

Rethinking Constraint

Andrew Gilden

Constraint has emerged as a controversial topic within copyright debates. Do copyright constraints, as proposed by Joe Fishman, improve the creative process by forcing authors to create around copyright? Or is state-backed constraint, as suggested by Rebecca Tushnet, government censorship in a more palatable form?

This paper provides a new perspective on these questions and embraces constraint for different reasons than Fishman and other scholars. Drawing upon sources from psychology, linguistics, and cultural theory, this paper shows that constraint—whether legal or cultural—has a dual quality of simultaneously recognizing the contributions of earlier creators and triggering a range of responses by consumers and future creators. It is impossible to know in advance precisely how audiences will respond to constraint, but this dual recognition/response dynamic is integral to the creative process, helps create a shared expressive language, and is a critical component of cultural progress. Copyright law, like other constraints, does not strictly limit creativity; instead it reshapes creative practices in a range of unpredictable ways. Because of this unpredictability, using copyright to engineer the creative process is likely a fraught task. However, copyright law might have a role in stepping in where social norms insufficiently allow certain creators to constrain others and accordingly trigger responses from them.

This paper will (1) examine the general operation of creative constraints, (2) suggest some ways in which copyright law might legitimately supplement them, and (3) provide some descriptive and normative advantages of approaching copyright policy through a constraint framework.