

Locke Remixed ;-)

Robert P. Merges*

TABLE OF CONTENTS

INTRODUCTION	1259
I. ENFORCEMENT COSTS AND MARKET COMPETITION: IMPORTANT “DISTRIBUTIONAL” CONSIDERATIONS	1262
II. THE CRUX OF THE MATTER: LOCKEAN LABOR THEORY AND THE REMIXERS	1265
A. <i>Content Is Not Strictly Necessary for “Identity Formation”</i>	1265
B. <i>Forgotten Narratives: Original Content Creators</i>	1269
CONCLUSION: AFTER THE BUZZ	1272

INTRODUCTION

This conference on Intellectual Property (“IP”) and Social Justice covered a lot of ground. I am going to bear in on only one small corner of this terrain: remixes. There is a close connection between remix culture and distributive justice. A remix (or mash-up) is a work created from one or more preexisting works — such as music, photos, videos, computer games, etc. As everyone at this conference was well aware, remix culture is a very big thing in the online world.¹ People adapt, distribute, trade, and comment on all sorts of preexisting works. At least some of these preexisting works are widely distributed, for-profit mass media products such as Beatles albums, *Star Wars* films, television shows, and the like. (In this short Essay, I call works such as these “original mass market works,”² and I often

* Wilson Sonsini Goodrich & Rosati Professor of Law, University of California at Berkeley, Boalt Hall School of Law. I thank Professors Anupam Chander, Madhavi Sunder, and Mollie Van Houwling, and the other participants in the UC Davis Symposium on IP and Social Justice for helpful comments and questions. The usual disclaimer applies.

¹ See, e.g., MashupCamp.com, <http://www.mashupcamp.com/> (last visited Oct. 23, 2006) (presenting numerous examples of mashups).

² “Original” stems from the Latin word “originem,” meaning beginning or source.

refer to the largest corporate creators and owners of these works as “Big Media.”)

One important group of remixers are “little guys” — individuals, mostly, who modify, add to, and comment on mass market works.³ They remix mostly as a hobby, in the sense that they are not paid for remixing. Their hobby puts the remixers into conflict in some cases with the formal system of property rights that cover the preexisting digital works that are their raw materials. Many who participated in this excellent conference at UC Davis would see a conflict such as this as essentially distributive; it is about how remixers *as a group* fare when their claims are weighed against the claims of the producers of original mass market works (i.e., Big Media). In this sense, the structure of copyright affects the distribution of legal rights (and hence, in theory anyway, money) between remixers and creators of original works, often Big Media.⁴

The view that this is a distributive conflict begins with a simple point: many remixes infringe copyrights. Professional observers of

I understand that very few creative works are an absolute beginning or source; they are almost all based on or derived from other materials in one way or another. I do not intend to “privilege” Walt Disney’s creation of the film *Snow White* out of myth and legend over a young, internet-savvy person’s creative “remixed” editing or commentary on a film or book. I simply mean to distinguish the two cases: the primary input for the Disney film is a loose amalgamation of preexisting cultural material, while the primary input for the remixer is one or more fixed, packaged, preexisting works, usually in digital form.

³ There is also a thriving commercial remix sector, in which high volume record labels license short snippets of digital music “samples” for use in mass market recordings. See, e.g., M. Leah Somoano, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289, 309 (2006) (describing market for samples generally); Josh Norek, Comment, “*You Can’t Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 89 (2004) (describing “going rate” for digital sample licenses for various uses of music samples). I do not address this market in this short Essay, but I would note two features of it. First, commercial players have apparently invested in the infrastructure to license samples. See generally Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Transactions and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1997) (describing generally repeat-play transactors in IP world who invest in transactional institutions). Also, because most of the licensing deals involve “repeat player” record companies, reciprocity plays a major role in the transactions. See generally Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, 13 SOC. PHIL. & POL’Y 145 (1996) (describing reciprocity in information exchange relationships).

⁴ For a comprehensive and illuminating statement of this idea, see Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

the copyright scene — mostly academics — largely think this potential for legal liability is a bad thing. They think it shows how biased “the copyright system” is against little guy “remixers.” In their view, copyright law fits the new digital era about as well as a string quartet fits a hip-hop concert.

