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FIVE

CULTURES COMPARED

I've described two cultures and two kinds of creativity. One (RO) is fueled by professionals. The other (RW) is fueled by both professionals and amateurs. Both have been critical to the development of culture. Both will be spread by the maturing of digital technologies. But though I believe both will grow in the digital age, there are still important differences between them. In this brief interlude, consider a few of these differences. Then, before we turn to perhaps the most interesting development, consider some lessons that understanding these two cultures can teach.

Differences in Value—and “Values”

These two cultures embody different values.

RO culture speaks of professionalism. Its tokens of culture demand a certain respect. They offer themselves as authority. They teach, but not by inviting questions. Or if they invite questions, they direct the questions to someone other than the speaker. Or performer. Or creator.

This form of culture is critically important, both to the spread of culture and to the spread of knowledge. There are places where authority is required: No one should want Congress's laws on a wiki. Or instructions for administering medication. Or the flight plan of a commercial airliner.

So too is RO culture central to the growth of the arts. The ability to channel the commercial return from music or film has allowed many people to create who otherwise could not. This is the proper function of copyright law, and its only good justification. Where we can see that creativity would be hindered by the absence of this special privilege, the privilege makes sense.

And finally, RO culture makes possible an integrity to expression that, for some at least, is crucial. Artists want their expression framed just as they intend it. RO culture gives them that freedom. Doctors or pharmaceutical companies want to assure that instructions or medical explanations are not translated by just anyone. Control here is important, and not at all evil. Again, where it gives us something we otherwise wouldn't have—artistic expression or quality assurance—control can be good.¹

RW culture extends itself differently. It touches social life differently. It gives the audience something more. Or better, it asks something more of the audience. It is offered as a draft. It invites a response. In a culture in which it is common, its citizens develop a kind of knowledge that empowers as much as it informs or entertains.

I see this difference directly in my life as a teacher. When students come to law school, most come from an essentially RO education. For four years (or more), they've sat in large lecture halls, with a professor at the front essentially reading the same lectures she's given year after year after year. "Any questions?" usually elicits

points of order, not substance. “Do we have to read chapter 5?” “Will the subjunctive be on the exam?”

Maybe that’s the appropriate way to teach most undergraduate courses. But the best legal education is radically different. The law school classroom is an argument. The professor provides the source for that argument. The class is a forum within which that argument happens. Students don’t listen to lectures. They help make the lecture. They are asked questions; those questions frame a discussion. The structure demands that they create as they participate in the discussion.

People who know little about how the law works are puzzled—sometimes terrified—when they see that this is how we train professionals. The model of biochemistry is more attractive to them: “Here’s a list of things to memorize. Do it.” But the law is not a list of statutes. The law is a way of speaking and thinking and, most important, an ethic. Every lawyer must feel responsible for the law he or she helps make. For within the American system, at least, the law is made as it is practiced. How it is made depends upon the values its practitioners share.

This form of education teaches responsibility as well as the subject. It develops an ethic as well as knowledge about a particular field. And it expresses a sometimes profound respect for its students: from their very first week in law school, they are part of the conversation that law is. Their views are respected—at least so long as they place them within the frame of the law’s conversation.

All of us believe this at some level. We all believe that writing has its own ethic, and that it imposes that ethic on the writer and the thing written. Those of us who object to judges who delegate opinion writing to their law clerks do so not so much because we want judges who are bettered by becoming better writers, but

instead because we want opinions that bear the mark of the constraint that comes from the responsibility of writing. Creating is a responsibility. Only by practicing it can you learn it.

Those who study juries say they have much the same effect on the citizens who serve on them. Jurors are given evidence. They act on it. As they deliberate, they recognize they've been credited with (sometimes) extraordinary power. That (sometimes) wakes them up. They understand they have a responsibility that reaches far beyond their ordinary lives. That makes them think and act differently—even after they have rendered their verdict.

These examples bias me. Of course I think reading is important. Of course it is “fundamental.” But humans reach far beyond the fundamental. And as I watch my kids grow, the part I cherish the most is not their reading. It is their writing. Since my oldest (now five) was two, we have told him “monster man” stories. Watching his rapt attention at every twist in these totally on-the-fly made-up stories was a kick. But the moment he first objected to a particular shift in the plot, and offered his own, was one of the coolest moments of my life. What we want to see in our kids is their will. What we want to inspire is a will that constructs well.

I want to see this capacity expressed not just in words. I want to see it expressed in every form of cultural meaning. I want to watch as he changes the ending to a song he almost loves. Or adds a character to a movie that he deeply identifies with. Or paints a picture to express an idea that before was only latent. I want this RW capacity in him, generalized. I want him to be the sort of person who can create by remaking.

