MILWAUKEE ART MUSEUM

CUT

FILM AS FOUND OBJECT IN CONTEMPORARY VIDEO

STEFANO BASILICO

WITH ESSAYS BY

LAWRENCE LESSIG

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The Failures of Fair Use and the Future of Free Culture

LAWRENCE LESSIG

The law regulates the creative process. It always has and always will. Some regulations are indirect: regardless of the genius of her work, an artist can't legally spray-paint the Washington Monument. Some regulations are quite direct: despite the power of the message, an artist can't legally use graphic sexual images that constitute "obscenity" under U.S. law. Creators live within these direct and indirect constraints. A free society seeks to minimize them.

In the last few years, copyright has increasingly come to regulate the creative process. Copyright law, of course, is not new. Nor have creators been immune from its regulation in the past. But it is only recently that the law has begun to impinge quite directly upon who gets to say what, when. And it is only recently then that this regulation has been seen increasingly as raising fundamental questions about free speech.[1]

One might therefore expect that a serious discussion about copyright's role in the creative process would follow this recognition. After all, we in the United States live under a constitution that promises that "Congress shall make no law... abridging the freedom of speech, or of the press." Of course, "no law" has never really meant "no law." But at least our tradition has argued that laws that burden the freedom of speech must justify themselves. Are their restrictions really necessary? Do they advance the speech-promoting ends that copyright law was designed to secure? Has technology rendered their particular form obsolete, signaling the need for reform?

Yet we have not yet had this conversation in the United States about copyright. Instead, as is increasingly our wont, we've launched a war—a "copyright war," or what former Motion Picture Association of America President Jack Valenti called his own "terrorist war"[2]—against those who use twenty-first-century technology to speak in a way that conflicts with nineteenth-century rules.

The Internet is the occasion for this war. An explosion of digital technologies, linked by a free digital network, has produced an unprecedented opportunity for creative work to be remixed and shared. It has therefore also created an extraordinary pressure on businesses that were built upon an economy of scarcity. These businesses have responded by using their financial and political power to fight these new technologies. "Intellectual property," they insist, is threatened by "pirates" and "thieves." New laws, and increasingly stringent enforcement, are thus needed to respond.

But what this war rhetoric obscures is the radical change that copyright law in America has undergone, and the devastating effect that change will have upon free culture if we don't soon rethink the nature and scope of this regulation. Whether or not the law made sense before digital technologies, it does not make sense now. The law is a kludge, crafted in every age to fit the technology of that age. It must be crafted again to fit the technologies of this age. Yet powerful interests—not aligned with the interests of artists and creators—are resisting this new crafting of the law. That resistance is the field upon which "the copyright wars" are waged.

The works gathered in this extraordinary exhibition make this point more effectively than I can. As all art has done from the beginning of time, these works draw upon objects of culture to reexpress them differently. Sometimes the reexpression shows us the same work, viewed differently. Sometimes this reexpression remixes the work with other work, revealing something in the collage that we wouldn't see if we viewed the works singly.

Yet under the law as it is just now, all of these works are presumptively illegal. They all "use" someone else's creativity without seeking permission of that someone else first. They remix, or re-create, other people's creative work without the authority of those "original" creators. These remixes are thus presumptively illegal because in the act of creating these works, the creators of necessity had to infringe upon what the law gives the "original" creator an exclusive right to control.

Thus, some of these works infringe the exclusive right to "copy." Some also infringe the exclusive right to control "derivative works." Some infringe an implied exclusive right to control the synchronization of sound to film. The mix of works collected here crosses a maze of rules that require years of practice fully to understand. So too would the exceptions collected in the doctrine of "fair use"—which I discuss more fully below—require many months of litigation to secure. The result of this complexity and uncertainty is that there is only one simple way for an artist to be secure: ask permission first. The law regulating the creative process, in light of the technologies for remixing culture, has thus produced a permission culture.

This result was never intended. More precisely, the particular way in which the law complicates the creative process was never intended. The complexity is instead the product of a set of rules designed with analog culture in mind, now applied mindlessly to digital technologies.

