welcome, David—our very own Marty Kaplan. Marty is a commentator on Marketplace and a former motion picture and television producer and writer. But in academia, he’s known as the Associate Dean of the Annenberg School for Communication and the Director of the Norman Lear Center. He’s going to be running the show tonight—Marty Kaplan.
OPENING REMARKS BY MARTIN KAPLAN: Thank you. It’s a special pleasure to be here. The Norman Lear Center, for those of you who don’t know, is based here at the Annenberg School. A central aim of our effort is to look at the way entertainment is, conceivably, the most important force in every advanced industrial society on earth. It’s a bold claim, but we think it’s at least partially warranted.

By entertainment, we mean everything from high art and culture to low: from Hamlet and Aida to the World Wrestling Federation, Oprah and tractor pulls. By entertainment, we include everything that could be considered part of the attention industries, so that we are not only looking at traditional subjects like movies and television and theater and music, but also, for example, the ways in which news is entertainment, politics is entertainment, education is entertainment – imagine the professor in front of the class trying to hold the attention of his or her audience; or consider the minister in his or her pulpit competing for attendance and the architect designing the new museum as a tourist attraction.

We look at entertainment broadly and from every possible disciplinary point of view. Here in this room, for example, there are people from the law school, the business school, the fine arts school, communication, journalism, cinema and television, English, history, sociology, business and so on, all looking at this one phenomenon together. Because of the support of visionary TV producer and philanthropist Norman Lear, who said, “Yes, that’s the idea of our time,” we’ve named this effort after him.

We meet, tonight under the auspices of the Lear Center program which focuses on creativity, commerce and culture, and the place where those three things intersect. In doing so, we are pleased to have as a partner and co-sponsor, the Center for the Public Domain. The Center for the Public Domain is a philanthropic organization based in Durham, North Carolina. It’s an advocacy group that believes that the cultural space we share in common—the commons, the information commons—is an
important aspect of contemporary life, which must be identified, cherished and protected.

But that having been said, this evening is intended as a free-for-all; it is not an effort to advance as a totality one particular point of view or another. It’s an effort to mix it up, lay out the issues and engage.

The topic that we’re speaking about tonight, “Creativity, Commerce and Culture,” contains within it a core tension, the tension or bargain between the freedom and rights of the individual artist and the freedom and rights of property owners, the owners of copyright and intellectual property. It is a complex ecology that includes at one end of the artistic food chain, the creator, and at the other end, the consumer. Peter Guber talks about the creator as the “eureka” end and the consumer as the “oh wow” end. In between are the realms of business and commerce and the marketplace, the realms of technology and media—the ways of enabling that transmission to occur and a public realm embodied in our norms, our government and our rules and regulations. In the case here tonight, we will be looking at the rules of copyright, intellectual property, fair use and public domain that govern such transactions. Emerging from that intersection of realms is the culture we’re going to be looking at tonight.

I’m delighted to have as our Sherpas for this investigation — and I cannot think of two better people to have this discussion—Larry Lessig and Jack Valenti. I’m going to introduce them, invite them to join me up here, make a couple of comments about the format, and then we’re off to the races.

So, first, I’d like to introduce someone who is at the forefront of these issues. If you ask legal scholars, people involved with the Internet or those concerned with any aspect of intellectual property rights who is the most influential voice in this area, our guest tonight is that person. He has been a Supreme Court clerk. He has been a professor at Harvard at the Berkman Center. He is now a professor at Stanford Law School.
His prior book, entitled Code, is one of the most widely discussed books about the Internet. And his new book, which is called The Future of Ideas, may, if we’re lucky, be available in the lobby upstairs. Please welcome Larry Lessig.

To introduce our other guest, I start with a memory seared into my brain. It was 38 years ago last week that, on Air Force One, a photograph was taken of Lyndon Johnson taking the Oath of Office with Mrs. Kennedy near him. They were heading back to Washington after the traumas that occurred in Dallas. A young man who was present at those events is in this photograph. That man became a special assistant to President Johnson, and then in 1966, head of the Motion Picture Association of America.

The motion picture industry is a place where if you’re in your job for 18 months, it’s considered a miracle. This gentleman has been in his position since 1966 as the head of the organization of all those people. And not only is he internationally known—a decorated spokesperson, an advocate for the industry—he is also someone that I had the honor of interviewing when I briefly worked at National Public Radio 20 years ago and so, Jack, I brought a copy of your book, too, Speak Up With Confidence, which I have kept since then. Please welcome Jack Valenti.

We have the pleasure tonight of being joined on the Internet in a live Web cast by a discussion group. So, in principle, people all over the world are following what we are saying and doing here, and they will also have the opportunity to participate in the question-and-answer component of this evening. In fact, there’s already a full page of questions that they want to pose to our speakers. That discussion group is being moderated concurrently with our conversation here tonight.

The format is very simple. There will be no filibusters. Other than that, it’s going to be a free-for-all in which people have a chance to talk back and forth and engage. At a certain point, we will open it up to all of you. I have the great good fortune of being a moderator in name only
because these two gentlemen do not need a moderator. They have plenty to say to each other.

But having said that, I hope to understand something before the evening is over, something from each of you gentlemen.

From Larry, what I’m interested in learning is how, at a time when the new *Harry Potter* movie can be found on the streets of Kuala Lumpur and Beijing, being sold and counterfeited, at a time when more music is being downloaded than ever before, can artists possibly make money? How is what you believe consistent with the ability of the creative community to flourish and to thrive?

And, Jack, what I’d like to learn from you before the evening is over is and I know you say that there’s such a thing as fair use; I know you believe in the political system as a way of putting a check on the demands of corporations and the consolidation of power, my question is, given current practice, what is it that will check the power of the corporations, which you so ably represent? How is it that anyone can possibly get an inch when they have an adversary like you on the other side?

So that having been said, the only other thing I’d like to add before opening it to these gentlemen is to say that this is Round Two of Lessig versus Valenti. Round One occurred at the Berkman Center at Harvard, and it’s a lively piece of online video. So please welcome them. Larry, perhaps you’d begin.

**THE DEBATE BEGINS**

**LARRY LESSIG:** Well, I am indeed honored, and I have to say this is an extraordinary measure of Jack Valenti that he would open this discussion between two people who share a common ideal about the value of freedom and free speech and creativity, but two fundamentally different ideas about how we get there. So I want to first thank you, Jack, that you would allow this conversation to occur like this, especially since it’s
Round Two and we had so much fun in Round One. But I think it's only appropriate that when we have Round Two of this boxing match, we have appropriate costumes that allow us to celebrate this debate in all it's grandeur.

JACK VALENTI: You look better in shorts.

LARRY LESSIG: And we saved the shorts for later, Jack. Marty set this up by asking how it is that we can assure that there is some opportunity for creators to earn what they deserve in the creative process of producing their art, and I think that's absolutely the right question to ask, and it's a different question from the way this question is typically framed, which is whether people should be allowed to steal artists' content.

If that's what anybody thinks this debate's about, let me tell you, I'm not going to take the side that says people should be allowed to steal artists' content because I don't think artists, like anybody else, should be subject to the theft by other people of their legitimate and rightful work. But this debate isn't about whether people should steal, but what the appropriate balance is between the rights that the artist has and the opportunity that other artists have to build on the creative work that has gone before.

I think the real difference between the two positions here is that, in my view, intellectual property laws, the product of Congress, the courts and people like myself – and the work that people that I produce for a living have done—have expanded far too much, such that the opportunity for creativity, built on these intellectual property laws, is fundamentally controlled and concentrated and has begun to stifle the very type of innovation that I believe we should have.

So in the course of this debate, I promise to lay out how it is that we establish a system to protect the rights of authors and creators to earn some return without the stifling control that I think we risk right now.
JACK VALENTI: First, thank you very much for those kind remarks, and when this is over, I should embrace you and kiss you full on the lips, manfully, of course. Marty, I want to thank you for that wonderful introduction, painfully brief, I thought, but that’s all right.

