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# Copyright Law and the Democratization of Cultural Value

By: Kris Pitzek

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## ABSTRACT

This essay examines and criticizes copyright law as it now functions in Western society. I argue that copyright law only serves corporate interests and functions to limit the development of and use of cultural symbols and texts. In effect, this eliminates the use of cultural texts by marginalized groups. Furthermore, I bring to light several case studies that suggest copyright law does not only hinder the production of cultural material, but is not necessary to facilitate a healthy environment for the production and distribution of cultural material within a given society. Conversely, I suggest that by way of eliminating copyright law altogether, we may expedite a process I call the "democratization of cultural production and exchange". By allowing citizen consumers of cultural products, using new digital technologies, to assign cultural value to cultural texts without the politics and economic injustices that arise from the use and abuse of copyright law, we may have a richer and ultimately more economically sound system by which cultural texts can be generated and shared. In order to defend against those who have similar notions about copyright law as I, but call for the implementation of a limited copyright law, I explain how communities and individual artists can and indeed do thrive while entirely disregarding copyright law. This paper should motivate future scholars to examine in particular the compatibility of outdated copyright law with digital technologies and web-based services. It is suggested through my initial research that these services can and will replace the function of rigid copyright law to help facilitate and incentivize a democratized and streamlined system of cultural production and exchange.

**Keywords:** Copyright law; digital age; corporatism; remix culture; ideological apparatus

Copyright Law has situated itself at the forefront of many scholarly discourses within disparate fields of studies: it has pervaded the study of hegemonic relations within the cultural sphere, economic structures and state policy-making alike, and the list continues. The recent explosion of discourse surrounding copyright law is primarily due to the huge influx of digital

technologies and the correlated increase in the piracy of intellectual goods globally, which has resulted in the reworking of cultural text production, distribution, and exchange in American society and abroad. Scholarly opinions are widely varied on the issue of what copyright should and should not encompass. Some question whether it should even be in existence as it stands today; some claim that copyright laws should be strengthened and enforced more heavily, while others say that copyright law should be loosened to allow for a wider, more bottom-up development and dissemination of cultural products. The latter group believes that copyright law as it currently stands only really serves corporate interests and a top-down system of cultural development. They believe that copyright is predicated on outdated Renaissance- and Enlightenment-era modes of understanding authorship and ownership. The logic follows that copyright law restricts the pool of common intellectual goods and symbols available to be articulated and engaged by marginalized groups who have already-limited means to create cultural texts on their own. The theorists who work within this framework of thought essentially decry the unequal distribution of means to produce cultural texts. As new digital tools emerge that allow the easy and cost-effective production and distribution of new forms of cultural texts, this mode of thought has come to directly attack copyright as being the main hurdle for the bottom-up production of cultural texts.

Ironically, corporations have utilized rhetoric that decries the loss of *profit* and *incentive* for cultural production when supporting copyright law against these attacks: but who is actually losing money? Their numbers are skewed – artists actually do *well* when bypassing corporate distribution and production companies.<sup>1</sup> These intermediary institutions of production and distribution are the ones losing money, and mostly only the top players in the system – the owners of these monolithic institutions. This corresponds well with the increasingly influential indie movie and music movements and attests to the strong capabilities of individuals to market themselves with the advent of digital technologies and highly developed social connections as facilitated by the Internet – without the need for intermediary corporate institutions.

If the economic argument is as fallacious as a surface level inspection suggests, what could in turn support the argument for copyright law as it stands? The other argument made in favor of exhaustive copyright law is generally a moral one. This argument is fairly effective as it is currently employed, but appealing to the need to protect against stealing, on ethical or moral grounds, by use of the iron fist of law, is shortsighted. The ethical appeal against stealing appeal resonates with so many on either side of the argument, so do we really need to rely upon the law to control for it? It begs the questions: can a culturally rich, just, and productive society be maintained without the implementation and enforcement of copyright law? Can this be achieved if society is left to its own devices sans comprehensive law systems? In short, yes.