This then is the first difference between RO and RW cultures. One emphasizes learning. The other emphasizes learning by speaking. One preserves its integrity. The other teaches integrity. One

emphasizes a hierarchy. The other hides the hierarchy. No one would argue we need less of the first, RO culture. But anyone who has really seen it believes we need much more of the second.

Differences in Value (As in \$)

The story so far emphasizes values with a capital V. Lefties who promote social, educational, and democratic ideals would very much like these values. They speak to the sort of stuff Lefties are supposed to like.

But there are more reasons to support RW culture than the fact that a bunch of us tree huggers would like it.

For as well as promoting certain values that at least some of us find important, the RW culture also promotes economic value.

To see just why, think for second about the devices necessary to make RO culture work. You see them everywhere. They are smaller and smaller, and cheaper and cheaper. As bandwidth grows, they more efficiently grab content, which they then enable you to consume. Their brilliance has grabbed me. I don't watch "television" anymore. But I do watch my iPod connected to a screen more and more. I spend way too much money on this. Apple hopes others will spend way too much, too.

But the economic value in this consumption is tiny compared with the economic potential of consumer-generated content. Think of all the devices you need to make that home movie of your kid as Superman—the camera, the microphone, the hard disk to store 500 gigabytes of takes, the fast computer to make the rendering bearable. And then think about the bandwidth you'll need to share this creativity with your family and friends.

This is a point that has been made for some time, perhaps never better than in Andrew Odlyzko's essay "Content Is Not King":² despite the rhetoric of the content industry, the most valuable contribution to our economy comes from connectivity, not content. Content is the ginger in gingerbread—important, no doubt, but nothing like the most valuable component in the mix.

People on the Right need to recognize this. As I've watched the debate about copyright develop, I've been astonished by how quickly those on the Right have been captured by the content industry. Maybe I'm astonished because, as Stewart Baker chided me in a review of *Free Culture*, liberals like me spend too much time talking to liberals like me rather than to conservatives. As Baker wrote in his review,

Viewed up close, copyright bears little resemblance to the kinds of property that conservatives value. Instead, it looks like a constantly expanding government program run for the benefit of a noisy, well-organized interest group—like Superfund, say, or dairy subsidies, except that the benefits go not to endangered homeowners or hard-working farmers but to the likes of Barbra Streisand and Eminem.... Copyright is a trial lawyer's dream—a regulatory program enforced by private lawsuits where the plaintiffs have all the advantages, from injury-free damages awards to liability doctrines that extract damages from anyone who was in the neighborhood when an infringement occurred.³

Baker's is a great point. Let me add to it: As conservative economists have taught us again and again, value in an economy is least likely to come from state-protected monopolies. It is most likely to be generated by competition. There is a huge and vibrant economy

of competition that drives technology in our economy. The monopoly rights we call copyright are constraints on that competition. I believe those constraints are necessary. But as with every necessary evil, they should be as limited as possible. We should provide protection from competition only where there is a very good reason to protect.

My point of course is not that we can or should simply sacrifice RO culture to enable RW. Instead, the opposite: in protecting RO culture, we shouldn't kill off the potential for RW.

Differences in Value (As in "Is It Any Good?")

In June 2007, the backlash against RW culture was born. In a short and cleverly written book titled *The Cult of the Amateur*, Andrew Keen, a writer and failed Internet entrepreneur, launched a full-scale attack on precisely the culture that I am praising. The core of his attack was that "amateur culture" is killing "our culture." The growth of this kind of creativity will eventually destroy much that we think of as "good" in society. "Not a day goes by without some new revelation that calls into question the reliability, accuracy, and truth of the information we get from the Internet," Keen writes.⁴ And in response to all the free stuff the Internet offers, Keen is quite worried: "What is free," he warns, "is actually costing us a fortune."⁵ Wikipedia, for example, "is almost single-handedly killing the traditional information business."⁶ And the "democratization" that I praise "is," he argues, "undermining truth, souring civic discourse, and belittling expertise, experience and talent."⁷

There is more than a bit of self-parody in Keen's book. For though the book attacks the Internet for its sloppiness and error, it itself is riddled with sloppy errors.⁸ (Here's a favorite: "Every defunct record label, or laid-off newspaper reporter, or bankrupt independent bookstore is a consequence of 'free' user-generated Internet content—from craigslist's free advertising, to YouTube's free music videos, to Wikipedia's free information."⁹ "*Every*"? Wow!)

Yet even if we ignore Keen, his point can't be ignored. There are many who have expressed a similar fear about the dangers that they perceive in this latest form of creativity.