For example, consider Professor Madhavi Sunder’s description of *The Grey Album*, a sound recording made by a digitally savvy remixer named DJ Danger Mouse. *The Grey Album* was fashioned from the 1970s *The White Album* from the Beatles and a more recent rap production called *The Black Album* by Jay-Z. Sunder describes the efforts of the copyright owners to curtail online distribution of *The Grey Album*, and the mass online civil disobedience effort known as Grey Tuesday:

Grey Tuesday was widely reported as a coordinated act of civil disobedience against an excessively restrictive copyright law. Suddenly, the copyright law of the last century appeared too obedient to traditional cultural, technical, and legal authorities, stifling an emergent social movement for “free culture” — a claim to deploy technology to access and critique existing cultural authorities. . . . Sampling reveals its social side in precisely such re-iterations of tradition. Far from simple mimesis, rappers practice an art that cultural theorists call signification: the exercise of cultural agency within a context of discursive hegemony. Individuals express themselves through critique, comment, or parody of cultural authorities, all the while seeking to represent themselves within a cultural context that had previously overlooked or worse, oppressed them. Stated differently, the mash-up [i.e., remix] is often a form of cultural dissent. The sample is used to evoke the past and to create a “lineage” between authors, thus claiming a place for oneself within a culture’s historical narrative. Sampling signals that an artist is working within a tradition, not without it. At the same time, as Walter Benjamin has described, the proliferation of copies contributes to the “shattering of tradition”; it debunks the mythical cult of the original, questioning the very existence of a singular text or cultural authority. Revealing the multivocality of the text invites the question of what other worlds exist and are possible. The Age of Mechanical Reproduction is yielding to the Age of Electronic Participation. Unmasking cultural autocracy makes way for cultural democracy. This approach

recognizes creativity is derivative: the only way to make gray is to mix black and white.⁵

Like Sunder, I think remix culture has great potential. But I disagree about its implications for copyright. I do not think remix culture ought to force deep, fundamental, and permanent change in the structure of copyright law. First, I do not think such change is necessary; high enforcement costs and market competition will neutralize much of the potential for copyright law to bog down remix culture. Second, it would not be fair to the people who create original mass market content for remixers to “redistribute” too much of the money creators earn from their work. Most of this brief Essay is devoted to the fairness argument. But I do want to say a few things about the first point, too.

I. ENFORCEMENT COSTS AND MARKET COMPETITION: IMPORTANT “DISTRIBUTIONAL” CONSIDERATIONS

We all know that “law on the books” is one thing, “law as it really works” is something else.⁶ So what I have to say in this section is really more of a reminder than anything new and startling. I just want to emphasize two core issues that academic fans of remixing should keep firmly in mind. The first is that IP rights are expensive to enforce. The second is that, partly because of these high enforcement costs, huge truckloads of IP rights are voluntarily waived every day by those who hold them. Given the importance of these two factors, I would hazard the following conjecture: practical considerations such as enforcement costs and consumer demand for less-than-fully enforced rights are more important to the future of remix culture than the formal legal rules governing digital content.

Evidence favoring the conjecture is all around us. Most low-volume music file sharing is “effectively legal,” in the sense that no one needs to worry about being penalized for it. Fan websites that routinely reproduce copyrighted pictures, film clips, and the like are effectively legal. Many are becoming explicitly legal as original content producers see the benefit of seeding and feeding the market for their works. Individual remixers who experiment with digital music sampling, video and photo modifications, and homemade enhancements to computer games have essentially no real worries

⁵ Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 304-06 (2006) (emphasis omitted).

⁶ At this late date, I would hope that I do not need a citation for this now self-evident proposition.

about legal liability. As Professor Polk Wagner argued brilliantly a few years ago, IP rightholders face severe practical limits in enforcing their rights, and this has been a huge benefit to the launching of remix culture.⁷ Despite anxious concerns about the lack of fit between copyright's archaic (i.e., pre-digital) principles and the brave new world of information, collaboration, and remixing, not many have noticed that remix culture has sprouted and grown quite rapidly without any major changes in the law. Some overstate things, saying that copyright is dead or irrelevant; but that, too, is belied by the anxious hand-wringing over every new development in the law, from the Digital Millennium Copyright Act to legislative solutions for the legal issues raised by online music "streaming." High-value content is still worth protecting from massive market-displacing copying, but low-volume copying at the hands of dedicated remixers flourishes due to the cost of shutting them down (and, increasingly, the realization that allowing remixing on this scale adds to rather than detracts from profits).

