Free(ing) Culture for Remix*

*Lawrence Lessig***

I begin with some stories to frame an argument about a potential that technology has given our society, and about the threat the law has raised for that potential.

I.

In 1839, Louis Daguerre created the Daguerreotype, a technology for producing what we would call "photographs." The technology was expensive and cumbersome, and the market for photography was tiny.

Then in 1888, George Eastman invented the Kodak: a simple and inexpensive technology for producing photographs—a consumer, rather than professional, technology for producing photographs—and the market for photography took off. That market included Kodak cameras of course. But as the technology spread, it came to include other cameras too, as well as film, photo albums, camera lighting, and everything else necessary to make photography function.

About the time Eastman invented his simple camera technology, there was a question bouncing around courts in the United States and elsewhere that would affect Eastman's technology quite directly: did a photographer need permission before he captured and used someone else's image? For some, this was no small matter: some believed they lost their soul if their image was captured without their permission. But for most, the question was a simple matter of privacy. Nonetheless, courts were quick to resolve this question against the interests of people whose image was taken. Except as limited by privacy rules, or as later modified by rights of publicity, images in the United States were free. Anyone was free to capture, and copy, an image of someone else without permission up front.

It was in part because of this freedom that the market for photography exploded as it did. We could imagine, for example, how things would be had the law gone the other way: a rule that required permission before an image is captured and copied, supported by a rule that insisted that businesses producing or reproducing images verify that permission for the original image had been secured. (A rule that imports to photography, that is, all the rules that

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**Professor of Law, Stanford Law School. Thanks to Darien Shanske for excellent research support. Many of the arguments presented here are discussed in more depth in LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

exist in copyright—but that, of course, will be the point of the story.) We could imagine such a rule, and imagine quite directly what the consequence of such a rule would have been: rather than a market exploding as it did after 1888, the market would have crawled. It would have grown, but it never would have grown as fast. It would have become larger, but it never would have become the consumer market that it currently is. There would have been "photography," but it would not have become so central to social life, or so widespread. Nor would it have inspired the economic growth that it in fact did. The rules requiring permission—imagine a (D)aguerre (M)achine (C)ontrol (A)ct—would have staunched a great deal of the growth that we actually saw.

II.

Consider a hypothetical that makes the same point slightly differently.

Imagine that, in the age of portraits, the law required that any artist painting someone's portrait must first secure from that person written permission governing how that portrait could be used. We can imagine that permission was simple and standard: a form that all signed before the painting commenced. Not a terrible burden, given the time it takes to paint a portrait. But the law would impose a severe penalty if the rule was violated.

Now imagine photography comes along—a simple, fast, inexpensive technology for capturing any image, of a person or not. How should the portrait-only-with-written-consent rule be applied to this new technology? Whatever the answer to that normative question, we can make a fairly certain positive prediction: if the portrait-only-with-written-consent rule were applied to photography, it would staunch the growth of photography relative to a world without such a rule.

III.

Copyright law has undergone a substantial change over its 215-year history in the United States. We can understand that change by mapping two dimensions along which the law has been transformed: first, distinguishing between commercial and noncommercial use of creative work; second, distinguishing between publishing a given work and transforming it. If we draw these two dimensions together, we produce the following matrix:

	Publishing	Transforming
Commercial	(1)	(2)
Noncommercial	(3)	(4)

Federal copyright law began in 1790 by regulating box (1) in this matrix, leaving boxes (2) to (4) unregulated. Commercial publishing was protected in 1790 against competing publishers. A book could not be "republished" without the permission of the copyright holder. To get that protection, a publisher would have to register his work. That registration was cumbersome and not

free, and that burden created the difference between "commercial" and "noncommercial" use in the sense I mean.[1]

	Publishing	Transforming
Commercial	©	Free
Noncommercial	Free	Free

Over the nineteenth century, this map was changed in just one way: transformative uses were added to the range of exclusive rights protected by copyright. Abridgments, translations, and adaptations—these were all within the scope of rights protected by the exclusive right of copyright. But again, because the right was limited to those who registered the work, the regulation reached commercial work only.

