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TEN

REFORMING US

The law is just one part of the problem. A bigger part is us. Our norms and expectations around the control of culture have been set by a century that was radically different from the century we're in. We need to reset these norms to this new century. We need to develop a set of norms to guide us as we experience the RW culture and build hybrid economies. We need to develop a set of judgments about how to react appropriately to speech that we happen not to like. We, as a society, need to develop and deploy these norms.

Chilling the Control Freaks

We know the norms this century needs. We can find them if we think again about the freedoms in writing. We were all taught as a kid how to write. We measure education by how well writing is learned. As I've already noted, this is a profoundly democratic feature of our creative culture: we tell everyone they should learn how to speak as well as how to listen.

That core experience brings with it certain expectations—not

just about what anyone is free to do, but also about the appropriate response to what anyone writes. Put simply, that response is essentially substantive and laissez-faire. When someone writes a stupid opinion, the appropriate reply questions the opinion, not the right of someone to write it. And while falsity could invite a legal response (defamation), there is (in the American tradition at least) a strong presumption against getting the government involved unless absolutely necessary. The Constitution limits the power of a public figure to sue for defamation. And someone who responds to an error with a lawsuit rightly loses the sympathy of most of us. This is the one place where President Andrew Jackson's mother's advice remains strong: "Never tell a lie, nor take what is not your own, nor sue anybody for slander, assault and battery. Always settle them cases yourself."¹ At least with respect to the slander part, that's got to be right.

As I've already argued, these writing norms are different from the norms that govern much of the arts. The willingness to invoke the legal system to address misuse with films or music is astonishing. As Academy Award-winning director Davis Guggenheim told me eight years ago, it is also increasing.

Ten years ago . . . if incidental artwork . . . was recognized by a common person, then you would have to clear its copyright. Today, things are very different. Now if any piece of artwork is recognizable by anybody . . . then you have to clear the rights of that and pay to use the work. [A]lmost every piece of artwork, any piece of furniture, or sculpture, has to be cleared before you can use it.²

We need the norms governing text to govern culture generally. This change must start with the companies that now have legal

control over so much of our culture. They must show leadership. Henry Jenkins divides these companies into two sorts:

[S]tarting with the legal battles over Napster, the media industries have increasingly adopted a scorched-earth policy toward their consumers, seeking to regulate and criminalize many forms of fan participation that once fell below their radar. Let's call them the prohibitionists. To date, the prohibitionist stance has been dominant within old media companies (film, television, the recording industry), though these groups are to varying degrees starting to reexamine some of these assumptions. . . . At the same time, on the fringes, new media companies . . . are experimenting with new approaches that see fans as important collaborators in the production of content and as grassroots intermediaries helping to promote the franchise. We will call them the collaborationists.³

These collaborationists are forcing "media companies to rethink old assumptions about what it means to consume media."⁴ As they experiment more with freedom, they will encourage norms that support that freedom as well.

Showing Sharing

As I've already described, copyright law is automatic. It reaches out and controls what you create—whether you intend it or not, and whether it benefits you or not. An academic publishing a paper wants nothing more than people to copy and read her paper. But the law says no copying without permission. A teacher with an innovative lesson plan for teaching Civil War history would love

nothing more than for others to use his work. The law says others can't without clearing the rights up front. The essence of copyright law is a simple default: No. For many creators, the essence of the creativity is: Of course.

No one needs to question the motive or necessity of those who insist that they must reserve all rights to themselves. Maybe they do. Who am I to say different? But while conceding a necessity sometimes, we should never concede that sometimes means always. That Lucasfilm needs to control all its rights to profit from its genius does not mean that a law professor writing an article about bankruptcy needs the same protection. Or that NBC needs to control the commercial exploitation of *ER* does not mean NBC should have the right to control the exploitation of the presidential debates. The copyright model works well in some places. But some places doesn't mean everywhere.

Movements like the Creative Commons were born to help people see the difference between somewhere and everywhere. Creative Commons gives authors free tools—legal tools (copyright licenses) and technical tools (metadata and simple marking technology)—to mark their creativity with the freedoms they intend it to carry. So if you're a teacher, and you want people to share your work, CC gives you a tool to signal this to others. Or if you're a photographer and don't mind if others collect your work, but don't want *Time* magazine to take your work without your permission, then CC would give you a license to signal this. All the licenses express the relevant freedoms in three separate layers: one, a "commons deed" that expresses the freedoms associated with the content in a human readable form; two, the "legal code," that is the actual copyright licenses; and three, metadata surrounding the content that expresses the freedoms contained within that copyright license in

terms computers can understand. These three layers work together to make the freedoms associated with the creative work clear. Not all freedoms, but some. Not “All Rights Reserved” but “Some Rights Reserved.”

