

Elizabeth Stark

Illicit Creativity

I am happy that people are breaking the law. No, I'm not talking about murder or traffic violations, and yes, I did just say that. I'm talking about copyright law.

Often in copyright circles scholars talk about the limits of fair use, which in US copyright law is a fairly flexible but also limiting exception for things like criticism, educational use and parody. We talk about the death of fair use, how fair use means the right to hire a lawyer (only a judge can truly determine what is or is not a fair use, and she can only do so in a court of law), and how fair use is continually being encroached upon. But I'm going to say something fairly radical: I'm glad that many people do not actually know about fair use, or if they do know about it, don't understand it.

Once upon a time Copyright was a field that even law professors found boring and obscure. Thanks to digital technology and its ability to facilitate the creation of exact, zero-marginal cost, digital copies, things have drastically changed. Of course, a legal system built around the assumption of physical copying just doesn't make sense for the digital analogue, regardless of which side of the debate you may take. And within the community of those advocating for a different, and less restrictive, copyright system, there is an inherent tension between those who think we should change the law and work within it, and those that have all but given up on the legal system's ability to properly promote innovation and creativity. While I often find myself taking both sides, today I feel more a part of the latter.

That's not to say that there aren't real problems here. That documentary filmmakers that have to clear each and every clip in their movie due to a fear of getting sued even for the most compelling fair use cases is not a good situation.¹ And musicians getting threatened with lawsuits after making bedroom remixes² or using three-note samples³ isn't a good place to be in either. But for the most part, there is a vast amount of creativity afloat right now, much of which can be broadly associated with the concept of "remix culture." Millions of people are remaking and reworking our culture, be it by making an audio mashup, creating a blog post with quotes of other materials, making a video remix, creating a photo montage. And a very large portion of these remixes, even under US fair use law, would be infringing. That is, illegal.

There is a fairly widespread conception that something along the line of non-commercial remixing does not violate copyright law. This, however, is not the case. Case law in the US is rather specific, for example, as to what constitutes a parody: one must be making use of the work to make fun of the *work itself*. So "It's Raining McCain,"⁴ a video that uses the song and some of the lyrics of "It's Raining Men" to support the presidential candidacy of John McCain in the US, would not be a fair use, and thus constitutes a copyright infringement. Yet a "Weird Al" song, where he uses the melody and some of the lyrics of a song to make fun of the original song, might very well be an example of parodic fair use, despite its commercial nature.

If the general public were aware of the current state of the law, they might very well not make as many of the kind of remixes that have flourished so much over the last five years. There is much more widespread awareness about the illegality of downloading exact copies of unauthorized songs, and that hasn't necessarily stopped most people, despite the seemingly never-ending arguments about whether illegal filesharing has actually increased or decreased. Or perhaps if they were aware of the law, a whole generation of remixers might protest against it, but recent history has shown that there is little to no hope of effecting change toward less copyright

law in a system that is riddled by large corporations, lobbyists, and special interests. And given that many either do not know or doubt what they are doing is actually illegal, they will just keep on remixing, perhaps engaging in a latent protest of its own.

In fact, much of what goes on on the Internet is copyright infringement, even absent blatant engagement in unauthorized P2P. People download other peoples' photos and images without permission, people copy articles wholesale and send them to large email lists, people use songs and video clips to remix and post it on a video-sharing site.⁵ And what about when someone sends you a remix they themselves made of someone else's song or video? Absent permission, they blatantly infringed copyright, and you did too. One law professor at the University of Utah calculated that he racks up over US\$4 billion (yes, 4 billion) in damages every year, merely by doing things like emailing and displaying his cartoon character tattoo in public.⁶

And there are entire remix communities that are all but illegal. Take Baile Funk (or just Funk, if you're from Brazil), the genre originating from Rio de Janeiro that is so heavily built upon borrowing and sampling from tracks like the Rocky theme song that it cannot be legitimately imported into the US, because the cost of clearing those samples with those who own the copyright would be all but prohibitive. I once asked the manager of the most famous Baile Funk DJ and producer in Brazil why he had never released a CD in the US, and he told me it was *impossible*.⁷ The entire genre of Baile Funk is based on the reappropriation of other songs, often purposefully sampling well-known tracks. This poses one of the very real problems in copyright law, where a US court has stated "get a license or do not sample."⁸ But the Brazilian artists that create Baile Funk tracks, located mainly in the favelas or shantytowns, likely have little to no idea about fair use or the state of the sampling law in Brazil, and I think overall that's a good thing. (I've joked with Brazilian friends as to what would happen if an American record label tried to sue a Baile Funk producer in a favela, and the answer was that they may not come out alive.)