	Publishing	Transforming
Commercial	©	©
Noncommercial	Free	Free

However, in 1909, the dynamic to this architecture of regulation changed quite dramatically. In a change that has had a substantial effect on the dynamic of copyright regulation, but that was intended to have no such effect, the Copyright Act was modified to regulate "copies" rather than "publishing." The report accompanying the Act explicitly stated that the change was not intended to have any substantive effect. At the time, the same technologies that "published" were the technologies that "copied." Nonetheless, the change meant that as the technologies for "copying" changed, so too would the scope of the law change.

Thus, in the early 1970s, as Xerox technologies made it easy to "copy" a copyrighted work, the law was held to regulate that "copy," whether that copy was for commercial or noncommercial purposes. This was consistent with the plain meaning of the statute, but far from the original meaning of copyright regulation.[2]

	Publishing	Transforming
Commercial	©	©
Noncommercial	©	Free

But even here, the noncommercial transformation of copyrighted culture remained largely free of regulation, at least to the extent this transformation happens without technology. Retelling the story of a movie, critiquing a song

[1]Obviously, much of the "noncommercial" content was used commercially. But this was not content that required the protection of a monopoly copyright for its commercial interest to be realized.

[2]*See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKE BOX 78–128 (1994).

you have just heard, reenacting for friends a joke you saw on a sitcom—this remix of culture remained free.

These remixes were essentially free because of a simple feature of the architecture of copyright regulation: its core regulation is of copying; remixing without technology does not copy. Of course, there are exceptions. You do not need to copy anything to perform a work publicly, yet public performance is within the exclusive rights granted by copyright.[3] But the core regulation of copyright is copying, and the core act of remixing without technology did not create a copy.

Now, over the course of history and the path of these changes, we should always ask whether the rules regulating creative activity continue to make sense given the underlying purpose of copyright law. In other words, does life with lawyers in each of these boxes make sense? No doubt, in many of these cases, the answer is plainly yes. A great deal of commercial publication could not happen were copyright not a regulator. In that context, the rules make sense. And if you think of the transformation right in the model of a movie made from a book, then here again, exclusive rights make sense. It is at least plausible (but by no means uncontested) that an exclusive right is necessary for at least some forms of creative remixing to occur. If a studio is going to make a big investment in adapting *The Lord of the Rings* or *Spiderman*, then it is arguable that it needs exclusive rights or it will not be able to recoup its investment (of course, this did not stop the movie *Troy*, which is vulnerable to follow-on competition).

But when we ask this question about exclusive rights outside of the context of commercial works, then the justification for the regulation, when balanced against the free speech interests of citizens, weakens.[4] No doubt some noncommercial copying has a commercial effect, but not all. So why should all be regulated? And no doubt some noncommercial transformation might have a commercial effect, but surely not much. And certainly it is at least plausible that any negative effect is outweighed by the positive.

And even when we ask the question about exclusive rights within the context of commercial work, the answer about what mix of regulation makes sense depends upon the mix of technology, and changes over time. Control necessary at one point becomes unnecessary later; control unnecessary at one point might become necessary later.

Put more formally, the point is this: copyright regulation obviously creates benefits by producing incentives to create that otherwise would not exist. But the same regulation also obviously imposes costs. Its restrictions, that is, block speech that otherwise would be created by imposing opportunity costs on those who cannot do things with creative material that they otherwise would have been able to do.

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[3]*See* 17 U.S.C. § 106(4)–(6) (2000).

[4]*See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 12 (2002).

These opportunity costs change depending upon the technology. In the world of portraits, a rule that requires written authorization before an image can be recorded creates fewer opportunity costs than in the world of Kodak. The opportunity costs of a rule depend upon what can be done independent of the rule; what can be done independent of the rule depends upon the technology of the time. Thus, as technologies enable more, the costs of any given restriction increase.

For example, consider the explosion of remixed video that spread across the Internet during this past year. A wide range of critical commentary, mostly awful but some brilliant, has exploded on the Internet, as more have come to master the remix capabilities of digital technologies. My favorite is a montage of video of President Bush and Prime Minister Blair, synchronized to Lionel Richie's *Endless Love*—and so well synchronized that it seems as if the President (in a beautiful tenor voice) and the Prime Minister (in a strange falsetto) are actually singing the song together.[5] The subtle and powerful message of that clip is only possible because of the remix that digital technology enables. And that technology is increasingly ubiquitous. Anyone with access to a $2000 computer can remix this form of speech, and anyone with access to the Internet can then share this remix with literally millions across the world.