In the five years since this project launched, millions of digital works have been marked to signal this freedom rather than control. Some have used them to help spread their work. Others have used them simply to say, “This is the picture of creativity I believe in.” And as the tools have been used, they have begun to define an alternative, privately built copyright system: Almost two-thirds of the licenses restrict commercial use but permit noncommercial use. The vast majority permit free derivatives, though half of those require that the derivatives be released freely as well. This is a picture of a much more balanced regime, built by volunteers, one license at a time. And it signals something to other artists as well.

This signal is very important, for it shows an alternative that authors and artists have selected. But more need to show the very same sign. Whole fields need to establish a different copyright default. Not necessarily by legislative change. Or at least not yet. But by the voluntary action of those who believe the default should be different.

Indeed, if you look at the five changes I suggest copyright law should make, four of those changes Creative Commons already enables through the voluntary action of copyright owners.

First, every CC license authorizes at least noncommercial distribution. That goes a great distance in deregulating amateur creativity.

Second, CC licenses make it simple to identify who a copyright owner is. More significantly, Creative Commons is now taking the

lead in building an international copyright registry. Both changes help clear title to copyrighted works, and thus help a market in copyright work better.

Third, CC licenses are designed to simplify as much as possible the copyright system it builds upon. Think of the copyright system as the command line interface for computers before Windows or the Mac became common. Like Windows, or graphical user interfaces generally, CC tries to make it easier for the ordinary user to use the copyright system. Not to do everything, but to do the sorts of things ordinary people are likely to need done.

And finally, as every CC license at least authorizes noncommercial copying, we have decriminalized the copy. The question is not “Has a copy been made?” The question is “For what purpose has a copy been made?” This goes a great distance in simplifying copyright in contexts of unexpected or unpredicted uses. That simplification should be Congress’s objective as well.

Though I was one of those who helped start Creative Commons, I’m the first to argue that CC is just a step to rational copyright reform, not itself an ultimate solution. But its key advantage is that it works with creators to build a better copyright system. Unlike the standard debate, which sets users against creators, CC is reform advanced by authors and artists themselves. We say what control we need. And in that conversation, we get to debate just how much control is healthy or necessary for a culture.

More creators need to take part in this conversation. More need to ask those who don’t why they don’t. We all need to work for a norm that doesn’t condemn copyright, but rather condemns senselessly deployed copyright. You can be in favor of handguns and oppose giving handguns to kids. Likewise here.

Rediscovering the Limits of Regulation

The final change is perhaps the most important. It is certainly the most general. We as a culture need to rediscover an idea that was dominant when Sousa was first learning to conduct: We must recognize the limits in regulation.

We've just left a century in which governmental power across the world was greater than at any time in human history. So too were people's expectations for government. At some point in the course of the century, it became almost natural to imagine that government could do anything. At some point, it seemed obvious that the only limit to governmental power was governmental incompetence.

Many in the nineteenth century had a very different view about government. Many believed that government could do little, or maybe nothing, to change how people behaved. As the prominent nineteenth-century legal theorist James C. Carter put it,

[H]uman transactions, especially private transactions, can be governed only by the principles of justice;...these have an absolute existence, and cannot be made by human enactment;...they are wrapped up with the transactions which they regulate, and are discovered by subjecting those transactions to examination. [T]he law is consequently a science depending upon the observation of facts and not a contrivance to be established by legislation, that being a method directly antagonistic to science.⁵

If society is to change or improve, Carter believed, it must do so by improving the individual. Legislation cannot "originate" that

change, Carter believed, though “it may aid it.” “Men cannot be made better,” Carter declared, “by a legal command.”⁶

In many ways, my own work could well be characterized as an apology for regulation. My first book, *Code and Other Laws of Cyberspace*, argued strongly that while I was as skeptical of our current government as any, it was extraordinarily important that the government help ensure that the values of cyberspace were our values. My argument was criticized by libertarians, who believed the best role for government was no role at all. They argued that cyberspace would be best off if government kept its hands off.

I still believe that there are important strategic ways in which government can do good. But the last few years have convinced me that we all must be less optimistic about the potential of government to do good.

