

**Configuring The Networked Self:  
Copyright, Surveillance, and the Production of Networked Space**

Julie E. Cohen

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**I. Into the Matrix**

**1. Information Rights in the Networked Information Society**

Over the last two decades, the rapid evolution of networked information and communication technologies has catalyzed equally rapid change in the organization of economic and social activity. Spurred by the perceived economic opportunities and threats that networked information and communications technologies create, powerful actors have endeavored to define and channel flows of cultural expression and personal information in ways that serve their goals. Those efforts have led to prolonged and often bitter struggles over the content of law, the design of technology, the structure of information markets, and the ethics of information use.

The debate among legal scholars and policymakers about the structure of the emerging networked information society has two odd features. First, the emerging regime of information rights and privileges is publicly justified in terms of economic and political liberty, but as a practical matter it allows individuals less and less control over information flows to, from, and about themselves. The commercial, legal, and technical infrastructures that define the individual experience of the network are converging around relatively strong default protection for intellectual property rights in information – most notably copyright and trade secrecy – and relatively weak protection for individual privacy. To an extent the explanation for this is political. Advocates of strong copyright and advocates of weak privacy share interests in strengthening the commodification of information and in developing infrastructures that render individual activity transparent to third-party observers. But the gap between the rhetoric of liberty and the reality of diminished individual control is nonetheless striking.

Second, despite their practical convergence, legal and policy debates about copyright and privacy issues have remained largely separate. For the most part, the leading scholarly books on these topics do not acknowledge, much less attempt to explore, the interconnections. Within the wider public policy arena, copyright and privacy issues are rarely linked. To an extent this disconnect also has a political explanation. Advocates of increased commodification and transparency have nothing to gain from highlighting the overlap. Advocates of “free culture”

and “access to knowledge,” meanwhile, tend to be uneasy with the limitations on access that privacy claims represent, and so have difficulty making common cause with privacy advocates across a broad range of issues. This uneasiness produces a second rhetorical gap, in which advocacy for human rights and human welfare in the networked information society proceeds as though “openness” were the only thing that mattered.

This book argues that the two phenomena are linked. The curious divergence between the rhetoric of liberty and the reality defined by emerging patterns of information flow and the failure to link copyright and privacy issues more systematically on both political and theoretical levels have a common origin. For the most part, legal scholarship about information rights shares a set of first-order commitments – to individual autonomy, to an abstract and disembodied vision of the self, and to the possibility of rational value-neutrality – that derive from the tradition of liberal political theory within which legal academics are primarily trained. Those commitments shape both the prevailing understanding of the legal subject and the preferred form of analysis by which a just and intellectual defensible system of information rights is to be derived. The resulting models, however, are too narrow both descriptively and normatively to yield useful insights into the problems of culture, subjectivity, and social ordering that confront us. Moving beyond the bounds of liberal political theory is essential to understanding the cultural work that regimes of information rights do, and to appreciating the ways in which formally separate regimes of information rights intersect.

This book will ask the sorts of questions with which law traditionally has concerned itself – what regime of information rights is just, and why – but it will foreground a set of considerations that legal thinking about those issues has tended to marginalize. It will consider how people encounter, use and experience information, and how those practices inform the development of culture and identity. In particular, it will explore the ways in which social practices of information use are mediated by context: by cultures, bodies, places, objects, discourses, and social networks. From that vantage point, it will consider the ways in which the processes of cultural development and self-formation adapt to laws, practices, and technologies designed to impose commodification and transparency within the information environment. For the most part, I will discuss these issues from a theoretical perspective. Along the way, however, I will endeavor to explain why the politics of “access to knowledge” should include a commitment to privacy, and why a commitment to human flourishing demands a more critical stance toward the market-driven evolution of network architectures.

