

TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

The First Amendment in a Digital Age – Date of Debate: 9/16/2005

A special taping of Justice Talking at the National Archives in Washington DC. When the founding fathers wrote the First Amendment to guarantee freedom of speech and freedom of the press, they could never have imagined a world where information is disseminated world wide in seconds. What rights and protections do journalists have today? Do bloggers enjoy those same rights and privileges? Should we be able to control the sharing of copyright materials over peer to peer networks? Guests include Floyd Abrams, a visiting professor of First Amendment law at the Columbia Graduate School of Journalism; Jack Valenti, former president and CEO of the Motion Picture Association of America; and Lawrence Lessig, a law professor at Stanford Law School and founder of the school's Center for Internet and Society.

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Host: Margot Adler (MA)

Guests: Floyd Abrams (FA); Jack Valenti (JV); Lawrence Lessig (LL); Dave Pomeroy (DP);
David McGuire (DM); Marsha Cole (MC)

Other: MS = Unidentified Male; FS = Unidentified Female; AQ = Audience Questioner

MA: From NPR this is Justice Talking.

MS: Piracy is wrong. What we need is a rethinking of how copyright law balances the importance incentives artists need with the extraordinary opportunity of technologies to democratize the creative process.

MS: There is no stifling of innovation on the Internet and if you say that it's okay to take something that doesn't belong to you, then you are going squarely in opposition to civil conduct that's been known since the beginning of time.

MS: You know when they drafted the First Amendment no one had any idea that you know we would have all this new technology, it was all unthinkable. And so the courts have got to develop law and have got to interpret this bare language of the First Amendment to apply in a computer age, in an Internet age.

MA: I'm Margot Adler. We are discussing free speech in the digital age. Stay with us.

MA: This is Justice Talking. I'm Margot Adler. On September 16, Justice Talking taped a program for Constitution Day discussing free speech in the digital age. An audience of high school students from the Washington, DC metropolitan area joined me at the National Archives where you can see the actual Constitution. First Amendment lawyer Floyd Abrams joined me to talk about the state of the First Amendment. Floyd Abrams is a visiting professor at the Columbia School of Journalism and has written a book called "Speaking Freely" which highlights his most important First Amendment cases.

Floyd, the First Amendment says, in part, "Congress shall make no law abridging the freedom of speech or of the press." What exactly does the First Amendment do?

FA: Well it provides a shield...a barrier against Congress or the states or the President...any branch of government from limiting what people can say and write and affectively think. And so if there were a statute, a law adopted by Congress and there have been some which effectively limit what people can write or say, under the First Amendment that law would be stricken...held unconstitutional and have no affect, not be a law at all, even though it was adopted and the same is true from the states. If a state passes a law as one state did long ago saying that German couldn't be taught...this was right after World War I when people were still angry at the Germans we had fought in World War I. Under the First Amendment and other provisions of the constitution the Supreme Court said that law is inconsistent with the constitution and therefore shouldn't be allowed and it wasn't.

MA: And briefly what are some limits to free speech under the Constitution?

FA: Well there are areas...libel for example. America protects the press more than any country in the world. But we still have libel law. If the press says something that is not true about somebody and let's say it does it on purpose, even if the person is the President or a public person that can be libel...a false statement of fact and the person can sue and get money. Or there are things that even the publication...a very secret information about how to build certain weapons, the publication of that can be a crime, but the rule...the basic rule of the First Amendment is speech is allowed and speech is protected and only in these very rare exceptional areas is it not.

