Social Construction of Copyright: The popular production of communication-based legality

By

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I've released a lot of music of the years. So I've read all of the contracts. . . they all have a clause in them that says I hereby certify that there is no use of previously copyrighted material. . .
Either you buy into the typical: make a song sign it to a label, it goes through all of the proper distribution channels and all that. Or the new alternative is: make whatever you want, include whatever you want in it (it's no rules really), and then just give it away for free. Because that in a way sort of gets you out of all of the. . . copyright problems – if you're not making money off of it. But the problem with that is there are so few people in the industry [who] actually know the word of the law as it pertains to copyright. So, I don't actually know if giving stuff away absolves you of any legal problems. I don't have any idea. But that's sort of the widely held thought: "I'm not making any money off of it, you can't come after me." A lot of people are doing it. . . .

[To make money, you] sort of fall into a community of artists who are doing a similar type of thing. And then, from what I have seen, people will rally around that community and it will become its own label-type entity, and then it will take off from there – for live shows, because that's where all the money is in dance music. No one buys music anymore. . . .

One thing that's always been a habit of mine, which is probably a bad habit from a copyright perspective. I like to take a capellas *of whatever – of old 90's R&B and stuff like that – and I just chop them up. I use fractions – less than words, like little syllables – just to fill out parts of songs. I've signed and released those through labels all the time. Every time I sign the contract I see the clause that says "there's no copyrighted materials," and I say well, nobody will be able to tell. . . .*

On one occasion, the producer experienced infringement: *The label e-mailed me and said, "we wanted to let you know that we found this song that just ripped off your song, and we wanted to let you know that we're doing something about it." So, he sent me a link to it and [another artist] had just taken my track, [and had] copied it beginning to end – it was the same thing. They had just put a little vocal sample on it. . . The [foreign] label that I was on contacted this label, and within a couple of days it [the infringing song] was taken down. . . For me, it was a minor inconvenience for a couple of days, but there's something as an artist that is kind of strangely flattering about that [infringement] happening. So, that's the hard part about all of this: the artists sometimes love to be sampled by other artists, because it shows mutual respect for each other's work. But, it's the people with all of the money that have the most to lose – they're the ones who worry about it.*[1]

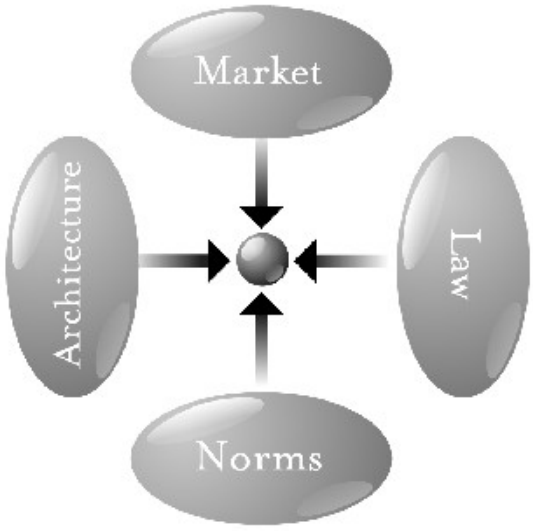
The music producer quoted above describes a vacuum in his knowledge of copyright law. In the absence of legal knowledge, a normative rule of "giving it away for free" has grown to meet his community's needs. However, the producer elaborates on an instance where, in conjunction with his representation by the record industry, he was able to utilize copyright law and the legal system to

1 Interview with DJ 9, December 26, 2012.

right a wrong of norms and law. Yet to some lawyers, his own use of sampled music is equally a copyright violation. Further, the fear of a copyright lawsuit likely underlies the norm of "just giving it away." This dissertation will explore knowledge of the law and the ways that (perhaps misguided) legal knowledge can impact community norms. It will also explore the ways that law-based norms become the basis for how law is lived in daily life. Using copyright as an example of the social construction of law, this dissertation will use communication as a basis for analyzing law as a social processes.

What we don't know about legal communication

As the music producer described, knowledge of law is a force which can impact individual actions. Lawrence Lessig portrayed the impact of four such forces on a "pathetic dot," which could be any individual – including the music producer.[2] An arrow points inward from each force, constraining the dot's free will, or agency. The all-powerful forces consist of law, social norms, architecture (such as technological limits created in computer code), and market power. For the purposes of this dissertation, social norms can be defined as "regularities in attitudes and behavior that characterize a social group and differentiate it from other social groups."[3] Given



2 Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (Basic Books, 2006), 123.

3 Michael A. Hogg and Scott A. Reid, "Social Identity, Self-Categorization, and the Communication of Group Norms," *Communication Theory* 16, no. 1 (2006): 7; Note an alternative definition by Sunstein, a lawyer with an acute interest in behavior, who defines norms in terms of acceptable behavior: "…we might, very roughly,

that individuals do not typically distinguish between rules from case law and statutes in the course of daily life, "law," except when referred to as the "law on the books," should be considered in the most general sense. Law can be defined as any rule, either real or perceived, that is imposed from governmental bodies. The generalized notion of law has also been conceptualized as "legality" or, "the meanings, sources of authority, and cultural practices that are commonly recognized as legal."[4] The balance between law and norms will be a consistent theme throughout the dissertation.[5]

Note that Lessig's diagram does not describe the mechanism of force behind the arrows. In many cases an arrow represents some form of communication – whether the words of a law, or the social sanction of a norm. While the diagram has an elegant simplicity, it oversimplifies the direction and weight of the four forces' influence on an individual. This dissertation will attempt to more fully describe the complexities of the interactions between the forces and the dot. I will argue that the arrow of law is not as effective and direct in its capacity to communicate order as Lessig suggests.

Though law certainly has some impact, individual knowledge of the law should not be assumed. When a law is passed, or a court reaches a decision, new rules do not magically enter the public consciousness. Yet, to maintain internal consistency in applying law to individuals with differing levels of legal knowledge, the legal system maintains the "ignorance of the law is no excuse" standard.[6] Rather than focus on such concerns "internal" to the legal system (known as the "law on the books"), this dissertation will focus on issues "external" to the system (known as the "law in

understand 'norms' to be social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." Cass R. Sunstein, "Social Norms and Social Roles," *Columbia Law Review* 96, no. 4 (May 1, 1996): 914.

4 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998), 22.

5 "Architecture" will be defined below in terms of "structural law." For the purposes of the present study, the market can be understood as the social transactions of sale and purchase, as well as perceptions of meaning that of the transactions create.

6 Steven H. Gifis, "Ignorantia Legis Non Excusat," *Law Dictionary* (Barron's, 1996).

action").[7] While the formal legal system receives a great deal of scholarly attention, daily experience of law – like the fear of a lawsuit – is less well explained.

Lawrence Friedman was among the first to describe how law coexists with culture outside of the legal system, noting that laws are not obeyed "simply because they are laws."[8] He coined the notion of "penetration" as a description of the degree to which a law has integrated itself into culture. Friedman describes how penetration cannot act alone in the creation of legal culture. He notes that:

> Penetration is a concept of command; it refers to the degree that government is successfully imposed. But government is a two-way street. Participation is a twin concept of penetration.[9]

In the span of a few words, Friedman illustrates the central issue of this dissertation: the balance between the government's ability to impose law, and the public's capacity to participate with its construction. The balance between law's overt power to constrain action and the public's daily participation with, and creation of, legal culture mirrors the sociological "structure versus agency" debate. This dissertation will conceptualize the balance of law and culture more concretely by using the literatures of mass communication effects and cognitive psychology.

To illustrate the issue of penetration, Friedman wryly uses the example of adultery laws. He argues that stricter adultery laws would have an "uphill battle for enforcement," and "would require a great input, in real enforcement resources, to raise the rate of effectiveness even a little."[10] In short, Friedman points out the low cultural penetration of adultery laws. Certainly, increased resources for

7 As Feldman remarked, "Those few law professors who advocated for the external position were typically dismissed with a disgusted wave of the hand." Stephen M. Feldman, "The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making," *Law & Social Inquiry* 30, no. 1 (2005): 89–135; Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition," *Legal Studies Forum* 9 (1985): 23; Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910): 12.

8 Lawrence M. Friedman, "Legal Culture and Social Development," *Law and Society* 4, no. 29 (1969): 42.

9 Ibid., 44.

10 Ibid., 42.

communication would be needed to increase public knowledge of newly stricter adultery laws – yet increased knowledge would not necessarily guarantee penetration of the law, even in conjunction with enhanced enforcement. To truly penetrate culture, the law must enter broader public consciousness. Even when individual interpretations of the law vary, a law which has penetrated culture will have engendered legal knowledge, if not compliance.

In like manner, this dissertation will focus on the cultural penetration of intellectual property law, where technology has made it easier to cavort with another's creative work. Given the rapid technological change brought by the Internet and digital technology, the acceptance or penetration of existing copyright and patent laws has come under question. I will argue that communication plays an invaluable role in revealing the balance between structure and agency in copyright. Further, it will be shown that communication of a law is necessary, but not sufficient, for its penetration into culture. It will be shown that participation with the law, regardless of legal knowledge, is the factor which generates sufficiency for penetration.

Evidence of a lack of legal knowledge in the public has been documented by survey data. A recent (2013) survey found a perception that gun laws are more restrictive than what the law dictates. The authors of the report stated in a New York Times op-ed, "if these Americans knew that we didn't have such laws – laws they so fervently wish to enforce – their beliefs about the correct course of Congressional action might be very different."[11] One might argue the misperceptions of law subsequently are impacting the actions of elected officials. In 2004, a study by the Pew Internet and American Life Project reported that public knowledge of copyright law was lower than that of

11 Joel Benenson and Katie Connolly, "Don't Know Much About Gun Laws," *The New York Times*, April 6, 2013, sec. Opinion / Sunday Review, http://www.nytimes.com/2013/04/07/opinion/sunday/dont-know-much-about-gun-laws.html.

musicians and artists, who depend on intellectual property for their livelihood.[12] Consumers were less likely to state that they are, "somewhat or very familiar with copyright laws," when compared to artists.[13] While the exact level of public knowledge has likely changed in subsequent years, a drastic increase is doubtful. This dissertation will examine copyright knowledge and construction by individuals who act as creators in some capacity, but whose interests may not be as well defined as the subjects of the Pew study.

One could argue that the foundations our legal and political systems, which depend on the consent and votes of an educated populace, depend to some degree on sound legal knowledge. Yet, it is within imperfect knowledge that social constructions of law arise. Despite a lack of mastery of legal concepts, individuals and groups still use their limited knowledge to form norms and rules that subsequently inform their practices. Norms and rules are enacted through cognition and communication. Knowledge generated by legal communication forms heuristics and stories to be used in later situations which call for awareness of the law. The cognitive processes are thus a basis for legal compliance and political action. By examining law through a lens of communication we gain frameworks to better understand the forces around Lessig's dot – or more specifically, an individual's experience of the forces. Further, a communication approach offers opportunities to see how connections between individuals come to form the ways that laws are constructed in daily life. However, to contend that law works through the social construction of legal messages, we must first explore how legal messages are communicated.

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12 Mary Madden, *Artists, Musicians and the Internet* (Pew Internet and American Life, December 5, 2004), http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet.aspx.

13 Ibid. 43% of the public, compared to 54% of artists report being very familiar. The ratios respectively drop to 18% and 24% for knowledge of the law of fair use.

Law is mediated and constructed

McCann and Haltom's *Distorting the Law* aligns with this dissertation's approach of seeking a communications basis for the social construction of law. The authors use the notion of "tort tales" as a case to examine legal communication through news narratives of the tort reform movement.[14] McCann and Haltom performed content analyses of news reports and interviewed reporters to argue that tort reformers have used media exposure to their advantage to reinforce a public perception of tort law abuse.[15] McCann and Haltom build, "on a rich tradition of study that envisions law itself as diverse forms of specialized knowledge that permeate and structure practices throughout contemporary society," and argue that, "law is inherently distorted – twisted, manipulated, reshaped – into multiple forms by ordinary practical activity."[16] In seeking to understand the distorted, practical activities of law, the authors find that, "the narratives disseminated by policy-driven tort reformers have at once reinforced and been reinforced by everyday news reporting."[17] By structuring practice, the narratives that the authors discover can be understood to contribute to the social construction of tort laws.

This dissertation will share much in common with McCann and Haltom's study, as both conduct an, "analysis regarding mass media constructions of law [which] thus represent a logical extension of legal study that addresses commonplace knowledge about law in routine social interaction."[18] McCann and Haltom's use of tort law as a case study aligns with the present study's

14 William Haltom and Michael J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2004), 6.
15 Ibid., 24–5.
16 Ibid., 10.
17 Ibid., 24.
18 Ibid., 11.

focus on copyright. However, the method of analysis in this dissertation will differ from McCann and Haltom's approach. Instead of news process and content analysis, I will use the mass communication effects literature to inform the analysis of targeted interviews. Here, the focus will be on interactions between group members, and their contact with law in daily life. Nevertheless, the present study aligns with McCann and Haltom's contention that, "mass-manufactured legal knowledge constitutes and reconstitutes law itself," – an argument which is firmly grounded in legal sociology.[19]

Sociologists of law have similarly framed the social construction of law as a process, though not in the terms of mass communication. For example, the issue of reception of the law was addressed in later work by Friedman, where he explored the notion of "legal culture," or the "ideas, attitudes, values, and opinions about law held by people in a society."[20] He suggests that there exists an unrealistic, "radical distinction between 'law' and 'society,' instead of recognizing that the two are really inseparable, intertwined, faces of the same coin."[21] The interplay between law and culture is one that Friedman indicated in his 1969 work, where he argued:

> The living law of a society, its legal system in this revised sense, is the law as actual process. It is the way in which structural, cultural, and substantive elements interact with each other, under the influence of external or situational factors, pressing in from the larger society.[22]

Friedman suggests that we must look for the social processes of living law which link together the inner and outer faces of law.[23]

Sociologists of law have addressed an intertwined or bi-directional view of law to some degree

19 Ibid., 13.
20 Lawrence Meir Friedman, *Total Justice* (Russell Sage Foundation, 1994), 31.
21 Lawrence M. Friedman, "Law, Lawyers, and Popular Culture," *The Yale Law Journal* 98, no. 8 (June 1989): 1583.
22 Friedman, "Legal Culture and Social Development," 34 emphasis original.
23 Friedman, "Law, Lawyers, and Popular Culture," 1587.

in studies of "legal consciousness." Legal consciousness attempts to look beyond legal knowledge to, "search for the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law."[24] In other words, legal consciousness assumes law to be a participatory process of the production of law through social actions. Ewick and Silbey expand on the exchange between consciousness and structure by focusing on social practice and interaction: "[Consciousness] must be construed as a type of social practice, in the sense that it reflects and forms structure. . . . [Structure is] envisaged as emerging out of, even as it impinges upon, social interactions."[25] That legal structure emerges from social practice, while creating constraints, is core to the notion of constructionism. By simultaneously making and being restricted by structure, the law might be understood to be a product of daily interactions. I would assert that structure-creating social practices have a basis in communicative interactions.

The mass communication effects literature has long examined the impact of mass media messages. If one accepts the argument that law is mediated, it follows that one might examine law as a media effect. However, by thinking of "impact" as a one directional influence on an individual or culture, we miss the opportunity to seek the ways that individuals and subcultures reflect the law in their practices. By extending our understanding of legal culture towards a bi-directional model of mutual impact, we may get closer to an accurate description of how law – or legal communication – works in society.

24 Susan S Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 334.
25 Ewick, *The Common Place of Law*, 225.

Copyright and participatory culture

Intellectual property lends itself to an analysis of the bidirectional impact of legal communication. A brief overview of copyright law will show that its emergent complexity has eroded a balance which accommodated the needs of the public, even as they increasingly participate with media. The Internet and digital technologies have enabled a greater ability to use copyrighted works, while also creating new ways of protecting content from unfettered use. By exploring the balance between use and control, we will find how the legal communication of copyright contends with a technologically enabled, participatory culture. After a brief discussion of the relevant provisions of copyright law, this section will describe how the Internet and digital technologies have stimulated conflict over the scope of copyright. Individual capacity to shape legal culture by participating with media and challenging copyright is arguably a manifestation of the bidirectional relationship between society and law.

At a basic level, intellectual property grants creative works and processes a temporary monopoly to incentivize the creative process, but the historical development has created legal complexity.[26] Copyright in the United States traces its roots to the English Statute of Anne of 1710, which established a 14-year monopoly for publishers.[27] Copyright was codified in the United States Constitution by granting authors "the exclusive Right to their respective Writings and Discoveries" for a limited time, with an ultimate social goal of "promoting progress."[28] The Copyright Act of 1976 is the most recent comprehensive legislation.[29] It codified five "exclusive rights" that creators hold at

26 Here, we will focus on copyright, which protects literary works and to some degree software. Though, some aspects of the study will invoke patent law, which protects inventions such as devices and processes.

27 8 Anne c. 19 (1710).

28 United States Constitution: Article I § 8, cl. 8.

29 Copyright Act of 1976, 17 U.S.C ch. 1-13 (2011, originally 1976).

the moment a work is created, which include rights to: duplicate their work, to create derivative works, to distribute copies of their work, to publicly perform their work, and to display the work to others.[30] The rights are tempered by a defense of "fair use" which one uses to contend that a violation of one or more of the exclusive rights is permitted. Courts were directed to consider four factors when deciding whether an infringement has occurred. Courts weigh the purpose of the infringing use, nature of the copyrighted work, the amount and substantiality of the copyrighted work which was used, and the effect of the infringing use on the market.[31] Given that fair use exists as a defense to an infringement claim, the uncertainty over the weighing of fair use presents a legal risk to one who wishes to use a copyrighted work.

Despite legal risk, the mass adoption of personal computers and the Internet has drastically reduced the monetary and transaction costs of violating the five exclusive rights. User-created content on the world wide web, fueled in part by greater bandwidth and cheap hardware and software, is placing stress on copyright law while fostering creativity outside of the traditional media framework. Networked digital technologies, with an innate capability to copy and distribute, have challenged the traditional copyright model of a limited time monopoly on the rights of reproduction and distribution. Technology and the public at large are now more often in conflict with the law of copyright. Rapid technological change has made the public responsible for adhering to the law of copyright.

In light of technological change, legal scholars have observed that the balance between protecting creators and stimulating use has shifted through recent legislation, litigation, and

30 Copyright Act of 1976, 17 U.S.C ch. 1 §106 (2011, originally 1976).
31 Copyright Act of 1976, 17 U.S.C ch. 1 §107 (2011, originally 1976).

technological controls. Siva Vaidhyanathan and Jessica Litman were among the earliest scholars to call attention to the problems of digital copyright.[32] Siva Vaidhyanathan argues for "thin" copyright through a historical analysis which comments on Mark Twain's permissive attitudes towards copyright, early Supreme Court decisions, and the musical traditions of motif borrowing in jazz and rap. Vaidhyanathan succinctly describes how copyright has shifted towards the interests of owners by way of four "surrenders of important safeguards in the copyright system."[33] First, the surrender of balance between creator's rights and fair use, to control in licensing and technology, describes a move towards greater capacity of copyright owners to dictate how works are used. Next, the surrender of public interest in progress-of-useful-arts, to the private interests of creators, connotes a move from a social goal of progress in copyright to one of ownership. Third, the surrender of republican deliberation within the nation-state, to decisions by unelected nongovernmental bodies in international treaty negotiation, describes a move away from congressional lawmaking towards legislation through treaty. Finally, the surrender of culture to technology underscores the shift towards technological locks overriding cultural interest in "fair use and open access."[34] The four "surrenders" describe much the of scholarly criticism of recent developments in copyright law.

Jessica Litman reiterates the surrendering shifts in balance of the law by arguing that the current law of copyright does not reflect the public interest. She finds that copyright has moved from the metaphor of a public bargain, or a limited time monopoly in exchange for progress of the useful

32 Other notable early works are: Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999); James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard University Press, 1997).

33 Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), 159–60.

34 Ibid., 160.

arts, to one of ownership.[35] The property metaphor has expanded the notion of "piracy" to cover all unlicensed use of a copyrighted work.[36] Litman and Vaidhyanathan find a lack of public involvement in the crafting of copyright law. They argue that lawyers and lobbyists have traditionally been responsible for negotiating and drafting copyright legislation, with no public input other than through congressional representatives.[37] Litman aptly concludes:

> . . . laws that we keep around for their symbolic power can only exercise that power to the extent that people know what the laws say. . . . The reason people don't believe in the copyright law . . . is that people persist in believing that laws make sense, and the copyright laws don't seem to them to make sense, because they don't make sense, especially from the vantage point of the individual end user.[38]

Litman's assertion that "people don't believe in the copyright law" reflects the public's growing a realization of a shift towards the law protecting the interests of industries who profit from strong copyright protection. As will be discussed below, Litman and Vaidhyanathan's conclusions especially impact individuals who interact with culture by simultaneously using and creating copyrighted works.

In addition to laws that "don't make sense," one who wishes to use copyrighted works must frequently contend with technological controls that limit their capability to interact with copyrighted media, even within fair use.[39] The Digital Millennium Copyright Act (DMCA) brought legal protection to "technological protection measures," or digital means to protect copyrighted works.[40] Many have found that technologies used to control access to, or use of, a copyrighted work have the

35 Jessica Litman, *Digital Copyright*, Pbk. Ed (Prometheus Books, 2006), 81.
36 Ibid., 85.
37 Ibid., 81.
38 Ibid., 113.
39 For example, software in the Adobe pdf reader would not allow the text to be read by a computerized voice. Niva Elkin-Koren, "The Changing Nature of Books and the Uneasy Case for Copyright," *George Washington University Law Review* 79 (2011): 101.
40 Digital Millennium Copyright Act, 17 U.S.C. § 1201-1202 (1998).

potential to drastically reshape our communication patterns – especially in conjunction with limitations presented by the legislative and market landscape. Lawrence Lessig articulates a useful distinction between "east coast code" (laws) and "west coast" (computer) code.[41] Lessig argues that computer code can be regulated and thus has power to regulate behavior without one knowing it. He argues that, "we should worry about a regime that makes invisible regulation easier; we should worry about a regime that makes it easier to regulate."[42] Lessig later argued for an understanding of the differences between a culture that is "read/write" versus "read only."[43] By looking at historical examples, he contends that "never before in the history of human culture had the production of culture been as professionalized."[44] Even when members of the public desire to use copyrighted works as a cultural exchange, the use is often prevented by technological and legal protection.

Tarleton Gillespie specifically examines the history of devices and systems which covertly regulate the "commercial choreography of culture."[45] In his portrayal of technical protection measures, Gillespie contends that we must strive to understand the social implications of code-based regulation:

> Understanding not only the turn to technology as a regulatory strategy, but also the social, legal, political, and cultural mechanisms by which it is possible . . . has significant implications for both the production and circulation of culture, for the digital networks upon which that culture will move, and for the practices and institutions that will accommodate decisions made in the courts and in the marketplace.[46]

The implications of technological regulation on culture and the market should be understood to

41 Lessig, *Code*, 72–4.
42 Ibid., 136.
43 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), 28–9.
44 Ibid., 29.
45 Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (The MIT Press, 2007), 247.
46 Ibid., 10.

impact both sides of the copyright balance between user and creator.

Jonathan Zittrain similarly argues that digital controls hold the potential to adversely impact creativity, as the Internet and digital technology have become a "generative system," which allows an "extraordinary number of people" to express themselves.[47] He acknowledges that generative systems are in a state of constant evolution, and that for continued success the "public must be trusted to invent and share good uses" of the system.[48] While technical copyright protection systems threaten that trust, other scholars have documented how long-existing subcultures quickly adopted the generative system.

Fan culture, or the study of media enthusiasts, has begun to document how individuals participate in a two-way exchange of "participatory culture." On the subject of the Internet, Henry Jenkins contends that convergence – or the "flow of content across multiple media platforms" – is "impacting the relationships between media audiences, producers, and content."[49] By presenting the perspective of media "fans," Jenkins reveals how media producers and consumers are, "participants who interact with each other according to a new set of rules that none of us fully understands."[50] In short, fan cultures and mass culture impact the activities of one another, and shifts in copyright law tilt the power dynamic to privilege commercial interests.[51] Given the slow pace of legal evolution, Jenkins predicts that, "change is more likely to occur by shifting the way studios think about fan communities than reshaping the law."[52] Thus evolving and uncertain norms between fans and studios will dictate the form of their relationships to content and law. Yet, interactions between fans in their

47 Jonathan Zittrain, *The Future of the Internet-And How to Stop It*, First Edition (Yale University Press, 2008), 42–3.
48 Ibid., 43.
49 Henry Jenkins, *Convergence Culture: Where Old and New Media Collide*, Revised (NYU Press, 2008), 2, 12.
50 Ibid., 3.
51 Ibid., 198–9.
52 Ibid., 199.

participation with media could potentially extend to participatory interaction with the law.

In extending beyond fan communities to examine broader social impact, Yochai Benkler argues that technological changes have lowered the costs of collaboration by facilitating interaction online. He argues that non-market production and large-scale cooperative efforts conflict with the assumptions and social structures surrounding physical capital.[53] By working collectively on products outside of the traditional commercial market, individuals reject much of the copyright-incentivized means of production and distribution. Clay Shirkey similarly argued for the social value of collective action on the Internet. He contends that new technologies allow for collaborations which could previously only be accomplished by institutional structures.[54] Further, non-institutional production has social value. Benkler and Lessig independently suggest that we must seriously consider the regulations that might limit on how individuals (like fans) express themselves and participate with culture and law.[55] Such regulations might violate the ethics of creativity and speech that some communities value.

The literature increasingly points to the power of technology-using people to challenge existing frameworks – including the law. Collective capacity to challenge legal structures, and the counterposing ability of structure to impose itself on individuals, is a primary focus of this dissertation. We shall find reason to believe that the legal message of an imposing regulation will have difficulty inspiring compliance. As the sociological literature describes, participation in the construction of law is produced through the interactions of daily life. As social connections and

53 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven [Conn.]: Yale University Press, 2006), 4–5.

54 Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations* (New York: Penguin Books, 2009), 45.

55 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (New York: Penguin Press, 2004); Benkler, *The Wealth of Networks*.

access to the law on the Internet increases, participation in the construction of law might likewise grow. We should strive to describe how construction of law facilitates both participation and penetration.

Argument and study description

Existing studies have attempted to understand how law is experienced in "everyday life," by exploring individual perceptions of law. This dissertation will contend that mass communications effects research provides a more meaningful basis for understanding common conceptions of law. Experiences of legal structures in daily life often grow out of communicative interactions with other individuals, or through reception of messages communicated by non-governmental actors.

A review of the literature will show that the law on the books is not directly communicated to the public. By contending that law is mediated through a number of communicators, we will find explanations for misunderstandings of law. While one's knowledge of law might be less than ideal, individuals nevertheless use their own understanding to construct their legal knowledge and ultimately perceptions of the law. The perceptions impact an individual's action, but also become the basis of deeds which construct the law within society.

Mass communication effects research, building on work in psychology, has determined a number of cognitive bases to inform our understanding of how messages are received and processed. Commonalities between mass communication research and the sociological study of legal consciousness reveal a meaningful way to study the experience of law in everyday life. In using the cognitive processes of heuristics and elaboration, along with the group context of prototypicality, we find a means to explain the social construction of law. An examination of the ways of thought

stimulated by legal messages provides a lens thorough which to view the law in everyday life.

Using concepts from mass communication effects in conjunction with legal consciousness, we might see how legal communication translates the law on the books into daily experiences of law in action. This dissertation will argue that analyzing the social production of law via a communication basis will best fit the balance between penetration and participation. I will argue that approaching an analysis of law in society from a mass communications approach will provide new perspectives on the question of structure and agency. The ultimate goal of the study is to use mass communication as a framework to understand the social construction of law as a mutual interaction between legal rules and individuals.

To reach this end, I conducted interviews with five groups of individuals to explore their experience of intellectual property law. I gathered a purposive sample of groups who were not currently engaged in the legal system, but whose creative work brings some risk of violating another's intellectual property. In-depth interviews with 44 individuals from 5 groups forms a case comparison of experiences of law, group norms, and perception of legal communication. A deductive analysis focused on the cognitive principles held as important in mass communications effects studies, and derived emergent themes of how intellectual property law obliquely informs social norms of sharing.

The results of the study find support for using mass communications principles as a means to study the social construction of law. By using the cognitive factors to understand how legal messages are received, we find a means to describe the ways that a law – or a given group's experience of the law – is lived in daily life. We gain important insight into how law works in society through understanding collective experiences of the law's structuring power, and through the capacity of common interpretations to bring meaning to law. By tying the experience of law to individual

cognition, we see how individuals simultaneously experience and create durable legal structures.

Outline

This dissertation will first contend that law is mediated and socially constructed. The majority of the public does not read legal opinions, but experiences the law through sources like the daily news and stories told by friends. Given that law is mediated, or filtered through a variety of media, legal communication may be examined as a media effect. This dissertation will use the mass communication effects literature to describe the possible impact of legal messages. It will also draw on the sociological legal consciousness literature's approach to analyze social interactions of law. I will thus describe how law is socially constructed through the experiences of individuals and their peers. Socially constructed law accounts for both the power of law to control society and the power of individuals to interpret or resist the law.

Three concepts from the mass communication literature will be used to explain the balance between law's rhetorical power and individuals' collective ability to construct the law. I will argue for a cognitive basis for the social construction of law through the models of heuristics, elaboration, and prototypicality. By basing the construction of law in cognition, we find a means to describe law's strength through durable mental rules, while also gaining a language to describe the ways in which individuals collectively create their own constructions of the law.

To examine these concepts, intensive interviews were carried out with five groups of individuals who engage in activities which are legally suspect. By focusing on the law of copyright, the impact and constructions of a complicated law will be tested through intensive interviews of members of five subcultures. The interviews will provide support for the cognitive basis of the social

construction of law.

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Chapter 2 will focus on the ways that law is communicated. It will show that, rather than direct exposure from an actual legal source, it is most common that individuals have a mediated exposure to the law. Any law must pass through a number of filters that will interpret and color a legal message before a listener hears it. It will be argued that a mediated legal message is ineffective in a number of cases. A byproduct of the process of mediation is a potential impact on compliance. In short, if a law is not heard as intended, the impact of the law might not be as expected. However, the chapter finds indications that legal messages which take the form of a memorable heuristic, or which align with a community's norms, can have enhanced impact.

Chapter 3 will examine the behavioral psychology of mass communication effects and will argue for a relationship to the legal consciousness literature. By providing further evidence against a direct effect of legal communication, chapter 3 will argue that principles of cognitive psychology provide a sound basis for analyzing legal communication. It will show that the legal consciousness' search for "durability" in legality might be explained by cognitive principles. Three specific objects of analysis emerge as potential sources of durability for law. Heuristics, or rules of thumb, describe when one is thinking in an automatic way. Elaborations reveal deeper, or more rational, thinking. These two well established bases of thought have their own consequences for the effects of a message. Additionally, the degree to which a message aligns with a group's norms is found to have some effect. Given that legal messages rely on the receiver for construction, the effects are often grounded more in group norms than in the law.

Next, the methods chapter (4) will give a brief overview of copyright law and will argue that

it is an appropriate body of law for a post-empirical examination of legal communication. It will describe the five groups of individuals who create works that at times use existing, copyrighted cultural works. By using qualitative methods that borrow from legal consciousness and media effects, we will see how group norms interact with legal knowledge to impact creativity in the landscape of "participatory culture." It will be shown that the methods used are best suited to describing the social construction of the law.

The results of the study are presented in chapter 5, where we will find support for a communication basis for the social construction of law. A series of heuristic rules that were common among all of the groups interviewed will be described, in addition to those which emerged within group settings. Elaborations of deeper legal analysis and stories of interaction with the law will provide greater detail on how the groups see and construct the law. The findings of the study will show that a direct impact of law cannot be expected, and that cognitive effects might explain how individuals and groups construct the law.

By describing the ways that groups relate to and thus construct the law, we find indications of how the law is lived in the everyday life of individuals. Understanding that law is mediated reveals the nature of individuals' imperfect legal knowledge. Yet, the knowledge is still used to interpret laws within a given social context. Such interpretations create a social legal structure, which can be a relationship with law that is unique to a group of individuals. By describing the structure of the unique relationship, we might gain a more complete understanding of how laws impact – and are impacted by – society.

2. The Mechanisms of Legal Communication

Law is typically seen as a clear, codified body of rules which communicate directly to a receptive public. To challenge the assumption of clarity in legal communication, this chapter will explore the effectiveness of the various ways laws are communicated. While the law guides our actions, it rarely addresses the public in a direct message. Instead, the process of legal communication is mediated through a variety of mechanisms.

In the following attempt to catalogue the many ways that laws are communicated, two extralegal factors will be shown to impact the effectiveness of legal messages. The degree to which norms align with legal communication is a key factor in a compelling legal message. When a message conflicts with an existing norm, it is difficult for the legal message to overcome the barriers that norms create. Conversely, heuristic rules can more readily impact behavior, or can form a basis for the clear communication of law.

This chapter will show that the mediated nature of legal communication can decrease the effectiveness of the law. After describing the distinctions that legal theorists have drawn between structural and expressive legal messages, this chapter will examine the effectiveness of official legal communicators, such as legal authorities, politicians, and signs. An examination of the professional and non-professional workplace finds norms to be much more powerful than law. Communications institutions, such as public relations, entertainment, and news media, can be the most effective public communicators of legal messages. Finally, traditions and personal interactions provide additional evidence of the important role of norms in legal communication. Each of the examples support the contention that law's power cannot be understood entirely as a central exertion of state power. The formal and informal mechanisms of legal communication are not always effective, and

communicators' interpretations of legal messages can impact the public's legal understanding. As such, mediated legal communication facilitates the social construction of law.

Expressive and structural legal communication

Legal scholars have analyzed how law law creates meaning and norms in society through the "expressive function" of law, or communicating to citizens what is or is not legal. Expressing law in words can be compared to "structural laws," which guide behavior by taking legal rules into account when creating an environment or situation. The distinction between expressive and structural law is a useful dichotomy for the analysis of the mechanisms of legal communication.

Sunstein argues that law creates social meaning via "semiotic content" connected to specific action. He suggests two ways to understand the "expressive function" of law: as a statement with a goal of affecting norms and ultimately behavior; and, as a (non-normative) grounding for individual interest in integrity.[1] Lessig similarly asserts that social meanings gain force through texts and context, because legal meanings are largely taken for granted in society.[2] Further, social meanings of law can be changed through either semiotic (word-based) techniques, or by trying to change behavior. While the way that the law addresses its subjects (semiotics) has some impact, few people actually read the laws.[3] Thus much of the law's expression falls to the news and entertainment media. While the role of media institutions has been acknowledged, few scholars describe legal mass communication as a primary social force in the facilitation of the law in action.[4]

1 Cass R. Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144 (1996 1995): 2021.

2 Lawrence Lessig, "The Regulation of Social Meaning," *The University of Chicago Law Review* 62, no. 3 (Summer 1995).

3 This has also been called law by "fiat" or regulating "ex post." See: Edward Cheng, "Structural Laws and the Puzzle of Regulating Behavior," *Northwestern University Law Review* (2006): 655.

4 For role of law in entertainment media, see: Lawrence M. Friedman, "Legal Culture and Social Development," *Law and Society* 4, no. 29 (1969).

While some have assumed the effectiveness of law's communication to the public, the effectiveness of expressive laws has been questioned by scholars. Sunstein notes that, "for the law to perform its expressive function well, it is important that law communicate well."[5] Sunstein thus succinctly asserts the vital importance of communication to legal effectiveness. Robinson and Darley provide additional detail to connect the expressive function to the law's effectiveness: "to be maximally effective, the legal system must publicize why these kinds of conduct[s] lead to consequences that are significantly damaging [enough] to be criminalized."[6] Darley et. al. later found that newspapers are ineffective at relaying information about new criminal laws to the public.[7] Given the questions over the effectiveness of laws communicated through expression, this chapter will describe in great detail the circumstances under which legal communication may be more or less effective.

Rather than guide behavior through communication, structural laws attempt to regulate behavior by design, or by "architecture."[8] Structural laws "establish mechanisms or procedures that push citizens toward compliance by making the undesirable behavior less profitable or more troublesome to achieve."[9] Cheng argues that structural law is superior to law by decree, or "fiat," because structural laws promote compliance. Structural laws create "preferred default behaviors [which] give rise to accompanying social norms."[10] For example, digital rights management (DRM) systems act to protect copyrighted works by placing locks to discourage unauthorized copying.

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5 Sunstein, "On the Expressive Function of Law," 2050.
6 Paul H Robinson and John M Darley, "The Utility of Desert," *Northwestern University Law Review* 91 (1997): 476.
7 This is clearly an open area of research. John M Darley, Kevin M Carlsmith, and Paul H Robinson, "The Ex Ante Function of the Criminal Law," *Law & Society Review* 35, no. 1 (2001).
8 Lawrence Lessig, *Code*, Version 2.0 (New York: Basic Books, 2006).
9 Cheng, "Structural Laws and the Puzzle of Regulating Behavior," 2.
10 Ibid., 10.

Newman and Clarke's analysis of "situational" crime prevention in e-commerce distinguished passive structural controls, from active, communicative controls. The distinction between structural enforcement and expressive attempts to control behavior, like education efforts by public and private policing organizations, was found to be problematic by Newman and Clarke.[11] They prefer fiat law over systems that passively assure compliance (like DRM) because of the potential for individual privacy to become compromised, without a user's knowledge. Consequently, a division exists between the law in action and legal theory: educating people about the law is often ineffective, yet structural laws are socially undesirable to many because of the resulting limits on individual freedom.

Transmitting the law on the books to the public is a subject that has only received a small amount of scholarly attention. This chapter will focus on expressive laws by differentiating the many communicators which express law. By examining a number of communicators, we will gain a more complete understanding of how legal communication is mediated. What follows is an attempt to categorize all of the means of legal communication in an effort to bring greater clarity to the ways that laws are communicated, understood, followed, or ignored.

The legal system

As the creator of laws, the legal system is perhaps rightfully considered the law's primary communicator to the public. The government does a great deal of communicating law as a necessary function of a transparent democracy. As the "official" publisher of the law on the books, the weight of the government's legal speech is paramount. This section will address legal communication by

11 Graeme R Newman, *Superhighway Robbery: Preventing E-commerce Crime / Clarke, R. V. G.* (Cullompton: Willan, 2003).

legal authorities, politicians, government media, and signs. I will find reason to question the effectiveness of legal communication in each of these mechanisms, but will find strategies that can enhance the success of a legal message. Messages which are communicated in agreement with existing norms, through memorable rules, and in structural context can be successful in guiding behavior.

Interactions with legal authorities – the police and courts

Personal interaction with the police, while little studied in a communications context, is perhaps the most coercive means of legal communication.[12] A gun-wielding officer barking an order might be where law appears the most powerful. Still, interactions with authorities should not be understood as a direct communication of the law on the books, but rather as an interpretation by one particular officer in a given situation.[13] Cases where an official's understanding of the law is less than accurate attest to the perception of law as an official expression. However, memorable heuristics can be used to guide the communication of officials towards expressions of the law on the books.

In one example of officials' misunderstanding the law, Transportation Safety Administration (TSA) agents temporarily detained a man for refusing to answer questions about a large sum of cash he carried on a plane.[14] The TSA released the man, and under the threat of a lawsuit, ultimately clarified their policies for airport screeners. Here, the lack of a clearly communicated policy created a conflict between the passenger's idea of individual rights and the screener's demand for security. In tense situations or interviews, police are more likely focused on telling a suspect what to do, or on

12 Paul Myers et al., "Law Enforcement Encounters: The Effects of Officer Accommodativeness and Crime Severity on Interpersonal Attributions Are Mediated by Intergroup Sensitivity.," *Communication Studies* 59, no. 4 (October 2008): 292.