This (obvious) point first cracked into my head as I was reading the accounts of America’s war in Iraq. Whole libraries have been published about the failures in that war.⁷ In book after book, even those sympathetic to the objectives of the war could barely find anything good to say about how it was executed. But as I read more and more of these books, I was struck most by a question that seemed simply not to have been asked before that war was waged: What reason was there to think that government power could succeed in occupying and remaking Iraqi society?

I’m not talking about the invasion: that’s easy enough. Invasions are won with powerful tanks and well-placed bombs. I’m talking about everything that would obviously have to be done after the invasion—from security, to electric power, to food supplies, to education. It was as if those at the very top simply assumed that the government could do all these things, without ever asking whether that assumption made any sense.

What made this all the more weird was that the very people who were operating upon this vision of regulatory omnipotence were the same people who, in a million other contexts, would have been most skeptical about the government's ability to do anything. We're not talking about FDR here. Or even the socialist member of the United States Senate, Bernie Sanders. We're talking about people who don't believe the government can run a railroad. But if a government can't run a railroad, how is it to run a whole society? What possible reason is there to think that we had anything like the capacity necessary to do this?

For though many predicted resistance, the presumption behind our government actions was that force could always quell resistance. If the enemy fought back, we'd fight harder. And at some point, we'd fight hard enough to overcome the enemy. All that was needed was a strong will and good character.

There's a deep fallacy in this way of thinking. In a democracy, more power does not translate into more success. Instead, like a car trying to free itself from a snowbank, in a democracy, more power is often self-defeating. There is a limit to what a government can do that can't simply be overcome by adding power or resources to the problem. At some point, adding more regulation decreases the effective control over the target.

This is not a book about Iraq. But I suggest we can apply the point about that war to the other wars we are waging. There are many such wars that would benefit from such consideration. But the one I want to return to is the war we are waging against our kids because of the way they use digital technology.

Again, as I've described, when p2p file sharing took off, the response of the government (and those who pushed the government) was that this bad behavior should be regulated away. We

assumed that if the government put enough force behind it—enough prosecutions, enough suspensions from universities—eventually, the bad behavior would stop.

In fact, the evidence is to the contrary. The government has passed law after law. It has threatened extraordinary punishments. And private actors like the RIAA have delivered these punishments in literally thousands of lawsuits—more than seventeen thousand as of 2006. But so far, this effort has been a massive failure. Not because it has failed to protect the profits of the record companies. No doubt, it has done that to some degree. But the real failure of this war is the effect that this massive regulation has had on the basic integrity of our kids. Our kids are “pirates.” We tell them this. They come to believe it. Like any human, they adjust the way they think in response to this charge. They come to like life as a “pirate.” That way of thinking then bleeds. Like the black marketeers in Soviet Russia, our kids increasingly adjust their behavior to answer a simple question: How can I escape the law?

This concern is not just speculation. There is important legal and sociological evidence to support the concern that overcriminalization in this one (and central) area of our kids’ lives could have negative effects in other areas of their lives, and on attitudes toward the law generally. To the extent that kids view the laws regulating culture as senseless, or worse, corrupt, that makes them less likely to obey those laws. To the extent that they see these senseless laws as indicative of the legal system generally, they may be less likely to obey those laws generally. Developing the habit of mind, especially in youth, of avoiding laws because they are seen to be wrong, or silly, or simply unjust, develops a practice of thinking that could bleed beyond the original source. Of course, no one would claim that laws against piracy increase the incidence of rape or murder.

But there is evidence that if the laws regulating culture are perceived to be morally unjust, that erodes the conditions within a culture for supporting the law more generally.⁸

But I'm not driven to this concern because of compelling T-statistics in a multiple regression. The source of my concern is the literally hundreds of people under thirty who have spoken to me passionately about this issue. Just as I was completing this manuscript, for example, one teenager sent me an essay he had written about "piracy." As his essay, titled "Who Passes Up the Free Lunch," explained:

You can get any song you want, any type of music, from any era, and it's all FREE! What could be better? All of music's history is at your disposal for one low monthly price: \$0! ...

I download songs all the time for these exact reasons. It's quick, easy and best of all, free! The other side of it is the artists that lose the revenue that they would have got if all those people had bought the CD's. Obviously not everyone would have bought the CD, but this creates a moral dilemma between supporting the artists and just taking the free lunch. The RIAA says this is illegal, the artists say it's stealing their money, and most of educated society says it's just plain wrong, but here's the problem: I completely agree with both sides.