Or take the large community of mp3 blogs that has developed over the past few years around the world. There are some Swedish music blogs that likely get more visitors to the site than most major newspapers in the country. All in all, the *Hype Machine*,⁹ a site that aggregates over 1500 music blogs, has assembled a group of websites with millions of unique visitors across the board. While these blogs often post verbatim copies of tracks, often without permission or even with permission from a music PR agency that doesn't amount to a copyright license, one can also find a large amount of unauthorized remixes by aspiring DJs and producers. On *Palms Out*,¹⁰ the music blog to which I contribute, we must get thousands of these remixes submitted to us a month. While the posting of verbatim tracks poses its own dilemma—many bloggers argue that they're providing free promotion for the bands, often only posting one or two tracks along with some editorial review, and record labels have largely left bloggers alone for the time being—it's the remixing that is the larger conundrum. What if someone sends you a remix they made of someone else's work? The wealth of copyright cases in the US actually dictates that such a remix, since it is infringing work, would lie solely in the hands of the copyright holder of the original work.¹¹ What if it was even an authorized remix, but you only have permission from the remixer? Also an infringement. So while some of these bloggers and remixers may be aware of the general idea that they may be infringing copyright law by either posting tracks without permission or by taking someone else's song and modifying it, misinformation abounds, and more importantly, they certainly do it anyway. And there's a common conception, especially among remixers, that what they're doing can't be illegal as long as they're not profiting from it.

Will this “ignorance is bliss” scenario last forever? Probably not. But until we manage to implement copyright laws around the world that make sense to people and are in line with social norms (I’m not holding my breath), it will probably continue. There are technologies out there, such as audio and video fingerprint-based filtering software that could pose a serious threat to such activity,¹² and there’s always the possibility of a copyright police state. Or we could enter into a commons-based utopia, where everyone would allow remixing in spite of the law. But for now we have a whole host of creativity that has flourished on the basis of recrafting and refashioning the work of others, and what we’ve seen is that given the opportunity to create at a low cost, even more people will participate. That’s not to say that every video mashup on *YouTube* deserves a Palm D’Or, but it does mean that we’ve seen a vast increase in the number of people creating and remixing on the Internet. And since the current law forbids much of this creation, I’m glad that people are not listening.

- 1 See, e.g., <http://www.onthedia.org/transcripts/2006/05/19/06;>
<http://www.nytimes.com/2005/10/16/movies/16rams.html>.
- 2 I have had hobby mashup musicians tell me personally that they have had to take down their music posted freely online after threats of lawsuits from record labels. The most renowned example of this is DJ Dangermouse’s the Grey Album. See <http://www.chillingeffects.org/fairuse/notice.cgi?NoticeID=1132> for a letter to someone hosting the files after Dangermouse agreed to stop distributing it due to the threat of a lawsuit.
- 3 Such a musician was successfully sued in *Bridgeport v. Dimension*, see http://en.wikipedia.org/wiki/Bridgeport_Music_Inc._v._Dimension_Films for a summary of the case. Downhill Battle organized an illegal-remix based protest at the time. See <http://www.wired.com/news/digiwood/0,1412,65037,00.html>.
- 4 <http://www.youtube.com/watch?v=MaP9eiWuX3s>
- 5 Such infringing uses should be distinguished from what is commonly referred to as “plagiarism,” or taking credit for someone else’s work, which is not governed by copyright law in the US, but may fall under the auspices of moral rights law in Europe. Regardless of whether the law addresses it, plagiarism is fairly universally frowned upon. In fact, in the examples given, many people often provide proper attribution to the author, if known, and they are generally not purporting to have made something that they did not create.
- 6 John Tehranian of the University of Utah wrote one of my favorite articles of late, estimating that even in the course of his seemingly normal daily life without any engagement in unauthorized p2p, his actions could amount to over US\$4.5 billion in copyright damages.
See http://www.turnergreen.com/publications/Tehraniian_Infringement_Nation.pdf
- 7 Impossible
- 8 This comes from the text of the infamous *Bridgeport v. Dimension* case,
http://en.wikisource.org/wiki/Bridgeport_Music,_Inc._v._Dimension_Films.
- 9 <http://www.hypem.com>
- 10 <http://www.palmsout.com>
- 11 So if I make an unauthorized remix of Britney Spears song, only she (or actually her record label and song composers) would hold the copyright to it, and I would have no rights to it.
- 12 In fact, *YouTube* already utilizes this type of technology on its website to identify uploads of verbatim copies of unauthorized videos, or the use of unauthorized songs to accompany a video. I’m not yet familiar with fingerprinting software that can successfully identify remixes where the original source has been significantly modified, although it’s arguably possible down the road.