- MA: Now when Constitution was first written there was no protection for freedom of speech. Why were the First Amendment and the other nine amendments of the Bill of Rights added?
- FA: Well they were added because Thomas Jefferson and other people said we won't support the Constitution itself unless there are certain amendments added making very clear that this new national government would not have the power to impose all sorts of limits on freedom...freedom of speech, freedom of the press, freedom of religion...all sorts of freedoms. And because those people said that, led by Jefferson, the drafts-people of the Constitution included the first ten amendments called the Bill of Rights limiting what Congress and after that what the states could do.
- MA: Now you were a lawyer representing the New York Times in one of the most famous First Amendment cases, pitting the right of a free press against government censorship in the name of national security...the Pentagon Papers case. You were thirty-four years old at the time. It was during the Vietnam War. What was at stake for the press and for the nation?
- FA: Well in that case basically the government said that newspapers...the New York Times, the Washington Post and others shouldn't be allowed to publish information that they had learned about the war in Vietnam which was then going on and was given them by somebody who was involved in the writing of a secret government study. The government went to court and said stop the Times from publishing. And the court said in the US Supreme Court said no. Even though we were in the war, even though there was secret information being published, it was so important to protect freedom of the press that the Supreme Court would not allow the government to keep this from being printed. What does it mean? If we'd lost the case I think we would live in a very different sort of country today. I really believe that.
- MA: Now since then you have fought many First Amendment cases and most recently you represented New York Times reporter Judith Miller, who is now in prison refusing to reveal her sources when ordered to by a court. Why should reporters have special privileges?
- FA: Well first of all they are not the only ones. I have a special privilege as a lawyer. Lots of people who do certain things are allowed by the law not to tell what people tell them. The question here is, can reporters gather news? Can they gather the information that they later tell the public about if they can't give some sort of promise to their sources that they won't tell who gave them the information? A lot of people have information, they are willing to talk to the press, they think something may be bad has happened in their company or in the government or in some place that they know about, but unless the reporter can say to them, look, you can tell me and I won't tell anyone else who you are. Unless they can say that, the public won't get the information. Reporters are entitled to this because it's good for them. They are only entitled to it because we think it's good for

the public generally because without that the news simply would not be obtainable and publishable and therefore the public won't know what's going on.

MA: And does it matter as many people have asked in this instance, if the source is a liar?

FA: I don't think so. A lot of sources give information for a lot of reasons. Some of them are admirable to help the public, some are not. The important thing is that the information be available to the public and the other important thing is that the government not have the power to keep the press from publishing things.

MA: Now when you look back at your whole career and the cases you fought, where would you say we've been and where are we now with the First Amendment?

FA: We have more protection here for free speech than any people ever did in the history of the world. That was true thirty years ago and it's true now. The important thing and the hard thing is to keep it because it's very tempting, particularly in times of crisis, particularly when we are afraid, particularly when there might be acts of terrorism, it's very tempting to say, well look you can't print that or that or that because who knows, it might be bad for the country. I think it's really important to try to resist that and to try to stay as free as we've been and as free as we are.

MA: And so given this, what do you think are our biggest challenges?

FA: I think one challenge is an educational one. I think people don't know well enough what protections we have and if they don't know it, they can't protect it. A recent poll of high school students showed that really almost half the high school students thought you needed a license to publish a newspaper. You don't. Or that the government could keep you from publishing certain types of material that the government thought it was bad for the people. It can't! These are basic, basic hard core protections of the First Amendment and the single most important thing I think is that first we learn what they are and then we protect them.

MA: In the next part of our show we are going to be talking about intellectual property rights and the rights of internet users. I'm interested in your thoughts how technology has affected the Supreme Court's view of the First Amendment?

FA: Well you know when they drafted the First Amendment; no one had any idea as you said earlier Margot that we would have all this new technology. It was all unthinkable and so the Courts have got to develop law and have got to interpret this bare language of the First Amendment to apply in a computer age and an internet age. I mean...the First Amendment all it says as you said earlier, Congress shall make no law abridging the freedom of speech or of the press. What does that tell us about the Internet? The important thing is that it be applied to the internet, just as it was applied to the print press, just as it's been applied to movies and that's been in general happening. So far the Supreme Court has been very protective of the internet; very protective that is to say of

free speech on the internet. That's one of the reasons there is a lot of stuff on the internet that is very offensive.

The price tag...remember the price tag of the First Amendment is that some things will be printed that we don't like and some things will be printed that we think are even bad for us. The other side of it is it keeps the government from cutting off speech and debate on important subjects.

MA: Now Floyd we are going to talk with our guests in the next segment about copyright law and how that affects the free flow of information. What's the relationship between copyright and free speech and is there a tension between them? Because you could argue that copyright is a form of censorship because it removes certain speech from the marketplace.

