

Essay: In Defense of Piracy --- Digital technology has made it easy to create new works from existing art, but copyright law has yet to catch up

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Corrections & Amplifications

John Philip Sousa's middle name was misspelled as Phillip in an article on copyright law in Saturday's Weekend Journal.

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(END)

In early February 2007, Stephanie Lenz's 13-month-old son started dancing. Pushing a walker across her kitchen floor, Holden Lenz started moving to the distinctive beat of a song by Prince, "Let's Go Crazy." He had heard the song before. The beat had obviously stuck. So when Holden heard the song again, he did what any sensible 13-month-old would do -- he accepted Prince's invitation and went "crazy" to the beat. Holden's mom grabbed her camcorder and, for 29 seconds, captured the priceless image of Holden dancing, with the barely discernible Prince playing on a CD player somewhere in the background.

Ms. Lenz wanted her mother to see the film. But you can't easily email a movie. So she did what any citizen of the 21st century would do: She uploaded the file to YouTube and sent her relatives and friends the link. They watched the video scores of times. It was a perfect YouTube moment: a community of laughs around a homemade video, readily shared with anyone who wanted to watch.

Sometime over the next four months, however, someone from [Universal Music Group](#) also watched Holden dance. Universal manages the copyrights of Prince. It fired off a letter to YouTube demanding that it remove the unauthorized "performance" of Prince's music. YouTube, to avoid liability itself, complied. A spokeswoman for YouTube declined to comment.

This sort of thing happens all the time today. Companies like YouTube are deluged with demands to remove material from their systems. No doubt a significant portion of those demands are fair and justified. Universal's demand, however, was not. The quality of the recording was terrible. No one would download Ms. Lenz's video to avoid paying Prince for his music. There was no plausible way in which Prince or Universal was being harmed by Holden Lenz.

YouTube sent Ms. Lenz a notice that it was removing her video. She wondered, "Why?" What had she done wrong? She pressed that question through a number of channels until it found its way to the Electronic Frontier Foundation (on whose board I sat until the beginning of 2008). The foundation's lawyers thought this was a straightforward case of fair use. Ms. Lenz consulted with the EFF and filed a "counter-notice" to YouTube, arguing that no rights of Universal were violated by Holden's dance.

Yet Universal's lawyers insist to this day that sharing this home movie is willful copyright infringement under the laws of the United States. On their view of the law, she is liable to a fine of up to \$150,000 for sharing 29 seconds of Holden dancing. Universal declined to comment.

How is it that sensible people, people no doubt educated at some of the best universities and law schools in the country, would come to think it a sane use of corporate resources to threaten the mother of a dancing 13-month-old? What is it that allows these lawyers and executives to take a case like this seriously, to believe there's some important social or corporate reason to deploy the federal scheme of regulation called copyright to stop the spread of these images and music? "Let's Go Crazy" indeed!

It doesn't have to be like this. We could craft copyright law to encourage a wide range of both professional and amateur creativity, without threatening Prince's profits. We could reject the notion that Internet culture must oppose profit, or that profit must destroy Internet culture. But real change will be necessary if this is to be our future -- changes in law, and changes in us.

For now, trials like Ms. Lenz's are becoming increasingly common. Both professionals, such as the band Girl Talk or the artist Candice Breitz, and amateurs, including thousands creating videos posted on YouTube, are finding themselves the target of overeager lawyers. Because their creativity captures or includes the creativity of others, the owners of the original creation are increasingly invoking copyright to stop the spread of this unauthorized speech. This new work builds upon the old by in effect "quoting" the old. But while writers with words have had the freedom to quote since time immemorial, "writers" with digital technology have not yet earned this right. Instead, the lawyers insist permission is required to include the protected work in anything new.

Not all owners, of course. [Viacom](#), for example, has effectively promised to exempt practically any amateur remix from its lawyers' concerns. But enough owners insist on permission to have touched, and hence, tainted, an extraordinary range of extraordinary creativity, including remixes in the latest presidential campaign. During the Republican primary, for example, Fox News ordered John McCain's campaign to stop using a clip of Sen. McCain at a Fox News-moderated debate

in an ad. And two weeks ago, [Warner Music Group](#) got YouTube to remove a video attacking Barack Obama, which used pieces of songs like the Talking Heads' "Burning Down the House." (Spokesman Will Tanous of [Warner Music Group](#), which represents the Talking Heads, says the request came from the band's management.) Around the same time, NBC asked the Obama campaign to pull an ad that remixed some NBC News footage with Tom Brokaw and Keith Olbermann.

We are in the middle of something of a war here -- what some call "the copyright wars"; what the late Jack Valenti called his own "terrorist war," where the "terrorists" are apparently our kids. But if I asked you to shut your eyes and think about these "copyright wars," your mind would not likely run to artists like Girl Talk or creators like Stephanie Lenz. Peer-to-peer file sharing is the enemy in the "copyright wars." Kids "stealing" stuff with a computer is the target. The war is not about new forms of creativity, not about artists making new art.