13 Though, this distinction makes little difference to either party at the time of an exchange.

14 Joe Sharkey, "A Constitutional Case in a Box of Cash," *The New York Times*, November 17, 2009, sec. Business, http://www.nytimes.com/2009/11/17/business/17road.html. While TSA agents are contracted employees, they nonetheless act with the legal authority of the government.

obtaining honest answers, as opposed to informing suspects of the law.[15]

The law on the books impacts official communication of police, who have been legally forced to inform suspects of their rights. While there is a rich literature on comprehension of the "Miranda warning," little has been done to understand it as an official communication.[16] Miranda's widely understood mandate that suspects be informed of their rights perhaps brings legal communication into situations where it might otherwise not appear. A memorable rule of thumb for the communicator provides additional support for clear legal communication.

Legal communication is the most rich in the court system, yet to the uninitiated, procedural jargon masks much the meaning behind the words. Kafka's *The Trial* perhaps most poignantly portrays how obtuse legal communication and process can be to an outsider.[17] To understand procedure and legal jargon, and to most effectively navigate the system, one must have a lawyer as a guide. While judges and the legal process may bear the responsibility for the force of the law, a lawyer is a client's best communicator to explain law and procedure, and to increase their legal knowledge.

Yet, when in direct communication with litigants, the court can clearly and effectively

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15 There is a growing literature on the psychology of this interaction, largely based around the "accommodation theory," where perceptions of an official are more favorable when they communicate in a manner that is more in line with the other's way of communicating, or takes a more understanding tone.

16 "Miranda V. Arizona," accessed December 26, 2009, http://www.law.cornell.edu/supct/search/display.html?terms=miranda&url=/supct/html/historics/USSC_CR_0384_0436_ZO.html ; Upheld Rehnquist, Dickerson v. United States (Opinion of the Court), 530 U.S. 428 (U.S. Supreme Court 2000) ; See Saul M. Kassin, "The Psychology of Confessions," review-article, October 21, 2008, http://arjournals.annualreviews.org.ezproxy.library.wisc.edu/doi/abs/10.1146/annurev.lawsocsci.4.110707.172410; "Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: a Comparison of Legal Standards. Jodi L. Viljoen. 2007; Behavioral Sciences & the Law - Wiley InterScience," accessed December 18, 2009, http://www3.interscience.wiley.com.ezproxy.library.wisc.edu/journal/114111004/abstract; Jennifer Woolard et al., "Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach," *Journal of Youth and Adolescence* 37, no. 6 (July 1, 2008): 685–698.

17 Franz Kafka, *The Trial*, 1st ed (New York: Schocken Books, 1998). The main character of the work is subjected to a trial where the law provides more confusion than order.

communicate. In their analysis of law in "everyday life," Ewick and Silbey offer a number of stories of court interactions. They remark on being, "struck by how [one interviewee] accepted the interpretations and conformed to the instructions of each of the legal actors she encountered."[18] Much like communication with the police, people respond when the court speaks. Official communication can be effective, but unless the message is guided by a memorable rule like Miranda, it should not be confused with the law on the books.

Political speech

Because of the assumptions of the adversarial political process government communicators, such as politicians and administrative officials, rarely communicate the law on the books. While newsletters may bring information about newly passed laws directly to constituents, most governmental messages are mediated through communicators like the news. Politicians directly addressing their constituency might remark generally on a legislative position, but likely do not express the nuance of the law. Instead, the mental shortcuts of political position may take the place of an accurate legal message.

Because of the often adversarial nature of political communication, messages are crafted to ensure that only "officialized" news is presented from the perspective of those involved in the policymaking process.[19] Summarizing strategic political communication, Bennett describes four goals of political speakers' messages. Each message must be:

> 1. shaped to have a simple theme, 2. salient so as to successfully compete with other messages in the media landscape, 3. credible to be accepted by the desired audience,

18 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998), 7.

19 W. Lance Bennett, *News: The Politics of Illusion*, 5th ed, Longman Classics in Political Science (New York: Longman, 2003), 126.

and 4. correctly framed to be satisfactorily repeated by journalists.[20]

Bennett's goals reflect the negotiated or adversarial nature of political speech, and thus the minimal communication of the law on the books.

Government media

Governmental agencies have their own communication systems which largely fall under their control. Government web sites have become easy distribution mechanisms for disseminating information, and even for gathering responses from the public.[21] Websites and e-mail lists have worked well for communication directly to lobbyists and interest groups, who might focus their attention on one specific committee or administrative body. While governmental media provides greater access to information, in many cases the distribution channels are privately held, thus creating the potential for mediating legal messages.

The demand for openness in government information is growing, both in the public and in business.[22] Given the difficulty of navigating publicly available data, citizen-created websites like govpulse.us allow anyone to monitor issues of interest.[23] Growing out of the online social network created for Barack Obama's campaign, the Open Government Initiative attempts to democratize government data. A few government sites, such as usaspending.gov, have been created to respond to the demand for easily navigable data and for open APIs (or "Application Programming Interface,"

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20 Ibid., 130–135.

21 For example: the Supreme Court <http://www.supremecourtus.gov/>, Federal Communications Commission <http://www.fcc.gov/>, or even local government <http://www.cityofmadison.com/>.

22 Doris A. Graber, *Mass Media and American Politics* (Washington, D.C.: CQ Press, 2010), 248–249.

23 Chris Lefkow, "White House Launches Open Government Initiative," *Agence France Presse*, May 21, 2009, English edition; David Talbot, "White House 2.0 A Group of Boston Geeks Helped Barack Obama Turn the Web into the Ultimate Political Machine. Will He Use It Now to Reinvent Government?," *The Boston Globe*, January 11, 2009, Third edition.

which often creates real-time connections to governmental data for external analysis).[24] While courts have operated websites for some time, they have been slower to open up case data, which is still organized by privately held systems such as LexisNexis' "Shepard" and Westlaw's "Keycite".[25] The shift towards greater access brings a possibility for legal documents to shape public opinion, while opening the legal system to greater public scrutiny.[26] The cliche of the "law on the books" is now, slowly, moving to become the "law on the .gov domain." However, privately held services often need to be developed to make sense of governmental data.[27]

Channels such as C-SPAN, the (defunct) Court TV television network, the Congressional Quarterly publication, and the broadcast of local or state proceedings, may be considered to be direct communication from the government.[28] The impact of "gavel to gavel" coverage on the legal system is still not yet clear. For example, some report that C-SPAN has not altered public consensus, yet others report that it has increased the use of the filibuster.[29] While the live viewers of governmental programs are likely a slim audience, the outlets often allow wider distribution through rebroadcast on the news or Internet. Yet, because of the private ownership of the physical or digital media created, many have questioned the ownership of what might otherwise be considered government

24 "USAspending.gov," *USAspending.gov*, accessed May 17, 2013, http://usaspending.gov/.

25 Though technologists outside the government have attempted to force this information open. See: Bobbie Johnson, "Technology: Cracking Open the Courtroom: Free Our Data: Access to US Legal Files Is Being Transformed by a Napster-like Sharing System Called Recap," *The Guardian*, November 12, 2009, Final edition, sec. Technology Project website: https://www.recapthelaw.org/.

26 Daniel M. Filler, "Review: From Law to Content in the New Media Marketplace," *California Law Review* 90, no. 5 (October 2002): 1742.

27 May examples exist in addition to, "Govpulse | About This Site," *Govpulse*, accessed May 17, 2013, http://govpulse.us/about; For example: "GovTrack.us - About," *GovTrack.us*, accessed May 17, 2013, http://www.govtrack.us/about.

28 These qualify as "quasi-governmental" because the content is largely unedited coverage of the government, but the channels are privately owned and operated.

29 Graber, *Mass Media and American Politics*, 248; Jr. Franklin G. Mixon, M. Troy Gibson, and Kamal P. Upadhyaya, "Has Legislative Television Changed Legislator Behavior?: C-SPAN2 and the Frequency of Senate Filibustering," *Public Choice* 115, no. 1–2 (April 2003): 139.

documents. Most notably, the creator of an open government website called for C-Span to allow freer use of its videos, following widespread internet distribution of comedian Stephen Colbert's 2007 Presidential Correspondent's Dinner speech.[30] C-SPAN relaxed its fair use policies because of public pressure, but maintains a claim of full copyright in the congressional footage they gather.[31] More importantly, the control that organizations like C-SPAN exercise over the dissemination of government messages gives rise to another example of mediated legal communication.

Signs

Signs are an overt notice of a rule seen at the moment it is most relevant, and thus may be considered one of the clearest means of legal communication.[32] Signs with content controlled by law are largely seen to be effective. The perception of effectiveness likely exists because signs are placed in the exact context to which a given law applies. Yet, it has been shown that the cognitive processing of a sign's message can impact its reception. Instead, controlling behavior through the structure of the road has been found to be superior to signs. Signs provide one example where structural legal communication may be preferable to law expressed as a message.

Bazire and Tijus describe road signs as consisting of three components: "(1) the iconic transcription of (2) a legal message about categories that is displayed and has to be interpreted (3) in context," yet their description misses one important legal distinction.[33] By being immediately visible and understandable to all registered drivers, it is difficult to claim "ignorance of the law." Therefore,

30 James Fallows, "Another Win for Carl Malamud (or: News You Won't See in the May 2007 Issue of the Atlantic)," *The Atlantic*, accessed January 2, 2010, http://jamesfallows.theatlantic.com/archives/2007/03/another_win_for_carl_malamud_o.php.

31 C-Span, "C-Span Takes Lead In Making Video of Congressional Hearings, White House and Other Federal Events More Widely Available to the Online Community," *C-SPAN: C-SPAN PRESS AREA*, accessed January 2, 2010, http://www.c-span.org/about/press/release.asp?code=video.

32 Many contracts, such as shrink wrap or "click wrap," fall under this category as well.

33 Mary Bazire and Charles Tijus, "Understanding Road Signs," *Safety Science* 47, no. 9 (November 2009): 1233.

in the complex landscape of driving, at least everyone theoretically knows the rules of the road.

Bazire and Tijus' propose five ways that drivers must interpret road signs, which may be considered precursors to legal knowledge in a driving situation:

> (1) the legal information that motives (*sic*) the road sign, (2) the semiotic transcription, (3) the location of the road sign in the road environment, (4) the contextual information, and (5) the operational information about the realization of the task at hand.[34]

The authors note that it can be difficult to consider all five characteristics simultaneously.

Bazire and Tijus' conclusions demand attention to factors outside of the law – factors which are central to this dissertation. First, they argue that "natural categories do not match with legal categories."[35] Stated differently, the mind's attempt at categorization of a given environment does not always match to how the law would have us approach it. As the next chapter will describe, the mental categorization process is crucial for making sense of the world. Thus, the experience of a sign may not match the cognitive structures necessary for understanding its message. Second, Bazire and Tijus find that legal knowledge decreases as people get older, but is replaced with more practical information as drivers become more experienced. As the memory of drivers' education dims, we begin to rely less on legal rules, and more on past experience. Finally, they find that the physical context of a sign plays a large role in the decision-making process. They state:

> When road sign, context and law combine and adjust themselves together, there is no ambiguity and road users easily comply their behaviors to the law prescriptions, as they should do without any concessions. But when only one level does not provide information that converges with the two others, it can lead to misunderstandings or to the simple omission of the information prescription.[36]

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34 Ibid.
35 Ibid.
36 Ibid., 1239–40.

Individuals think of law differently in different settings, and our understanding of law evolves over time. It would appear that most do not approach daily situations "legally." Our brains do not come to a situation with the law in mind, as there are too many other things to consider. Signs may not be the clear expressions of law they are imagined to be.

Tom Vanderbilt summarizes the effectiveness of signs in controlling behavior on the road. He explains one humorous situation involving moose warning signs in Newfoundland. One stretch of road experienced an abnormal number of car/moose collisions, as well as accidents involving motorists who stopped to take pictures of live moose.[37] The signs erected on the scene were equally captivating to motorists, and soon accidents rose as they stopped to take pictures of the signs as well. Similarly, a special animated deer warning sign in the United States was found to increase deer deaths. Researchers found the most effective intervention was to place a deer carcass near the animated sign.[38] Though signs give succinct legal guidance within an exact context, the messages are often misconstrued.

Vanderbilt also describes the work of Dutch road engineer Hans Monderman, whose controversial "woonerven" or "shared space" style of urban planning attempts to control driver behavior without signs. Monderman asserts a belief in two kinds of space: the traffic world, which is impersonal, standardized, and efficient; and the social world, where the car is treated as a guest.[39] A shared space heightens driver awareness by creating congestion, or a potentially dangerous mix of cars and pedestrians. Woonerf (woonerven, pl.), loosely defined as "living yards," envisions streets as

37 Tom Vanderbilt, *Traffic: Why We Drive the Way We Do (and What It Says About Us)*, 1st ed (New York: Alfred A. Knopf, 2008), 187.
38 Ibid., 186.
39 Ibid., 191.

"rooms" where drivers are very mindful of "decor" as they drive through.[40] A woonerf is practically achieved by narrowing roads, adding trees and playgrounds, to force drivers to interact "eye-to-eye" with their surroundings.[41] Regulating behavior through woonerven is decidedly structural, in the sense of creating the "code" of the streets, and the results are striking. Accident rates typically fall and property values rise, as people are attracted to the more intimate spaces.

While signs may appear to be the easiest method of regulating behavior on the road, their effectiveness must be questioned. It is also clear that changes in the structure of a place may work better than signs. Still, signs play an important function in communicating law in specific situations.

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Authorities, politicians, government media, and signs make up the majority of official legal communication. Yet, it should be clear that each either communicates through an intermediary, or communicates ineffectively. The ineffective communication may be due to inadequate prior knowledge on the part of the recipient, or a confusing message. Yet society has a democratic need for government speakers to communicate law. The limits of government communication are of primary importance in the greater landscape of legal communication. Perhaps these limitations also suggest some ways that the government might communicate law with greater impact – which would be a worthwhile goal.

The workplace

Despite the large amount of case and legislative law that impacts the workplace, there is no

40 Ibid.

41 Tom McNichol, "Roads Gone Wild," December 2004, http://www.wired.com/wired/archive/12.12/traffic.html.

direct line of communication from the law on the books to employers. Fortunately, there is a great deal of research on the subject of workplace legal communication. This section will show that workplace laws have the best chance of being recognized when they take the form of clear rules or when they align with preexisting norms. This section will also trace the differences between professionals who are responsible for knowing the law, and blue or gray collar workers who are often subject to it. Both groups need legal information if they are to effectively carry out their job, or to assert their rights in the workplace. Yet in most cases, norms appear to be more powerful than law for guiding behavior.

Professionals and white-collar workers

Professionals are workers who typically have a higher degree of education and more responsibility in their jobs. Professionals typically have more exposure to the law, through schooling in the norms and laws governing their profession. Professionals also carry more legal liability than other types of workers. This section will focus on two professions: journalists and psychologists. I will describe a study of journalists who were sued for privacy invasion, as well as studies of journalists' conceptions of law and ethics. In the psychologist example, I will describe the communication of a legal decision that is well known within the psychology community – *Tarasoff v. Regents of the University of California*.[42] In addition to norms, I will contend that heuristics can be an effective way to distill legal rules to guide behavior. Further, the difficulty of updating knowledge of changing legal rules will be revealed.

42 Tarasoff v. Regents of University of California, 17 Cal.3d 425 (Supreme Court of California 1976).

Journalists

As professionals, journalists must contend with legal issues on a daily basis. While they may receive some training, such as an undergraduate course in media law, research finds their legal knowledge to be lacking. The minimal knowledge stems in part from the fact that journalism is not a formal profession that requires practitioners to be qualified by an official body. For example, one journalist stated that he got his "education...on the streets," and never took a law class.[43] A street education fits the profession well, as much of the job is dictated by organizational routines which "are the basic rules and practices that journalism schools and news organizations [use to] train reporters and editors to follow in deciding what to cover, how to cover it, and how to present the rules of their work."[44] Reporting becomes standardized through frequent cooperation with news sources, work routines within the news organization, and daily information sharing among fellow reporters.[45] In some organizations, law may not receive much attention. In following a routine, a journalist might miss the details of a situation that could become legally troublesome.

While journalist knowledge of the law is low, reporting requires some familiarity with libel, privacy, and other laws of mass communication. Journalists find out about the boundaries of law through the process of "lawyering," where a lawyer vets a story.[46] Yet, even the lawyering process has been found to involve decisions of ethics as well as law.

Ethics researchers created useful categories for understanding the interaction between law and ethics. The "separate realms" approach sees law and ethics existing in separate spheres, whereas the

43 Paul Voakes, "What Were You Thinking? A Survey of Journalists Who Were Sued for Invasion of Privacy," *Journalism and Mass Communication Quarterly* 75, no. 2 (Summer 1998): 384.
44 Bennett, *News*, 162.
45 Ibid., 165.
46 Paul S Voakes, "Rights, Wrongs, and Responsibilities: Law and Ethics in the Newsroom," *Journal of Mass Media Ethics: Exploring Questions of Media Morality* 15, no. 1 (2000): 39.

"correspondence model" finds law and ethics as existing in harmony. A survey of journalists found both models to be present, yet neither did a good job of describing how journalists think on the job. Voakes suggests a "responsibility model," whereby there is a close correspondence between law and ethics, but law acts as a subset or sovereign of ethics.[47] While organizational and professional norms can hinder the responsibility model, Voakes saw responsibility during the "lawyering" process. Journalists, editors, and lawyers discussed issues as a team, and the law did not always impose on what could be an ethical decision. Laws and norms do impact decisions in the newsroom, but when there is a decision to be made, a legal expert is often involved.

When it comes to quick decisions by individual journalists, Voakes found in a different study that ethics were one element in a "hierarchy of social influences" that might affect media content.[48] However, these other influences, such as organizational policies or competition from other media outlets, might also support legal and ethical reporting practices. The study of journalists sued for privacy invasion found the law was not viewed as influential to their daily work, yet "organizational structures often helped raise a journalist's anticipation of legal problems."[49] Routines in a news organization may be one way to give reporters a sensitivity to potential legal or ethical problems.

While the study found that the majority of respondents were "blissfully unaware that ethical and legal questions had arisen" prior to their being sued, it was clear that most issues were considered normatively, rather than instrumentally.[50] Heuristics, such as "public figure," were one way that many journalists were able to become aware of potential legal problems. It is not clear if these mnemonics were learned in journalism school or passed down from veteran journalists, but their impact was

47 Ibid., 40.
48 Voakes, "What were you thinking?," 380.
49 Ibid., 385.
50 Ibid.

clear.

Between the two studies, it is apparent that heuristics and an organizational structure which promotes discussion of legal and ethical issues can be key to raising journalists' awareness of potential legal problems. While journalists are not professionals in the formal sense, "professionalism" likely plays a large role in keeping reporters mindful in their reporting practice. It is also clear that norms and ethics perhaps play a greater role than law in the daily work of journalists.

Psychologists

The legal education of psychologists can be summarized in the context of a widely-known case, which dictated different standards at different times in the legal process. It reveals not only the power of clear heuristic standards, but also the difficulty of changing that knowledge. Studies reveal the difficulty of informing professionals about shifting legal standards over time.

The *Tarasoff* case illustrates the impact of changing standards. Prosenjit Poddar fell in love with Tatiana Tarasoff in the fall of 1968, but his feelings were unrequited. After he learned of this, Poddar became despondent and considered killing Tarasoff. The next summer, Tarasoff left the country and a psychologist determined Poddar to be a paranoid schizophrenic after he admitted thoughts of killing Tarasoff. The psychologist recommended that he be committed, but after being held for a short time, Poddar was released. When Tarasoff returned at the end of the summer, Poddar had already stopped seeing his psychologist and carried out his plan to kill Tarasoff. The issue before the court was whether Poddar's psychologist had a duty to warn Tarasoff or her family of the threat. The case was heard twice by the California Supreme Court. The original California Supreme Court ruling held that therapists have to "use reasonable care to give threatened persons warnings." The

California Supreme Court later re-heard the case and held that therapists have to use "reasonable care to protect" intended victims. The difference between the two standards is that the first standard requires an active duty to contact potential victims to warn them of danger ("duty to warn"), whereas the second only requires that therapists take some measure to protect potential victims ("duty to protect").[51]

Given that the "duty to protect" standard does not provide a bright line rule, research in the 30 years since the decision reveals poor understanding among therapists.[52] While most therapists are not bound by the California standard to take "reasonable care to protect" intended victims, psychologists around the country believe that the "duty to protect" standard applies to them. In a 1983 survey of 2,875 psychologists from around the country, Givelber, et. al. found that most therapists learned about the case from professional sources, such as organizations and literature, as well as in professional social networks.[53] In fact, the authors were concerned that the case had so polarized respondents, that they might feel compelled to follow appropriate behavior instead of law. Careful survey design was believed to minimize interpreting the survey as gauging appropriate behavior, yet it highlights an important point – separating knowledge of what the law says from what one believes it should say can be a difficult process for those without legal training.

Professionals constantly face the problem of learning about changes in the law. Givelber and colleagues ask a crucial question in regards to how therapists learned of the Tarasoff decision: "…if the court's ruling was to enhance public safety, someone had to tell the therapists about their new

51 Many therapists will, for example, contact the police to check up on the patient and to contact a potential victim. Rules on patient privacy further complicate these interactions.

52 For example, it causes one to wonder what a "reasonable" therapist might look like, or what constitutes "reasonable care" or "protection."

53 Daniel J. Givelber, William J. Bowers, and Carolyn L. Blitch, "Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action," *Wis. L. Rev.* 1984 (1984): 454.

obligation and how to meet it. Who filled this role?"[54] While the Tarasoff decision applies only to therapists practicing in California, the law has influenced therapist behavior in states where the "duty to protect" may not apply. Givelber, et. al. found that 94% of California psychiatrists believed that the law applied to them, while only 18% did in other states. In a subsequent study, Pabian, et. al. found that the misperceptions about the standard of law had grown in many states. For example, a staggering 70-90% of therapists surveyed in Ohio, Michigan, New York, and Texas incorrectly explained their state's laws for "Tarasoff-type situations."[55] Further, a large number of those surveyed had high confidence that their understanding of the applicable state rules was correct. That such a large majority could be confidently wrong about the legal standard in their home state reveals the stark the gap between the law on the books and the law in action. Perhaps the more direct "duty to warn" from the first ruling became engrained in the norms of psychologists.

Pabian and her colleagues contend that a number of factors contribute to the knowledge gap regarding the laws directing therapists to protect potential victims. They point out that the hearing and rehearing by the California Supreme Court sent two different messages – first being duty to warn and the second being duty to protect. It can be difficult to "unlearn" a clear rule like the initial standard – especially when the decision had been so controversial. The degree to which the earlier standard penetrated the psyche of therapists is shown by the fact that "Even PsycINFO [a common database in the field of psychology] uses 'duty to warn' as the appropriate search term when seeking data on psychotherapist responsibility with potentially dangerous clients."[56] Further, the authors note that the lack of a clear legal standard can be difficult for non-lawyers to apply.

54 Ibid., 446.

55 Yvona L. Pabian, Elizabeth Welfel, and Ronald S. Beebe, "Psychologists' Knowledge of Their States' Laws Pertaining to Tarasoff-type Situations.," *Professional Psychology: Research and Practice* 40, no. 1 (February 2009): 10.

56 Ibid., 9.

Pabian et. al. lament that continuing education has not helped increase psychologists' knowledge of the law, and recommend that more time studying law in graduate school might be helpful. Additional legal education is perhaps an unreasonable expectation, as developing a legal approach takes time, which psychologists could perhaps better spend in learning how to treat their patients. While schooling is one form of legal communication, the law's constant change and vague standards can be difficult for the uninitiated to follow. Givelber explains the process and difficulty of learning in a way that any legal instructor might appreciate:

> Traditional legal education begins with the professor calling upon a student and asking that student to "state the case." The beginning law student typically responds by attempting to summarize the judicial decision, and almost inevitably misstates the relevant facts, the legal issue, the actual decision, or the reasoning. Typically, the student misstates all four. No law-trained person, whether judge, lawyer, professor, or even second-year law student, finds this surprising. After all, judicial decisions are replete with technical language, do not serve as models of clear expression, and often appear elliptically, if not illogically, reasoned. After a few months of repeating this process, law students "catch on"; they finally get to the point where they can read a case and explain the relevant facts, the legal issue presented, the court's reasoning, and, ultimately, its decision. If it takes considerable training and effort for neophytes to be able to "state a case," then we should not be surprised if those not trained in law, in this case, psychotherapists, might also "misstate" the *Tarasoff* case.[57]

Teaching legal reasoning takes time, and is likely more involved than one might expect psychologists or other professionals to devote. Certainly, learning to reason through a complex case like Tarasoff would take longer than one continuing education course. Differing standards among states and frequent changes make the duty to potential victims a difficult issue to follow, even for an attorney.[58] Yet individuals in other professions often do not have such robust communication and education opportunities.

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57 Givelber, Bowers, and Blitch, "Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action," 483.

58 For examples of conflicting state laws, see Damon Muir Walcott, Pat Cerundolo, and James C. Beck, "Current Analysis of the Tarasoff Duty: An Evolution Towards the Limitation of the Duty to Protect," *Behavioral Sciences & the Law* 19, no. 3 (2001): 329.

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Professionals have the advantage of long, and continuing, education in which to learn about the law. Many also benefit from readily available sources of legal help. Yet the responsibility for knowledge of how the law treats relationships with clients and sources, as well as one's own practice, rests on the shoulders of the professional. It appears that heuristics which take the form of memorable and coherent rules (such as "duty to protect" or "inciting or producing imminent lawless action") are the easiest for professionals to follow, but also might be the most difficult to change. The complexities of law are difficult for professionals to grasp in the course of their work, but may be even more difficult for those without such great resources.

Blue and gray collar workers

Experiencing the uniqueness of rules and norms in a given workplace is common for gray or blue collar workers.[59] Processes, rules, assembly lines and other controlling factors bound what is seen as acceptable in a particular work situation. The bounding process makes up the norms of a workplace. Norms have become confused with law in the minds of many workers. To some employers, the law is an imposition on the order of the workplace society and a potential disruption of processes that promote productivity. To counter employer norms, employees need legal information to use the law to change work experiences. Yet, the balance of norms from work and within ones home life inform the choices that workers make regarding the law.

In a study of "at will" employment law, Pauline Kim found evidence that workers do not distinguish law, norms, and internal rules. At will employment dictates that employers and employees can terminate their relationship at any point. Unless there is a clear agreement between

59 "Gray collar" is a term that has come to signify non-management workers in service industries.

the two parties, or a state law setting terms other than at will employment, the relationship is seen as a contract which either party can exit.[60] Kim cites a range of economic and rational actor literature to support the idea of employment as contract, but argues instead that norms can explain most misunderstandings of workplace law.

By surveying workers in three states about their knowledge of the law, Kim found remarkable consistency between the states and workplace conditions. Beliefs about legal protection were resistant to change. None of the variables examined which were predicted to have a positive influence on legal knowledge – knowledge that might run contrary to a workplace norm – had a measurable effect.[61] Kim explains these findings as the result of an overriding norm of fairness. She argues that her study confirms Ellickson's finding that new legal knowledge is often rejected because of the cognitive dissonance with established norms.[62] She found employees would not acknowledge "at will" disclaimers that employers explicitly stated in their workplace manuals. She explains:

> To the extent that the respondents in this study did focus on the disclaimer language [in employment materials], the close link between their views of the law and deeply held normative beliefs likely affected their willingness to view a mere statement by an employer, disclaiming its obligation to abide by those norms, as effective. Put differently, workers' strong fairness norms may lead them to assume that the rule forbidding discharge without cause is a mandatory one that employers cannot contract around.[63]

Despite efforts of communication, the fairness norm could not be displaced. While the rational actor model predicts that new information and experience will correct misunderstanding, the study shows that even when correct information is explicitly communicated, it sometimes cannot counteract a

60 Pauline T. Kim, "Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge," *U. Ill. L. Rev.* 1999, no. 2 (1999): 449.

61 Ibid., 476.

62 Ellickson's study of cattle ranchers will be described in greater detail in the methods section. Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass: Harvard University Press, 1991).

63 Kim, "Norms, Learning and Law," 497.

strong norm. In the workplace, law has difficulty overcoming the stronger messages individuals receive from norms.

Albiston's research of employee knowledge of the Family and Medical Leave Act (FMLA) similarly found a strong "good worker" norm. The FMLA states that workers can take time off for serious health conditions, to care for a sick family member, or to care for a new child. The expectation that workers continue to work despite sickness or hardship is contrasted by the alternative of being labeled a "slacker."[64] The "slacker" norm was uncovered in telephone interviews with workers who had a conflict over their termination from a job, but did not pursue the problem in court. Albiston found that:

> Employers communicate this norm through concrete practices such as passing over leave-takers for promotion, transferring (or refusing to transfer) them, cutting their hours, or assigning them undesirable work. These practices mark those who take leave as poor workers, despite legal rights to leave.[65]

The norm of being a "good worker" was found to be in direct conflict with the norm of being a "good mother."[66] The conflict between being a good worker and mother is somewhat ironic, given that new mothers are one group the law explicitly targeted. The normative conflict likely expresses itself in personal and complex ways. For example, a mother might be torn between feelings of duty to her job and child, where a desire to avoid workplace conflict exists despite the law's support of familial duties. While there likely would be no statement in an employee manual about any consequences of taking FMLA leave, seeing what had happened to coworkers or dealing with a disappointed boss may send a stronger message than that of the law.

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64 Catherine R. Albiston, "Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights," *Law & Society Review* 39, no. 1 (March 2005): 36.

65 Ibid.

66 Ibid., 33.

Worker norms must also contend with internal processes or rules that a workplace has created to "shape how workers understand conflict," which can make a rights violation seem invisible.[67] The structure that employers impose might both limit what workers can do and what they *think* they can do. Kim found that employees who read manuals or hiring letters which clearly explain a state's law persisted in the belief that firing for a reason such as cost savings was unlawful. Other individuals who were promised permanent employment after a probationary period, "believed a pure cost-saving discharge to be unlawful than when the same discharge occurs after the employer has clearly stated the at-will nature of the relationship."[68] Individuals appear to be resistant to explicit explanations of the law.

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Workplace norms appear to be uniquely powerful for blue and gray collar workers. Even in cases where the law is explicitly described, norms can override legal concerns. Despite greater access to legal information, professionals benefit from the presence memorable rules. Yet, difficulties exist in communicating legal change. Aside from heuristic rules, the effectiveness of legal communication in the workplace appears to be minimal.

Public relations

The inwardly focused legal communication of businesses to their employees contrasts with the external communications efforts of public relations. Businesses, along with other special interest groups, are invested in communicating their desired vision of law to the public and legal system.[69]

67 Ibid., 25.

68 Kim, "Norms, Learning and Law," 460.

69 One example of such a special interest group is the Electronic Frontier Foundation, an organization that advocates on issues of technology law. Electronic Frontier Foundation, http://eff.org/.

Businesses use legal public relations (PR) to influence public perceptions of law, to change public behavior, or to suggest a change in policy. By stating what the law should be, or how it should be understood, businesses work to frame the law in a particular way.

The Recording Industry Association of America's (RIAA) lawsuits against individual music downloaders is perhaps the best-known legal public relations campaign. Evidence of the RIAA's effective efforts of legal education indicates the resources invested have benefitted the industry. The recording industry's first attempts to frame the public debate about copyright took the form of a public relations campaign to "educate" consumers about the dubious nature of music downloading.

> Before pursuing individuals, the association sponsored antipiracy television and radio commercials; sent four million instant messages warning people using KaZaA, the most popular file-sharing software, that they were violating copyright law; and published an advertisement in The New York Times and Entertainment Weekly that began, "Next time you or your kids 'share' music on the Internet, you may also want to download a list of attorneys."[70]

In 2003, the RIAA won a court battle to force internet service providers (ISPs) to turn over the names of subscribers who were believed to be involved in file sharing.[71] While they brought suit against tens of thousands of individuals, the RIAA changed their strategy in 2008.[72] The RIAA fully admits the lawsuits were filed to communicate a message to internet users that file sharing is against the law. After sending almost 1,000 subpoenas, the president of the RIAA, Cary Sherman, remarked: "I guess people didn't take it seriously, but we really are very serious about this. . . We want the message to get across to parents that what their kids are doing is illegal. We are going to file

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70 Amy Harmon, "Subpoenas Sent to File-Sharers Prompt Anger and Remorse," *The New York Times*, July 28, 2003, Late ed edition, sec. C1.

71 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (New York: Penguin Press, 2004), 205.

72 "RIAA V. The People: Five Years Later," *Electronic Frontier Foundation*, accessed May 20, 2013, https://www.eff.org/wp/riaa-v-people-five-years-later.

lawsuits."[73] The degree to which the public has accepted the message that file sharing is illegal, however, has yet to be established.

Some public relations experts would have advised against the legal strategy of the RIAA. PR Week, in fact, called the initial round of lawsuits the "initial signs of a PR blunder."[74] Academics in the field of public relations also decried the lawsuits. One public relations expert remarked:

> In terms of PR, this is the worst thing they could've done because it just further makes the case for people wanting music this way. It's never wise to launch a PR campaign in response to a business problem.[75]

At the same time, traditional public relations efforts of the music industry have been successful at getting into print, perhaps to the detriment of the wire services. A popular, but admittedly anti-copyright, technology blog argued that stories published by the Associated Press and Reuters news services in 2007 reflected the RIAA arguments too closely.[76] The RIAA was also named the "worst company" of the year in 2007 by a consumer advocacy website.[77]

Yet evidence exists that the RIAA's tactics have been working. While some report that the industry has "alienated many of its fans," some argue it is possible that "P2P activity would be at least at the level that it is today … [and] the lawsuits are helping to change public attitudes and spur stakeholders to implement long term solutions to file- sharing."[78] Two Pew "Internet and American Life" studies operated as a sort of pre- and post-test to the RIAA lawsuits. The second survey found:

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73 Harmon, "Subpoenas Sent to File-Sharers Prompt Anger and Remorse."

74 Sara Calabro, "RIAA Lawsuits - Music Industry Mistakes Its Lawsuits for a PR Maneuver," *PR Week*, September 22, 2003 quoting Paul Argenti, professor at Dartmouth's Tuck School of Business.

75 Ibid.

76 Mike Masnick, "Since When Does The Associated Press Simply Reprint RIAA Propaganda? | Techdirt," *Techdirt*, May 14, 2007, http://www.techdirt.com/articles/20070514/022505.shtml. As of 1/1/10, Techdirt was in the top 150 bogs as rated by Technorati.

77 Ben Popkin, "Worst Company In America 2007: The Final Big Board," *The Consumerist*, March 19, 2007, http://consumerist.com/2007/03/worst-company-in-america-2007-the-final-big-board.html.

78 Kristina Groenings, "Costs and Benefits of the Recording Industry's Litigation Against Individuals," *Berkeley Technology Law Journal* 20 (2005): 591–2.

> The percentage of online Americans downloading music files on the Internet has dropped by half and the numbers who are downloading files on any given day have plunged since the Recording Industry Association of America (RIAA) began filing suits in September against those suspected of copyright infringement. Furthermore, a fifth of those who say they continue to download or share files online say they are doing so less often because of the suits.[79]

While the statistics since then have not been as stark, the record industry as a whole is selling fewer albums in 2009 than they were a decade before.[80] Clearly, the deterrence provided by the lawsuits, perhaps in combination of a difficult economic period, have had an impact on both downloading and the industry as a whole.

The decrease in downloading may also owe some of its success to other educational efforts of the RIAA. Working with educators in the K-12 arena, the RIAA has created a curriculum for grades 3 and up. A few materials created by the RIAA are available for educators who teach younger children, and the federally reviewed i-Safe curriculum is recommended for older students.[81] The RIAA has also lobbied congress to force universities to include music subscription services in student tuition fees.[82]

The RIAA's public relations efforts may be impacting downloading, but it arguably has come at a cost to the recording industry's reputation. From the standpoint of communicating law, the RIAA lawsuits have been successful. Not only is it now widely known that downloading music is a

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79 Mary Madden, "The Impact of Recording Industry Suits Against Music File Swappers," *Pew Research Center's Internet & American Life Project*, January 2004, http://www.pewinternet.org/~/media/Files/Reports/2004/PIP_File_Swapping_Memo_0104.pdf.pdf.

80 Mary Madden, "The State of Music Online: Ten Years After Napster | Pew Research Center's Internet & American Life Project," *Pew Research Center's Internet & American Life Project*, accessed January 2, 2010, http://www.pewinternet.org/Reports/2009/9-The-State-of-Music-Online-Ten-Years-After-Napster.aspx.

81 Recording Industry Association of America, "Music Rules," 2009, http://www.music-rules.com/; Note the fee to access the curriculum and that instructors are to be certified to teach it. "i-SAFE Inc.," accessed January 2, 2010, http://www.isafe.org/; Note that a study by the Department of Justice found the curriculum had little impact. Susan Chibnall et al., *I-SAFE Evaluation*, April 2006, http://www.ncjrs.gov/pdffiles1/nij/grants/213715.pdf.

82 Sara Lipka, "Recording Industry Proposes 'Tax' on Students.," *Chronicle of Higher Education* 55, no. 17 (December 19, 2008): A9.

violation of copyright, but many who otherwise might not be interested in law have sought legal information to better understand the issue. Perhaps unfortunately for the RIAA, the strategy of legal education by lawsuit has created a galvanized public who care deeply about copyright.

Another example of legal public relations was the push by insurance and other industries for tort reform. Daniels explains how, "In the middle 1980s, insurance trade groups, insurance companies, and other groups interested in reform began exploring public views towards civil litigation through national public opinion polling."[83] He further argues that what was initially a public relations campaign has become a part of our mass culture. Daniels argues through analysis of public opinion polls that a large number of print ads throughout the 1980s and 90s may have changed jury perceptions of tort law and ultimately changed the outcome of litigation.[84] The rhetoric has also found its way into the news. In a content analysis of major newspapers, Haltom and McCann found that tort reform themes are widely circulated.[85]

When compared to the efforts of the legal system and traditional media, the efficacy of legal public relations is surprising. The success may be due to the greater monetary resources that businesses put behind a PR campaign. Perhaps the success also stems from greater acceptance to communications which are framed as persuasive arguments, rather than "the law." It may be argued that the perspectives expressed in legal communication via public relations mediates the law on the books. While the government may have difficulty notifying the public of laws, providing legal information to the public can be a good investment when it suits a business' interest. Examining how

83 Stephen Daniels and Joanne Martin, "The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiff's Lawyers," *DePaul L. Rev.* 50 (2001 2000): 462.

84 Ibid., 466–472.

85 William Haltom and Michael J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2004), 171.

legal public relations alters the public's view of law and mediates the law on the books is an area worthy of further research.

Popular and news media

Popular entertainment and the news media at times portray misleading legal messages. The nuance of the law and time involved in the legal process often do not translate well to entertainment. As with the other mechanisms of legal communication, entertainment and news media both contribute to informing the public about the law, while at the same time mediating the message and providing less than accurate legal information.

Popular media

Law in popular media, from television shows like *Law and Order* to crime novels, communicate legal messages – and a rich literature of analysis on the topic has developed in the last thirty years. It is important to remember that popular media is written to be entertaining. Dramatic themes and exaggerations make a story worth watching, and thus dictate the form of legal stories. Yet, there are truths about the legal system mixed in with the drama, and popular visions of law are a source of legal information for a majority of people. One study, for example, found that soap opera fans specifically mentioned the television shows as a source for legal information.[86] Yet, there are many ways that popular culture sends a skewed vision of the legal system.