The potential of this technology is extraordinary. Its artistic potential is obvious; its political potential is just beginning to be glimpsed. The point is not that remix is something new to culture. Indeed, culture itself is, and has always been, remix. The point instead is that this remix potential is now amplified by technology. We have always had the opportunity to parody the President. We share that parody with our friends; if extremely good, our story might then be shared by them with their friends. But now a wide range of citizens have the opportunity to engage in this form of speech, and to share the product of that speech with others, using digital technologies.

Yet this form of speech—remix using images and sounds from our culture—is presumptively illegal under the law as it stands. The Bush/Blair clip, for example, invades Ritchie's exclusive rights to control the copying, distribution, and synchronization of that music with video images. Even if the video images are unprotected, these underlying music rights are protected. Thus, lawful distribution of this clip requires permission from the music copyright holders. The creator of the Bush/Blair clip requested that permission. That permission was denied.

Or again, a hilarious Flash animation produced by JibJab contrasted the two 2004 presidential candidates, President George Bush and Senator John Kerry, but used Woodie Guthrie's song *This Land* to give the contrast form.[6] After literally millions of copies of this work had spread across the Internet,

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[5]Johan Soderberg, *Bush and Blair Love Song*, *at* http://www.atmo.se/ (last visited Dec. 10, 2004).

[6]JibJab Media, Inc., *This Land*, *at* http://www.jibjab.com (last visited Dec. 10, 2004).

lawyers for the music publisher threatened legal action against the Flash producers.

If we multiply these examples by the literally thousands of others that appear on the Internet, and if you add those not created because of the legal regulation of that creativity, then we can begin to get a sense of the opportunity cost the existing system of regulation imposes. The cost of the system, which presumptively requires permission first, increases dramatically as the technological opportunity for remix increases.

As opportunity costs go up, policy makers should ask whether the particular set of exclusive rights reserved by copyright continues to make sense. The *particular* set, for nothing in my argument rejects copyright generally. What gain does the system as a whole get in exchange for restricting this creative activity? No doubt there is some gain. But the question is never whether there is any gain; the question is whether the gain outweighs the costs.

IV.

There is a war—a copyright war—raging in the United States just now. This is war against "piracy." As well as enabling an extraordinary opportunity to remix our culture, digital technologies have enabled an extraordinary opportunity to "share" our culture. And when that sharing, even for noncommercial purposes, impacts the market for the content shared, this "sharing" is renamed "piracy."

One can be skeptical about whether this sharing is really having an effect on the commercial market for content. For the purposes of this Article, however, I will assume that it is. Indeed, I do not mean to question at all the objectives of those who wish to stop commercial and noncommercial "sharing" of copyrighted content. Let us assume that all such sharing of verbatim copies of creative work should be stopped. Even if that is correct, this Article's aim is to focus on a collateral cost to that objective: a cost to the remix opportunities that digital technologies enable.

The argument is this: First, that the "weapons" now being used to wage war against "piracy" are destroying the opportunity for "remix." Second, that there is no need for this conflict, because we could—and should—craft a law of copyright that would encourage the remix that digital technology enables without undermining the legitimate protection against unauthorized verbatim copies.

So why don't we?

The answer, I am afraid, is that our legal culture, and hence, political culture, suffers a failure of imagination. This may be by design—disruption of the existing balance could threaten certain industries—or it may be by chance. In either case, rather than using the emergence of the Internet as an opportunity to update the law to embrace this new technology, a kind of IP-McCarthyism has taken hold within our society. Any questioning of the particular balance that copyright law has struck is translated into an attack on copyright law generally. This in turn means that useful reform—reform directed at

rebalancing the law—does not occur. Instead, a hardening of already extreme positions becomes the norm.

V.