I will demonstrate that, by studying the currently transitional epoch within which archaic copyright law hasn't caught up with the advancement of the digital means to entirely undermine those laws, copyright law is in fact *not* devastating sales of intellectual property, but *is* hindering

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<sup>1</sup> Leah Belsky, Byron Kahr, Max Berkelhammer and Yochai Benkler, Everything in Its Right Place: Social Cooperation and Artist Compensation, 17 Mich. Telecomm. Tech. L. Rev. 1 (2010).

the bottom-up production of cultural texts and a richer, more diversified and informed culture. This can be observed in the economic and social relations of the pre-digital era of folk music and African-American artists, who had no regard for copyright, as well as in the emergent community of electronic artists within which copyright law is also enthusiastically ignored. What I will try to extrapolate from studying these systems is that abolishing copyright law altogether could serve to promote what I call the “*democratization of cultural production and exchange*” and, as a result, enrich the cultural wealth of society.

Although I cannot possibly address every argument supporting either a strengthening of or reassessment of copyright law in the face of digital iterations of piracy, I can certainly demonstrate the validity of my own argument by first creating a theoretical framework by which to establish what evils (economic, moral) copyright intends to address or manage. After identifying the apparent targets of copyright law, it is then possible to invoke several relevant case studies to move the discussion from an abstract theoretical paradigm to a relevant discourse grounded in actuality. This approach will elucidate the idea that the cultural market can potentially regulate itself *without* any copyright law, and with greater utilitarian benefits to society.

Some media and law theorists have suggested that lawyers rework or *tweak* copyright law in order to promote the democratization of culture that I speak of. Many of these individuals, like Lawrence Lessig, claim that copyright law must be maintained but loosened to facilitate a larger, more diverse rate of cultural exchange. In other words, the idea is that in order to maintain a healthy and vibrant cultural ecology, or “free culture,” in which people can interact with and create cultural texts more easily, we must develop and maintain a Creative Commons of cultural texts.<sup>2</sup> He is on the right track in recognizing the need to streamline democratic participation in the construction of cultural texts; however, he claims that there is a distinction to be made between *commercial* piracy, like selling bootlegged copies of things or using peer to peer (p2p) software to bypass paying for a cultural text, and the sort of *creative* piracy that is executed by dialogic modes of cultural creation. By making the distinction he means to elucidate, distinguish, and justify forms of cultural creation like mash-up videos, fan-zines, the integration of fellow intellectuals’ and scholars’ works in lectures, symposiums, sermons, and demonstrations, etc. But this distinction is absurd, because it has no practicality in application; those who perform what he calls commercial piracy are reacting to a more deep-seated economic issue that isn’t even addressed when tweaking the copyright laws to maintain his proposed free culture; the people who steal will still steal regardless of what sort of cultural texts are pooled in the Creative Commons. And the idea does nothing to address the same issues that, as we will see, stem from maintaining copyright law. For now, let us subsume his theoretical distinctions of piracy for argument’s sake.

Lessig and his cohorts assert that the courts must arbitrarily determine what is fair use of the available creative commons by dissecting, case by case, which instances of alleged copyright fraud is considered to be, and therefore sanctioned by, a form of the Lockean idea of authorial

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<sup>2</sup> Lessig, Lawrence. (2004). Free culture. New York: The Penguin Press.

genius – or the original and inspired creation of a text – whether it be in the form of music, images or otherwise.<sup>3</sup> The notion here is that the courts can and should measure the cultural significance of these individual instances of textual poaching in order to give it a stamp of legal approval, else it is a form of *commercial* piracy. But this sort of measurement will indefinitely change from epoch to epoch, community to community, and judge to judge. The courts could not possibly extrapolate from increasingly disparate piles of anecdotal case decisions what can be deemed culturally significant and therefore be protected under copyright as well as against others' copyrights, and what cannot be protected as such. The means by which people reinterpret, remix, re-imagine, and reify cultural texts grows and changes with the incessant invention of new trends and new digital copying and sharing technologies on a daily basis, and these forms of cultural production cannot feasibly be kept up with by the courts.