These rules developed slowly over the two hundred plus years of copyright in America. But their unintended effect is fairly recent. The law of copyright began as a tiny regulation of the creative process. It first regulated "maps, charts, and books" only, granting its protection solely to authors who registered their works and marked their works in a way that gave others notice that copyright protection was claimed. The term of this protection was just fourteen years, renewable once to twenty-eight years if the author was alive at the end of the first term. More significantly, the exclusive right granted copyright owners was the right to control the right to publish and republish their work. It did not cover "derivative" works, meaning works built out of the original work. Nor did it cover foreign works: until 1891 America was a pirate nation.[3]

Both the scope and the term of copyright changed slowly over the next two hundred years. Music was added early in that history. Derivative rights were regulated by the end of the nineteenth century. The law was modified slightly at the turn of the twentieth century to reflect the new technology of "mechanical reproduction" of sound. It was modified again in the late 1970s to reflect other new technologies of reproduction, including cable television.

Throughout this period, three basic facts guided the reach of this regulation. First, and most importantly, until 1976 copyright remained a conditional regulation. It extended protection only where the author claimed protection. Thus, the vast majority of published work was never governed by copyright at all. Upon publication, this work passed immediately into the public domain, meaning that others were free to build upon the work without securing permission. Second, for most of this period, and with one important exception, noted below, copyrighted work was essentially single-purpose. An author wrote a book and copyrighted it. The vast majority of creativity never saw a life beyond the book. Some books were turned into plays or screenplays. But that use was the exception. The ordinary case was that copyright law regulated silos of creativity—books, photographs, music, and so on—and only rarely did one form cross another. But third, sometimes works did cross borders, of course. Films, for example, mix many different forms of creativity. To mix these forms consistently with the law, rights had to be cleared. That clearance was made simpler by formal systems that helped identify who owned what work. These clearances were costly, yet because the cost of producing film was already relatively high, this additional expense was not prohibitive. In the context of a commercial venture, one more expense simply gets added to the cost of doing business.

These three basic facts can thus be restated in a single sentence: for most of our history, most published work was free of copyright regulation; for that work within the reach of copyright, ordinary uses did not infringe the copyright; and where mixing of these creative works was necessitated by the medium, the other costs of that medium channeled creativity to commercial enterprises, capable of bearing the additional rights cost fairly well.

One might quibble with the details of these three "basic facts." But however one fills in the details, the contrast between the worlds they describe and the world that digital technologies has produced is stark. And it is the contrast

that we must first see if we're to begin to see why the law burdens creativity today when it did not—I will argue—for most of our history.

So consider how each of these three facts has changed.

First, no longer is federal copyright limited to works for which the author claims protection. Any work reduced to a tangible form is automatically copyrighted, for the full term of a copyright, which today is at least a century. That means that the burden of copyright is no longer limited to those relatively few published works intended for commercial use. The burden is now extended indiscriminately. Second, given the nature of digital technologies, works no longer live in separate silos. As content becomes digital, the lines separating text from sound from images from moving images fade. "Multimedia" is the norm, though the medium is no longer multiple. All forms of "media" exist on a common digital platform. Their mixing is no longer the exception; mixing is the rule. Yet, third, the legal costs of clearing the rights to mix this content have not gone down. Indeed, because formalities have been removed from copyright, they have only increased. The presumption is always that permission must be sought. Yet the costs of seeking permission are only getting higher. The creator who thus creates in the way these technologies beg to be used creates in a way that the law deems criminal.

We thus live in the era of "illegal art"[4]—not because of the political message of the art, not because of its morality, but because to use and reuse without permission is deemed a crime.