In addition to these practical constraints on rightholders, consumers are pushing hard for less restrictive content. Put simply, remix culture is fun, which means people are increasingly asking for more freedom to remix. The result, not surprisingly in a market-driven economy, is that some content producers are giving it to them. Online computer game makers are giving users legal permission to modify original characters, and design new characters of their own. (Indeed, game makers are increasingly providing software tools to make this easier.) Television and movie copyright owners are giving broad leeway to websites devoted to their fans. These sites promote user commentary on mass media content, and they also serve as clearinghouses for remixers. Even erstwhile "control freaks" such as George Lucas seem to be getting with the remix trend. Lucas himself applauded a short-film parody of his *Star Wars* films done entirely by fans without prior permission.⁸

Of course, there have been and will be cases where content owners object to remixing. This is where academic remix supporters will concentrate their fire. Sure, they might say, many content copyright owners may decline to enforce their rights; but the fact that they *can* enforce them if they want to may create a "chilling effect" on remixers.

⁷ See R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1011-12 (2003).

⁸ See Michael Wiese Productions, *Hardware Wars* — Special Edition — The Video, <http://www.mwp.com/films/hardware-wars/special-edition.php4> (last visited Oct. 23, 2006) (including quotation of Lucas praising *Hardware Wars* parody).

There is a world of difference, they might say, between someone who has rights but may decide not to enforce them and someone who has no rights to enforce because they are held by the remixers. Only the latter situation provides true, rock solid, wide open freedom for remixers — so that is the legal regime we must insist on.

Two points in response, one quick, the other more involved. The first is a simple observation: legal academic remix fans are lawyers. They are trained to worry. The slightest breeze, the smallest shift in temperature in the legal atmosphere, may give them a chill. Most remixers are not so sensitive to legal issues. (Some may be, but I believe most are not.) Given the practical issue of enforcement costs, and the robust constitutional protections for infringing works that qualify for First Amendment protection, at least some remixers will understand the significant chance that infringing works will not lead to legal liability. Some may well be deterred in the face of stronger formal property rights, but as long as there are others who are not, remix culture will grow. If maximizing remix culture were the only goal that counted in our copyright system, we might have to worry about the potential remixers who were deterred. But it is not, so we do not.

In my opinion, the law's goal should not be to maximize remixing, but to balance the legitimate claims of content creators and remixers. Thus, my second objection to the idea that little guys should not have to rely on the "kindness of strangers" (content owners) to confidently go forth and remix. To put it simply, I do not believe remixers should have broad *rights* to remix, because I believe content creators deserve to hold the rights in many situations. I explain why in Part II below. But at this point, I just want to say this: I do not think remixers should be able to do their thing at no legal risk, because the right to control digital content should reside in large part with the creator(s) of original content. Put another way, remixers can and do often proceed on a shaky legal foundation for the practical reasons described earlier, but it would be wrong to privilege their efforts by giving them the legal *right* to proceed in an unfettered fashion. The rights will often more properly reside with content creators. It is a wonderful thing that remixers often have *de facto* rights to remix (because of enforcement costs), or voluntary *de jure* remix rights (due to a legally binding waiver of rights by content creators). But it would not be wonderful to grant them full legal rights to do so for all works, because that would deprive original content creators of rights they deserve. The remainder of this Essay outlines this "desert" argument.

II. THE CRUX OF THE MATTER: LOCKEAN LABOR THEORY AND THE REMIXERS

To state it simply, I believe that creators of original content deserve some significant rights over that content — property rights, to be exact. In this brief section, I simply sketch the argument. I keep it brief because longer and better versions are available,⁹ and because the essence of the argument is very simple.