My first exposure to this skepticism was at a conference at New York University about "fair use." The Comedies of Fair U\$e conference was filled with artists and creators demonstrating precisely the creativity I've been praising. But in the middle of this conference, Charles Sims, a lawyer with the firm of Proskauer Rose, pleaded with the young creators to turn away from their "derivative" form of creativity. They should focus, Sims argued, on something really challenging—"original creativity." Sims said:

I can't say strongly enough that I think what Larry is really fundamentally focused on ... [—] this parasitic reuse [—] is such a terrible diversion of young people's talent. ... I think that if you have young film people you should be encouraging them to make their films and not to simply spend all of their time diddling around with footage that other people have made at great expense, to create stuff that's not very interesting. There's a fundamental failure of imagination. ...

I'm saying, that as members of the academy, to encourage young people to think that instead of creating out of their own souls and

their own talents to simply reuse what's available off the streets to them, is underselling the talents that young people have.¹⁰

There are a number of layers to this form of criticism. We should be careful to tease them apart.

Most obvious is the criticism that the work on average is more than "creative" work. There's no comparing ten minutes produced by J. J. Abrams and ten minutes from any of the stuff that passes for video production on YouTube. Remix is just "crap." This criticism is certainly true. The vast majority of remix, like the vast majority of home movies, or consumer photographs, or singing in the shower, or blogs, is just crap. Most of these products are silly or derivative, a waste of even the creator's time, let alone the consumer's.

But I never quite get what those who raise this criticism think follows from the point. I was once a student at the Goethe Institute in Berlin. After a week of our monthlong intensive German course, I asked the teacher why we weren't encouraged to speak more. "Your German is really quite awful just now," she told me. "You would all make terrible mistakes if you spoke, so I think it best if you just listen." No doubt her assessment was right. But, amazingly for a language teacher at the Goethe Institute, she was simply missing the point.

So too do critics who argue that the vast majority of remix is bad. Think again about blogs. The value of blogs is not that I'm likely to find a comment that surpasses the very best of the *New York Times*. I'm not. But that's not the point. Blogs are valuable because they give millions the opportunity to express their ideas in writing. And with a practice of writing comes a certain important integrity. A culture filled with bloggers thinks differently about politics or

public affairs, if only because more have been forced through the discipline of showing in writing why A leads to B.

If this point weren't true, why would we teach our kids how to write? Given that the vast majority will never write anything more than an e-mail or a shopping list, why is it important to torture them with creative writing essays? For again, like the Internet, the vast majority of what students write is just crap (trust me on this one). What reason is there for wasting their time (and worse, mine) to produce such garbage?

(That's a rhetorical question. I suspect you see the point.)

A second layer to this criticism is more relevant but even less true. Some criticize what I'm calling "remix" by arguing there's no there there. This is Sims's real complaint. Even granted that most is crap, even the best, in his view, is a waste, "a fundamental failure of imagination."

But anyone who thinks remixes or mash-ups are neither original nor creative has very little idea about how they are made or what makes them great. It takes extraordinary knowledge about a culture to remix it well. The artist or student training to do it well learns far more about his past than one committed to this (in my view, hopelessly naive) view about "original creativity." And perhaps more important, the audience is constantly looking for more as the audience reads what the remixer has written. Knowing that the song is a mix that could draw upon all that went before, each second is an invitation to understand the links that were drawn—their meaning, the reason they were included. The form makes demands on the audience; they return the demands in kind.

This point links directly with an argument advanced by Steven Johnson in his fantastic book, *Everything Bad Is Good for You*.¹¹

Aiming to rebut the view that television has become “brain dead,” Johnson argues that TV has in fact become more rich and complex over time, not less. The reason relates in part to technology. As people collect not only television sets but DVD players, producers of television programming have a strong incentive to give their audience an interest in after-broadcast sales. A show maximizes its revenue when there’s a postbroadcast demand for DVDs or for reruns.

So how do you create that demand? One way is through complexity. As Johnson demonstrates, the most successful television shows have multiplied the number of plot lines running through them. And though the shows are always understandable at one viewing, few viewers would understand everything going on in every show. The fan thus has a reason to watch it again—which means, buy the DVD or tune in to reruns. Complexity thus drives follow-on consumption. Henry Jenkins makes a related point about movies:

The old Hollywood system depended on redundancy to ensure that viewers could follow the plot at all times, even if they were distracted or went out to the lobby for a popcorn refill during a crucial scene. The new Hollywood demands that we keep our eyes on the road at all times, and that we do research before we arrive at the theater.¹²

Obviously, this idea can be taken too far. The story can’t be totally inaccessible. There must be some payoff for watching the first time. But the key is to make the first time, and the next ten times, worth it. To make once necessary but not enough.

This strategy is not new with television. Think about the great nineteenth-century novels. When an author such as Dickens wrote

his novels in serial form (where each chapter originally appears as an installment in a magazine, published before the full novel was completed),¹³ his goal was to attract people to each installment, and then to draw them back to the finished book. Dickens (and many others) did this by writing very intricate stories that repaid many rereadings.

