Chapter IX

New Threats to Intellectual Freedom: The Loss of the Information Commons through Law and Technology in the US

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ABSTRACT

This chapter explores the growing threats to intellectual freedom through the loss of the information commons in the U.S. as a direct result of advances and changes in technology and laws. In particular, the Digital Millennium Copyright Act and the Sonny Bono Copyright Extension Act are considered, as is the 2003 Federal Communications Commission ruling on media consolidation. When these laws are combined with current technological developments, intellectual freedom faces serious threats. As a foundation in a democratic society, consumers should take heed of this growing erosion of rights and access to information.
INTRODUCTION

In the United States’ recent war in Iraq, while soldiers guarded oil wells and the records stored in Iraq’s Oil Ministry building, looters, unimpeded by occupying forces, pillaged the National Museum in Baghdad, and an important part of the precious shared heritage of both Western and Islamic civilizations disappeared right before the world’s eyes. Some of that heritage will probably be recovered. But some of it will go to the highest bidders on the black market, or fall into the hands of private “owners” and be lost to the public for years, decades, lifetimes.

When news slowly trickled in through the media to American shores of the looting, many American citizens, along with the rest of the world, were horrified at the loss and at its implications for our shared heritage and understanding of civilization and culture. It was a great tragedy with grave consequences that will affect this generation and many generations to come.

Back in the U.S., there is another tragedy occurring daily, one that threatens our shared memory and understanding of ourselves as a society, that threatens our future creativity as a culture, that challenges traditional ethical ideals of a common good, and that threatens the intellectual freedom that is the foundation of America’s progress over the past three centuries.

The tragedy is, in Harlan Onsrud’s (1998) words, “The Tragedy of the Information Commons.” Onsrud’s extension of the “The Tragedy of the Commons,” (Hardin, 1968) brings to recognition a serious loss: the tragedy, in a remarkable parallel to the enclosure of the physical commons in England during the 1700s and early 1800s, is that the information commons in America is being “enclosed” or even destroyed by a combination of law and technology that is privatizing what has been public and what may become public, and locking up and restricting access to ideas and information that have heretofore been shared resources. Notably, the notion of the information or intellectual commons, as Drahos (1996, p. 54, emphasis added) calls it, is “that part of the objective world of knowledge which is not subject to any of the following: property rights or some other conventional bar…; technological bars…, or a physical bar…” It took over 4,000 acts of Parliament to enclose the physical commons in England (Bollier, 1999). A half-dozen American laws and new digital technology — two of the three types of bars referred to by Drahos — are doing the job as well or better in the information society of 21st century America.

The implications for the theory and exercise of intellectual freedom are enormous, as we shall explore. The assumption underlying a democratically
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