A. *Content Is Not Strictly Necessary for “Identity Formation”*

As most readers will know, John Locke based his account of the legitimate origin of property rights on a simple foundational concept: labor. For Locke, exerting labor on something found in nature satisfied an essential condition for converting it from common to individual ownership. But Locke included a number of “provisos” in his account of property as well. He would require that the laborer not take so much from the “state of nature” that part of it would spoil. He also provided that those in extreme need have a superior claim to some of what a laborer might otherwise appropriate (the “charity proviso”). Some also find a third proviso, the “sufficiency” or “as much and as good left for others” proviso, but not everyone agrees.¹⁰ Many intellectual moves are required to apply or adapt this simple setup to specific problems in modern IP law. I won’t try to do that here. But I will make a straightforward statement, and proclaim the centrality of Locke’s insight — that one who works hard to make something original deserves some rights and, therefore, a chance at a reward for the work (assuming the provisos are satisfied).¹¹

⁹ An outstanding example is a series of articles by Kenneth Einar Himma. See, e.g., Kenneth Himma, *Abundance, Rights, and Interests: Thinking About the Legitimacy of Intellectual Property* (Berkeley Ctr. for Law & Tech., Working Paper No. 11, 2005), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1012&context=bclt> (discussing proceeding from 2005 International Conference of Computer Ethics — Philosophical Enquiry); Kenneth Himma, *The Justification of Intellectual Property: Contemporary Philosophical Disputes* (Berkeley Ctr. for Law & Tech., Working Paper No. 21, 2006), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1022&context=bclt>.

¹⁰ Compare Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (describing sufficiency proviso), with Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319 (1979) (denying that there is separate sufficiency proviso).

¹¹ On this generally, see Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005).

Most supporters of wide remix rights are not persuaded by the Lockean theory. They cite a number of issues, but I will focus on one here. A common argument in this literature is that those who would invoke Locke to defend IP rights rely too much on a distorted view of the creative process. Professor Rosemary Coombe, for example, has written of the “dialogic” way in which culture is constructed; she has focused on the “drive to meaning” engaged in by all people, which she believes requires legal rules that permit widespread commentary, critique, and reaction to previously published works. She sees expansive IP rights as a threat to these important values.¹²

She and others writing from this strong public domain position have pointed out that the dialogic nature of culture makes it impossible in many cases for IP rights to satisfy the Lockean sufficiency proviso.¹³ Even assuming the proviso is a real constraint, there is a basic problem with this view. As Professor Jeremy Waldron has argued, it raises an obvious problem of baselines, or starting assumptions. True, once a given work is made public, people who have been exposed to it cannot rid their systems of it. (This is especially true for works made available through the mass media — the type of work that the pro-public domain authors seem most concerned with.) This is the precise point at which strong public domain advocates who are immersed in the literature of postmodern culture sense in the IP laws a fundamental unfairness. We cannot escape the barrage of images, signs, and symbols that flood our minds from the ubiquitous mass media, yet we are supposed to honor property lines, and remain passive consumers of, instead of active participants in, the media-saturated culture that engulfs us. There is a sense in these writings of the need to “fight fire with fire” — to actively reshape powerful cultural images, and “take back our minds from the corporate interests that would dominate them,” if you will. These writings often describe

¹² ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 82-83 (1998) (“[Bakhtin’s] conceptual framework does greater justice to, or more adequately accounts for, the complexities of the signifying lives of commodified texts protected by intellectual property laws in conditions of postmodernity than either a nominalist-positivist or a structuralist account of language.”). Coombe does not believe that one needs to get authorization from Walt Disney to use the words of “Thumper” in the movie *Bambi*, stating that Thumper constitutes a “collective cultural heritage.” *Id.* at 42. She writes: “[F]or some of us, it’s the closest thing we have to a shared cultural memory of childhood.” *Id.* (citation omitted).

¹³ For a nuanced discussion of contemporary ideas about the public domain, see Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 *LAW & CONTEMP. PROBS.* 147 (2003).

the mass media as boringly conventional, socially conservative, or at least too “vanilla” to be interesting. As a consequence, many of the stories told by strong public domain advocates feature romantic narratives of resistance and rebellion: the brave and lonely battle of the “little guy” against the flat, metallic, and vapid forces of the corporate media machine. Because this narrative fits the contours of the First Amendment literature, constitutional values of self-expression are often invoked as a counterweight to the “over-propertyization” that is said to be the primary IP policy of the media juggernaut.