I am glad to be here, although I’d like to say that I think that – well, let’s just say that the sum total of culture and commerce and law that we’re going to talk about is umbilically connected to the philosophy of Marcel Proust. I haven’t the foggiest idea what that means. I’m going to take as my text tonight The Future of Ideas, the latest book of Larry Lessig, for which, I might say, I paid him the highest compliment I know. I bought this book at full retail price. It cost me $30. That means under copyright laws, he made about $5.50 off that book. It seems to me that if Larry had the fortitude of his convictions, he would have told his publisher to give it away, but he didn’t.

All right. So, everything I say tonight is going to be taken from Larry’s book—that’s my Bible.

Now, I think what I’d like to do is to sum up what I think this book says, and I’ve read every bloody word of it. I must say I found it enticing. You have enriched the nobility of the sentence, and I congratulate you on that. It’s a very readable book, though I didn’t agree with almost any of it.

Let me tell you what Larry is saying in this book. I quote. He says, “Copyright is out of control.” That’s a direct quote. He believes that copyright is stifling innovation, inventiveness and progress in this new digital world, which, by the way, is just one of many new technologies that have intruded on our society, beginning with the telegraph and semaphore signals and television and the computer. All of them have had to operate under some kind of standards and rules. And he believes that copyright is destroying fair use. Now, that’s what’s in this book.
It just so happens that in politics as in war and romance, timing is everything. So let me take you right to the heart of this thing. This is an issue that Larry feels very strongly about. On page 190 of his book, he hurls some very heavy stuff at a case that took place in the Second Circuit called the DCSS case. He says this case shows copyright at its most grotesque distortion, crushing fair use, and, I might add, demolishing freedom of the Web.

Now, what is the DCSS case? CSS stands for content scrambling system. It allowed people who make DVDs to put them out with this code that disallows anybody from watching them free of charge. Some very innovative folks got together and broke the code. And what did they do? They put this code-breaking series on the Internet for six billion people to access. And the courts then took it over. The District Court, Judge Kaplan presiding, issued an immediate injunction, forcing them to stop distributing this material. Now, in his book, Professor Lessig says that the District Court was palpably in error, and very optimistically, says, “the Second Court of Appeals has that case; let’s wait to see the outcome.”

As I said earlier, timing is all. Twenty-four hours ago in New York, the Second Circuit handed down its decision. Now, here, first, is the heart of the Judge Kaplan decision. I’m going to read one sentence in the last paragraph of his crisp, compact and very readable and understandable decision— which is rare for lawyers. Other than Larry Lessig, few of them write well. Listen to Judge Kaplan’s last sentence. “The excitement of unlimited access to untold quantities of information has blurred in the minds of some that taking what is not yours or what is freely offered to you is stealing.”

Now, let me take you through briefly, because this is so important, a summary of this Second Circuit Court Opinion, because, like Zeno’s arrow, it goes straight to the heart of Professor Lessig’s beliefs and, I might add, cleanses the debate for the future. Now, here is what it says—
LARRY LESSIG: Can I just interrupt to say that the New York Times reported your response to the decision as, and I’m quoting, “I’m not chortling or anything, Jack Valenti said.”

JACK VALENTI: Well, I didn’t think I was chortling. I was delighted, but not chortling. There’s a big difference. And I go through this because these are terse little sentences, but they’re very important because this is the latest decision handed down by the Second Circuit.

Now, by the way, Professor Lessig in his book calls the Ninth Circuit here in California the Hollywood Circuit. I’m sure he’s going to call the Second Circuit the Hollywood Second Circuit. I don’t know what he’s going to do with the other five or six circuits before he’s done.

“In considering,” said the Court, on page 51, “the scope of First Amendment protection for the decryption program like DCSS, we must recognize that the essential purpose of an encryption code is to prevent unauthorized access.” Now, listen to this. “Owners of all property rights” – and that sure as hell includes the Screen Actors’ Guild and the Screen Directors’ Guild and the Screen Writers’ Guild and the studios and every creative person in the country, as well as the Craft Union. “Owners of all property rights are entitled to prohibit access to their property by unauthorized persons.”

On page 51, he says, “The DCSS’s computer code that can decrypt CSS in its basic function,” – and I’m so proud to say that I’ve used this metaphor myself, so I really applaud the Second Circuit – “is like a skeleton key that can open a locked door, a combination that could open a safe, or a device that could neutralize the security device attached to a store’s product.”

Page 56, “The government’s interest in preventing unauthorized access to encrypted copyrighted material is unquestionably substantial, and the regulation of DCSS by prohibiting its exhibition clearly serves that interest.”
Now, here comes fair use, which is one of the core assets of Professor Lessig’s argument, which he makes in a most enticing way. “The Appellants contend that DMCA, Digital Millennium Copyright Act, as applied by the District Court, unconstitutionally eliminates fair use of copyrighted material.” That’s what the defendant said. “We reject this extravagant claim,” said the Second Circuit. “We note that the Supreme Court has never held that fair use is constitutionally required.”

Page 69, “Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. We know of no authority,” said the Court, “that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format.” And, finally, “Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair users’ preferred technique or in the format of the original.”

Now, I would like to hear Professor Lessig rebut the Second Circuit.

LARRY LESSIG: Please.

JACK VALENTI: And tell me what is the next step. Perhaps you’ll argue it before the Supreme Court—where your former mentor, Justice Scalia, would hear it, and I think Justice Scalia will find it unwise to collapse the concept of private property if I have read Justice Scalia’s decisions in the past rightly. Professor Lessig, cross-examine.

LARRY LESSIG: Yes, sir. So, Jack, the last time you sounded so confident about a decision was after the Ninth Circuit Court held that VCRs were an illegal technology and could be banned.”
And you, speaking before Congress, applauded that decision with about as much love and attention as you applauded the decision of the Second Circuit. But as we know, even though, as you said in that testimony, "I say to you" – this is wonderful, brilliant, beautiful – "I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to a woman at home alone."

JACK VALENTI: I must tell you I love that. I really do. And, frankly, I’d like to say it again.

LARRY LESSIG: Even though you applauded the decision, the Supreme Courts rightfully, in my view, took a different view of the VCR technology. What they established in the Sony Betamax case was whether the technology has a potential for a substantial non-infringing use. Now, the Second Circuit has made its decision. I’ve not had as much chance as you to go through it, so I won’t criticize the decision directly, but I do want to talk about the DMCA, and ask these people, as they hear these cases, to ask themselves whether this sounds like the quintessentially reasonable regulation that you talk about.

So, for example, Sony makes a little dog called the AIBO. It dances and jumps around. You pay $1,500 for the privilege of having this robot dancing around on your floor. A man decided to crack the technology of the Sony AIBO to make it so he could have his dog dance to jazz. He then tried to share with other people the way to make the dogs that they had purchased dance to jazz. He posted it on his Web site and soon got a call from the lawyers from Sony saying this is a violation of the Digital Millennium Copyright Act. You have facilitated the cracking of a technology that’s designed to protect copyrighted works; namely, our ability to control whether our dogs dance jazz or not – case one.

Case Two – Edward Felten, a professor at Princeton University, researches the encryption technology protecting something called the Secure Digital Music Initiative. He discovers the Secure Digital Music Initiative is crafted with an extremely poor encryption technology. He decides to
write a paper and present the paper at an academic conference describing the weaknesses of the SDMI encryption system. He receives a letter from a lawyer representing RIAA. The letter says, in terms that couldn’t be more clear, “You should realize that if you present your academic paper, you are risking prosecution under the DNCA for facilitating the cracking of a technology that enables copyright protection.”

Case Three – a Russian in Russia writes a bit of code to enable people to unlock an Adobe eBook. An Adobe eBook is an electronic book. My book has been released in Adobe eBook form. In the Adobe eBook form for my book, there are absurd restrictions on people’s use of that book. My publisher did it. I fight the publisher, but it turns out, that though my friend Jack Valenti will talk to me, my publisher won’t talk to me about this issue. The code for the eBook, for example, forbids you to copy any text out of the eBook into memory or print any pages off the eBook or use a technology to read the book aloud. All of this is forbidden by the code. Dmitry Sklyarov wrote a bit of code to make it so you could crack the Adobe eBook.