FA: Sure. The whole idea of copyright after all is that we said, you made something up, you wrote a book, you are entitled to the protection of it against the world, so you can sell it and what the Courts have said is that is a pro-First Amendment provision. What the Courts have said is copyright law encourages authors and encourages writers and that's a good thing because without encouragement we won't have all this speech. The problem is as you say Margot, sometimes you could interpret a copyright law in a way that suppresses speech that keeps things...too many things from being said and it's the reconciliation of those...that tension between free speech and copyright, between saying you wrote it, you own it and saying the rest of us want to read it and I want to write a book which quotes from it. I want to put a internet program on which has a little bit of film from someone else's film and the hard question...the question that I think your panelists are going to be talking about is how do we reconcile those interests—the interest in free speech and the interest in a copyright law which encourages people to be creative while not suppressing speech?

MA: First Amendment lawyer Floyd Abrams. He's a partner at Cahill Gordon and Reindel and a visiting professor at the Columbia School of Journalism. Floyd, thank you so much for joining me today on Justice Talking.

FA: Thank you.

MA: This is Justice Talking, millions of people share files on the Internet, are they criminals or just innovators? Stay with us.

MA: I'd like to introduce two people who like Floyd Abrams are legends in their respective fields. Joining me to discuss the complexities of copyright and distribution of digital culture are Jack Valenti and Lawrence Lessig. Jack Valenti was the President and CEO of the Motion Picture Association of America for thirty-eight years. He led the industry's charge against movie piracy and now is a senior consultant at the MPAA. Lawrence Lessig is a law professor at Stanford University and founder of the Schools Center for

Internet and Society. He is the author of several books including "Code and Other Laws of Cyberspace". Please welcome Jack Valenti and Lawrence Lessig to Justice Talking.

- MA: Jack you argue that pirating intellectual property, downloading a movie for example for free is the same as stealing physical property. If I steal a car, I'm denying the owner the use of that car, but if I download a movie from Larry's computer, I'm not keeping him from seeing that movie, so what's the harm?
- JV: Well I wasn't one to say, the Supreme Court has said that and it has said it very recently...just a month ago in a case called Grokster, in which it said that if you induce or encourage or entice people to download something that doesn't belong to you, you are liable for copyright infringement. And I might add the decision was made by a nine to nothing court, which is very rare. I think Professor Lessig would confirm for all these Justices, liberals and conservatives alike to say that the Internet cannot be made immune to the rules of a civil society.
- MA: Now we are going to get into Grokster in a minute. I want to ask Larry, you think that further regulation of intellectual property will stifle innovation and restrict the public domain, but don't people who create works of art deserve to control what happens to them?
- LL: So Jack and I don't disagree at all about the wrongness in piracy. I think both of us agree there is something wrong with people taking work that is not theirs inconsistent with the views of the copyright owner. But my problem with this debate is that it's focused so much on that particular problem and not enough on the ways that copyright laws interfere with the extraordinary creative activity that digital technologies enable, especially creative activity by our kids because when people take computers and see what we do with computers, the kind of creative works that are produced and compare them to existing copyright laws, the answer is that the kind of creativity that is going on right now is illegal. So what I think what we need is not encouragement for piracy.
- Piracy is wrong. What we need is a rethinking of how copyright law balances the important incentive artists need and I think copyright should always be part of the mix. With the extraordinary opportunity of technologies to democratize the creative process and that's the problem we face now.
- MA: But you both arguing for creativity and you are both arguing for innovation. Larry, don't most people who illegally download just want to consume music and movies and on the other side, doesn't the entertainment industry just want to make a profit? So are we really talking about creativity or just this culture consuming and making money? Start with you Jack.
- JV: Unhappily if you wrote a book, I've written five, Professor Lessig has written as many. You write alone. If I want to compose a song, I do it alone. If I want to paint a picture, I do it alone. But when you make a movie, you have an army of people that deal with you, unless you are making sort of a home movie and therefore, it takes money to do it. Now

unless you have a rich father or a rich wife, or a rich husband, you have to get people to invest in your movie and people who invest usually have this bizarre notion that they'd like to make a little profit along with the investment. So you have that conflict.

But believe me when I tell you, there is no stifling of innovation on the internet. The Supreme Court itself in this Grokster case said there is no evidence of any kind that creativity is being stifled. Today if you want to make a little movie and you put it on the Internet, no one will ever sue you or ever tell you you can't do it. It is absolutely open to you to do it and if you don't choose to make any money off of it, that's your business and you can do it. So there is no conflict there. It's just that taking something that doesn't belong to you is what a free democratic society, particularly in the framers of the Constitution had in mind, that unless you build a rostrum from it's springs, a moral compact, a moral imperative and I'm not talking about religion now at all, I'm talking about how you conduct yourself as a human being in the daily moral grind and if you say that it's okay to take something that doesn't belong to you, then you are going squarely and opposition to civil conduct that's been known since the beginning of time.

