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NINE

REFORMING LAW

Copyright law regulates culture in America. Copyright law must be changed. *Changed*, not abolished. I reject the calls of many (of my friends) to effectively end copyright. Neither RW nor RO culture can truly flourish without copyright. But the form and reach of copyright law today are radically out of date. It is time Congress launched a serious investigation into how this massive, and massively inefficient, system of regulation might be brought into the twenty-first century.

Providing that comprehensive plan is not my purpose in this book. Instead, in this chapter, I sketch five shifts in the law that would radically improve its relation to RW creativity and, in turn, significantly improve the market for hybrids. None of these changes would threaten one dime of the existing market for creative work so vigorously defended today by the content industry. Together, they would go a long way toward making the system make more sense of the creative potential of digital technologies.

1. Deregulating Amateur Creativity

The first change is the most obvious: we need to restore a copyright law that leaves “amateur creativity” free from regulation. Or put differently, we need to revive the kind of outrage that Sousa felt at the very idea that the law would regulate the equivalent of the “young people together singing the songs of the day or the old songs.” This was our history. This history encouraged a wide range of RW creativity. And even if the twentieth century lulled us into a couch-potato stupor, there’s no justification for permitting that stupor to sanction the radical change that the law, in the context of digital technologies, has now effected—the regulation, again, of amateur culture.

That regulation could be avoided most simply by exempting “noncommercial” uses from the scope of the rights granted by copyright. No doubt that line is hard to draw. But the law has already drawn it in many different copyright contexts. Eight sections of the Copyright Act explicitly distinguish their applications based upon the difference between commercial and noncommercial use.¹ A jurisprudence could develop to help guide the distinction here as well.

This exemption should at least be made for noncommercial, or amateur, remix. Consider, for example, the following table:

	“COPIES”	REMIX
PROFESSIONAL	©	©/free
AMATEUR	©/free	free

The rows distinguish between professional creativity and amateur. The YouTube video of Stephanie Lenz’s eighteen-month-old is ama-

teur creativity; DJ Danger Mouse's remix of the Beatles' *White* and Jay-Z's *Black* albums is professional creativity. The columns distinguish between remix and non-remix, or what I call "copies." "Remix" here means transformative work. "Copies" mean efforts not to change the original work but simply to make it more accessible.

With this matrix then, we can now see at least one clear example of where culture should be deregulated—amateur remix. There is no good reason for copyright law to regulate this creativity. There is plenty of reason—both costs and creative—for it to leave that bit free. At a minimum, Congress should exempt this class of creative work from the requirements of clearing rights to create.

By contrast, copies of professional work should continue to be regulated in the traditional manner. The right to distribute these could, in this model, remain within the exclusive control of the copyright holder.

Professional remix, and amateur distribution, are more complicated cases. There should be a broad swath of freedom for professionals to remix existing copyrighted work; there's little reason to worry much about amateur or noncommercial distribution of creative work—at least if the compensation plan described below is adopted. These categories could thus also be deregulated partially. But neither should be deregulated to the extent that amateur remix should.

What about "fair use"? By "deregulating," I don't mean the doctrine of fair use. I mean free use. Fair use is a critically important safety valve within copyright law. But it remains, perhaps necessarily, an extraordinarily complicated balancing act, and a totally inappropriate burden for most amateur creators. My recommendation is that Congress exempt an area of creative work from the requirements of fair use or the restriction of copyright. It is not that courts

find ways to balance the system to free use. By contrast, fair use would remain a critical part of any professional creativity.

But what happens when a commercial entity wants to use this amateur creativity? What happens when YouTube begins to serve it? Or NBC wants to broadcast it?