Now, why would you want to crack the protection of the Adobe eBook? Some people want to crack the protection of the Adobe eBook so that they can take my book and enter into the resale market for Lessig books and make millions and millions of dollars by posting my eBook outside of the control of Adobe. That’s what some people want to do. And those people are criminals. I agree.

But some people want to crack the protection system so that, for example, if they’re blind, they can use their read-aloud technology to read the text aloud. Or, if they want to put it on another machine that they might have at their home, they can put it there and back it up on their other machine.

In fact, that’s why Dmitry Sklyarov was writing this code. Now, Dmitry comes to the United States to give a lecture in Nevada about the weaknesses in Adobe’s encryption system. Adobe doesn’t like this much. Adobe calls the U.S. Attorney and says, “U.S. Attorney, this Russian hacker is coming here to talk about our system, and we’ve bought his code online, and he’s, therefore, violated the DMCA.” They arrested Dmitry, held him in jail for six weeks. He now faces 25 years in jail for a technology that can both be used to do bad things and can be used to do good things.

JACK VALENTI: I voted to execute him.

LARRY LESSIG: You would execute him? Okay. Let’s just put this in perspective. We live in a country where there’s a technology called a handgun. A handgun is used to kill ten children a day. This technology is an extremely dangerous and, I think, evil technology. But when a child is killed with a handgun, people at Smith & Wesson don’t fear that the U.S. Attorney is going to knock on the door and lock them up and send them to
The people at Smith & Wesson don’t fear being locked up for developing a technology that can be used to commit a crime. Instead, Smith & Wesson says, “Our technology is used for bad purposes, but also for good purposes. And rather than attacking the technology, attack the criminal.”

Now, that’s exactly what the DMCA case in the Second Circuit is about because the part that Jack didn’t tell you about the technology in the New York case is that DCSS did not make it any easier to copy a DVD movie. You could always copy a DVD movie without decrypting it. All that the DCSS technology did was to enable you to play a DVD movie on a machine that the DVD licensing organization had not licensed. For example, a Linux machine. So, what is the crime in somebody buying a DVD movie, coming home, discovering it doesn’t play in his Linux box, downloading a bit of code so that he can crack it and play it in his computer? It’s his DVD. It’s a completely fair use of this technology, and the law that makes it a crime to enable him to take advantage of that fair use seems, to me, to be wildly extreme, without even getting at whether we should execute the poor Linux user.

JACK VALENTI: You know, Professor Lessig, I just gave you the indictments conclusions of the Second Circuit. When I was working in the White House, we were preparing the President for a press conference, and he had decided he was going to change ambassadors in South Vietnam, but he hadn’t made it public yet. And one of us said, “You know, Mr. President, you’re going to get that question, ‘are you thinking about changing ambassadors?’ and they’ll have you cold.” And he said, “You’re right. What do you think I ought to do?” And somebody said, “I’ll tell you what. Don’t answer it. Just say, yes, I’ll come back to that later, and then you go on and answer another question that you know somebody else is going to ask.”

Now, that’s what Professor Lessig just did. He didn’t want to handle that Second Circuit. In the back of the room as you leave tonight, we have excerpted two-and-a-half pages of the summary of that Second Circuit.
I hope you’ll pick it up and read it because it demolishes clearly, cleanly and concisely in readable prose the essence of Professor Lessig’s book about copyrights.

Now, he talked about Sony Betamax, but he didn’t tell you what Sony Betamax said and didn’t say. The Sony Betamax case, as you know, came down in 1983, a five-to-four decision in the Supreme Court, which held that it was infringing, but that it also had other uses besides illegally infringing, so they said okay. But here is what the Court said and I invite Professor Lessig to tell me, untutored in canon law and civil statute, a non-lawyer up here with one of the brilliant explorers of law in this country: Why am I here? It’s a stupid question. I don’t know why. I shouldn’t be here.

The Court said, in Betamax: “It is okay to time shift,” that is, to copy an over-the-air broadcast — not a cable program, not a premium cable program, but an over-the-air broadcast — to timeshift it, watch it later, and, guess what, erase it. That’s what the Court said. It did not deal at all with anything else about copying. And understand that the Court said that time shifting was a fair use, but it was not a right, which is exactly what the Second Circuit has said. I invite Professor Lessig to tell me more about that Second Circuit decision because I will bet you this. Ten will get you forty that he’s read that decision in great detail. I promise you he has.

Now, he’s vexed at the Congress because he says the Congress gives too long a period to copyright protection, and he says they have no right to do that. And, indeed, I don’t know whether you’re challenging the constitutionality of it, but I pray that it finally makes its way to the Supreme Court because in Article One, Section Eight of the Constitution — and very few specific art forms are in that Constitution, but copyright is it says, “the Congress shall have the power” — it didn’t say may have the power or possibly or most probably shall have the power. Just as with the First Amendment, those wonderful 45 words of spare,
unadorned phrases that guarantee all the other clauses in the Constitution, which states “that Congress shall make no law,” – not maybe, or possibly, but no law. Article One Section Eight states that, “Congress shall have the power to set copyright terms in a limited fashion.” It determines what limited is.

Now, the same thing goes in Section Two of the Constitution about the President’s right to pardon. It is absolute. Though we may criticize the President for pardoning some fugitive who fled the country, criticism is okay, but the power is absolute. The power of Congress to limit is absolute. And I want you to know that we’re not dealing with “limited” here, with Euclidian geometry, where the equations are pure and precise and always equal and measured. We’re dealing with subjectivity, which is always ripped with a muffled pen.

In his book, Professor Lessig quotes one of my great heroes, a man named Garrett Hardin, professor of philosophy at the University of Oregon, who wrote a great book called *Promethean Ethics*. In this book, Professor Hardin poses the perplexing question which, to philosophy, is the same thing as the due process clause is in the law, and lawyers get very rich debating what is due process. Professor Hardin says, “When is enough – how much is enough?” And the answer is, when it is more than enough. Now, try that on without the advice of Euclid sometime, and you’ll see what subjectivity is all about.

And, by the way, the European Union has granted to its authors a copyright term which is now well beyond 100 years. So in his declaration of opposition to copyright in this country, I suggest he go global with this and take on the European Union as well. And later on, I want to discuss that. That’s a very important part of his book. In some cases, Professor Lessig is like the striptease artist who takes off some but doesn’t take it all off.

**LARRY LESSIG:** I promise I won’t take off all tonight. So, Jack quotes the Constitution, sort of, a slight paraphrase of the Constitution. Let’s
just be exactly clear as to what the Constitution says. Article One, Section A says, Congress has the power to “promote the progress of science and useful arts by securing for limited times to authors and inventors exclusive rights to their respective writings and discoveries.” This is the only clause in the Constitution granting Congress power that expressly sets the purpose of the grant in the grant itself. It is to promote the progress of science. That’s what the grant of power is.

Now, Jack refers to a statute, which a bunch of us are challenging in the Eldred versus Ashcroft case, called the Sonny Bono Copyright Term Extension Act, affectionately referred to as the Mickey Mouse Protection Act, because Congress has gotten into the habit of extending the term of copyright whenever it occurs to them that it’s in their great wisdom to extend it. So, in the first 100 years of copyright in America, Congress changed the term once. In the next 50 years, Congress changed the term once again. In the last 40 years, Congress has extended the term of copyright 11 times. It’s called the Mickey Mouse Protection Act because it just so happens that when Mickey Mouse was about to fall into the public domain, Congress gets around to extending the term of copyrights.