Lessig puts too much faith in the ability of the courts to make the distinction between culturally enriching, justifiable textual poaching and culturally insignificant, indefensible cultural poaching. He and his colleagues acknowledge the need for a system that allows for a rich interplay of cultural texts and goods among people other than members of established institutions like record labels or production companies, who are the primary holders of copyrighted property today. As lawyers, they seem to think the answer to enabling a “free culture” lies with the *reinterpretation* of current copyright law, but by studying communities of cultural production that ignore copyright (past and present), we can see that the problem lies not with those who are refusing to play by the rules (as delineated by the courts), but with those who *abuse* the copyright itself. In other words, the problem *is* copyright.

Studying folk music traditions and the folk music community's induction of or forced interaction with copyright law proves one thing: that copyright serves only those who are trying to make an abnormally large profit, and a profit that impedes the proliferation of cultural production. Kembrew McLeod puts it succinctly: “copyright law predisposes judges and lawyers to interpret the law in a way that slows or ‘freezes’ a mode of cultural production.”<sup>4</sup> What he means by this is that copyright, when, in this context, is granted to a folk artist's particular song, it hinders the derivation of the folk (and copyright-free) elements utilized within that song by other subsequent artists. This is because although the artist does not own the (folk) elements in their song, they can claim copyright infringement when another folk artist tries to utilize those song elements, even if the song is an entirely different derivation of those elements and is not infringing upon the copyright holder's own unique composition of those elements.

This is illustrated nicely in the case of Led Zeppelin: Led Zeppelin used many riffs and elements of past blues (or folk) songs in their first album. These elements were also very central to Willie Dixon's own music, and he successfully sued Led Zeppelin for using those folk elements in their first album. However, Dixon *also* borrowed those elements in making his own songs. They both took creative license with these elements and successfully reworked them into

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<sup>3</sup> McLeod, Kembrew. (2001). *Owning culture: Authorship, ownership, and intellectual property law*. New York: Peter Lang, pp. 18-25.

<sup>4</sup> *Ibid.*, p 43.

their own discernible “style” or “voice,” which is what German philosophers of the late 18<sup>th</sup> century, like Fichte and Kant, deemed necessary to claim authorial rights to a piece of cultural text – that it is an original form, not content, that gives someone exclusive copyrights to a given piece of work. As the argument goes, everything is inter-textual anyway, and no content is truly original until it is put forth in a distinctive creative *form* by the author. This idea was essential to the rise of our modern conception of intellectual property rights, but, ironically, the resultant copyright laws have been abused to mean something egregiously antithetical to it: Led Zeppelin’s implicit use of similar *content* as Willie Dixon, though in a completely different manner, rendered them guilty of copyright infringement, regardless of the originality of each artist's form.

The problem with applying copyright to Led Zeppelin's particular form of cultural development – re-appropriating blues/folk elements into rock form – is that it rendered the practice illegal. The original intent of copyrighting Willie Dixon’s songs was most likely to ensure fair earnings and exclusive rights for the individuals who distributed, or copied and sold, his product for him. But the unexpected externality of copyrighting the material was the subsequent “freezing” of further textual reinterpretations of the elements within those songs. The copyrights, in effect, ended a cultural practice (folk artistry) for the profit of one company/person. But what if the copyright holders of Willie’s songs were effaced from the equation? What if there were no copyrights, but simply a straight artist-to-fan injection of the cultural material (in this case music) into the public sphere? Would there be a need for copyright law at all?

Lessig and the school of thought that proposes we tinker with, not eradicate, copyright law would say that the answer to this problem is to again, copyright the cultural texts by law of the Creative Commons, so that artists could safely utilize the elements they share without infringing upon each others’ copyrights. But this doesn’t address the problem with the top-down system of cultural production that has arisen from copyright laws as they stand: one, because it only takes one individual to decide not to pool their song in the Creative Commons to break down the system, but more importantly, two, because the people who draw from the Creative Commons cannot make any profit by doing so. Within this system, Willie Dixon could make money, but Led Zeppelin never would have (whose songs, again, drew from the naturally occurring pool of cultural texts within the American blues/folk music community and which were heavily used and re-used before (and after) they were ever copyrighted by Willie Dixon).

