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CREATIVE ECONOMIES

Lawrence Lessig[*]

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I want to continue a conversation that you have been having here today. I am going to continue it by talking about what I think might be the other side of this conversation. To frame that other side, I want to get us to think about the two separate lives that creative work lives—at least if that creative work is lucky.

One life is the commercial life of the creative work. The second life we might call the "beyond commercial" life. The commercial life of creative work depends upon the exclusive rights granted by copyright; the "beyond commercial" life does not depend upon the exclusive rights granted by copyright. So, we can describe these two lives as the E.R. and non-E.R. life of creative work.

This distinction between the two lives that creative work might go through is the distinction that makes possible the difference between bookstores and libraries. Bookstores are enabled by the E.R. life of creative work. Libraries are enabled by the non-E.R. life of creative work. The obvious point is that culture needs both. We need rules that support the construction of both. We need to recognize the very different economies that exist within both of these very different lives. And by "economy," of course, I mean something more than the buying and selling of things. I mean the complex system of production that goes into the creation of both of these lives of creative work.

That system of production is different for each of these lives. They each live in different domains. These different domains have different norms. These norms support each system of production. These norms can be breached. So, think about Cass Sunstein's example about buying an excuse from lunch. A friend says to you, "Can we have lunch?" You agree. But then

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* Professor of Law, Stanford Law School. This Article is based on Professor Lessig's keynote lecture delivered on April 8, 2005, at the "W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age" symposium held at Michigan State University College of Law. To retain the essence of the lecture, it was transcribed verbatim and has been edited for reader comprehension.

you decide that you do not want to have lunch, so you call him up and say, "Can't have lunch, how about if I give you just $100 instead?" The obvious point is that there is just something wrong with the notion that you would trade $100 for a lunch—even if the person would be happier with the $100—because it belies the nature, or the meaning, of what it is to agree to have lunch with friends. In this sense, a norm about lunch is breached.

And so too can norms about creative economies be breached. And thus if we are to support these different economies, we need to reflect upon their norms within each economy to understand how to sustain and build each of them.

So, think more about these economies of creativity and how they each work differently. Within the law, one of these two economies—the E.R. economy—is very familiar. The other—the non-E.R. economy—is not. We focus on the domain of the E.R. economy in the context of thinking about the scope, duration, and expanse of copyright law. In that domain, today you had something of a debate about the proportion of the economy of E.R. domain that the artist gets, and the proportion the middlemen get. And in this context, there is a familiar story about how the Internet is going to change these proportions—that more of the income from the E.R. domain will go to artists, and less to middlemen.

Is that true? I don't have a clue to the answer to that question and I do not care. That is not what I want to focus on in this talk. The extent to which the gap between the artist income and the total income might be changed by the Internet I think is highly contestable; there are a lot of interesting theories about it, and we will need to do a lot of economics to figure it out.

I want to focus instead on an emergence of the middlemen costs in the non-E.R. domain. This is the emergence of middlemen costs that might change the economy of the non-E.R. domain. For these are middlemen costs that might have a profound effect on the economy of the non-E.R. domain, or on the opportunity for the non-E.R. domain to thrive.

Now, in its simplest terms, we can think of these middlemen costs simply as transaction costs imposed on this non-E.R. sector. But transaction costs here raise three distinct kinds of concerns. One is the concern that we have with any transaction costs: Transaction costs eliminate the opportunity for some activity to happen. Second is a concern about the particular elasticities associated with these particular transaction costs in the non-E.R. domain. The third is a particular corruption that these costs might impose on the non-E.R. economy, again suggested by Cass Sunstein's example about lunch, that occurs when transaction costs are imposed on the non-E.R. domain.

But, before we consider how these costs might matter, let's consider a bit more carefully what this non-E.R. domain looks like. I do not mean by the non-E.R. economy that activity which we typically call "non-commercial."

Certainly, non-commercial creativity is part of it, but I mean something more. The non-E.R. economy includes commercial activity, but that commercial activity which is not tied to the traditional way we think about copyright. Or, more specifically, it doesn't depend upon controlling exclusive rights. Used bookstores live in this non-E.R. domain. They are commercial, but they do not depend upon controlling exclusive rights in order for their commercial activity to thrive. Google lives in this non-E.R. domain; it makes its money building value on top of other peoples' creative works without controlling the exclusive rights to any of the work it builds upon. And finally, and of course, the non-E.R. domain also includes the traditional things that we think of as non-commercial or beyond commercial. That's the sort of creativity many of us engage in—scholarship. This sort of creativity that ordinary people engage in as they live and remix life and culture.