Entertainment tends to misrepresent or distort the ways that law works in society – especially in the area of procedure. Programming frequently shows arrests, confessions, and convictions, with little attention to process. Macaulay argues entertainment:

86 Anthony Chase, *Movies on Trial: The Legal System on the Silver Screen* (New York: New Press, 2002), 558.

> ...presents important issues of civil liberties in distorted ways. Often the audience knows that the villain committed the crime, and we have no reason to worry about mitigating factors. We are the eyewitnesses, and matters are clear cut. Trials would be a waste of time. Television crime is solved by killing or capturing the guilty party. Leading characters often administer retribution on the spot.[87]

Additionally, many shows contain images of criminals being acquitted because of procedural errors and "hiding behind civil rights," where a bad guy with a slick lawyer is acquitted because of a legal technicality. Such portrayals might cause some to question the legitimacy of the legal system, which may not be surprising as procedure does not often make an engaging storyline.[88]

The way that the legal system works along with the roles of actors like judges and lawyers are also frequently misrepresented. Popular media often portrays legal actors as having a great deal of power, and there are more images of legal professionals than of other professions.[89] Images of powerful characters might also be thought of as a broader signal of who the authorities are within a culture.[90] Chase argues that television highlights power, and shows legal professionals as often exerting their will over others. Finally, popular media "misrepresent[s] the nature and amount of crime in the United States," perhaps creating a culture of fear that is greater than the facts warrant.[91]

Popular culture, or the "norms and values held by ordinary people," might be considered a reflection of "popular legal culture," whereby images of law in popular culture are largely informed by the norms and prevailing ideas of the general popular legal culture.[92] Friedman aptly explains that, "Popular culture is therefore involved with law; and some of the more obvious aspects of law are exceedingly prominent in popular culture. But of course not all of law. No songs have been

87 Stewart Macaulay, "Presidential Address: Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports," *Law & Society Review* 21, no. 2 (1987): 198–9.
88 Ibid., 199.
89 Anthony Chase, "Toward a Legal Theory of Popular Culture," *Wis. L. Rev.* 1986 (1986): 549.
90 Lawrence M. Friedman, "Law, Lawyers, and Popular Culture," *The Yale Law Journal* 98, no. 8 (June 1989): 1595.
91 Macaulay, "Presidential Address," 197.
92 Friedman, "Law, Lawyers, and Popular Culture," 1579, 1592.

composed about the Robinson-Patman Act, no movies produced about the capital gains tax."[93] In spite of this humorous remark, Friedman stresses that that popular culture and popular legal culture are related.[94]

The influence of law on popular culture, however, may also be bidirectional. Richard Sherwin argues that popular media have driven trial attorneys to present arguments in sound-bytes, and that "…legal spin control has come to be viewed as but another tool in the lawyer's toolbox."[95] Yet, he points out that story-based thinking is different from linear or logical arguments – what makes a good story often is not the soundest argument.[96] A story's need for a tidy ending – one where truth and justice prevail – does not match well with the legal mindset. The feedback loop between popular culture and legal communication, he fears, may have a grave impact on the effectiveness of the justice system. It is odd to consider that the communication of law through popular culture might ultimately change legal system that informs it.

News

News coverage of the legal system has been found in many cases to be lacking in both volume and substance. While research of news coverage of the legal system is still evolving, Darley et. al. found (after cursory research) a lack of newspaper coverage of legislation, and cite Graber & Bower as arriving at a similar conclusion for the courts.[97] News coverage is also unequal between the branches of the Federal government. Perhaps because he is a single speaker, the President receives the

93 Ibid., 1588, though this could perhaps change following the economic crisis of the late 2000's, and this has been only recently true for copyright.

94 Ibid., 1593.

95 Richard K Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: University of Chicago Press, 2000), 147–8.

96 Ibid., 42.

97 Darley, Carlsmith, and Robinson, "The Ex Ante Function of the Criminal Law," 185; S Garber and A. G. Bower, "Newspaper Coverage of Automotive Product Liability Verdicts," *Law & Society Review* 33 (n.d.): 93–122.

greatest amount of coverage, and Senators often enjoy more favorable coverage than Representatives.[98] Nadler argues that gravitating towards stories that have the greatest dramatic effect may inadvertently make the system appear to be unjust. She states:

> A portrayal of injustice in the legal system may cause people to question the integrity of not only the particular law, judge, jury, or attorney portrayed but may also cause them to call into question the integrity of the legal system itself. The cultural influences that lead people to question the integrity of the legal system might also have consequences that emerge behaviorally-that is, people might violate the law more than they would have if they did not question the law's-integrity.[99]

In a detailed content analysis of one such case, McCann, et. al., analyze "the social context and actors that made this seemingly trivial event into a powerful cultural icon."[100] One's being burned by McDonald's coffee is a case that is popularly held to be a hallmark of "what is wrong" in our overly litigious society.[101] They found that newspapers left out complex aspects of the trial, and made few attempts to relay "carefully constructed legal arguments" to the public.[102] Later coverage, captured greater nuance and corrected some errors in coverage, but by this time, the authors believe a small number of early stories had played a role in the construction of legality. McCann, et. al. argue that, while citizens do not passively accept stories of law in the popular media:

> we believe that repeated exposure to a particular story line and normative logic significantly delimits and shapes the cultural repertoire from which citizens construct legal meaning. There is, we expect, considerable lure to law's lore.[103]

These conclusions must be tempered by the fact that the research was a content analysis of news

98 Graber, *Mass Media and American Politics*, 248, 250.

99 Janice Nadler, "Flouting the Law," *Texas Law Review* 83 (2005): 1429.

100 M. McCann, W. Haltom, and A. Bloom, "Java Jive: Genealogy of a Juridical Icon," *U. Miami L. Rev.* 56 (2001): 114 Note this article has been republished as a book chapter in; Haltom and McCann, *Distorting the Law*.

101 The situation even became a storyline on the Seinfeld sitcom (1989-1998), where Michael Richards' character Kramer burnt himself on some hot coffee. Andy Ackerman, "The Maestro," *Seinfeld* (NBC, October 6, 1995), http://en.wikipedia.org/wiki/The_Maestro.

102 McCann, Haltom, and Bloom, "Java Jive: Genealogy of a Juridical Icon," 136.

103 Ibid., 168–9.

reports. The authors' guesses about how the public reacted may be accurate, but further study would be necessary to verify their account. Still, one can guess that the news stories may have had a great impact, such as creating a reluctance to file a lawsuit even when a claim might be actionable.

The impact of news on government is echoed by Cook, who argues that the press should be understood as a government actor because it is "deeply shaped by official sponsorship, subsidies, protection, and legal recognition."[104] While he is critical of journalistic process, Cook addresses the role of the news in communicating what occurs in the courts. He quotes Justice William J. Brennan's assessment of the importance of the news to the judicial system: "[T]hrough the press the Court receives the tacit and accumulated experience of the nation, and … the judgments of the Court ought also to instruct and inspire – the Court needs the medium of the press to fulfill this task."[105] The gap between the importance of news reports and their effectiveness underlines the importance of understanding multiple means of legal communication.

Journalistic routines do not support reporting on law in a substantive fashion, instead reporting on subjects that are more dramatic. Bennett remarks that the Supreme Court receives less coverage than the President, not because it is a lack of information but because:

> the business of the Court, while important, doesn't fit the news bias toward personalized, dramatic coverage. If the media adopted another information format, the Court might share the front pages with the president – a place more in keeping with its constitutional role.[106]

Since a legislative text or court decision lack the drama found in other typical news stories, they receive less coverage.

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104 Timothy E Cook, *Governing with the News: The News Media as a Political Institution*, 2nd ed, Studies in Communication, Media, and Public Opinion (Chicago [Ill.]: University of Chicago Press, 2005), 109.

105 Ibid., 159.

106 Bennett, *News*, 64.

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Stories of law in popular media play an essential role of informing the public about the law on the books and the legal system. Research has found that the ways in which both popular and news media cover the legal system is lacking in both amount and specificity. Yet each is a necessary component of effectively communicating law. Thus, we are left with a conflict between a legal system that needs an external communicators to disseminate its messages, and popular media which ineffectively communicates the law. Popular communications should be understood to filter or mediate legal messages, even though their communication is essential to democracy.

Schools and traditions

Legal communication in school and through religious and ethnic traditions promote both legal and non-legal rules, and can also act as a moral authority. Traditions such as religion or tribal background also might contribute to one's legal (and moral) understanding.[107] The interaction between formal law and tradition is perhaps most pronounced in the process of colonization. Variations in local control over law, as well as the degree to which the law is imposed from the outside, appear to have great impact on the role of law in a culture. The following examples arguably display both successful and unsuccessful means of disseminating legal information.

School

In arguing for an examination of non-legal sources of legal communication, Stewart Macaulay called for researchers to "understand people's knowledge of and attitudes toward the legal

107 While churches in the United States do engage in legal debates, such as that over abortion, little research has been done in regards to how these legal messages are communicated. It is worth noting, however, that their status as religious organizations give their speech added protection under the First Amendment.

system…[formed by] arbitrary exercises of authority by teachers and coaches, episodes of 'Miami Vice,' and morality plays staged by organizations such as the Badgers, Bucks, Brewers, and Packers."[108] He repeated the sociology of education's assertion that schools teach a "hidden curriculum," where civics books offer a "simplified, formal picture of government, courts, trials, lawyers, and police."[109]

Macaulay notes that schools do not foster an understanding of the complex nature of the legal system. Further, he criticizes schools' hidden curriculum for not encouraging students to seek knowledge. Yet, he argues that "just by attending school, students learn something about complying with rules, respecting authority, and coping with bureaucracy."[110] Students also learn about how to break rules and laws: "even without firsthand experience, many learn to disparage cops, lawyers, judges, social workers, and authority in general."[111] Informal education, when compared to formal lessons, perhaps skewed understanding of law early in life. Students certainly learn about the political and legal processes in civics class, yet the material contends with many other lessons about law.

Religion and tradition

Law and rules based in a tradition, such as a religion or tribe, transmit rules and morals, and conceivably law as well. Such institutions involve a lifelong connection for many individuals. Some countries integrate religion and law by promoting faith-based arbitration. India, for example operates under a system where secular and "family law," or religious rules, formally coexist.

When the British arrived in India, they found what already was a "functioning legal order."

108 Macaulay, "Presidential Address," 186.
109 Ibid., 192.
110 Ibid., 194.
111 Ibid., 196.

When India later gained independence, a legitimate question emerged over whether to enact a uniform civil code.[112] While the constitution stated that lawmakers would "endeavor" for a uniform code, the chair of the Drafting Committee argued that "...there is no obligation upon the State to do away with personal laws [meaning, religious laws]. It is only giving a power."[113] Ignoring the constitutional provision was a solution to the conflicts between Hindus and Muslims at the time. India thus now has a secular legal system that to some degree enforces Hindu, Muslim, and Christian rules. The compromise arguably made it much easier to promote compliance and lessen the need to communicate an entire new body of legal rules to the population. The modern system also unifies the population into what has been called an "all-India legal culture."[114] However, the system has been criticized due to the weakened equality of legal protection, which some in the population claim to be a human rights violation.[115]

Studies of colonialism also reveal the impacts of imposing external laws on a newly colonized public. Laws were forced on the citizens of Hawaii to a greater degree than in the previous two examples. In her study of the colonization process, Sally Engle Merry describes how the transformation was not a substitution of one code for another, but rather a "negotiation of the meaning and practices of law in various local places over time."[116] She describes the two stages of legal colonization, beginning with missionaries who brought religious law, then followed by a transformation of rules into secular laws. The missionaries realized that the legal institutions they

112 Partha S. Ghosh, "Politics of Personal Law in India: The Hindu-Muslim Dichotomy," *South Asia Research* 29, no. 1 (February 1, 2009): 2.

113 Ibid., 4–5.

114 Marc Galanter, "The Displacement of Traditional Law in Modern India," *Journal of Social Issues* 24, no. 4 (1968): 77.

115 Sabiha Hussain, "Shariat Courts and Question of Women's Rights in India," *Pakistan Journal of Women's Studies* 14, no. 2 (December 2007): 73–102.

116 Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law*, Princeton Studies in Culture/power/history (Princeton, N.J: Princeton University Press, 2000), 35.

created would find greater acceptance if run by the natives, but worried that if they "let go…these institutions would not be run exactly as they should be."[117] Yet, as the secretary of the American Board of Commissioners of Foreign Missions remarked, "Better have the duties performed imperfectly, then not done by them [the natives]."[118] Such a disagreement may sound paternalistic today, yet the colonizers certainly sensed their responsibility for creating a legal institution.

The tension between the colonizer's vision of how a legal system "should" be run, and the need for acceptance by locals, is arguably present in any case of instilling new values in a population. Yet, one might questions how well an institution can serve a public when legal values do not match those of the population. The later transition to secular law in Hawaii brought new uniformity to rules, through printed laws, and effective communication of the law by public trials and hangings. Yet, these rules, and the eventual constitution in 1840, still allowed for "interpretation through existing meanings and practice."[119] One might wonder, after such a strong approach to imposing law, how much existing practice reflected the local's wishes.

Historical examples of radical legal change by colonialism, in addition to legal learning in American schools, reveal a need to acknowledge the greater context which is vital for a law's acceptance. From extracurricular legal learning, to the historical basis of Indian family law, to the application of Hawaiian laws, legal rules backed by social norms stand the greatest chance of acceptance.

117 Ibid., 49.
118 Ibid.
119 Ibid., 81.

Personal interaction & personal media

Personal interaction is not an institution, but it is a crucial component to understanding the many ways that a legal messages are received. Especially in our new media landscape, which includes online social networks, greater legal communication may occur through weak social ties. Social networks are the personal connections we share with others. Whether the communication happens face-to-face or online, the close tie to personal life results in greater impact.

Interpersonal communication has been shown to be an effective means of legal communication. In a study of Norwegian housemaids following the passage of a 1948 law enhancing general employment rights, Vilhelm Aubert found social norms played an important role in compliance.[120] His research also found that the law largely mirrored the prevailing norms and concluded that while there was some knowledge of the law, compliance grew from the law's match with the established "mores" or customs of the time. More importantly, he found that interpersonal communication was crucial to spreading the norms and expectations among housemaids. Aubert's theory, while 40 years old, is insightful and worth quoting at length:

> It seems probable that the norms of the Housemaid Law are to an increasing degree transmitted by word of mouth among friends, acquaintance and neighbours. The sheer passing of time increases the number of occasions for such personal transmission of information. Thus, what originally was a distant message without much psychological force may gradually have been translated into meaningful personal communication within certain milieus of housewives and housemaids. This may very well be a general process in the dissemination of legal information and in the strengthening of the motive to abide by laws.[121]

Aubert's theory that interpersonal communication is so important to strengthening a law's supporting norms has been mirrored in other studies, including those discussed above. As we shall

120 Vilhelm Aubert, "Some Social Functions of Legislation," *Acta Sociologica* 10, no. 1/2 (1966): 99.
121 Ibid., 119.

see in the next chapter, mass communication research has found that a message's agreement with norms fosters greater understanding.

The power of interpersonal communication might otherwise be explained by how much we gravitate towards narrative or story to facilitate our own understanding. Legal sociologists have argued for narrative's importance to law. For example, Richard Delgado argues:

> We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place.[122]

Delgado and others have explained that narrative is key to the framing of an event, which can greatly impact the perception of truth.[123] Perceptions of truth can impact the results of a jury trial.

Yet, stories certainly do much to transmit norms and ideas outside the courtroom. As Aubert recounted, the milieu and rhetorical framework of a message may hold great power over a law's impact. Law may be debated, negotiated, or ordered, depending on the milieu or dynamic of a given family. Harold Scheub, a passionate proponent of stories who collected traditional stories of native South Africans in the 1960s, states "I'm convinced that stories are the way we make sense of the world we live in…[they] are essential to human existence."[124] I would argue that stories of what happens within the legal system which make their way to the public may carry greater rhetorical weight than stories in the news or popular media. Stories regarding a "friend of a friend" might not involve an immediate personal connection, but may be the most memorable or repeated.

Emphasizing rhetoric also suggests that good, or established, storytellers might have more

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122 Letter from Delgado, cited in Kim Lane Scheppele, "Foreword: Telling Stories," *Mich. L. Rev.* 87 (1989 1988): 2075.
123 Ibid., 2085.
124 Harold Scheub, "The Storyteller with Professor Harold Scheub," *You Tube - Research Channel*, accessed December 21, 2009, http://www.youtube.com/watch?v=HRD0DM3Jjfc.

success in communicating legal messages. Sunstein's "norm entrepreneurs" are individuals who speak loudly about the issues of the day, and their speech might carry greater rhetorical weight than the news media.[125] Sunstein states norm entrepreneurs attempt to "change norms by identifying their bad consequences and trying to shift the bases of shame and pride," and that law can act as a corrective force when private efforts fail.[126] When an entrepreneur presents a legal argument, those who find it persuasive may be likely to use a similar argument in conversation. Scholars whose legal work finds a popular audience may be one example of norm entrepreneurs in law.

Blogs and social networking sites like Facebook further extend our capacity to share stories. The technologies share characteristics of both interpersonal communication and popular media, as the interactions extend the reach of a personal message. Sharing a story or news clipping with a large audience has become radically easier via blogs and social networking tools. Additionally, the sharing on social networks often comes with some additional commentary which further personalizes the message. While the networks may only foster socially weak ties, they perhaps work at their best for sharing legal stories and news beyond one's immediate social network.

Personal interactions and personal media are both means to transmit information to a receptive audience. A good story – one that is close to the norms or experiences of the group where it is being told – can be more readily received.

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125 This is actually a very common and long-standing idea. See e.g. Lippman's experts or Boyd's cultural offspring. Walter Lippmann, *Public Opinion* (New York: Free Press Paperbacks, 1997); Robert Boyd, *Culture and the Evolutionary Process* (Chicago: University of Chicago Press, 1985).

126 Sunstein, "On the Expressive Function of Law," 2030–1; One example of this phenomenon was the role Prof. Michael Geist played in rallying public support to kill a recent copyright bill. "Copyright Reform Bill Critics Eye Victory," *CBC News*, December 10, 2007, http://www.cbc.ca/technology/story/2007/12/10/tech-copyright.html.

Conclusion

The law is communicated to the public in a number of ways. I would contend the disconnect between the law on the books and the law in action can be traced to issues in the communication of law. These mechanisms of legal communication do not always portray an accurate picture of the law because each mediates law in some way – perhaps due to the nature of the medium being used, or because of the perspectives of the communicator. Legal communicators also attempt filter the law to their benefit.

The differences between individual, institutional, and collective interpretations reveals the social construction of law. A communicator's interpretation of the law is a natural activity, as the actual text of a law rarely is communicated. Because the law is constructed by communicators, the effectiveness of legal communication appears to vary greatly. The norms of the recipient of a legal message have been found to determine whether it might impact behavior. Yet a simple, heuristic rule of thumb was found to assist in the communication of law. The next chapter will describe how norms and heuristics, in addition to other cognitive factors, provide frameworks for further understanding of the construction of law.

3. Constructing Legal Communication

> Since most people do not read statutory or scholarly legal resources, they tend to learn about the law from secondary sources. Empirical evidence shows that most people learn about law from the media, and specifically, television. . . . because individuals have little personal experience to draw upon, these pop cultural representations obtain an enhanced authority. As these stories of law take root in our psyches, they help construct our understandings of law and justice. For example, as people attempt to make sense of their experiences, they may reference these as templates, superimposing their narrative, or *using them as schema or heuristics, i.e. mental short cuts for legal decision-making*. These schema then impact the way that individuals expect trial evidence to unfold or make judgments about truth or guilt. This remains true whether the law on TV is fictitious or real . . .[1]

> Structures, then, are sets of *mutually sustaining schemas and resources that empower and constrain social action and that tend to be reproduced by that social action*. But their reproduction is never automatic. Structures are at risk, at least to some extent, in all of the [communicative] social encounters they shape – because structures are multiple and intersecting, because schemas are transposable, and because resources are polysemic and accumulate unpredictably. Placing the relationship between resources and cultural schemas at the center of a concept of structure makes it possible to show how social change, no less than social stasis, can be generated by the enactment of structures in social life.[2]

To build on the previous chapter's argument that law is mediated, we must explore the effects of legal communication. As the first quote illustrates, it can be a natural mental process to apply media experiences to real life. While we shall see that there is some accuracy to the quote's depiction of cognition, we will also find that the process is not entirely so direct. The second quote explains a possible role for schema in shaping broader social structures – such as law. The overlap of "schema" between the mass communication and sociology literatures is not as remarkable as it might seem. Both are describing a similar mental process by which our individual and shared mental structures

1 Kimberlianne Podlas, "CSI Effect: Exposing the Media Myth, The," *Fordham Intellectual Property, Media & Entertainment Law Journal* 16 (2006 2005): 443–446 emphasis added.

2 William Sewell, "A Theory of Structure: Duality, Agency, and Transformation," *American Journal of Sociology* 2 (1992): 19 emphasis added.

have the potential to shape society. This chapter describes how mental processes, in part, have a genesis in communicative acts which can ultimately impact the way that law works in society.

We will begin with a brief review of the history of mass communication effects research. The literature has evolved away from a "direct effect" mindset, where a message is assumed to have its intended impact on a recipient, and has moved towards an emphasis in cognition and social relationships. By examining these social and cognitive realms, we will see how law and communication relate to the sociological problem of structure and agency. While formal law structures what individuals can do, sociologists have struggled to find a balance the capability of "agents" (individuals) to impact formal structures. By using mass communication effects and sociological theories, I will argue that mental "schema" offer a means to understand how laws provide social order. This chapter will make the argument that, rather than a pronouncement from the halls of justice, the law works as a socially constructed process that is driven by communication.

Practical research on law in society has explored structure and agency through the "legal consciousness" literature, yet this chapter utilize mass communication effects research to integrate findings from controlled studies. By rooting structure in mental "schema" legal consciousness has attempted to show how individuals might create durable, but changeable structures. I will argue that recent mass communication and cognitive psychology literature will bring a deeper understanding of how schemas work, and will show how we might use this knowledge in empirical research. The commonalities in the media effects, psychology, and sociology literatures will provide a theoretical basis for the research of the present study.

Mass Communication Effects and the Law

> A common idea of a mass effect is that some aspect of content has a direct and immediate impact on members of the audience. In the vocabulary of the philosophy of science, this implies that the content is viewed as a necessary and sufficient condition for some effect. Unfortunately, such simple models of causation seldom fit the reality of any area of human behavior, and the study of communication is no exception. We are more likely to find media effects if we understand that the consequences of exposure to media content are likely to be varied and complex.[3]

While seemingly simple and scientific, a "direct and immediate" definition of media effects glosses over the complexity of what has grown into a nuanced and multifaceted academic field of study. McLeod and Reeves describe the ill fit between a "common idea of a mass effect" and the reality of the field, finding "reveals that there is no simple answer to the question of whether the media affect people."[4] The present section will give a brief history of the field of mass communication effects by focusing on four of its sub-fields: direct/limited effects, cultivation, the elaboration likelihood model, and the social cognitive theory.

I will suggest that current misconceptions about legal communication hold much in common with direct effects theories. It will be suggested that a more nuanced explanation of the legal communication landscape, grounded in psychology and social construction, offers insights into the inefficiencies explained in the previous chapter. If knowledge of the law is assumed to have an origin in a communicative act, we should use communication effects research to understand how legal messages are processed and remembered. The connection between law and mass communication effects may bring a greater understanding of law in society.

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3 J.M. McLeod and B. Reeves, "On the Nature of Mass Media Effects," in *Television and Social Behavior: Beyond Violence and Children*, by Withey, Stephen and Abeles Ronald (Hillsdale, N.J: L. Erlbaum Associates, 1980), 17.

4 Ibid.; Glenn G. Sparks, *Media Effects Research: A Basic Overview*, 3rd ed. (Wadsworth Publishing, 2009), 58.

Direct Effects

Early communication theories often assumed a very direct connection between a message and an impact on its audience. The direct effects view aligns closely with common conceptions of how law works in society, but has been disproven in empirical media effects studies. Early models included the "hypodermic needle" model, also known as the "magic bullet" or "transmission belt," which posited that the receiver of a message would experience an impact of that message in the way that the communicator intended.[5] Much like an injection from a needle, a received message was thought to "exert powerful, relatively uniform effects on everyone who processes it."[6] The psychological theories of the day, which emphasized "uniform physiological mechanisms common to all human beings," align closely with the direct impact models which took it for granted that messages were understood as they were intended to be by the communicator.[7] The public purportedly accepted the direct effects interpretations, perhaps due to an assumed impact that was visible from World War II propaganda.[8] For example, in the "People's Choice" study of voter behavior, perhaps the first large-scale media study, a new model of limited effects was introduced. Under the limited effects model, it was suggested that individuals are selective about the media to which they pay attention. The "selective exposure" model acknowledges that individuals are "motivated to expose themselves voluntarily to messages with which they already agree . . . [and] will tend to avoid messages that they find disagreeable."[9] Thus, even early research found evidence for "limited" or "selective" effects.

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5 Circa 1930s, around the time of Well's *War of the Worlds* broadcast.
6 Sparks, *Media Effects Research*, 51.
7 Ibid.
8 McLeod and Reeves, "On the Nature of Mass Media Effects," 35. It is also possible that media consumers of the time were less savvy.
9 Sparks, *Media Effects Research*.

Limited effects and the law

While communication theory moved in a direction of limited effects at a very early stage, a direct effect is perhaps largely assumed to be valid by the public – certainly in the case of legal communication. McLeod and Reeves argue that, "[a]lthough the limited effects model still dominates academic reviews of the field, the public, along with any public action groups, holds to a view that is much closer to a mass persuasion model."[10] In fact, the proclivity of the mass persuasion view has been widely supported in the "third person" media effects literature. The third person effect has found widespread support in empirical research for its hypothesis that "members of an audience that is exposed to a persuasive communication will expect the communication to have a greater effect on others than on themselves."[11]

It thus stands to reason that judges and lawmakers are not immune to the third person effect, and the vast body of "fiat" law, or law by decree, is one indication. As Cheng describes:

> Fiat is the most common and direct method of regulating behavior, and it forms the basis of all modern discussions about criminal law. Legislatures announce specific prohibitions or standards of conduct, and then these mandates are enforced by police and prosecutors, or in some cases through private tort litigation.[12]

Lawmakers clearly believe that the word of law alone will change behavior, given the number of laws written without a budget for enforcement or an educational media campaign. Yet, there is little evidence that the fiat method of regulating behavior is effective.

In fact, a growing body of literature has found very little public exposure to the law. Evidence shows that very few individuals have direct experience with the formal justice system.[13] Much of the

10 McLeod and Reeves, "On the Nature of Mass Media Effects," 36.

11 W. Phillips Davison, "The Third-Person Effect in Communication," *Public Opinion Quarterly* 47, no. 1 (March 20, 1983): 3.

12 Edward Cheng, "Structural Laws and the Puzzle of Regulating Behavior," *Northwestern University Law Review* (2006): 146–7.

13 Valerie Hans, "Law and the Media," *Law and Human Behavior* 14, no. 5 (1990): 399–407; Bruce M. Selya, "The

experience is "indirect," or in many cases comes to an individual via the media.[14] The literature appears to support the contention that the communication of the "law on the books" to the public is mediated via a number of channels (described in the previous chapter). If the third person effect literature extends to legal communication, it seems plausible legal communication (either from the law on the books or mediated through another source) is not as persuasive for changing behavior as members of the public might believe it to be. In other words, while it might be tempting to believe that a law or its depiction might be persuasive enough on its own to change one's behavior, the validity of that assumption must be questioned.

We should not assume that a legal decree has a direct effect on its subjects. A more nuanced view, informed by the cultivation research below, will illustrate the cognitive mechanisms that legal messages operate within. While there may be evidence for a perception of direct effects in the public, media effects theory has largely focused on limited effects.

Cultivation

The theory of cultivation began with a goal of examining how large structures in the media landscape might impact individuals over a long period of time. The theory has evolved to examine the mental processes that underly the broader effects. This section will explain how cultivation came to utilize cognitive psychology and will begin to describe how it relates to legal communication. It will then examine a specific area of cultivation theory that applies directly to legal communication – the "CSI effect."

Confidence Games: Public Perceptions of the Judiciary," *New England Law* 30 (1996): 909.

14 David M. Spitz, "Heroes or Villains - Moral Struggles Vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture," *Nova Law Review* 24 (2000 1999): 725; Lawrence M. Friedman and Issachar Rosen-Zvi, "Illegal Fictions: Mystery Novels and the Popular Image of Crime," *UCLA Law Review* 48 (2001 2000): 1411.

Cultivation's development and history

On a basic level, the theory of cultivation can be defined as "the long-term formulation of perceptions and beliefs about the world as a result of exposure to the media," usually television.[15] It is distinguished from other media effects studies due to its focus on an emergent impact over a long period of repeated exposure. Cultivation's founder, George Gerbner, defined it more generally in a review of the field. He argued that cultivation is an illustration of "the independent contributions television viewing makes to viewer conceptions of social reality."[16] Cultivation analyzes interactions between "large bodies" of "message systems," the "organizational forms" or "institutional process" that determine how messages are created, and the "public assumptions, images, and policies that they [the message systems and institutional processes] cultivate."[17] Cultivation's broad focus on systems, organization and process has been argued to have unacknowledged roots in the Frankfurt School (specifically in social theorists such as Adorno, Horkheimer, and Marcuse).[18] It is perhaps the broad focus that aligns cultivation research with an examination of legal communication. In its 30 years of systematic analysis, cultivation has become established as "grand theory," perhaps more so as the theory has come to rely on the principles of cognitive psychology.[19] The mental structures that underly memory, along with their social context, also might explain some of the complexities of processing legal messages. The complexities, which at times seem to defy rational logic, support the contention that laws which hew more closely to an individual or group's existing norms will have a

15 W. James Potter, "Cultivation Theory and Research," *Human Communication Research* 19, no. 4 (June 1, 1993): 564.

16 George Gerbner, "Cultivation Analysis: An Overview.," *Mass Communication & Society* 1, no. 3/4 (Summer 1998): 180.

17 George Gerbner, "Cultural Indicators: The Case of Violence in Television Drama," *The Annals of the American Academy of Political and Social Science* 388, no. 1 (1970): 71.

18 Potter, "Cultivation Theory and Research," 566.

19 Beverly Roskos-Ewoldsen, John Davies, and David R. Roskos-Ewoldsen, "Implications of the Mental Models Approach for Cultivation Theory," *Communications: The European Journal of Communication Research* 29, no. 3 (2004): 346.

better chance of compliance.

The evolution of cultivation theory has moved away from direct effects towards an examination of the complex processes that describe long-term effects on a more granular level. Cultivation may be considered an extension of direct effects theories because it assumes some sort of impact from a media message.[20] However, the approach is tempered, as cultivation takes into account the receiver's perceptions to some degree.[21] Additionally, Gerbner does not consider cultivation to be measuring the direct, "unidirectional," impact of a single message. He instead describes it as, "more like a gravitational process [where the] angle and direction of the 'pull' depends on where groups of viewers and their styles of life are with reference to the line of gravity, or the 'mainstream' of the world of television."[22] The theory thus accommodates media effects as a "part of a continual, dynamic, ongoing process of interaction among messages and contexts."[23] Cultivation's more nuanced, indirect view of the interactions between media and public perhaps meets Gerbner's original goals to examine messages in the context of their creation.

The departure from seeing cultivation as a direct result of the influence of television came from a transition towards examining cultivation as cognitive processes. In 1982, Hawkins and Pingree suggested two possible mental processes: *learning*, where the audience remembers and is influenced by messages seen on television; and *construction*, which involves an incorporation of television messages into one's own world views.[24] Later, a third process of *generalization* was added to account for the possibility of viewers integrating statistical information learned on television into

20 Potter, "Cultivation Theory and Research," 7.
21 Ibid., 3.
22 Gerbner, "Cultivation Analysis," 180.
23 Ibid., 182.
24 Lisa M. Schroeder, "Cultivation and the Elaboration Likelihood Model: A Test of the Learning and Construction and Availability Heuristic Models," *Communication Studies* 56, no. 3 (January 2005): 229.

beliefs.[25] Perhaps because early research encompassed only a few of the possible processes that might explain cultivation, many of the results were largely inconclusive (however, the learning model was completely disproven).[26]

By 1990, Hawkins and Pingree argued that the early dead ends provided direction towards understanding the cognitive processes that underlie cultivation.[27] The research revealed that the cultivation effect is indirect and correlated with a number of various factors and processes. Unfortunately, the difficulties of empirically proving correlated processes to be valid makes the case for cultivation much more difficult:

> A large majority of cultivation research is correlational in nature, bringing with it the threats to validity that reside in all correlational research. Thus, providing and empirically verifying a cognitive processing model that can specify clear links between television and judgments should make threats to internal validity such as spuriousness and reverse causality less plausible.[28]

In other words, to explain the often complex correlations that empirical cultivation research uncovered, it was necessary to ground the research in cognitive psychology. Fortunately, cognitive psychology had recently developed frameworks which appeared to describe the cultivation effect. Understanding cognition as a process where memories of media experiences are stored and recalled brought a more empirically verifiable means to understand the cultivation process. A description of the bases of knowledge will inform the process of storage and recall in cultivation.

Cultivation, mental models, and dual-process theory

The human mind has evolved to store, organize, and recall information, including

25 Ibid.

26 L. J. Shrum, "Social Cognition and Cultivation," in *Communication and Social Cognition: Theories and Methods* (Psychology Press, 2007), 248.

27 R. P. Hawkins and S. Pingree, "Divergent Psychological Processes in Constructing Social Reality from Mass Media Content," *Cultivation Analysis: New Directions in Media Effects Research* (1990): 35–50.

28 Shrum, "Social Cognition and Cultivation," 248.

experiences like television viewing. As our understanding of processes underlying mental functions has increased, the application of the principles to other theories (like cultivation) has become more apparent. Cultivation theory has looked to the "dual processing" theory to describe when a cultivation effect might be more pronounced, depending on an individual's mode of thinking. The theory also has some immediate applications to how we might consider legal communication.

On a very basic level, the storage of memories is thought to be organized by "mental models." A mental model can be defined as "a dynamic mental representation of a situation, event or object . . . [used] as a way to process, organize, and comprehend incoming information, make social judgments, formulate predictions and inferences, or generate descriptions and explanations of how a system operates."[29] In other words, a mental model represents the external world and is the mechanism by which the mind facilitates a number of mental processes. Further, Roskos-Ewoldson, et. al., argue for a continuum of different kinds of mental models from a "situation model," to a "mental model," to a "schema."[30] Situation models are defined as a "representation of a specific story or episode . . .," and along with mental models can be considered as "knowledge *about* some event."[31] Schemas represent more abstract, less specific, knowledge "*of* something," and make up the deeper, more interconnected knowledge of a given subject.[32] The notion of "schema" is a topic to which we shall return in the discussion of the sociology of law.

Roskos-Ewoldson, et. al., use the situation/mental model/schema continuum to support the assertion that cultivation effects arise in a situation. They describe that:

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29 Roskos-Ewoldsen, Davies, and Roskos-Ewoldsen, "Implications of the Mental Models Approach for Cultivation Theory," 349.
30 Ibid., 350.
31 Ibid.
32 Ibid.

> . . . when a person views a TV show, s/he constructs a situation model of the [TV] series. If the person watches more TV shows about the same general events (e. g., shows in a series), s/he would construct a situation model of each episode of the series. In addition, s/he would construct a mental model of the series.[33]

The more well developed a situation model becomes from television viewing, the more easily the model will be accessed when encountering similar situations in real life. The apparent connection between media experiences and real life may thus be thought to impact legal compliance. While the distinctions between situation models, mental models, and schema are likely becoming essential to detailed cognitive studies, the contrasts are perhaps too new to appear in more theoretical literature.[34] Nevertheless, mental schema could be useful to understanding how legal rules are constructed in the mind – perhaps revealing an individual's construction of a particular law.

Beyond the process of storing memories in the mind, cognitive psychologists have determined that two separate processes of recalling information are key to understanding reactions (known as "dual process theory"). An expert in the field, Daniel Khaneman, recently described the distinction between "System 1" and "System 2" in the popular book, *Thinking Fast and Slow*. He succinctly describes:

> *System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control.
>
> *System 2* allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.[35]

An understanding of the natural division between intuitive and rational thought explains much about how a given situation is naturally approached. While Khaneman's recent work has reached the

33 Ibid., 352.

34 The various model types will be collectively referred to as "schema" from here forward.

35 Daniel Kahneman, *Thinking, Fast and Slow*, 1st ed. (Farrar, Straus and Giroux, 2011), 20–21.

popular literature, it has formed the basis of recent developments in cultivation theory. The dual process framework has been used to resolve the negative findings in early cultivation research as a superior way to explain the cultivation effect.

The connection of cultivation literature to cognitive psychology proposes that the effect can be explained by both System 1, known as the "active, learning and construction model,"[36] and System 2, known as the "passive, availability heuristic model."[37] Schroeder described the distinctions between the two models:

> The active, learning and construction model suggests people actively compare the probability of events through cognitive rationalizing . . . and found that people are rational in making social reality judgments. On the other hand, the passive, availability heuristic model suggests that people estimate the probability of events, such as violence, on the ease of accessibility of information from memory.[38]

The author argues that, much like the differences between Systems 1 and 2, different *levels of processing* take place in the construction and heuristic models.[39] Shrum has agreed with the dual processing theory, arguing that the "ability to process information is proposed to moderate the cultivation effect."[40]

The difference between active and passive processing of information has obvious connections to the mental processes that underlie compliance with the law. Indeed, the legal literature has also begun to look to the cognitive psychology literature on heuristic reasoning and dual processing. For

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36 W. James Potter, "Examining Cultivation From a Psychological Perspective Component Subprocesses," *Communication Research* 18, no. 1 (February 1, 1991): 77–102.

37 L. J. Shrum, "Psychological Processes Underlying Cultivation Effects: Further Tests of Construct Accessibility.," *Human Communication Research* 22, no. 4 (1996): 482–509; citing Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology* 5, no. 2 (September 1973): 207–232.

38 Schroeder, "Cultivation and the Elaboration Likelihood Model," 230.

39 Ibid.. Note this theme will return as the author uses this argument to turn a connection between cultivation and the elaboration likelihood model, described below.

40 Shrum, "Social Cognition and Cultivation," 257.

example, Korobkin and Ulen argue that a "law-and-behavioral-science approach" might improve normative policy conclusions.[41] While it has scarcely been suggested that "System 1" thinking might excuse one from responsibility for adhering to the law, the connection between the mind, law, and morality strike at the philosophical core of fairness in law.

Cultivation and attitude

While the "learning model" of cultivation was disproven, evidence of the impact of media-based schema/heuristics (likely operating on System 1) appears to be undeniable. Shrum argues that the propensity to think heuristically does not mean that cultivation can be, "explained in part by the fact that people simply don't give a lot of thought to their answers," – especially given the growing evidence that heuristic processing is "automatic rather than controlled."[42] While the genesis of heuristics is still not entirely clear, the mechanisms by which they are accessed (or activated) and acted upon have become well established. Much of the research on activation has focused on the potential for media exposure to strengthen or weaken attitudes (which can be defined as the "association of an evaluation with an object").[43] When messages are processed against a background of cultivated memories, a number of cognitive factors can impact the activation of stored attitudes and ultimately impact an individual's reaction. The factors provide useful anecdotes that indicate common reactions in a variety of situations.

To date, the accessibility of attitude-driven heuristics has been determined to operate by four

41 Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics," *California Law Review* 88 (2000): 1051. The literature is surprisingly sparse and is an entire area worthy of study.

42 L. J. Shrum, "Processing Strategy Moderates the Cultivation Effect," *Human Communication Research* 27, no. 1 (2001): 115.

43 Shrum, "Social Cognition and Cultivation," 260–1; Laura Arpan, Nancy Rhodes, and David R. Roskos-Ewoldsen, "Attitude Accessibility: Theory, Methods, and Future Directions," in *Communication and Social Cognition: Theories and Methods* (Psychology Press, 2007), 361.

factors: recent activation, frequent activation, expectation of need, and cognitive elaboration.[44] Exposure to a media message has some potential to alter an existing attitude, but its effect can be enhanced or mitigated by any of the above factors. Exposing someone to a "priming" message, to create a recent activation increases attitude accessibility, but the effect is only very temporary (milliseconds).[45] Attitudes that have been frequently activated are more durable (months), as the activation can cause attitudes to be "chronically accessible."[46] If it is suggested that we might have a need for an attitude, or if we anticipate the need, "we will likely develop an accessible attitude toward the object in question."[47] Expecting to need an attitude can also increase the likelihood that an attitude will be developed, which might store it in memory.[48] Finally as we shall see in more detail, elaborating on an attitude, or associating it with other memories or attitudes, can increase the degree to which it can be recalled.