Yet every war has its collateral damage. These creators are this war's collateral damage. The extreme of regulation that copyright law has become makes it difficult, sometimes impossible, for a wide range of creativity that any free society -- if it thought about it for just a second -- would allow to exist, legally. In a state of "war," we can't be lax. We can't forgive infractions that might at a different time not even be noticed. Think "Eighty-year-old Grandma Manhandled by TSA Agents," and you're in the right frame for this war as well.

The work of these remix creators is valuable in ways that we have forgotten. It returns us to a culture that, ironically, artists a century ago feared the new technology of that day would destroy. In 1906, for example, perhaps America's then most famous musician, John Phillip Sousa, warned Congress about the inevitable loss that the spread of these "infernal machines" -- the record player -- would cause. As he described it:

"When I was a boy . . . in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. Today you hear these infernal machines going night and day. We will not have a vocal chord left. The vocal chords will be eliminated by a process of evolution, as was the tail of man when he came from the ape."

A professional fearful that new technology would destroy the amateur. "The tide of amateurism cannot but recede," he predicted. A recession that he believed would only weaken culture.

A new generation of "infernal machines" has now reversed this trend. New technology is restoring the "vocal chords" of millions. Wikipedia is a text version of this amateur creativity. Much of YouTube is the video version. A new

generation has been inspired to create in a way our generation could not imagine. And tens of thousands, maybe millions, of "young people" again get together to sing "the songs of the day or the old songs" using this technology. Not on corner streets, or in parks near their homes. But on platforms like YouTube, or MySpace, with others spread across the world, whom they never met, or never even spoke to, but whose creativity has inspired them to create in return.

The return of this "remix" culture could drive extraordinary economic growth, if encouraged, and properly balanced. It could return our culture to a practice that has marked every culture in human history -- save a few in the developed world for much of the 20th century -- where many create as well as consume. And it could inspire a deeper, much more meaningful practice of learning for a generation that has no time to read a book, but spends scores of hours each week listening, or watching or creating, "media."

Yet our attention is not focused on these creators. It is focused instead upon "the pirates." We wage war against these "pirates"; we deploy extraordinary social and legal resources in the absolutely failed effort to get them to stop "sharing."

This war must end. It is time we recognize that we can't kill this creativity. We can only criminalize it. We can't stop our kids from using these tools to create, or make them passive. We can only drive it underground, or make them "pirates." And the question we as a society must focus on is whether this is any good. Our kids live in an age of prohibition, where more and more of what seems to them to be ordinary behavior is against the law. They recognize it as against the law. They see themselves as "criminals." They begin to get used to the idea.

That recognition is corrosive. It is corrupting of the very idea of the rule of law. And when we reckon the cost of this corruption, any losses of the content industry pale in comparison.

Copyright law must be changed. Here are just five changes that would make a world of difference:

Deregulate amateur remix: We need to restore a copyright law that leaves "amateur creativity" free from regulation. Before the 20th century, this culture flourished. The 21st century could see its return. Digital technologies have democratized the ability to create and re-create the culture around us. Where the creativity is an amateur remix, the law should leave it alone. It should deregulate amateur remix.

What happens when others profit from this creativity? Then a line has been crossed, and the remixed 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 Mr. 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 the copyright law for assuring that payment. We need to be as creative as our kids in finding a model that works.

Deregulate "the copy": Copyright law is triggered every time there is a copy. In the digital age, where every use of a creative work produces a "copy," that makes as much sense as regulating breathing. The law should also give up its obsession with "the copy," and focus instead on uses -- like public distributions of copyrighted work -- that connect directly to the economic incentive copyright law was intended to foster.

Simplify: If copyright regulation were limited to large film studios and record companies, its complexity and inefficiency would be unfortunate, though not terribly significant. But when copyright law purports to regulate everyone with a computer, there is a special obligation to make sure this regulation is clear. It is not clear now. Tax-code complexity regulating income is bad enough; tax-code complexity regulating speech is a First Amendment nightmare.

Restore efficiency: Copyright is the most inefficient property system known to man. Now that technology makes it trivial, we should return to the system of our framers requiring at least that domestic copyright owners maintain their copyright after an automatic, 14-year initial term. It should be clear who owns what, and if it isn't, the owners should bear the burden of making it clear.

Decriminalize Gen-X: The war on peer-to-peer file-sharing is a failure. After a decade of fighting, the law has neither slowed file sharing, nor compensated artists. We should sue not kids, but for peace, and build upon a host of proposals that would assure that artists get paid for their work, without trying to stop "sharing."

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