So, how do middlemen costs in the non-E.R. domain rise? The clue is to focus on two very important changes that have happened relatively recently in the history of copyright law. One is the change in the architecture through which we access creative work. This is the move from analog to digital culture. The second is a change from an opt-in system of copyright to an opt-out copyright system.

To make both of the changes salient, we must first step back from copyright and reflect upon an idea about how culture develops that should be familiar to everyone. This idea I want to call "remixing." We first imagine a creative work mixed together by someone; and then someone else remixes that creative work.

In this sense, culture is remix. Knowledge is remix. Politics is remix. We remix all the time. Corporations engage in remix—here is an example of Apple "remixing" the iPod. Politicians engage in remix—this guy [President Clinton] took the platform of the Republican party, remixed it a bit, and became a Democratic president with it. Liberals engage in remix—here is a wonderful site on the Web that remixes old propaganda posters, this one to say, "Daddy why didn't you or any of your friends from Enron have to go to war?" We all engage in this remix all the time. You watch a movie by this guy, Michael Moore, and you whine to your friends that this is the best movie you have ever seen, or the worst movie ever made, and you are using Michael Moore's work in your life. You are remixing it into your life and sharing that remix with others. In that process, you are changing the world in tiny little ways. You are changing the way our culture is. You are constructing and reconstructing culture by these acts that you engage in. Every single act of reading and choosing and criticizing and praising our culture is, in this sense, remix. This is how cultures get made.

This remix is free. It is free in the sense of being unregulated. You do not need permission to engage in these acts of remixing. They are free, at

least in all of the "ordinary ways" in which humans engage in this practice of remixing. You could say that they need to be free so to avoid infantilizing culture. Or you could say that they need to be free as a basic human right. Whatever the reason is, in our tradition, these ordinary ways of remixing culture are beyond the regulation of the law. They need to be free as an expression of a tradition. That tradition I would call "free culture."

So, what are the "ordinary ways" of remixing that culture leaves free? We can think about two contexts: the "ordinary ways" in which we use culture and the "ordinary ways" in which culture gets reused.

Think about the "use" of culture in the analog world, in particular, in the context of books. If you think of this circle as describing all the uses of books in real space, a significant chunk of these uses are unregulated by the law. So, reading a book is not a fair use of the book, it is a free use of the book—it does not produce a copy. Giving somebody a book is not a fair use of the book, in our tradition, it is a free use of the book—it does not produce a copy. In America, selling a book is not a fair use of the book, it is a free use of the book. In America and around the world, sleeping on a book is not a regulated use of the book, it is a free use of the book—it does not produce a copy.

At the center of all the possible uses of a book are a set of uses which are presumptively regulated, and rightfully so, by copyright—uses which are essential to create the incentives necessary to produce great new works.

Then, within our tradition, there exists a thin sliver of exceptions to these regulated uses which we could call fair uses—uses that otherwise would have been regulated by the law, but which the law deems to be beyond regulation because the law calls these uses "fair."

We thus have three categories: free uses, fair uses, and regulated uses. That is the balance for the use of works that copyright law in the analog world provided. Think now about the balance copyright law created for the reuse or remixing of creative work. We could frame the inquiry by asking, "What is the technology of remix for us, or at least those of us who are over the age of forty, who use computers to type fast, and that is all that we use computers for?" Or you could say, "What are the ordinary ways of remix for us?"

If we reflect on that for half of a second, we recognize that remix, in the way I have described it, for us is a practice that we engage in using texts. We use words. We write. In the practice of remixing texts, this practice is what I think we call "free"—what I mean by free practice of remixing. It was not always clear that you would be allowed to write in this particular way. We had to defend and create this freedom, but in our tradition we can say that writing is allowed, unregulated in this essential way. It is the practice at the core of what we call "literacy": the capacity to understand how texts interact, whether through oral or written practice. It is the essence of what we understand teaching to be.

Against this background, then, the question digital technologies present is this: What happens when the ordinary ways of using and remixing culture change? Do the freedoms change as well?

Consider some of the technologies of remix that will be the technologies of remix for this century. In the context of music, we all know this album by the Beatles, *The White Album*. That inspired this album by Jay-Z called *The Black Album*. And that inspired this album by DJ Dangermouse called *The Grey Album*, which synthesizes the tracks from the first two albums together to create a new kind of musical species.

In the context of film, in 2004, this film *Tarnation* made its debut at Cannes. The BBC reports it "wowed" Cannes. It was a film that was made for $218. This kid used a Mac given to him by a friend to digitize all of the video he had shot throughout his life and remix it to produce a film that could "wow" Cannes and win top honors at the 2004 Los Angeles International Film Festival.