Remix is doing the same thing with other forms of culture. Like the work of a great classical composer (Mahler and Beethoven fit here), the best remix is compelling both the first time and the hundredth time. Indeed, it is only by the hundredth time that one begins to understand it enough for it to make sense. There needs to be a strong enough raw pull to get the listener to that hundredth hearing (something Arnold Schoenberg never quite got). But once you're hooked, you don't fight to get free. You listen again and again, each time hoping to understand more.

Even with nonclassical music, this isn't completely new. Why does one listen to Bob Dylan a thousand times, or to the ballads of Jeff Tweedy again and again? It's not just the music that compels the repeated listening. In this form, the melody is best if it's simple and compelling. Instead, it is the poetry that the melody illustrates. You listen again and again because each time you understand the poetry differently—more, and more fit to the context.

Thus the argument in favor of remix—the essential art of the RW culture—is not simply the negative: what harm are they doing? The argument for me is strongly positive: I want my kids to listen to SilviaO's remix of fourstones' latest work—a thousand times I want them to listen. Because that listening is active, and engaged, far more than the brain-dead melodies or lyrics of a Britney Spears. Her work draws on nothing, save the forbidden and erotic. In this, it may be, in Sims's view, perfectly original. Yet it

is also totally derivative, and deeply disrespectful of the tradition from which she comes. You pay respect to tradition by incorporating it. But you make the tradition compelling by doing so in a way that makes everyone want to understand more. As the novelist Jonathan Lethem puts it, "What we want from every artist is that they surprise us and show us something unprecedented. But . . . this act is itself innately supported by response, appropriate, imitation."¹⁴

And then there's one final layer of this criticism that in the end annoys me the most. Maybe some of this work is okay, this criticism says, and some of it is even quite good. But none of it is as good as the greats of [you pick the time]. Our culture, the story goes, is collapsing. There are no standards anymore. There is no quality. Taste and art are wasting away.

Every generation has had the experience of an older generation insisting that the new is degraded, that only the old is great. Didn't that experience teach us something? As Ithiel de Sola Pool said almost two decades ago, "Each generation sees as its culture those values and practices with which it grew up. Its hallowed traditions are those it learned in childhood."¹⁵ Of course the new is inferior to the past. How else could it be progress?

But even accepting this critique, what should be done about it? If our culture is collapsing because millions of people are choosing to watch or create stuff that the critic doesn't like, should the government intervene on behalf of the critic? I'd be the first to admit that the state has a role in regulating society, and I'm even willing to admit that sometimes the state has a role in regulating speech. Copyright law, after all, is a regulation of speech, and justified if it produces incentives to create speech that otherwise wouldn't be created.¹⁶

But none of these justifications for state regulation could ever support the idea that we intervene to suppress a form of “culture” that some elite believes is not good enough. Subsidies are one thing. Prohibition is something radically different.

Maybe, however, the most effective response to this criticism is one that Victor Stone, architect of ccMixter, offered me: “You know...this discussion will be over in ten or twenty years. As the boomers die out, and they get over themselves by dying, the generation that follows...just doesn’t care about this discussion. They just assume that remixing is part of music, and it’s part of the process, and that’s it.”

And they’ll defend it, at least until a new form of creativity comes along that they try to stop. We all become our parents.

Differences in Law (As in “Is It Allowed?”)

American copyright law regulates (at least potentially)¹⁷ any creative work produced after 1923, for a maximum term of life of the author plus seventy years, or ninety-five years for corporate work or work created before 1978. This regulation relates differently to RO and RW cultures. Put simply, current copyright law supports the practices of the RO culture and opposes the practices of the RW culture. Or again, as the law is architected just now, it clearly favors one kind of culture over another.

Consider first copyright’s relationship to RO culture. As I’ve described, the essence of RO is that the user, or consumer, is given the permission to consume the culture he purchases. He has no

legal permission beyond that permission to consume. During the analog history of RO culture, he had no easy technical capacity beyond that capacity to consume.

Digital technologies changed the technical capacity. In its first version, digital technologies gave users almost unlimited technical capacity to mix and remix RO culture. But “can” does not imply “may.” While the tools enabled users to do with RO culture as they wished, the law did not grant users of RO culture the permission to do as they wished. Instead, as applied to a world where each use of culture is a copy, RO culture required the permission of copyright owners before RO culture could be remade.

This gap between what the law permitted and what the technology allowed could have been closed either by changing the law or by changing the technology. The past five years have seen changes in both—but both aiming to strengthen the control over content, not weaken it. As RO culture has evolved in the digital world, technologies have given the copyright owner an ever-increasing opportunity to control precisely how copyrighted content is consumed. At its most extreme, digital-rights management technologies could control how often you listen to a song you’ve downloaded, where that song gets stored, whether you can share that song with someone else, and how long you have the right to listen. The technology could enable almost any form of control the copyright owner could imagine.