Now, the Constitutional question is, does extending the term of already existing works promote progress? Does it promote progress in the way that the framers imagined progress should be promoted? Because the framers had a very simple formula in mind, it was a quid pro quo. You do this; we’ll give you that. You create new work; we’ll give you a monopoly protection to protect it for a limited time. The framers protected it for 14 years, renewable once. We now have a term of the life of the author plus 70 years, which in the case of somebody like Irving Berlin means 140 years of protection.

Now, they said quid pro quo – you produce, we give you protection. And the whole claim in this case is what is the quid pro quo that the Disney Corporation is giving when they’re getting more protection from
Mickey Mouse but have to do nothing in exchange? They put out movies called *The Hunchback of Notre Dame* and *Pocohontas*. They have *Fantasia, Snow White and the Seven Dwarfs* -- all this wonderful Disney work that draws from the public domain. But they articulate in Congress a principle that they should own their property forever. They can use stuff from the public domain, regardless of whether the Victor Hugo estate is outraged at *The Hunchback of Notre Dame*. That's not their concern. But they have the right to protect their work forever.

Now, I submit, Jack, this is not the framer's vision. It might be yours; it might be everybody's here.

But if I get the chance to stand before the Supreme Court, the first person I'll look to and say, “This is unconstitutional,” is my justice, Justice Scalia, because I’ll say the framer's vision of copyright is not the vision articulated by Jack Valenti in the VCR hearings of 1982, where he said, “Creative property owners must be accorded the same rights and protections resident in all other property owners in the nation.”

That's not what the framers of our Constitution believed because the very same Constitution that says, “If the government takes your house, it must pay you money,” says “The government must take your intellectual property after a “limited time’ and turn it over to the public.”

Now, Jack, do you understand why they wanted to do it like that? Were they just budding communists, those framers of the United States, that they didn’t understand the simple points about property, which you so eloquently push? Or do you think you might have missed something about what they were on to when they wrote that ideas and culture should not be owned, but should be free and fall into the public domain, not that there should be no copyright protection. Obviously, they created the right to create copyrights. But those rights are to promote progress, not to enable large publishers to continue to hold monopoly rights for apparently an infinite time, so long as infinity is reached by limited terms.
Now, you know, when Mary Bono was speaking about the Copyright Term Extension Act, which was named for her husband, who had died, she said, “Sony (Bono) wanted the term of copyright protection to last forever. I am informed by staff,” she said, “that such a change would violate the Constitution.” Then she said, “But, of course, there’s Jack Valenti’s proposal that the term last forever minus a day.”

JACK VALENTI: I like that. Yeah, I’ll buy that.

LARRY LESSIG: Now, I’m not arguing about whether it’s a good idea or bad idea. I’m happy to argue about that. But I just want to know why you think the framers would have believed that that’s the appropriate way to think about copyright?

JACK VALENTI: All right.

LARRY LESSIG: Why did they create a 14-year term?

JACK VALENTI: I never knew that Professor Lessig was a psychic. He’s gone into the minds of John Dickinson and George Mason and James Madison. Whenever anybody says, “the original intent of the framers,” that’s all bullshit.

LARRY LESSIG: Tell that to Justice Scalia.

JACK VALENTI: There is no document that shows what was in their minds. If you read the Madison notes, which I have, they’re very cryptic, and there are about six or seven others, Luther Martin, among others, who kept diaries, but they’re all wallowing in imperfection. Nobody got into the heads of these framers. You just read what you want to read.

Now, you are one of the great lawyers in this country, Larry. Are you telling me that when the Constitution says — whatever the intervening words are — Congress shall have the power to set for limited times copyrights....
“Are you telling me that when the Constitution says ‘Congress shall have the power to set copyrights’, that that’s subject to constitutional disapproval?”

“IT DOESN’T SAY THAT, Jack.”

LARRY LESSIG: It doesn’t say that.

JACK VALENTI: Are you saying that that’s subject to Constitutional disapproval?

LARRY LESSIG: It doesn’t say that, Jack.

JACK VALENTI: Well, it does say that.

LARRY LESSIG: It says, “Congress has the power to promote progress by granting Congress”….

JACK VALENTI: Don’t dance around this thing. It says has the power to set for a limited time, does it not?

LARRY LESSIG: Right.

JACK VALENTI: Forget the intervening words, for whatever reason.

LARRY LESSIG: Right. Forget the intervening words.

JACK VALENTI: Okay?

LARRY LESSIG: That’s exactly the argument. Forget what the framers said….

JACK VALENTI: No.

LARRY LESSIG: Just look at what Jack believes.

JACK VALENTI: No, but you see we’re dealing here with what we call legal sophistry, and that is, just as I might criticize Bill Clinton….

LARRY LESSIG: Sorry, Jack, now we’re going to have to put the gloves on. You used the word sophistry.
JACK VALENTI: That’s legal sophistry. And I’m telling you, you get before the Supreme Court, you won’t be able to practice that kind of deceptive language. You’ve got to come to the heart and core of this issue. Does Congress have the authority to set limited times copyrights?

LARRY LESSIG: For limited times.

JACK VALENTI: The answer is, it most assuredly does.

Now, let me just go back to pardons. Same thing. “The president shall have the power to pardon.” Even though we hate the fact that he pardoned Mark Rich, and we got a hell of a lot more criticism on that than you have on copyright terms. But every legal scholar in the country says, without contradiction, it is absolute. So I want to stick to what I think is what we’re all talking about, and that is your contention that copyright is out of control, that it is stifling innovation and invention on the Internet.

If Mickey Mouse has copyright protection for the next thousand years, tell me how that stifles innovation? How did it stifle invention? If you could bring Harry Potter free of charge to billions of people all over this world, would that mean it would jeopardize the continuance of a free democratic republic in this country?

LARRY LESSIG: No, but, Jack, I haven’t said that this should be for free.

JACK VALENTI: Now wait a minute now. Just a second. I’ve got my Boston Strangler thing coming up in a minute. I want to deal with the Second Circuit. I want to deal with the question of whether copyright is wrong or right, and whether or not it hurts anybody that somebody has a copyright on his material.

Now, here’s my favorite. God, I love this. It’s on page 203 of this book. And if you do nothing, read this. This is my favorite Lessig citation. He cites the decision in the Vanna White case before the Ninth Circuit Court of Appeals as one of the great societal calamities of the last cen-
“I want to deal with whether it hurts anybody that somebody has a copyright.”

“I want to deal with whether it hurts anybody that somebody has a copyright.”

VALENTI

“Why a denial of Vanna White’s right to control images resembling her is indispensable to a free and democratic republic escapes the scope of my mind.”

VALENTI

tury. It might even be up there with the Dred Scott decision. I didn’t even know about the Vanna White decision, to be honest with you. “The Ninth Circuit granted Vanna White the right to control the uses of images which resembled her.” Now, one may ask the question, who the hell cares? But that’s a subject for another seminar.

Now, Professor Lessig praises this Judge Kozinski. It turns out that the judges he most admires are those who espouse his own views. By the way, when Judge Kozinski wrote his dissenting opinion in the Ninth Circuit, he had great dizzying moments, dizzying Maalox moments, as he wrote this because – am I going too fast for this group? Kozinski believes that this tilted the democratic foundations of this country. Why a denial of Vanna’s right to control images resembling her is indispensable to a free and democratic republic escapes the limited scope of my mind.

So let’s come back. Copyright is out of control. How – even if it’s out of control how does it stifle invention?

LARRY LESSIG: Okay.

JACK VALENTI: How does it stifle innovation?

LARRY LESSIG: Excellent question.

JACK VALENTI: Anybody can make a movie, and the fact that that movie has a copyright, how does that hurt the Internet, for God’s sake?

LARRY LESSIG: Excellent question. In 1936, a woman named Margaret Mitchell wrote a book, *Gone with the Wind*. It sold millions and millions of copies and was translated into 30 different languages. In fact, it has sold more copies than any book except the Bible. *Gone with the Wind*, when it was written, was under copyright that should have expired in 1993. But because of Congress’ practice of extending the term of copyright, Margaret Mitchell’s book won’t expire from copyright until 2032. Now, as I learned from my mother, who was from the South and forced me to watch this movie hundreds of times and read the book when I
could first read, this book tells the story from a certain perspective within the antebellum South and describes what the culture was like.

