PREFACE

California has 3,427 miles of shoreline.[1] Under the state's constitution, the shoreline is available, up to the mean high-tide line, for the public to use. Owners of beachfront homes, however, would prefer to keep the whole beach abutting their properties to themselves. In Malibu, homeowners place phony "No Trespassing" signs on the public beach, and they deploy security guards on all-terrain vehicles to chase away beachgoers. In Malibu's Broad Beach neighborhood, residents have bulldozed wet sand from the shoreline up to the high-tide mark to create a giant access barrier. At Carbon Beach, gated homes spanning multiple lots form a wall that blocks access to the shoreline from the Pacific Coast Highway. Whenever public interest groups have sought to open up pathways to the beach so that the state's constitution may be honored, homeowners have vigorously fought back. In 2005, DreamWorks co-founder David Geffen's decision to give up the keys to locked wooden gates next to his Malibu home, allowing the public to enter a stretch of beach, was headline news because it followed years of litigation and daily fines imposed upon Geffen for unlawfully blocking beach access. Battles

over beaches occur in other states as well. In most states, the wet sand area of a beach is held by law in public trust, meaning it exists for the use and benefit of the population as a whole, even when the adjacent property is privately owned. Yet property owners routinely attempt to make their rights go farther than they actually do by interfering with people's ability to access beaches. On the New Jersey shore, homeowners have obstructed public entry points near their properties by erecting fences, and private beach clubs have set up entrance gates that admit only paying members onto public lands. On the island of Oahu, in Hawaii, gated subdivisions have turned public beaches into private sands. And in certain New York municipalities, local voters have passed ordinances limiting the use of the beach to town residents, notwithstanding the fact they have no legal right to do so. Increasingly, the beach—the public's playground—is subject to private claims.

Like the owners of beachfront property, owners of intellectual property regularly claim more than the law gives them. Intellectual property law gives private parties rights in the works they create while also protecting the public's interests in accessing and using information. To achieve this laudable balance between public and private interests, intellectual property rights are limited. The law imposes various requirements that a creative work must meet to merit protection in the first place, and it specifies the kind and scope of rights that may be asserted. For example, copyrights and patents exist for limited terms; when the term of protection expires, the work falls into the public domain, where anybody is free to copy and use it. Increasingly, however, creators and content providers do not adhere to the distinction that intellectual property law draws between what belongs to them and what belongs to the public. They attach illegitimate ownership notices to works that are in the public domain. They wall off public works behind technological barriers. Their lawyers issue threats against individuals who have not infringed any actual property rights. They overreach.

While there are many other books on intellectual property, this is

the first to examine overreaching as a distinct problem and to show how to solve it. Intellectual property law in the United States does not work well, and it needs to be reformed—but not for the reasons given by most critics. The principal defect of intellectual property law is not, as many observers have maintained, that intellectual property rights are too easily obtained, too broad in scope, and too long in duration. Rather, the primary problem is the gap that exists between the rights that the law confers and the rights that are asserted in practice. Overly broad claims to intellectual property rights are a widespread phenomenon. Such claims interfere with legitimate uses and reproductions of a wide variety of works, impose enormous social and economic costs, and undermine creative endeavors. The solution is not to change the scope or content of intellectual property rights, but to create mechanisms to prevent people and organizations from asserting legal protections beyond those they legitimately possess.

This book does three things. First, it shows the astonishing extent to which overreaching occurs and the effects of overreaching on the balance between private rights and public interests. Although the book focuses largely on copyrights, because copyright law is, of all the different kinds of intellectual property law, the one that ordinary people confront most regularly, we will see many examples of overreaching in a variety of sectors and media, including the music, movie, and software industries, and by a variety of actors, including owners of trademarks in children's toys and television characters and, most surprising, nonprofit entities such as academic presses, museums, and archives.

Second, the book explains why creators and content providers overreach. In some instances, overreaching is simply about making money. Creators and content providers who can claim they own more than they actually do sell licenses to people who believe their claims. In other cases, overreaching is designed to inhibit competition. Profit is not, however, the only motivation. Overreaching also occurs when creators and content providers seek to control who gets to use creative

works and for what purposes. For example, sometimes overreaching is intended to stifle criticism, promote a political agenda, or otherwise interfere with free speech.

Third, the book shows how to remedy overreaching. It presents a series of proposals by which government, organizations, and private actors can stand up to creators and content providers when they seek to grab more than the law gives them. We will see ways in which intellectual property law needs to be changed to prevent overreaching as well as how existing laws can be deployed to combat it. In identifying these remedies, we will draw lessons from other countries that have taken firm steps to keep intellectual property rights within their proper bounds. We will learn also how ordinary people can prevent and respond to overreaching claims. The public can and should take back its metaphorical beach. This book shows how to do that.