Copyright law supports this control in the digital age because of a deceptively simple fact about the architecture of copyright law, and the architecture of digital technology. The law regulates “reproductions” or “copies.” But every time you use a creative work in a digital context, the technology is making a copy. When you “read” an electronic book, the machine is copying the text of the

book from your hard drive, or from a hard drive on a network, to the memory in your computer. That “copy” triggers copyright law. When you play a CD on your computer, the recording gets copied into memory on its way to your headphones or speakers. No matter what you do, your actions trigger the law of copyright. Every action must then be justified as either licensed or “fair use.”

Because every use triggers the law of copyright, I say that copyright law supports the technologies used to implement an RO culture. For if DRM says you can read an e-book only twice, all that the technology is doing is implementing a right that copyright law gives the copyright owner. Copyright law is triggered every time you read an e-book. Unless protected by “fair use,” each time you read the e-book, you need permission from the copyright owner.

It’s critical to recognize, however, that this control is *radically greater* than the control the law of copyright gave a copyright owner in the analog world. And this change in the scope of control came not from Congress deciding that the copyright owner needed more control. The change came instead because of a change in the platform through which we gain access to our culture. Technological changes dramatically increased, and the scope of control that the law gave copyright owners over the use of creative work increased dramatically.

In the physical world, copyright law gives the copyright owner of a book no legal control over how many times you read that book. That is because when you read a book in real space, that “reading” does not produce a copy. And because copyright law is not triggered, no one needs any permission to read the book, lend the book, sell the book, or use the book to impress his or her friends. In the physical world, the law of copyright is triggered when you take the book to a copy shop and make fifty copies for your friends—no doubt a

possible use, but not an ordinary use. Ordinary uses of the book are free of the regulation of the law. Ordinary uses are *unregulated*.

But in the digital world, the same acts are differently regulated. To share a book requires permission. To read a book requires permission. To copy a paragraph to insert into a term paper requires permission. All the ordinary uses of a creative work are now regulated because all the ordinary uses trigger copyright law—because, again, any use *is* a copy.¹⁸

RO culture in the digital age is thus open to control in a way that was never possible in the analog age. The law regulates more. Technology can regulate more effectively. Technology can control every use. The law ratifies the control that technology would impose over every use. To the extent the copyright owner wants, and subject to “fair use,” the use of his copyrighted work in digital space can be perfectly controlled. In this sense, the law supports RO culture more than it ever has.

The law’s relationship to RW culture is different. For again, the very act of rewriting in a digital context produces a copy; that copy triggers the law of copyright. Once triggered, the law requires either a license or a valid claim of “fair use.” Licenses are scarce; defending a claim of “fair use” is expensive. By default, RW use violates copyright law. RW culture is thus presumptively illegal.

For most of American history it was extraordinarily rare for ordinary citizens to trigger copyright law. For most of American history, the practice of RW culture would have flown under the radar of this form of commercial regulation. The reason again was a combination of the architecture of copyright law and the technologies of culture. From 1790 until 1909, copyright law didn’t regulate “copies.” Its core regulation was of “printing, reprinting, publishing and vending.” People engaged in RW culture were not “printing,

reprinting, publishing and vending.” This core was expanded in 1870, when the law added the regulation of what we call derivative works to its scope. But even then, the regulation was not general. It was specific to particular activities, and these activities were again primarily commercial. “By 1873,” writes Professor Tony Reese, “the subject matter of copyright protection included ‘any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or . . . painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts.’”¹⁹ Again, not the sort of things that ordinary RW creators do.

In 1909, the law changed. For the first time, the word “copy” was used generally to refer to the rights of any copyright owner, including the copyright owner of books. Until that time, the exclusive right to “copy” was limited to works such as statues, but not generally to works such as books. (Thus, to “copy” a statue required the permission of the copyright owner, but to “copy” a book did not.) But the revisers of the 1909 act forgot this distinction and granted copyright owners “the semblance of a right to an activity that was to have increasing importance in the new century.”²⁰ Over time, the word began to reach every technology that “cop[ied].” Thus, as the range of technologies that enabled people to “copy” increased, so too did the effective scope of regulation increase.²¹

This automatic expansion in regulation was not really remarked upon by Congress. Congress didn’t intend the expansion. Neither did it stop it. Those who benefited from this expansion were happy for the benefit. Those who might potentially be harmed by it failed to notice that the contours of their freedom—their RW freedom—were narrowing.