## 2. Copyright, Creativity, and Cultural Progress

Copyright scholars vehemently disagree on whether current copyright laws strike the right balance between authors and the public. Even so, Anglo-American copyright is premised on a set of assumptions about the relationship between copyright and creativity that most scholars largely accept: Copyright supplies incentives for authors to produce creative work, but the creative process is essentially internal and unknowable. Because of the incentives it supplies to authors, copyright promotes both the widespread dissemination of knowledge and learning to the public and the continual forward march of creative and intellectual progress. Because copyright attaches only to creative expression and not to underlying ideas, functional principles, and the like, properly tailored copyright protection can avoid frustrating the needs of future authors. And because ideas and other noncopyrightable subject matter exist in the public domain, they are freely accessible to everyone.

This account of cultural development is incomplete in every critical respect. First, although creativity is constantly invoked by copyright lawyers, lobbyists, judges, and scholars to explain their arguments and decisions, it is never really explored. Copyright scholars have not been particularly interested in understanding what it is that the people we call “authors” actually do on a day-to-day basis, nor in understanding the processes by which users of copyrighted works perform their important roles within the copyright system. Second, copyright’s reigning modernist model of cultural progress sheds very little light on how culture evolves. Finally and relatedly, copyright’s model of the process of cultural transmission is highly artificial. The foundational idea-expression distinction conflicts with a large body of evidence about the way that cultural transmission actually works, and the abstract concept of the public domain that predominates in copyright discourse suggests a distribution of cultural resources that corresponds poorly to the cultural reality that users and authors alike must negotiate.

This chapter links the gaps in copyright’s account of cultural development to a set of core epistemological commitments that unite copyright maximalists and minimalists alike. Copyright theory and jurisprudence are powerfully structured by the first-order precepts of liberal individualism and by the presumptions that those precepts generate about the appropriate tools for understanding the interactions between copyright and culture. Those presumptions define the boundaries of copyright’s epistemological universe in a way that excludes many other approaches to investigating and theorizing about creative processes.

### 3. Privacy, Autonomy, and the Subject as Object of Information

The leading scholarly accounts of privacy are incomplete in three ways that go to the most fundamental questions about what privacy interests encompass. First, privacy scholars generally have assumed that the “self” that privacy protects is characterized by its “autonomy.” This formulation does not withstand close scrutiny—scholars cannot agree on whether “autonomy” denotes an absolute condition or a matter of degree, and neither understanding makes sense taken on its own terms—and the policy recommendations it generates are incoherent. Yet privacy theory clings to it nonetheless. Second, although privacy theorists have articulated a variety of collective interests that privacy serves, they have avoided digging too close to the root of the asserted social interest in denying privacy—in gathering information, monitoring spaces, and imposing identity-linked authentication procedures. Scholarly reluctance to confront the case against privacy weakens the case for privacy; collective interest justifications that seem incomplete are more easily swept aside. Finally, privacy theory offers a very poor account of the metaphors used to describe privacy interests and harms. Most privacy theorists disdain spatial metaphors for privacy as ill-suited to the networked information age, but have not seriously considered why spatial metaphors continually recur in privacy discourse or what that recurrence might mean for privacy law. At the same time, they have not considered the ways in which the implicit equation of privacy with invisibility structures the legal understanding of privacy interests and harms.

As in the case of copyright, the deficiencies in privacy theory can be traced to the methodologies that legal scholars of privacy commonly employ and the assumptions on which those methodologies are based. Privacy concerns the boundary conditions between self and society, and the ways that those conditions mediate processes of self-formation. Like legal scholarship about copyright, legal scholarship about privacy is infused with the commitments of liberal political theory, which do not function well at the self/society intersection. In Anglo-American legal scholarship about privacy, resistance to examining the complex relationship between self and society works systematically to undermine efforts at reconceptualizing privacy, and to steer privacy theorists away from literatures that might help in that task.

Some privacy scholars argue that “privacy” is itself an artifact of liberal political theory. Privacy and liberal political theory are closely intertwined, but the problem of privacy is more complicated than that argument suggests. The understanding of privacy as tied to autonomy represents only one possible conception of privacy’s relation to selfhood. More fundamentally, although

privacy is often linked to the liberal value of dignity and autonomy within our political discourse, it also conflicts with other liberal values. In the networked information society, protection for privacy compromises the liberal commitments to free flows of information, to the presumed equivalence between information and truth, and to the essential immateriality of personality. The conceptual gaps within privacy theory therefore reflect not only tensions between liberalism and critical theory, but also tensions internal to liberalism. The gaps within privacy theory in turn have very real consequences for the content of privacy law and policy.