MA: Now I want to act very quickly ask Larry that question though, you know are the kids you are talking about really being innovating or are they just consuming?

LL: They are doing both. And to the extent they have a right to take other people's content, I'm with Jack. I'll defend the copyrights that are being violated, but in addition to that, they are making extraordinary creative works and it's too simple to say that the law right now says they can make those creative works when what they want to do is comment upon and remix culture and it's not just in this type of creative context. Google for example, wants to take 20 million books and scan them and make them available on the internet just like the internet is so that you could Google-ize all twenty million books.

American Association of Publishers says before you can do this, even though 90 percent of these books are out of print, the vast majority are even in copyright, you got to come to us first and ask permission to be able to put these books up in a way that makes them assessable to everybody and Google now is faced with this very difficult decision. Do they face literally billions of dollars in potential liability by making our culture accessible or do they cave in to the interest of those who want to frankly just make a little bit of money on the power that they've got over our past? Nobody wrote a book and the publisher said to them, "I'm not going to make any money off of your book, but I will make money when Google starts indexing that book and gives access to it." This is not what creativity is meant to be in the context of copyright, yet that is exactly how businesses now confront the innovation opportunities, the innovation the Internet would give them.

JV: Well let me just step in to say that I agree with what Larry is saying except for one thing. And that is, that if you have a movie that is in the public domain, believe me, you can do anything you choose to do with it, because there is no owner of that particular movie. On the other hand if it's not in the public domain, the only way a creative person gets back

his investment in time and to pay off his investors, is he has to take that movie and send it around the world and hopefully in time he will get his money back.

MA: Now I'd like to move our discussion right now into the audience because we have this large high school audience here and I'd like to take a question from one of the students.

AQ: Hi, My name is Caitlin Fisher and my question is... how much money does an artist actually lose when their music is downloaded? Don't they make most of their money off advertising anyways?

MA: Who wants to take that? Jack?

JV: Artists won't make any money out of advertising. Networks who license their films make money out of advertising, but the author of a film has to go through the theatrical movie, he goes into cable, he goes into premium cable, he goes to network television, he goes to DVD and may be at the end of that, he might get his money back. Four out of 10 films made never get their money back and of the seven 700 films produced last year, only about 400 ever got into a theater. So there is great risk involved in this.

LL: Well there have been economic studies that have tried to show this and the fact is there is no good independent economic studies that it shows that it's any significant loss. Even though I still think that's it wrong to engage in it, but recognize there are new artists who are actually making money off of this opportunity. There is a fantastic band called Wilco. They released their album "Yankee Hotel Foxtrot" free on the Internet and then they started selling CDs after they released it free on the internet and they found that they sold more CDs than they had ever sold after they had released it free on the Internet. So there is a particular case where artists began to exercise their rights in a way that actually makes them more successful by taking advantage of the kind of distribution that the Internet provides.

MA: That brings up a question I want to ask Jack. In 1982, you said that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone. But you were wrong; the movie industry has made more money....

JV: ...no I was right and I'll tell you why because they only quote in part...and by the way, last year from the VCR and illegal distribution of DVDs, movie industry lost 3.5 billion dollars. Number two what I wanted to do was to have a copyright royalty fee put on every blank cassette, which is what they do in Europe today and it's very successful so that you give that back to the creative people for the piracy they will suffer. They didn't quote that.

MA: But Jack... why can't you make file sharing profitable? Why can't the same thing happen as happened with the DVD and the VCR?

JV: Well that's going on right now. For example, iTunes is a good example of where Apple has now... you can now download iTunes at \$.99 a song so they are trying to get business models to deal with this. I think the Internet is the greatest distribution system ever

known to man so far and everybody in the entertainment business wants to use it in a way that comports with the laws of the lands. So you are going to see over the next couple of years, what Larry is talking about... there are going to be new business models out there, there are going to be new ways of distributing films and as a matter-of-fact, I think you are going to see the windows between theatrical exhibition and DVD narrowing so that you can get your films out there faster, but there are going to be all sorts of new business models, but it has to be resting on a rostrum of you can't take it without permission any more than somebody can take your bicycle or anything that you have. That's such key to this civil society.