The hip-hop/electronic/remix music cultures found in today's digital age have functioned effectively for decades now without acknowledging in any way copyright laws. Recently this has come with a special twist: many of these artists are now self-releasing their own music, bypassing the need to contract specific copyrights to distributors and producers. Electronic and hip-hop music functions a lot like folk music: artists take from other artists habitually to create pastiche musical collages, and each artist’s authorial distinction comes from the style and unique voice that each artist develops on their own, despite the often overtly-recycled content. These artists are making a living and are actually proliferating despite the fact that they ignore

copyright law amongst each other. It is in fact typical that these artists encourage and then embrace other artists' remixes of their own work. Why, within this culture, is there such a widely occurring embrace of what many people would deem unethical, or at least inimical to social/economic infrastructure? The key is to understanding how it allows their musical work to garner additional promotion. If one's work is re-appropriated by another musician, so be it, it will be spread to new listeners, and it allows for a rich cultural body of text to enjoy and further draw from both as a consumer and producer of these texts.

Radiohead, a very successful band, have released their past two albums – *In Rainbows* (2007) and *King of Limbs* (2011) – independent of any distribution or production company, without acknowledging copyright law in any way. They sold the albums on their own website for whatever fee the purchaser wanted to give, including nothing at all. They also *encouraged* artists to remix their songs and take whatever profit they could pull in without giving monetary compensation to Radiohead in return. They made it easier to do so by releasing the separate tracks of all their songs via their website. Although Radiohead has not released any official or comprehensive reports, similar experiments by other bands have proven lucrative.<sup>5</sup> Obviously, copyright laws were naturally in place for the safeguarding of their product, but did they need it? I would say not, because they bypassed the need to grant permission to a distributor to distribute their product, and received the profit they could initially after the release. Beyond that point, anybody could redistribute the product, as many p2p websites and platforms that enabled bootlegging inevitably did. But illegal file sharing wasn't necessary to get a hold of their music, because these bands allowed for it to be taken right off of their figurative digital shelves for free, if that was so desired. There was no copyright law to stop that activity from occurring – the free loaders took it while they could. Those who paid did despite having no real incentive, as rational economic actors, to do so. In short, the true worth of the album was determined democratically through the bypassing of conventional copyright procedure.

Is this a case for the abolition of copyrights? No, but it suggests that bands who have popularity behind them can generate substantial revenue without the use of corporate intermediaries for production and distribution. It also suggests that there is an inherent impulse for cooperation among consumers and between fans and cultural producers; people understand the need to compensate the purveyors of cultural texts within society.

What about those artists without a large fan base? Can they afford to do the same? A simple thought experiment would show us that they can. Even if a given unknown band, with no fan base, does not initially make money, the lack of copyright could not harm them. If they made no money off of their work, any sort of exposure – the use of their music in a film, another band covering their music – through the use of their work by another artist or entity could only prove valuable for promotional reasons. If an established artist uses the fledgling band's songs, say a director who produces a movie with Warner Brothers, they could only gain recognition within the market, even if they don't make any money off of that use (and it does not necessarily follow

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<sup>5</sup> Leah Belsky, et al, Everything in Its Right Place: Social Cooperation and Artist Compensation, 17 Mich. Telecomm. Tech. L. Rev. 1 (2010), p 7.

that the director would refuse to compensate the artist, as we have seen demonstrated in the choice of Radiohead fans to pay for their albums despite not having to). Further, as an aside, the utilitarian benefits to the other members of society are exponential when copyright is ignored, because these texts are more fluidly dispersed throughout society.

One may propose that if a non-famous artist or entity uses the hypothetical fledgling band's work, then there is potential for the band's work to get hijacked, so to speak, by the next band. However, this is where the digital technologies that be, which are exactly what the source of concern is for copyright enthusiasts, can also be the safeguard against this behavior. There are plenty of resources for authors of cultural texts to maintain profit and license, in a loose sense of the word, of their work without relying on copyrights. Small, unsigned bands can publish and sell their products online, as well as time-stamp the production of that work using various web services and so on. If band B tries to rip off Band A, Band A can, at least potentially, establish that they are in fact the originators of that product previous to Band B by showing that they "posted" the work online on, say, a website like Soundcloud. The cultural consumers will then be the arbiters of who deserves compensation for the work, which is essentially the system blues performers relied on in the early 20th century. The more streamlined this sort of digital activity becomes, the easier it will be for a more democratic arbitration to occur concerning a particular piece of text. If Band B does a better job of delivering the content, then, although it may seem counterintuitive to allow something as such to occur, the assignation of cultural value (and by extension the economic value) will lie with Band B's song. Essentially, a system without copyright law will help develop an entirely democratic process of cultural production and exchange that eliminates the top-down control that develops when several corporate conglomerates dictate and hold a majority of copyrights within the cultural sphere. Also, it may be interesting to consider that there are other, more nuanced forms of social vindication for the theft of another author's work without the presence of copyright law. For example, news media can reconcile disputes between cultural authors and help illuminate fraud.