I have two things to say about these stories. One is a critique of their starting point. The other is a call for a counter-narrative. The starting point for these observations is that we cannot escape from mass or popular culture; it pervades our environment, invades our minds, and in some ineffable way constitutes who we are. The medium is the message, and we are the medium. My objection is this simple: I don’t think it is necessarily so. I think people can and do opt out of the digital onslaught all the time. Because I see immersion in this culture as more a matter of individual choice than of involuntary mass perpetration, I think there are limits on how much someone may be permitted to comment on, reconfigure, and “make their own” the works of the mass media.

Many people, all around the world, get along fine with little or no exposure to modern media content. Even in highly developed countries such as the United States, there are large groups of people who voluntarily exile themselves from mass media, or the products of Big Media at any rate. There are people living rustic lives who watch no television and have no e-mail. There are Amish and Orthodox Jews and Hutterites who voluntarily eschew modern electronics in most forms, including modern music and television.¹⁴ And there are many others who choose to remove themselves from some or all modern media, for as broad a variety of reasons as obstinate human nature can come up with.¹⁵ I have seen no research showing that these peoples

¹⁴ See, e.g., DONALD KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 26 (2001) (no television or computers).

¹⁵ See, e.g., BRIAN MARTIN, *INFORMATION LIBERATION* (1998), available at <http://www.uow.edu.au/arts/sts/bmartin/pubs/98il/il02.html> (“Many people are such regular and insistent consumers of the mass media — television, radio and newspapers — that it’s possible to speak of an addiction. This also includes many of those who are strongly critical of the mass media. Cutting down on consumption can be part of a process of imagining and fostering a participatory communications system.”); see also GEORGENE MULLER LOCKWOOD, *THE COMPLETE IDIOT’S GUIDE TO SIMPLE LIVING* 40 (2000) (advocating “lessons from the Amish,” including restricting

have no identity, or that they are somehow incompletely formed as human beings. Indeed, at least in the case of the Amish and Hutterites, the depth of their community ties speaks to the opposite conclusion. Perhaps media exposure thins out and weakens one's identity. If so, remixing culture is perhaps not an ideal way to construct a firm, fixed, and authentic identity. Unplugging from it might be a better alternative.

But I do not mean to press this point here. All I mean to say is that, regardless of the intensity of the pleasure or comfort one derives from consuming mass media, it is not after all an essential activity in a deep sense. Exposure to Big Media is a choice. It is a widely shared choice, it is a very easy choice, it is a highly popular choice, but it is still a choice. True, children whose parents expose them to media from a young age may have little choice in their early years, but at some point they are capable of extracting themselves from the routine patterns of their upbringing — as so many do in so many areas of life — and making an independent choice. Perhaps for some adolescents, grappling with conflicts between the banal values imposed by the media and other values (from family, community, or their own emerging set of individual values) is an important intermediate step along the way to authenticity and, for some, exile from the media. Even so, IP law's restrictions on "remixing" cultural images will not, I believe, be decisive to the viability of remix culture, for reasons explained earlier in Part I (i.e., high enforcement costs and the availability of content whose owners permit and encourage remixing).¹⁶ Allowing content owners to restrict remixing might remove an easy channel of expression for some, but it will not and cannot eliminate all opportunity to react to, comment on, and "make their own" the objects of mass media culture. Because the need for self-expression must be weighed against the legitimate claims of hard-

or eliminating media).

¹⁶ It is entirely plausible that all the commotion over Digital Rights Management and related technologies will in the end not amount to much compared to the imperatives of competition in the digital content marketplace. If most consumers want freedom to remix content, content producers would be insane to deny it to them. In this sense, the market may ultimately be a much better protector of the desires and preferences of those interested in ripping, mixing, and burning than any effort to dictate rules and requirements "from above," through legislation or court rulings. Even so, ongoing vigilance is required to make sure that the market is not malfunctioning for some reason. Examples might include: (1) the need to provide better notice to consumers regarding the rights and duties they are taking on in licensing and downloading digital content, and (2) highly unpopular speech that requires or makes good use of legally protected content.

working content creators, this need does not trump all other claims, in my view. It is an unfortunate fact, in this crowded world, that we must often balance what we want with the needs of others. IP law is no different in this respect from anything else. Remixers — despite their energy and their enthusiasm — are not immune from this basic fact of social life.¹⁷

To summarize, then, I will admit that remix fans have an interest in remixing. If this can be reasonably accommodated, there is every reason to allow it into our thinking about IP rights in the digital era. But it is not a right, trumping all other interests, and that is a crucial distinction. This point opens the door to a counter-narrative which illustrates the other interests that must be balanced if IP policy is to be fair and effective. Enter the prosaic original content creator.