Elaboration is based on the network model, where attitudes or memories (nodes) are connected to other related memories. Each time a nodal connection is travelled, it is reinforced. Arpan, et. al., describe:

> The result is a greater likelihood that the original attitude will be activated more frequently because of its stronger connection to more nodes in memory. Each subsequent activation of the attitude further strengthens its accessibility.[49]

Activation and reinforcement of an attitude can occur via direct experience or by media exposure, thus increasing the cultivation effect over time. Each of the factors are empirically measurable, but

44 Arpan, Rhodes, and Roskos-Ewoldsen, "Attitude Accessibility: Theory, Methods, and Future Directions," 360.
45 Ibid.
46 Ibid., 361.
47 Ibid.
48 Ibid.
49 Ibid.

are also phenomenon that we might look for in other research.[50]

The construction process, along with its basis in mental models and hooks will be crucial to an understanding of how communication and rules work in both the individual and social mind. It will ultimately be argued that mental constructions, both individual and shared across society, are evidence of a non-dualistic approach of social structure.

Cultivation and anthropology

Cultivation is now reaching towards the field of cognitive anthropology to reconnect with its original aims to "explain the relationship between the media and culture."[51] As Roskos-Ewoldsen, et. al., describe:

> Within cognitive anthropology, culture is defined as the knowledge that one must possess to function adequately as a member of that society. The knowledge that is necessary to function effectively resides in cultural models, which are intersubjectively shared mental models.[52]

Cultural models have been shown to be shared to a great degree among members in a civilization. As we collectively create situation models through experiencing similar communications we create shared mental models – or cultural models – over time. In fact, time has been shown to be important within cognitive anthropology, both from the standpoint of how long a model takes to emerge and the impact of age (or stage of development) of an individual.[53] On a more granular level, research has shown how cultural schemata can influence how specific messages are interpreted.[54] Cultural models

50 For example, degree of elaboration (explanation) on an attitude or memory.

51 Roskos-Ewoldsen, Davies, and Roskos-Ewoldsen, "Implications of the Mental Models Approach for Cultivation Theory," 356.

52 Ibid., 357; Citing: William Dressler, "Cognitive Anthropology," in *The Encyclopedia of Social Science Research Methods*, by Michael S. Lewis-Beck, Alan Bryman, and Tim Futing Liao, 2003.

53 Roskos-Ewoldsen, Davies, and Roskos-Ewoldsen, "Implications of the Mental Models Approach for Cultivation Theory," 358–9.

54 For example, see Ralph E. Reynolds et al., "Cultural Schemata and Reading Comprehension," *Reading Research Quarterly* 17, no. 3 (January 1, 1982): 353–366.

provide a theoretical basis to the idea that we have a dynamic relationship with the media we view, as well as with the people we interact with about media. As we shall review in the law and society literature, it has been suggested that shared cultural models or schema might provide some of the strength necessary to explain the durability of social structures. It is also plausible that cultural models might offer common constructions of laws (as a melding of law, media, individual, and society). The root of common constructions of law might be the more successful legal communication types described in the previous chapter. Of these common constructions, one might assume that television dramas appear to be heavy contributors to common cultural models of law.

Cultivation of law: The "CSI effect"

The "CSI effect" is a well-studied cultivation phenomenon that directly applies to legal communication. *Crime Scene Investigation* (CSI) is a network television drama which emphasizes the use of forensic evidence to "tell an investigator what has happened without having any witness to a crime."[55] The show has achieved incredible popularity (originally broadcast in 2000, it still airs on CBS). It has consistently ranked in the top ten of seasonal rankings, and has inspired a number of spin-offs and copycat shows.[56] Cultivation theory would predict that the consistent narrative of solving crimes through forensic evidence might impact heavy viewers of the genre.

The literature has distinguished three different ways that *CSI* might influence a viewer. Reports in the news media, as well as accounts from prosecutors, hold that viewers will have unrealistic expectations about the types of evidence that should be used – thus increasing the

55 Podlas, "CSI Effect," 432.

56 "CSI: Crime Scene Investigation: American Ratings," *Wikipedia, the Free Encyclopedia*, October 28, 2012, http://en.wikipedia.org/w/index.php?title=CSI:_Crime_Scene_Investigation&oldid=520314880. Spin-offs include *CSI: Miami* (2002-2012) and *CSI: New York* (2004-present); copycats include *Crossing Jordan* (NBC, 2001-2007) and *Forensic Files* (CourtTV, 1996-present).

"reasonable doubt" of a defendant's guilt, and decreasing the rate of conviction.[57] If juries expect prosecutors to use the same (expensive) forensic techniques depicted on *CSI*, they may be less likely to convict when the forensic evidence is not used. Second, it is possible that *CSI* may have the opposite impact, whereby viewers will view scientific evidence as unquestionable, thus increasing conviction.[58] Finally, it is also possible that *CSI* has no impact on juror verdicts, but may have other effects (such as increasing the appeal of jobs in forensics).[59] Determining the impact of *CSI* viewing over time is one of the few examples of media effects research in the area of legal communication. The results of the research, however, have been mixed.

One study found little evidence of a "CSI effect" in juries. In 2005, Podlas examined 254 "jury eligible adults" for the CSI effect by distributing a survey on television viewing habits and by exposing subjects to a criminal law scenario.[60] The scenario was designed such that the legally reasonable conclusion should have been "not guilty," as "it was not possible . . . for guilt to be proven beyond a reasonable doubt."[61] In other words, a jury would be certain to arrive at a "not guilty" verdict. Surprisingly, heavy *CSI* viewers did not use "CSI-oriented reasons" for arriving at a not guilty verdict. Podlas concluded that "empirical evidence does not support any anti-prosecution 'CSI effect;'" thus providing counter-evidence to the common conception that *CSI* viewing might decrease the rate of conviction.[62]

Studies examining juror expectations of forensic evidence have also found mixed results. For

57 T. R Tyler, "Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction," *The Yale Law Journal* (2006): 1052–4.
58 Podlas, "CSI Effect," 433.
59 Ibid.
60 Ibid., 432.
61 Ibid., 458.
62 Ibid., 461. Additionally, Podlas was surprised by the number of participants who, in spite of the design, arrived at a guilty verdicts.

example, Shelton, et. al. found skepticism of forensic evidence among *CSI* viewers in a mock jury, suggesting that the skepticism arose from a "tech effect" separate from viewing of *CSI*. However, both Shelton, et. al., and Schweitzer and Saks found that *CSI* viewers had greater expectations of scientific evidence presented at trial when compared to non-viewers.[63] Podlas found evidence in the literature that the fragmentation of media may be driving a genre-specific cultivation effect – especially for fictional television.[64] While the mixed results do not entirely draw on the cultivation literature, they do offer some evidence for the lack of cultivation in the CSI effect.[65]

Perhaps the mixed, or counterintuitive conclusions point to the need for an effects model that is more embracing of complexity – especially in an area like law, where norms and cognition may play a greater role than in areas just involving general opinions. One researcher of the CSI effect summarized the overlap between cultivation/cognition and legal communication as follows:

> For example, as people attempt to make sense of their experiences, they may reference these [stories of law] as templates, superimposing their narrative, or using them as schema or heuristics, i.e. mental short cuts for legal decision-making. These schema then impact the way that individuals expect trial evidence to unfold or make judgments about truth or guilt. This remains true whether the law on TV is fictitious or real, for research shows that misinformation about the legal system and crime investigation can impact the way in which citizens make legal judgements.[66]

Still, the emphasis on individual schema, or the stories of law, highlights a theme to which we shall return in the context of the sociology literature. Additionally, preexisting thoughts and ideas, as well as social context, matter a great deal in the interpretation of a message. The weight of an individual's

63 Donald E. Shelton, Young S. Kim, and Gregg Barak, "An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence," *Vanderbilt Journal of Entertainment & Technology Law* 12, no. 1 (n.d.): 9, accessed March 14, 2012; N. J Schweitzer and Michael J Saks, "CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science, The," *Jurimetrics* 47 (2007 2006): 357.

64 Podlas, "CSI Effect."

65 For example, Mancini suggests that a "Need for Cognition" might better explain the impacts than the CSI effect. D. E Mancini, "The CSI Effect Reconsidered: Is It Moderated by Need for Cognition?" (2011).

66 Podlas, "CSI Effect," 446, summarizing a broad array of literature.

history or a given social context might be an indicator of why norms seem important to evaluations of law in society. Norms may appear to sit atop a layer of mental schema that have been in part formed by messages in the media, and to some degree impact individuals' expectations of reality. The interplay between message, individual, and group norm is more fully explicated in the social cognitive theory, below.

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By looking at media effects over a long period of time, cultivation theory opened the door to consideration of how our experience of media messages is driven by the ways that our minds naturally process information. Approaching effects from the perspectives of mental models and dual processing points to the conclusion that we naturally use heuristics and differing levels of thinking in forming our thoughts and in informing our actions. Often, the likelihood of a different mental strategies being used depends on our attitudes or the degree to which we elaborate (or think further on) a particular thought or piece of information. There is also emerging evidence of a social cultivation effect, or common cultural models that drive the understanding of a message within a group. Given that laws are rules that are to dictate our actions, how we come to mentally process a legal message might hold a key position in compliance with the law. While there was little evidence of a "CSI effect," it is clear that we must recognize the complexity and importance of mental processes to grasp how laws work in society.

Persuasion and elaboration likelihood

The "elaboration likelihood model" (ELM) gauges effects by measuring how carefully one

might think about a persuasive message.[67] An emphasis on persuasion and cognition perhaps has given the model a clear focus and concrete (physical) basis on which to build. The elaboration likelihood model provides additional insight on the conditions which trigger automatic or deeper thinking, and also provides a basis for understanding how groups might accept particular messages.

Similar to the cognitive systems underlying the cultivation effect, persuasion is thought to involve two potential "paths." An audience member can weigh the argument of a persuasive message via the "central route," which (similar to System 1) requires cognitive effort.[68] As with System 2, the "peripheral route" involves persuasion via familiar cues that do not involve a great deal of cognitive effort.[69] The elaboration likelihood model predicts that, "as the likelihood of mental elaboration (careful processing of a persuasive message) increases, the central route to persuasion is dominant . . . [but as] the likelihood of mental elaboration decreases, the peripheral route to persuasion becomes more important in the persuasion process."[70] In other words, persuasion decreases as one elaborates on their preexisting understanding of an issue. Notice that the effect is one of a direct impact via processing, but that the effect is enhanced or mitigated by the same processes described above in the discussion of the cultivation effect's impact on judgment. The core ELM model, however, looks only at the impact that a message has via the cognitive activity recipient – not at the social or cultural context in which a message appears.

Elaboration likelihood and cultivation

One way in which the elaboration likelihood model may examine cultural context is through

67 Jennings Bryant, *Fundamentals of Media Effects*, 1st ed, McGraw-Hill Series in Mass Communication and Journalism (Boston, Mass: McGraw-Hill, 2002), 158.
68 Ibid.
69 Ibid., 159. One example of peripheral processing include deferring to experts, or the "bandwagon effect."
70 Ibid., 160.

an emerging overlap with cultivation theory. A 2005 study by Schroeder attempted to reconcile "inconsistencies" in the cultivation literature by examining the cognitive processes behind both the learning and construction model and the passive, availability heuristic model.[71] Building on Mares' 1996 contention that cultivation focuses on the degree to which people rationalize when considering a message, Schroeder argues that the mental process of elaboration may explain the cultivation effect.[72] By arguing that cultivation "should be examined through a persuasion model that will clarify how differing sources of information are judged and ultimately affect perceptions of reality," Schroeder connects cultivation's cultural impetus with its more recent cognitive orientation.[73] How much an individual engages in "issue-relevant" thinking might reflect the degree of mental elaboration, thus moving one's processing between either the central or peripheral route. Empirical evidence was found supporting Schroeder's four hypotheses that a cultivation effect could be driven by central or peripheral processing. She concludes by arguing:

> The findings of this study, as well as the breadth of the literature, suggest there is ample reason to believe that the theoretical assumptions of cultivation are faulty. These foundational assumptions should be abandoned and replaced with assumptions that allow for variance in cognitive and psychological processing of information.[74]

Bringing together the broad focus of cultivation with the processes uncovered by ELM may shed some light on the broader cultural and social impacts of persuasive communication.

Elaboration likelihood and norms

Some cultural aspects of persuasion have also been included in ELM analyses of group norms. While early studies found a propensity towards conformity within a group, subsequent

71 Schroeder, "Cultivation and the Elaboration Likelihood Model."
72 Marie-Louise Mares, "The Role of Source Confusions in Television's Cultivation of Social Reality Judgments," *Human Communication Research* 23, no. 2 (1996): 278–297.
73 Schroeder, "Cultivation and the Elaboration Likelihood Model," 231.
74 Ibid., 239.

research discovered a divergence between influence based on group norms, versus the influence of information.[75] As with the above example, group norms appear to be more influential than non-group-based information. By looking more deeply at what is going on in the "uncritical" model (System 1), van Knippenberg suggests "that norm-induced influence may be based on the systematic processing of norm-representing communications."[76] Citing a 1995 study by Deutsch and Gerard, van Knippenberg distinguishes *normative* and *informational* influence, which considers influences within a group as completely separate from influence based on the validity of a message.[77] Van Knippenberg departs from prior research, arguing that the normative/informational split is a false distinction – or that "all influence is proposed to be simultaneously informational and normative."[78] Yet group influence, whether informational or normative, is not equal to and can come into conflict with other normative or legal pressures.[79]

Van Knippenberg argues for a distinction between more and less "group-normative" communications, and coins the notion of "prototypicality" as a means to describe group communications. He states:

> Prototypicality refers to . . . the more a group member, a statement, or an attitude represents what members of a group have in common and what differentiates the group from other groups, the more group prototypical the group member, statement, or attitude is.[80]

Further, norm-induced influence occurs when ingroup norms are present and a message is

75 Daan van Knippenberg, "Group Norms, Prototypicality, and Persuasion," in *Attitudes, Behavior, and Social Context: The Role of Norms and Group Membership* (Psychology Press, 2000), 157.

76 Ibid., 158.

77 Ibid., 159.

78 Ibid., 160.

79 Suchman characterizes these differences as "instrumental" and "normative," see Mark C. Suchman, "On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law;," *Wis. L. Rev.* 1997 (1997): 475.

80 van Knippenberg, "Group Norms, Prototypicality, and Persuasion," 161.

prototypical for the group. In a 1992 study, van Knippenberg and Wilke found that messages communicated within the normative structures of the group were more "systematically processed."[81] Because of the level of "prototypicality," significantly increased levels of processing were found within a group context, when compared to messages outside of a group.[82] Recall that the central or systemic "route" of processing in ELM can be more persuasive. It would thus appear that, within a group context, the prototypicality of a message is a key component to understanding its persuasiveness.

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It is plausible that greater alignment of law with prevailing cultural norms (or ways of thinking) would promote deeper thought, and perhaps greater compliance. After all, laws are messages which their authors hope will be persuasive and will ultimately impact behavior. The above findings that increased processing or elaboration can make a message more persuasive – especially in a group context – follow many of the same themes surrounding cognitive schema. Perhaps if combined with memorable heuristics, a norm-aligning legal rule might have a better chance of engendering compliance than a more general legal message. The strength of group interactions on cognition finds additional theoretical support in the social cognitive theory of media effects and in sociological explanations of how law works in society.

Social cognitive

The social cognitive theory of media effects provides a framework to explain the mental functions that underlie learning and inform subsequent behavior on an individual, collective, and structural level. Derived from Albert Bandura's social learning theory, the social cognitive view of

81 Ibid., 166.

82 Ibid., 169. "...ingroup messages should elicit more systematic processing and should be more persuasive . . . because ingroup messages are more ingroup prototypical than are messages from nonmembership groups."

media effects attempts to "explain behavior by examining how cognitive, behavioral, and environmental factors interact," and has been argued to be a "theoretical basis for many other media effects theories."[83] The theory's focus on agents and the structures in which they participate provides another meaningful connection between media effects and the sociology of law. While the theory largely operates above a level of practicality, it creates a bridge to transition between mass communication and social theory.

The social cognitive theory of media effects attempts to bring more emphasis to the role of audience (or "agents") within the media and social landscape. Focusing on collective action, the theory asserts that individuals and groups hold some control over their immediate environment to "shape their life circumstances and the course of their lives take."[84] The "agentic" (or agent-focused) power to shape one's experiences is thought to extend to a collective impact on society, as "people create social systems, and these systems, in turn, organize and influence people's lives."[85] Bandura is posing a question about how we might better understand the position of an individual to gain some power (or "agency") within effects theories.[86] While the explicit connections to the above media effects theories will not be explored here, the social cognitive theory serves as a useful transition to the sociological theories of law – especially theories of structures and agency. Here, we will focus on Bandura's notions of collective agency, as well as how social cognitive theory connects with rules and sanctions.

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83 Bryant, *Fundamentals of Media Effects*, 67.

84 Albert Bandura, "Toward a Psychology of Human Agency," *Perspectives on Psychological Science* 1, no. 2 (June 1, 2006): 164.

85 Ibid.

86 Albert Bandura, "Social Cognitive Theory of Mass Communication.," *Media Psychology* 3, no. 3 (2001): 266. In his own words, "People are self-organizing, proactive, self-reflecting, and self-regulating, not just reactive organisms shaped and shepherded by environmental events or inner forces. Human self-development, adaptation, and change are embedded in social systems. Therefore, personal agency operates within a broad network of sociostructural influences." Again, this is a topic that will return in the discussion of the sociology of law.

A "bottom-up" view of communication

Bandura's depiction of agency within the context of structure is perhaps best begun by a description of the structural powers that agents act within. Individuals act within a landscape of three interacting elements of social influence (in Bandura's terms, "triadic reciprocal causation").[87]

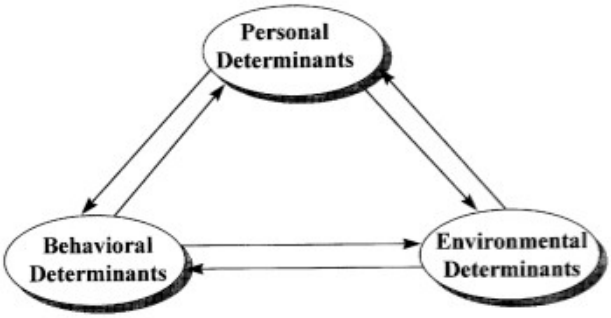

Illustration 1: Bandura's triadic model of reciprocal causation (Bandura 2009, 266).

The personal, behavioral, and environmental "determinants" are the drivers of change on both an individual and societal level. Much like the symbiotic relationship between a cleaner fish and its host, Bandura's model asserts that the determinants make up the necessary relationship between an individual and the society individuals collectively create.

The "bottom-up" view of agents creating their society is a key point for Bandura. While the determinants interact with one another, and to some degree shape agents' interactions, Bandura argues that "people are producers as well as products of social systems . . . [where] personal agency and social structure operate as codeterminants in an integrated causal structure rather than as a disembodied duality."[88] The "codeterminant" relationship between structure and agent is a crucial point, both for our understanding of media effects and for the social theories described below.[89] By distinguishing "individual" from "collective" agency, Bandura offers a framework for understanding the ways that structures can have impact, yet also be impacted by individuals or groups.

87 Ibid., 265.
88 Ibid., 266.
89 It also has strong parallels with other communication and information theories, such as Darnton's "communications circuit." Robert Darnton, *The Forbidden Best-Sellers of Pre-Revolutionary France* (W. W. Norton & Company, 1996).

Sanctioning and law

Bandura's theory also connects to legal communication's impact on individuals through the lenses of "motivation" and "sanctioning." Social cognitive theory posits that behavior is ultimately regulated through sanctioning and "self-sanctioning." The regulations of sanctions are "modeled" on "rules" learned through cultural interactions, and impact action only in competition with other "motivations" that guide an individual's actions.[90] While Bandura's "rules" are not legal, they similarly guide behavior. An individual's behavior is governed as they refrain from actions out of a desire to avoid either social sanction or "self reproach."[91] Bandura sees the sanctioning phenomenon as being intimately tied to media portrayals, which "can alter perceived social sanctions by the way in which the consequences of different styles of conduct are portrayed." Citing the example of "physical aggression" as a resolution to conflict, he argues that the media can legitimize certain behavior, while differing factions of society can also attempt to try to "sway [the communication system] to their ideology."[92] Media might have an impact on individuals, while still falling under some contention for use within society. Thus, one can both learn rules laws through media, but can also vie to influence mass communication on an issue of interest.

The balance of media impact and influence over media, as well as the balancing between the three "determinants," to some degree mirrors the structure/agency tension in social theory. The balancing is also perhaps the best depiction of a multi-directional mass communication effect. Additionally, Bandura's framing of social rules and self-sanctioning are a potential tie between effects theories and social theories of norms and law. While media can serve the function of communicating

90 Bandura, "Social Cognitive Theory of Mass Communication.," 275.
91 Ibid., 277.
92 Ibid., 277, 279 Note that Bandura is perhaps best known for the "Bobo Doll" experiments where children who were exposed to violent media messages were more likely to show aggression towards a clown doll.

social or legal rules, Bandura's embracing of contention between determinants fits well with the idea of law acting as a structural power that is also structured by agents.

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Recall from the quote that opened this chapter that connects the media-induced experiences of law and individual schema of legal rules. While much of this literature review has argued against a "direct" media effect, it is worth remembering the third person effect's contention that it is common to believe that *others* fall victim to simplistic effects. Additionally, recall that there are a number of factors which can impact the ways a message will be remembered or utilized. Effects have been found for the utility (or expected need) that one finds in the message, as well as how recently or frequently an idea is interacted with. Evidence is emerging, however, that "cognitive elaboration" on a message is a powerful predictor of whether one might think using System 1 or System 2 when encountering a message. Empowering individuals or groups with constructing meaning, or collective-meaning-based social action, is a possible cumulative effect systematic thinking. Yet agents are still subject to limits from rules. Perhaps cognition and media priming play a large part in individuals sanctioning themselves or others. The role of schema in forging the balance between individual potential and social limiting has been well described in the sociology of law literature.

Legal consciousness and communication

While it may be possible to draw some conclusions about law from the media effects literature, an examination of the interaction between law and society is more typically the work of sociologists. Legal consciousness is one way to study law's impact outside of the formal legal system. Legal consciousness focuses on the experience of law by the public, yet understands it as an active

process of social production of the law – not a one-way imposition.

The study of legal consciousness originally aimed to explain more than "what individuals think and do" regarding law, but rather to demonstrate how law acts as "a set of circulating schemas and habits."[93] Looking back after the discipline evolved, Silbey defined consciousness as:

> . . . participation in this collective, social production of ideology and hegemony, an integral part of the production of the very same structures that are also experienced as external and constraining. In this framing, consciousness is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making.[94]

While the nuance of the approach is thought to have been lost in much of legal consciousness research, the present study will attempt to revive the focus on schema and habit through a connection with mass communication effects research. Legal consciousness' basis on rich social theory must therefore be described to lay the groundwork for a comparison to the communication literature. This section will describe the legal consciousness literature, and will focus on how its theoretical underpinnings compliment the above theories of media effects. The findings will set the empirical direction for the present study.

Legal consciousness

The most cited legal consciousness study, Patricia Ewick and Susan Silbey's *The Common Place of Law*, shows how attention to social theory might guide both the methodological approach and data analysis. Ewick and Silbey surveyed 430 individuals to examine engagement in "legality," or the emergent social relationship between individuals and law. Legality is an important concept to the

93 Susan S Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 323.
94 Ibid., 333–334.

authors, as it explains a new way of looking at laws relation to society. Legality would view law as emerging from diverse social situations as a "resource" that guides understanding of a situation, or as something that can be used to shape the outcome of a social interaction. Rather than an "external apparatus acting on social relations," legality "is enduring because it relies on and invokes commonplace schemas of everyday life."[95] As we shall see, the dual notion of law as a top-down and bottom-up interaction is born out of the social theory underlying legal consciousness, and pervades the results of Ewick and Silbey's study. Additionally, the study provides an excellent example of a framework of how individuals engage law outside of proscribed legal structures.

Ewick and Silbey's study results describe three "stories of legality" which provide a means to observe law as a socially constructed phenomenon. The first is legality as the "objective realm of disinterested action," which refers to law as an imposition from outside of normal life.[96] The imposition of law from outside includes experiences of the law where one must appear "before" the law in obedience to its rules. The next story is legality as a game, which portrays law as a site for different players to compete for their desired objectives. Here people use the law, or act "with" the law, in attempts to resolve conflicts in their interests. The last story relates to law's ability to exert power – a power that some might see as being arbitrary as opposed to objective. Here individuals work to resist legal forces ("against" the law) which they believe are working outside of the realm of socially acceptable practices or outcomes. These three stories inform what Ewick and Silbey call a "social construction of legality," and they depict a unique way of viewing how law can operate outside of the explicit rules of the formal system.[97] The construction they find is one of both

95 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998), 17.
96 Ibid., 28.
97 Ibid., 34.

contradictions and commonalities.

Ewick and Silbey found contradictions on many levels: between and within schemas of law, and even within individual interpretations ("utterances").[98] In keeping with the book's title (*The Common Place of Law*), a number of important commonalities were also found. The authors reported remarkably limited "interpretive" schemas in the stories of their 400 interviewees, leading them to the conclusion that the schema are objectively observable, and thus open to interpretation.[99] The ability to interpret their results is an important point – I will argue that using cognition and communication provides a means to understand the finding of a limited set of schemas. Building on the similarities in interpretation, Ewick and Silbey conclude by remarking that "legality is a durable and powerful structure of American society because it is ordinary and has a common place in daily life."[100] The element of "durability" in socially constructed law is the very issue that social theorists (and the present study) have grappled with.[101] It is also an element that Silbey has subsequently argued to be lacking in subsequent studies of legal consciousness.

The development of legal consciousness falls short

Reflecting on a decade of legal consciousness research, Silbey takes issue with much of the current legal consciousness research, arguing that "rather than explaining how the different experiences of law become synthesized into a set of circulating schemas and habits, the [legal consciousness] literature tracks what particular individuals think and do."[102] By outlining her expectations, we will show how the current study attempts to address the literature's shortcomings.

98 Ibid., 226–228.
99 Ibid., 247.
100 Ibid., 250.
101 Silbey, "After Legal Consciousness," 358, calls it the "critical sociological project of explaining the durability and ideological power of law."
102 Ibid., 323.

We will begin to examine how the study strives to be a practical example of legal consciousness' sociological underpinnings.

In keeping with an "external" view of law, Silbey argues that legal consciousness departs from traditional legal studies in three ways. First, legal consciousness "abandoned a 'law-first' paradigm of research," instead focusing on how law works outside official channels.[103] Second, the empirical focus shifts away from "measurable behavior" towards "meanings and interpretive communication of social transaction."[104] Finally, legal consciousness examines how law works in "everyday life" by looking at the relationships between law and culture. Here communication plays a key role, as "society is a fiction we sustain through hard work and mutual communication."[105] By focusing on interactions between individuals, as well as on the interaction between individuals and the system, legal consciousness attempts to empirically describe the balance of social forces of ideology and hegemony.

The balance of the interactions between individuals and system can be thought of as a "push" and "pull" between the structural powers of law and the collective power of agents. The structures of law can pull an individual by constraining his or her action through "elaborate regulations, codes delineating prohibited conduct, and social norms designed to maintain existing arrangements of power and order."[106] However, the collective power of individual's legal interpretations has the potential to push law into new directions. The pull (ideology) and the push (hegemony) might be understood to lie on opposite ends of a continuum. Silbey succinctly describes both ideology and hegemony:

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103 Ibid., 326–327; Citing: Austin Sarat and Thomas R. Kearns, *Law in Everyday Life: Austin Sarat and Thomas R. Kearns* (University of Michigan Press, 1995).

104 Silbey, "After Legal Consciousness," 327, citing Habermas.

105 Ibid.

106 Anna-Maria Marshall and Scott Barclay, "Introduction: In Their Own Words: How Ordinary People Construct the Legal World," *Law & Social Inquiry* 28, no. 3 (Summer 2003): 617–618.

> At one end of the continuum are the still-visible and active struggles referred to as ideology. At the other end are the struggles that are no longer active, where power is dispersed through social structures and meanings are so embedded that representational and institutional struggles are no longer visible. We refer to this as hegemony.[107]

The push and pull can be seen in Silbey's definition of consciousness as "participation in this collective, social production of ideology and hegemony, . . . [as a] part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified."[108] Thus the mutually reinforcing relationship between ideology and hegemony is at the core of Silbey's understanding of consciousness. Legal consciousness has drawn from Giddens and Sewell's description of the push and pull, and their conception of ideology and hegemony align clearly with the above communications theory. We shall argue that the questions posed by the social theory underlying legal consciousness might be best answered by the mass communication literature.

Structuration and schema

Legal consciousness has drawn on Anthony Giddens' theory of structuration as one way to resolve the "push and pull" of ideology and hegemony. Structuration is Giddens' framework to explain social structure as a process, rather than ideological rules or "formalized" procedures.[109] The theory explains how structures have social power, while still giving individuals freedom to move about within their bounds.

At its core, structuration deals with the relationship between agents and the structures which appear to constrain their actions. First, Giddens assumes that agents freely make choices about

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107 Silbey, "After Legal Consciousness," 333, for the sake of brevity we will gloss over ideology and hegemony's roots in Marx and Gramsci.

108 Ibid., 333–334.

109 Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration*, 1st pbk. ed (Cambridge: Polity, 1986), 17–18.

whether to interact with social structures, though some to a greater or lesser degree. More importantly, the actions of agents serve to reproduce social structures by consistently reinventing and reinforcing social rules. The process of reproducing structure is what Giddens calls "structuration."[110] By constantly recreating structure over time via their actions, agents take an active role in its social force. Structure and agency therefore "presuppose" each other, forming an interdependent duality where one cannot be considered without also reflecting on the other.[111]

By placing structural power in the hands of agents, we can perhaps see how law has a structural impact, directly as its own social entity. While law naturally has some direct force (e.g.: a prison sentence or fine is a direct effect of institutional power), Giddens' placement of power in the hands of agents personalizes what might otherwise be considered an impersonal force. Giddens describes agentic power in terms of "resources," or the "media through which power is exercised, as a routine element of the instantiation of conduct in social reproduction."[112] In other words, agents use resources to both create and reproduce actions of power that may appear to be social structure.

Because agents are placed at the center of reproducing structural force, I would argue that the exercise of structural power is a social act – power happens through (often mediated) interaction rather than through some perceived or external social force. Seeing legal structure as a communicative process allows us to more accurately pinpoint how law works in day-to-day life. Though law is given some indirect structural force, we can still recognize the high degree to which mediated legal messages and their communicators impact that structural force. Yet, the balance of ideology and hegemony in Giddens' conceptualization perhaps does not meet all of his desired ends.

110 Ibid., 28.
111 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," 1992, 4.
112 Giddens, *The Constitution of Society*, 16.

Agents clearly have some power to use their knowledge and other resources to shape relationships of power, however it is difficult to see how sole individuals might bring about larger scale social change when power is embedded in individual interactions. Giddens' formulation of structuration explained how structure and agents might be broadly interrelated, but the power given to individuals may be too great.

Sewell's revision to structuration: schema

Recall Giddens' argument that power, rather than being a unified and impersonal force, was socially created and recreated by individuals through the process of structuration. William Sewell, while appreciative of the effort to more clearly define power in social structure, found a gap in Giddens' account. Sewell argues that the power to create structure given to agents was too great. He thus attempted to ground structuration in the structure our thoughts and flow of actions as human beings – schema and habit. Sewell's solution to the deficiency in structuration aligns directly with the mass communication literature addressed above.

It takes Sewell only a few pages to deconstruct structuration by removing its deficiencies while keeping its conceptually valuable parts. Sewell distinguishes Giddens' notion of structure by arguing that, "structures are not the patterned social practices that make up social systems, but the *principles* that pattern these practices."[113] In other words, he disputes Giddens' contention that practices make structure, arguing instead that it is the ideas or assumptions underlying these practices. Thus, Sewell finds that structures have only "'virtual' existence," or that structures only exist in agents' minds, but are then put into practice by our actions. Transposing structure's fiber away from institutional actions into individual's mental structures, while a bold move, helps to

113 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," 1992, 6, emphasis original.

explain how power works in taken-for-granted practices and in day-to-day activities. The focus on individual knowledge and daily interaction draws Sewell's attention to the field of cultural anthropology. In it, he finds a, "vocabulary for specifying the *content* of what people know."[114] The focus on "content" and knowledge is important, as it indicates a move towards focusing on communication and cognition.

Sewell resolves Giddens' ambiguous use of the concept of "resources" by turning to the idea of "schema" as an alternative basis for structure. Sewell quotes Giddens to define the "schema" which make up structures as the "generalizable procedures applied in the enactment/reproduction of social life."[115] Generalizability, or the potential to be transposed between realms of schemas, is vital for making the rules of structure virtual while making resources to be an effect of structure.[116] However, by making structure purely virtual, Sewell quickly assesses that Giddens' duality of structure has been destroyed.

To address his concern that structure is not structural enough, Sewell first argues that as "embodiments" of schema, resources "are *read* like texts, to recover the cultural schemas they instantiate."[117] In other words, the principles in a schema can be interpreted for use in a variety of circumstances. Likewise, he finds schemas are recreated over time by the use of resources, which thus keeps a schema relevant. Sewell argues the connection between schema and resources' mutual recreation "constitute *structures* only when they mutually imply and sustain each other over time."[118] The creation of schema through resources becomes structural through continued use.

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114 Ibid., 7 emphasis original.
115 Giddens, *The Constitution of Society*, 21; William H. Sewell, "A Theory of Structure: Duality, Agency, and Transformation," *The American Journal of Sociology* 98, no. 1 (July 1992): 7.
116 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," July 1992, 11.
117 Ibid., 13 emphasis original.
118 Ibid. emphasis original.

To create the stability or stasis necessary for a power to be considered structural, Sewell uses Pierre Bourdieu's notion of "habitus" to explain why the recreation process stays steady over time and establishes five axioms to maintain changeability in structures. Bourdieu depicted habitus as history conditioning individuals to accept and reproduce the social rules which dictate and limit acceptable behavior.[119] Yet, here again, he finds Bourdieu's ideas as invoking *too much* stability over time.[120] To gain what might be considered just the right amount of stability, while still accounting for the possibility of social change, Sewell argues for a more flexible theory which indicates a "more multiple, contingent, and fractured conception of society – and of structure."[121] He offers five "key axioms" to create the framework through which we might understand how structure can be static while allowing for transformation over time. While the text does not show an explicit connection between the axioms and communication, I will argue that the mass communication literature offers a firmer grounding than Sewell's axioms.

Schema-based structure and communication

Sewell's five key axioms show the static fluidity of structure and characterize how structure can be tenuously created at the local level while still holding some capability of enforcement. Sewell explains the axioms in some detail (much like the definitions of Giddens), but I would argue that we might look to the communication literature and science of the mind to understand both how mental structures work on an individual and collective level. By shifting from the axioms to a cognitive basis

119 Pierre Bourdieu, *Outline of a Theory of Practice*, Cambridge Studies in Social Anthropology (Cambridge [England]: Cambridge University Press, 1977), 85.

120 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," 1992, 15. In his words, it retains the "agent-proof quality that the concept of the duality of structure is meant to overcome."

121 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," July 1992, 16.

for schema, we might find a psychologically grounded explanation for the non-duality of structure and agency. The shift also forms a basis for empirical legal consciousness research.

Sewell's axioms could achieve a similar definitional goal through a grounding in cognitive principles. Sewell first states that structures are multiple and non-homologous, noting that we can apply a "wide range of different and even incompatible schemas" to different situations.[122] The multiplicity of structures overlaps to a great degree with his argument that structures can be "transposed," or that they "can be applied to a wide and not fully predictable range of cases outside the context in which they are initially learned."[123] Mental models by their very nature create shortcuts which decrease the need for cognition in different situations. The automatic patterns of thought in System 1 provide a framework to lower the bar of necessary cognition in varying and unique situations. A connection to systematic or heuristic thinking is also apparent in Sewell's axiom that structures are "unpredictable and "overlapping," whereby "schemas can be borrowed or appropriated from one structural complex and applied to another."[124] Given that System 1 type thought does not always follow a rational pattern, heuristic thinking seems likely to create situations of unpredictability or borrowing in the use of (perhaps erroneously) remembered information. A cognitive approach might give appropriately stronger sticking power for structure when compared to Bourdieu's habitus as it uses psychological principles of heuristics and ways of practice.

Finally, Sewell states that structures can have multiple meanings, or polysemy. The connection to communication clearly appears in the, "array of resources [which are] capable of being interpreted in varying ways and, therefore, of empowering different actors and teaching different

122 Ibid., 17.
123 Ibid.
124 Ibid., 119.

schemas."[125] Information is naturally open to interpretation – which is the very essence of the argument for a limited mass communication effects model (i.e.: not direct). Legal consciousness' basis in Sewell's schema is thus arguably more fully understood to be a function of cognition. It is apparent that Sewell's axioms of structure can be explained by cognitive and communicative models – in fact at levels below conscious thought. By shifting from the axioms to a cognitive basis for schema, we might find a psychologically grounded explanation for the non-duality of structure and agency. More importantly for the present study, by grounding questions of legal consciousness in cognitive science we gain the ability to look for specific phenomenon in empirical research.

The five axioms lead Sewell to his final definition of structure: "sets of mutually sustaining schemas and resources that empower and constrain social action and that tend to be reproduced by that social action."[126] The elements of empowerment, constraint, and reproduction maintain much of Giddens' original vision of structuration, while also fitting well theories of cognition and communication. Sewell thus finds that the duality of structure is maintained by:

> Placing the relationship between resources and cultural schemas at the center of a concept of structure makes it possible to show how social change, no less than social stasis, can be generated by the enactment of structures in social life.[127]

Sewell's definition of structure is therefore profoundly social – thus granting a good deal of power to groups of agents – and should be understood to be largely grounded in the communication. It is remarkable that Swell uses language similar to that of cognitive psychology to describe how seemingly constraining social structures (like law) constrain our action.

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125 Ibid., 19.
126 Ibid.
127 Ibid.

Legal Consciousness, Communication, and Cognition

Silbey's lament that legal consciousness research no longer attempts to explain "how the different experiences of law become synthesized into a set of circulating schemas and habits" arguably might be revived by focusing on cognition and communication.[128] While she notes a few "exceptions" to the trend, Silbey argues against research that purely reports perceptions of law, stating:

> Too many of the studies seem to have rested on the pixels of perception (e.g., attitudes) rather than the ground that enables perception. Legality, a theoretical construct as the object or consequence of legal consciousness, is lost as a structure of cultural production and its contribution to the production of legal ideology and hegemony unspoken.[129]

I would argue instead that the groundwork of perception *is* spoken – we need only look at individual and group communication to discover heuristics and patterns of elaboration.

In fact, Sewell and Silbey appear to agree on the importance of communication for the description of social structures and law. While only a brief note, Sewell remarks that, "the transpositions of schemas and remobilizations of resources that constitute agency are always acts of communication with others."[130] Our ability to take what we have learned in one area and apply (or transpose) it in another, has a basis in reducing the effort needed to think in a given situation. The reduction in effort need not be only at the individual level. By communicating our schema to others, we collectively shape and reshape our collective schema.

Silbey also finds two examples of research examining the social construction of law with deep roots in communication (including Haltom & McCann's work, described in the previous chapter).

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128 Silbey, "After Legal Consciousness," 323.
129 Ibid., 358.
130 Sewell, "A Theory of Structure: Duality, Agency, and Transformation," July 1992, 21.