#### 4. "Piracy," "Security," and Architectures of Control

The changes produced by the ongoing expansion of copyright and contraction of privacy are not just legal changes. The perceived imperatives of piracy and security are catalyzing major realignments in the structure of the networked information society. In aggregate, these realignments seek to produce what I will call architectures of control: network configurations that define in highly precise fashion ranges of permitted conduct for network users.

Legal scholars have analyzed architectures of control primarily through the prism supplied by Lawrence Lessig in *Code and Other Laws of Cyberspace*. Lessig described code as one of four regulatory "modalities" – law, code, norms, and the market – that can work singly or in combination. In a diagram that forms the theoretical backbone of *Code*, he depicted the four modalities as Newtonian "forces" acting on the individual subject, who is depicted as a solitary dot. Most legal scholars who write about the networked information society have adopted Lessig's regulatory taxonomy and overall approach. That scholarship has produced important insights, but it also suffers from the same general defect identified in Chapters 2 and 3: Constrained by the commitments of liberal theory, it frames code's origins and effects in simplistic and unrealistic ways. Binary distinctions between liberty and coercion, and between public and private power, are not particularly useful for describing the ways that different digital architectures evolve and affect the experiences of network users.

The architectures of control now emerging within information networks are embedded within broader changes in patterns of social ordering in our emerging information society. Although *Code's* central insight about the regulatory force of digital architectures is enormously important, an account of "regulation" as emerging from the Newtonian interaction of code, law, market, and norms is far too simple both as to instrumentalities and as to effects. Understanding the

technical, social, and institutional changes now underway requires a theoretical toolkit that encompasses the operation of pervasive, embedded social institutions. Understanding the effects of architectural regulation on users requires a theory of materially-mediated subjectivity.

## II. The Matrix Reloaded: Locating the Networked Self

### 5. From the Virtual to the Ordinary: Networked Space, Cyborg Bodies, and Everyday Practice

Before considering the questions about creativity, subjectivity, and sociotechnical ordering raised in Part I, it is useful to establish some general parameters for those inquiries. The terms “networked self” and “networked space” are not usual in legal scholarship about information policy. For most legal scholars, the most salient aspect of the networked information society is the network itself, and the new patterns of cultural participation that it enables. As Part I described, legal scholars have used theoretical frameworks derived from liberal political theory—most notably frameworks organized around expressive liberty and market exchange—to impute overarching structure and purpose to those patterns. For the most part, they have conceptualized the activities of network users as occurring in an abstract, disembodied plane.

The vision of the networked information society and its citizens as transcending spaces and bodies, and as moving inexorably within patterns dictated by the overarching values of speech and market exchange, is terribly incomplete. Networked information technologies change some of the problems with which law must grapple, but still a book about information policy in the networked information society cannot be only a book about the Internet. And the autonomous, rational, disembodied liberal self is as much a fiction as it ever was. To understand the architectural and regulatory challenges that confront our emerging information society, we must consider all of the ways that situated, embodied individuals encounter information in a real world that is increasingly networked.

To structure that inquiry, this chapter offers four organizing concepts. First, I will argue that real, embodied individuals do not experience “information” in the abstract; rather, the world both online and off is apprehended through the lens of *embodied perception*. Second, networked information technologies do not call into being a new, virtual space that is separate from “real space”; instead, they have