MA: Larry, the Supreme Court has heard a couple of cases regarding file sharing and copyright. There was the Napster case, the Grokster case. Tell us briefly a little bit about each case and how the Supreme Court ruled?

LL: Well the Supreme Court ruled in just the Grokster case so far. The Napster case didn't get to the Supreme Court. And in the Grokster case the question was whether a company, which was alleged to be promoting a technology that could be used to violate copyrights, could be held responsible for the tools that were used to promote violation copyrights. And the Supreme Court held that in certain circumstances company could be responsible for the harm caused by their tools. Now you might say there are a lot of tools out there that maybe we should hold manufacturers for... for example guns. You might say it's a great thing if we start regulating gun manufacturers for the harm that they cause, but of course here in Washington that would never happen. Instead what we do is regulate a technology which I guarantee has never killed anybody. Nobody ever died from file sharing, unlike guns.

But the point about the case was the court said we can hold the manufacturer responsible. Now again, I think this makes people think the whole issue here is about as Jack said, other people have the right to steal. I don't think that's what the issue is. I think it's about how people will be able to use that technology. Jack talks about this extraordinary technology for distributing content and I agree it will be that. But what are we allowed to do with the content once we have it on our machines? Are we allowed to quote it in reports we want to make? Are we allowed to remix it? Are we allowed to make home movies with it? There is a fantastic book by a guy, J.D. Lasica ...terrible title, it's called "Dark Net", but it's a fantastic book. And in it he tells a story of writing to the studio executives because he wanted to make a home movie of his kids and he wanted to include in the home movie little clips from movies that the studio executives included and he said, just for my own family, I'm not going to show it to anybody, I'm not going to share it on the Internet, I just want to be able to make this home movie and include these tiny clips.

And all studios except for one, absolutely denied him the right to use any bit of their materials. There is one example, Warner was out for two, 10 second clips from a Daffy Duck film... absolutely no possibility Warner said to use this. And in each of these cases he was told no you can't use anything at all. My point is, when we have this technology it

is inviting people not just to be consumers, but creators. Then the extremism here is the extremism that says, you need permission for every single use of culture you want to make. Now I've agreed with Jack that its wrong to pirate material, but I'd like to know whether Jack thinks it wrong for owners of our culture to exercise absolute control over how our culture gets used? Whether that extremism too ought to be condemned by people who think we ought to create this ecology of creativity that the Internet could produce?

MA: Jack what do you think and why isn't that fair use?

JV: I think the culture isn't being in corseted or constricted. If you have a movie and this young gentleman says I'm not going to show it to anybody, I'm just going to use this in my own home, suppose he doesn't? Suppose 10 million, 20 million and 30 million people do that, then how do you know? How do you know? How do you know what hurts?

LL: How is the movie studio being hurt if I put 10 seconds of a Daffy Duck clip inside my home movie? What's the harm?

JV: There is nothing but 10 seconds, but what happens is it's more than that.

LL: But what if it's just that? Just 10 seconds? Isn't it wrong for them to say...

JV: I have no problem. If I owned a movie, I wouldn't mind giving 10 seconds to somebody, but that's my decision to make, not anybody else's. So I think if I ran a studio and somebody wanted to use 10 seconds, five seconds, fine. They want to use two minutes, three minutes I might cavil with that a little bit, but I'd have no problem with it.

LL: But that's the difference between us in addition to the fact that you got into the Harvard MBA program and Harvard never admitted me anything, but that's the difference between us. You think the right to fair use depends upon the copyright owner giving permission. And I think the right to fair use is a fundamental feature of free speech. The right to be able to criticize or build on or transform our culture is one of those freedoms that I think the First Amendment properly speaks to and the problem we have right now is Floyd Abrams in his earlier talk spoke about how strong the First Amendment is except when it comes to copyright. In fact, the Court of Appeals in this circuit... in Washington, in the case that I took the Supreme Court and lost and you stood there watched me lose. That case...

JV: But you were brilliant!