In these cases, the noncommercial line has been crossed, and the artists plainly ought to be paid—at least where payment is feasible. If a parent has remixed photos of his kid with a song by Gilberto Gil (as I have, many times), then when YouTube makes the amateur remix publicly available, some compensation to Gil is appropriate; just as, for example, when a community playhouse lets neighbors put on a performance consisting of a series of songs sung by neighbors, the public performance of those songs triggers a copyright obligation (usually covered by a blanket license issued to the community playhouse). There are plenty of models within copyright law for assuring that payment. Collecting societies have long provided private solutions to these complex rights problems. Compulsory licensing regimes—where the law either specifies a price, or specifies a process for determining a price that will govern a particular use of a copyrighted work—have done the same.² The aim in both cases is to find a simple and cheap way to secure payment for commercial use. The aim as well, I've argued, should be to avoid blocking noncommercial use in the process of protecting commercial use.

This is not the balance the law currently strikes. Perversely, the law today says the amateur's work is illegal, but it grants YouTube an immunity for indirectly profiting from work an artist has remixed. That is just backwards, and legal reform to reverse it is appropriate.

Most of those who would resist this kind of proposal wouldn't resist it for the money. Hollywood doesn't expect to get rich on

your kid's remix. Nor does it have a business model for licensing cheap reuse by cash-strapped kids. But it is worried about reputation. What if a clip gets misused? What if Nazis spin it on their Web site? Won't people wonder why Kate Winslet has endorsed the NRA? (Don't worry. She hasn't.)

This problem comes not, paradoxically, from a lack of control. It comes from too much control. Because the law allows the copyright owner to veto use, the copyright owner must worry about misuse. The solution to that worry is less power. If the owner can't control the use, then the misuse is not the owner's responsibility.

Consider a parallel that makes the point more clearly. As every American should know, for almost a century after the Civil War, segregation continued to stain our ideal of equality. The Supreme Court took an important step toward reversing that fact in 1954, when it ruled state-sponsored segregation unconstitutional. But it wasn't until Congress began to enact meaningful civil rights legislation in the 1960s that equality made any real progress at all.

The heart of that new legislation was the Civil Rights Act of 1964, which, among other things, forbade discrimination in public accommodations, including restaurants, bars, and hotels. Among the many witnesses called to the congressional hearings in support of this federal regulation of "public" accommodations were owners of restaurants and hotels in the South.³

This fact at first seems puzzling. Why would the target of an extensive set of federal mandates be arguing in favor of those mandates? Ideology isn't an explanation: these witnesses were not integrationists for reasons of principle or justice. Instead, they wanted the government to force them to do something for economic reasons.

As the witnesses explained, however, in principle, they wanted to serve African Americans. Segregation artificially constrained

their market. But if they simply opened their doors voluntarily to African Americans, whites would boycott the restaurants. Inviting blacks in would be seen as pro-black. Pro-black in the South was punished. But if the government removed any choice from the restaurants, then opening their doors to African Americans would be ambiguous. It might be because they were pro-black; it might be because they were simply following the law. According to these witnesses, that ambiguity would stanch any retaliation. Segregation could be ended without them having to pay the price for ending it.

For reasons analogous to the civil rights debates, copyright law gives copyright owners more power than they should want. Put differently, like the Southern restaurant owners, they should want the law to remove some of the rights that the law currently gives them.

Why? Well, think again about Warner and its relationship to its fan culture. Warner has come to see what many now understand: that the obsessive attention of fans makes their franchise more valuable. The “piracy” that happens when a fan takes a clip from a Harry Potter film to post on her Web site is productive. It makes Harry Potter more valuable. Warner reaps the benefit of that increased value.

But as Marc Brandon rightly observed, trademark law puts some obligations on the trademark owner. Which means that technically, Warner needs to worry about which content it authorizes and which content it doesn't. Some of those worries are for good purpose: sites that commercialize Warner content cannibalize Warner's profit. But some of those worries are simply political, like content on a site promoting sex education, or opposing abortion.

