

Just a Little Bit of History Repeating

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Peter Decherney, [Hollywood's Copyright Wars: From Edison to the Internet](#) (Columbia University Press, 2012).

Peter Decherney has written an excellent book about the ways in which copyright laws have shaped and responded to the movie industry in the US. Professor Decherney, who, not incidentally, was instrumental in achieving the first context-specific exemption for ripping DVDs (for use in teaching film studies, [renewed in the 2009](#) cycle), has a sharp eye for the way the movie industry has exploited and reacted to law as part of its business models over time. He suggests that the usual reaction of the industry to legal rulings has been self-regulation either to confirm or to avoid the formal law, depending on what works best for the people in charge.

History repeats, not just in the oft-told story of new media relying on unauthorized copying from old media—plays into films, for example—but also in the smaller details. The relationship between technological measures designed to prevent copying and unauthorized copying, for example, goes back to the start of moviemaking, when different producers used film with different sprocket holes in order to preserve their control over their own preferred, often patented, technologies. This incompatibility didn't deter copying, though. Instead, it led people who wanted to show movies to make their own copies to fit on their own equipment, just as technical protection measures still do today.

Decherney begins early in the movies' history, when it was unclear whether the performances therein qualified for copyright. In some cases, legal decision-makers deemed films, which were much lighter on plot than the texts we think of as movies today, insufficiently dramatic to be legally protected. In other instances, judges considered films immoral. [As is consistently the case with copyright, sex confounds the law](#). It was also unclear who was responsible for a recorded performance, assuming that the recording infringed someone else's right; in one important case, a film company claimed that it wasn't responsible for infringing the novel *Ben-Hur* because it had merely filmed a chariot race staged by the Brooklyn Fire Department. (The novel sparked a vogue for such recreations, which just confirms my belief that media fandom is everywhere.)

Later, studios fought with directors over artistic control. When films were first being edited for television broadcast, critics often worried over their "emasculatation," a gendered term indicating some of the cultural meanings of control over broadcast versions. As Decherney points out, the passage of time turns outrages against art into high art. Just as directors for years fended off charges that they were mutilating novels and plays in their adaptations, now directors became believers in the inviolability of their own art. Their quest for recognition as auteurs was largely successful outside the law, but largely a failure within the US legal system.

Hollywood's history with copyright law is full of these ironies, including the studios' fear of the VCR that ultimately brought them great riches. Decherney points out that Disney, one of the great opponents of the VCR, was a niche studio until the profits enabled by videotape sales gave it the capital to fund its next great wave of films.

More recently, Decherney argues, 1970s avant-garde filmmaking developed in the context of various

assumptions about what could legally be done, especially with music. Even when these assumptions didn't exactly follow the law, they shaped behavior. "Underground" works were ignored by copyright owners, but still used music cautiously, and their makers licensed rights in order to show them at international festivals or on TV. Kenneth Anger's "avant-garde classic *Scorpio Rising* (1964) ... freely used old film clips, advertisements, and cartoons. Some viewers were shocked by the sexual situations depicted in the film. Many filmmakers were more surprised by Anger's flagrant use of popular music to create counterpoint and commentary. Anger's 30-minute film used a 'wall-to-wall' string of popular hits" What they didn't know was that Anger had actually cleared the rights for the songs (though apparently for nothing else). This more than doubled his budget and cost more than the total budget of most avant-garde films.

Martin Scorsese watched Anger's film and was shocked—his NYU professors had always told him not to use music in a student film. He said: "That gave me the idea to use whatever music I really needed." While film's gatekeepers enforced strict rules on music, refusing to consider fair use at all, Scorsese decided to use unlicensed music in his own student films. This practice got him ready to make breakthrough uses of music, this time licensed, in his later feature films. Among the complicated lessons here is that "misinformation can be as powerful as accurate information." Another is that tomorrow's lasting art comes from experimentation, often experimentation perceived as illegitimate by today's gatekeepers. When we suppress the amateur, among the costs is that we suppress tomorrow's professionals.

Decherney also tells the story of the unusual case in which experimental video was suppressed by copyright owners: Todd Haynes's 1987 *Superstar: The Karen Carpenter Story*, blocked not by Mattel but by Richard Carpenter. Haynes decided to proceed without licensing the music—based in part on his beliefs about *Scorpio Rising*—but was ultimately forced to stop allowing it to be shown. Of course, this all made *Superstar* more attractive as a bootleg, and it's now [even easier to find](#). Haynes's story created its own myths about copyright and trademark overreaching among filmmakers, even though Decherney didn't find any other instances of such legal threats until the rise of online video sites like YouTube. Hollywood in general hasn't been very aggressive about pursuing self-proclaimed video artists, in part, Decherney suggests, because the law of fair use is "underdeveloped and highly unpredictable" in this area. In addition, the economic harm from video artists' use was realistically nonexistent and the public relations risks are real.

Decherney argues that YouTube was not a disruptive technology because it created a video-sharing culture. Plenty of people were primed to share their videos already. Instead, he suggests, YouTube brought a number of different video-making cultures—and their expectations around copyright and fair use—into contact and occasional conflict, and made them all more visible to each other and to copyright owners. "The fans, avant-garde artists, home video makers, and other fair use communities had spent decades learning when they should worry about attracting the attention of copyright holders.... They all became subject to increased surveillance, and their cultures of fair use were homogenized as large media companies sought one-size-fits-all solutions to employing the DMCA to control copyright infringement." This creates a need for continued scholarly and activist engagement in pushing back against the (new) norm of total copyright owner control that the industry would like to establish.

Hollywood's Copyright Wars works as historical narrative and contemporary reminder: the law's role in film's creative process is not and has never been as simple as providing incentives for creation. Decherney's readable book provides a century of evidence about the complicated relationship between film, law, and power.

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