"Pirating" music, as the RIAA calls it, is something I do whenever I want some new music. All I do is type in the name of the artist or song, and click download, and voila, it appears and starts playing. It's so easy it's like stealing candy from a baby. However, now I'm at a point where I kind of take it for granted, and I don't even think about what I would do if one day it were suddenly not available. In a time when there are so many options to amass a

music collection, I take the way that is most convenient for me and most damaging to the artists. Much has been said in the justice system, in the media and online about the legality of these peer to peer networks, but the reality is that millions of people do it and only a few are ever stopped. I shamefully admit that, despite my sympathy for the artists and others who lose money from the file-sharing, I consciously take part in it and I have no plans to stop in the near future.

Some people can justify stealing music because they do not realize the consequences; that is not the case for me because I am fully aware of them. I live in New York City, a place with liberal political views and that has been the home to many famous musicians over the years. My school, Trinity, is a place full of people with enough money to buy their own CD's, and there is also a club that is trying to encourage people to trade CD's. However, despite many people's support of the philosophy of this group, in this digital age, it is simply infinitely easier to share music online. I even have a guitar teacher who writes songs for a living, and who depends on the money that people steal when they download songs from the internet. I am even so self-consciously guilty about this that I hide the program on my computer so she can't see it when she comes. I tell her that I get my songs from my friends because I know that even if she wouldn't tell me directly, she would be very disappointed in me. Each of these three groups that I am a part of, New Yorkers, Trinitarians, and guitar players, has a moral opposition to "pirating" music, yet somehow, as a member of educated society, I am able to shun this opposition in favor of a "free lunch."

So why is it that I, as well as millions of other people, go on stealing music from artists every day? For some, it may be

disrespect for copyright laws, or simply an issue of money that one uses to justify “pirating” music. Others may not know the consequences for the artists, or choose to disregard those consequences. However, there is still another, more hedonistic reason, which I too can identify with, why people still download music from the internet. In a way, it is a product of our take-what-you-can capitalistic society, but at the same time our justice system has said that it is illegal....

The singer “Weird Al” Yankovic also deals with the issue of morality in one of his songs, creatively titled, “Don’t Download This Song.” He uses his playful lyrics to convince people to buy CD’s, but at the same time, he doesn’t exactly side with the artists or the RIAA either. He talks about the “guilt” and “shame” that will stay with you after you download the music, but later he talks about the RIAA like it’s an evil empire prosecuting children and grandmas willy-nilly. Also, he mentions another part that has been at the back of my mind: Why do the artists need the money more than me because they’re already super-rich? His perspective as an artist is very interesting, because one would think that he would only be supportive of artists and the RIAA. Instead, he refuses to redeem the morality of either side, only adding to the murkiness of this issue.

Ok, so there you have it: while I have a moral opposition to “pirating” music, the proposition of free music makes this opposition purely philosophical. All I have left to do is hope that “Weird Al” was wrong when in “Don’t Download This Song,” he calmly describes the only possible progression for a “music pirate”: “You’ll start out stealing songs, then you’re robbing liquor stores, and selling crack, and running over school kids with your car.” Oh, and

also that I never get good enough at guitar to have my music “stolen” on LimeWire.⁹

I’ve never met the author of this essay. But I meet his kind all the time. They are my students. They populate the Stanford campus. And their attitude reveals a cost tied to the war we now wage.

No politician has explained how the benefits we seek in this war against piracy could ever justify that cost. No politician supporting this war has ever considered the alternatives to this war, and the costs. We have a practiced blindness when it comes to waging “war.” We don’t think about costs. We think instead about the morality of our cause. But as history has taught us again and again, morality in motive does not guarantee morality in result. Good intentions are a first step. Responsibility requires considering, and reconsidering, every step after that.

We as a people need to remember: government power is limited. It is not limited because the government has limited funds. Or limited bullets. It is limited because it operates against a background of basic morality. That morality insists upon proportionality. The parent who beats his child with a two-by-four because the child didn’t clean his room is not wrong to insist his child clean his room. He is wrong because however right the motive, means are always subject to measure. A parent, an army, a government: they all must be certain that their devotion to truth does not blind them to the consequences of their actions. There’s only so much a government can do. Where we find that limit, we must then find other means to the legitimate end.