Warner must police such uses because not doing so might be seen as an endorsement of the particular uses. The fact that it is

Warner's right means that it is also Warner's responsibility. Any mother opposing a particular way that Warner's material is used would be right to say to Warner, "This is your fault because you're perfectly able to say "no" to this."

Just as the Southern restaurant owner was free to say no to black patrons. That freedom meant responsibility, even when the responsibility had nothing to do with the ultimate purpose or profit of the restaurant.

Were the law to curtail Warner's rights by exempting from copyright regulation any noncommercial use of creative work, however, then Warner would not be responsible. When a parent objected to the use of Harry Potter on a site that also promoted Republican/Democratic ideals, Warner's perfectly fair response would be, "There's nothing we could do about that. We don't have the right to regulate noncommercial use. This site is plainly using the content noncommercially." Warner's responsibility would thus end where its rights ran out. Its obligation to keep its products pure would be limited to those contexts in which commerce affected the use of its products.

That limit would not just remove Warner's responsibility. It would also increase Warner's profits—at least for work that inspires a fan community. For with the removal of a legal barrier to fan action, more fans will participate in that fan action. And the more who devote their efforts toward Warner creative products, the better it is for Warner.

Less control here could mean more profit. Removing the right to some of that control would thus be a first, and valuable, change that Congress could make toward enabling the RW hybrids to flourish.

2. Clear Title

When Google announced its plans to digitize—or Google-ize—18 million books, the editors at the *Wall Street Journal* were outraged. “There’s a happy-go-lucky vibe around Google,” the *Journal* wrote, contributing to an “image” that lends a “spin of respectability and beneficence to projects such as Google Print.” “But,” the *Journal* warned, “the mere activity of digitizing and storing millions of books . . . raises a serious legal question.” Google was ignoring these questions, the *Journal* charged. “Intellectual property was important enough to the Founding Fathers for them to mention it explicitly in the Constitution. We assume that when Google says ‘Don’t Be Evil’ this includes ‘Thou Shall Not Steal.’”⁴ (Actually, the Constitution doesn’t explicitly mention “intellectual property.” It speaks of “exclusive rights” to “writings and discoveries”—aka, monopolies. To say that means the framers endorsed IP is like saying they endorsed “war” because the Constitution mentions that as well.)

In this case, the editors missed a fundamental fact about the “property right” that copyright is. Copyright is property. But as currently constituted it is the most inefficient property system known to man. That inefficiency is the core justification behind Google’s claim to be allowed to use this content freely. “Fair use,” in other words, turns upon this “inefficiency.”

Consider a few statistics. Of the 18 million books that Google intended to scan, 16 percent are in the public domain and 9 percent are in print, and in copyright—meaning 75 percent are out of print yet presumably within copyright.⁵

What does it mean to be out of print? The most important practical consequence is that it is virtually impossible to identify who the owners of copyrights are for works that are out of print. Impossible precisely because the government has so totally failed to keep the property rights for these copyrights clear. There's no registry for identifying the owners of copyrighted works. Nor is there even a list of which works are copyrighted. For anyone trying to make culture accessible in exactly the way Google has, the existing system makes it impossible—at least if permission is required for any particular use.

This problem is not limited to Google. Consider the University of Houston's Digital Storytelling project. As I described, the majority of students at the University of Houston are not native English speakers. Many are immigrants. Most were raised in homes where English was not the mother tongue. This mix creates an important language gap: some students speak English significantly better than others, meaning any task exclusively in words is a task that burdens some more than others.

To respond to this difference, Houston began a digital storytelling project. Students were invited to develop short videos that told a story about some period in American history. The stories were to mix images and sounds from the period, in a way that brought the history to life. But as these students discover recordings from the Depression, or photographs of the Korean War, what are they allowed to do with them? I'm not talking about Disney films, or the collected works of America's greatest jazz musicians. I'm talking instead about obscure works whose owner could never be found.

The university's lawyers had a simple answer: they weren't happy with this permissionless use, but they would ignore it so

long as the project didn't let anyone see the work. These kids were allowed to create. But what they created could be viewed by no one except their teacher.