catalyzed the emergence of a new kind of social space, which I will call *networked space*. Flows of information through networked space alter social patterns of interaction and resource allocation in important ways. Third, the individuals who inhabit networked space have not disappeared into a virtual world. The networked self is both connected and localized, both virtual and embodied. The figure of the *cyborg*, familiar to scholars in STS, provides a useful starting point from which to interrogate the relationship between networked flows of information and experienced selfhood. Embodied experience does not wither away in networked space, but neither is it the same as it was before: Becoming “networked” affects the ways in which we understand our own capabilities, our relative boundedness, and the properties of the surrounding world. Finally, I will argue that legal scholarship on the networked information society should largely abandon simplified theoretical constructs like “freedom of expression” and “freedom of choice,” and instead examine the activities and experiences of network users through the lens supplied by literatures that focus on the routines and rhythms of *everyday practice*. Understanding how networked information technologies affect the domains of creativity and subject-formation requires careful attention to the ways in which culture and subjectivity emerge from the interactions between the ordinary and the unexpected.

## 6. Decentering Creativity

Conceptualizing copyright’s role in processes of cultural development requires a model of creativity that faces outward: that recognizes the inseparable relationship between authorship and use of cultural works. This chapter develops an account of creativity and cultural progress as emergent properties of social and cultural systems.

Artistic and intellectual cultures are most usefully understood not as sets of products, nor as sets of discrete outward expressions of authorial will, but rather as relational networks of actors, resources, and emergent creative practices. Within those networks, individual, situated users appropriate cultural goods for interrelated purposes of consumption, communication, self-development, and creative play. From each user’s situated perspective, the experienced cultural landscape determines the resources that are available to that user. That landscape includes both public and proprietary content, and is shaped both by established conventions of artistic and intellectual production and the spatial distribution of cultural resources. “Progress” emerges in iterative, dialogic fashion both from intentionally chosen acts of creative play and from the unexpected juxtapositions and interconnections that the networks enable.

The emergence of networked space alters cultural landscapes in important ways, but it does not change the fundamental patterns of appropriative incrementalism and continual cultural movement that this chapter describes. Understanding cultural progress as decentered and always-emergent suggests a more modest conception of the role that copyright plays in stimulating it, and enables a more rigorous explanation of the systemic harms that too-expansive copyright can produce.

## 7. Reimagining “Privacy”

A viable understanding of privacy for the networked information society must consider the complexities of the self-society relation, and must confront the assumptions that underlie the “information processing imperative” – the social urge to collect more and more information. At the same time, it must avoid conceiving either subjectivity or privacy in purely informational terms; both subjectivity and privacy have important spatial and material dimensions. Building on the critique of privacy theory in Chapter 3, this chapter develops an account of privacy interests and harms that is based on the emergent, relational development of subjectivity within social spaces that are increasingly networked.

As in Chapter 6, I begin by developing a decentered model of subjectivity organized around three sets of considerations: the evolution of experienced “selfhood” from the situated subject’s perspective, the collective dimension of subjectivity, and the play that overlapping social and cultural networks afford. Next, I consider the ways in which the emergence of networked space and the formation of surveillant assemblages within that space affect the processes of evolving subjectivity. In particular, I draw attention to some informational, spatial, and normative dynamics of the networked information society that Anglo-American privacy jurisprudence and theory have tended to overlook. Finally, I offer a working definition of “privacy” as room for the processes and practices of socially-situated boundary management.

## 8. Rethinking “Unauthorized Access” [chapter provided for workshop]

In this chapter, I attempt to lay the groundwork for a different way of thinking about the architecture of the networked information environment: one that takes into account both emerging social and institutional patterns and the everyday practice of network users. The starting point is a deceptively simple question: What if we inverted the analysis suggested by the *Code* framework? Rather than

asking what architectures of control do, what if we asked how users experience the accessibility of information networks and resources, and then considered how architectures of control reshape that experience? *Code's* implicit orientation toward the liberal subject—the solitary, unknowable dot at the heart of the regulatory matrix—results in relative indifference to the first question. How might foregrounding the user experience affect our understanding of both network architectures and the institutional and social patterns within which they are embedded?

The analysis proceeds in three parts. First, I develop a “recentered” model of accessibility that considers the ways in which networked information technologies, including both technologies of control and technologies of more general application, structure the experienced accessibility of network resources. Networked information technologies have some features that empower users and other features that create new challenges for everyday practice. For some time now, networked information technologies have been evolving in a direction that renders the operation of the networked information environment increasingly opaque.