Here is something that Charles Schultz never saw [clip of *Peanuts* characters dancing to Outkast's song "Hey Ya!"].

And, most important, in the context of politics, consider these very different political clips [montage of political news clips]. And remixing is not just for the left [clip of an Anti-Kerry 2004 presidential election ad]. And this is my favorite [Lionel Richie's song "My Endless Love" played over various clips of Prime Minister Tony Blair and President George W. Bush].

This is digital creativity. This is digital remix. And we should just reflect for a moment on what these really trivial examples suggest about what the world will look like in ten years. Anybody with a $1,500 computer can take images and sounds from the culture around us and remix them together to express ideas and arguments more powerfully than anything any of us could write as text. This is remix with more than text, yet it is the literacy of a twenty-first century. It is what kids do with computers once they are finished hoarding all of the content that was ever produced in the history of man. When they grow bored with the hoarding, what do they do next? They find things to do with the content they've collected. And what do they do? They do this. Watch kids with computers. This is what they do. This is writing for them. It has extraordinary creative potential. It will change what whole fields of creativity look like.

More important, it has extraordinary democratic potential—changing the freedom to speak by changing the power to speak, making it different. Not just broadcast democracy, but increasingly a bottom-up democracy. Not just the *New York Times* democracy, but blog democracy. Not just the few speaking to the many, but increasingly peer-to-peer. This is what this architecture begs for—this form of expression, then this expression set free on

a free digital network that anyone in the world can access as they demand. This is the invitation that digital technologies give to our cultures.

So, that begs the question, When these ordinary ways of speaking change, do the freedoms to speak change as well? Or, put differently, if we grew up in a tradition where writing was allowed for us, meaning writing in the way we understand writing—writing with text—will we give to our children a world where writing is allowed for them? Do the old freedoms that we have survive this transition to a digital world?

The answer just now is, "No." The same freedoms do not survive. The new uses of culture against the background of old law are presumptively illegal, as these new uses require permission, primarily, and these permissions are not coming.

Think of just the simple problem of use. Given the architecture of access, which is a digital architecture, every use in this space produces a copy. That is the nature of a digital system. Given the architecture of law, which is now again obscurely described as an opt-out system of copyright, copies presumptively require permission. This map of balance between unregulated fair and regulated uses is, by a switch in the platform, inverted so that a space that was presumptively free before is presumptively regulated now. There are particular contexts within which this shift has a very dramatic effect.

Consider, for example, Brewster Kahle, who founded the Internet Archive. His dream was to launch a project to make available out-of-print books. He would cover the cost of scanning these books and making them available in his library for free around the world. He said, "Let's try to do it. What would it involve?"

Well, take a particular year, 1930. In 1930, there were 10,057 books published. 174 of those books were still in print as of 2001, meaning 9,883 books were potentially within the reach of Brewster's project. Of course, an ordinary, sensible person like Brewster, unaffected by training in the law, thinks to himself, "Well, you know, it can't be too hard. There has to be a list somewhere of the 9,883 potential copyright holders. We just have to call them up or send them an email. It is probably automated right now, right? All we have to do is contact them and ask permission." But, of course, there is no list of the proportion of the 9,883 works that are still under copyright. There is not even a simple way to know which are still under copyright.

So, the system requires permission to make available these works in a way that is perfectly consistent with what libraries have always done. In a digital age, this is rendered impossible legally, with the existing system of regulation. That requires hiring a private detective to clear these rights, and, of course, once that's true, the transaction costs of clearing the rights destroy the market that this technology would otherwise make possible—the market

of the "beyond exclusive rights" spreading of culture in which traditionally out-of-print books thrive.

Or, think of it in the context of the remix. Here, of course, the presumption is permission, but permission is not coming. DJ Dangermouse knew that the Beatles never give permission for anybody to do anything with their work. And this kid, after discovering that his iMac had produced a film that could "wow" Cannes, then discovered it would cost $400,000 to clear the rights to the music that happened to be in the background when he was shooting the shots that he shot throughout his whole life.

The "Endless Love" Bush-Blair clip is my favorite example. Whatever you think of Tony Blair, whatever you think of the War, whatever you think of President Bush, the one thing you cannot question about that clip is what the lawyers for the Lionel Richie estate said when permission was sought to synchronize Richie's music with that set of images. The lawyer said, No, we won't give you permission because "it is not funny."