Silbey argues that this research, which focuses on institutional communicators, "provide[s] analyses of the production, distribution, and reception of messages about crime, litigation, and law, displaying and probing the professional production of legal ideologies."[131] Silbey cautions, however, to avoid looking purely to the "cultural industries" as institutional producers of legal consciousness. Thus we must still look to individuals – and arguably their communication – to fully articulate the structuration process that legal consciousness attempts to describe.

Fortunately, the cognitive and communicative frameworks described in the first half of this chapter can also accommodate a collective or cultural vision of agent-driven social structure. Recall the emerging research in the area of "cultural cultivation" that has found importance in the alignment of a message with the norms of a group. The notion of "prototypicality," or the degree to which a message aligns with the norms within a group, can dictate the likelihood that a given message will be processed.[132] The more a message resonates with group members, the more influential that message is likely to be. An influential message is likely to impact a group's collective schema. Additionally, heuristic thinking might offer a clue to group rules or norms. "Rules of thumb" within a group are further evidence of System 1 thought, and therefore potential evidence of the creation of structure – especially if the rules are influenced by understandings of the law. Finally, the depth of "elaboration" might reveal issues that individuals or a group think more deeply about. Evidence of elaboration on a concept might indicate System 2 thinking, which may be a location where a group may be desire structural change or may be breaking from dominant or hegemonic

131 Silbey, "After Legal Consciousness," 360; Citing: William Haltom and Michael J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2004); A. Doyle, *Arresting Images: Crime and Policing in Front of the Television Camera* (Toronto: University of Toronto Press, 2003).

132 van Knippenberg, "Group Norms, Prototypicality, and Persuasion," 161.

forces in society. Deeper thinking reveals a motivation to exert the cognitive effort necessary to consider structures in new ways. By examining 1) how legal issues are framed within groups of individuals, 2) common ways of interpreting a legal message, and 3) common normative rules related to law, we might uncover the schema, structures, or legal consciousness of a group. We might better grasp how larger structures (and law) change or stay the same by describing how individual and group schemas formed and are changed.

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Legal consciousness' attempt to show how law works in society from the perspective of empowering agents in the creation of social structure brings a practical means to examine a broad social phenomenon. Ewick and Silbey's efforts to base legality in Sewell's notion of schema-based structure was an important (if poorly understood) attempt at the goal of understanding the role of agents in structuration. I would argue that basing legal consciousness in the more established literatures of cognition and communication might help the study stay true to its theoretical goals while providing a clearer path for future research.

Conclusion

This chapter has implicitly argued against a rational or direct effects view of how law works in society. Rather than having an impact through official channels, the law is mediated and affects individuals only by virtue of their ways of thinking about the world. More importantly, the impact flows in both directions.

The present study will use a legal consciousness approach to examine how groups of individuals consider the law in the context of their media habits. By looking for evidence of heuristic

or elaborated thinking as well as for the types of messages that are prototypical of group communications, we might come to understand how the law is being constructed within the context of their interactions. By looking at communication, we might find evidence of different modes of thought to consider in combination with group norms. This combination of factors might reveal a group's conceptions of legality – both in changeable and durable ways.

4. Study methods

Examining the communications basis of the social construction of law will lead to a better understanding of how laws can promote compliance or resistance – especially in relation to norms. Indeed, such an examination might also uncover areas where law matters little, or where the impact of law is other than what was intended by lawmakers. The present study will describe the impact that copyright law has on creative activities, both at an individual and group level. Further, it will attempt to connect the impact of copyright law to communicative patterns. The methods of examination will largely follow the legal consciousness literature's tradition of qualitative study, but will add aspects from the mass communication literature described in the previous chapter.

Copyright law is an especially good fit for a study of legal communication. Intellectual property has recently become an area of intense legal conflict between content owners and a recently empowered public. The Internet and digital technologies have combined to ease copying and distribution, as well as technical and business processes. Thus, the public who use these tools is now responsible for laws which they previously were not party to. The expectations of digital culture have begun to permeate into offline relations to challenge traditional notions of copyright. The individuals and groups studied challenge the law through practices which could be interpreted as violations of intellectual property.

This chapter will present the central questions of the study and will describe the groups of individuals examined, including the recruitment and interview procedures. A detailed description of the method will join conceptual threads from the literature review, the legal issues, and the conceptual questions.

Study description

Growing public controversy around intellectual property has recently increased public awareness of the law. It is suspected that, because highly connected publics (like fans) read popularized scholarship on intellectual property, scholarly arguments may have permeated culture.[1] Further, knowledge of the law and legal arguments will frame members' perceptions of legal, social, economic, and technological issues. While the law of copyright is not the object of analysis in the present study, the high degree of rhetoric and interest surrounding the law foster an ideal case for a study of legal communication.

Copyright to be an appropriate body of law to analyze for three reasons: the law is complex, there is a great deal of interest in the law, and the law is poorly understood. First, decades of legal "cruft" (a term for a buildup of material, typically used by programmers to refer to old code) has made intellectual property law exceedingly complex and prone to misconception and interpretation.[2] Second, consumer adoption of computers and the internet has brought a sudden application and relevance of the law to the public. While copyright prosecutions were largely applied to businesses who could afford the costs of reproduction and distribution, it now must be adhered to by everyone with a computer and internet connection. A natural interest has grown around copyright, as it is a complex law that was arguably imposed on a public without their input.[3] Finally, a 2000 report by the National Academy of Sciences Committee on Intellectual Property Rights and the Emerging

1 The participation of scholars in blogging and social media further enhances access to the arguments described here.

2 "Cruft," *Wikipedia, the Free Encyclopedia*, February 25, 2013, http://en.wikipedia.org/w/index.php?title=Cruft&oldid=540269834 Lack of clarity around evolving issues such as fair use and technical protection measures is evidence of the "buildup."

3 Recall the arguments of: Jessica Litman, *Digital Copyright*, Pbk. Ed (Prometheus Books, 2006); Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

Information Infrastructure, gave very specific recommendations for how to address the "Digital Dilemma." The solutions to the report's recommendations have still largely gone unaddressed. Among the primary recommendations was that:

> Research and data collection should be pursued to develop a better understanding of what types of digital copying people think are permissible, what they regard as infringements, and what falls into murky ill-defined areas. Such research should address how these views differ from one community to another, how they differ according to type of material (e.g., software, recorded music, online documents), how user behavior follows user beliefs, and to what extent further knowledge about copyright law is likely to change user behavior.[4]

The Academy's call for research points directly towards questions that might be answered through an understanding of how copyright law is constructed by users, especially in a group context.

Given the timing of legal and technical developments described above, I would contend that copyright provides a unique case to explore legal communication. While copyright will be the subject matter of the present study, it should be underscored that the particularities of the law of copyright are not the unit of analysis. Rather, copyright provides an effective context in which to analyze legal communication. A number of questions about the communication of copyright, and subjects' interaction with the law will drive the study's methodology.

The guiding questions of the study address issues of copyright, communication, and community norms. When considering how individuals experience copyright in the contexts of culture and digital technologies we might ask:

- How one learns about copyright and its complexities?
- Whether knowledge of the law has an impact on an individual's creative acts?
- If there are there community norms related to the law?

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4 United States. Congress. House of Representatives. The House Committee on Energy and Commerce :: Welcome, "The House Committee on Energy and Commerce :: Hearing," Text, accessed March 6, 2007, http://energycommerce.house.gov/cmte_mtgs/110-ti_hrg.030107.WorldWideWeb.shtml.

Finally, it would be wise to explore the communication and reception of copyright law:

- Are there typical ways of addressing law within a community?
- Does a community follow any "rules of thumb?"
- Are there any legal perspectives unique to a given community?

The above questions will guide the analysis of the relationship between individuals, their collective communication diet, and the law. Using an approach grounded in legal consciousness research, I will strive for a thick description of trends across the groups.

Methods description

Sampling

To examine how copyright is lived in "everyday life," it is necessary to find individuals who, while not currently facing legal problems, are engaged in activities which may present risk of violating copyright law. A purposive sample of five groups, described below, was conducted to find candidates who fit the profile of legal risk, yet also have contact with other individuals who perform similar activities.[5] Purposive sampling is "a nonprobability sampling method in which elements are selected for a purpose, usually because of their unique position."[6] While not representative, purposive sampling seeks informants who are knowledgeable in the culture being studied, willing to talk with the interviewer, and representative of the range of viewpoints.[7] Additionally, the sample was extended with a snowball method whereby new interviewees "are identified by successive informants."[8] By purposefully seeking out members of communities who engage in creative activities which may

5 Note that the sample was not a "convenience sample," as all subjects had to fit the above criteria – most of all by being members of one of the five groups.

6 Russell K. Schutt, *Investigating the Social World: The Process and Practice of Research* (Pine Forge Press, 2011), 157.

7 Herbert J. Rubin and Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (SAGE Publications, Inc, 1995), 66.

8 Schutt, *Investigating the Social World*, 158.

violate copyright, the sample best fits the goals of the present study. By interviewing communities of individuals, the degree to which the law informs their norms might be found.

Participants, who were largely drawn from the Midwest region of the United States, were found using a mix of contact strategies. The primary strategies for collecting interviewee contact information were through community organizers, and by directly meeting subjects at community events. I personally attended public events to personally describe the study to group members and later contacted them for an interview. Additionally a key figure was found for each of the communities. The key figures at times forwarded a request to an existing list of participants via e-mail. The key figures often pointed to a few key contacts, shared insight on the community, and in some cases, participated in an interview. The guidance proved invaluable for setting the tone of the interviews and subsequently for gaining trust with participants.

The setting for the 30-45 minute interviews was typically a public coffee shop or other quiet location, as the conversations were audio recorded with participant consent. Given the possibility of divulging illegal activity, confidentiality was assured to all participants. After each interview the participant was given a $5 gift card to a major retailer as incentive for participation. The interviews for each of the five groups reached an "exhaustive" point where data was sufficiently deep enough for analysis.

Protocol

The structured interview protocol focused on four themes: the individual's background in the community, the knowledge and impressions of copyright law, a response to a hypothetical situation, and a reaction to a news article.[9] First, I asked questions about the participant's history, interest, and

9 The interview protocols for each group appear in Appendix A.

role in the group. I used more personal questions at the outset of the interview to "break the ice" and to form a basis for further questions. Questions regarding how the community interacts made reference to the mechanics of creating and working with content. I also asked subjects about their impression of larger industry (i.e.: publishers, the recording industry).

The second set of questions examined the individual's process of learning about the law, as well as broad impressions about copyright, technology and culture. All participants were asked about their recollection of the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA), including direct inquiry into the source and depth of knowledge of the proposed bills.[10] Given the level of attention the legislation received in the news media, and the widespread website "blackouts," the bills seemed to be an appropriate topic to discuss, even months after their defeat.[11] In addition to asking about general memories of intellectual property in the news, I asked participants to broadly offer their impression of the relationship between copyright, technology, and culture.

The final two groups of questions specifically targeted interpretation of law and legal news. A complex hypothetical situation was designed for each group. It portrayed an individual in a difficult legal situation who asks the interviewee for advice.[12] The hypothetical question was an opportunity to see how an individual would approach the legal situation, including the resources or extra-legal strategies that the subject might employ or recommend. Finally, I asked participants to read an article relevant to their group regarding intellectual property.[13] After finding out whether the subject

10 Lamar Smith, *Stop Online Piracy Act (SOPA)*, 2011; Patrick Leahy, *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA)*, 2011.

11 Jenna Wortham, "With Blackouts and Twitter, Web Flexes Its Muscle," *The New York Times*, January 18, 2012, sec. Technology, http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html.

12 Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass: Harvard University Press, 1991), 50.

13 Articles given included: For fanartists, Anderson Nate, "Why Anime Fans Pirate the Shows They Love," *Ars Technica*, February 22, 2011, http://arstechnica.com/tech-policy/news/2011/02/why-anime-fans-pirate-the-shows-they-love.ars; For zinesters, Andrew Smith, "'Ghost Rider' Story Brings Controversy," *Star Tribune*, February 22, 2012,

had prior knowledge of the story, I asked whether the article provoked any curiosity into the law. The strategy of responding to a news artifact attempted to elicit how the article's information aligned with the subject's experience or opinion. The interview notes and conversation recordings were subsequently analyzed.

Analysis

Given the explicit focus on heuristics, elaboration, and prototypicality, the interview data was analyzed using a deductive approach. Deductive analysis is often used when the data are being examined to answer a specific question.[14] Seale describes that "sometimes a more deductive approach might be required, with at least some themes developed before you begin analysis, from previous research or theory or researcher intuition and experience."[15] However, a deductive analysis does not preclude open coding. Seale asserts that, when one has "a general idea of what you are looking for," an analysis can begin by using "broad, deductively determined codes to home in on the data, and then inductive coding to explore this in more detail."[16] A mix of methods was necessary to examine both 1) the presence of specific phenomena (heuristics, elaborations, and prototypicality), and 2) broader descriptions of how copyright law is experienced in everyday life. The multiple goals of

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http://www.startribune.com/entertainment/movies/140021683.html; For DJs and music producers, Chris Richardson, "'Girl Talk' Provokes Copyright Owners with Free Download of New Album, 'All Day'," *Christian Science Monitor*, November 16, 2010, http://www.csmonitor.com/The-Culture/Music/2010/1116/Girl-Talk-provokes-copyright-owners-with-free-download-of-new-album-All-Day; For Startup Weekend participants, Mark Milian, "Startups Party at the Patent Office," *BusinessWeek: Technology*, May 3, 2012, http://www.businessweek.com/articles/2012-05-03/startups-party-at-the-patent-office; For students, Selby Rodriguez, "UW Faces Lawsuit for Possible Copyright Infringements," *The Badger Herald*, September 14, 2011, http://badgerherald.com/news/2011/09/14/uw_faces_lawsuit_for.php.

14 For example, Schutt notes how he uses such a mixed scheme with predetermined categories: "My coding scheme included measures of the source and target for the communication, as well as measures of concepts that my theoretical framework indicated were important in organizational development: types of goals, tactics for achieving goals, organizational structures, and forms of participation." Schutt, *Investigating the Social World*, 433.

15 Clive Seale, *Researching Society and Culture* (SAGE, 2011), 368.

16 Ibid., 371.

analysis warrant both a targeted (deductive) analysis and thick (inductive) description.

The data analysis combined both deductive and inductive coding. First, I created codes for the targeted categories of heuristics, elaborations, and group prototypicality in the data analysis program. Additional predetermined codes arose from specific points of interest in the interview protocol. With these codes as a beginning framework, I listened to the audio to tag clips with the existing categories, to create memos of relevant points, and to add new categories which emerged.

Second, the initial round of listening to interview audio sifted the data by capturing the general topics of interest. The first round of categorization was not used to describe every remark, or each discrete idea. The tags made the audio data more accessible by chunking it into useful remarks, while discarding data which was not relevant to the targeted categories or a subject's everyday experiences of copyright.

The predetermined codes were used to categorize clips of audio from a few seconds to a few minutes in length. In cases where the predetermined codes did not adequately capture a valuable point, open codes were created for concepts which were repeated with some frequency. Codes were added only in cases where interview notes or analysis memos supported the creation of a new category.[17]

Third, following the initial coding of the interviews, I created a descriptive text memo for each of the tagged segments. The process provided easier access to the data for description and quoting. A summarizing guide of categories was used for the final data analysis.[18] Additionally, I combined overlapping codes and added additional tags when a segment addressed more than one

17 Unfortunately, the process of adding new codes in the software used was cumbersome as it required a number of steps.

18 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998), 255–6. See Appendix B for a category listing.

topic.

The third stage most approximated a transcript of the interview audio, but provided numerous advantages to transcript data. Tessier describes that working directly with audio can allow a researcher to work with a greater number of interviewees, which in the case of the present study allowed for study of a greater number of groups.[19] Crichton and Childs present a convincing case for the use of audio data in research. Though the researchers used video to capture their interviews, they describe advantages which align with the present study's focus on the use of language:

> The method we suggest in this article allows us to record our participants, analyze their words and actions, clip the relevant segments, and organize those segments into a series of frames and codes, keeping the images and/or voice of the participants intact for as long as possible. This method allows the researcher to hear and see the gestures, intonation, passion, pauses, and inflections throughout the analysis process. It reduces the impact that the transcription process has on the content, given that often the transcription is not done by the principal researcher because of time or cost considerations and that the transcription process itself flattens the potentially rich, three-dimensional quality of the original footage into a two-dimensional text format.[20]

In the present study, the words spoken are of equal importance to the aural evidence – such as the pace at which words are said, or the amount of time a subject used to make a point, as both reveal underlying thought patterns. The timing of speech could only be analyzed directly in the audio. To take advantage of the benefits of such an analysis of audio data, a modern data analysis tool was selected to both facilitate categorization while listening to interview audio, and to assist in analyzing the data.

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19 She remarks: "Working with tape also reduces both the time and costs associated with data management, which provides another advantage because it could lead to studies with more interviews, thus providing a more robust set of data."Sophie Tessier, "From Field Notes, to Transcripts, to Tape Recordings: Evolution or Combination?," *International Journal of Qualitative Methods* 11, no. 4 (August 15, 2012): 451.

20 Susan Crichton and Elizabeth Childs, "Clipping and Coding Audio Files: A Research Method to Enable Participant Voice," *International Journal of Qualitative Methods* 4, no. 3 (November 29, 2008): 42.

The "Dedoose" software focuses on mixed methods research, but also offers a flexible means of audio analysis.[21] The application facilitated the categorization or tagging of uploaded interview audio. Additionally, the software also allowed entry of "descriptors" to track characteristics of interview participants, such as gender or group members. By adding category tags to utterances in the audio, Dedoose made it possible to find patterns in the interview data and to verify those patterns by quickly reviewing a category's audio fragments. All categories were also defined in a "data dictionary" for reference throughout the analysis process, and memos were kept to elaborate on conceptually interesting points and connections.[22]

In the final stage of analysis I reviewed the code and general memos, while again listening to the categorized interview audio. The final stage iteratively drew out themes from the cognitive strategies (law-based heuristics, elaborations, and group prototypicality), as well as for general emergent trends. Multiple reviews of the data and multiple hearings of relevant audio clips revealed statements which common strategies within or across groups.

The predetermined and emergent categories served a purpose of ordering the data for subsequent review on the second round. Much like Ewick and Silbey's process, a mixed strategy revealed "moments of silence," where an interviewee referred to an issue that "could be made [into a] legal matter," and compared the issues with "explicit legal interpretations" within the "narrative structures and social circumstances" in which they arose.[23] In comparing the times when a subject chose not to frame an issue legally with cases where the law was called upon reveals when group members saw law as mattering to their practices. The present study's focus on structures which

21 Dedoose, Version 4.5.91, web application for managing, analyzing, and presenting qualitative and mixed method data (2012). Los Angeles, CA: SocioCultural Research Consultants, LLC.

22 Ewick, *The Common Place of Law*, 220. The data dictionary appears in Appendix C.

23 Ibid., 255–6.

emerge within social context through silences and assertions align with a constructivist approach.

Methods justification

While quantitative methods could have acquired data from a larger sample, face-to-face ethnographic interviews were chosen for a number of reasons. First, ethnography strives for a breadth and depth of detail to comprehensively describe how an individual engages with social forces. Since legal compliance can be a sensitive issue, conversation may be a more comfortable and candid way for participants to respond. Moreover, ethnographic research is arguably the sharpest way to test hypotheses and to move between the levels of structure and individual. Braithwaite convincingly argues that case studies illustrate the delicate balance of one's impacting and being impacted by society through:

> explain[ing] both how macro variables shape purposive individual action, and how these individual choices combine to constitute other macro variables which further constrain individual action, moving backwards and forwards between the macro and micro in a way that sees human beings as neither totally determined by structural variables nor totally unconstrained by their choices.[24]

The movement between macro and micro applies particularly well to the present study, given that the interviews attempt to gauge how communication patterns reflect larger constructions of law.

Second, while much of mass communication effects and cognitive psychology research is experimental or quantitative in nature, the methodologies typical in communication do not necessarily fit with legal consciousness research. A legal consciousness approach, which seeks to draw out constitutive power, might be characterized as growing from constructivist theory. As such, the descriptive results collected by interviews could never hope to capture the "reality" of

24 John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge [Cambridgeshire]: Cambridge University Press, 1989), 110.

communication-based legal construction.

Constructivist theory acknowledges that individuals intuit multiple and varied realities, and the theory therefore instead seeks to explain these individual (collective) constructions.[25] Charmaz argues that a constructivist approach, "means more than looking at how individuals view their situations," but further requires a vigilance to the conditions under which differences and distinctions arise.[26] The constructivist approach aligns with legal consciousness studies, which Silbey argues should, "show us how the different forms of consciousness or ways of participating work with each other to constitute the power of the law, or legality."[27] Silbey addresses the "empiricist-substantialist" problem by urging researchers to examine the durability and ideological power of law.

The present study will attempt to address the empiricist-substantialist issue by examining all points in the social construction model – by triangulating between the actual letter of the law, its communication (through typical media stories), and finally what individuals report and do in relation to the law.[28] At the same time it will attempt to consider both the construction and the constructed, or what people think the law says in comparison what they actually do. The approach is supported by ethnographic work of Forester, which suggests that an utterance's facts, norms of legitimacy, inner dispositions, and framing categories can point to, "issues of the control of information and belief, the management of legitimation and consent, the presentation of self and the construction of trust, and the selective organizing or disorganizing of other's attention."[29] Forester's

25 Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Pine Forge Press, 2006), 127.

26 Ibid., 130–1.

27 Susan S Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 357.

28 To some degree the triangulation strategy mirrors that employed by Haltom and McCann to "understand virtually all practices by means of a triangulation among the instrumental and the institutional and the ideological." William Haltom and Michael J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2004), 14.

29 John Forester, *Critical Ethnography: On Fieldwork in a Habermasian Way* (Sage Publications, London, 1992), 54.

"Habermassian" method of fieldwork highlights the "micropolitics of speech and action," rather than "assum[ing] determinate structures a priori."[30] In other words, by ethnographically exploring the relationship between communication and power at a small scale, within social networks, we might address the "indeterminancies of meaning and action."[31] Silbey argues that, although social practices, "are indeterminate, events and outcomes may still be, and research has shown them to be, probabilistically predictable."[32] Again, from a legal consciousness perspective, an approach which looks below surface results for durable, hegemonic structures will more completely describe the social construction of power. Silbey argues:

> Too many of the studies seem to have rested on the pixels of perception (e.g., attitudes) rather than the ground that enables perception. Legality, a theoretical construct as the object or consequence of legal consciousness, is lost as a structure of cultural production and its contribution to the production of legal ideology and hegemony unspoken.[33]

The study will be strengthened by a sensitivity to any normative or legal "durabilities" in the form of the cognitive cues addressed in the third chapter: elaboration, heuristics, prototypicality.

"Durability" in mass communication effects

In the previous chapter, a few factors were determined to be indicative of thought patterns which might engender social structure. Structural ways of thought, especially in a group setting, might show the interplay between norms and law. By looking at a group's communication habits as well as ways of talking about issues, we might discover how law is "lived" in their community. A cognitive approach also aligns well with Ewick and Silbey's notion of "schema" as an organizational

30 Ibid., 62–3.
31 Silbey, "After Legal Consciousness," 329.
32 Ibid., 330.
33 Ibid., 358.

strategy.[34] This section will describe the strategies used to seek heuristic, elaborated, and group-prototypical ways of thought in the interviews.

Recall that automatic thinking (which has also been called System 1, heuristic, or thought via the "peripheral route") is the primary mode of cognition.[35] When thinking heuristically, one draws upon existing mental resources to frame or disregard new information. As Schroeder describes, one thinking via the peripheral route engages "in relatively little elaboration . . . referring to easily accessible constructs to determine the accuracy of the message."[36] One example of heuristic thought might be a "rule of thumb," or a practices that have been agreed upon within a group. Such explicit or repeated heuristics might bias one towards a thought or action. Easily accessible heuristics may at times bear some relation to the law.

In the course of an interview, rules of thumb are often stated in very brief and common terms. A common phrase might indicate that group members have experienced similar communications, which have become inculcated into the group's vocabulary. Yet, the differences in meaning experienced by the group members could be equally important.

Second, signs of elaborated thinking are characterized by the types of thought more often associated with rationality. Mass communication researchers have argued that rationality is characterized by, "'issue-relevant' thinking or critical evaluation of messages."[37] One might display critical evaluation through an understanding of multiple perspectives to an issue; which reveals a depth of understanding that extends beyond their own perspective. A thoughtful elaboration may

34 Ewick, *The Common Place of Law*, 256.
35 Daniel Kahneman, *Thinking, Fast and Slow*, 1st ed. (Farrar, Straus and Giroux, 2011), 20–21.
36 Lisa M. Schroeder, "Cultivation and the Elaboration Likelihood Model: A Test of the Learning and Construction and Availability Heuristic Models," *Communication Studies* 56, no. 3 (January 2005): 231.
37 Ibid., 230.

have been carefully developed by a subject prior to the interview, or at other times a speaker might slow down to carefully consider a newly elaborated thought.[38] The elaboration pattern remarkably shows up in the audio waveform, and presents arguably one of the greatest strengths of the *in situ* audio analysis method. For example, notice the regularity in the waveform in illustration 1 when compared to the more jagged form in illustration 2. The greater distance between the peaks of the waveforms show the pauses that the subject was inserting between words. Fewer words being said in an equal amount of time is evidence of the thought being given to the remark being made.

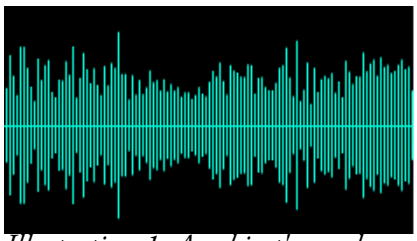

Illustration 1: A subject's regular speech pattern.

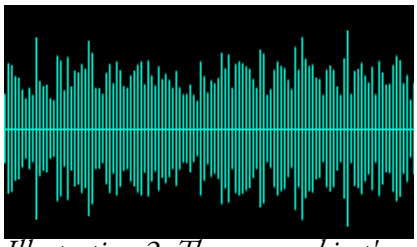

Illustration 2: The same subject's elaborated speech pattern.

Finally, recall that "prototypical" messages which align well with group norms are better received than messages which do not.[39] Common reactions to a story show ingrained ways of approaching an issue. Prototypical reactions might also reveal practice-based elaborations, which have some basis in a group's common practices or ideals. For issues that have more than one potential viewpoint (which is usually the case with law), the level of agreement within a group may show prototypical points of view. A reaction to an informational or normative influencing attempt may show how a group will accept or deny a particular message.[40] Eliciting a common reaction to a news story within a given group might reveal the degree to which the rhetoric aligns with the prototypes of the group.

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38 Note, there is potential for false positives with individuals who are natural elaborators. In these cases, the interview was compared to others in the group and unique points were listened for.

39 Daan van Knippenberg, "Group Norms, Prototypicality, and Persuasion," in *Attitudes, Behavior, and Social Context: The Role of Norms and Group Membership* (Psychology Press, 2000), 161.

40 Ibid.

By taking a cue from behavioral mass communication theory, the present study looks for heuristic, elaborated, and group-prototypical thinking which might indicate "durability"(or static qualities in flexible system) of the ways of thought and practice within a group.[41] Since these modes of thinking have been shown to impact how information is processed, it is hoped that we might see how law impacts individuals in a group context. By looking at constructions of law through communication and cognition, we might find a framework to understand the impact of legal communication.

Groups analyzed

To examine the social construction of copyright, I conducted in-depth interviews with individuals from five different groups whose members are involved in activities that potentially use the copyrighted or patented work of others were conducted for the present study. Each of the five groups were purposively sampled as a "case" upon from to draw conclusions and comparisons.[42] Members of the five groups were not involved in formal legal proceedings. Thus, creators supported by the major content industry are absent from the present study. To examine law in everyday life, it is necessary to find subjects who do not typically engage the legal system on a regular basis (which, for most members of society, is not a regular activity).

The five groups were selected to highlight actions of participatory culture – which can be conducive to intellectual property problems. Community norms were present in each of the groups, based on the interpersonal contact between members. In some cases, group interactions take place in

41 Ewick, *The Common Place of Law*, 30.

42 This strategy is derived from Elickson's use of cattle ranchers as a case to explore norms of property. Ellickson, *Order Without Law*.

a physical place (e.g. at an event or in a frequent "hangout"), but others connect online.[43] Many members of the groups perform a mix of copying existing works and sharing copyrighted works which they have altered.

Often, the activities hold some potential for income. While some work for free, many of the group members earn small amounts of "hobby money" from their work; while, for others, the work is a primary means of income. In total, 44 individuals were interviewed across the five groups analyzed: fan artists, zine creators, disc jockeys and producers, startup weekend participants, and an undergraduate class.[44]

	Male	Female	Average age	Total participants
Fan artists	2	5	37	7
Zine makers	5	6	35	11
DJs and Producers	9	0	35	9
Startup Weekend participants	9	1	32	10
Undergraduate web design students	3	4	22	7
Total	28	16		44

Table 1: Group demographics

Fan artists

> **Fan art (fan ärt):** original artwork related to science fiction or fantasy, created by fan artists, and which appears in low- or non-paying publications . . .[45]

A "fan" is one who has an affinity for a cultural object; fan artists draw inspiration from cultural objects in the creation of art, often portraying a character or situation from a game, movie, or television show. Fan art is an expression of participatory consumption commonly found in fan

43 Online groups were not interviewed, as was proposed, because of difficulty in locating willing subjects. The shift away from online interviews necessitated a slight change in the targeting of groups because some of the originally targeted groups only meet virtually.

44 Demographic data is presented in Table 1. Recall that a purposive sample strives for a diversity of perspectives rather than demographic diversity.

45 "Fan Art," *Wikipedia, the Free Encyclopedia*, February 27, 2013, http://en.wikipedia.org/w/index.php?title=Fan_art&oldid=541061716.

communities, and can historically be traced to cultures surrounding science fiction.[46] Fandom has been found to foster participation with culture, the building of virtual communities, and the expression of individual identity.[47] Because of the participatory interaction that often uses cultural materials, fan artists create works which some might consider violations of copyright. Practices which are known to exist in fanartist communities, such as adding disclaimers of attribution to derivative works, make them a group worthy of study.[48] It is expected that practices such as the disclaimers, which have only minimal basis in the law, might reveal misconceptions about copyright in the 7 individuals interviewed for the present study.

Rather than passively receive popular culture, fans participate in media consumption through the making of costumes, role playing, and the creation of art. As Henry Jenkins observes, fans look "for ways to prolong their pleasurable engagement with a favorite program, and they [are] drawn toward the collaborative production and evaluation of knowledge."[49] Fan artists, in particular, seek to engage with media by portraying characters with a unique or personal interpretation.

While a great deal of fan activity takes place online, face-to-face interaction is also a common means of connection. Conventions, or "cons" are popular meeting places for fans. From *Star Trek* conventions, to regional anime gatherings, to the yearly Comicon, conventions provide a socially sheltered place for fans to interact with other fans with similar interests.[50] Theresa Winge documents

46 For example, the World Science Fiction Society has been awarding a "best fan artist" since 1967. "Hugo Award for Best Fan Artist," *Wikipedia, the Free Encyclopedia*, March 3, 2013, http://en.wikipedia.org/w/index.php?title=Hugo_Award_for_Best_Fan_Artist&oldid=510664101.

47 Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture*, Studies in Culture and Communication (New York: Routledge, 1992), 1–2.

48 Rebecca Tushnet, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law," *Loyola of Los Angeles Entertainment Law Journal* 17 (1997 1996): 664.

49 Henry Jenkins, *Convergence Culture: Where Old and New Media Collide*, Revised (NYU Press, 2008), 58.

50 Comicon is a convention dedicated to comics which annually draws well over 100,000 attendees. City News Service, "Comic-Con Attendance Expected To Top 126,000 This Year | KPBS.org," accessed March 22, 2013, http://www.kpbs.org/news/2012/jul/12/comic-con-attendance-expected-top-126000-year/.

the safe haven for the case of costuming (or "cosplay"), which is acceptable within the social context of a convention.[51] Commerce also is an important part of conventions. Many fans arrive prepared to buy and sell items that complement their cultural interests.

Given that fan art borrows from characters and scenes which appear in media owned by corporations from around the world, the intellectual property status of fan art is often suspect. Schott and Burn note that fan artists, "engage in forms of appropriation and adoption of digital media, for instance, incorporating images from the game into iconic representations of their fan identity badges and banners."[52] Yet, some evidence exists that many fans have opportunities to become aware of the law. For example, in 2013 a news site dedicated to English-speaking anime fans published a lawyer-authored, four part series on "The Law of Anime."[53] Additionally, forum threads discussing news and interpretations of copyright are common within fan communities. The apparent knowledge of the law may be strategic, as different studios and publication corporations have differing policies on fan activities.[54] The lines often blur between fandom and original works of art. Some fan artists also create original comics, and other fans create self-distributed "zines" as an alternative means of distribution.

Zine makers

> **Zine (zēēn):** a small circulation self-published work of original and/or appropriated texts and images usually reproduced via photocopier.[55]

51 Theresa Winge, "Costuming the Imagination: Origins of Anime and Manga Cosplay," *Mechademia* 1, no. 1 (2006): 65–76.

52 G. Schott and A. Burn, "Fan-art as a Function of Agency in Oddworld Fan-culture," *Videogames and Art, Bristol: Intellect Books* (2007): 247.

53 "The Law of Anime Parts I & II: Copyright and the Anime Fan," *Anime News Network*, accessed March 17, 2013, http://www.animenewsnetwork.com/feature/2013-02-15/. Anime are japanese cartoons.

54 Jenkins, *Convergence Culture*, 197–200.

55 "Zine," *Wikipedia, the Free Encyclopedia*, March 17, 2013, http://en.wikipedia.org/w/index.php?title=Zine&oldid=543286711.

The community of zine makers (a shorthand for "fan-zine," root word: "magazine") offers an opportunity to examine how the countercultural choice of self-publishing in print engenders norms which may conflict with copyright. Zines have been defined as amateur, "noncommercial, nonprofessional, small-circulation magazines which their creators produce, publish, and distribute by themselves."[56] Having been in existence since the 1930s, zines have limitless forms and subject matter – from a means to connecting a fan-base, to a personal journal, to revolutionary or countercultural declarations. Classic zine form is often drawn or cut-and-pasted, hand photocopied, and distributed by mail or face-to-face at a "zinefest" (though, exceptions to the form are more common than the rule). Zines provide a unique copyright perspective because of their long-standing practices of borrowing material and for an often personal interaction with (or against) mainstream culture.[57] Additionally, the rise of digital production and distribution presents questions of whether the Internet has changed any of the norms of sharing within zine culture. It is expected that the 11 zinesters interviewed for the present study might reveal how practices that are based in print culture have been influenced by online experiences.

Zines at times engage the politics of popular culture, but in a way that arises from a personal voice of experience (what Duncombe calls "personalized analysis").[58] The analysis is often expressed as a personalized narrative, but with an underlying function of communicating as, "zines are as much about the communities that arise out of their circulation as they are artifacts of personal expression."[59] Zines interact with mainstream culture by participating with it – producing as well as

56 Stephen Duncombe, *Notes from Underground: Zines and the Politics of Alternative Culture* (London; New York: Verso, 1997), 6, 14.

57 Note that many fanartists also do original work drawing comics; also, some original comic artists distribute their work in the form of a zine.

58 Duncombe, *Notes from Underground*, 28.

59 Ibid., 29, 44.

consuming.[60] Duncome describes one early example of *Amazing Stories*, a pulp science fiction magazine started in 1926. He describes:

> instead of accepting the unidirectional information flow of commercial mass media . . . [fans] sent letters to *Amazing Stories*, then began writing to one another, and finally, pushing one step further, started writing their own stories and producing their own publications, eradicating the distance between consumer and creator.[61]

While "fannish" interaction with dominant culture is empowering, Duncome argues that it is "forever lopsided," given that "the culture industry has final control over" the images of a particular story.[62] However, the creative industry's control is often acceptable to zinesters, as the tamer images of mass culture often do not overlap with the dissonant or graphic imagery common within zines.[63]

The norms of copying and distribution in the zine community are not uniform. The source material of zines is often cut from magazines and other print sources. It is also not unprecedented for a zine to copy large portions from existing materials. A lax-but-conscious attitude towards the rules of mainstream culture is also present in zinester attitudes towards their own work. Duncombe notes one zine asserts its status as "anti-copyright. Feel free to copy and distribute," and another which after a formal copyright statement states:

> Actually if you're cool, you can gamble that my relatives, the hoighty-toity Washington DC lawyers won't be set on your scrawny butts so gamble and reproduce anything you want. . . . However major publishing concerns can suck my International Standard Serial Number.[64]

It is not uncommon to find a zine with a Creative Commons or copyleft license, or some statement about the permission surrounding the content acquisition or distribution. What is not clear,

60 Ibid., 106–7.
61 Ibid., 108.
62 Ibid., 113.
63 Ibid., 128.
64 Ibid., 123–4.

however, is the degree to which zinesters would be comfortable with the consequences of permissive licensing schemes or anti-copyright attitudes. Often, such licensing choices can bring surprising and unwelcome use of one's copyrighted work. While photocopying and physical distribution have been the norm in zine communities, Duncombe predicts the arrival of zines on the Internet with the qualification that paper zines will continue to exist. Given that zinesters consciously decide to create their work in print with a limited distribution, one might guess that they would be similarly careful in a choice of copyright license or in a move to a new medium.

DJs and Producers

> **DJ (dē-jā):** Club DJs select and play music in bars, nightclubs, or discothèques, or at parties or raves, or even in stadiums. Hip hop DJs select and play music using multiple turntables . . . and are also often music producers who use turntablism and sampling to create backing instrumentals for new tracks.[65]
>
> **Producer (prō-dü-sər):** hip hop producers are the instrumentalists involved in a work. . . in the studio, a hip hop producer also functions as a traditional record producer, being the person who is ultimately responsible for the final sound of a recording.[66]

Disc Jockeys (hereafter DJs) and producers find, arrange, present, and to some degree compose, music in a broad range of styles. While DJing and producing, are rooted in playing music on the radio and in music recording, both have evolved similar strategies to blend sound into musical experiences. Each is also in a unique position of using existing music to create a new and unique performance or song. Given the contention over copyright in music sampling, or the reuse of short phrases of recorded music, DJs and producers often risk a lawsuit in the course of creating a work. The 9 DJs and music producers interviewed for the present study might reveal whether the law

65 "Disc Jockey," *Wikipedia, the Free Encyclopedia*, March 18, 2013, http://en.wikipedia.org/w/index.php?title=Disc_jockey&oldid=545221381.

66 "Hip Hop Production," *Wikipedia, the Free Encyclopedia*, March 19, 2013, http://en.wikipedia.org/w/index.php?title=Hip_hop_production&oldid=544246268.

impacts any perceptions of the copyright pressure from the music industry.

A DJ's interaction with music occurs both in and outside of dance clubs. DJs historically spent large amounts of time in record stores looking for, "rare or obscure records."[67] With the right track, a traditional DJ would use a variety of techniques to blend one song with another. As technology evolved, the processes of finding and blending music has grown easier and less expensive. While many DJs do not compose new music, the simultaneous consumption and production of music makes their work an interesting case of participatory (or postmodern) interaction with media.[68] By selecting and performing recorded music, DJs act as a reviewer in the music distribution process. Being a DJ is also very often a precursor to working as a producer.