LL: Well maybe, but not brilliant enough. In that case the DC Circuit said that copyright is categorically immune from First Amendment scrutiny. So Floyd was right. The Supreme Court has been great in making sure the Internet can use to distribute pornography and you know I like pornography as much as the next guy, but is that really what's important? When it comes to the copyrighted material, when it comes to copyrighted material, is it really the case that the First Amendment should be immune, that copyright should be immune from First Amendment scrutiny?

JV: I never knew Larry was such a sensual devil now and I'm finding it out now. Let me talk about fair use. Do you young people know that in your class your professor, your teacher can show any movie he chooses? He can fast forward, he can freeze, he can discuss it, he can criticize it, and he can have two VCR/DVD screens to show two films at the same time. All of that is totally his province, he pays not one single cent...

MA: This Justice Talking. Coming up is a Nashville musician producer and bass players tell us why stealing music hurts musicians like him.

MS: [song] Change was subtle and the mood was low key, the sky was overcast, you couldn't hardly see. But the creatures all slid down to a slower frequency, the day the bass players took over the world.

MA: More from our discussion about the First Amendment in the digital age with the Motion Picture Association of America's Jack Valenti and Stanford University cyberspace expert, Lawrence Lessig. Don't go away.

MA: This is Justice Talking, I'm Margo Adler. We are talking about free speech, copyright and the Internet. Now back to our conversation with Jack Valenti from the Motion Picture Association of America and Stanford Law Professor Lawrence Lessig. We are talking about the legal and illegal distribution of copyrighted material. I'd like to bring in Dave Pomeroy into this discussion. He's a Nashville song writer and musician who says that when people illegally download music he loses out. I asked him if he thought that downloading music has a negative affect on creating new music and the development of new artists?

DP: The new developments in technology in some ways do promote the creation of new music in that what's happening in technology has made it much more easy for the average person who has written some songs and has a band to make their own record and promote it and sometimes the way to promote something is to give it away. But in terms of the established music industry and the major record labels, I think there's definitely has been a negative affect in that it's given the labels less money to develop new things and there's been such a long debate in all of the sort of anti-piracy things are not only a monetary drain, but I think it sometimes can make the industry loose focus toward the creating of new music because they are perhaps just worried about trying to protect the copyrights that they've already got out there.

MA: Larry do you think that Dave Pomeroy is wrong to be concerned and worried about the future of his livelihood?

LL: So Dave said the established industry and established music is hurt and I'm not an expert. He's the expert. Maybe he is right. But the point that I think he misses is that there is a whole new generation of music and music technique out there. When a jazz musician improvises and builds upon earlier jazz we have a strong tradition that says that's

protected by fair use and its okay for the jazz musician to use earlier work to produce new work. But the courts have said that if you use a recording as opposed to the underlying music... a recording, even a second of that recording, you have engaged in piracy. And my point is unless we begin to recognize how the creative opportunity of this technology is being destroyed because of our war... what Jack told the "New York Times" was his own "terrorist war", where apparently you guys are the terrorists, the war against piracy because we focused on that so much we miss...we're blind to how the very same rules will stifle... suffocate this new form of creativity using these technologies.

MA: I'd like to go back into our audience where we have another question from a high school student.

AQ: Hi, my name is Fame and I have a question on bootlegging movies. Are they legal or illegal, because I bought several types of bootleg movies and I was just wondering, I have.

LL: As a lawyer, let me advise you what you mean is you know somebody who has bought several...

AQ: Well... yeah.

JV: Let me tell you this. In 36 states now there are anti-camcorder laws because what we have found out is one of the greatest assets for I guess illegal movies on the Internet is done in a camcorder and you can get these tiny little Japanese camcorders now that are marvelous with great fidelity to sight, sound and color and you can get in the back of the theater and particularly stand up at a sneak preview or the first day of this exhibition and have a really flawless copy of that movie, which in 24 hours is in Asia, Latin America, and Europe and all over the world. So yes, cam-cording is illegal.

MA: Jack... piracy is a world-wide problem as you've mentioned and it is as you've mentioned growing in China and Malaysia. How do you keep other people in other countries from illegally obtaining and selling American-made movies? You know is it the responsibility of our government? Is it even possible to regulate this?

JV: We have trade laws bi-lateral and multi-lateral trade laws, but the greatest assets that we have are the creative communities in all these countries. The French who have been very, very precise about trying to keep the American movie out of their country because they are so popular, but now French writers, directors and actors are up in arms about their movies being stolen and the greatest asset we have in China which is one of the worst pirated countries in the world are Chinese creative people who now both the Chinese songwriters as well as script writers and directors and actors in China now are trying to persuade their government to crack down on piracy that is causing them some distress.