So, we set up a system requiring permission, yet permission is not coming. And so people are faced with the choice to obey the law or not to obey the law, to create or not to create. In both contexts, the system renders illegal a set of creative activities. That doesn't mean they won't occur. But it does mean we cannot teach our children this form of literacy because to teach this form of literacy is to engage in systematic "piracy." We cannot imagine companies really engaging in businesses-building on this because of the fear of secondary liability. All we do is threaten punishment in this context. Punishment because we are waging war against something called "piracy."

This is the way the rise of the middleman could affect the non-E.R. culture. It is the indirect effect of regulations designed for the E.R. culture—the indirect effect of protecting the E.R. part of culture. The way we have chosen to protect exclusive rights has this consequence on this second form of culture, the non-E.R. part, leading to this dramatically and well-illustrated expansion of the middlemen costs. It is thus restricting the opportunity of this non-E.R. culture because of the way these particular costs weaken the economy for this non-E.R. culture.

Again, the obvious way it burdens non-E.R. culture is the burden of transaction costs generally. And with non-E.R. culture, slight increases in transaction costs can have dramatic effects on the culture that is produced within that economy. Non-E.R. culture can't pass transaction costs on to the consumer. Consumers don't pay in this economy. So, increasing transaction costs here has a very significant effect on the total production within that economy.

A less obvious way that these middlemen costs affect the spread of free culture is the corruption point. Think about some of the remix examples I

demonstrated—remixes that are themselves criticisms of the particular people whose work was being remixed. Can the non-E.R. creator get permission from these people? And if he must, will his creativity be the same? As critical? As sharp?

Here the middlemen costs are not just the traditional burdens of additional expense. They are costs that really do queer the environment for this form of creativity. And thus, if we recognize the significance of this form of creativity to our culture, we should worry about the way these transaction costs will destroy the environment for that kind of creative work.

The appropriate response to these changes is, of course, both a public response and a private response. I have been spending an extraordinary amount of my life on the private response because in my view, the current hope for any public response is for now precisely zero. A kind of IP McCarthyism reigns over this debate in Washington just now. People who question intellectual property are likely to be referred to—as Bill Gates did two months ago—as a "communist." In this context, I am not hopeful of a public response. So, in this context, the private response becomes critical.

That is the objective of the Creative Commons project. Creative Commons makes tools that make it simple for creators to mark their content with the freedoms that they intend their content to carry. Those markings are "license." These licenses come in three layers. The first layer is an education layer—a human-readable Commons deed that expresses to people in terms that anybody can understand the freedoms associated with the content. The second and very different layer is a lawyer-readable license —a billion-page document written by the best lawyers in Silicon Valley, designed to guarantee the freedoms associated with the content. And the third layer is a machine-readable expression of the freedoms associated with the content, so that search engines can begin to gather content on the basis of the freedoms.

In addition to six core licenses, we have also released a license called the Developing Nations license. This license invites people to make their content accessible within developing nations for any use at all. Outside the developing world, ordinary rules apply. So, if you mark your work with the Developing Nations license, anybody in a developing nation can make whatever use they want of that work—within the developing nation.

This is private action that would help restore a balance in copyright law. But private action won't be enough. And we who theorize about what copyright law should be need to begin to think, I think, more creatively about the public changes that are necessary here. I think we need to think more creatively about ways to restore something of the filter that the old opt-in system of copyright produced here.

Let me be clear about what I mean by the opt-in system of copyright. As all of us recognize, there was a system of copyright law that had certain

contours in the United States, inspired by the British. These contours were the requirements of registration and renewal, and the requirement of marking creative work with a copyright signal. These were "formalities." These formalities had a very important substantive effect. Our estimates are that less than 50 percent of work in the nineteenth century was ever registered initially, and more than 85 percent of that work did not renew its copyright after the initial term. That meant that this system of opt-in copyright automatically filtered its protection to those works presumptively needing it—meaning a minority initially and a tiny minority after an initial period of time. It was a system that had a built-in engine for separating out its regulation between those creative works that depend upon it and those that do not. Between 1790 and 1977, that was our system.

Then, beginning in 1978, this opt-in system began to be replaced by an opt-out copyright system. Copyright now is automatic, and it extends to all creative work reduced to a tangible form. When that change was first effected in 1976, it didn't really matter much. The change just lowered the transaction costs for facilitating copyright, and, because copyright's effective restriction on use, as I described earlier, was small, it did not really matter that it was achieving that. So, it made sense at that time and it also made sense for the E.R. ecology.