Before digital networks, the architecture of creative content effected a fairly stable distinction in how creative content was legally used. Objects of creativity—records, films, radio broadcasts—were produced. Consumers then consumed those objects. Copyright law protected these objects. But ordinary use of copyrighted materials was unregulated by copyright law. There was no exclusive right of copyright that was infringed by playing a record that you had bought. Playing a record does not produce a copy; it is an act that is therefore unregulated by copyright law. In principle, you could infringe the public performance rights that protect the composition in a record if you played it in public. But except in college dorm rooms, most do not play their music for their neighbors. So again, most ordinary use was unregulated by copyright.

Most of us have a good sense of what "ordinary uses" of copyrighted content are. But we should recognize the contingency in that judgment. What uses are "ordinary" turns in part upon the law, and in part upon technology. Or at least, ignoring the law, "ordinary uses" would change as technology changes.

For example, in 1960, it was not an ordinary use of records to record tracks onto a mix-tape. Cassette tape technology was not introduced until 1962, and not common until much later. It was of course possible to make a mix-tape. The technology existed. But ordinary use does not depend upon what exists; it depends upon what is ordinary.

When cassette tape technology became common, the ordinary use of records changed. Consumers did not just buy records. Consumers also created mix-tapes. These mix-tapes were sometimes space-shifting devices—made so that a consumer could listen to a record in her car as well as at home. They were sometimes creative works on their own—mixes created to demonstrate a knowledge of music or mixes to express a certain message.

Courts and commentators were uncertain about the legality of these mixes. Congress finally resolved that uncertainty in the Audio Home Recording Act of 1992,[7] which affirmed the right of consumers to mix music in this way.[8] Play lists are a kind of expression, and the freedom to craft a play list encourages this expression. The law was crafted to allow that encouragement.

This example is not unique in the history of copyright. It is the norm. When recording technology, for example, enabled music to be recorded and those recordings to be reproduced, the law did not vest total control of the

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[7] 17 U.S.C. § 1008 (2000).
[8] *Id.*

product in the original copyright holder. Instead, a mechanical reproduction license gives musicians the *right* to cover a song once recorded.[9]

Like the mix-tape right, the cover right, too, induced a great deal of creativity. Indeed, as the recording industry argued in 1967, it has been responsible for an extraordinary amount of growth. As stated in a report submitted by Congressman Kastenmeier in 1967,

> [T]he record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argued that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.[10]

One difference between the two examples—mixing and covering—however, is the baseline. The Supreme Court had held that the "copies" of, say, a player piano roll were not the sort of copies regulated by copyright law.[11] The baseline was therefore no protection; Congress added some protection back. Mix-tapes are different. By the 1960s, the "copies" in a tape were plainly understood to be within the scope of "copies" regulated by the Copyright Act. Whether such copies would constitute "fair use" was a separate question. Arguably, they did not.[12] So the baseline here more plainly favored content owners. Yet here too, the result favored a limit on the exclusive rights of the copyright owners to encourage a creativity enabled by the technology.

This same pattern has arisen again with the rise of digital technologies and the Internet. Digital technologies have changed "ordinary use" of copyrighted material. They have made it possible for individuals to manipulate content in ways not practically possible before. The most familiar of these capacities is

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[9] *Id.* § 115.

[10] H.R. REP. NO. 90-83, at 66 (1967).

[11] *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 7 (1908).

[12] The Office of Technology Assessment addressed the issue of home taping at length in a 1989 Report; one prominent finding was that four out of ten persons surveyed over the age of ten had copied music in 1988. OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 145–46 (1989). Despite the prevalence of home taping, which should arguably affect the baseline, this Report did not come to a strong conclusion that the net economic effect of home copying was negative because home copying also acted as a spur to the purchase of more music and other economic activity (such as the purchase of blank tapes). *Id.* at 206–07. For acknowledgement of the ambiguous findings, see S. REP. NO. 102-294, at 34 (1992).

the ability to distribute content freely and perfectly, using peer-to-peer services. But more important than the ability to more easily make verbatim copies of content is the change in the ability of ordinary users to remix content. Because of digital technologies, individuals can remix the content they acquire, and publish that remix broadly.