There was a woman named Alice Randall, who had a very different view about what the culture was like. She wrote a book called The Wind Done Gone. The Wind Done Gone tells the story of Gone with the Wind, but from the perspective of the African slaves. Alice Randall had a publisher. The publisher was Houghton Mifflin. Houghton Mifflin went to release this book; the lawyers for the estate of Margaret Mitchell called. The lawyers said, I’m sorry, this book is close to the story of Gone with the Wind, and because it’s close to the story of Gone with the Wind, it’s a derivative work under copyright law. You may not publish it unless we give you permission. We don’t give you permission. And they filed a lawsuit that actually asked the District Court to order the books burned. This is the United States. But a court is supposed to order books burned because they violate copyright law. Now, the District Court judge, I think, did a very good job, spending 50 pages of his opinion trying to figure out whether Gone with the Wind was too close to Alice Randall’s The Wind Done Gone story. He talks about the characters, the struggles, and finally at the end he concludes, it is too close. So he issues an injunction that says they can’t publish the book because if it were allowed, the books would have to be burned. It goes to the Court of Appeals. The Court of Appeals looks at this. Eight months later, the Court of Appeals decides, well, you know, fair use, blah blah blah, First Amendment, blah blah blah. Contrary to the Second Circuit’s view, the Eleventh Circuit firmly believes fair use is a Constitutional requirement. They say, “You can publish the book.” Now, you ask, how does copyright stifle innovation? Let me tell you exactly how.

The next author who has a story that dares to question Margaret Mitchell’s view of the South will have to hire lawyers to go into court to defend her right to publish the story; $150,000 later, she’ll win the case, fine. But the publisher is going to look at this and say, “Oh, wait a
minute. We can’t make $150,000 in profit to cover these legal fees, so, I’m sorry, we’re not interested in this publication.” Here’s a simple and obvious example—replicated in 100 different contexts—of how this perpetual copyright as it has been expanded to include derivative rights, inhibits the ability of subsequent creators to go back and create in a way that the existing copyright holders don’t approve of. Now, of course, they could have told a nice story about how Margaret Mitchell got it right. Maybe the lawyers for the Estate of Margaret Mitchell would’ve approved of that. But how is it, Jack, in the United States, that you can be forced to burn a book because you don’t adopt the party line of a copyright holder whose copyright should have expired 10 years ago, who is dead, and who’s already made millions of dollars off of this work?

**JACK VALENTI:** I find this so trivial. I feel like Adlai Stevenson tonight. When he was running for President, he spoke to the New Jersey Chamber of Commerce, which was composed of all the big business people in the state, and he got up and said, “I’m so glad to be here, to see so many of my friends, but none of my supporters.” That’s the way I feel tonight.

And, by the way, having said that, I’m overjoyed that in the audience is a very talented film director named Davis Guggenheim and his absolutely gorgeous wife, who’s one of my favorite actresses, Elisabeth Shue. I’m so proud to have you here, Elisabeth and Davis. Thank you. It may not be *The Wind Done Gone*, but she’s pretty darned good, I must say that.

I’m still anxious for an answer to my question. You took one trivial case. Frankly, that lady would never have written her book if Margaret Mitchell hadn’t out of thin air conjured up this extraordinary book, the only book she wrote, by the way—that has lived all these years. I think *The Wind Done Gone* is a derivative work. And if I were a copyright owner, I’d be damn unhappy that somebody took my original work and tried to make money off it just by turning it around.
If I took this book and I took the other side and just lambasted Lessig one page after another, taking everything he said, I would be perfectly free to do that, I guess, although it would be a derivative work in many ways. But that’s not the issue. I want to come back again to the subject of copyright – which, by the way, is at the core of this country’s creativity. If it is diminished or exiled or shrunk in the way that Professor Lessig wants it to be, everyone who belongs to one of the creative guilds or is trying to get into the movie business or television, or who is trying to create programs, is putting his future in hazard.

Now, let me tell you why I think it goes beyond these vagaries of the law and about what was in the minds of the framers, which no living human being borne of woman ever knows, and that is this. The copyright industries in this country have over five percent of the Gross Domestic Product of this country. They bring in more international revenues than aircraft, than agriculture, than automobiles and auto parts. Before September 11, we were creating new jobs at three times the rate of the entire rest of the economy. And, finally, at a time when we’re bleeding almost $400 billion through our balance of trade deficit, the copyright industries have a surplus balance of trade with every single country in the world. No other American enterprise can make that statement.

So this goes beyond the question of psychic determination in the framer’s mind. This goes to the very heart of this economy, and it’s why copyright must be sustained. If you cripple it, exile it or bury it in some form, it’s going to go right to the heart of this economy. Now, that’s not a legal argument, but nothing takes place in a vacuum. The Supreme Court has done many things that have nothing to do with the law, for God’s sake.

So I’m saying to you, and I come back again, again and again, Larry. You never touched the Second Circuit decision. You never said how fair use is not a right. It’s part of the Copyright Act. And, by the way, that’s
in Section 1101 of the Copyright Act which has to do with fair use. Fair use has nothing to do, though, with a right or any Constitutional requirement and it never has.

So I come back again. How does *Harry Potter* having a copyright of whatever length, how does that stifle somebody from having some new invention on the Internet or some other format for spreading information around? How does that hurt? It doesn’t. Indeed, the Internet has had an explosive growth in the last five years, going from 100,000 host computers to well over 15 million today and it is growing at exponential speed. I guess what I think Professor Lessig would want is to so cripple copyright that we would be in a state of entropy over the next several years. And I’ve been looking for a way to use that word, entropy, for about 16 months now, and I finally found it, but I’m not going to tell you what it means if you don’t know. You’ve got to look it up the same way I did.

Now, that’s the question, and I do not believe that you have answered this question, Larry. And in your book — I didn’t go into *iCrave*, which is a little Canadian case, where I have to say, with all due respect and affection, and you know somebody’s about to shove the dagger in when they say that, you didn’t give all the facts.

Let me tell you about *iCrave* because he sets that up as the intrusion of a brute government, the U.S. government, into a Canadian enterprise. *iCrave* is a Web site in Canada that had the idea of stealing – and that’s what it was – television program signals from Canadian television stations and American stations broadcasting below the 49th parallel. *iCrave* brought those signals onto its Web site. According to Larry, they were merely re-transmitting programming, which, he says, in Canada is okay with the law. That is not true. The law is very fuzzy, and this question will be in the courts because the Canadian broadcasters are protesting.

But let me tell you what he didn’t tell you *iCrave* did. This is what gnaws at me. *iCrave* reduced the size of the picture by one third, and in
that one third of the screen, they sold advertising. Hello? How do you like that scam, sports fans? They brought in the TV signal, reduced it, and then sold advertising and said, “We didn’t do anything wrong. We’re merely re-transmitting.”

So why was the case in the Western District of Pennsylvania and not in Canada? Again, Professor Lessig didn’t tell you. The owner of iCrave registered his domain name in Pittsburgh. Simple as that, Larry. That’s why the case was in Pennsylvania.

But iCrave had to shut down. Why? You know, in accounting, you always figure out the cost of goods sold? The cost of goods sold to iCrave was zero. They didn’t pay a dime for the material they were bringing in, the stolen material that they made money off of. No wonder the court threw the book at them and shut them down. Larry uses this story in his book as an example of a big elephantine country called the U.S. moving in to shut down a poor little Canadian enterprise that’s just trying to help people by re-transmitting. But that’s not what they were doing, folks, and that’s why the court shut them down.

So I want to come back again to my earlier question, Larry. Tell me why copyright is destroying invention on the Internet?