But, in the current context context, this change to an opt-out copyright regime is only harming the non-E.R. ecology. For even if is producing, on the margin, greater exclusive rights creativity, it is simultaneously reducing the non-E.R. creativity. The change thus produces a marginal gain on the one side (the E.R. ecology), traded off against a pretty substantial loss on the other (the non-E.R. ecology).

A case currently pending in the Ninth Circuit, *Kahle v. Gonzalez*, attacks this change. *Kahle* is grounded on the one bit of silver lining at the end of the *Eldred v. Ashcroft* opinion, where the Court was explaining the standard for First Amendment review that should apply in the context of copyright statutes. The Court stated that laws that do not change the "traditional contours" of copyright protection are not subject to First Amendment scrutiny, leaving the implication that laws that change those "traditional contours" do get First Amendment scrutiny. But there is no tradition more fundamental to the history of American copyright law than this tradition of opt-in copyright. There is no feature that more dramatically affected the scope and reach of how copyright law regulated, and certainly today, no change that has a more significant effect on the opportunity costs of copyright regulation.

The objective of *Kahle* is to get the court to look at this change in the traditional contours of copyright, and apply First Amendment review to this change. Such a review wouldn't mean that Congress couldn't adopt an opt-in system of copyright. It does not mean that Congress is in a straight-jacket,

tied to the way copyright law was for the first 186 years of the Republic. But what it does mean is that, if Congress changes the fundamental architecture of the system, then the First Amendment ought to apply. That analysis would ask, "Are you restricting speech more than necessary to achieve whatever legitimate purpose you are trying to advance?"

What are we really looking for here? We went to the most independent circuit in the United States hoping for an independent opinion, crediting the First Amendment theory. If we win, then we have to go back to the district court and do a First Amendment analysis. But the important point is that if we win, then the politics surrounding formalities change dramatically. Any rule requiring some technique to narrow the scope of copyright—as the system of formalities did for 186 years of copyright—threatens Congress's latest extension of copyright: the Sonny Bono Copyright Term Extension Act. Of course, Congress could re-pass that Act, making it compliant with any requirement the Court imposed. But given the way the Act was structured, there is no severability possible with this statute. Thus, even if there is a 3 percent chance that the Act would be threatened, then all of the copyright owners who benefit from these extensions of copyright have a very difficult political choice to make. They can either take the gamble that the Supreme Court does not actually apply the standard they set in *Eldred*, and instead simply affirm the existing system. Or, they can try to push legislation that would effectively moot the case. Because if they could effectively moot the case, they do not have to fight the political battle about extending copyright terms again.

This is because the one important difference between 1998 and 2008, when this battle would be fought, is that, in 1998, there was no real political awareness surrounding this question; nor was there any real appreciation of what the cost of these extensions is. In 2008, we certainly would have that political awareness. And thus, it would be very costly to fight for term extension in this current political context.

Let me pull everything I've said this afternoon together with this: It is important to frame these issues in a relatively simple way. Obviously, every simple description is an exaggeration, but the dramatic character of the change demands a kind of exaggeration. In the analog world, the presumption was freedom; regulation was the exception. As we move life into the digital world, a digital inversion produces the opposite effect—freedom is now the exception; presumptive regulation is the default. By changing the default, we have thus effectively destroyed the legal potential of this extraordinary technology. By changing this default, we have produced this world where you choose to produce illegally or you choose not to produce. Existing law, in my view, against the background of the old way copyrighted works were used,

complemented each other. But existing law against the background of these new uses conflicts.

That conflict produces a kind of harm here. And of course, the RIAA says there is also harm from the way the network facilitates "piracy." No doubt, in some sense, the RIAA is absolutely right—I do not want to quibble about that harm.

But there are two different ecologies functioning here. And whatever harm occurs in the E.R. ecology, there is a huge and, I think, a much more important harm that occurs in the non-E.R. ecology. To the extent that we want to develop and sustain a literacy with these new technologies, we have got to find a way to change this default of regulation. Without that change, the system of control will stifle the opportunity for the non-E.R. ecology to take off.

We who theorize and write about these issues have a role in this debate. I think that we have a role to educate so that we can defend this tradition. It is a tradition of writing that our forebearers defended, by establishing free speech principles that guaranteed limits on the power of control over our ability to write. We need the same ideals to guide us in helping this non-E.R. economy. We need to get policymakers to recognize that this is not a question of whether you are in favor of "piracy" or against "piracy"—that is one very small part of the balance. It is, instead, also about whether this non-E.R. ecology can survive. By getting others to see the economy of this non-E.R. ecology, we can begin to get them allied with a movement to reform the regulation here, so that regulation does not destroy this economy just to benefit the E.R. ecology.