This remix is illegal under the law today. The technology enables a use that violates the law. And however strongly one might believe that using the technology to produce verbatim copies is wrong, it is difficult to believe the same issue is involved when technology is used for remix. You might be deeply upset to learn that your child has illegally downloaded all the songs released by Sony Records last year, but I suspect most parents would be proud of a creative remix a child made using the latest news and music. One might draw the line with commercial remixes; one might believe that some payment somewhere should be required. But there is little doubt that there is a value to this sort of re-creativity that is missing from simple verbatim copies.

So that is the conflict: the law as it is today, to protect against verbatim copying, makes remix illegal. Many would respond, "so what?" The law is a weak force on creativity—especially the creativity of kids. It might be technically illegal for kids to remix, but that technicality will not stop anyone. And if the rule protects businesses against the "theft" of their content, then imposing upon kids such a "technicality" might not be such a high price to pay.

But this response misses at least three separate points. First, whether rules constrain kids or not, they certainly constrain institutions and businesses. Schools are not likely to teach remix if the act of remix is illegal. Businesses will hesitate to develop applications and content that encourage remix, especially when Congress is considering legislation that would make it illegal to produce technology that "induces" copyright infringement.

Second, technical rules are still rules. And to the extent those rules are known by the kids who violate them, the kids know they are violating the rules. That knowledge is corrosive. A culture built by generations that internalize the idea that rules are meant to be broken is a weaker culture, democratically, and a culture that weakens its own commitment to the rule of law.

Third, and most importantly, if the trend in technological protection measures for restricting verbatim copying continues, then the "technical" restrictions now imposed by the law alone will soon be supplemented by "technical" restrictions imposed by technology. The same tools used to stop verbatim copying will also stop remix. And while a few, no doubt, will find a way around the technical restrictions, most will not. Restrictions of code are a kind of regulation that few can ignore, and when backed up by law, even fewer will try.

Thus, the conflict is real, and we ought to take it seriously. Currently, we cannot both protect content against verbatim copying and enable remix. We

should ask, as policy makers in the past.have asked, whether there is a different way to protect both objectives.

VI.

Let me be clear about my bias, and about my objective in this part of the essay. I support remix. Indeed, I believe it will become increasingly central to how we understand our culture. The freedom to use technology to recreate culture will change how we think about culture. These acts of creativity should be central to how we educate our children. They should become second nature in our communication with one another. Unless some compelling state interest overrides this freedom, this freedom should be secured.

In light of this bias, my objective is to point to policy changes that might protect remix, while rewarding authors for their creative work. My focus for now is music, though the same issues obviously are raised by other forms of content. At the end, I will suggest what differences those other forms might raise.

The system of reward for music in the twentieth century hung upon controlling the distribution of copies of recorded music. Copies were sold; artists and copyright owners were rewarded as a function of the number sold. Controlling access to copies thus was crucial to securing an artist's reward.

The Internet initially undermined this business model. A free digital network gave millions the opportunity to "share" copies of content outside the control of the copyright owner. Thus, millions of copies of Madonna's latest work could be distributed for free, without compensation to Madonna.

This reality, in turn, has inspired the copyright wars that I have described here. A loss of control caused by a shifting technology has led policy makers and content owners to scramble to find alternatives for reinforcing control.

These alternatives are essentially four: First, to strengthen laws that restrict distribution without the permission of the copyright owner. Second, to develop technologies of control to counter the liberating technologies of the Internet. Third, to reinforce norms against violating the distribution model of the content owners. And fourth, to develop business models that better compete with the model of the "free web."

Yet ten years into this war, there are two points that we still do not seem to recognize fully. First, controlling distribution is not the only way for artists and copyright owners to be rewarded for their work. In particular, reward can be calibrated without exercising control over distribution. Second, and central to my argument, the decision to use law and technology to reinforce the control over distribution is a decision to disable much of the potential for remix culture.

First, as to alternatives: there is a wide range of authors who have mapped plans for setting compensation to artists independent of controlling

distribution.[13] Professor William Fisher's is the most ambitious.[14] For my purposes here, the details of these plans are not essential. I have described—and criticized—them elsewhere.[15] But whatever their weaknesses, those weaknesses ought to be compared to the opportunity cost of the existing system, assuming technology enforces that cost perfectly.