MA: Now I'd like to bring in David McGuire into this conversation. He's from the Center for Democracy and Technology and he'd like to ask our guests a question.

DM: So we've talked a lot tonight about fair use and there seems to be some question as to where you draw the line but wherever you draw the line, there is this principle that there are instances where satirists or journalists can use some excerpt of a copyrighted work without asking a copyright owner's permission. Increasingly however these copyrighted works are being locked behind powerful electronic protections, digital rights management, licensing arrangements that make it effectively impossible to get those clips, to take those snippets and use them for instance on a website.

I'd just like to ask Jack and Larry if they think that this sort of fair use principle is in jeopardy just from the technology itself to be effectively locking these pieces of copyrighted works behind digital rights management and if so is there something that needs to be done in this sort of digital rights schemes to make sure that people still have at least some right to use copyrighted works in certain prescribed way without permission from copyright owners?

LL: Well in fact I think this is one of the most important problems with fair use. That technology will be used to block you physically from doing what you should be allowed to do by rights. I mean...take the example Jack was talking about with the camcorders. One of the problems that camcorders have is that they can be used to commit copyright infringement...no doubt, but they are also used for lots of other purposes. Like people making their own movies. Now to avoid copyright infringements, they are talking about this cool technology to putting camcorders so that they can see a copyrighted film is being filmed and if the film is being filmed, shut the camcorder down. Sounds like a good idea for the purpose of protecting copyright against copyright violations, but let's say you are taking a movie of your kid taking his first steps...like a home movie of his kid taking his first steps, you are panning across the living room as he is taking his steps and in the background there is a HBO movie with one of these little signals in it that says it's copyright infringement going on when you are filming this particular movie and then what happens is your camera shuts down and we don't have in the law right now a clear right to break the technology in order to engage in fair use rights.

In fact, the court that you were involved in this case and the last time we debated you pulled this case out and shook it in front of me and said "see, this shows there is no First Amendment right to fair use."

JV: I apologize for shaking it in front of you.

MA: Well how would you respond to that?

JV: Well let me just respond with two levels. One I come back again to something that is so logical to me that maybe I'm not seeing it. If you allow one person for noble, sensible, religious and virtuous reasons to crack that code, then you must let everybody do it because the bad guys will say well I'm noble and I'm virtuous and I want a crack at it for the same reason, but he is not cracking for the same reason. Once you crack that and you put it on the internet, you are making it available to literally a billion people.

MA: Now we only have a couple of minutes so I wanted to ask both of you to remunerate very quickly on what you think the future holds as far as these issues of digital copyright. Where are we going to go? What do you see in the future? Jack?

JV: I see a changing business model among entertainment companies who want to take full advantage of this extraordinary distribution system where you can in the next several years be able to bring down a full length two hour movie in four seconds or five seconds. That's on the horizon. Internet too and other experiments by computer science that prove this is possible and the entertainment companies want to take advantage of this. They don't want to lock up anything; they want to make all their movies available to everybody at varying levels of pricing right after the movie is in theatrical exhibition two, three, four months later down the line. So I think you are going to see a complete change in the way these operations go, but at the base of it, if you cannot protect what you own, you don't own anything.

MA: Larry?

LL: Well, I see creativity. I see these technologies as being used in an extraordinarily democratized way to produce new content that might build upon the content produced by Hollywood or the content produced by the music industry, but it is much more important than just that content. Think about blogs—there are seventeen million blogs now registered in Technorati. That's an extraordinary creativity in the kind of activity engaged in here. That's with text and I think what we could see in the future is the same kind of creativity using images and sound and video if the law were to allow it. Now to allow that is not to encourage piracy. To allow that is simply to say that the law should defend that kind of free use that the culture has always had.

It was never the case in our history that the law was as restrictive in people's opportunities to build upon their culture because never before were the wide range of uses of culture regulated by copyright law, but everything now that you do with content in the digital world is technically subject to copyright law and that in my view is an extremism that will stifle this potential future of creativity.

MA: We'll have to leave the discussion there. I'd like to thank Jack Valenti and Lawrence Lessig. Thanks also to Floyd Abrams. Special thanks to the National Archives in Washington, DC.