Sampling, or the use of short, existing musical tracks in a new work, can trace its roots to hip-hop DJing. With two records and a good beat, a DJ would create a seamless background for a live performance by quickly moving the records and needles around in a technique called "backspinning."[69] Backspinning evolved into digital techniques, and has subsequently arrived at a point of composition where, "increasingly, 'writing' has come to mean the deft combination of samples from various sources, and the skilled manipulation of technology."[70] Moorefield argues that the role of producer has thus evolved from, "being primarily a technical to an artistic matter," raising the level of a modern producer to that of *auteur*.[71] The techniques of sampling have also expanded beyond hip-hop to electronica, and now more broadly into popular music. Digital technology has

67 Bill Brewster, *Last Night a Dj Saved My Life: The History of the Disc Jockey*, 1st American ed (New York: Grove Press, 2000), 8–9.
68 Ibid., 14.
69 Virgil Moorefield, *The Producer as Composer: Shaping the Sounds of Popular Music* (Cambridge, Mass: MIT Press, 2005), 91–2.
70 Ibid., 92.
71 Ibid., xiiv.

played an invaluable role in the process, as "the integration of digital control and digital audio in the computer, [has created] an unprecedented amount of sonic control is available to everyone – there exists today unparalleled creative opportunity for the individual of even moderate technical ability."[72] Indeed, the democratization of low cost technologies and endless source material available on the Internet has drastically expanded the number of people who attempt music production.

The copyright issues in sampling are largely known to producers. Moorefield contends that early electronica artists, "legitimized sampling as an art form by adding the element of transformation," essentially making sampled tracks unrecognizable.[73] Obscuring source material was legally a well-founded choice, as a string of cases beginning in the 1980s culminated in a 2004 court of appeals decision which found no *de minimis* exception for copyright.[74] Over the course of those 24 years, a great deal of legal scholarship was published on the issue of sampling, and the technology also greatly evolved.[75] Yet, as Moorefield describes, the impact of the law on the musical art was fortuitous:

> . . . although the use of techniques such as resampling, filtering, shuffling, and the like partly developed as a way to keep from getting sued for copyright infringement, the results have propelled the development of this kind of electronic music to interesting places.[76]

While copyright, the music industry, and technology have all impacted the creativity of DJs and music producers, techniques of creating music have continued to evolve.

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72 Ibid., xviii.

73 Ibid., 97.

74 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), 104; Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2005).

75 The work of McLeod and DiCiola provides recent context. Kembrew McLeod, *Creative License: The Law and Culture of Digital Sampling* (Durham [NC]: Duke University Press, 2011).

76 Moorefield, *The Producer as Composer*, 97–8.

Startup Weekend

> **Startup Weekend (stärt-əp wēk-end):** a 54-hour weekend event during which groups of developers, business managers, startup enthusiasts, marketing gurus, and graphic artists pitch ideas for new startup companies, form teams around those ideas, and work to develop a working prototype, demo, and/or presentation . . .[77]

Startup entrepreneurs often imagine being the "next Facebook" or the "next Twitter." Internet startup companies typically begin with small staffs working long hours funded by venture capitalists. However, the economic potential of startups has stimulated events which foster opportunities for startups to spawn and "incubate." Startup Weekend is one such event, which to date has spawned over 1,000 events.[78] The website for the non-profit Startup Weekend organization describes the meetings as "54-hour events where developers, designers, marketers, product managers, and startup enthusiasts come together to share ideas, form teams, build projects, and launch startups!"[79] The mission statement's enthusiasm illustrates how startups see themselves as the engines of the new, networked economy. The zeal perhaps masks some of the unique intellectual property issues which can surround a startup event. Conversations regarding patent and copyright do not necessarily happen at the outset of a 54-hour collaborative, creative marathon. It is expected that the free sharing of ideas which are common within "maker culture" might influence the construction of law in the 10 Startup Weekend participants interviewed for the present study.[80]

While small startup companies predate the Internet, the focus on intense experiences to drive a startup idea towards execution is relatively new. In March 2005, Paul Graham posted an article on

77 "Startup Weekend," *Wikipedia, the Free Encyclopedia*, February 14, 2013, http://en.wikipedia.org/w/index.php?title=Startup_Weekend&oldid=538218645.

78 "Startup Weekend Upcoming Events," *Startup Weekend*, accessed March 17, 2013, http://startupweekend.org/events/.

79 "About Startup Weekend," *Startup Weekend*, accessed March 22, 2013, http://startupweekend.org/about/ emphasis original.

80 Justin Lahart, "Tinkering Makes Comeback Amid Crisis," *Wall Street Journal*, November 13, 2009, sec. Gadgets & Games, http://online.wsj.com/article/SB125798004542744219.html.

"How to Start a Startup."[81] Much as startups promote quickly moving an idea to "execution," Graham went on to found a startup "incubator" (Y Combinator) which takes, "ambitious geeks and puts them in a situation with no distraction and expects audacious outcomes from them, . . . [to] get the company into the best shape possible."[82] The success of Y Combinator was repeated in similar events, including Startup Weekend.[83] While the scale and duration of Y Combinator and Startup Weekend are different, both focus on entrepreneurship to nurture creative ideas, to foster collaboration, and to move an idea into something with long-term financial viability.

Startup Weekend has democratized the Y Combinator model to occur in hundreds of locations and to involve thousands of people. It also has brought more opportunities for investment (by venture capitalists, governmental organizations, and schools), and has become a forum for experienced entrepreneurs to mentor those new to the field.[84] The speed of the Startup Weekend experience, however, creates unique problems for intellectual property. Within the span of a few hours, dozens of new ideas are shared with of the participants. The best ideas are voted on, and teams are created to work to create a tangible product inside the span of a weekend. The rapid pace and creative flow leaves little space for discussions of intellectual property.[85] The degree to which startup week participants are mindful of their intellectual property as they pitch ideas and loosely

81 Paul Graham, "How to Start a Startup," *Paul Graham*, March 2005, http://www.paulgraham.com/start.html.

82 Jennifer Lee, "Running a Hatchery for Replicant Hackers," *The New York Times*, February 21, 2006, sec. Business / Business Special, http://www.nytimes.com/2006/02/21/business/businessspecial2/21startup.html.

83 Companies started through Y Combinator include Reddit, Dropbox, and Scribd.

84 Laura Pappano, "Campus Incubators Are on the Rise as Colleges Encourage Student Start-Ups.," *The New York Times*, July 19, 2012, sec. Education / Education Life, http://www.nytimes.com/2012/07/20/education/edlife/campus-incubators-are-on-the-rise-as-colleges-encourage-student-start-ups.html.

85 One example involved a startup company (Infoflows) which found its intellectual property inappropriately used by the larger company Corbis. The article notes, "technology start-ups that work with big companies, said Kevin Rivette, a Silicon Valley consultant, should take care to protect their most valuable ideas, even as they collaborate."Steve Lohr, "In a Partnership of Unequals, a Start-Up Suffers," *The New York Times*, July 18, 2010, sec. Technology, http://www.nytimes.com/2010/07/19/technology/19startup.html.

collaborate on tangible works of intellectual property, is yet to be determined.

Undergraduate web design students

> **Undergraduate (uhn-der-graj-oo-it):** A student at a university who has not yet received a degree.[86]

Undergraduate students in a web design class were also interviewed. By comparing the norms of the class to those of the members of the other groups, the organic norms of the other groups could be compared to the more formal lessons of copying norms which are taught at the undergraduate level. The impact of rules taught in the classroom, where students were being taught to create websites both by looking at existing code and through novel means, could be compared to norms developed through other experiences. Given the balance of learning information, as well as exposure to new norms, in an undergraduate's life, it is expected that the 7 undergraduate web design students interviewed for the present study might show how the constructions of copyright law may come to be established. Being younger on average and not being members of a self-formed community, the group also serves as a useful counterpoint to the other groups.

The questions for the undergraduates aligned with those of the other groups, but focused on the processes and industry of web design. While a class is not an organic community and largely does not foster the same sort of self-driven creativity as the other groups, the data serves as a good counterpoint to the core study – especially given that the participants were still very fresh in their careers. Along with technical skills, the students were learning practices of creativity which potentially could involve use of the copyrighted work of others.

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86 "Undergraduate," *Wiktionary*, May 13, 2013, http://en.wiktionary.org/wiki/undergraduate.

Many members of each group risk legal action for intellectual property violations in the course of their activities. One might also contend that these possibly violating activities also have an element of creativity, or that members use technologies to their fullest capabilities. Additionally, the existence of some form of community within each group brings an opportunity for shared experiences of legal communication, and for the development of group norms.

By examining legal communication through the lens of copyright law, we might see how communication is the mechanism by which law works in society. Looking at knowledge and attitudes of law in a community setting will uncover some of the ways that legal messages are received. However, the present study aims to deepen the analysis to investigate the ways that the structural power of copyright law is created through the actions of individuals, both in their relationships and through creative acts.

5. Analysis

The results of the interviews support a communications basis for the social construction of law. The groups' relationship with the law is in all cases unique and complex. Yet the complexity can be accounted for by using the frameworks defined by the mass communication literature. The heuristics used within and across the groups reveal constructed, but durable rules. How the rules compare to the law points towards shared legal constructions. Elaborations, which require more detailed thought or explanation, take the form of narrative stories which describe a group's experience with or relationship to the law. The degree to which a message matches with a group's perspective, defined as prototypicality, can be seen in both heuristics and elaborations. Common ways of thinking about law and legal communication reveal a social construction of the law.

This chapter will first explain three heuristic rules that were present throughout the groups, as well as a four common elaborative descriptions. In large part, the group's thought patterns distanced the law from daily practices. By constructing rules which create a safe haven from the law, individuals were able to participate in the activities that they desire without worrying about legal risk. Even when performing an elaborated legal analysis, one often takes into account all of the various social and economic pressures that could impact or guide a response.

Each group's heuristics bear a tenuous relationship to the law, yet are consistent with daily practices. The commonly told elaborative stories reveal situations where the law has not quite fit with group norms, or stories of legal difficulty within the group. The relationship between thought patterns and the law reveal the prototypicality of a legal message, and thus show how a legal message might be processed. Ultimately, the heuristics and elaborations provide a telling description of a group's construction of the law.

Universal heuristics

Given the mass communication literature's definition of automatic thought as key to understanding a media effect, one of the primary objects of analysis was to define *heuristics.* Rules of thumb might indicate the means by which groups of individuals gravitate towards a common mental framework. Also, as Schroeder describes, an easily accessible mental construct can create bias.[1] As rules of thumb enter a group's vocabulary, we might discover some of the cognitive elements of durable, socially constructed law.[2] The heuristics are also embedded in existing social contexts, which new legal messages must contend with.

Three heuristics rules emerged in the interviews. First, the motivation to create is not only a widely held value, but is often expressed in similar ways within each group. Second, the perception of a right to sample copyrighted works was expressed across the groups – perhaps to a greater degree than a fair use analysis might allow. Finally, it was widely believed that making money from another's copyrighted work is the greatest factor which could bring legal trouble. While many of the individual groups had their own versions of each heuristic rule, the ability to freely create while using samples, within some financial constraints, emerged as universal heuristics of copyright.

"Execution" heuristic

Focusing on "creating," prior to considering law, was a prominent heuristic across the groups.

1 Lisa M. Schroeder, "Cultivation and the Elaboration Likelihood Model: A Test of the Learning and Construction and Availability Heuristic Models," *Communication Studies* 56, no. 3 (January 2005): 231.

2 Durability is used here, not in the sense of lasting over time, but as being sturdy to change. As a cognitive structure which is held by a number of individuals, a heuristic is not likely to change quickly. Susan S Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 358.

The need to flex one's creative muscle before considering law was frequently phrased in terms of "making whatever you want."[3] For example, while some Startup Weekend participants expressed desire to consider intellectual property at the outset of the weekend, many recognized that such a discussion would, "take away from the positive vibe" of the event.[4] The focus on creation aligns with the startup community's value of "execution" – or completing a creation – above thinking ahead to legal implications.

Zinesters also value personal creative freedom to work without boundaries. One zinester described how the medium has, "kind of that ephemeral quality that you're not going to get when it's mass produced," which is tangibly expressed through a creator having, "folded and stapled each one by hand, [or by including] . . . googley eyes glued on, or glitter."[5] The drive for personal expression was described as a natural impulse that needed to be satisfied – especially given the technologies at a group's disposal. Legal messages contradicting the heuristic of making "whatever you want" would meet resistance, or even blatant disregard.

"Sampling" heuristic

A desire to participate with culture drives many to sample from existing copyrighted works. Zinesters feel extraordinarily free to sample – as one said they "don't give it a second thought."[6] Limited distribution may be one factor which has enabled zines to liberally borrow from copyrighted works. For example one zinester remarks that she has, "seen a lot of zines that are photocopies of actual books. . . . zinesters don't care at all about stealing the work – and I don't even consider it

3 Recall the producer from the introduction. Interview with DJ/producer 9, December 26, 2012.
4 Interview with Startup Weekend participant 3, May 17, 2012.
5 Interview with Zinester 9, December 2, 2012.
6 Interview with Zinester 2, June 30, 2012.

stealing . . . [I have seen zines that] copy a chapter from a book, and then putting it out as a zine."[7]

Startup weekend participants at times knowingly use patented functionality in their creations. One described discomfort with a patent that had been granted for seemingly normal functionality: "someone had filed a patent for, it was like a pull-down menu, it was something really basic."[8] Yet, the individual felt safe in reproducing the functionality in the confines of Startup Weekend. Individuals earlier in their career may struggle with the permissibility of borrowing features. One student in the web development class remarked: "I guess I'm kind of trying to understand the politics of it, because looking at someone else's code. . . if you're using that [code], then it's someone's work."[9] Reproducing protected functionality in the context of a class or a startup weekend can feel safe, but it is unclear whether the practice can escape into other areas of life.

As we shall see, the rules of sampling in the DJ world are much more involved. The practice of sampling might be considered to be at the core of participative culture, whereby individuals both produce and consume the media that they interact with. The communities studied resist notions of all-encompassing intellectual property.

"Money matters" heuristic

"Making money," or gaining widespread attention, is perceived as a heuristic of bringing great legal risk. There appears to be a practical sense that it is not a good investment of a large company's time to pursue small-scale infringement. As one Startup Weekend participant remarked, "for the small companies, you're not going to get sued because there's no money in it."[10] A perception

7 Interview with Zinester 9, December 2, 2012.
8 Interview with Startup Weekend participant 1, May 14, 2012.
9 Interview with Student 1, February 26, 2012.
10 Interview with Startup Weekend participant 1, May 14, 2012.

of safety in small size (or the lack of large profit) is creatively freeing for some. As one fanartist stated, "As long as you're not making a penny off of it, just go do it. . . . If you're making a lot of money off of their stuff, that's when their radar goes up."[11]

The issue of a rights holder's "radar going up" is the primary concern of many – it is largely how the issue of risk is addressed across the groups. Even one web design student sensed the risk, stating, "it's more trouble, it's more headache. If you're not making any money, it's not a problem, but if you're making money. . . they [the industry] sense that to be a problem."[12] Perhaps due to limited income and distribution, zinesters (a few of whom admit to being anti-capitalist) sense little risk. One remarked that, "people definitely don't make zines to make money. I think they would prefer to trade zines with another zinester, to getting the $1 or $2 that they charge them. People create zines to forge communities."[13] For creators who distribute their work more widely, the risk is ever-present. One DJ described both the rule and the risk:

> The rule of thumb, in my experience, is: unless you're making money, unless you're selling records, and unless it's worth it for somebody to go after you, you really don't have anything to worry about. There's always a danger that you'll do something in that mindset, and then all of the sudden, it will blow up and everybody wants it. And then, you are in trouble. But for the most part, you have to be making some pretty serious waves before anybody cares.[14]

Some relief is found in the heuristic that the entertainment industry is content to ignore infringement until profit is eroded. Lawrence Lessig attempted to persuade industry that, "parallel economies are possible . . . work successfully licensed in a commercial economy can also be freely available in a sharing economy."[15] The "money matters" heuristic also aligns with a criticism implied

11 Interview with Fanartist 6, November 25, 2012.
12 Interview with Student 5, March 7, 2012.
13 Interview with Zinester 10, January 28, 2013.
14 Interview with DJ/producer 2, August 31, 2012.
15 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008),

by some: the formal justice system only serves those with the funding to engage it.

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Bearing in mind that the heuristic mode of thought is automatic and bias creating, the universal rules of copyright might indicate the boundaries of law which groups wish were in place. By making definitions that bound law and set it aside from group activity, the law is placed at a safe distance from creativity. In many cases the heuristics described above exist to justify or enable individual creation. The law of copyright underlies some of the rules, such as the amount sampled or the impact on the market for a copyrighted work. Yet, the ways that the rules are described attempt to put law at a distance. The participants justify actions of personal expression, liberal sampling, and earning a small profits by describing rules which protect these activities. When considered as automatic thought, the heuristics emerge as a sort of defense mechanism to distance one's activity from worry about the law. By putting up a cognitive defense against the law, individuals construct a zone where law's impact is minimized. The heuristic defense is cognitively more accessible than the rational actions of calculating legal risk. By distancing the law in heuristic terms, the individuals have formed a natural defense against the reach of law.

Common elaborations

Recall that a greater degree of mental elaboration indicates a shift from automatic to more rational thought.[16] Through greater mental processing in elaboration, the persuasiveness of a message is decreased.[17] Thus common elaborations might indicate issues where the dominant messages of law

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16 Schroeder, "Cultivation and the Elaboration Likelihood Model," 231.

17 Jennings Bryant, *Fundamentals of Media Effects*, 1st ed, McGraw-Hill Series in Mass Communication and Journalism (Boston, Mass: McGraw-Hill, 2002), 160.

are being resisted. When people perceive that their impression of the world is outside of the norm, it often results in a careful description of a cognitive elaboration.

Four common elaborations of reactions to legal situations emerged in the interviews. First, there appeared to be a resistance to use the law – even when defining legal problems. A more common approach was to calculate the personal value or impact of potential solutions. However, the language of law was used to justify some of the groups' legally suspect activities. By picking convenient terms, like fair use, groups simultaneously distanced the impact of law and justified their pursuits. Third, ways of contesting the law were described in the context of legal situations, like DMCA takedown requests. Finally, a desire for a safe creative space provided further elaboration on the "money matters" heuristic. The need for a space free from legal constraint was described as natural impulse to create and innovate.

"Personal approach" elaboration

The groups hesitated to address situations in legal terms. Participants were more likely to approach legal situations in a personal context. Participants often suggested that a hypothetical friend in need of legal advice should consider what a creative work "means to you," before considering legal options. For example, when given a situation of a zine collage (which had been posted online by another zinester) one advised to consider:

> . . . what impact does that have upon their life and their goals with that zine. If the goal was for people to see this totally awesome collage . . . then it's going to make more people able to see that collage if it's online. . . If it's something that was intensely personal, that the person was only sharing with people that they felt comfortable with. . . I might encourage the person to get in touch with whoever had scanned that [collage] and explain the situation to them to see if there is some way that they could work it out.[18]

18 Interview with Zinester 10, January 28, 2013.

An extralegal strategy to determine the value of a creative endeavor was the primary rational calculation for dealing with the situation. Many described finding strategies for avoiding, or "working around" a legal issue. For example, one fanartist suggested:

> I think I would maybe try to take an end run around it, and try to figure out ways to do the same sort of thing without getting into trouble, but I think most people doing this are trying to stay under the radar and kind of feeling our way to see what's okay and what isn't.[19]

The strategy of avoiding the law when possible addresses the personal desire to achieve creative ends by any justifiable means – even when pressed by legal risk. While many participants were able to deduce the legal issues present in the hypothetical situation, the legal analysis was often not the first thing that came to mind.

"Legal language" elaboration

Many participants used interpretations of legal terminology to justify activities known to be legally troublesome. Copyright defenses like fair use, parody, and derivative works were picked up as a means to the end of justifying desired activities.

Fanartists particularly gravitate towards the use of legal terms. One artist feels uneasy about the lack of clarity in parody as a fair use: "Lots of people talk about this gray area of parody. We have to find where that gray area of parody is, and sometimes it's not clear, because it's a person deciding."[20] The "person deciding," or interpreting the law, might be an industry lawyer or a judge – thus creating uncertainty.

Other fanartists claimed that describing a work as derivative provides legal protection. One suggested to deviate, "more than what you would think [is necessary] – deviate 95% if you have

19 Interview with Fanartist 1, September 7, 2012.
20 Interview with Fanartist 5, November 24, 2012.

to . . . [to make sure that the] big guys [won't] say it's mine."[21] Derivation is common within the fanart community, where one will remake an object to avoid liability. For example, less liability is perceived when drawing a character with one's own hand than if one were to download and print a digital copy.[22]

Fair use of a minimal amount of a copyrighted work is also cited in other groups. Music producers referred to sampling small bits of music so that it was unrecognizable. One zine maker stated that he felt fair use was an appropriate legal standard, yet bemoaned:

> But, of course, if you're familiar with copyright law, fair use is a defense – it's not a right. There's nothing cut and dry, it's not clear. . . The way copyright has become abused. . . [but] believe me, I'm an artist, I think copyright is great. . . but it has clearly been abused. . . . The law itself is great, fair use is great, but that's not the law. It's a defense, and it's on a case-by-case basis. . . [23]

The zinester appears to feel fair use does not provide enough protection to freely create. He correctly deduces that, should anyone file a suit for infringement, a fair use defense provides no guarantees.

Through the use of legal terms we see the strongest evidence of what Ewick and Silbey call "legality." The authors describe that in legality, people see law as, "available and multipurpose, people often see the possibility of putting the law to their own ends."[24] Law is thus used much like a tool: it can be picked up and used when convenient, or set to the side when it does not serve a present need.

"Be practical" elaboration

Elaboration is also present when one is pressed to make a legal decision. Yet, social and economic factors weigh more heavily than law in the decision-making process. Because of frequent

21 Interview with Fanartist 6, November 25, 2012.
22 Interview with Fanartist 2, September 25, 2012.
23 Interview with Zinester 6, September 25, 2012.
24 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998), 131.

online sharing, and in some cases direct experience, the issues of licensing and DMCA "takedowns" are prominent in group elaborations.[25] Unlike the use of legal language to distance the law, practical decisions take a more legalistic approach.

The decision to license one's copyrighted work promotes rational thought. One zine maker recognized the complexity of the Creative Commons licensing system, which provides a menu of licensing options for a creator.[26] While she eventually grasped the distinctions that the license makes, she believes that others may find it complex.[27] She noted that it is a little bit, "hard to create [a social] movement around [Creative Commons]. . . . maybe it's just me not understanding all of the [licensing] language, but when I look at the Creative Commons stuff, it took me awhile to parse it . . . and I feel that shouldn't be the case."[28] With such complex licensing options, the zinester wondered if anyone would want to use Creative Commons.

While it may be hard to create a movement around Creative Commons, those who understand flexible licensing rely upon it. A student in the web design class appreciated the creativity that permissive open source licenses enable: "I'm a big fan of the open source, Creative Commons thing. I think that has a lot of potential for people to make really interesting things, and to build on stuff that other people have done, while still respecting their work."[29] The licensing options also appear to encourage greater rationality in the creative process. One librarian zinester related the licensing decision to her own personal sensibilities towards the sharing of her work:

Now, making my zine, and giving it out to librarians, I definitely think about

25 "Limitations on Liability Relating to Material Online," 17 U.S.C. § 512(g)(2) (2011).
26 "About The Licenses - Creative Commons," accessed April 24, 2013, http://creativecommons.org/licenses/.
27 Though, note she may be experiencing the "third person effect." W. Phillips Davison, "The Third-Person Effect in Communication," *Public Opinion Quarterly* 47, no. 1 (March 20, 1983): 1–15.
28 Interview with Zinester 8, November 18, 2012.
29 Interview with Student 6, March 9, 2012.

> anticipating what would upset me about them sharing my work. I think I'm more permissive than other folks, just because I think the restrictions of standard copyright stand in the way of things that I want people to be able to do [with my work].[30]

Those who understand the options to license their creative work clearly exhibit elaborated thought processes.[31] The law – or rather flexible and freely-available licenses – arguably guides the ways that knowledgeable individuals choose to share their work.

In the more business-minded DJs and Startup Weekend communities, the decision to sell or license the rights to one's work can be life altering. Such decisions are not made lightly, given the income potential of assigning the rights of an app to a large company, or of signing a contract with a record label. For example, one music producer who espoused the strength of internet-based distribution and promotion noted that, if you're successful:

> what do you need a label for? You're already doing everything that they could possibly do for you, on your own. You might make more money, but you might also end up in a contract that screws your over for the next decade of your life.[32]

Licensing, or the assignment of intellectual property, is seen as a reward in startup culture. One Startup Weekend participant remarked that, "there's a very strong cultural emphasis on acquisition instead of creating competitors."[33] Large companies are more likely to buy a small company to acquire the human resource of their talent. A licensing decision can be one of weighing the costs and benefits, much like the decision to take a job.

Licensing appears to be one area of law where members across all of the populations show some degree of legal acumen. It would thus appear that law has some impact on the decision making

30 Interview with Zinester 10, January 28, 2013.

31 Much as the zinester expressed concerns about flexible licenses being hard to "parse," the degree to which those less knowledgable about flexible licensing are able to rationally consider licensing issues is unclear.

32 Interview with DJ/producer 2, August 31, 2012.

33 Interview with Startup Weekend participant 1, May 14, 2012.

process. The level of nuance that appears in the above quotes indicates cognitive elaboration.

However, not all elaborated legal decisions appeared to be purely legalistic. Participants experienced different levels of tolerance to a DMCA "takedown" notice. The reactions ranged from heuristic responses, to interpersonal appeals, to legal activism.

A number of individuals across the sample would take a "no questions" approach to a DMCA takedown request. One fanartist told of a verbal "cease and desist" notice in a physical space, at a comic convention. She describes her policy and the circumstances:

> If we are asked to take something down by the creator, we do it, no questions asked. There's a meme called Nyancat. . . we had a button that had Nyancat on it, and the guy who was selling the official Nyancat merchandise asked us to take it down – he was really polite about it – and we did, no questions asked.[34]

Others imagined the process of disputing a takedown request would be a substantial investment of time and money. In the context of the hypothetical question, another fanartist explained he, "would take [the work] down, simply because they have enough money to last forever in a lawsuit, while I couldn't go long. I would say, give up, no matter how much you don't want to, unless you have the funds."[35] A heuristic decision to back down in the face of a takedown request was remarkably common.

Others, who had personally experienced a takedown notice, described the impact on their business. One DJ described the lack of effect:

> Personal mixes that I've tried to put up there, I get the 'nasty gram.' . . . I don't think that [a technical limit or a cease and desist notice] limits people's creativity. . . there's nothing to prevent you from doing that, it's just that you can't distribute it widely or put it on certain websites. . . . There's ways around the roadblocks for smart and creative people.[36]

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34 Interview with Fanartist 2, September 25, 2012.

35 Interview with Fanartist 6, November 25, 2012.

36 Interview with DJ/producer 8, November 29, 2012. We will later hear a more lengthy story from another music

The variations in types of responses, as well as the perceived impact of the takedown process, points to a contested area of legal construction which ultimately indicates the fluid nature of the social construction of law.

Two operators of digital zine libraries fluidly construct the takedown rules based on interactional requirements, as opposed to the statutory process. Under the DMCA, service providers are compelled to respond to a takedown request. Yet, the zine archivist responses mirror the values of personal interaction that are present in zine culture. One archive operator relayed the following story: "We have a very liberal takedown notice saying, "if your stuff is on our site, and you want it not to be, let us know and we will remove it."[37] In one circumstance, the archive received a takedown notice for an obscurely hidden file which could have been difficult to respond to. The archivist described both the difficulty of the situation and the rationale behind their response:

> . . . we're not going to be threatened by you, bring the worst. And the thing that's funny is, jurisdiction would have been impossible, because we had the file but the zine was created in the Netherlands, and the creators were a whole bunch of anarchists who were mostly anonymous. . . . So that's how we deal with copyright is: if you're nice to us, we'll bend over backwards to help you out. If you're a dick, fuck it.[38]

The archive so decided not to comply, and instead placed the file on their homepage. Another zine library operator explained the need for the zinesters whose work is represented in her archive to feel comfortable with its public availability. She remarks:

> It's more important for me to have someone feel comfortable, than [to have every] zine in our library. . . . I feel like if anyone ever has a problem with it, you should just take it down – even if you don't understand why there is a problem with it.[39]

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producer who felt an impact from the takedown process.

37 Interview with Zinester 2, June 30, 2012.

38 Interview with Zinester 2, June 30, 2012.

39 Interview with Zinester 9, December 2, 2012.

She explained further that a belief that "people change" motivates her to taking things down:

> I think because a lot of the content of zines is really personal [including personal stories of rape and incest, and political issues like picking locks] . . . that kind of stuff, people might not put their names on as much. . . . And if you did put your name on it because you were an 18-year-old kid, and now you're 35, you might not want that to be on the internet.[40]

Even though the DMCA process for a notice and takedown is clearly delineated, the archivist hosts created justifications to act within their own comfort, as well as that of their patrons. While there certainly was rationality behind the archivists' decisions, the law was not the prime motivator of action.[41] Both went to some length to describe their legal knowledge, but then described responses which were based in non-legal considerations.

Even when the law demands a practical response, it need not be guaranteed. However, in most cases it would appear that a legal situation does elicit some degree of rationality. While one might have built up some legal awareness, a decision to comply is weighed with a number of factors. Even in cases of accurate legal knowledge, elaborations of the decision-making process show the multitude of factors to consider.

"Small scale" elaboration

Recall the common heuristic of legal risk from earning too much money from derivatives of another's work. A number of individuals across the groups described how they expected large size or profit to be a tipping point for when the law might impact their activity. The elaborations found distinctions between small and large actors in the economy, the need for a protected space for

40 Interview with Zinester 9, December 2, 2012.

41 The finding is somewhat reminiscent of a study of libel litigants, which found that an apology was frequently the desired outcome. Randall P. Bezanson, Gilbert Cranberg, and John Soloski, "Libel Law and the Press: Setting the Record Straight," *Iowa Law Review* 71 (1986 1985): 215.

innovation, and a perception that large actors of industry do not recognize the need for small-scale creativity.

One Startup Weekend participant described his perception of the difference between "small and large actors." He remarks:

> I also think we have this balance between small actors and large actors. And it's people in the middle who are hurt the most. So, let's say you're really small, and you're a DJ and you remix some copyrighted songs. If you're really small, it's not going to get on anyone's radar to create a fuss. And, if you're really big (like a Girl Talk) the artists like you and want to associate with you. . . [42]

While stated in many different ways, the notion of being "too small to matter" to larger industry was common across the groups. Many participants realize that operating at a small level accompanies some amount of legal risk. Perhaps the process of considering risk drove participants into an elaborated level of thought.

A few subjects were able to articulate a societal need for small actors to foster exploration, innovation, and learning. Despite acknowledging risk, many argued for the value of small actors and the need for a space free from legal risk. One DJ, who feels creatively stifled by a lack of freedom to sample declared, "there should be enough restrictions where people aren't just stealing your material off of the Internet, but at the same time, there should be the freedom to do what you want to do – what you need to do."[43] In claiming a need for sampling freedom, he subsequently described how sampling benefitted the economy and inspired a, "whole new generation of music."[44] Similarly, a zine maker expressed how the increase in the distribution of his work caused him to reconsider his creative freedom:

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42 Interview with Startup Weekend participant 9, June 18, 2012.
43 Interview with DJ/producer 7, November 8, 2012.
44 Ibid.

> It wasn't until later, where my work did gain greater exposure, that I started to think about it twice. Earlier, I didn't consider it like 'nobody sees this,' I felt like it was my god-given right as a member of society to comment very directly on the goings on of my society, and to use examples of my world in a creative way. Later on, I realized 'whoa, people are going to see this and may not agree with that.'[45]

The tension between a god-given right and the practical concerns of legal risk drew out elaborations which expressed how law has compromised otherwise firmly held beliefs.

Some of the legal risk was attributed to the entertainment industry not understanding fan and creative communities. One DJ described how the "labels just haven't adapted – and they refuse to adapt – to the new model of how people are getting music."[46] A fanartist described her own perspective as "conspiratorial." She sees a desire by the entertainment industry to be a sole source of content, and thus believes the industry perceives user-generated media to be an economic threat. She remarks:

> . . . some of these Hollywood interests want people to get your entertainment from them. . . . With the Internet, you have so many ways to be entertained now [for free]. . . . It's so easy for them to say, "it's because of piracy," instead of "I just don't want people to be entertained elsewhere."[47]

In spite calling it a conspiracy, she reveals a perception of the industry as operating against the interests of fan communities.

However, it should be noted that the notion of big business being an "outsider" was not universal. Some participants noted that some industry actors at times understood a subculture, or used it to their advantage. For example, large technology firms support startup weekend, and comic book companies draw new talent from the ranks of fanartists. Major industry was not seen as an issue to zinesters – very little interaction was perceived as occurring between large publishers and the

45 Interview with Zinester 6, September 25, 2012.
46 Interview with DJ 9, December 26, 2012.
47 Interview with Fanartist 2, September 25, 2012.

zine community.

While the perception of safety in small scale bears some similarity to the "money matters" heuristic, here the demands were elaborated in broader terms of freedom and innovation. The argument most often included recognition of a need for balance in the rights of owners and users. Such protection might free the norm-based rules of sharing from taking on a legalistic tone.

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The four common elaboration types appear to be clear cases of elaborated thought. The level of detail in the participants' responses displayed a rationality which indicated "System 2" thinking. Yet in most all of the cases, analyses were not purely legal. Factors such as social norms, economics, and technical capability were as important as law in a decision making process. The law was used when it suited the results one might want to achieve, but it was only one of a number of strategies employed.

The participants' elaborations also provide evidence for legal construction. For example, in claiming a need for a space free from law for experimentation and innovation, participants were explicit in staking a claim for what the law should be. The claim drew on descriptions of community norms, as well as broader notions like the freedom to create. By describing one's understanding of common legal terms like "fair use," the law is being used to provide legitimacy for the normative rules in a group. When a specific legal situation is presented, one considers a confluence of factors (including legal knowledge, social relations, and economic situation) to derive a reasonable solution. Often, the solution is to work around the legal problem, or to quit because one cannot afford a fight. It was suggested that the solution is also often negotiated with others, taking into account the community's fluid expectations.

The combination of all of the claims and the strategies used form a social construction of law. The elaborated responses show a process of social strategizing which underlies each claim. The practical reality that most do not have unlimited resources to mount a legal battle, and that there are group relationships to maintain, factored into all of the elaborated responses. The strategies of staking a claim thus rationally balanced a number of factors.

Still, the commonalities of the claims across the groups appear to indicate some emergent construction of law. The resulting social constructions do not emerge from the utterance of one person, but instead from the amalgamation of many voices with commonly developed elaborations. The following section will describe how common elaborations develop within the social context of a community of practice.

Group Results

Recall the notion of "prototypicality" which describes the degree to which a communication is "group normative," and thus dictates the level of processing that might occur.[48] By describing heuristics common within a group, we might reveal the mental frameworks which legal messages must contend with. The degree to which a legal message is "prototypical," or aligns with group heuristics, may reveal the level of processing that the message might engender, and thus how well the message might be received.

Additionally, common elaborations within groups will be explored through examining prevalent stories. The common tales reveal the defining conflicts that a group faces. The structure of a

48 Daan van Knippenberg, "Group Norms, Prototypicality, and Persuasion," in *Attitudes, Behavior, and Social Context: The Role of Norms and Group Membership* (Psychology Press, 2000), 80.

narrative that can be told and retold bears a constructive quality that may create territorial boundaries or group cohesion – boundaries with which a legal message would have to contend. The structures that the common heuristics and elaborations create can be seen in the general constructions of legality within each group.

Startup Weekend participants

A great deal of uniformity was found in the way that Startup Weekend participants described their ethic. One participant described it as "religion," stating, "I don't know if people believe it or if they're just saying it. Your idea is crap, is kind of the mantra, it's all about execution."[49] The focus on "execution" places law in the background – especially during the three days of Startup Weekend. As another participant described, "at an event where you're building it in one day, it's like who knows where it's going to go. I don't have a good answer for how to solve that problem [of intellectual property]."[50] Others thought the lack of clarity over intellectual property ownership was not necessarily bad, since the ability to create uninhibited by the constraints of law can be freeing.

Startup Weekend participants are largely against the notion of software patents, and find investors who expect startups to generate patents misguided. A developer explained how venture capitalists (who largely fund the industry) might think patents are necessary:

> Having IP that you own is really important to investors. Even if I don't actually believe that anything that I have is patentable . . . we have to spin it like, 'we have this proprietary algorithm that nobody can copy. . . [51]

A tech-minded entrepreneur explained why he was in the process of filing for a patent: "even though

49 Interview with Startup Weekend participant 3, May 17, 2012.
50 Interview with Startup Weekend participant 10, June 30, 2012.
51 Interview with Startup Weekend participant 10, June 30, 2012.

I don't believe in it, it seems like you have to do it."[52] In cases where patents are demanded, law seems a burden to entrepreneurs.

Yet the diversity in background of Startup Weekend participants, which includes both software developers and entrepreneurs, brings diversity to legal knowledge and perspectives. One entrepreneur remarked he had to become accustomed to the sharing which happens at the outset of the weekend, and not to hold ideas too close.[53] Another entrepreneur wished to "make sure that we own everything that is built. . . .so the developer can't come later and say 'I built it, I have a stake in this,'" thus appearing to value the protection of intellectual property more than the others.[54] However, he later expressed a misconception regarding the protection in software patents. In coming from a different background, entrepreneur participants found themselves within unfamiliar norms of sharing, which to their perspective might not be based in law.

Startup Weekend participants negotiated a balance between the drive to create and the support of protection-desiring venture capitalists. Even though investors' demands for patents were treated as a burden, most acknowledged an obligation to acquiesce. It would seem that the demands of the larger business community are met with skepticism, given that nearly all of the participants were aware of the SOPA. Software developers used phrases like "the anti-SOPA box," "protectionist crapstorm," to describe the law, and expressed relief that people are "finally paying attention" to the law.[55] However, the possibility of a larger company acquiring a project or team is a motivating factor for many. The conflicting relationship creators and venture capitalists have with intellectual property

52 Interview with Startup Weekend participant 5, May 17, 2012.
53 Interview with Startup Weekend participant 4, May 16, 2012.
54 Interview with Startup Weekend participant 6, June 5, 2012. He expressed a belief that protection arises original code, rather than similarities in process or functionality.
55 Interview with Startup Weekend participant 3, May 17, 2012. Interview with Startup Weekend participant 8, June 16, 2012.

manifested the balance between creators' desire to share, and the business need for protection from competitors.

Prominent story

Stories of software patent lawsuits were widely shared as examples of the pressure startup entrepreneurs and developers feel from the patent system.[56] In general, the software developers appeared to be very aware of the news – all who identified themselves as a developer were aware of the SOPA dispute.

A story broadcast by American Public Media's *This American Life* (in collaboration with *Planet Money*) on the issue of "patent trolls" was recalled by a significant number of participants (4). The broadcast described Intellectual Ventures, a complex organization of dozens of shell companies, and included a visit to the empty headquarters. An individual who was sued by a patent troll (also known as a "non-practicing entity," but hereafter "trolls") described them as: "You don't know that there's one under the bridge. They pop up. They have unreasonable demands. They can charge monopoly tolls or monopoly rents."[57] The broadcast discussed the practices that trolls use to file, buy, and sell patents, with an apparent portrayal that trolls have a negative impact on startup companies.

In addition to the lawsuits, the show took issue with overly broad patents, which are perceived, ". . . as most software engineers will tell you, at least when it comes to computers and the Internet, a patent and an invention are not the same. Lots of patents cover things that people in the field wouldn't consider inventions at all."[58] Or, as one of the software developers who does not believe

56 One startup weekend participant remarked about ". . . all sorts of stories about patent trolls – Apple vs. Motrola vs. Microsoft vs. . . . ." Interview with Startup Weekend participant 8, June 16, 2012.

57 Ira Glass, "This American Life," *When Patents Attack!* (Chicago Public Media, July 22, 2011).

58 Ibid.

software is patentable described, "when I write code, I don't think of anything I'm writing as really patentable. I'm just taking an idea and turning it into another language for a machine to do."[59]

That nearly half of the participants recalled the *This American Life* story was unique in the present study. In one case, a participant used the same language of the broadcast: one has to "check the box" of getting a patent in order to secure venture capital funding.[60] Others who did not mention the story largely used similar arguments in describing perceptions of problems in the patent system. The *This American Life* episode thus stands out as a superb example of a "group prototypical" message. Its portrayal of the law matched so well with members of the group, that it has been inculcated into their language.