Here again, this makes no sense. No one loses because of these kids' use. The law should not inhibit it at all. Yet the uncertainty that now dominates copyright law makes this, and a thousand other projects, uncertain. For no good copyright-related reason.

Digital technologies make it feasible—for the first time in history—to do what Jefferson dreamed of when he founded the Library of Congress: “to sustain and preserve a universal collection of knowledge and creativity for future generations.” The costs of digitizing and making accessible every bit of our past are increasingly trivial. At least, the technical costs are trivial. The legal costs, on the other hand, are increasingly prohibitive. Uncertainty destroys the potential of many of these projects. It reserves others to those companies only that can afford to bear this extraordinary uncertainty.

This reality is ridiculous. The main function of copyright law is to protect the commercial life of creativity. Though there are exceptions, in the vast majority of cases, that commercial life is over after a very short time.⁶ There is no good copyright reason for the law to interfere with archives or universities that seek to digitize and make available our creative past. And yet the law does.

This problem could be fixed relatively easily by applying an innovation as old as American copyright law.

For most of the history of copyright in America (186 out of almost 220 years, to be precise), copyright was an opt-in system of regulation. You got the benefit of copyright protection only if you asked for it. If you didn't ask in the appropriate way—if you didn't register your work, mark it with a copyright symbol, deposit

it with the Library of Congress, and renew the copyright after an initial term—your work passed into the public domain. That fact didn't bother most who published creative work in America. For much of that history, the majority of published work was never copyrighted. The vast majority of work that was copyrighted didn't renew its copyright after an initial term.

This system was cumbersome, and expensive. Sometimes it resulted in an unfair forfeiture of rights. But it had an important benefit—both to other creators, and to the spread of creativity generally. The system was automatically self-correcting. It automatically narrowed its protection to works that—from the author's perspective—needed it. And it left the rest of the world of published creativity free of copyright regulation.

This system of opt-in copyright was abolished beginning in 1976. Motivated in part by the desire to conform to international conventions, and in part by a desire simply to make the system simpler, Congress inverted the old system. Copyright was now an opt-out system, where the regulation of copyright was automatically extended to all creative work upon its creation. No formal acts were required to get the benefit of this protection. And the term was now the maximum term, automatically. When Congress made this change, it probably didn't matter much. Nineteen seventy-six was the climax of the RO culture. Those producing this culture benefited from this automatic expression of the right for them to control.

In the RW era, however, this automatic and fundamentally ambiguous system of property law unnecessarily burdens creativity. And there are obvious, simple ways to change this system to remove this burden. The least destructive change, in my view, would create a maintenance obligation for copyright owners after an initial term of automatic protection. Under one proposal, fourteen years

after a work was published, the copyright owner would have to register the work. If she failed to do so, then others could use it either freely or with a minimal royalty payment. The system would clarify rights after fourteen years. The only work that would continue to be fully protected would be work that the author took steps to protect.

This change would thus clear the title to creative work, so the market could regulate access to that work more efficiently. In this sense, the proposal has parallels in every other body of property law. Copyright law is unique in its failure to impose formalities on property owners. In many areas, property law is unforgiving of those who fail to shoulder their fair share of the burden in keeping the system efficient. That principle should be returned to copyright. If it's not worth it for a copyright owner, after fourteen years, to take some minimal step to register her works, then it shouldn't be worth it for the United States government to threaten criminal prosecution protecting the same property.

This change would make the copyright system more efficient. Copyright gives copyright owners a property right—just as real property law gives homeowners a property right to the land on which their house is built. In theory, this is a good thing. By protecting the resource with a property right, the law enables the resource to move to its highest-valued user. The market thus complements this property system by encourage trades to make sure the right is held by the person or entity that values it most.