LARRY LESSIG: Right. If there weren’t the Internet, if we hadn’t had this revolution in communications technology, and not just the Internet, but digital production, I think he’d probably be right. It wouldn’t matter much because without the Internet, without digital production, it’s basically large corporations that need to be making production decisions because that’s the economics of it. And so the economics would mean that we’d have large organizations hiring lots of lawyers, and I produce lawyers for a living, so I’d like this, right? That wouldn’t be a problem. It’s because of the Internet, Jack. It’s because of the opportunity that the Internet presents that we’ve got to rethink the extent of copyright, not whether we should have copyright or not. I’m not saying anybody should be able to steal Harry Potter for at least 14 years.
“Why is copyright protection wrong after 20 years or 30 years?”

LESSIG

“The opportunity the Internet presents means we have to rethink the extent of copyright, not whether we should have copyright or not.”

VALENTI

JACK VALENTI: But tell me why. Why isn’t it wrong after 20 years or 30 years?

LARRY LESSIG: Okay, I’ll tell you. Here’s the story.

JACK VALENTI: What difference does it make?

LARRY LESSIG: All right. Here’s the story.

JACK VALENTI: I want you to stick to your subject here. Come on, tell me.

LARRY LESSIG: I’m stickin’. Here’s the story. In LA, there was a teacher who thought it would be good to have her students learn how to make films because she realized that the process of writing and creating is very different from the process of making a film, as any director will tell you. So she thought, we want to encourage a different kind of creativity. Let’s do it through film. So she took the digital archive of lots of films, many of them old, and she gave her students cameras, and she told them, go out and make films, which you can splice into the digital archive and create something new using this old stuff, just like Margaret Mitchell did. She didn’t think of antebellum South stories out of thin air; it was the history of and the many stories written about the antebellum South that she called upon to produce her work. So this teacher said to her students, “Do the same thing with film.” They produced extraordinary films. You know, not the quality of Davis’s perhaps, but still extraordinary films. The class then wanted to make them available to other people, but the lawyers came in and said, “No, no, no. There’s no possibility of making this available to anyone because there’s about a bajillion ways in which this violates copyright law.” Now, this is the problem: The extent and expansion of copyright law, in a context where there is a great opportunity for lots of people to be creators. And when I say we have to rethink the extent, I mean we have to rethink the extent given the opportunity for creativity— that’s much more broad-based than it was before.
Now, I don’t really think that issue has much to do with iCrave. iCrave, I think, is a very different case. I used iCrave in the book because I wanted to contrast the attitude we have about copyright with our attitudes about free speech.

So I tell the iCrave story next to another famous story, the Yahoo in France story. In France, a French judge, Gomez, shut down the Yahoo auction site because they were selling Nazi paraphernalia and French law forbids Nazi paraphernalia. He told them they couldn’t sell Nazi paraphernalia on their auction site anywhere until they found a way to block out all French citizens. When this decision came down, people in America said, “Oh, my God, this is a terrible violation of free speech.” The idea that you could stop the sale of Nazi paraphernalia is fundamental to the idea of free exchange. The Internet embrace of Nazi paraphernalia is the way we demonstrate our commitment to free speech, and France – you know, France is crazy in a lot of ways— has violated this principle of the Internet. All I said about iCrave is that if you’re going to criticize the French, if this is a deep violation of free speech, why do you think differently about iCrave because iCrave was fundamentally the same case. With iCrave, under Canadian law, the judge assumed it to be in the case – he’s quite explicit – “I’ll assume Canadian law makes this legal to transmit, rebroadcast”.

JACK VALENTI: But it doesn’t.

LARRY LESSIG: Well, he assumed, for purposes of the decision that it does, and I think it does. We can argue about that, but let’s put that aside because he said, “I assume it does.”

Assuming it does, still, they had not adopted sufficiently effective technology to block out Americans. So the judge essentially said, “Until you can promise me you will guarantee no American will see this content, you have to shut it down.” Well, now, that’s exactly what the French said—
JACK VALENTI: But, Larry, do you agree then that it was perfectly okay for them to change the picture, reduce it by one third, and sell advertising on the other third? Do you find that to be a laudatory venture for free speech?

LARRY LESSIG: Well, Jack, you know, American law is hard enough. I don’t know Canadian law. All I know is what the judge said, and the judge said he assumed the action was legal in Canada. So the point is, legal action in Canada bleeds into the United States; the United States courts shut iCrave down in the same way that the French courts had shut down Yahoo when they said, “Even though it’s legal in the United States to sell Nazi paraphernalia, because it bleeds into France, we’re going to shut it down, and we’ll shut it down until you find a way to block out all non-.

JACK VALENTI: Well, you know, I find this to be strange. As someone who wears the Legion D’Honneur, I’m not unattracted by French culture, but I will tell you this. I find it odd and bizarre that you’re saying of our First Amendment, which doesn’t exist in France or Great Britain or Germany or anywhere in the European Union, that it has to be the supreme law of the world. I think that sometimes we Americans think that we are chosen by God to lead the world. There are a lot of religions, there are a lot of languages, there are a lot of cultures in this world that are different from ours. I think France has a perfect right as a sovereign country to pass a law that says, “We don’t allow Nazi propaganda in this country.”

Now, it would certainly violate our First Amendment, and I would be the first one, alongside you, to say, “You can’t do that. I hate what they’re doing, but, by God, you’ve got to let them do it.” That’s not what happens in France. Are you suggesting that France should adopt our First Amendment?

LARRY LESSIG: I wish they would, but that’s not what I’m suggesting.

JACK VALENTI: Which would be laudable—

LARRY LESSIG: What I’m suggesting is that it’s inconsistent to make fun of the French for what the French are doing and not to criticize what the Americans are doing. Now, you are being consistent. You think every country should be able to impose its rules on the Internet regardless of whether it affects people other than those who inhabit the particular country at stake. And that’s a consistent position. But I wasn’t, in this part of the book, arguing against you. In this part of the book, I was arguing against people who don’t see that there’s a free speech issue raised in both cases. Now, you can resolve them the same way, as you would. But I think you must admit that the extension of the law in this context is a free speech issue.
When you said, “Why do I find it laudatory that they should be able to steal this programming, make it available and make revenue from it using advertising? Why do I find it laudable?” Well, again, Jack, some historical perspective is very useful here. You have consistently argued that copyrights should be exactly the same kind of right that any property right is, but historically, that’s not been the case. You’ve heard of the Napster case, which, fortunately, we have not raised here tonight, but let’s talk about the first Napster case, called cable television.

Cable television was a new technology. It came along, set up antennae on top of mountains, stole broadcasters’ content and sold it to its customers. That’s the Napsterization of broadcasting. Twice, people like you – you weren’t in this battle, I take it, but people like you went to the Supreme Court and said, “Supreme Court, you’ve got to stop this theft of our property.” Twice, the Supreme Court said, “No, we don’t buy it. Not theft, not copyright violation.” Technical blah blah blah, lots of lawyers’ stuff. Conclusion: no violation of the copyright law. So for effectively 20 years, they get to steal this content until Congress finally gets around to sitting down and confronting the issue as they did in the 1976 act. And when Congress sat down and addressed it, they struck what I think of as a perfect balance for the time. I’m going to agree with you in your wonderful testimony about cable today. The 1976 act might have been good for the time; it’s no longer good. I’ll agree with you about this. But in that context, they struck a perfect balance. They said, “Authors should be paid. So you can’t take this content without paying the copyright owner.” But cable companies have a right of access to this content. Broadcasters and copyright owners must not be able to leverage their power in the dinosaur industry into control over the emerging new technology of cable. So Congress said, “Compensation has to be separated from control through a compulsory licensing right.” Now, that balance, I think, would be a wonderful balance to strike in the context of the Internet as well.
So, for example, people think the Napster case is about whether people ought to be allowed to steal content. But Hank Barry, who was the head of Napster from the very beginning of Napster, was before Congress saying, “Just give us what you gave the cable companies. Give us a compulsory licensing right. We’ll pay for the content, but we want the right of access to the content. The labels won’t give us access to the content because the labels will never embrace new competitors on the horizon.”