Legality for Startup Weekend participants

An active balance exists between Startup Weekend participants' perception of law's structuring power and their own construction of the law. As the above language indicates, the majority of the participants passionately described the social problems perceived to be present in software patents, and in laws like SOPA. One participant described the disconnect between law and practice as a, "point where it's not about innovating on a product basis, it's more about innovating legally."[61] Interaction with the law varied among participants: some engaged in talk about grievances regarding the structure of the law with others, others participated in actions to raise awareness of the problems, and one advocated for change with his congresspeople in Washington D.C.[62] Certainly the participants perceive some impact of the law, and also make efforts to speak out against perceived

59 Interview with Startup Weekend participant 8, June 16, 2012.
60 Interview with Startup Weekend participant 5, May 17, 2012. Ira Glass, "This American Life."
61 Interview with Startup Weekend participant 1, May 14, 2012.
62 Interview with Startup Weekend participant 5, June 17, 2012.

legal inefficiencies – in however small a way.

Yet some participants were willing to use patent law when it furthers a need. The funding of startup companies by venture capitalists appeared to be a primary motivator of creative output, as it is a common source of initial funding for start up companies. Two participants spoke of begrudgingly attempting to secure a patent, because it was a condition of venture capitalist funding.[63] Venture capitalists perceive monetary protection in patent, thus some startup entrepreneurs admitted to "spinning" questionably-patentable ideas to investors.[64] Yet participants also recognized that other venture capitalists were likely to see the talent of a group of individuals as more valuable than any intellectual property that an entrepreneur might already hold. The potential for a large company to acquire a startup team was perhaps equally as motivating to creativity as a patent. Since market factors often dictate where a startup entrepreneur might receive a paycheck, the concerns of venture capitalists often weigh heavily in a legal decision. Startup entrepreneurs were at times likely to use the law when it suits their interests – even when that interest conflicted with principled feelings about the law. Perhaps advocacy against disliked laws vented the cognitive dissonance experienced due to this conflict.

Music producers and DJs

DJs and music producers acknowledge the impact of technological change on every aspect of their practices. From the DJs who prefer to search for obscure records, to producers who create new songs entirely from sampled music, to the process of promoting a show, to the mechanisms of music distribution – there is a sense that the Internet and digital technology has fundamentally altered the

63 Interview with Startup Weekend participant 5, June 17, 2012. Interview with Startup Weekend participant 10, June 30, 2012.

64 Interview with Startup Weekend participant 10, June 30, 2012.

business of music. However, given the contention over copyright in the music industry, DJs and producers feel extra legal scrutiny.

Sampling is a practice which is appreciated by many DJs and producers. Having "flipped a sample" or using a sample "like colors [in painting]" is seen as an achievement.[65] Yet, as one producer described, the balance between the capabilities of music authoring tools, and the legal use of sampled material, is unclear: "technology being used for what it's designed to be used for, and then people turning around and saying, 'no, you can't do that, even though we made this so that you could.'"[66] Some adopt a copyright-influenced strategy of obscuring the source material in samples. One DJ described how he would, ". . . hack up and chop up [the music], and I make it unrecognizable. . . . there's not a ton that you're going to make that [hacked] way that's going to be hacking [infringing] on other people's work."[67] Those who attempted to work with music labels to gain copyright clearance for the use of a sample experienced difficulties. As one producer remarked:

> Once you head down that path. . . [of clearing a sample], it's a long ways to the end. They have got to check in with the label. . . [In one case,] the original band, they loved it, so they were trying to push the label to release the rights, or negotiate. And then it just went away, and I never heard about it. . . It's not worth the label's time, unless they're going to make a lot of money on it.[68]

Given that the means of creation and distribution are easy, and that obtaining clearance is so difficult, it may seem reasonable to risk a copyright lawsuit.

At times the self-distribution model is not as frictionless as it might seem. Many of the DJs and producers referred to difficulties with distribution via mainstream and underground websites. One DJ spoke at length about the strengths and weaknesses of various websites he had used to

65 Interview with DJ/producer 2, August 31, 2012. Interview with DJ/producer 3, September 5, 2012.
66 Interview with DJ/producer 2, August 31, 2012.
67 Interview with DJ/producer 1, August 2, 2012.
68 Interview with DJ/producer 9, December 26, 2012.

distribute mixes. He described one site which, ". . . went from being an awesome tool. . . for making your own music . . . [but found] as far as sharing music, they just take things down randomly," and went on to describe a takedown of a, "track from 1980. Nobody who is going to listen to this mix, is going to [think they can download it]. And, it's mixed too!"[69] The surprise of a takedown or "nastygram" detracts from the allure of the Internet as an ideal music distribution platform – even without the labels acting as intermediaries.[70]

Technology plays a central role in the work of DJs and music producers. Using digital tools and the Internet to sample and distribute one's work is firmly based in community practice. Yet some of the practices, such as short length samples, have a basis in law. Frequent experience with takedowns also makes the law more prominent in the life of a DJ or music producer. However, awareness of the law may not perfectly align with legal messages.

Prominent stories

Stories of big artists who took big risks or were caught sampling, such as Eminem and Danger Mouse, are commonly told in the DJ and producer communities.[71] The telling of these stories portrays a realization of the legal boundaries faced in the community, yet also expresses the possibility that legal risk can pay off with attention and fame. Yet, it is not only the artists who have found fame that experience issues with contracts and takedowns. Two producers shared stories which describe difficult copyright situations. Both acknowledged that their experiences were not unique, and that they are typical of stories which producers share.

69 Interview with DJ/producer 3, September 5, 2012.

70 Interview with DJ/producer 8, November 29, 2012.

71 Michael Brick, "Lyrical Judge Praises Eminem In Lyrics Fight," *The New York Times*, June 10, 2004, sec. Arts, http://www.nytimes.com/2004/06/10/arts/lyrical-judge-praises-eminem-in-lyrics-fight.html; Rob Walker, "The Grey Album," *The New York Times*, March 21, 2004, sec. Magazine, http://www.nytimes.com/2004/03/21/magazine/21CONSUMED.html.

The first producer was experienced in the field, having been long involved with the hip hop industry. He describes his penchant for sampling, and the struggle he experienced in his start working with the music business:

> That is my specialty. I come from the sample world. My first really known song that I got placed had a sample, and I went through the ringers with that – I'm still recouping.[72]

The producer described how he played a song that contained a sample for someone in the industry, who subsequently sent it to a major rap artist. The label operated by the artist released the track on an album, with a video, shortly afterward. The producer went on to describe what happened after he saw the contract paperwork, which contained a lot of deductions:

> . . . because they want me to 'recoup' all the money that they had to spend to get permission to use the sample from [another major R&B artist]. . . . let's just say [the R & B artist] took about 60-70%. . . for 15 seconds [of the song], maybe?
>
> [The label told him] . . . we're not going to pay you for this song, we'll give you credit. . . . I had a decision to make, and I chose not to sign the contract.[73]

The producer negotiated with the label for a small amount of the income that the song generated. However, the consequences of his demanding income from the deal were negative:

> It was a horror story. After that whole ordeal, I was kind of black balled. I'm dealing with. . . one of the most powerful rappers in the industry.[74]

That the producer was shut out of the community for demanding to be paid for his work illustrates of the primacy of interpersonal relationships over the law. The producer reported feeling that he subsequently has not felt able to use sampled music as much as he desires. While he has adjusted to electronic techniques that use less sampling, he laments that he, "hates this music."

The second producer is younger, and utilizes technology to a much greater degree than the

72 Interview with DJ/producer 7, November 8, 2012.
73 Ibid.
74 Ibid.

first producer. He also works with artists on a more informal level – music labels are often not involved in his work with "signed" artists. When asked about the impact of copyright and the possible SOPA legislation, he described his perception of the impact on his creative process:

> . . . It's actually hurting me, as an aspiring artist in that, I've produced music for artists that are signed [to big label]. . . I've uploaded music that I've created, stuff that I haven't gotten get paid for, stuff that I didn't go through the labels, because there's this big informal exchange. . . . I produced a record for [a big rap artist, who now creates music at home]. . . as far as I'm concerned, I still own half of it. We didn't sign any paperwork. I didn't get paid off it, so I need to use this song to my advantage. . . So I'm just putting it out through my promotional channels, my social media, and all of the sudden my YouTube gets flagged, my HulkShare account gets shut down, because [a label] is filing a claim. [The label] was never a mediator in this exchange, so why does [the label] have the authority – and you can't appeal something like that, because that's their artist and they've got the money. I didn't get paid off of this, I'm not going to put in $30k for a legal defense.[75]

The producer's description of how he collaborated with another artist based on a handshake, with no expectation of return on his investment, might seem like naïveté to a lawyer. In fact, his legal representation advised him against similar deals. Yet, given the presence of the "giving it away for free" heuristic in producers who were interviewed, such informal agreements are increasingly common practice. He presents a convincing case that an expensive legal fight is not worthwhile for a song that was given away for free.[76] To his disappointment, disputing the DMCA takedown notices has not been successful.

The producers' frustration is similar to that of other DJs and producers. The tales show the degree to which both law and social relationships can impact one's creativity and business. The stories also are a way for group members to portray the differences between the law and community norms of sampling and free distribution. While there exists some awareness of the law, the perception of

75 Interview with DJ/producer 4, September 26, 2012.

76 The argument aligns with the conception presented by many participants: that the justice system is not a fitting venue for those without significant capital to engage it.

protection from not charging for music appears to be a strong norm. In cases where legal messages do not match group norms – whether the message is from an official source or from industry – prototypicality dictates the messages are less likely to be well received.

Legality for DJs and producers

Digital technologies have fostered a new capacity for DJs and producers to make music by manipulating and combining sounds. Despite technological ability, a perception exists that both the law, and industry's use of law and technology, creates limits on the capacity to create. Laws like SOPA, which might limit distribution and thus the chance for popularity, create the perception that law can limit creativity. Yet limits from technological controls are experienced on a more regular basis. Tales comparing what one can "get away with" on the various music sharing websites is evidence of a location where DJs and producers feel an attempt to control the creative process. Yet the algorithms which detect alleged copyright violations are created by website operators, and are largely pressed by the music industry.[77] In experiencing website algorithms as law, DJs and producers experience a limitation which is not entirely grounded in the law on the books. The algorithmic interpretation of the website owners, in conjunction with pressure from the music industry, creates a practical impact on what DJs and producers are able to do online.

When combined with law, the market also impacts a DJ or producer's ability to widely distribute sampled music. The need for copyright clearance for sampled music is common practice within the industry – as documented by its presence in contracts.[78] The industry appears to be unwilling to bear the cost of securing clearance for a sample – either for time for legal counsel, or for

77 For example, see: David, "Q&A: Our New Content Identification System," *The SoundCloud Blog*, January 5, 2011, http://blog.soundcloud.com/2011/01/05/q-and-a-content-identification-system/.

78 Interview with DJ/producer 9, December 26, 2012.

the cost of paying an original artist. Because the industry is unwilling to clear samples, and producers bear some risk in distributing sampled music, a norm of giving sampled music away arose to avoid a problem of costs in the market.

The norm of "doing whatever you want" was espoused by DJs and producers to allow for full use of technology, while skirting both technical and legal limitations. Yet the scope of the norm is limited, as is the creative output that it espouses to create. The concern for an algorithmic limitation or a takedown notice on a website was seen as an impediment to creation and distribution. Still, the hope of being discovered and finding fame exists for many. While a norm of operating outside the bounds of law creates a the perception of creative freedom, it is often limited in practice by law or technology.

Fanartists

Fanartists were the group most likely to mention being nervous about copyright. As one artist remarked, "[copyright is something I] am aware of, am leery of, slightly nervous about. . . I did do some research, but it seems to be a hugely cloudy, gray, ambiguous morass."[79] The response rate of fanartists was low, perhaps indicating a hesitancy to talk about copyright. It thus may not be a coincidence that fanartists have developed norms of sharing and copying through common elaborations, which have the intellectual property of institutional owners as their basis.

Fanartists described constricting rules designed to distinguish between fanart and work of the entertainment industry.[80] One rule is that official merchandise is usually not directly copied. Instead, artists, "try to make it my own, instead of just 'straight up copying,'" by creating in a personal style.[81]

79 Interview with Fanartist 1, September 7, 2012.
80 Fanartists must be understood as fans – the industry creates the media which they are fans of.
81 Interview with Fanartist 2, September 25, 2012. Interview with Fanartist 3, September 29, 2012.

Even within the personal style, there exists a strong norm of attribution to the official creators. One fanartist remarked that she has:

> seen a lot of artists who will put a little note on the bottom of their fanart, saying 'so and so character belongs to so and so, this is just fanart.' Actually, I have that on all of our Etsy things. We don't own the character, we don't own the show. This is just us making this item. You wouldn't claim it as your own.[82]

Another artist described the distinctions between the norms of anime and comic book conventions: "Anime and fanfiction people think that you're clear if you attribute. They ask if you sell something in their art show and not original, that you have to attribute . . . The normal comic book conventions are the opposite – they don't have any policy at all."[83] Others with experience in both communities verified this assessment. Recognition of unease over copyright at fan conventions perhaps indicates the uniqueness of the strong copying norms among fanartists.

Most also suggested to immediately back down from the legal challenge presented in the hypothetical situation. One remarked, "if a company came to me and said, 'don't make this,' I would stop it. . . I would make something else, it's not worth it."[84] Though there may be little evidence of legal risk in fanart communities, the members constantly feel the potential of legal action. It is perhaps surprising that fanartists report that the business community is often supportive of their work.

Two individuals who also create original comics reported that fanart is one of the best ways to get noticed as an artist. One artist described the important role that fanart plays in the comics industry:

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82 Interview with Fanartist 3, September 29, 2012.

83 Interview with Fanartist 5, November 24, 2012.

84 Interview with Fanartist 3, September 29, 2012. She then went on to note that this had never happened to her knowledge.

> All of it is fanart. . . . the smaller companies won't hire you unless they've seen that you can draw their character. I've done a few portfolio reviews in San Diego [at Comicon] and the first time, I brought 95% my own stuff, and one picture of [a known character]. They looked through my portfolio for 30 seconds, and all 30 seconds was on [that character].[85]

At the following Comicon, the artist showed a portfolio consisting of primarily fanart, and the time the publishers spent with her increased to 10 minutes. Other fanartists remarked that industry representatives attend the same conferences as fanartists, clearly indicating awareness of the fans' activity. Portions of the industry appear to approve of the creation of fanart.[86]

In spite of approval by some in the comics, anime, and other related industries, many fanartists are concerned about the risk of copyright – as the practice of disclaimers reveals. The awareness of copyright present in the fanart community reveals a clear impact of law on group norms. While a good deal of uncertainty about the law is expressed, that the law is being considered shows a curiosity and perhaps a greater likelihood of a legal communication's impact. While the present study did not uncover any tales of major players in the industry taking action against fanartists, perhaps these are the types of stories that create a culture of copyright fear. Instead, some of the strong claims of theft depicted the actions of smaller actors.

Prominent stories

Within the fanart community, stories often appear to describe attempts by creators to protect their art, or cases of fanartists using another's art without attribution. One commonly told story involves the web comic *Homestuck* and the creator's desire to restrict fan activity inspired by his comic. In a posting in 2011 it was relayed that Andrew Hussie requested that "no one sell MSPA-

85 Interview with Fanartist 5, November 24, 2012.

86 The largest exception to the rule that was mentioned is Disney, which was reported to disapprove of fanart.

related [Microsoft Paint Adventures] products or services without his explicit permission."[87] The request effectively blocked fanartists from making – or more specifically charging for – art based on Hussie's work. The creator clarified his position:

> When you do an HS [Homestuck] commission, I can't really imagine how that translates to dollars leaving my pocket, other than projecting losses in the very big picture if stuff like that goes unchecked. It's mainly a little unsettling to watch so many people at once act so casually about profiting off another's IP without asking, and even more unsettling to imagine it spiraling out of control.[88]

Though it does not appear to have been widely distributed, Hussie's message was received by fanartists. One fanartist criticized Hussie's stance as: ". . . one of the reasons why I don't read Homestuck, because I have no respect for the man. It has kind of sparked a lot of debate. . . there's tons of Homestuck stuff being sold [at large anime conventions]."[89] However, Hussie's warning that, "if you're an artist, you should care about this topic and evaluate your standards, because you are undoubtedly hoping others will respect your work and your rights as well," perhaps is worth consideration by some fanartists.[90]

In fact, a few stories described differing standards of fanart attribution and sharing within the community. The norms of sharing fanart appear to strongly support attribution of the original artist's work. As one artist remarked, "the minute you steal someone else's fanart, you are blacklisted in the community."[91] The same artist described how the community knows each other's work, and will quickly spot and report online violations of the norm. Yet alternative practices also exist. Another artist described the value that is placed on attributing via a link to an artist's personal website. She

87 Lexxy, "ANNOUNCEMENT: REGARDING THE SELLING OF MSPA STUFF," May 28, 2011, http://www.mspaforums.com/showthread.php?39382-ANNOUNCEMENT-REGARDING-THE-SELLING-OF-MSPA-STUFF.

88 Ibid.

89 Interview with Fanartist 2, September 25, 2012.

90 Ibid.

91 Interview with Fanartist 3, September 29, 2012.

described that when one finds an unattributed piece of fanart, the "artist or a friend of the artist will go and say, 'that's credited to so-and-so.'"[92] She went on to describe that the original poster will at times retaliate by, "delete[ing] the message and ban[ning] you for attributing the artwork."[93] The need to have one's work properly attributed, whether to seek a job or to keep credibility as a fan, is a sanction-backed norm.

Yet, the elaborations of fanartists reveal a surprising lack of legal basis. Hussie's request to halt fanart of his work, which is reasonable from a legal perspective, was met with surprise at his lack of understanding of fan community norms. Yet, when a fanartist's work is shared without attribution, it is perceived as an affront. The contradiction in the reactions regarding permissiveness in sharing might be based in a value of free expression – so long as credit given to all original artists. Given the lack of attribution as a copyright standard (outside of Creative Commons licensing), and the permissive attitude towards unauthorized sharing and derivation, it would appear that the norms of fanartists have tenuous basis in law. While legal messages might not be received by fanartists as prototypical, the group's participatory interest in the law might raise their level of cognition when exposed to legal messages.

Legality for fanartists

Fanartists' experience of legality can be characterized by a tension between one's experience as a fan and the desire to profit from work as a fanartist. For individuals who primarily identify as "fans," the two roles coexist without conflict; yet comic artists find a tension between the norms of the fanart community and the desire to be successful in the industry. Consequently, the two groups

92 Interview with Fanartist 5, November 24, 2012.
93 Interview with Fanartist 5, November 24, 2012.

react differently to legal issues, and have differing norms of sharing and protection.

Fanartists who defined themselves as "fans" appeared to define the relationship to a creative work in terms of the norms of the group.[94] As the "Homestuck" scenario described above, fans expect that a character will be freely shared so that anyone can create derivative works. In the vein of participatory culture, fans describe a right to express affinity for a character by creating derivative works.[95] Yet the norms of protection are largely based in a desire that works be attributed.[96] For a fan, protection guards credit for the work work that one has done, rather than align with the exclusive rights under copyright.[97] Additionally, fans were most likely to express concern that a change in the industry's permissive attitude towards fanart would result in a sudden threat to their work. While the concern may be unjustified, it nevertheless impacted the creative output and norms of "fan" group members.

Individuals who create fanart as a means to promote their own original comics saw fanart as a "job," and thus experienced different norms of sharing and experiences of the law.[98] While comic artists may be fans of characters, their creative output appears to be primarily motivated by the desire to sell artwork, increase exposure to their own original artwork, or to find entry into the industry. Attribution may be a concern in their norms of sharing, but comic artists have more direct experience with the legal realities of the industry. Comic artists were more likely to receive a notice to remove their work from a personal website. The comic artists were also aware of the income potential realized by other artists who, though having worked in the comic industry, would compose

94 Four fanartists fit this profile.
95 Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture*, Studies in Culture and Communication (New York: Routledge, 1992), 92.
96 Interview with Fanartist 4, September 29, 2012.
97 As described above, the protection is backed by sanctions.
98 Three fanartists defined themselves in this way.

commissioned works – while the industry would "look the other way."[99] The comic artists were perhaps most knowledgeable about different corporations' stance towards fanart. Yet, they echoed the "fan" realization of the possibility of a business suddenly changing from a permissive attitude. Thus, the experience legality of copyright similar to music producers: fanartists know that the industry is not likely to raise issue with distribution of derivative works; yet at the same time fanartists perceive risk of a takedown notice, risk in popularity, and risk in having one's work distributed in an unauthorized way.

Zinesters

The personal nature of the zine medium is brushing against some of the more institutional expectations of larger distribution and intellectual property. The intensely personal nature of zines perhaps lends itself to the countercultural influences present in the medium. Yet, for some zinesters the cultural motivations are not overt; as one cartoonist zinester remarked, "I'm not a mainstream person – I'm not trying to smash the state or anything like that – but my interests don't ever seem to jibe with the mainstream."[100] Another zinester works with underprivileged individuals, and composes zines to tell their stories. While a personal narrative may not fit into mainstream interests, it was clear in the context of the interview that the subject was not making an overt political statement through her zine.[101]

Other zines are more political. One zinester explained the personal and economic focus of zines as, "you don't have to ask for anybody's permission. . . you don't have to put up with all of the bullshit of capitalism, for the most part." He continued by distinguishing zines from mainstream

99 Interview with Fanartist 5, November 24, 2012.
100 Interview with Zinester 3, August 11, 2012.
101 Interview with Zinester 5, September 10, 2012.

publications:

> . . . because it [mainstream publications] exists to make money, the owners and the editors and the shareholders and the advertisers have set up a whole bunch of rules, in terms of what the content is, what the writing style is going to be. . . when it comes to zines, there are no rules. . . [102]

The lack of rules is one aspect of the medium that zine makers find appealing. The limited scale and distribution of a zine is perhaps thought to offer the kinds of protection of the "small scale" elaboration.

The means of distributing zines have grown, yet the personal connections have persisted. As one zinester who has worked with publishers remarked, "I feel that the smaller publishing houses that are publishing zine compilations still have that spirit of, kind of, almost, anti-capitalism."[103] Another zinester reports that "the publisher that [he works] with has an impeccable reputation. There's no question that I maintain the copyright on all of my work."[104] The same zinester, who also runs a "distro" or small-level zine distribution, values the personal connections that he makes at face-to-face zine fests: "it feels like home. . . there's nothing . . . like the feeling of going to a zine fair. . . it's my people."[105] A personal approach to authoring and distribution appears to be common among zinesters. Others remarked on how distros have grown into small publishers, and that both use the zine "scene" to help creators find a wider audience.[106]

Perhaps some of the intellectual property practices from industry are impacting norms of zine culture. It is conceivable that exposure to Creative Commons has shifted some of the expectations in zine communities from rules based in a personal conversations, towards more standardized but

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102 Interview with Zinester 2, June 30, 2012.
103 Interview with Zinester 9, December 2, 2012.
104 Interview with Zinester 6, September 25, 2012.
105 Interview with Zinester 6, September 25, 2012.
106 Interview with Zinester 1, June 29, 2012. Interview with Zinester 10, January 28, 2013.

flexible licenses. Yet, the expectations of distribution control seem to be manifested in ways that align with the norms of the zine communities. By growing distribution in ways that align with law and community norms, zinesters show a shifting social construction of law. The boundaries of the social construction are perhaps best viewed in stories of violations of the group norms.

Prominent stories

One zinester described a "zinester ethos" in terms which may generally describe the sharing culture of the zine communities:

> I think I honor 'the Golden Rule,' as opposed to copyright. I think there's a 'zinester ethos,' so I think I'm true to that more than what's legal. I happen to know more about [what's legal] than other people, but I don't care that much more than anyone else.[107]

When pressed to describe the "ethos" in more depth, she described a violation. By using language like "due diligence" and "sensitivity" to the wishes of individual zine creators, it became apparent that respect for the author's distribution wishes is a key concern for zinesters – even when not outlined in an explicit license.

It was not until the ninth interview that a copyright story which perhaps should have been well-known to zinesters was shared. The lack of widespread knowledge confirms one zinester's assessment that there is, "not really something that you can call 'the zine community,' I think there are zine communities. . . [in addition to geography, they are] based on interests. . . ."[108] The story of Teal Triggs' "coffee table book" *Fanzines: The DIY Revolution* was an excellent example of a copyright issue which affected zine makers.[109] A zine review blog described the controversy in a personal tone:

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107 Interview with Zinester 11, January 30, 2013.
108 Interview with Zinester 10, January 28, 2013.
109 Triggs, Teal. *Fanzines: The DIY Revolution*. San Francisco: Grantham: Chronicle Books, 2010.

> The 256-page book is the largest printed collection of zines I have seen, with more than 750 images making up the bulk of the book. Yet, when I received my complimentary copy in the mail – because Zine World was among the zines included – I could barely stand to look at it.
>
> The reason for my animosity? Many of the reproduced images were included without permission, and the book contains a slew of errors.[110]

A range of opinions emerged in the zine community – especially online. One post on the foremost online social network, *We Make Zines*, sparked a long debate. It read:

> Poor form right? I know a lot of zinesters don't care about their things being reproduced or used, and I actually don't mind at all for it to be included, but it seems like asking ahead of time would be the right thing to do, right? Especially for a book?[111]

Others agreed that the author's lack of contact was bad form, while others contended that because of the reproduction without permission, the violation might be illegal. One zinester who was interviewed for the present study perhaps accurately described the issue behind the "uproar" as arising because the author, "didn't ask the zinesters if it was okay to include the covers of their zines and their names in this book."[112] That so few of the zinesters interviewed were aware of the controversy perhaps confirms the lack of a unified zinester community.

While there appears to be a "zinester ethos" of personal interaction and requesting permission, the range of responses to the *Fanzines* controversy reveals a lack of consensus around sharing norms. As with fanartists, it appears that attribution is important, however for zinesters there appears to be extra sensitivity over the creator's distribution preferences. An expectation of control of

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110 Jerianne Thompson, "Why I'm Mad About the New Fanzines Book," *Zine World: A Reader's Guide to the Underground Press*, February 10, 2011, http://www.undergroundpress.org/zine-news/why-im-mad-about-the-new-fanzines-book/.

111 ramsey everydaypants, "How Do Y'all Feel About This?," *We Make Zines: a Place for Zinesters - Writers and Readers*, August 24, 2010, http://wemakezines.ning.com/forum/topics/how-do-yall-feel-about-this?commentId=2288844%3AComment%3A150396.

112 Interview with Zinester 9, December 2, 2012.

distribution may be reasonable, given the creators' choice of an analog, hand made medium. By valuing the desires of individuals through social interactions, more standardized rules of law are being rejected. Yet, some zinesters do refer to the law in their interactions. The negotiation between the group norms and the law reveals that legal messages might have mixed success.

Legality for zinesters

The "zinester ethos," which values the wishes of a zine creator are supported by practices which exemplify a balance between knowledge of the law and countercultural leanings. The move from bartering zines towards commercial distributions is one example of a practice which serves the zinester valuing of a creator's work. In creating a personal connection to a zinester through a bater, a zinester may be better equipped to understand a creator's desires for sharing. Bartering may also serve to further the interpersonal network of zinesters, further establishing community norms. While zines are at times sold (usually at or below production cost), the norm of bartering bolsters the meta-norm of valuing the wishes of the creator.

Small zine distributors ("distros") and publishers also strive to accommodate the wishes of zine creators, while still meeting the market's demand for greater distribution of zines. By respecting the desires of creators, distributions and publishers are seen as aligning themselves with the norm of deferring to creators.[113] The zinesters who reported having published their work with small publishers have maintained full rights. The low profits made by distros and small publishers likely further promote the impression that their actions are in the best interest of the creators.[114]

Legal knowledge of copyright appears to be present in zinester culture, but it is localized in a

113 One zinester reports the perception that, while the zine publishing industry profits a small amount, zinesters primarily benefit from the reach to a wider audience. Interview with Zinester 1, June 29, 2012.

114 One zinester called it "distro for cost." Interview with Zinester 2, June 30, 2012.

few individuals, and is rarely framed in legal claims. Individuals with commercial pursuits, such as comic artists, and librarians, who have benefitted from a professional education, are two types of individuals most likely to be knowledgeable about copyright.[115] The norm of negotiation with a creator's comfort with sharing did not appear to overlap with the knowledge.[116] While negotiating a license is well within the bounds of the law, zinesters did not frame copyright issues legally. Perhaps the hesitancy to frame issues legally is due to the countercultural nature of zines, or because of the desire to create a personal connection with a creator. Entering a legal relationship with a creator, much like paying for a zine, may be seen as sullying the relationship.

Undergraduate Class

Given that an undergraduate class is young and does not exhibit the characteristics of a community, it is perhaps not surprising that the responses addressed the issues of academics and student life. The instruction that students receive in plagiarism and intellectual property provides an interesting counterpoint to experiences outside the classroom.

Undergraduate students at the institution where the interviews took place receive explicit instruction on the issue of plagiarism.[117] The academic requirement to attribute one's source, commonly referred to as "giving credit," is well known. While realizing that the practice may not be widespread outside of academia, all of the class members mentioned giving attribution. One student described the instruction as, "they were stressing, basically, to do the right thing. It was not recognized that, outside of Creative Commons licensing, attribution is not a requirement of the use

115 In fact, at the time of writing these two categories appear to make up a large part of the zine community.

116 The zine archivist's reaction to the takedown notice may be evidence of the disconnect between law and personal connection. Interview with Zinester 2, June 30, 2012.

117 Personal experience with campus library instruction program.

of a copyrighted work. That you should acknowledge people, and make sure that you give them credit."[118] While attribution is stressed as important, instructors who assign multimedia tasks suggest that students seek permission to use copyrighted works.[119] Another student described her experience seeking permission: "I remember last semester I was creating a video, and I used an image, in passing, so I did contact them and asked permission. . . . I just e-mailed them and they e-mailed me back 'okay.'"[120] That all of the students expressed the need to attribute and seek permission to use a copyrighted work displays sensitivity to the law and academic norms within the confines of the classroom.

At the same time, most of the students recognized that the practical issues of downloading and sharing on the Internet can be much more difficult to navigate. One computer science student described some trepidation over the possibility of inadvertently violating the law. He remarks it, "is a little more scary, because if you accidentally use something [which is copyrighted]. . . am I liable for that kind of a thing? That makes it a little more hairy, just because it's so easy to share things."[121] While it may seem like an odd notion to inadvertently infringe on copyright, the ease with which material can be downloaded and shared on the Internet might make it seem like a greater possibility – especially to someone at a young age.

Some students also discussed the issues of downloading that are commonly attributed their generation, and pointed out the new medium of sharing: YouTube.[122] One student described, "It kind of seems like, with YouTube, it's more of a free expression. Like anyone can do their own

118 Interview with Student 3, March 5, 2012.
119 Personal experience with campus technology.
120 Interview with Student 2, March 1, 2012.
121 Interview with Student 5, March 7, 2012.
122 Sean Michaels, "YouTube Is Teens' First Choice for Music," *The Guardian*, August 16, 2012, sec. Music, http://www.guardian.co.uk/music/2012/aug/16/youtube-teens-first-choice-music.

thing."[123] Another student described her experience of music downloading in the dorms – both from the perspective of it being discouraged, but happening frequently. She said:

> Music downloading, I feel like I hear about that every day. . . to be honest, I illegally download music, I feel like a lot of people do. When I think about it, it's probably not right, but you're a college student, you like free stuff, it's common.[124]

It is not clear whether the students were aware of the interesting juxtaposition of favoring attribution or permission and the prevalence of sharing and downloading. Perhaps the difference in contexts between classwork and entertainment shows that the rules of law do not penetrate all experiences. The effort to apply the rules of school to daily life may not elicit the cognitive effort to cross between the different social contexts. In other words, students have conflicting practices because they use different heuristics in the classroom versus the dorm room. Yet, because the lack of a cohesive community to create law-based norms, it is difficult to find expressions of legality in remarks of the undergraduate students.

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The social construction view is supported by the variation of the relationships of law to the group-specific heuristics. The rules are internally consistent with group norms, yet the legal connection is often tenuous. Loose relationships to the law for heuristics – like "execution" for startups, giving away sampled music, deferring to an individual zine creator's personal wishes, and giving "credit" for the undergraduate web designers – do not match with copyright law as it is written today. Yet a few rules, such as minimizing the size of a music sample, do have basis in fair use. That the groups remake law in their own image seems indicative of a social construction of law.

The prominent stories in the groups also supported the notion of prototypicality, as the depth

123 Interview with Student 3, March 5, 2012.
124 Interview with Student 7, March 14, 2012.

of thought displayed characteristics of elaboration. As with the heuristics, the elaboration more clearly aligned with group perspectives than to the law. The startup entrepreneurs' recollection of the *This American Life* story because the language in the program aligned with group elaborations of perceived problems with the patent system indicates its prototypicality. Specific stories – like music producers who experienced difficulty with the industry's use of law, or fanartists' differing over a situation that either affronted group norms or overstepped legal bounds – display the complex interaction between law and group context. In the detailed descriptions which take law into account, but recognize group expectations and personal comfort, we can see a construction of law. When the elaborations are common, a group construction is present. Elaborations are constructions of law, made durable by heuristic rules and group prototypicality.

6. Conclusion

The interview findings support a communication basis for the social construction of copyright law within and across the groups. The law influences group norms through common cognitive heuristics and elaborations. Heuristics such as "execution," "sampling," and "money mattering," are used to ease the cognitive burden of regularly considering copyright law. Heuristics act to decrease contemplation of legal impact in a given situation, thus eliminating the cognitive overload necessary to deduce justifications for acting outside of the law. Elaborations take the form of common stories which characterize a "personal approach" to legal issues, strategic use of "legal language," "being practical" when considering legal problems, and asserting a need for "small scale" action. Tales of legal resistance depict more rational interactions with law. The group-specific heuristics and elaborations form frameworks of prototypicality, which can dictate the level of cognition exerted when considering a legal message. Prototypicality influences the degree to which legal messages will be considered, interpreted, and complied with. The groups experienced heuristics and prototypicality as automatic influencers of their group interactions, which ultimately forms a cognitive basis for collective boundaries of law and norms.

The communication and cognitive bases of group practice exemplify the bidirectional social construction of the law. While heuristics acted to distance the law, or to bound it from consistent consideration, the group stories elicit common ways of approaching a legal issue. Law is thus subservient to, yet simultaneously informs, group norms. The principles from communication and cognition are thus a means to discover agency within the structuring power of law. In the balance between efforts to keep law at a distance, while still experiencing structuring effects of the law, evidence of participatory constructions of the law emerged in the course of the present study.

Keeping law at a distance

The common strategy of keeping law at a distance from the legally suspect activity was a major finding of the present study. Each group exhibited strategies and rationales which ensure a feeling of safety in their activities. Given that none wish to live life fearing the constant threat of a lawsuit, reasons were given to justify the legality of a group's chosen activity. Each group found reason to assert that their activities were justifiable – whether through an argument that the activity aids in innovation, fosters learning, or that the activity is a "natural" practice.[1] The idea of being "too small to matter" when compared to an industry's economic or marketing success further supports efforts to distance an activity from the reach of the law. Participants see law as a threat to activities that they wish to keep doing.

Some expressed a sense that the formality of law would not fully accommodate the norms or ways their group operates. Each group exhibits unique norms of copying. Often the institutions that own the material being infringed agree not to challenge group norms. But a gentleman's agreement between group members and industry does not provide consistent assurance of protection. The fear of an unexpected lawsuit chills the speech of some creators. One fanartist characterized their group's collective reaction to SOPA:

> . . .they weren't against the basic idea, they were against the way they were written… they didn't like the idea that you could be shut down because someone else, *who doesn't know anything about the community*, could come in and say "hey, you have Superman on your webpage," and then could shut down your webpage until you defended it.[2]

Fear of a copyright complaint by an ignorant external entity reveals a concern that law might

1 For example, music sampling in hip hop music.

2 Interview with Fanartist 5, November 24, 2012, emphasis added.

override the rule of norms. Even when activities are clearly covered by fair use, many feel that the risk of defending a lawsuit is too chilling.

The groups' efforts to distance law may appear to be a vain plea to allow infringing activities to continue unimpeded by legal constraint. A perspective of law internal to the legal system might drive criticism of such arguments, yet the heuristic distancing of law should be understood as *non-rational*. By creating heuristics which lessen the daily impact of law, we find a psychological basis for the bracketing of law. In this case, heuristics allow the group members to go about their desired activities. The unconscious strategy of setting the boundaries around the law through quasi-legal heuristics makes the law matter less in daily activity. Yet, the law can still be called upon or reacted against when the situation calls for it. The heuristic bracketing process often occurs through elaborative stories, which facilitate the sharing of strategies for rationally dealing with legal situations – even if the solutions do not always take the form of a legal strategy.

Numerous possibilities exist for further research to better understand how communication and cognition might underlie social processes of distancing the law. Existing studies have already examined how norms are processed in the mind.[3] However, none considers the role of communication in normative processing, or the strategies for distancing the impact of law. Most consider the threat of normative or legal sanction as rational process. In striving to better understand the mental processes of distancing law by directly examining the mind, we might find support for the bidirectional model of law described in this dissertation. Further, such study may provide an impetus to attempt to accommodate these psychological truths into the body of law. If evidence

3 For example: Manfred Spitzer et al., "The Neural Signature of Social Norm Compliance," *Neuron* 56, no. 1 (October 4, 2007): 185–196.

exists that distancing the rule of law is a natural human activity, one might argue that the law should be crafted loosely enough to accommodate the vital role of social norms in structuring activity.

Law matters

While the impact of a mediated and misinterpreted law may appear to be mitigated, the results of this study clearly indicate that law indeed structures society. Legal rules and misconceptions of law are inform a variety of the heuristics constructed by the groups. Group members interrelate in ways that are to some degree dictated by law – from startup entrepreneurs feeling obligated to patent their work, to undergraduates and fanartists giving credit to sources, to DJs who give their music away. The presence of law in some form, while not a direct effect, is evidence that law has an impact on rational and non-rational action. We might discover ways that law impacts society through the stability of quasi-legal heuristics and through consistency of the rational opposition to the law.

It was clear from the interviews that law informs heuristic rules and elaborative stories within and across the five groups. While the exact letter of the law may only weakly underlie heuristics and elaborations, general perceptions of the law appear to inform mental structures. The law exerts an influence even in cases of misinterpretation, such as the fanartist's belief that a disclaimer of attribution provides legal protection. The lack of a connection to the law on the books should underscore law's mediated nature. Additionally participants' heuristics and elaborations did not reveal an understanding of the slow evolution of law.[4] The stability in heuristics of law supports the contention that cognitive structures act with structure-like force. While the stability may not match

4 Thus providing further support for the lack of understanding of the legal evolution of the standards in Yvona L. Pabian, Elizabeth Welfel, and Ronald S. Beebe, "Psychologists' Knowledge of Their States' Laws Pertaining to Tarasoff-type Situations.," *Professional Psychology: Research and Practice* 40, no. 1 (February 2009): 8–14.

the structuring power of institutional momentum, the continuity of heuristics may have the durability that Ewick and Silbey sought in *The Common Place of Law*.[5]

Law-based heuristics also appear to serve an important function of offering a point of contention over societal rules. Remarkably consistent stories, like the startup weekend participants' frustration with the patent system, show that law is an important issue to the groups – especially in cases where a perceived legal injustice exists. When legal rules are perceived to be unjust or misaligned with group norms, many groups revealed greater rationality through elaborative explanations of their perspective. The common narrative frameworks appeared bear some normative force within the group. Should the groups decide to martial their rhetoric into a legal claim, the potential exists for participatory interaction to change the course of the law.