For that system to function, however, the rights have to be clear. It must be possible to know who owns what. For that reason, for example, owners of land must file a deed describing the metes and bounds of their property. Or the owner of a car must file a registra-

tion. These systems are designed to make the market function efficiently. By making claims on the ownership of property clear—or put differently, by making title to property clear (“clear title”)—the system assures that the property can be allocated in a way that makes everyone better off. Technology offers an extraordinary opportunity for making registration work efficiently. Already companies such as YouTube are experimenting with technology that can automatically identify video or music in the content that’s being uploaded. We could easily imagine a system whereby, as these technologies develop, copyright holders would “register” their work not in the old-fashioned way (by filing a form with the copyright office) but by uploading the works so that servers could take a signature of it, and then add that to the list of creative work monitored for infringement. Works that were added into this kind of “registration system” would get the full protection of the law. Works that were not would, after a period of time, rise into the public domain.

There’s lots to question about that theory. But for my purposes here, I want to embrace it without qualification. Assuming one believes the market perfects a well-functioning property system, what has to be true about the property system? Or put differently, assuming we want the market to work well, is the copyright system designed to enable that?

As it is currently built, the answer is no. As currently constituted, copyright is an extraordinarily inefficient property system. Even the *Wall Street Journal* should see that. Or actually, *especially* the *Wall Street Journal* should see that. From its perspective, why would it be surprising that a government-crafted system of monopoly would be inefficiently run?

3. Simplify

The third change follows directly from the second. Congress must work to make the law simpler.

If copyright were a regulation limited to large film studios and record companies, then its complexity and inefficiency would be unfortunate but not terribly significant. So what if Fox has to hire more lawyers to work through complex copyright licensing problems? (For those of us who make lawyers for a living [law professors], the need is positively a good thing!)

But when copyright law purports to regulate everyone with a computer—from kids accessing the Internet to grandmothers who allow their kids to access the Internet—then there is a special obligation to make sure this regulation is clear. And that obligation is even stronger when, as here, the regulation is a regulation of speech.

Copyright law fails miserably to live up to this standard. Under the current law, if a kid wants to legally make a video to post on YouTube, synchronizing music from his favorite bands with film clips from his favorite movies, he has to clear rights. Even if the rights holders were likely to clear those rights, it would be extremely difficult to track them down. And of course, considering the current attitudes of the major rights holders, it is impossible to imagine that they would even entertain the idea of authorizing this remix use.

We thus have a system of technology that invites our kids to be creative. Yet a system of law prevents them from creating legally. The regulation of this creativity thus fails every important standard of efficiency and justice. And Congress should immediately address how it could be changed to make it work better.

One particular area of the law's failure is the doctrine called

“fair use.” Fair use is designed to limit the scope of copyright’s regulation. A use that would otherwise be within the monopoly right of copyright is permitted by fair use, to advance some important social end. So if my previous books are any indication, there will be many who after reading this book will copy text from it in a highly critical review. Such “copying” technically triggers the law of copyright. But the doctrine of fair use would protect that copying, so long as the scope and purpose of the copying were within the ordinary contours of criticism.

The problem with fair use is not its objective. The problem is how it advances its objective. Once again, the doctrine was developed imagining it would be administered by lawyers. In a world where copyright only (effectively) regulated Fox and Sony Records, that might not be a terrible assumption. But again, when copyright law is meant to regulate Sony and your fifteen-year-old, a system that imagines that a gaggle of lawyers will review every use is criminally inadequate. If the law is going to regulate your kid, it must do so in a way your kid can understand.

Fair use could do its work better if Congress followed in part the practice of European copyright systems. Specifically, Congress could specify certain uses that were beyond the scope of copyright law. Congress should not follow the Europeans completely, however. The flexibility of existing fair-use law does encourage development of the law. It should remain so that those who can afford the lawyers can push the law to develop in ways that make sense of the law. But that system must be married to a clearer and simpler system regulating everyone else.