There were, of course, important exceptions. In the late 1960s,

Xerox gave us a technology to copy texts. In the mid-1970s, technologists gave consumers a device designed to record television shows. That device thus “copied” copyrighted content without permission of the content owner. In 1976, Disney and Universal filed a lawsuit against the maker of that device, Sony. Eight years later, the Supreme Court excused the copying, finding that consumers’ actions were protected by the doctrine of “fair use.”²²

Similarly, in the 1980s there was an explosion of devices for copying cassette tapes. The content owners complained that people were using these devices to copy copyrighted content without the permission of the copyright owner. Congress ordered an extensive study of the practice. That study concluded that 40 percent of people ten and over had tape-recorded music in the past year; that the tapers had a greater interest in music than nontapers did; that most were “place-shifting”—“shifting” the “place” the copyrighted material would be played; that taping displaced some sales and inspired others; and that both tapers and nontapers believed “that it was acceptable to copy a prerecorded item for one’s own use or to give to a friend.”²³

Each of these conflicts was not really a conflict with the core of RW culture. Mixtapes are perhaps an exception—many of my friends growing up thought the creativity in the selection was among the most difficult, and important, for anyone who knows anything about popular culture. But these weren’t really the target of the copyright owners. Their concern instead was the use of these technologies to displace a market they thought they owned. It was technology competing with the protection of copyright. Technology, in other words, competing with RO culture. Despite this competition, the technology was largely left alone.

When RW culture moves to the Net, however, things change

dramatically. First, digital technologies, as I've already described, explode the demand for RW culture. More and more people use technology to say things, and not simply with words. Music is remixed; video mash-ups proliferate; blogs begin to build a culture around the idea of talking back.

Second, digital technologies also change how RW culture and copyright interact. Because every use of creative work technically produces a copy, every use of creative work technically triggers copyright law. And while many of these uses might be fair use, or uses licensed, expressly or implicitly, by the copyright owner, the critical point to recognize is that this is still a vast change to the history of American copyright law. For the first time, the law regulates ordinary citizens generally. For the first time, it reaches beyond the professional to control the amateur—to subject the amateur to a control by the law that the law historically reserved to professionals.

This is the most important point to recognize about the relationship between the law and RW culture. For the first time, the law reaches and regulates this culture. Not because Congress deliberated and decided that this form of creativity needed regulation, but simply because the architecture of copyright law interacted with the architecture of digital technology to produce a massive expansion in the reach of the law.

This change is also reflected further in professional culture itself. Think, for instance, about how the law regulates music. Perhaps the most distinctive American form of music is jazz. Jazz musicians create by building upon the creativity of others before. They listen to the work of others. They remake it. "Improvisation is a key element of the form." Indeed, the genre is known for its "collective improvisation."²⁴ Great jazz musicians are known for their ability

to improvise. Louis Armstrong “essentially re-composed pop-tunes he played.”²⁵

A modern equivalent to jazz is called by some “laptop music,” by others simply “sampling.” Musicians create this music by taking the sound recordings of other musicians and remixing them. Girl Talk is an example of this. Dean Gray, Shitmat, 9th Wonder, and Doormouse are others.

The law was fairly relaxed about the creativity of jazz musicians.²⁶ But the law is not at all relaxed about the creativity of modern laptop music. In a series of cases beginning in the 1980s, samplers have faced an increasingly hostile judiciary which insists that any use of a recording requires the permission of the copyright owner. The point of this series came in 2004, when the Sixth Circuit Court of Appeals held that every sample used in a remixed recording triggered copyright law. There was no “de minimis” exception to copyright* that would permit samplers to avoid licensing the sample they used.²⁷ Beginning with hip-hop, which introduced sampling to popular culture, and continuing through laptop music today, no creative act would be distributed free of a legal cloud.

You might think that artists would be eager to end this insanity. In fact, among their lawyers at least, this craziness is a kind of lottery system. An extraordinary effort is devoted by lawyers to identifying samples used without permission in successful records. The threat of copyright liability is huge, so the payoff to make litigants go away is also huge. The system loves the game; the game thus never ends.

But this is much more than a game. There’s a profound injustice

* Meaning simply that the amount of “copying” was so small as to not be within the scope of copyright law’s concern.

in the difference of the law here, especially as it affects an emerging class of artists. Why should it be that just when technology is most encouraging of creativity, the law should be most restrictive? Why should it be effectively impossible for an artist from Harlem practicing the form of art of the age to commercialize his creativity because the costs of negotiating and clearing the rights here are so incredibly high?

The answer is: for no good reason, save inertia and the forces that like the world frozen as it is.

Can we imagine a movement that will get us from this world to a better world? Are we stuck in these dark ages? We'll think a bit more about those questions at the end of this book.

The point for now is simply to recognize that the law strongly favors RO culture while strongly disfavoring RW. Given all the good RW might do, we as a society should at least decide whether this bias against RW creativity makes sense and whether it should continue.

Lessons About Cultures

I've described two cultures of creativity. I've argued that both are important and valuable. Differences exist. In the last chapter, I described some of those differences. What can we learn from these two cultures? What lessons can we draw from how they interact?

RO CULTURE IS IMPORTANT AND VALUABLE

I've had lots of nice things to say about RW culture. That doesn't mean there isn't an equal amount of good to say about RO culture.