Given that legal rules are well-defined and codified, a traditional mass communication study of the impact of specific legal messages is well suited for future research. In addition to controlled studies of legal communication, it would be valuable to examine the how specific messaging strategies impact the flow from reception, to understanding, to compliance. That some laws have engendered increased compliance, such as the wearing of automobile seat belts, is evidence of the influence of legal messages. Controlled mass communication effects studies of legal messages, such as news reports, might reveal the nature of effective messages. However, a one-way model of mass communication or legal effects does not accurately represent how law works in society.

5 Patricia Ewick, *The Common Place of Law: Stories from Everyday Life*, Language and Legal Discourse (Chicago: University of Chicago Press, 1998); Susan S Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 357.

Legal consciousness of copyright

Legal consciousness attempts to define everyday relationships with law as a balance of law's top-down structuring power with the bottom-up power of public legal construction. The balance of structure and construction finds support in the mass communication effects literature's cognitive analysis of message reception. The balance between the structuring effects of legal messages, and the individual and intra-group constructions of legal interpretation, reflects the dual nature of legal structure sought by legal consciousness. The differing levels of mental processing in heuristics and elaboration, as well as the limits on processing created by the group effect of prototypicality, can dictate how a legal message might be received.

The present study uncovered common ways of addressing copyright both across and within the five groups. The commonalities appeared to be indicative of shared ways of interpreting copyright through common processing of its legal messages. Through revealing heuristics, which receive minimal processing, we see areas where the law has either reached acceptance or is largely dismissed. Elaborations, where an idea is processed or explained more thoroughly, reveal areas where the law is either actively resisted or somehow distinguished from group norms. The elaborations and heuristics expressed across groups and by individual groups provide an easy way to summarize common ways of experiencing and constructing copyright. As argued above, the law is at times bracketed or distanced in common ways, while individual norms are also influenced by perceived impacts of law. The balance between impact and distancing exemplifies how legal structure is mutually created by top-down perceived impact and bottom-up resistance.

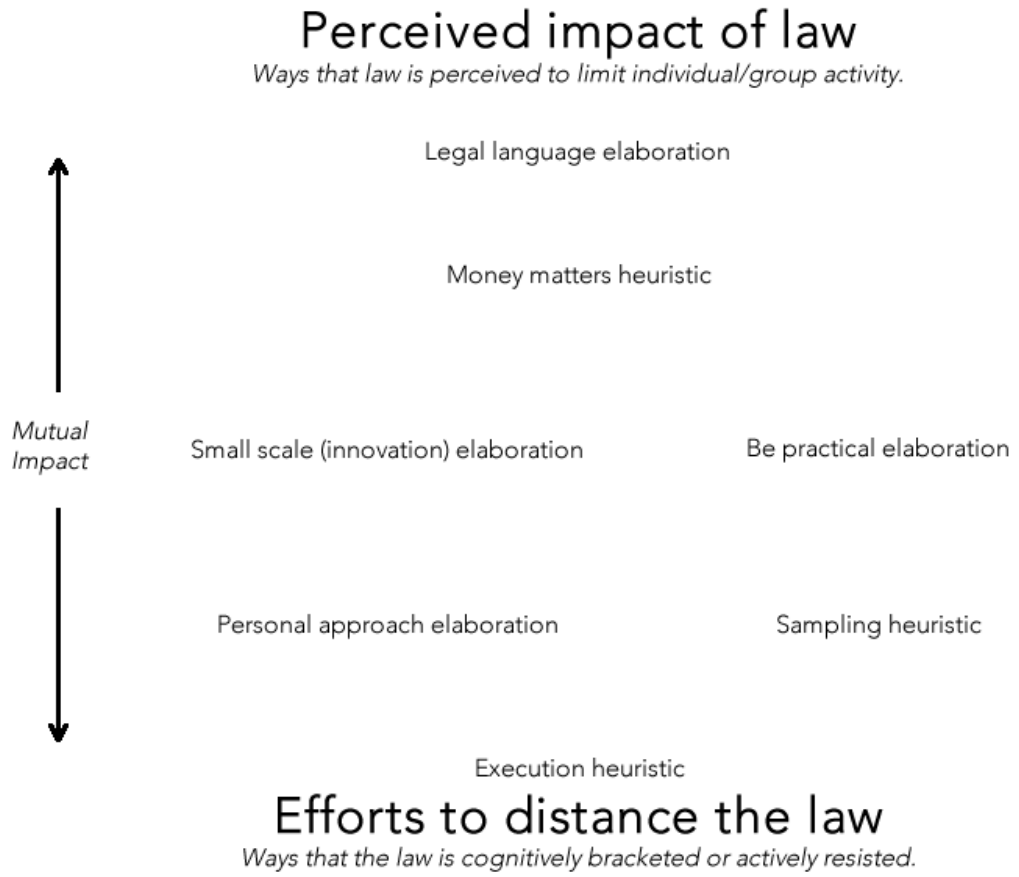

Illustration 1: Cross-group elaborations and heuristics.

The above illustration portrays common heuristics and elaborations of copyright as they relate to perceived impacts of law and efforts to bracket the law from consideration. The perceived impact represents the top-down force of law, and the efforts to distance the law characterize bottom-up capacity to push back against law's structure. A zone of "mutual impact" appears in the middle, where both the law and norms might receive equal weight in considering a given situation. Since the heuristics and elaborations were not quantified, the closeness to the top or bottom is an estimate of the degree to which the law is perceived or distanced. For example, recall that the "money matters heuristic" portrays the notion that one can "get away with" violating copyright until a large sum

money is made, or great attention is received. The realization that law might suddenly impact daily practices introduces legal consideration – but perhaps not on a regular basis.[6]

The patterns in the above heuristics and elaborations reveal the important role of cognition in the reception of legal messages. The presence of the elaborations in the middle zone of "mutual impact" perhaps illustrates the cognitive elaboration needed to negotiate the balance of law and norms. For example, the "be practical elaboration" suggests that individuals take a reasoned approach to their interactions with the law – using norms whenever possible, but working with (or around) the law when necessary. Also, the function of reducing cognitive load in distancing law is indicated by the presence of two of the three heuristics on that side of the balance. By taking a shortcut in considering a legal problem – in essence not considering it at all – the heuristics reduce the perceived need to worry about the law. While the above illustration provides a useful summary of the present study, further research into more elaborations and heuristics may bring more definitive results.

6 Justification of placement of factors not mentioned above: "Legal language elaboration" is an attempt to use the language of the law to one's advantage, even incorrectly, thus law weighs most heavily. The "innovation elaboration" describes the expression that some space is necessary in copyright for small scale work to take place; here the law is acknowledged, but quite equally to the demand to create a distance of the law. The "personal approach elaboration" and the "sampling heuristic" both represent a demand that one should deal with a potentially legal issue personally or that some right to use parts of a copyrighted work exist. In both cases, the law could play a role (either through a legal negotiation, or by setting limits on sampling). Finally, the "execution heuristic" values creativity above all else – the law is at least temporarily pushed to the side.

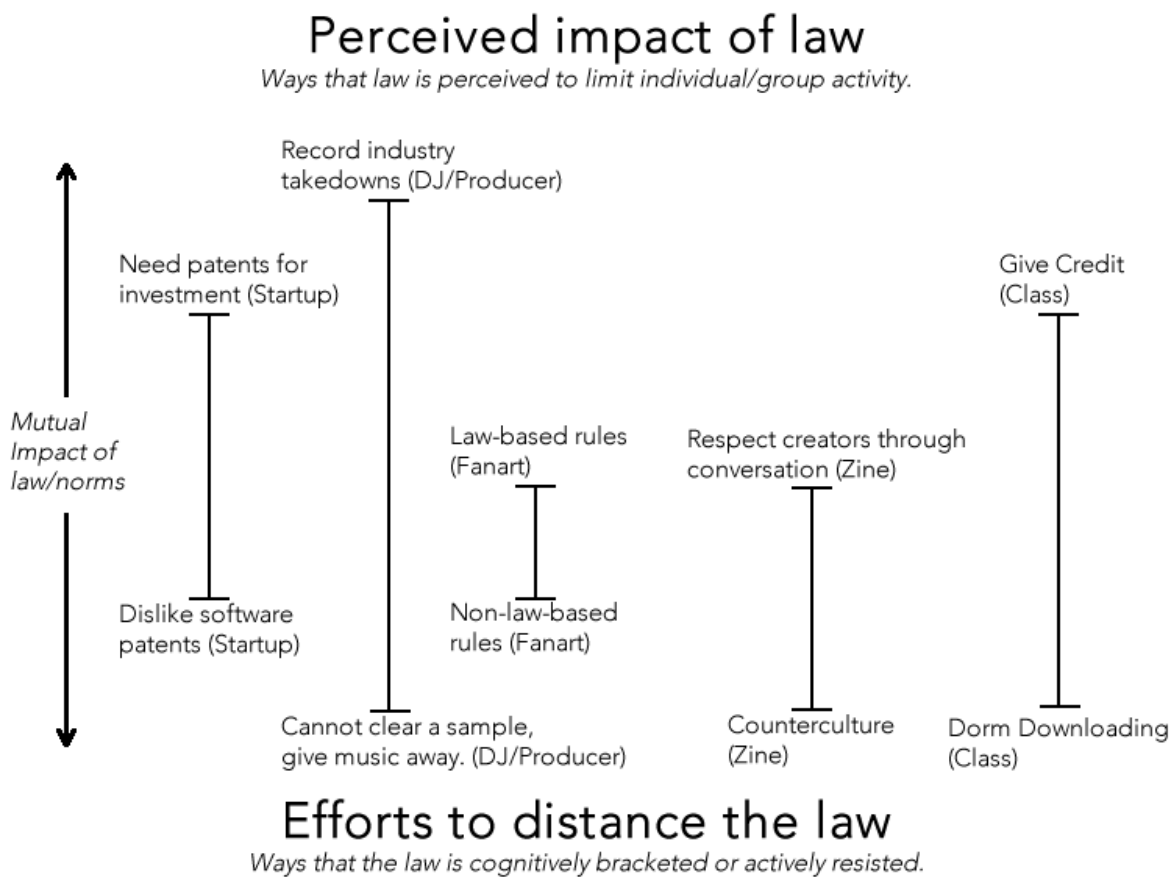

Illustration 2: Group-specific heuristics and elaborations.

The above illustration follows the same format as illustration 1, but depicts the links between group perceptions of legal impact and collective efforts to distance the law. By portraying opposing perceived impacts and distancing, the character of a group's construction of the law and normative frameworks might be seen. The polarity or tightness (as shown in the length of a line) of perceptions within a group reveals the balance of their experience with the law and their normative reactions to it.

However, the "perceived impact" of law should not be confused with the law on the books. For example, most of the undergraduate students speak of attributing creators in a rule-based way.

Similarly, producers and DJs see the record industry's copyright actions as the letter of the law.

Most of the groups have unrealized potential to use of the law. The DJs and producers appear to have a strong normative reaction (of giving work away) to counter the perceived legal impact from the record industry. Fanartists, on the other hand, closely tie norms to the perception of legal impact through law-based rules.[7] While zinesters define themselves counter-culturally, the respect they hold for creators could be similarly achieved thorough licensing conversations with other creators.[8] In spite of the dislike expressed for software patents, some Startup Weekend participants entertained the idea of obtaining a patent when it serves an investor's need. The span of a group's relationship to law reveals the character of their norms of sharing, which might ultimately impact how well legal messages are received.

Using communication and cognition to depict the balance between law and norms in the illustrations above arguably provides a means to view the social construction of law. By comparing the perceptions of legality with the norms present in the groups studied, the areas where the law is heeded can be compared to instances where it is pushed away. Such an understanding might aid in the drafting of policy, or in the crafting of legal communication. However, the need for sound policy may be outpaced by new communication technologies which facilitate more participatory interaction with the legal system.

Participatory demand of a space protected from law

Law placed at a distance through norms, while playing a structuring role depicts the balance

7 Recall examples such as creating works by hand and sanction-backed norms to support the attribution to original creators.

8 Though, such conversations do not seem likely.

of the social construction of law. Law structures activity, yet at the same time it does not. The balance is struck through communicative and cognitive processes, and thus has durability over time and across social space. The social construction of the law has the potential to structure society, but is also comprised of the structuring cognition of the public.

Given the move towards more participatory culture online, it is conceivable that law might similarly become more participatory. In fact, groups such as the ones examined may come to expect engagement with the creation or revision of law. Participation in crafting legal text would need to be much more rational than the groups regularly exercise through heuristics. Yet, the rationality exhibited in legal elaborations shows potential for collective consideration of legal rules.

Evidence of the participatory crafting of law is emerging. One example is the Center for Social Media's "codes of best practices" which have been developed for communities who regularly rely on fair use in their work. The Center has worked with associations representing interests such as documentary filmmakers, poets, and research librarians to establish a common agreement of fair use within the community through a deliberative process.[9] Urban and Falzone describe the practical utility of the Center's fair use statement for documentary filmmakers:

> Because the Statement's covered principles are limited to situations that filmmakers encounter on a regular basis, and because they are described in terms drawn from the community's practice and vocabulary . . . they can be much more easily applied by filmmakers to the situations they encounter. Because they are designed to be understandable to filmmakers and gatekeepers, they give filmmakers a starting point for negotiating with gatekeepers. Because they are limited to commonly occurring situations that a community believes are truly reasonable fair uses, they can help limit practical risk by avoiding especially *avant garde* or challenging uses.[10]

9 "Fair Use," *Center for Social Media*, February 18, 2010, http://centerforsocialmedia.org/fair-use.

10 Jennifer Urban and Anthony Falzone, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 13, 2012), 346, http://papers.ssrn.com/abstract=2004030.

As such, the fair use practices provide more clarity than the general principles of fair use outlined in the statute. The definitions frees some cautious individuals to create content they otherwise might not have, but prevents others from creating works which might provide a needed challenge to the law.[11] While the best practices may provide some guidance to a court's weighing of fair use, there is still no guarantee that the standards would survive a legal test. It also is doubtful that creating standards would work in for communities who lack an official organizing body, as the deliberative creation of the standards requires a significant time investment.[12] Still, the fair use practices provide a useful example of norms meeting law.

The presence of norms which emerge in the interaction between a creator and user can also be seen in the Creative Commons license options.[13] While the licenses offer only a limited number of options, they represent a way for a creator to proactively decide in favor of expanded use of their copyrighted work. However, given that they are predetermined, Creative Commons may represent a way to avoid the conversations about sharing that some of the individuals interviewed suggested that they might appreciate. That the licenses are not widely known, and may be complex to some, may further limit their utility as a participatory form of law.

Further research in the area of participatory law should seek ways for the public to participate in the drafting of legal code. While the possibility of collectively crafting "east coast" (legal) code is activity that extends beyond sending a check, signing a petition, or "blacking out" a website, it not unimaginable. The tools used to collaboratively write computer code are being utilized to track the evolution of legislation. While no legislation is known to have been crafted or enacted using

11 Ibid.

12 For example, recall the assertion of one zinester that there is no "zine community." Interview with Zinester 10, January 28, 2013.

13 "About The Licenses - Creative Commons," accessed April 24, 2013, http://creativecommons.org/licenses/.

distributed revision control and source code management software, the entire body of the U.S. Code has been made available via the "Github" repository.[14] The software allows for commenting on specific portions of text (which could be computer or legal "code"), tracks suggested changes, and allows one to "fork" the code text to propose substantial change. Though the technology has not developed to fully accommodate the needs of collectively writing legislation, the potential for public participation in the crafting of law is emerging.

Future Research

In addition to the areas outlined above, rich opportunities exist to further develop the findings of this study. While the communities were exhaustively interviewed, potential to expand the scope of research may be found in a both the focus and method of study. Additional detail to the present study's results may be found in the norms of different geographic locations or undiscovered sub-communities. Additional law-based norms might be discovered by examining groups outside of the Midwest. Different stories are exchanged, and different media are experienced in varying locations. Any variation in the reactions may be worth study, as heuristics and elaborations which bound reactions to the law are formed within social contexts. By expanding the scope of study to explore new social contexts, and thus new heuristics and elaborations, we may come to better understand the ways in which mental structures impact interaction with the law. Further insight may be gained through survey research or through empirical studies exposing group members to specific media messages.

14 Alex Howard, "The United States (Code) Is on Github," *O'Reilly Radar*, December 6, 2012, http://radar.oreilly.com/2012/12/the-united-states-code-is-on-github.html. Github can be found at http://github.com/, but can also be installed on private web hosts.

Most importantly, more research is needed to understand the effects of legal communications. Much as media scholars have studied the impact of political communications, a more developed understanding of how law is constructed through news stories of law and depictions of law in the popular media is needed.[15] While notable studies of the law in popular media exist, extending beyond content analyses toward examining audience effects is preferable as it may reveal how messages are received and interpreted by the public.[16] As with studies of political communication, where the effect of a message might be voting behavior, a legal message's ultimate effect of *compliance* is an open area of study. However, it should be reiterated that the effects should not be understood as a "silver bullet" imposing laws on a "pathetic dot." While legal communication has been shown to have some effect, it still occurs in a way that is constructed by the interpretations and social interactions of the public.

Policy

Given the lack of a direct impact, it is difficult to make policy recommendations for the future of copyright.[17] As collective constructions of the law have been shown to play a large role in compliance, it is difficult to suggest changes that would strike a better balance between users and owners than what currently exists with fair use. Users of copyrighted works might find some

15 Dietram A. Scheufele, "Framing as a Theory of Media Effects," *Journal of Communication* 49, no. 1 (1999): 103–122. Scheufele notes in a widely cited study, "Space constraints force me to limit my examination to media effects in the area of political communication. This does not mean, however, that the typology developed cannot be applied to other areas."

16 Notable examples include: William Haltom and Michael J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2004); Richard K Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: University of Chicago Press, 2000).

17 Lawrence Lessig has essentially given up the issue of copyright to focus on the underlying issue of corruption in politics. Lawrence Lessig, "Required Reading: The Next 10 Years," *Lessig*, June 19, 2007, http://www.lessig.org/2007/06/required-reading-the-next-10-y-1/.

assurance that their actions fall within the law if fair use was elevated from a defense to a right. Alternatively, if measures were in place to more easily dismiss a case when a use is clearly fair, the perception of legal risk might not be as great. A means for a creator of a derivative work to counter such a "frivolous" lawsuit against a clear fair use might warm the chill on speech that fear of a lawsuit sometimes brings. By giving more certainty to fair use in copyright creators of derivative works might perceive less legal risk, and consequently may be less likely to cognitively bracket copyright law.

While not addressed in any of the interviews, reducing the potential financial strain of copyright infringement might also alleviate the impact experienced by creators of derivative works. The copyright statute provides "actual" damages lost to a plaintiff as a result of the infringement, or the plaintiff can opt for a punishment of "statutory" damages of $750-$30,000 per infringement of a work.[18] Given that online distribution can rapidly duplicate and distribute numerous digital copies of a work, the total amount of an infringement judgment can be "grossly excessive."[19] The worry of an expensive lawsuit might cause some to go to extraordinary lengths to avoid potential infringement, or to practice cognitive distancing to alleviate the concern over legal risk. In either case, the law is arguably not serving the needs of the public who perceives a right to use and refashion copyrighted works.

Most of all, policies should strive to ensure some degree of accommodation for existing norms within communities, or the public as a whole. The evidence for increased processing of messages which are prototypical to a group suggest that policies which are in accord with community

18 17 U.S.C. § 504(b-c) (2006).

19 Samuelson and Wheatland argue that "Some copyright statutory damage awards are inconsistent with congressional intent and due process principle." Pamela Samuelson and Tara Wheatland, "Statutory Damages in Copyright Law: A Remedy in Need of Reform," *William and Mary Law Review* 51, no. 2 (2009): 439.

norms will not be "distanced," as the interviews showed copyright to be. It seems reasonable (though unlikely) that policymakers might strive to consider norms when crafting law, given the natural cognitive activity of heuristic distancing of disagreeable laws, and the penetration of agreeable laws. If reactions to recent attempts to strengthen copyright through international treaty are an indication of community reactions, such laws will likely be constructed in ways other than intended, or will be cognitively distanced.[20] The difficulties of crafting a balanced and acceptable copyright policy are a difficult prospect.

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Given that the law is mediated through a number of resources in society, the source of the social construction of the law can be found in imperfect legal knowledge. Despite not matching the letter of the law, the knowledge forms cognitive structures which impact activity throughout life. The rules and stories which create structures have limited legal basis, but are used in varied unique social situations. Though the connection to law is often tenuous, collectively the heuristic rules and story elaborations form group constructions of the law.

The results of the study found that the rules and elaborations, while bearing some connection to law, often contended with group norms and social considerations. The heuristic rules, which spring into action with little cognitive effort, acted as a defense mechanism to prevent consistent rational consideration or worry about a legal problems. When making a rational decision, or when elaborating on a legal story, a number of factors such as social norms, economics, and the power of technology entered into the mental process. Often such justifications were given in resistance to the

20 Michael Geist, "The Trouble with the Anti-Counterfeiting Trade Agreement (ACTA)," *SAIS Review* 30, no. 2 (2010): 137–147; Regarding the public reaction, Amy Chozick, "Rebooting the Debate on Internet Piracy; After Legislation Fails, Media and Tech Firms Seek Common Ground," *The International Herald Tribune*, July 11, 2012, sec. Finance.

dominant messages of law.

We might use cognitive psychology and mass communications effects research to better understand the ways that law works in society – and specifically within a given community. By taking into account natural mental processes, the potential arises to better craft and communicate laws that will have the desired impact on society. Given the ways that individuals participate in the process of constructing law, both in social settings and at times in formal processes, pressure may increase to craft laws in ways that accommodate social and psychological realities.

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Appendix A
Interview Protocols

Undergraduate Class Protocol

Interview

- Tell me about your class, why did you want to take it?
- What have you learned from being a part of the class [technical, management skills]? Have you applied the skills you learned elsewhere?
- Do you ever work collaboratively in class?
    - Describe the process by which you do your work, as an individual and as a group. Is the process you described usually how the work is done, or the best-case scenario?
    - Tell me of a specific instance when the work went especially well (or bad). Explain why?
    - By what mechanism do you all communicate? How do you keep the process moving?
- Where do you get material/ideas for assignments?
- How do you (collectively) handle the files that go into your work, as you are working on them [storage, copying]?
- How do you distribute your work? Why did you choose this method?
- What is your relationship with other groups doing similar things? [Cooperative/competitive]
- How do you view the ____ industry? [the industry whose work is used]
- Have you heard about the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA). Do you remember where you heard about the story? What was your reaction (and that of other students)?
- Where do you usually hear news or stories about copyright or other internet laws?
- From what you understand of copyright, do you feel it affects what you do in

class? Does it impact any other activities [downloading music/video]?

- Can you recall hearing or reading anything recently (in the news or from a friend) that was related to copyright—tell me about it? What did you think of what you heard [opinion]? [in regard to... offer guidance, if necessary]
- Do you have any thoughts about the relationship between technology and copyright? Culture and copyright?

OR, if the participant does not know or think much about copyright:

  - Prompt to hear about the little they do know, and where/what was heard.
  - Have you had any desire to learn more about it? Why or why not?

Hypothetical

A classmate has been assigned to create a video "digital story" for their history course. The background music track she selected is a song by Celine Dion and the video features a 20 second clip from the movie Titanic. She didn't have access to her home computer, so many of the pictures from her travels were downloaded from Flickr. After getting a good grade, she decides to upload the video to YouTube after the class is finished.

(What does this mean? What more would you want to know? How would your group react in this situation? Have you ever discussed it?)

News

Have you seen this news story, or another on the same topic?

Is this a website on which you would typically learn of these issues? Or, is there another source through which you might typically find out about stories about copyright (friends, another news source, etc)?

What was/is your initial reaction to this story?

Was this story discussed within your group? What about it was discussed?

Does/did the story's balance of perspectives influence any of your thoughts about copyright, the music industry, or your group's practices? In what way?

Does/did the factual content of this story influence your thoughts about copyright, the ___ industry, or your group's practices? In what way?

This is the last question! Is there anything further you would like to say about the topics raised during this interview/survey, or thoughts on your group's relation with copyright?

Zine Protocol

Interview

- Tell me about being a zinester, why did you become interested in it?
- Did you get connected with a group / community?
- Do you play a specific part or role within the group (has it evolved)?
- What have you learned from being a part of the group [technical, management skills]? Have you applied the skills you learned elsewhere?
- Do you ever work collaboratively?
    - Describe the process by which you do your work, as an individual and as a group. Is the process you described usually how the work is done, or the best-case scenario?
    - Tell me of a specific instance when the work went especially well (or bad). Explain why?
    - By what mechanism do you all communicate? How do you keep the process moving?
- Where do you get material/ideas?
- How do you (collectively) handle the files that go into your work, as you are working on them [storage, copying]?
- How do you distribute your work? Why did you choose this method?
- What is your relationship with other groups doing similar things? [Cooperative/competitive]
- How do you view the publishing industry?
- Have you heard about the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA). Do you remember where you heard about the story? What was your reaction?
- Where do you usually hear news or stories about copyright or other internet laws?
- From what you understand of copyright, do you feel it affects what you do in the group? Does it impact any other activities [downloading music/video]?

- Can you recall hearing or reading anything recently (in the news or from a friend) that was related to copyright—tell me about it? What did you think of what you heard [opinion]? [in regard to... offer guidance, if necessary]
- Do you have any thoughts about the relationship between technology and copyright? Culture and copyright?

OR, if the participant does not know or think much about copyright:

  - Prompt to hear about the little they do know, and where/what was heard.
  - Have you had any desire to learn more about it? Why or why not?

Hypothetical

A fellow zinester includes a collage in their latest release that includes some of their own drawings, but also text and images from recent magazines. The point of the collage was to paint Bart Simpson in an unflattering light. A reader enjoys the work, scans it, and posts it online.

(What does this mean? What more would you want to know? How would your group react in this situation? Have you ever discussed it?)

News

Have you seen this news story, or another on the same topic?

Is this a website on which you would typically learn of these issues? Or, is there another source through which you might typically find out about stories about copyright (friends, another news source, etc)?

What was/is your initial reaction to this story?

Was this story discussed within your group? What about it was discussed?

Does/did the story's balance of perspectives influence any of your thoughts about copyright, the music industry, or your group's practices? In what way?

Does/did the factual content of this story influence your thoughts about copyright, the ___ industry, or your group's practices? In what way?

This is the last question! Is there anything further you would like to say about the topics raised during this interview/survey, or thoughts on your group's relation with copyright?

Startup Weekend Protocol

Interview (25m)

- Tell me about Startup Weekend, why did you become interested in it?
- Did you get connected with a group / community?
- Do you play a specific part or role within the group (has it evolved)?
- What have you learned from being a part of the group [technical, management skills]? Have you applied the skills you learned elsewhere?
- Do you ever work collaboratively?
    - Describe the process by which you do your work, as an individual and as a group. Is the process you described usually how the work is done, or the best-case scenario?
    - Tell me of a specific instance when the work went especially well (or bad). Explain why?
    - By what mechanism do you all communicate? How do you keep the process moving?
- Where do you get material/ideas?
- How do you (collectively) handle the files that go into your work, as you are working on them [storage, copying]?
- Do you distribute your work? How/why did you choose this method?
- What is your relationship with other groups doing similar things? [Cooperative/competitive]
- How do you view industry?
- Have you heard about the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA). Do you remember where you heard about the story? What was your reaction (and that of other makers)?
- Where do you usually hear news or stories about copyright or other internet laws?
- From what you understand of copyright, do you feel it affects what you do in the

group? Does it impact any other activities [downloading music/video]?

- Can you recall hearing or reading anything recently (in the news or from a friend) that was related to copyright—tell me about it? What did you think of what you heard [opinion]? [in regard to... offer guidance, if necessary]
- Do you have any thoughts about the relationship between technology and copyright? Culture and copyright?

OR, if the participant does not know or think much about copyright:

  - Prompt to hear about the little they do know, and where/what was heard.
  - Have you had any desire to learn more about it? Why or why not?

Hypothetical

A group of friends works together on creating a new app. Unbeknownst to them, Apple was working on something similar, and had filed a patent on some of the app's processes. On seeing a blog post about the group's invention, Apple threatens to file a lawsuit to prevent them from using, sharing, or marketing their invention.

(What are the legal issues? What more would you want to know? How would your group react in this situation? Have you ever discussed it?)

News (10m)

Have you seen this news story, or another on the same topic?

Is this a website on which you would typically learn of these issues? Or, is there another source through which you might typically find out about stories about copyright (friends, another news source, etc)?

What was/is your initial reaction to this story?

Was this story discussed within your group? What about it was discussed?

Does/did the story's balance of perspectives influence any of your thoughts about copyright, the music industry, or your group's practices? In what way?

Does/did the factual content of this story influence your thoughts about copyright, the ___ industry, or your group's practices? In what way?

This is the last question! Is there anything further you would like to say about the topics raised during this interview/survey, or thoughts on your group's relation with copyright?

DJ & Music Producer Protocol

Interview

- Tell me about being a DJ (if that's what you'd call it), why did you become interested in it?
- Did you get connected with a group / community?
- Do you play a specific part or role within the group (has it evolved)?
- What have you learned from being a part of the group [technical, management skills]? Have you applied the skills you learned elsewhere?
- Do you ever work collaboratively?
    - Describe the process by which you do your work, as an individual and as a group. Is the process you described usually how the work is done, or the best-case scenario?
    - Tell me of a specific instance when the work went especially well (or bad). Explain why?
    - By what mechanism do you all communicate? How do you keep the process moving?
- Where do you get material/ideas?
- How do you (collectively) handle the files that go into your work, as you are working on them [storage, copying]?
- How do you distribute your work? Why did you choose this method?
- What is your relationship with other groups doing similar things? [Cooperative/competitive]
- How do you view the ____ industry? [the industry whose work is used]
- Have you heard about the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA). Do you remember where you heard about the story? What was your reaction?
- Where do you usually hear news or stories about copyright or other internet laws?
- From what you understand of copyright, do you feel it affects what you do in the

group? Does it impact any other activities [downloading music/video]?

- Can you recall hearing or reading anything recently (in the news or from a friend) that was related to copyright—tell me about it? What did you think of what you heard [opinion]? [in regard to... offer guidance, if necessary]
- Do you have any thoughts about the relationship between technology and copyright? Culture and copyright?

OR, if the participant does not know or think much about copyright:

  - Prompt to hear about the little they do know, and where/what was heard.
  - Have you had any desire to learn more about it? Why or why not?

Hypothetical

One of your fellow artists likes to make a political statement through his music. On his newest track, he samples a number of riffs from the band Metallica. He posts the track on YouTube, along with a commentary about how the music is a statement about the Metallica's cultural impact. He also remarks on the band's use of copyright to protect their music as much as the law will allow.

(What does this mean? What more would you want to know? How would your group react in this situation? Have you ever discussed it?)

News

Have you seen this news story, or another on the same topic?

Is this a website on which you would typically learn of these issues? Or, is there another source through which you might typically find out about stories about copyright (friends, another news source, etc)?

What was/is your initial reaction to this story?

Was this story discussed within your group? What about it was discussed?

Does/did the story's balance of perspectives influence any of your thoughts about copyright, the music industry, or your group's practices? In what way?

Does/did the factual content of this story influence your thoughts about copyright, the ___ industry, or your group's practices? In what way?

This is the last question! Is there anything further you would like to say about the topics raised during this interview/survey, or thoughts on your group's relation with copyright?

Fanartist Protocol

Interview

- Tell me about fanart, why did you become interested in it?
- How did you get connected with this group, in particular? (Alt: What drew you to take this class?)
- Do you play a specific part or role within the group (has it evolved)?
- What have you learned from being a part of the group [technical, management skills]? Have you applied the skills you learned elsewhere?
- Describe the process by which you do your work, as an individual and as a group. Is the process you described usually how the work is done, or the best-case scenario?
- Tell me of a specific instance when the work went especially well (or bad). Explain why?
- By what mechanism do you all communicate? How do you keep the process moving?
- Where do you get material/ideas?
- How do you (collectively) handle the files that go into your work, as you are working on them [storage, copying]?
- How do you distribute your work? Why did you choose this method?
- What is your relationship with other groups doing similar things? [Cooperative/competitive]
- How do you view the entertainment industry?
- Have you heard about the Stop Online Piracy Act (SOPA) or the Protect IP Act (PIPA). Do you remember where you heard about the story? What was your reaction?
- Where do you usually hear news or stories about copyright or other internet laws?
- From what you understand of copyright, do you feel it affects what you do in the group? Does it impact any other activities [downloading music/video]?

- Can you recall hearing or reading anything recently (in the news or from a friend) that was related to copyright—tell me about it? What did you think of what you heard [opinion]? [in regard to... offer guidance, if necessary]
- Do you have any thoughts about the relationship between technology and copyright? Culture and copyright?

OR, if the participant does not know or think much about copyright:

  - Prompt to hear about the little they do know, and where/what was heard.
  - Have you had any desire to learn more about it? Why or why not?

Hypothetical

A friend uploaded a piece of anime fanart to Deviant Art a few years ago, when the show was popular in Japan. The anime was recently licensed in the U.S. and the licensee is clamping down on fanart. The company sends your friend a letter which asks that the fanart be taken off of Deviant Art (and to cease any sales).

(What does this mean? What more would you want to know? How would your group react in this situation? Have you ever discussed it?)

News

Have you seen this news story, or another on the same topic?

Is this a website on which you would typically learn of these issues? Or, is there another source through which you might typically find out about stories about copyright (friends, another news source, etc)?

What was/is your initial reaction to this story?

Was this story discussed within your group? What about it was discussed?

Does/did the story's balance of perspectives influence any of your thoughts about copyright, the anime industry, or your group's practices? In what way?

Does/did the factual content of this story influence your thoughts about copyright, the ___ industry, or your group's practices? In what way?

This is the last question! Is there anything further you would like to say about the topics raised during this interview/survey, or thoughts on your group's relation with copyright?

Appendix B
Analysis code counts & hierarchy

Code	Total
Heuristics	
– Common frame (rhetorical)	17
– Practice	11
– Rule of thumb	43
Elaboration	
– Long / unique perspective	43
– Practice-based perspective	16
– Recognition of complexity / conflict	41
Legal knowledge	
– Questioning	2
– Reading law	8
– Misconception	20
– Good or unique legal articulation	24
News	
– Article	1
– – Typical	18
– – New info	5
– – Surprising	9
– – Interest	6
– – Writing or source	10
– Other	6
– – Music downloading	8
– – Patent Trolls	3
– SOPA / PIPA	16
– – No memory	5
– – Limited memory	16
– – Good understanding	10
– – Perspective from politics	19
– – Specific Story	9
Music downloading	8
Quotable	56
Interaction w law	
– Lump it	10
– Considering or avoiding	27
– Advocating for change	15
– Direct experience	11
– Seeking advice	9

Code	Total
IP Attitude	
– Patent reform	11
– Moral rights	3
– Game or politics	4
– Nervous	5
– Sampling	23
– Permission	5
– Plagiarism/Attribution	37
– Execution more important than idea	7
– IP as personhood or expression	26
– Knowledge source	8
– Mixed impact	38
– No or limited impact	39
– Against protecting ideas	6
– Promotes creativity	23
– Protect monetizer	18
– Protection	17
– Sharing	27
– Unequal protection	9
Group dynamics	
– IP	25
– How tightly knit	12
– Cooperation/Competition	17
– Networking	32
– Team leader	5
Relation to industry	
– Acquire / license	5
– Big biz are outsiders	28
– Business ethics	22
– Can work around suit	1
Relation to life	
– Mentoring	12
– Utility of exercise/group	3
– Autonomy	3
– Curiosity	3
– Working collaboratively	4

Appendix C
Data Dictionary

Code	Definition	Example
Heuristics		
– Common frame (rhetorical)	A way of looking at an issue	Patents protection is overbroad
– Practice	Common workflow or way of doing something	Take work offline on request
– Rule of thumb	Commonly expressed rule that guides action	Give credit to the owner
Elaboration		
– Long / unique perspective	Opinion is explained at length, to give depth and describe unique patterns of thought	Anything that is "interesting," or "never thought of it that way". Going off on a rant.
– Practice– based perspective	Elaboration based on group experience/background (common but elaborated)	A good description of patent trolls by a software dev
– Recognition of complexity / conflict	Having depth of thought to hold own opinion, but recognize other views	I can see how one might think...
Legal knowledge		
– Reading law	Alluding to having actually read legislation	
– Misconception	Mischaracterization of law, with or without confidence	
– Good or unique legal articulation	Accurate depiction of law, or one with sufficient depth to have potential legal basis	Answer would get a good grade on a class hypothetical
– Questioning	Unsure of the boundaries.	
– Research as needed	Alluding to doing legal research when necessary	I don't think of the law, but if I got in trouble I would
News		
– Article		
– – Typical	Not surprised or had previous awareness of the story/issue	
– – Surprising		
– – Interest		
– – New info	Learned something from reading the article	New perspective, idea, etc
– – Writing or source	Some meaningful reflection on the structure or source of article	Balance, news outlet, etc
– Other		
– – Music downloading	Music or movie downloading / streaming	Articles about music downloaders, lawsuits, TV streaming.

– – Patent Trolls	News about patent trolls.	*This American Life* story
– SOPA / PIPA		
– – No memory	Cannot recall the legislation or the blackouts, even with prompting.	
– – Limited memory	Remembers with prompting, or vague specifics.	
– – Good understanding	Articulates the major issues in the legislation.	Websites would need to monitor user posted content.
– – Perspective from politics	Heuristic response, "loss of freedoms..."	It was bad. It was a handout.
– – Specific Story	Recall of a specific news story about the legislation.	
IP Attitude		
– Patent reform	Problems with the patent system, patent reform,	
– Execution more important than idea	Completing a creative act is more laudable than idea (which is less deserving of protection).	
– IP as personhood or expression	Self expression as a rationale for IP protection, or for allowing use.	Depends on how much it means to you.
– Knowledge source	Where the law was learned.	School, online forums
– Mixed impact	SOME impact (mixed, big, small).	Exploiting law
– No or limited impact	The law has a limited impact, or it doesn't matter.	Subject does not frame issue legally, or an overt statement such as "do what you want."
– Against protecting ideas	IP shouldn't protect ideas, or there's little way to control in the internet age	
– Promotes creativity	Traditional view of supporting creativity, alternative modes of supporting creativity, creativity in general.	
– Protect monetizer		
– Protection	Protection and preservation	
– Sharing		
– Game or Politics		
– Plagiarism / Attribution		
– Permission		
– Nervous		
– Sampling	Includes viewing online pre purchase.	
– Moral Rights	Integrity or authors rights (different from attribution)	Authenticity,
– Unequal protection		
Group dynamics		
– IP		

– How tightly knit		
– Cooperation/Competition		
– Networking		
– Team leader		
Interaction w law	(Most, but not all, hypothetical)	
– Considering or avoiding	Recognize legal implications, considering the problem, but no further engagement	A "workaround" for a legal problem, "not going to worry about it," "deal with it if it happens"
– Direct experience	Some direct experience w law	Filed a patent, got a notice, in a contract
– Seeking advice	Have, or would, seek legal advice	Would hire a lawyer if..., need a lawyer for __
– Lump it	Give up in the face of legal opposition	
– Advocating change	Taking some active role to shape or change law	Writing a congressperson
Music downloading	Bringing up music downloading (as an example), unprompted	
Quotable	Good quote	
Relation to industry		
– Acquire / license	IP biz strategies, also own vs invent/create	
– Big Biz are outsiders	Outsiders or are becoming a part (investing, etc). How a related business relates to the group.	"Fanart friendly", "don't understand the ___"
– Business ethics		
– Can work around suit		
Relation to life		
– Mentoring		
– Utility of exercise/group	What is the exercise good for (what skills are developed)	Develop critical skills, get something started
– Curiosity		
– Working collaboratively		
– Autonomy	Ability to control ones own work (ie: self employed), or self work for hire (eg: commission)	