Jack Valenti: Let me just tell you about this. Thank God, he brought that up. I was there in 1976, and I negotiated this whole Copyright Act with a man named John McClellan, chairman of the Senate Judiciary Committee. And when Larry talks about a perfect balance, he’s talking as an idealist who’s never been in the firestorm of the internal workings of politics in Washington. Senator McClellan had a great friend, who had cable systems in Texas and in Arkansas, and he sure as hell wanted to grow his cable systems. He was a great supporter of Senator McClellan. And I went to Senator McClellan and said, “It is wrong not to negotiate. Just say that they have to negotiate a fair marketplace rate.” And Senator McClellan says, “Well, you can’t negotiate because there’s 9,000 cable systems…” Of course, 90 percent of all programs on cable today are negotiated program by program. We do it every day. In those days, the Copyright Act of ’76 only pertained to the over-the-air broadcast signals of another station, distant signal importation. I said, “Let’s negotiate it, but not a compulsory license.”

Let me tell you something. All of you in the movie business, if you ever have a compulsory license on the Internet for your product, it will be for a pittance of the marketplace worth of that, and you’re going to be in deep-ass trouble, I can tell you that right now.

So I negotiated with Senator McClellan, and I finally realized, “This guy owns this judiciary committee, and whatever he says is going to go. I’ve got to negotiate a price war.” We started at 10 percent of the revenues of stations. But he said, “No, 10 percent’s too much.” And he got to
eight, and then to seven, and then to six, and then to five, and then to four, and when he got to three, I said, “You know something? It’s going to zero.” And here’s your delicate balance, Larry. We finally settled at about 1-1/2 percent of revenues, an unbelievably bizarre contraction of the marketplace worth of these signals.

Now, what has happened is that, over time, distant signal importation turned out to be not nearly as important as HBO and Discovery and USA and Fox and all of that, so it’s changed. But there’s your delicate balance. It was pure, unadulterated politics by a powerful chairman who had all the trumps, and that’s how it all came about.

LARRY LESSIG: Yeah.

JACK VALENTI: So that’s what you have, a delicate balance, and it had nothing to do with copyright. He was just determined, “This is what is going to happen.”

But I come back to you again. I still haven’t heard the answer. I haven’t heard the answer as to why the protection of property—which mostly comes out of Southern California, is harming the digital thing?

And, by the way, digital is not all that great. The computer came before that, television came before that, the telephone, the telegraph, the Pony Express, the railroads—these were all new inventions that were going to change America. And, in time, we found out that you couldn’t have Dodge City without a sheriff. You had to have some rules of the game. Right now, with the Internet, everybody says leave it alone. It can’t be touched. Why the hell not?

Let me tell you the difference, and then I’m done here. I can hear heavy breathing and gratitude out there. What is the difference between the analog format and the digital format? Most of you know, but for those of you who don’t, it’s the difference between lightning and the lightning bug. Total difference. With video technology, you have to have
slave machines to manufacture because after the fifth, sixth or seventh copy, the video becomes pretty much unwatchable. You have to manufacture the cassette and you’ve got to move it out. But even so, my predictions of what would happen with the VCR have come true. I said it would cause theft of our product, and guess what? Today, as Kerry McCluggage and Elliot Silverstein will tell you, we’re losing three to three-and-a-half billion dollars a year on videocassette theft. It’s all over the world. Now, how is that different from digital? You can copy on a digital format 10,000 copies, and the 10,000th copy is as pure and pristine as the original.

To allow a movie, say Harry Potter, to be stolen, by which I mean recorded in the theater on the second day with a digital camcorder, sent to China, and within two days made into a video compact disc—has become pandemic. If you allow that, if you don’t have copyright to protect you on the Internet, we’re dead.

Every movie that’s on the Internet today is illegitimate. A Boston consulting firm named Veon estimated that 350,000 movies are brought down every day, and every one of them is illegal. So we don’t dare put our movies on the Internet now because we can’t protect them. We’re trying to set up meetings now with the Silicon Valley people to see if we can come to some agreement for content encryption, for watermarking, for digital rights management so that we can protect our valuable product on the Internet. That’s what we’re trying to do right now because if we can’t, I promise you, it’s a disaster.

So I come back again....

**GEOFFREY COWAN:** Okay, Larry, before you answer, I would just like to invite anyone who does want to ask a question to approach the microphones, and we’ll get to you in just a moment.

**LARRY LESSIG:** Right. I think it’s a good opportunity to see how close our two positions are, Jack. We have no disagreement about what’s...
properly called piracy, and we have no disagreement that *Harry Potter*
and every creative product has and should have the opportunity for
copyright protection.

The only question we’re talking about, the only disagreement we might
have, is whether perfect control of this, as you call it, “property right,”
inhibits innovation and growth.

Now, you have already taken the position in a different context that too
much control exercised by a relatively concentrated industry does harm
innovation. In wonderful hearings in 1988, you said, speaking of the
networks, “No one industry, no single entity, no group of enterprises
ought to be allowed by special grants of Congressional privilege to
dominate the marketplace and, thereby, unfairly contend with those
who want to compete with them. The losers in that ungainly
arrangement are the consumers” – and then with a dramatic flourish –
“always, always, every time, every time.” Now, that’s all I’m saying
about the concentrated exercise of copyright protections, which are in
themselves….

**JACK VALENTI:** But, Larry, if you do that, you should be talking
antitrust, not copyright.

**LARRY LESSIG:** I am talking antitrust.

**JACK VALENTI:** I was just dealing with antitrust law in this country, not
copyright.

**LARRY LESSIG:** I am talking about the antitrust principles that guide us
in making sure that a “special grant of Congressional privilege,” which
is a copyright, doesn’t enable one industry to protect itself from new
competitors. And that’s exactly the dynamic that we’re seeing in the
context of the Internet right now.

**JACK VALENTI:** I wish you’d take all this to the Supreme Court as
quickly as you can so that we won’t have to wait. You might be able to
dodge the Second Court decision, but you can’t dodge a Supreme Court decision.

LARRY LESSIG: Well, join me on the petition, Jack, and we’ll both argue that they ought to hear the case of Eldred v. Ashcroft. But I’m sure they’ll listen to you more than they’ll listen to me.

JACK VALENTI: I hope they grant certiorari. Have they?

LARRY LESSIG: They haven’t considered it yet.

JACK VALENTI: All right. Okay.

GEOFFREY COWAN: Question over here.

UNIDENTIFIED SPEAKER: Actually, a few things.

GEOFFREY COWAN: No, just one. Sorry.

UNIDENTIFIED SPEAKER: Okay. There is one thing I’m surprised both of you missed, which is that the limitation of the terms of copyright provides an incentive for somebody to create something new because if their meal ticket from movie one stops, they have to have another sequel or another movie to give them a kick in the butt to get more money coming in. It’s like a shark. If you don’t create, you die.

LARRY LESSIG: Well, I don’t buy the “starve the artist as a way to get the artist to work” theory. My father did, but not me. And so I’m not in the school that says we ought to make it so that they have to be kicked in the butt, as you so eloquently put it, to produce. I’m happy Margaret Mitchell made millions and millions of dollars. It’s just the idea that her grandchildren should be able to continue to control what people say about Margaret Mitchell that troubles me.

GEOFFREY COWAN: Question over here.

ARTHUR MYROM: My question has to do, first of all, with Congress having apparently overlooked the fact that recordings of performances
were not intended to be copyrighted. But at a recent meeting of the Computers and Library Conference, I pointed out that there are two issues where Congress has failed to meet its responsibility. Copyright's one, but where is the electronic post office? And this has repercussions immediately on copyright because if you consider, for example, an electronic postmark, governmentally sanctioned, then you have a great way to provide copyright protection. Anything sent over the Internet would have to identify where it was purchased originally and who's been transmitting it subsequently, with, of course, penalties for anybody who would attempt to forge or delete these copyright markers, including the marker at time of purchase. Do you have any reflections on that or notions as to where this might be headed?