Conservatives should not resist this point. As one of America’s leading libertarian scholars has taught us, the question for regulators is not what rule perfectly advances the policy objectives. The

question is whether the return from a complex rule advancing some policy objective is worth the price.⁷ In theory, the fancy qualifications and limitations on copyright may well ideally balance protection and incentives. The real question should be whether we couldn't get very close to that ideal balance with a much much simpler (read: cheaper) system.

4. Decriminalizing the Copy

The fourth change is perhaps the most geeky but possibly, in the end, the most important. Copyright law has got to give up its obsession with “the copy.” The law should not regulate “copies” or “modern reproductions” on their own. It should instead regulate uses—like public distributions of copies of copyrighted work—that connect directly to the economic incentive copyright law was intended to foster.

To most people, the idea that copyright law should regulate something other than copies seems absurd. How could you have a “copyright” law if it didn't regulate *copies*? But in fact, for most of our history copyright law didn't regulate copies. From 1790 until 1909, the law regulated different uses that directly linked, or were likely to link, to the commercial exploitation of creative work. Thus, it regulated “publishing” and “republishing” of books, as well as “vending” of books—all activities likely to be commercial.⁸

In 1909, the law was changed to refer to “copies.”⁹ Yet, as I've already described, even that change was not intended to widen the real scope of the law. And in any case, as Lyman Ray Patterson has argued, that change most likely was an error in drafting.¹⁰ Nonetheless, after 1909, the law reached beyond the particular acts that

Congress regulated. The law would reach as far as the technology for “copying” would reach.

The effect of this change in technology was to change radically the scope of copyright law. In 1909, writes Jessica Litman,

U.S. copyright law was technical, inconsistent, and difficult to understand, but it didn't apply to very many people or very many things. If one were an author or publisher of books, maps, charts, paintings, sculpture, photographs or sheet music, a playwright or producer of plays, or a printer, the copyright law bore on one's business. Booksellers, piano-roll and phonograph record publishers, motion picture producers, musicians, scholars, members of Congress, and ordinary consumers could go about their business without ever encountering a copyright problem.

Ninety years later, the U.S. copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything. In the intervening years, copyright has reached out to embrace much of the paraphernalia of modern society.... Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission—potentially actionable events under the copyright statute—into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law.¹¹

If copyright regulates copies, and copying is as common as breathing, then a law that triggers federal regulation on copying is a law that regulates too far.

Instead, Congress should adopt again its historical practice of specifying precisely the kinds of uses of creative work that should be regulated by copyright law.¹² The law should be triggered by

uses that are presumptively, or likely to be, commercial uses in competition with the copyright owner's use. The law should leave unregulated uses that have nothing to do with the kinds of uses the copyright owner needs to control. Copying, in this world, would not itself invoke federal regulation. Public performances, or public distributions, or commercial distribution, would.

Why is this important? Under the current law, it is easy to get thrown into the briar patch of copyright regulation, and very hard to get out. As I've described, if every single use of culture in the digital context produces a copy, then every single business that purports to use culture in a digital context is potentially subject to copyright's regulation.

In some cases, that's not a problem. It's easy to identify whose permission is required, easy to secure that permission from the copyright owners. But in many other cases, the new or innovative use challenges the copyright holder. The use might create competition, for example, that the copyright holder doesn't want. And so the threat of a copyright-infringement suit against the innovator is an effective way to control that innovation. Once that initial copy is made, the lawyers have to be called into the research lab. Complex and uncertain doctrine is waved around the project. Magic phrases are incanted, as if by witch doctors aiming to ward off inevitable disease.

I know this process well. Though I've never consulted for money in this context, I have been privy to many such conversations among technologists and venture capitalists, trying to understand whether their next great idea will end them up in financial jail (i.e., litigation). I've watched as one side makes a pitch that seems to everyone 100 percent convincing. And then the other side makes a counterpitch that also seems 100 percent convincing. The net result

is always a gamble. And because copyright liability is so severe, it is often a “bet-the-company” gamble.