In building the Library of Congress, Jefferson hoped, as the library boasts in its slogan, “to sustain and preserve a universal collection of knowledge and creativity for future generations.” That access is important because it teaches us about our past, and about the diversity of culture that lives around us. The first step of learning is listening. RO culture is essential to that first step.

RO CULTURE WILL FLOURISH IN THE DIGITAL AGE

For most of our history, universal access was just another Jeffersonian dream. It is now a possibility. As the costs of access drop, there will be a market incentive to build the biggest “library” in human history. And like the very best libraries in our past, the job of this library will be to assure access. Not necessarily for free, for in many cases, “free” would produce insufficient incentives to build that access. Instead, RO culture will flourish; more culture will be accessible more cheaply than at any point in human history.

RW CULTURE IS ALSO IMPORTANT AND VALUABLE

Yet the history of the Enlightenment is not just the history of teaching kids to read. It is also the history of teaching kids to write. It is the history of literacy—the capacity to understand, which comes not just from passively listening, but also from writing. From the very beginning of human culture, we have taught our kids RW creativity. We have taught them, that is, how to build upon the culture around us by making reference to that culture or criticizing it. As

Negativland's Hosler put it to me: "*Of course* human beings build on what came before them in anything they create. That's just obvious." We have encouraged them to build upon it. We have forced them to acquire a "literacy" about the culture around them. We test our kids on the basis of that literacy; we reward the "literate" of every generation. We reward "writing."

For most of human history, text was the only democratic literacy. For most of human history, words were the only form of expression that everyone had access to. The twentieth century gave us an extraordinary range of new types of "writing." But until the last years of that century, none of that "writing" was ever democratized in the way that text had been. Only a few could go to film school. Only a relatively few had the resources to learn how to record or edit. The single most important effect of the "digital revolution" was that it exploded these historical barriers to teaching. Every important form of writing has now been democratized. Practically anyone can learn to write in a wide range of forms. The challenge now is to enable this learning, not only by building the technologies it requires, but by assuring the freedom that it requires.

So again, as I encouraged in chapter 2, think a bit about that freedom. Remember when you learned to write. Remember the act of quoting. Or incorporating. Or referring. Or criticizing. What freedoms did you take for granted when you did all of this? Did you ask permission to quote? Did you notify the target of your criticism that you were criticizing him? Did you think twice about your right to dis a movie you saw in a letter to a friend? Were you ever troubled by quoting Bob Dylan in an essay about war?

The answer to all these questions is of course "no." We grew up taking for granted the freedoms we needed to practice our form

of writing. We created, and we shared our creativity with whoever would read it (our parents and teachers, if we were lucky). We never questioned the right to create in this way, freely.

Our kids want the same freedom for their forms of writing. For not just words, but for images, film, and music. The technologies we give our kids give them a capacity to create that we never had. We've given them a world beyond words. This world is part of what I've called RW culture. It is continuous with what has always been part of RW culture—the literacy of text. But it is more. It is the ability for amateurs to create in contexts that before only professionals ever knew.

WHETHER RW CULTURE FLOURISHES DEPENDS AT LEAST IN PART UPON THE LAW

As it exists now, copyright law inhibits these new forms of literacy. I don't mean that it stops kids from remixing. No law could ever do that, any more than a law could stop quoting. Instead, I mean that the law as it stands now will stanch the development of the institutions of literacy that are required if this literacy is to spread. Schools will shy away, since this remix is presumptively illegal. Businesses will be shy, since rights holders are still eager to use the law to threaten new uses. Uncertainty about the freedom to engage in this form of creativity will only stifle the willingness of institutions to help this form of literacy develop. RW culture can't help but expand the sense of "writing." But legal culture will force the institutions that teach writing to stay far away from this new expressive form.

THE LAW'S CURRENT ATTITUDE IS BOTH
DESTRUCTIVE AND SELF-DEFEATING—TO
VALUES FAR MORE IMPORTANT THAN THE
PROFITS OF THE CULTURE INDUSTRIES

We, as a society, can't kill this new form of creativity. We can only criminalize it. We can't stop our kids from using the technologies we give them to remix the culture around them. We can only drive that remix underground. We can't make our kids passive in the way we were toward the culture around us. We can only make them "pirates." So does this criminalization make sense?

Here history has an important lesson. About a decade ago, scholars and activists began calling for a legislative response to what we would eventually term "peer-to-peer file sharing." We did not call for further penalties for illegal file sharing. Instead, we called for decriminalization. A wide range of proposals asked Congress to create a compulsory license for peer-to-peer (p2p) file sharing. Under this license, the act of sharing music, for example, would not violate any law of copyright. It would instead simply affect how compensation for file sharing would be shared.