B. *Forgotten Narratives: Original Content Creators*

Coombe and Sunder have written eloquent descriptions of the impetus behind remixing. Their accounts celebrate the stories of people who took time and effort to rework preexisting original content to make it meaningful and relevant in their lives. They describe with care projects such as *The Grey Album* and a female-centric reworking of the *Harry Potter* stories. In most cases, they show how individuals have used remixes to push back against aspects of preexisting works that seem to them restrictive and inapposite to their lives.

In my opinion, these narratives of resistance and rebellion add something important to the IP discourse. In discussing IP theory, it is easy to abstract away from real people, members of real groups. It is easy to assume that all marginalized groups are comfortably accounted for by our neat and tidily “balanced” IP policies. This is not always true. Advocates of a strong public domain, like Biblical prophets, serve a crucial social purpose.

And yet the romantic narrative of rebellion is only one of the stories we need to tell. There are others at least as important, and, on the numbers, quite pervasive. This is the workaday story of people trying to make a living at what they love to do. Not faceless bureaucrats at Walt Disney or Sony Records, but real-live musicians and songwriters, novelists and film industry workers, people who actually send the kids off to school and go to work “making content.” They may work in

¹⁷ One further note: even if there were something like a fundamental right to remix, there are vast libraries of public domain and voluntarily free content on which one could exercise this right. So the remix right would still not require that *all* content owners surrender their rights.

groups large or small, designing, sketching, brainstorming; or they sit down in their kitchen or small studio and try to write a new song, or edit a script, or lay out a website, as a way to make a living. This narrative — call it “trying to make a go of life in the digital media industries” — is no less compelling than the romantic story of resistance and rebellion. But it is a story not told often enough (in my view) in the pages of academic journals, or even the popular press.¹⁸

The story of the original content creator should affect how we think about remixing. The efforts of these people, collective or individual, are important. They deserve our respect. To say that readers and viewers of what these creators produce deserve or need to be able to comment on, critique, and modify all the content they want, whatever the impact on the original creators, is to deny this plain desert. It is to make one set of stories — romantic resistance and rebellion — the dominant narrative, wiping out all others. To call original content creators the contributors to “cultural authority,” and to label the success of their works as “discursive hegemony” (as Sunder does) creates a mask of abstractions. It hides the human impact.¹⁹

A recent popular song by folk artist Gillian Welch, called “Everything Is Free,” illustrates this human element. The chorus to the song includes these lyrics:

Everything is free now, that's what they say.
 Everything I ever done, got to give it away.
 Someone hit the Big Score. They figured it out,
 That we're gonna do it anyway,
 Even if it doesn't pay.

The verses describe the life of a workaday songwriter-musician trying to make a living at what she loves to do. “I can get a tip job, gas up the car,” she sings, “[T]ry to make a little change, down at the bar. Or I can get a straight job, I've done it before. I never minded working hard, it's who I'm working for.” Welch's views on digital technology

¹⁸ Notice, for example, that the canonical narratives of resistance and rebellion often involve relatively faceless Big Media — witness Coombe's comments about Bambi and Thumper, and Sunder's example of *The Grey Album* remix made from a copyrighted recording now owned by the corporate legacy of the Beatles. See *supra* notes 5, 12 and accompanying text.

¹⁹ I should clarify here that I am assuming that broad rights in favor of remixers cannot effectively be limited to Big Media. There is no principle way to distinguish a big Disney production from an animated film made by a group of film school friends, or a Beatles recording from a homemade garage band master tape. Therefore, any legal regime that strikes against the authority and hegemony of Disney and the Beatles will inevitably impact small producers of original content.

seem to be that it is making it more difficult for her to make a living, perhaps tempting her not to stop singing and playing, but to stop trying to make a living as a recording artist. She sings further:

Every day I wake up, hummin' a song.
But I don't need to run around, I just stay at home.
And sing a little love song, my love, to myself
If there's something that you want to hear, you can sing it
yourself.²⁰

The title of the song says it all: "Everything Is Free." The drive toward "dialogic" culture, the emphasis on "self-expression," the stories that focus on the heroic narrative of resistance and rebellion — they all play off the theme of increasing freedom. Welch's song is about what we forget if we focus solely on the freedom of copiers and remixers — the very human cost when "everything is free." It is a powerful counter-narrative, the part of the story we might forget if we only focused on the freedom-enhancing aspects of remix culture.