Those costs are many. Most directly, they are costs born by those who otherwise would participate in remix activities. Kids, or creators, who would use technology to express themselves differently, or criticize culture differently, cannot do so if that remix is coded out of the opportunity set that the Internet creates. That lost opportunity is a cost.

Second, there is the opportunity cost to commercial entities, such as Microsoft and Apple, as well as broadband providers and providers of remix software, that would have enjoyed the growth that a remix culture could produce. These are the Kodaks of the day—enterprises that would flourish if remix were free. These enterprises in the United States are vastly larger than the traditional "content industry." The loss to them should be weighed in calculating the value in reinforcing the old model.

Framed like this, the question seems zero sum, a choice between benefiting copyright owners or benefiting consumers and innovators. But the tradition of balance in copyright is subtler than this. There is a space between "nothing for copyright holders" and "nothing for the remix generation." This compromise is modeled upon the cover right.

Recall the cover right gives follow-on artists the right to cover a song, once it has been recorded, with authorization by the song's composer. That right compromises the ordinary mix of rights the law grants a copyright owner: the copyright owner ordinarily has exclusive rights over derivative works. The cover right limits that exclusive right, by securing to follow-on artists the right to create a derivative work—a cover—so long as they pay the original composer a fixed fee per record distributed.

The cover right, however, extends to whole songs only. And it extends only to covers that are substantially the same as the songs covered. It does not, in other words, grant any remix rights. So while the relative simplicity of the cover right is a model for remix, it is not yet a solution. In the balance here, I try to sketch such a solution.

VII.

There are two types of general solutions to the mix of problems I have identified here: private solutions and public solutions. In this section, I describe both.

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[13] *See, e.g.*, WILLIAM W. FISCHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004).

[14] *See id.*

[15] LESSIG, *supra* note **, at 301–04.

A. Private

While there are no doubt some who would resist the idea that their creative work should be free to be sampled, there are some who would not. Some genres of music, or perhaps genres of creators, would be happy to have others remix their work. But the default rule of copyright forbids such remixing, and the costs of changing that default are high. To reliably signal to others your desire to permit them to remix your work requires a copyright license that effectively secures such permission. Such licenses are not cheap. And as they produce no direct or immediate benefit to the person granting such permission, the likelihood that many such licenses would be produced is small.

Yet, as scholars such as Robert Merges have long argued, private institutions can work to reduce the transaction costs associated with IP rights, especially IP rights that have been set to the wrong default.[16] And that objective is precisely the aim of a nonprofit that I chair, Creative Commons.[17]

Creative Commons is a nonprofit corporation founded to provide IP-related transaction-cost-reducing devices affecting innovation and creativity. The cost-reducing service the foundation provides is a set of free licenses—"CC" licenses—with which people can mark their content to signal the freedoms they intend their content to carry. Using a CC license, an artist can signal, for example, that she is willing to allow noncommercial use of her creative work, or commercial use so long as attribution is given, or commercial use so long as no derivative is made. These are three of about eleven options now made available through our website.[18]

One CC license is particularly relevant to remix. That is the "recombo" license. The recombo license is a "derivatives only" license. It gives no authority to distribute or copy the original work, but it does give permission to build a derivative work out of the original work. This is the remix right. And as artists begin to make work available under this license, it will enable others to remix from that authorized content, for both commercial and noncommercial purposes. And that in turn will inspire others to open their content to this freedom, using (we hope) our tools for achieving this end.

This solution is obviously limited. Not all—or even most—artists will make their work available under such a license, especially when the right to remix is given away for free. But our hope is that if many begin to make work available under this license, it will suggest the importance and value of this approach more generally. That will either push more to make work available in this way, or it may increase legislative support for a change in law that I map here.

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[16]*See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295 (1996).

[17]Creative Commons, *at* http://creativecommons.org (last visited Dec. 10, 2004).

[18]*See id.*

B. Legislation

Two kinds of legislative change would help remix culture flourish. One would limit the range of material protected by copyright, the other would limit the reach of copyright for material protected. I consider the second here first.

1. Remix Rights

I have already sketched the cover right which copyright law gives recording artists. Once a song is recorded with permission of the song writer, subsequent artists have a right to rerecord it, so long as they pay a small fee to the author for that right.