The most ambitious of these proposals was made by Professor William Fisher at Harvard. Under Fisher's plan, Congress would permit, for example, music to be shared freely.²⁸ It would establish technologies to sample who was getting what. Then, based upon that evidence of popularity, it would compensate artists for their creativity through a tax that would be imposed upon digital technologies in the most efficient way possible. Thus, Madonna would make more than Lyle Lovett; and Lyle Lovett would make more than I.

There are plenty of ways to criticize these proposals. While I've made my own, I've also criticized many others. But as we look back over the last ten years and imagine how things would have been different if, in 1998, Congress had enacted any of these proposals, several facts become clear.

First, the war on file sharing has been an utter failure. As one article notes,

More than 5 billion songs were swapped on peer-to-peer sites [in 2006] while CD sales, the industry's core revenue-producing product, continue to decline, dropping about 20 percent this year alone. And according to a recent report from Jupiter Research, things are only going to get worse. "Young consumers are increasingly shunning music buying in favor of file-sharing, which is four times more popular than digital-music buying among ages 15 to 24," the report notes.²⁹

A picture captures the point much better than words. Using data provided (generously for free) by BigChampagne Online Media Measurement, we can graph the average number of p2p users from August 2002 to October 2006 (see pages 112–13). The gray bar indicates when the Supreme Court decided *MGM v. Grokster*, holding p2p file sharing to be illegal.³⁰ As is plain, whatever the law is doing, it's not having much effect upon what p2p users are doing.

Second, had a compulsory license been put in place, artists would have received more money over the last ten years than they have. Legal sharing may have stanching some growth in legal sales. But there was a huge amount of content shared "illegally" that, under this alternative, would at least have triggered compensation for artists.

Third, had businesses been free to rely upon these licenses, there would have been an explosion in innovation around these technologies. It would not just have been a few who could strike deals with the ever terrified recording industry. Anyone who had an idea could have deployed it, consistent with the terms of the compulsory license. Thus, innovation in content distribution would have been greater too.

But fourth and most important, had we had a system of compulsory licenses a decade ago, we wouldn't have a generation of kids who grew up violating the law. As a recent survey by the market research firm NPD Group indicated, "more than two-thirds of all the music [college students] acquired was obtained illegally."³¹ Had the law been changed, when they shared content, their behavior would have been legal. Their behavior would therefore not have been condemned. They would not have understood themselves to be "pirates." Instead, they would have been allowed to lead the sort of childhood that I did—where what "normal kids did" was not a crime.

Again, I don't mean this as an argument in favor of decriminalizing all currently illegal behavior. Whether or not kids rob banks, it should be illegal to rob banks. The wrong of rape is increased, not mitigated, by its frequency. Instead, I'm asking you to weigh one bad against the other: What our policy makers have done over the last decade has not actually stopped file sharing; it has not actually helped a lot of artists; it has not spurred a wide range of innovation. All it has done with certainty is raise a generation of "pirates."

Weigh that bad against the alternative: if there had been a compulsory license, artists would have had more money; business (outside of the recording industry) would have had a greater opportunity to innovate; and our kids would not have been "pirates."

Average Simultaneous P2P Users—USA

No doubt someone would have lost something in this alternative scenario. Lawyers for sure. Maybe record companies too. Lawyers would have missed out on the extraordinary boon to our industry caused by the litigation surrounding illegal file sharing. Record companies might have lost out because they would have given up an exclusive right in favor of compulsory compensation. But even this loss is uncertain. It is more than plausible that a compulsory system would have secured for the recording industry more money than in fact it got.

I raise this parallel not to endorse peer-to-peer file sharing. I stand by my position in *Free Culture* that “piracy” is wrong—a position I repeated nine times in that book.³² Instead, I raise the parallel to ask whether we want to make this mistake again. Should the next ten years be another decade-long war against our kids? Should we spend more of our resources hiring lawyers and technologists to build better weapons to wage war against those practicing RW culture? Have we learned nothing from the total failure of policy that has defined copyright policy over the last decade?

I believe this for the same reason the content industry is so keen to enforce copyright. As the RIAA's Mitch Bainwol and Cary Sherman explained:

It's not just the loss of current sales that concerns us, but the habits formed in college that will stay with these students for a lifetime. This is a teachable moment—an opportunity to educate these particular students about the importance of music in their lives and the importance of respecting and valuing music as intellectual property.³³

Exactly right. So what rules should we work so hard to enforce?

The argument in favor of reforming our legal attitude toward remixing is a thousand times stronger than in the context of p2p file sharing: this is a matter of literacy. We should encourage the spread of literacy here, at least so long as it doesn't stifle other forms of creativity. There is no plausible argument that allowing kids to remix music is going to hurt anyone. Until someone can show that it will, the law should simply get out of the way. We need to decriminalize creativity before we further criminalize a generation of our kids.