It seems to me that we need to see the value in both stories. If people, in "just trying to make a living," create something important, something that others respond to at a deep level and in great numbers, we should be sure to recognize that without their efforts, this important work would not have come into being. Perhaps the critics are right — restrictions on remixing do make others worse off. We can't rid ourselves of media influence — expunge Barbie or James Bond from our minds in a final and permanent act of mental purgation. Nevertheless, the "harm" we suffer because we cannot do whatever we want with some film or record or book must be considered not by itself, but with respect to the dignity and respect we owe to the creators of the work. In a legal sense, "but for" their contribution, we would never have the work which touches us so deeply (one way or the other) that we need to internalize it, adapt it, "make it our own." The desire to embrace and "own" a work comes about, I would argue, when the work's creators have done their job

²⁰ GILLIAN WELCH, *Everything Is Free*, on TIME: THE REVELATOR (Acony Records 2001).

superbly well.²¹ For this, they deserve our respect, and the property rights that go with it.

CONCLUSION: AFTER THE BUZZ

Remix culture is exciting. It's new, it's young, it's fresh. Original content is old. It's established. It's exemplified by boring Big Media. In a contest of coolness, pizzazz, fizz, and buzz, remix wins, hands down.

But as academics, part of our job is to remember. What other people forget, we remember. We take time to read and think about not the headlines, but the trend lines. Newsprint fades; scholars' libraries are built to last (not forever, but a lot longer than today's newspaper).

The telegraph was new once. Radio was new once. So was television. In each case, a revolution was proclaimed. Things were never going to be the same, and indeed they were not. But the changes took a long time to work themselves out. They were not instantly obvious. Those who described the scene with subtlety, nuance, and patience had a better chance of being proven right, or at least not as wrong as others.

It is tempting to get caught up in the excitement over remix culture, and over the new media of the internet in general. But as scholars, I think we need also to remember the forgotten narrative of creative artists. While digesting and trying to understand the new possibilities of the new media, it would be a good idea to listen for the voices pushing back against the tide that the new media is unleashing. What happens when "everything is free" — not just to the romantic resistance fighters, but to those who get paid to create original content? Who is swept up by the new tide, and who is swept away in it?

²¹ This is why, even though remixers put a great deal of effort into many of their projects, their rights ought to be subordinate to the initial labor of the original content creator(s), in my view. Again, though Locke sees labor as the origin of property rights, appropriation in his system of thought always takes place in a social context (as evidenced by the various Lockean provisos). Hence, claims based on labor must be evaluated for their overall effect on society — which is why even a hard-working remixer ought not necessarily have a superior claim to ownership as compared to the original content creator. This is not an example of powerful interests tweaking the definition of rights to get what they want. It is an example of carefully considering competing sets of rights, and making an appropriate decision about which should predominate.

Keep in mind that, as I argued earlier, a huge amount of content will be available for free anyway, regardless of whether some creators choose to enforce their IP rights. High enforcement costs and voluntary content giveaways are immutable facts of the digital world. But I have argued that these facts, the “is” of the digital world, do not translate into an automatic “ought.” For those who choose to retain IP rights for at least some of their works, those rights should have value. They should not be easily trumped by the claims of remixers who want to internalize and transform the creator’s works. The two claims should instead be balanced.

To put this more clearly, what we must strive for is an accommodation between the needs of the creators and those of the readers, the consumers, “the general public,” including avid remixers. As I have indicated, I believe Locke, those many years ago, framed a very workable way of thinking about these issues, one in which individual appropriation takes place in full recognition of the egalitarian and communal nature of human society. But however we achieve it, in the name of Locke, some other overall approach, or just case-by-case, I believe we need to keep the needs of both remixers and creators firmly in mind. There is nothing wrong with stories; they are the pulsing heart at the center of the very content industries we academics are paid to study and comment on. We just need to keep both sets of stories in mind as we try to figure out how to structure the IP system so everyone gets as fair a deal and as fair a share as we can figure out how to give them.
