

Creating Around Copyright

Joseph Fishman

Climenko Fellow and Lecturer on Law, Harvard Law School
Cambridge, MA

It is generally understood that the copyright system constrains downstream creators by limiting their ability to use protected works in follow-on expression. Those who view the promotion of creativity as copyright's mission usually consider this constraint to be a necessary evil at best and an unnecessary one at worst. This conventional wisdom rests on the seemingly intuitive premise that more creative choice will deliver more creativity. Yet that premise is belied by both the history of the arts and contemporary psychological research on the creative process. In fact, creativity flourishes best not under complete freedom, but rather under a moderate amount of restriction. Drawing from work in cognitive psychology, management studies, and art history, this Article argues that contemporary copyright discourse has overlooked constraint's generative upside. The Article unpacks the concept of constraint into seven characteristics: source, target, scope, clarity, timing, severity, and polarity. These characteristics function as levers that determine a given constraint's generative potential. Variation in that potential provides an underappreciated theoretical justification for areas in which copyright law is restrictive, such as the exclusive derivative work right, as well as areas where it is permissive, such as the independent creation and fair use defenses. The Article reveals that the incentives versus access debate that has long dominated copyright theory has misunderstood the relationship between creativity and constraint. Information may want to be free, but creativity does not.

Email: jfishman@law.harvard.edu

Fishman