There have also been changes beyond this intentional and unintentional bloating of copyright's regulation. A less perceptible change in the legal culture surrounding these rights has occurred as well. Uses that before would routinely be called "fair" have increasingly been challenged. The Warhol estate, for example, demanded that the producers of Monty Python's *Life of Brian* pay more than $100,000 because a scene caught a Warhol image. (Yes, Warhol!) Filmmakers recognize that any legal threat might delay the release of a film, and delay equals death. So this in turn shifts practice away from free use, to use with permission.[5]

Think very practically about what the law demands, in light of a very practical description of what the technology enables. If you buy a new Macintosh, for a little extra you can get a suite of technologies bundled into the computer that would enable anyone with a couple of spare hours to make a movie. That movie could mix sound with images that the creator shot, intermixed with clips from movies that the creator has acquired. So imagine that you make a movie that captures your new child playing in front of a television set, intermixed with clips from a Woody Allen film, with a sound track by David Bowie. And suppose you want to post this movie on the Web. What would you have to do to do this legally?

Well, you're free to film your child. But the television in the background might capture a snippet of *The Simpsons*, for example. Technically, that means that you may need to contact Fox. And to intermix clips from your favorite films will require permission from the copyright owners (plural) of the film. In the minds of some, it would also require getting

permission of any actor too. And, of course, to reproduce the sound recordings of Bowie, you need to secure both the performance right, which allows the work to be used for public performance, and the synchronization. That too will require a lawyer—turns out David Bowie doesn't read his own e-mail. And, of course, because all this is supposed to be displayed on the Web, and therefore constitutes a public performance, these "requirements" become quite real.

So technically (under the law), just at the time that technically (as in "with technology") it has become unimaginably simple to mix and remix culture, it has also become extraordinarily difficult to remix this culture legally. The costs of the law swamp the benefits of the technology. Culture becomes a permission culture; free culture is restricted to gossips.

What has happened here?

This conflict is produced by two changes: a change in the law and a change in technology. Given the law, use of the technology to remix culture is presumptively illegal. But given the technology, we should be asking of the law, why? Why should the law demand permission first when technology could enable an extraordinary range of people to be creators? Why should the law require permission before expression is sanctioned?

These questions are not new to the law of copyright. Indeed, copyright law has historically balanced new technologies with the legitimate objectives of the law. Every time in our past when a new technology has changed the way content gets made or distributed, the law has been adjusted to make sense of the technology. And thus we have a tradition that asks how best to balance. We could be following that tradition now.

That practice has historically sought to promote one overriding public goal through a very particular private means. Our constitution says that Congress has the power "to promote the Progress of Science" (which in the eighteenth century would have included what we consider the arts). That goal is to be advanced by "securing" to "authors" an "exclusive right" for a "limited time." These "exclusive rights" are copyrights. But the critical point is that these rights are a means to an end; they are granted for the purpose of promoting progress, even if the consequence of these rights is to benefit authors.

It is that purpose that helps answer the first, most obvious question about copyright law, namely, why it is limited at all. Why does the copyright of a work expire? Why is there any fair use right? These limitations make sense only in light of the overall aim of the law–to promote progress. If the aim of the law were to benefit artists alone, then it would be harder to justify these limitations. Harder, but not impossible: it is perfectly possible to imagine a justification that spoke of the need to assure that work pass into the public domain so that others can build upon it, for example. But that justification would be more difficult to support than one that simply aimed at promoting progress.

Yet even if the right question is asked, the answer is not obvious. Consider the recent flap raised about DJ Danger Mouse's Grey Album, created by mixing Jay-Z's Black Album with the Beatles' White Album. Jay-Z had no problem with the remix. EMI, for the Beatles, did. And EMI threatened to sue anyone participating in the redistribution of the Grey Album, since the Grey Album itself had no permissions granted up front.

It is easy to see why artists go both ways on this particular example. Danger Mouse didn't believe that he should be required to ask permission first. So he didn't. The law as it stands plainly says that he did have to ask permission first. I would agree with him that he shouldn't have to get permission, but I can well understand others who would worry about the way "their work" was used if others could sample from it freely. What if Disney took Danger Mouse's Grey Album and used it in a remix for a rerelease of Mickey Mouse? Should Danger Mouse have the right to object?