JACK VALENTI: I don’t know how to answer that. I’m sorry.

LARRY LESSIG: I would be very anxious about a system that required identification like that for stuff to be sent across....

JACK VALENTI: Well, that's called watermarking.

UNIDENTIFIED SPEAKER: That would be one way to accomplish it.

JACK VALENTI: Yeah, watermarking is something that we very much advocate, but we’re unable to get that because we have to have computers be able to listen to the instructions on the film and then be able to respond to that. And, thus far, they don’t want to do that.

GEOFFREY COWAN: Gib, before I get to you, a question from the Internet, from the online discussion group. “Will movies ever be made available online through these high-speed pipes in a way acceptable to the movie industry?”

JACK VALENTI: Absolutely. Right now, there are about 9.5 million broadband hook-ups; access is moving slow. I think one of the reasons — as I've said to the Silicon Valley people—there's little interest in broadband is because movies are not there.” In a poll taken by the
Consumer Electronics Association, 70 percent of people in homes that have computers said that what they want off of the Internet they can get without having broadband. What they did say as well was that if there was entertainment, they might be interested in broadband. But we can’t put our stuff out there, our valuable, created work without copyright protection. And by the way, Mr. McCluggage, who is here from Paramount, will tell you that last year, of the 121 films made by the major studios, the average negative cost – and I’m not talking about marketing, was $54 million. You add marketing cost to that, and you have an average total cost of $83 million. Now, I don’t know about you, but I count that as serious money. But the reality is that it’s after-theatrical exhibition where you finally make your money off of these films, not in the theaters. Only 21 percent of our revenues from abroad come from theatrical exhibition. You have to go to pay cable, you have to go to television, you have to go to pay-per-view, you have to go to home video in order to retrieve this vast investment. So we’re now working to get content encryption. And, indeed, several of our companies say that in the next six months or so they want to be online with content encryption and see whether this would work because the technology now says you can show it on your computer. You pay $2 for the right to see it. But you can’t show it on another computer because the screen would say, “I’m sorry. You’re not authorized to see this unless you pony up two bucks.” But we’re trying to find out whether this technology works, and I think it would be foolhardy of our companies to go online with their precious product and have it dispatched all over the world at the speed of light without adequate encryption and copyright protection. It’d be dead.

LARRY LESSIG: It’s a great point. I completely agree with you. But, here, we’re going to be on the same side of the debate because I just saw Yair Landau, who works for Sony, describe the technology that he’s developed.

JACK VALENTI: That’s what I was talking about.

LARRY LESSIG: Right. And it sounds like a great technology. But there’s another group of property rights owners who don’t like this technology. They’re called the cable companies. Landau went to the cable companies selling this new way to deliver movies across broadband because, of course, cable companies make money streaming video to television sets. And, as he reported at a Stanford event about three weeks ago, the cable companies said, “We will shut off Internet access before we would ever allow our property to be used in this way.”

JACK VALENTI: That’s antitrust, Larry.

LARRY LESSIG: We’re on the same page. Antitrust, call it what you will. I’m talking, as you’re talking, as Landau was talking, about the ability of dinosaurs to protect themselves against evolution.

JACK VALENTI: But that’s not our debate. Our debate’s not about antitrust. Our debate is over copyright, which is in the Judiciary Committee of the Congress, House and Senate. The Antitrust Division, that’s in the Justice Department.
LARRY LESSIG: Yeah, well, that’s a nice legal distinction, and I’d give you two points on an exam for that.

JACK VALENTI: I don’t make the rules, Larry. I just try to live by them.

LARRY LESSIG: The fact is copyright and patents are forms of government-granted monopolies, and it is an antitrust question when we’re trying to worry about whether it’s too big. That’s all we’re arguing about. And in the cable context, you and I, I think, would be on the same side. If cable companies start vetoing your ability to deliver content across the Internet because you don’t pay them enough or because they just don’t want competition with their other video services….

JACK VALENTI: Well, I think we should save that for the next debate because that’s not what we’re talking about.

LARRY LESSIG: Oh, come on, one agreement, Jack. Out of a whole night, you can give me one agreement.

GEOFFREY COWAN: Quick question here.

LARRY LESSIG: Okay.

UNIDENTIFIED SPEAKER: Instead of a complicated constitutional law question, let’s ask a Norman Lear kind of question for the Center. On Tuesday night, there’s a new popular series called The Guardian. It raised the issue of copyright and smacked me up-side the head. I couldn’t believe that Hollywood was going to paint this picture. It was the copyright of a bunny buddy character of little kids painted on the wall, and they were being sued, which is part of the issue, but the larger question here is that this conversation is taking place, though on a national, highly rated series and without the opportunity for public discussion after it. I think that show was kind of visualizing the debate. As beautifully, as articulately as you make the cases, most people would find it hard to follow your arguments.

LARRY LESSIG: Did they have boxing gloves in that series?
GEOFFREY COWAN: Over to this side.

UNIDENTIFIED SPEAKER: This question’s for Jack Valenti. I’m gathering from your presentation here tonight that you do not believe that there is any fundamental Constitutional right to fair use. Correct me if I’m wrong. That being said, do you believe that there is any fundamental social interest in having fair use, such that it would apply to all copyrighted works?

JACK VALENTI: I’m a great advocate of fair use. I think that, for example, today if you’re a teacher, you can show an entire movie in your classroom without a performance license. Now, that’s a privilege that’s granted to you under fair use, and I’m totally in favor of it.

But I am against the grotesque distortion of fair use, and that is people who say, “I need to be able to break your code because I want to put together a bunch of movies and show an edited version of five movies.” That’s a gross distortion; that’s not good. But any teacher who wants to show a full-length movie in his or her classroom, wonderful. No problem with that at all. As a matter of fact, you can take several DVDs and you can freeze frame them and show this particular scene, put another one in there, show that scene. There’s nothing wrong with that, and, indeed, I think it’s laudatory.

GEOFFREY COWAN: Over here.

UNIDENTIFIED SPEAKER: Professor Lessig, how is it consistent with your viewpoint on copyright when applied to content of the type we’re talking about that you have refrained from suggesting or urging that Microsoft be deprived of its copyright and other protections when it abuses its Windows operating system to, among other things, stultify any other innovation in operating systems?

LARRY LESSIG: Well, Jack didn’t cover the Microsoft part of the book, but there is a Microsoft part of the book, and it is similar to the argument that you’re making with respect to consistency.
The owner of the platform, Microsoft, should not be in a position where it can use its power to stifle new innovation. That was the government’s case. That's what the Court of Appeals upheld in the government’s case, that that's what they tried to do, and I think it's exactly the same debate that we’re having in this context, whether an old industry dinosaur can use its power to protect itself against innovators.

Now, should you force them to give up their copyright? That’s a complicated question of what the appropriate remedy is. Jack’s told me we’re not having an antitrust debate, so I can’t get into that debate right now. But I think that might be one solution, although I think it’s not the best solution among those that the government’s talked about.

GEOFFREY COWAN: I’m sorry to disappoint the other questioners, but there is hot food awaiting us, so I’m going to ask the final question to both, which is have either of you heard anything from the other which has persuaded you to alter your point of view?

JACK VALENTI: Briefly, the answer is no.

LARRY LESSIG: The answer is yes, but I can’t go on forever because –

JACK VALENTI: I think Professor Lessig and I are First Amendment advocates. I am a Hugo Black First Amendment man. I’m an absolutist on the First Amendment, and I defend it. I yield to no man in my defense of it. But I’m also a staunch advocate, and, indeed, a disciple and an acolyte of copyright. I think it’s the foundation from which springs the creative industries in this country which have dominated the world and will continue to do so, and I think that's something that I find to be useful to this country, as well as to this region of this country.

LARRY LESSIG: So we agree about the First Amendment, we agree about the importance of copyright; our only disagreement is an antitrust debate. Maybe that’s Round Three of Lessig versus Valenti.

GEOFFREY COWAN: Please thank our panel.

(End of Debate)