Copyright law limits the array of available cultural symbols – signifiers that can be used to construct cultural meaning – within society. Coombe says that copyrights create “monopolies over public meanings.”<sup>6</sup> In 1987, Todd Haynes made a graduate student film project about the death of Karen Carpenter entitled *Superstar: The Karen Carpenter Story*. Several lawsuits or threats of lawsuits were filed against him as a result. It was pulled from circulation because it violated copyright of the Carpenters' music.<sup>7</sup> More significant are the allegations Mattel made against Haynes for infringing upon their copyrights in regards to the Barbie doll. Barbie dolls were used in the film as stand-ins for actors. However, they doubled as powerful symbols of social critique. Mattel claimed they infringed upon the copyrighted use of the dolls, but the copyright is only meant to protect Mattel's profits from its Barbie dolls. Haynes' use of the dolls arguably would not do much to threaten Mattel's profits. In effect then, all the copyright did is

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<sup>6</sup> Coombe, R. J. (1998). *The cultural life of intellectual properties: Authorship, appropriation, and the law*. Durham, NC: Duke University Press.

<sup>7</sup> Hilderbrand, Lucas. (2004). *Grainy days and Mondays: Superstar and bootleg aesthetics from Camera obscura* 57, Vol. 19, No. 3. Durham, NC: Duke University Press, p 65.



limit the use of the Barbie doll to create cultural meaning and discourse surrounding, in this case, a very important issue: anorexia. The copyright disallowed the Barbie symbol from being utilized to construct critical discourse, and, in effect, limited or *monopolized*, the meaning(s) of this icon and cultural signifier to Mattel and only Mattel. Surprisingly, many other cultural texts have been stricken from public circulation because of Mattel's copyright of the Barbie, including feminist magazines that have held a critical eye to the effects of the Barbie doll's wide dissemination within society.<sup>8</sup> Copyright is, in this regard, a tool by which to entrench the top-down nature of the "culture industry" that the (in)famous Frankfurt School was so critical of.<sup>9</sup>

As current copyright law stands, there is no room for resistance to the dominant, hegemonic public reading of a particular cultural text. No Creative Commons measures can negate this. Corporate profits are maximized by copyright at the cost of neutralizing all resistant textual readings. When analyzing the effects of copyright in this way, the world becomes much more Althusserian – we see the manipulative effects of the ideological state apparatuses – in this case through the corporations that own the meanings of cultural texts.

Piracy occurs regardless of the extent of copyright law, and without it artists and authors of other cultural texts can, and indeed do, successfully support themselves. Copyright cannot be defended on economic grounds. As we have seen, copyright as we now know it seems only to harm the hope of maintaining a rich cultural economy, despite the specious arguments by (mostly corporate) copyright holders that without copyrights, there is no incentive to create cultural texts. I believe the next rational step in this thought experiment is to further accumulate data on the success of artists who ignore copyright law and observe what kind of culture arises. Even if the corporate copyright holders are right about the inevitable loss of incentive, we will certainly observe, at very least, a more discursive, bottom-up, and democratic mode of cultural production that far outweighs the hegemonic leanings of the current top-down, corporative system of cultural exchange and production.

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<sup>8</sup> McLeod, Kembrew. (2001). *Owning culture: Authorship, ownership, and intellectual property law*. New York: Peter Lang, p 10.

<sup>9</sup> Stam, Robert. (2005). *Film theory: an introduction*. New York: Blackwell Publishers, p 68.