MA: The Supreme Court term begins October 3rd. To get an idea of some of the cases that will come before the Court, I called Marsha Cole, Washington bureau chief for The National Law Journal. Marsha thanks so much for joining me.

MC: Oh you're welcome. I'm glad to be here.

MA: We've been hearing a lot lately about the composition of the Supreme Court and we thought we should take a look at some of the cases that will come before the Court. So,

one of the first cases will be a challenge to an existing law in Oregon that allows doctors to prescribe lethal doses of medicine to terminally ill patients. What's at stake here?

MC: Well this law is known as the Death With Dignity Act and it has actually been improved twice by voters in Oregon. Back in 2001 when the Attorney General was John Ashcroft, he issued what is come to be known as the Ashcroft Directive which basically said that physicians who prescribe these types of medications are in essence practicing drug abuse. The Directive was challenged in federal court by a group of physicians, patients and others.

MA: There's another case out of Maryland that will be heard in October, involving a family with a learning disabled son who wants the state to pay for private school because they think the public schools aren't serving their needs. What do you think will come out of that case?

MC: That's sort of a technical issue for the Court because it involves who has the burden in this situation of proving either the service should be paid for or it shouldn't be paid for. The Court very rarely takes education cases. It'll be interesting to see how this Court rules because we don't have a lot of experience with them in this area.

MA: But they have ruled on many disability cases and actually they've... you could argue that they've eviscerated the ADA, certainly in regard to employment in some other cases.

MC: Yes, this Court has taken a very narrow view of the ADA and the case that the Court's going to take up this term comes out of the State of Georgia. The issue here is whether Congress exceeded its authority in enacting Title II of the ADA and applying it to prisons.

MA: In December the Court will look at case involving military recruitment on college campuses and federal funding. What will the Court consider here?

MC: This is a really interesting case and this goes back to the military's don't ask, don't tell policy. There were some Congressmen who were upset when they heard that some colleges, universities, law schools... were balking at providing access to the military for recruiting purposes on their campuses or required all employers who came on campus to sign a non-discrimination policy. And of course the military was not going to sign that policy because it does not permit gays in the military. Well the Congressmen who were upset about this enacted a provision in the Defense Spending Bill that basically said that if you don't provide access to military recruiters, you're not going to get federal funds.

And this case worked its way up through the courts and the... Bush Administration actually lost in the lower court and it's the one that has come to the Supreme Court arguing that this doesn't violate the First Amendment and this is essential, they claim, to national security, to be able to recruit law graduates in particular for the JAG Corps at a time when our national security is so endangered.

MA: There are several cases about the death penalty that the Court will hear this term. What do the cases involve?

MC: The Supreme Court has set up a whole series of hurdles over the years for prisoners, especially death row inmates to attack their convictions because it believes that state courts which review them first are owed a great deal of deference and also it has wanted to cut down on sort of what it perceives to be endless number of challenges that these inmates bring to their convictions and sentences.

MA: And of course there have been at least 15 or so people who have in fact subsequently been...

MC: Well that's what makes this very interesting...

MA: Innocence, yeah.

MC: Yeah, because some of the Justices most recently, John Paul Stevens in a speech out in Chicago this summer, spoke about the number of inmates who were found to be innocent very late in the court system and on death row for years and they're expressing growing concern about how the death penalty is being implemented in the country, what kind of defense these inmates are going to receive.

MA: Are there any other cases that you are looking at and paying particular attention to this term?

MC: I'm interested in a case out of New Hampshire that involves un-emancipated minors and their right to an abortion. This is a challenge to New Hampshire's law that prohibits minors, un-emancipated minors from getting an abortion with certain exceptions. The issue before the Court is whether there is a general health exception that is required in abortion statutes and this may play into what's coming very quickly up the pipeline to the Supreme Court challenges to so-called partial birth abortions statutes.

MA: Sounds like it's going to be an interesting term.

MC: I think it's going to be a fascinating term.

MA: Thank you so much for joining us today Marsha.

MC: You're welcome, thank you.

MA: Marsha Cole is the Washington bureau chief for The National Law Journal. Throughout the year we'll follow these cases and keep you up to date on what's happening in the Court. I'm Margot Adler. Thanks for listening to Justice Talking.