Such questions shouldn't be answered in the abstract. They should be answered in light of experience. We as a culture should experience a world where artists are free to remix before we decide that that freedom should be disallowed. And it is here that the works in this exhibition become so important. For the presumption of our culture today is that these works are "theft." No law professor will persuade anyone to the contrary. Arguments don't work here.

But art does work. If the world is to be persuaded about the importance and value of this freedom, it will be persuaded only by the product of that freedom. Only when people watching or experiencing this work understand something differently, and understand that the remixing was necessary for that different understanding, will the right to create be protected.

These criticisms of the law are harsh. Many would say overly harsh. Indeed, I have mentioned only once the central balance that copyright law offers artists and creators to help them escape irrational burdens. This is "fair use." So what about fair use? Doesn't fair use guarantee the rights that I complain the law has removed?

Fair use is the copyright lawyer's apologist. Every time there's a skirmish about copyright law, the doctrine is brought on stage as a symbol of the fairness and reasonableness of the system. Only rarely does the content industry question fair use. (I once heard a senior executive at Universal declare fair use the "last refuge of scoundrels.") Instead, most point to fair use to show just how reasonable and sensible the system is.

In theory, the system of fair use does sound quite fair. If a copyright owner complains that his exclusive rights have been infringed, the alleged infringer has the right to defend the use of the material by claiming that it was "fair." A judge is then to apply a four-factor test to determine whether the use claimed by the defendant should be deemed "fair." That test considers (1) the purpose and character of the use, including its commercial nature; (2) the nature of the copyrighted work; (3) the proportion that was "taken"; and (4) the economic impact of the "taking."[6] Weighing these factors together (for the Supreme Court has been clear that none is to be deemed to be determinative alone[7]), a court decides whether the speech challenged shall be allowed. So if a use is commercial, it is less likely to be "fair." If the work is a poem, then you can use less than you could if it were a book. Using a few pages from a book is more likely fair than using a whole chapter. And if you're competing with the author in a market that should be hers, then it is less likely to be fair.

These standards are vague, and designed to be so. And that's precisely the problem. For the question a free culture should ask is not what rights the law would guarantee in theory—or, more accurately, what rights it would secure at the end of costly and slow litigation. The question that a free culture should ask is what rights the law grants in fact. And the fact is that our legal system is so extraordinarily expensive that if anyone actually needs to defend his or her right to speak using the law, the cost of that defense will exceed what most can afford. If a publisher has to answer a complaint about a work that it has published, the legal costs would be greater than the expected profit for the whole book. The same with film and, increasingly, music. The consequence is that these publishers—and film producers and music companies—create their own "fair use" regime. That regime is designed to eliminate the chance that the artists (and hence the publisher) will be sued. And because the test of fair use is so amorphous and uncertain, the only way to eliminate the chance of being sued is to radically restrict the scope of fair use. Fair use in America has become the right to hire a lawyer, which is worth a great deal to people who can afford a lawyer and worth nothing to everyone else.

Lawyers are not trained to see this reality. Artists must force them to see it. Too much of the practice and theory of law remains cocooned from reality. Reality, then, must fight back.

Art is that reality. We have entered an age in which the right of artists to create freely must again be won. It cannot be presumed. And it will be won only if artists understand first the accident that has rendered the law unintelligible and if they demand that the law again make sense.

NOTES

1. See, e.g., Neil Weinstock Netanel, "Locating Copyright within the First Amendment Skein," *Stanford Law Review* 54, no. 1 (2001): 1-86.
2. Amy Harmon, "Black Hawk Download: Moving beyond Music, Pirates Use New Tools to Turn the Net into an Illicit Video Club," *New York Times*, January 17, 2002.
3. I describe the early history of American copyright law in *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2004), 130-68.
4. Indeed, there is now an "Illegal Art" project. See "Illegal Art: Freedom of Expression in the Corporate Age," sponsored by *Stay Free!* magazine, http://www.illegal-art.org/.
5. For a collection of examples, see Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), 3-16.
6. See 17 USC, sec. 107.
7. See *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994).