The book uses a typology to classify different kinds of overreaching along with the factors inherent in our intellectual property system that contribute to its occurrence. The typology allows the reader to recognize and understand overreaching when it occurs, as well as to identify the best remedy for the particular problem at hand. The typology distinguishes between two principal kinds of overreaching. False claims to intellectual property involve an assertion of ownership (and the accompanying ownership rights) when there is no basis for the claim. Claiming copyright in a work after the copyright has expired is one kind of false claim. The second general kind of overreaching, overzealous assertions of intellectual property rights, involves owners of intellectual property asserting their rights in ways that, while not dishonest, are of dubious validity. For example, threatening a lawsuit for copyright or trademark infringement when there is little likelihood of such a lawsuit prevailing (and thus little likelihood the case will ever be brought) entails an overzealous assertion of rights.

As to factors that contribute to overreaching, we will encounter laws that enable overreaching to occur. For example, copyright law does not

punish very severely false claims of copyright. As a result, false copyright claims are common. In other cases, overreaching occurs because content providers are able to take advantage of the fact that the boundaries between private rights and public access are not always visible to the public. Just as the tide line can shift and cause confusion about where private property ends and the public beach begins, intellectual property is not always clearly demarcated. In such circumstances, private parties are able to extend their rights to the maximum degree possible by denying that the public owns anything at all. One example of this phenomenon is the vagueness of the fair use provision of copyright law: intended to facilitate certain uses of copyrighted works without the permission of the copyright owner, fair use law ends up enabling copyright owners to claim that *all* proposed uses require their permission. The book thus explores how intellectual property law itself provides, perversely, the basis for creators and content providers to claim rights far beyond those they actually possess.

Confronted with these extravagant ownership claims, people make conservative uses of existing intellectual property. Rather than risk a lawsuit, people alter or abandon their own creative projects. So too will we see how risk-averse gatekeepers such as publishers, distributors, and insurers prevent legitimate uses of intellectual property by the creators they represent. Conservative uses and the role of gatekeepers enable overreaching to occur.

Throughout the book, we will see gaps between norms and laws. In a variety of contexts, people behave according to norms that are more protective of the rights of intellectual property owners than is the relevant law. These norms sustain a culture of licensing in which all uses of intellectual property, even in ways the law permits, require permission and payment of a fee. The gap between norms and laws relates to the problem of misinformation. Confronted with inaccurate information about intellectual property law, content providers claim more than they have and users do less than the law allows them, on the basis of

misunderstandings of the scope of legal protections. Misinformation thereby buttresses the phenomenon of overreaching.

As this discussion already suggests, as we explore these elements of the typology, we will see also how they interact. For example, misinformation leads to false claims, which nervous gatekeepers do not confront. Laws that enable rights holders to make overzealous assertions result in conservative uses of intellectual property law, which in turn embolden rights holders to overreach in the future. The gap between laws and norms makes gatekeepers cautious. And so on. Understanding these interactions helps in curing the disease.

Current debates about the proper role and reach of intellectual property rights in the modern information society have reached an impasse. On one side of the gulf stand creators and their representatives. They see widespread infringement of their intellectual property rights—helped along by new technologies—and declining sales in their traditional markets. Their position, one that has reached sympathetic ears in Congress in recent years, is that intellectual property rights need greater protection, including increased penalties for infringement. On the other side of the divide are individuals and organizations that believe that corporations have profited too long from hardworking artists, and that intellectual property rights stifle creative endeavors that build upon preexisting works. From this perspective, intellectual property law is too severe, it serves those who don't deserve the law's protections, and it undermines the public domain.

There has been little hope of closing the divide between these two positions. Since I began writing this book, I have attended, moderated, and participated in numerous conferences and other discussions bringing together industry representatives who are in favor of strong intellectual property laws and those who advocate loosening intellectual property rights. These conversations have never approached any agreement because the participants have such different views on what the problem is. Content providers believe they are under threat; their critics contend that content providers themselves are the threat.

This book takes a different approach and offers a way out of the impasse. I believe in both strong intellectual property rights and a strong public domain. The way to enhance the public domain is not by limiting the scope and duration of intellectual property rights. Instead, the focus should be on developing mechanisms to keep those rights within their designated limits. Rather than choose between the rights of creators and the interests of the public, it is essential to protect both. This book shows how to achieve that goal.