Next, I explore the ways in which the emergence of architectures of control alters the experienced accessibility of the network. Architectures of control and the institutional arrangements within which they are embedded reflect a fundamental shift in our political economy, toward a system of governance based on precisely defined, continually updated authorization of access by and to actors, resources, and devices. Within the emerging regimes of authorization, discourses of national security, economic security, and technical authority work to reinforce a system of differential accessibility to information about the network's operation. Paradoxically, those discourses derive enormous power from the fact that they are embedded within an ideology of openness, in which precepts about open networks function both as received truths and as cardinal aspirations. Although regimes of authorization have no necessary connection to authoritarian *political* forms, they work to instantiate a system of governance that is authoritarian in the generic sense: that favors compliant submission to authority. They seek to produce not only willing vendors, consumers, and citizens, but also tractable ones, and they seek these changes not merely at the behavioral level, but at the infrastructural level as well.

Finally, I consider the lessons that this exercise suggests for the theoretical perspective on information rights and human flourishing developed in this middle section of the book. The rules and institutions that regulate the network's technical accessibility should acknowledge and accommodate the play of everyday practice.

### III. A Research and Policy Agenda for the Networked Self

#### 9. The Structural Conditions of Human Flourishing

Within U.S. legal and policy circles, the discourse of information policy reform has been organized principally around the themes of “access to knowledge” and “network neutrality.” Each of those movements has contributed powerful insights to our understanding of the principles that should inform the legal and technical specification of information rights and architectures. Yet the discussion in Part II suggests the need for a more accurate understanding of the ways that the information environment can foster, or undermine, capabilities for human flourishing. We saw that play – including both intentional play and the fortuitous play of circumstances – is a vital ingredient in creative practice, subject-formation, and the evolving accommodation between networked artifacts and user behavior. Those processes do not follow automatic and inevitable trajectories. Everyday practice is highly robust as a phenomenon, but the specifics of everyday practice are contingent and extraordinarily vulnerable to environmental modulation. And the everyday behaviors of networked selves require spaces where they can be enacted, tools with which they can be pursued, and meaningful legal guarantees with which they can be claimed. This means that information policy problems cannot always be solved by prescribing greater “openness” or more “neutrality.”

Beginning with the centrality of everyday practice and the overarching importance of play, this chapter derives three subsidiary principles that should inform the design of legal and technical architectures. The first principle remains that of *access to knowledge*; without the raw materials necessary for social and cultural participation, one cannot participate meaningfully in the development of culture and community, and without access to the appropriate tools, one cannot partake of the resources that the networked information society has to offer. The second and third principles, however, move beyond access to specify structural attributes of the networked information environment that are necessary to provide, and shelter, “breathing room” for everyday practice. In different ways, each principle takes aim at the growing imbalance between the seamless predictability of autonomic technologies and the transgressive potential of everyday practice. The second principle, *operational transparency*, seeks to render the network’s geographies of accessibility and inaccessibility less opaque. To take full advantage of the network’s potential to enable human flourishing, network users need access to information about how the network and its constituent artifacts and protocols work.

The final principle concerns the ways in which legal and technical boundaries that define the scope of copyright, privacy, and (un)authorized access to information technologies should be defined. To preserve room for play, those boundaries should afford degrees of freedom to access and repurpose cultural and technical materials, and should reserve to individuals and communities degrees of control over both personal information and the experienced boundaries of personal space. Such control is achieved most effectively when legal and technical architectures are characterized by *semantic discontinuity*—by gaps and inconsistencies into which the everyday practice of network users can move. In an increasingly networked information society, maintaining those gaps may require legal and technical interventions designed to circumscribe the authority of powerful state and commercial actors.

#### 10 (Not) The End of the World as We Know It

(still in progress — will address some of the principal objections to the argument in Chapter 9, with discussion organized around the social construction of risk in national security, commerce, and capital markets)