This is an extraordinary waste of economic resources. A business shouldn’t need a witch doctor to tell it whether its plan is legal—especially a witch doctor who charges \$400 to \$800 an hour. The law instead needs to be clearer. And the complication caused by the law being triggered upon the mere creation of a copy is an unnecessary tax on the creative process.

5. Decriminalizing File Sharing

My final change is the one I will describe the least because, again, others have effectively mapped this change.¹³ But it is my view that Congress needs to decriminalize file sharing, either by authorizing at least noncommercial file sharing with taxes to cover a reasonable royalty to the artists whose work is shared, or by authorizing a simple blanket licensing procedure, whereby users could, for a low fee, buy the right to freely file-share. The former solution has been described in depth by Neil W. Netanel and William Fisher. The latter is the proposal of the Electronic Frontier Foundation.

While there are advantages and disadvantages to both types of solutions, it is critical that Congress take steps to do one or the other. The reason flows from a simple reality check: a decade of fighting p2p file sharing has neither stopped illegal sharing nor found a way to make sure artists are compensated for unauthorized sharing. In short, the strategy of this decade has failed to advance the objectives of copyright law—providing compensation to creators for their creative work.

No doubt there are still a thousand ideas about how we could

regulate the technology of the Internet to kill p2p file sharing. And no doubt there are gaggles of lawyers who would love the easy work of suing kids and their parents for illegal file sharing. But the question Congress should ask is what strategy is most likely to assure compensation to artists, and minimize the criminalization of our youth.

Decriminalizing file sharing is that strategy. As the work of Fisher demonstrates, there are plenty of ways that we might tag and trace particular uses of copyrighted material. That provides the baseline for compensating artists for the use of their creative work. And while I don't believe we need to embrace this system permanently just now, I do believe a transition regulation, designed to compensate and decriminalize, would significantly reduce the collateral damage being caused by the current war.

All five of these changes would go a long way to relieving the copyright system of unnecessary pressure. They would go a very long way to legalizing most of the uses of creative work on the Internet today. And they would not limit in any way the profits of the industries that fight so hard to resist these uses. That's the ultimate test that copyright law should pose: would these uses actually do any harm? The people I spoke with in preparing this book made that point again and again. As Don Joyce explained:

All lawsuits in this field are always couched in economic terms: "By ripping this off, by stealing this thing, you have threatened the economic viability of the original somehow." They actually say that without any proof that that's true at all. I have never seen anyone prove that in fact, that some work was diminished in its

ability to make money by somebody's sample. In my mind the work that's reusing it is not in competition with the original. And you haven't removed the original. It's still there. It will always be there, as it is, as it was, as the original. And if you sample from it, you've made something else. You've probably put samples from ten other things into this thing, and that's just one little element, and together the parts make up something that has very little bearing on that one thing you may have sampled from. I just don't think there's an argument there of what the harm is. If there's no harm, and it's a lot of fun, I say do it. No one's ever shown me that the harm is real.

That much is perfectly true. Economists argue ferociously about whether or to what extent p2p file sharing of complete digital copies of commercially available works might harm the copyright owner. But no one would even speculate about the harm that comes from remixing works, much of which is not even commercially available.

Of course, that's not to say there's no "harm" here at all. As Johan Söderberg put it to me: "I don't think I'm hurting anybody. I mean, of course I am hurting [Bush and Blair]. It's something that is against George Bush and Tony Blair. So I'm hurting them." But is it copyright's job to protect Blair and Bush from criticism? Is that the reason the framers granted Congress the right to secure exclusive rights? If you even hesitate to answer that question, then let me suggest you know very little about the motives of our framers. Giving government the power to silence critics through licensing was them at their worst (see, e.g., the Alien and Sedition Acts of 1798). It was not one of the ideals motivating the drafting of our founding document.