The cover right is important. But it is not enough for the remix culture. The right covers a whole song. It does not cover samples, or parts. And it does not cover the right to synchronize song and video. And it does not cover anything beyond music. Yet the cover right could be a model for a remix right.[19] Congress could grant remix rights to remix creators, so long as they pay a flat fee for the right.

The details here are complex and many, but the basic idea would look something like this. Call the kind of work I am describing "remix art." Remix art is any art that "samples" from other creative work. "Sample" in turn refers to a use defined by the community of "samplers" for a particular kind of work. Music sampling, in other words, is different from film sampling. Proper "sampling" is different for each. For any commercial remix art, the law would specify a percentage of the royalties that would be divided among the artists whose work was remixed. That percentage would be added to a pool, and divided much as collecting rights societies divide royalties for music used on film. The limits of this remix would be determined by the community standard for that kind of work.

The law would operate most efficiently if all work were within the compulsory right. But Congress could permit artists to opt out of the system, through registration. Except for those works listed, all work would be available for this remix. Work listed would be exempted from the compulsory regime.

For noncommercial remix, the fees would be set on a flat fee basis. The fees in turn should be effectively much lower, and could be a component of the fees collected in a compulsory regime designed to compensate for the distribution of music generally. In both cases, the aim of the law would be to reduce the transaction costs associated with using creative work, but also assure that artists whose work is used get compensated for that work. The existing regime assures the latter; but the high cost of clearing rights means a great deal of work never gets used. For some, no doubt, this shift in regimes will result in a loss of revenue. But for most, the shift would mean a wider range of material remixed, and hence, an increase in revenue.

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[19] I am grateful to an extraordinary student, Stuart Rosenberg, who wrote an outstanding paper mapping the options I describe here.

2. Filtered Copyright

The second legislative change that could support remix culture would be to clear the undergrowth of copyright, by limiting its reach to just those works that continue to need copyright protection. Such narrowing was the history of copyright law before the changes in 1976. Until then, copyright owners were required to comply with a wide range of formalities to secure the protection of copyright. Those formalities automatically restricted the reach of copyright protection to those copyright owners with some continuing personal or commercial need to protect copyrighted work. The balance of copyrighted work would then pass into the public domain.

The effect of these formalities was not insignificant. As analyzed by Chris Sprigman, for much of the nineteenth century, as little as fifty percent of published and copyrightable work was actually copyrighted.[20] For the twentieth century, Sprigman could not provide a comparable estimate, and no doubt more and more works were copyrighted. Nevertheless, Sprigman has found examples of published works of significant interest (e.g., political posters) that were rarely copyrighted right into the 1970s.[21] This formality filter thus helped copyright law secure two separate and important goals—one, to benefit artists, and two, to release work from the burden of copyright as soon as was possible.

Treaty obligations currently restrict the opportunity of United States law makers to return to the regime that existed before the 1976 changes. But it would be possible, consistent with these treaty obligations, for Congress to impose a light regime of formalities that would achieve much of the effect of pre-1976 law.

One example is the Public Domain Enhancement Act,[22] introduced by Congresswoman Zoe Lofgren in 2003. That statute would require copyright owners to register a work fifty years after that work was published, and pay a small fee to process that registration.[23] Historical data suggests almost ninety percent of work would not be registered if required, and thus would be freed from regulation. Whatever portion was freed from continued, orphaned protection would support a remix culture even more strongly than the remix right.

VIII. CONCLUSION

I started this Article with two stories and a history. The first suggested how sensitive innovative growth was to legal regulation; the second showed how regulations from one period become destructive in another. Those two

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[20]Fifty percent is a conservative estimate. The proportion was likely lower. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

[21]*Id.*

[22]H.R. 2601, 108th Cong. (2003).

[23]*Id.*

stories reinforced this lesson from history: that the scope of copyright protection has changed in our past, and that change has reflected changes in technology.

We are at the cusp of another such change. Digital technology could radically expand the range of "creators" who participate in the remix of culture. To enable this change fully will require a change in law; to change it even partially will require a substantial change in practice. Neither change will happen, however, unless policy makers recognize the distance between the concerns driving the copyright wars, and the concerns behind the free culture movement.